



# PRESERVING DATA FOR LITIGATION

BY EMMA K. DIVER, ESQUIRE &  
LAURA G. READINGER, ESQUIRE

**O**n January 26, 2024, the Court of Chancery of the State of Delaware issued an opinion imposing sanctions on defendants for failing to preserve text messages.<sup>1</sup> The sanctions included rebuttable presumptions against defendants at trial and a higher burden of proof for the defendants.<sup>2</sup> The opinion raised concerns for many on the obligation to preserve data, counsel’s role in a party’s preservation and collection obligations, and what steps are necessary to preserve data when the threat of litigation arises.

Generally, any “party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit.”<sup>3</sup> As soon as there is a reasonable likelihood of litigation, counsel should issue a litigation hold informing a party of its obligation to preserve data.<sup>4</sup> Practically speaking, parties are most often concerned with preservation of emails, hardcopy documents, and mobile data.

Of these categories of data, emails tend to be relatively easy to preserve

and collect. Email servers tend to have sufficient capacity to hold a large number of emails without deletion, so parties are less likely to be deleting emails on a regular basis. To prevent data loss, parties should be informed of the obligation to preserve relevant emails and should disable any auto-delete functions. This may include contacting a company’s IT department if IT maintains company-wide auto-delete on emails. But barring a catastrophic event causing data loss, entire email servers of data are unlikely to be lost.

Similarly, hard copies and handwritten notes are relatively easy to preserve, although parties tend to be less likely to store and preserve hard-copy documents on a regular basis than they are to keep emails. It may be important, therefore, to emphasize the importance of preserving handwritten notes and printed documents when explaining the obligation to preserve relevant documents. And handwritten notes should be scanned or sent to counsel early on once litigation is underway to avoid loss.

Mobile data, on the other hand, tends to cause more serious preservation concerns. This is for a few reasons. First, unlike email servers, mobile devices are portable, and we tend to bring them everywhere with us, making them more likely to



be lost or destroyed. And merely telling parties to avoid bringing their phones near bodies of water is insufficient to fulfill counsel's role in preserving evidence.<sup>5</sup> Phones also tend to have less storage capacity than email servers, encouraging parties to develop a habit of deleting messages on their devices. Certain mobile messaging apps also have features that cause data to be more ephemeral, such as Signal, where settings can be tweaked so that one chat participant deleting a message causes the message to be deleted for all chat participants. For all of these reasons, counsel must pay special attention to ensuring mobile data is preserved.

In addition to informing parties to litigation that their obligation to preserve data extends to mobile data, it is important to make sure the parties understand the steps they themselves must take to preserve the data. As soon as litigation can be reasonably anticipated, potential parties to the litigation should turn off any auto-delete functions on their phones.<sup>6</sup> For iPhone users, this means making sure the message settings under "keep messages" is set to "forever." This also means turning off any auto-delete for other messaging apps (such as turning off "disappearing messages" on all chats in Signal).

Then, once litigation begins, it is important to backup or collect a party's phone to guarantee no data is lost after litigation has started.<sup>7</sup> Note that it is possible in some circumstances to preserve mobile data without collecting or imaging the phone, and, indeed, in the early stages of litigation, it may be better to preserve the data without collecting to avoid the need to collect the phone more than once. An iPhone can be backed up to the iCloud to preserve text messages, and vendors can generally collect the data directly from the iCloud backup. Androids can also generally be backed up to Google or through a backup app, although vendors are less likely to be able to collect the device from the backup or restore lost data through a backup. Therefore,

it is more important to collect Android devices early to avoid data loss.

While recent court opinions have not radically changed the obligation to preserve relevant evidence, the opinions have emphasized that the obligation extends to mobile data and that the consequences for failing to preserve evidence may be severe. It is therefore important to understand and emphasize to a client the steps necessary to preserve all data, including mobile data. ⚖️

Notes:

1. *Goldstein v. Denner*, 310 A.3d 548 (Del. Ch. 2024).
2. *Id.*
3. *Gener8, LLC v. Castanon*, 2023 WL 6381635, at \*14 (Del. Ch. Sept. 29, 2023) (quoting *TR Invs., LLC v. Genger*, 2009 WL 4696062, at \*17 (Del. Ch. Dec. 9, 2009)).
4. See, e.g., *Huntsman Int'l, LLC v. Benelux*, 2024 WL 3792398, at \*19 (Del. Super. Ct. Aug. 13, 2024) (granting sanctions and criticizing a party for failing to issue a litigation hold).
5. See *Goldstein*, 310 A.3d at 588 (criticizing counsel after mobile data was lost because one defendant "was personally cleaning his swimming pool, dropped [his] phone in the water, and then sent it to be repaired"); In re *Shawe & Elting LLC*, 2015 WL 4874733, at \*24 (Del. Ch. Aug. 13, 2015) (discussing the failure to safeguard evidence on a phone that "allegedly was dropped into a glass of soda").
6. *Goldstein*, 310 A.3d at 577-78 ("Failing to either disengage the auto-delete setting or to back up messages before deleting them is sufficient to show that a defendant acted unreasonably.") (quotations and citations removed).
7. *Goldstein* 310 A.3d at 579 ("In a world where people primarily communicate using personal devices, it will almost always be necessary to image or backup data from phones.")



**Emma K. Diver** is an associate at Potter Anderson & Corroon LLP and focuses her practice on eDiscovery. She can be reached at [ediver@potteranderson.com](mailto:ediver@potteranderson.com).



**Laura G. Readinger** is a partner at Potter Anderson & Corroon LLP and leads the firm's eDiscovery team. She can be reached at [lreadinger@potteranderson.com](mailto:lreadinger@potteranderson.com).

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