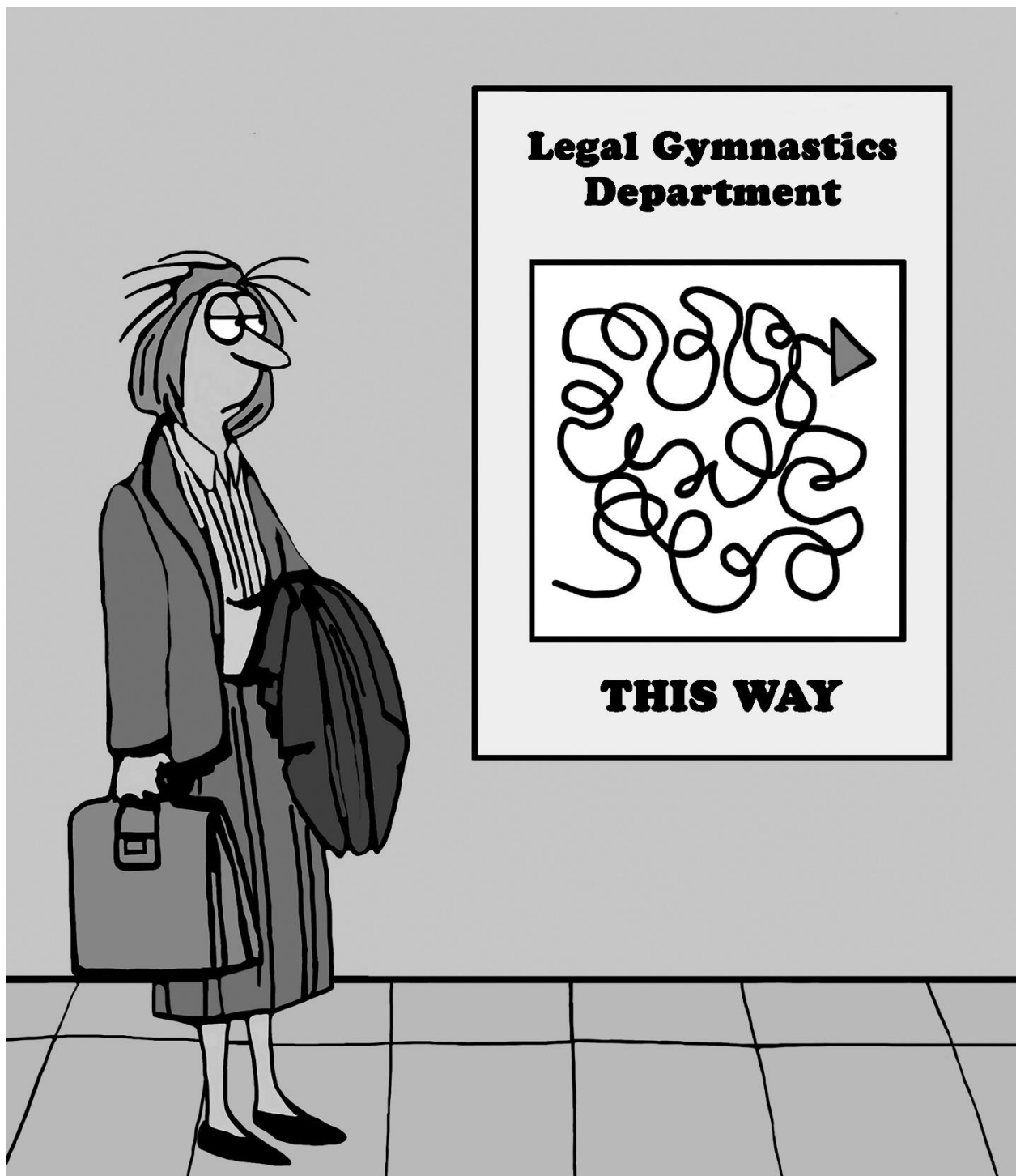


UNDERSTANDING THE LITIGATION HOLD

**WHAT IT IS AND WHAT TO DO
IF IT EVER HAPPENS TO YOU**



SCENARIO

**FOR THE “RECORD,” THIS SCENARIO IS A WORK OF FICTION
AND DID NOT ACTUALLY HAPPEN
(NO PERSONS WERE HARMED OR SUED IN THE MAKING OF THIS SCENARIO)**

*A credit union calls CU*Answers, very concerned. A member is furious and claiming that their check in the amount of \$250,000 was not returned by the Federal Reserve. The member is threatening to sue “anyone and everyone” involved in the transaction.*

Because of the threat of litigation, the employee immediately contacted a member of the Executive Council. After a preliminary investigation, the Executive Council determined that a Litigation Hold is appropriate.

“LITIGATION HOLD” YOU SAY? WHAT IS THAT?

Litigation Holds are simply a way of putting a company on notice that relevant evidence **needs to be preserved**. Organizations are not allowed to destroy information (even if they normally would) that might be relevant evidence in a lawsuit. If you destroy evidence, you can be sanctioned by the court or **even go to jail**.



See, back in the halcyon days of the early aughts, organizations liked to claim to courts that with all this *gol-dang newfangled technology* (like “email”) they couldn’t find evidence the court required for the case (“the computer ate my homework”). Eventually, the courts said it is **on your head** if you destroy evidence knowing that litigation is pending or is simply a likely possibility. So, we issue a Litigation Hold to protect the organization and our employees from destroying evidence that might be needed in a court of law.

SOUNDS SCARY!

Well, a little bit. You do need to take a Litigation Hold seriously. It is your right as an American to have easy access to the courts, and sometimes people run to the lawyers even when it isn’t a good idea. We need to hold on to evidence even when the other side is wrong or unreasonable.

But that’s why we are here! To walk you through a Litigation Hold so you know what to do if the time comes.



“Who should I examine first, you or your lawyer?”

WHO IS RESPONSIBLE FOR OWNING THE LITIGATION HOLD?

The Policy Manual assigns the CIO, although it could be assigned to another Executive Council member. This person has responsibility for ensuring that the Litigation Hold is followed.

WHAT ARE THE STEPS?

LITIGATION HOLD NOTICE

In this case, the first task will be to issue an all-staff notice. A notice in this case would look something like this:

TO ALL STAFF

*CU*Answers has been advised that the organization may face litigation with respect to Item Processing and the failed return of checks greater than \$2500. CU*Answers has been advised by counsel that litigation may result.*

Per our policy, I have been authorized to advise staff of a Litigation Hold. A Litigation Hold is where documents and records containing subject matter that could be used as evidence in a lawsuit must be preserved. In this case, the subject matter includes:

Data and communications around the return of the member's check for \$250,000.

EMPLOYEE DUTIES UNDER THE LITIGATION HOLD

- 1. All employees must not delete, overwrite, or otherwise alter or destroy any records (paper or electronic) that may contain information that is reasonably related to the subject matter identified above.***
- 2. This obligation applies to records or documents that currently exist or are created in the future.*
- 3. The format of the document does not matter; the record could be paper, electronic, or stored on tape. This information can be stored on the network drives, laptops, smart phones, home computers, or voice mail.*
- 4. All data containing this subject matter, even data on back-up tapes, should not be overwritten or rotated until further notice.*
- 5. If an employee has or obtains any records that include the subject matter, this data should be preserved and turned over to Internal Audit for retention and storage.*
- 6. Any question about the relevance of information should be resolved in favor of preserving and retaining information. Failure to preserve relevant information may result in significant penalties against CU*Answers.*

*What matters is not that we find all relevant information today. **What must not happen is for any employee or system process to destroy relevant information now that the Litigation Hold has been issued.***

IDENTIFICATION OF “KEY EMPLOYEES”

Although **everyone** is responsible for information in the Litigation Hold, one of the core principles is to identify the employees likely to have paper or electronic information relevant to the possible lawsuit. The owner of the litigation hold will want to be sure these employees understand their responsibilities. All data, even data on back-up tapes, should not be overwritten or rotated until further notice.

In this case, we are likely looking at the Item Processing Team. This Team would be asked to provide any information they have on the check, be they electronic or paper. This might include emails and voicemails. In addition, if the initial call with the credit union describing the possible lawsuit was recorded, this call would also have to be provided.

BUT WAIT! WHAT IF THIS INFORMATION WAS ALREADY DESTROYED?

If records were already destroyed per the records retention schedule before the Litigation Hold notice (well, technically when the company was told about the pending litigation), **that’s okay**. The courts can’t tell us to hold on to everything just because something *might* happen in the future. Unless there is a law requiring you to retain records for a specified period of time, or we have a contractual obligation to preserve, destroying records in accordance with a record retention schedule is perfectly legal as long as a Litigation Hold is not in force.



“I begged him to get a smart reader.”

This is true for non-record information as well. If it is normal for you to delete an email about this subject matter, as long as it was done before the Litigation Hold, you are in the clear.

In this case, our contract with the client specifies that we will retain Check Images information for seven years:

Retention of Check Images and or Microfilm Copies.

CU*Answers shall maintain check images for a period of seven years from the date of presentment (the “Retention Period”). At any time prior to the expiration of **seven years from the date of presentment** of any Check, CU*Answers will, upon request of the Credit Union, **furnish an imaged copy of any Check.** During the Retention Period, all paid Check images will be available for examination by the Credit Union during the normal business hours of CU*Answers.

So in this case, anything from seven years prior that was destroyed, **even if relevant to this case**, is exempt from the Litigation Hold.

The fancy-pants legal term for destroying information subject to a Litigation Hold is **spoliation**. This is what gets you in *real* trouble; when it appears to the courts that you are destroying evidence because you don’t want to held liable. The courts don’t like the “computer ate my homework” excuse any more today than in 2005.

Finally, what happens if you have relevant information that could have been destroyed, but *wasn’t*? **That information must be preserved now.** So, it is a good idea to keep current on your retention schedules and throw it out when the retention period is done.

COLLECTION OF APPLICABLE RECORDS

The Hold owner will work with all teams and develop a plan for the systematic and orderly collection of all paper and electronic records subject to the Litigation Hold. Teams that might be involved include:

- Network Services Team
- Internal Audit Team
- EC/BOD
- Legal Counsel

Information that must be preserved will be identified and collected. New information that comes in, such as communications about this from the credit union, will also be collected and stored. Employees may be asked to verify that to the best of their knowledge they have identified and turned over all paper and electronic records subject to the Litigation Hold.



PRODUCTION OF APPLICABLE RECORDS

How long do you have to continue the Litigation Hold? Unfortunately, it can be for a long time! The court system is slow, discovery can take months, and final resolution can take years. During that entire time, **all** relevant information has to be preserved!

The Owner of the Hold will have a responsibility to update the key employees and CU*Answers' responsible lawyer(s) as needed regarding the status of the litigation hold and periodically remind all key employees (and any other personnel newly assigned to the applicable matters) of their continuing obligations to preserve information.

ENDING THE LITIGATION HOLD

Good news! As it turns out, it was the Federal Reserve that was in error and they fixed the problem with the member. The lawyers have all flown back to their caves and we have the all-clear that we and our client will not be sued. What next?

Once the Litigation Hold is over, it's back to status quo. You'll see an announcement that the Litigation Hold is ended. Information that has been retained will need to be examined:

- If the information is still within the retention period, it still needs to be retained and returned to its normal retention location;
- If the information is not within the retention period, it can be destroyed;
- If the information is not part of the normal retention schedule, throw it out!



Remember, we are here to help you be successful. Let us know if we can provide you any additional assistance.

For additional guidance contact Internal Auditor, Marilyn Boyd, at extension 112.