

Spoliation of Evidence Letter

I would like to send the other party a warning not to spoliage evidence.
Does anyone have a template I can use?

I have this blurb in the instructions in my requests for production form.

"DOCUMENT DESTRUCTION: IT IS REQUESTED THAT ALL DOCUMENTS AND/OR OTHER DATA COMPILATIONS WHICH MIGHT IMPACT ON THE SUBJECT MATTER OF THIS LITIGATION BE PRESERVED AND THAT ANY ONGOING PROCESS OF DOCUMENT DESTRUCTION INVOLVING SUCH DOCUMENTS CEASE. If any document requested herein has previously been destroyed, you are requested to describe in detail the circumstances of and reasons for such destruction and to produce all documents which relate to either the circumstances or the reasons for such destruction."

Neal A. Kennedy, Texas

From NY:

Please be advised that you and your clients, D & D2, are under a legal duty to maintain, preserve, retain, protect, and not destroy any and all documents and data, both electronic and hard copy, that may be relevant to Ps claims as set forth in the Complaint. The failure to preserve and retain the electronic data and evidence outlined in this notice may constitute spoliation of evidence which will subject you to legal claims for damages and/or evidentiary and monetary sanctions.

For purposes of this notice, electronic data or electronic evidence shall include, but not be limited to, all text files (including word processing documents), presentation files (such as PowerPoint), financial data, spread sheets, e-mail files and information concerning e-mail files (including logs of e-mail history and usage, header information, and deleted files), Internet history files and preferences, graphical files in any format, databases, calendar and scheduling information, task lists, voice mail, instant messaging and other electronic communications, telephone logs, contact managers, computer system activity logs, and all file fragments, internet usage files, offline storage or information stored on removable media or storage media, information contained on laptops, or other portable devices, network access information and backup files containing electronic data or electronic evidence.

Specifically, you are instructed not to destroy, disable, erase, encrypt, alter, or otherwise make unavailable any electronic data and/or evidence relevant to the Plaintiffs claims, and you are further instructed to take reasonable efforts to preserve such data and/or evidence. To meet this burden, you are instructed by way of example and not limitation, to:

SoloSez Popular Threads, September 2012

Preserve all data storage backup files (i.e., not overwrite any previously existing backups);

Preserve and retain all electronic data generated or received by employees who may have personal knowledge of the facts involved in the claims against the Defendants as set forth in the Complaint;

Refrain from operating, removing or altering, fixed or external drives and media attached to any workstations or laptops, voice mail systems, and cell phones, copy machines that are reasonably thought to have data related to the claims, including but not limited to the workstations and/or laptops used by S and T;

Preserve and retain all data from servers and networking equipment logging network access activity and system authentication;

Preserve and retain all electronic data in any format, media, or location relating to the claims, including data on hard drives, hard disks, floppy disks, zip drives, CD-ROMs, CD-RWs, DVDs, backup tapes, PDAs, cell phones, smart phones, memory cards/sticks, or digital copiers or facsimile machines;

Prevent employees from deleting or overwriting any electronic data related to the Plaintiffs claims; and

Take such other security measures, including, but not limited to, restricting physical and electronic access to all electronically stored data directly or indirectly related to the Plaintiff's claims.

To facilitate the retrieval of said data, be advised that a forensic accounting firm will be retained to, in addition to reviewing the requisite documentation, forensically acquire the hard drives and other media that may contain electronic data related to the action.

Joi Aberle, New York

I believe Kroll on Track (sp?) has forms on their website

Sharon Campbell, Texas

Thank you, although it appears that much of the spoliation has already occurred. What happened is that the other party deleted a bunch of his facebook posts that contradict his recent testimony.

SoloSez Popular Threads, September 2012

In addition to what has been mentioned, if not mentioned, I cite the relevant rule of evidence in my area and a case that indicates that a negative inference can be drawn against the party that has destroyed evidence. I want them on notice that I know of certain things and if gone, it will be presumed that they would have hurt your case/defense.

Facebook posts may be still available from Facebook, so you may want to look into that and act fast. I think there may some information on FB about how long they save things.

Phil A. Taylor, Massachusetts

I always ask ppl to print out FB posts as soon as they see them. Did your client or anyone happen to have printed out the FB posts? Or, how do you know about the FB posts? Guess you can get some direct and cross-examination testimony about the posts if you don't have documentation. Also, the rules of evidence may address this, esp. if the posts were deleted after suit was filed.

Tracia Y. Lee, Texas

As a practical matter, how do you guys use Facebook posts if you're trying to introduce them into evidence in a formal proceeding? Do you just print out what shows up on your computer screen? Do a screen capture and save as PDF or something? And do you simply use the Facebook post as a prior statement of party-opponent?

Ryan Phillips, South Carolina

Those are recoverable through a website, but unfortunately I cannot remember the name of the website. Someone on this list will have that website's name.

Robert W. "Robby" Hughes, Jr., Georgia

Print out as pdf. Get opponent to admit something on the stand that is not true. Get him to then admit he has facebook account, that he posts on it, that is name on it is XXXX and that he said XXX on his facebook page. When he denies, make him authenticate and give it to the court.

Robert W. "Robby" Hughes, Jr.

My client already printed out a bunch of the posts and then we found out later (after the FB friendship was terminated) that these posts and pretty much any other useful posts were deleted. I don't necessarily want to let the other side know yet that these posts are gone. I want to see what they produce in oral and written discovery first and perhaps even issue some requests to admit to lock them into their new story.

They already know the posts are gone. What they don't know is that you got a copy of them before they were deleted. This is purely impeachment material and you should not have to disclose it until the opponent is locked into a position. I just had this same matter occur when a fellow challenging the probate of a copy of a will had FB postings written prior to my client finding and offering the copy of the will for probate stating that he was nervous over the impending fight over his father's will. The fellow had found the original will and had destroyed it because it omitted him from the estate. He did not know that my client later found a copy of it in their father's other possessions. All during discovery, the fellow maintained he knew nothing of the will His FB posting had him directly speaking about a will three months before he maintained he knew nothing about a will. Just a couple of days before trial, after all positions were secured through the pretrial order, I sent a copy to the opposing counsel. The case settled within hours.

Robert W. "Robby" Hughes, Jr.
