

Georgia Gwinnett College Litigation Holds Guidelines

Background

The law has long required all parties to preserve evidence that may be relevant to a dispute, even before a lawsuit is filed. Because much communication is now electronic, the courts have adapted the requirement to preserve evidence specifically to apply to electronic information. The courts have also ruled that the doctrine of “litigation holds” applies equally to electronic and hard copy information.

Litigation Holds

The courts require a party to preserve evidence – i.e., implement a litigation hold on information likely to become relevant in a dispute -- in the following circumstances:

- When a demand to preserve evidence is received, whether litigation is filed or not
- When litigation is served
- When a court issues a preservation order
- When litigation is “reasonably foreseeable”

The last situation is the most challenging, as there is no bright line, and the determination of whether to implement a hold requires the exercise of judgment. Disputes do not always result in litigation. There is a duty to preserve evidence only when the problem is not likely to be independently resolved. The following list illustrates situations where litigation may be reasonably foreseeable. Each situation must be evaluated on a case-by-case basis:

- Where there is a major accident or injury
- When a police report is filed
- When a claim is filed with a government agency
- When a third party seeks indemnification
- When an employee is terminated
- When an independent investigation corroborates a claim
- When there are multiple claims about the same set of circumstances
- When a whistleblower or whistleblower retaliation claim is filed
- When a claimant threatens litigation
- When GGC plans to file suit

When a litigation hold is required, the destruction of documents and information under a document retention schedule must be suspended. The value, nature or scope of the dispute is irrelevant to the requirement of a litigation hold.

How to Decide Whether to Implement a Litigation Hold

Each campus should have a decision-making process to determine whether litigation is reasonably foreseeable. College Counsel are available to assist, but the ultimate decision should be made by campus personnel. It is best to document the outcome of every decision, particularly those where a decision is reached not to implement a litigation hold.

How to Implement a Litigation Hold

In order to effectively manage the preservation of documents, a team should be designated by the campus. This team may include representatives from the unit where the principal documents reside, IT,

Risk Management or Human Resources, and in some cases, College Counsel. The team must take steps to ensure that all appropriate documents for the particular dispute are identified and preserved. The first step is to identify the kinds of information that needs to be preserved. The team must then take steps to preserve documents that are centrally located. Then the team will need to communicate with all employees who might have relevant information at their work stations. (A sample letter advising employees of their responsibility to implement the litigation hold is attached.) Electronic information should be preserved in the form in which it was created, including metadata, (electronic information describing the history, tracking or management of an electronic document that is embedded within the communication and not visible on its face). The information may be retrieved from:

- Hard copy
- E-mail
- Computer hard drives
- Network servers
- Back-up tapes
- Personal Data Assistants
- Voice messages
- Videos and photographs

The hold applies to information in existence at the time that the hold is implemented, and any new information generated after that time and until the hold is released. In a dispute of longer duration, reminders of litigation hold requirements should be periodically re-issued.

Release of Litigation Hold

When the dispute is resolved, or it becomes clear that litigation is no longer likely, the team should communicate with all who have been asked to preserve information and release them from the obligation to retain information.

Consequences for Failure to Implement a Litigation Hold

The courts have imposed the following sanctions on the parties from whom information is sought for failure to appropriately implement a litigation hold:

- Sanctions, including attorneys' fees and costs
- Preclusion from introducing evidence at trial
- Instructions to the jury to draw an adverse inference from unavailable evidence
- Dismissal or default judgment