



LITIGATION HOLDS: WHAT & WHY & HOW

by Kimberli Poppe-Smart and Sarah P. Gates

Litigation hold. Until a few years ago you may have never heard this phrase yet by now you have likely become familiar with the phrase and may even be subject to one currently. *Litigation hold, preservation notice* or *legal hold* has become an essential obligation of businesses that are exposed to litigation, government investigation, or enforcement actions. These phrases refer to the process a company puts in place to preserve information relevant to a lawsuit or investigation.

How will I know? When a dispute arises that triggers the need for a litigation hold, a preservation notice will be issued. That notice will advise you what types of documents and information must be retained.

Here is a quick refresher on the basics of a *litigation hold*:

What:

- Relevant evidence may be in a computer, a cell phone, a medical device with recoverable electronically stored information, or in a paper file.
- For healthcare providers, evidence may also be kept in monthly tracking logs, or in nurse endorsement logs, in addition to the chart.
- Clinical records (Including 24 hour logs)
- Business file & Admissions paperwork & Billing records
- Policies & Procedures
- Job Descriptions
- Staff Assignment sheets and other staffing materials
- QA materials
- Photographs
- Training records
- Emails about the patient or family
- PowerPoint presentations

Why:

- Once a party or potential party has notice of a dispute or the potential for a lawsuit or government investigation, efforts to preserve must be undertaken.
- The duty to preserve is triggered by actual, anticipated or foreseeable litigation.
- Notice of a lawsuit can be express, such as the formal filing of a lawsuit, or less obvious, such as a request for medical records from an attorney.
- Evidence relevant to a lawsuit must always be preserved. A litigation hold or preservation notice provides the directions on what to preserve.

How:

- Once a litigation hold is issued, a party must determine all sources where potentially relevant evidence might exist.
- Evidence relevant to a suit should be located immediately and kept in a safe place away from other records.
- Once a litigation hold is in place, normal document retention policies must be suspended.

It is extremely important that you comply with litigation holds when they are issued. Failure to do so can have financial, administrative and criminal consequences. Become familiar with your organization's policy regarding litigation hold and strive to comply. A tool to assist you in managing the litigation hold process can be found on the Wroten & Associates website. [Litigation Hold Checklist](#)

About the Authors:

A Senior Attorney returning to Wroten & Associates, **Kimberli M. Poppe-Smart** has united her nearly 30-year nursing career with over a decade of legal experience into a health care risk management and compliance specialist. Her most recent experience as an appointed leader in state government, overseeing Medicaid, survey and certification and a myriad of additional state-administered programs add a depth of knowledge and experience rarely seen in the litigation arena. Ms. Poppe-Smart earned a diploma in registered nursing in 1983, a bachelor of science in nursing in 1992 and graduated cum laude from Thomas Jefferson School of Law in San Diego, CA in 2002.

Ms. Poppe-Smart is a Wroten & Associates litigation team member as well as an expert in identifying and managing risks and implementing enterprise risk management plans and strategies. She has spoken nationally on health care topics including quality assurance, risk management and compliance.

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As a Senior Associate at Wroten & Associates, **Sarah P. Gates** defends focuses on the defense of elder abuse and neglect claims; the defense of negligence and malpractice claims in the long term care setting; and the provision of ancillary services to long-term care providers such as restraining orders, and the development of litigation guidelines and best practices.

Ms. Gates graduated from California State University San Bernardino with a Business Administration degree, and obtained her Juris Doctor from the Southwestern University School of Law in Los Angeles. While at Southwestern, she was active in the Moot Court Honors Program, competing in the National Labor and Employment Law competition in New York City, and the International Information and Technology Competition in Chicago. Ms. Gates also was a member of the Moot Court Board of Governors. She was admitted to the California State Bar and to practice in the U.S. District Court for the Central District of California in 2003.

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