

# E-Discovery Litigation Holds

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Preserving company E-mail that may be relevant in litigation is important for every business. Failure to do so can open a company to liability for breaching the duty to preserve evidence.

Sending a notice to employees who may have relevant E-mail is an important step in preserving such evidence. The notice, commonly referred to as a litigation hold, should instruct employees not to discard or erase such E-mails.

A recent decision by the 2<sup>nd</sup> Circuit Court of Appeals held that failure to send a litigation hold doesn't constitute gross negligence per se, resulting in grounds for judicial sanctions, but it is an important factor to consider in determining if sanctions are warranted. [*Chin v. Port Authority*, 7/10/12]

Additional steps that may reduce the risk of judicial sanctions for failure to preserve E-mail evidence are suggested in a recent [article](#) in California Lawyer (November 2012), which examined the *Apple v. Samsung* patent case in which the issue of E-mail evidence arose. [Apple v. Samsung, 2012 WL 3042943; 2012 WL 3627731]

1. Send litigation holds at the earliest possible stage, including before litigation commences, when you know a dispute exists and the possibility of litigation exists.
2. Make sure your litigation hold notices to employees specifically identify E-mail and other electronic documents as being subject to the hold.
3. Train employees how to preserve relevant documents.
4. Make sure you send litigation holds to all employees who may have relevant documents. Casting the net too narrowly can be a problem.
5. Disable any software that automatically deletes E-mails.
6. Audit employees to ensure compliance with the litigation hold notice.

Following these and other steps will increase the likelihood of preserving relevant evidence, while reducing the risk of judicial sanctions for failing to do so.

Link to original article: <http://commercialcounselor.com/e-discovery-litigation-holds/>

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