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Re: Notice of the Duty to Preserve Evidence
And Preparing For a Litigation Hold

Dear Colleague: Please note that this letter contains general advice we send from time to time, and is unrelated to any potential or actual litigation. This letter advises you of certain obligations you may have due to the possibility of future litigation involving you or your organization. Specifically, I refer to the duty under US law to "preserve evidence" whenever litigation is "reasonably foreseeable".

Reasonably foreseeable: Litigation is often "reasonably foreseeable" long before the litigation occurs. If there comes a time when you envision litigation based upon facts of which you are aware, then it is likely that a Court would find that is the time your duty to preserve evidence arose under US law. This may for example be years in advance of actual litigation.

Scope of Evidence to Preserve: The scope of the evidence falling within the duty to preserve is any evidence that reasonably may lead to the discovery of evidence admissible in the litigation. Preservation of electronic documents evidence may include the data associated with documents, including "metadata," whether associated inside of a particular computer file or in a computer operating system.

How to Preserve evidence - Litigation Hold: Merely instructing employees generally to preserve evidence would be legally insufficient to meet this duty. Evidence is preserved by imposing a "litigation hold". A "litigation hold" refers to the practice of notifying an organization to preserve evidence, and enforcing the preservation of the evidence. Effecting a litigation hold may be complicated, particularly in larger organizations. In order to put in place a litigation hold, organizations need to consider their document retention policies and procedures; how to suspend the normal policies and procedures to effect a litigation hold at the time a duty to preserve evidence arises; and the scope of documents included in the suspension. This is a complicated area and is highly depending upon the organization. In any case, a best practice is to have litigation hold policies and procedure in place, in anticipation of a future litigation and litigation holds.

Obtaining Further Advice: If you wish further advice on this issue, please feel free to contact us. If there comes a time when you envision litigation based upon facts of which you are aware, please contact us to discuss the litigation issues and your duties to preserve evidence.

Very truly yours,
Richard A. Neifeld
President, Neifeld IP Law, PC

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