

# PRESERVATION OF EVIDENCE

BY PETE CLANCY

More than ever before, society relies on computers, e-mail, databases, etc. to conduct its business affairs. In the context of litigation, the evidence created through this reliance can be invaluable. If you have any doubts as to the importance of electronic evidence or the impact it can have, take a look at [www.enronemails.com](http://www.enronemails.com); the Federal Energy Regulatory Commission published some 200,000 e-mails it collected in the course of investigating Enron. With that as background, attached are two sample "preservation" letters: one directed at a client, the other directed at an opposing party. These should be tailored to the circumstances of your particular case, and are intended to be a jumping-off point only. Of course, any additional information you may want to incorporate into your preservation letter can be found in the pages of this issue of *Nevada Lawyer*.

June 1, 2009

Mr. Jerry Brown  
ABC Company  
235 'A' Virginia Street  
Reno, Nevada 89503

Re: Webster v. ABC Company  
2nd Judicial District Case No. XXXXX

Dear Mr. Brown:

I write with regard to the preservation of electronic data related to the Webster v. ABC matter. It is likely that critical evidence relevant to the issues raised in this matter exists on ABC's computers. As your attorney I am obligated to inform you of ABC's duty to preserve this electronic data for potential use in the lawsuit. It is essential that it be kept in electronic form (*not* as a paper printout, which would not reflect all information contained within the electronic file).

Further, please be aware that the continued operation of the computer systems identified herein may result in the destruction of relevant evidence; such use may cause the data to be altered, deleted, or overwritten. ABC may want to create a "mirror image" of the computers in question to allow ABC's continued operations while also preserving the evidence in question.

The failure to preserve and retain the electronic data outlined in this below (or any data Mr. Webster requests) may constitute spoliation of evidence and may subject ABC Company to legal claims for damages and/or evidentiary and monetary sanctions. See, Bass v. Bass-Davis, (2006) 122 Nev. 442; Johnson v. Wells Fargo Home Mortgage, Inc. (D. Nev. 2008), 2008 WL 2142219 (adverse inference as sanction for spoliation).

Once you have had a chance to investigate the potentially applicable computers<sup>1</sup>, please contact me so we can formulate a long-term strategy for preserving the evidence and allowing ABC to use its computers as normal.

Sincerely,

Your Lawyer

<sup>1</sup> The computers at issue include, but are not limited to, the computer used by Mr. Webster while an employee at ABC, any e-mail server(s), and any computers Mr. Webster was connected to via a network. There may be other relevant computers. If you have any doubts, err on the side of caution.

June 1, 2009

Mr. Jerry Brown  
Brown, Smith and Brown  
235 'A' Virginia Street  
Reno, Nevada 89503

Re: Webster v. ABC Company  
2nd Judicial District Case No. XXXXX

Dear Mr. Brown:

I write with regard to the preservation of electronic data<sup>1</sup> related to the Webster v. ABC matter. It is likely that critical evidence relevant to the issues raised in this matter exists on your client's computer(s). It is essential that this data be preserved, and that it be preserved in electronic form (*not* as a paper) form. Further, please be aware that the continued operation of the computer systems identified herein may result in the destruction of relevant evidence; such use may cause the data to be altered, deleted, or overwritten.

As you are no doubt aware, the failure to preserve the data outlined below may constitute spoliation of evidence and may subject your client to evidentiary and/or monetary sanctions. See, Bass v. Bass-Davis, (2006) 122 Nev. 442; Johnson v. Wells Fargo Home Mortgage, Inc., (D. Nev. 2008), 2008 WL 2142219 (adverse inference as sanction for spoliation).

The computer systems on which my client believes there may be relevant electronic data and the scope of our preservation demand are outlined below:

1. Please preserve and retain all electronic data generated or received by Sal Webster while an employee at ABC Company.
2. Please preserve and retain all electronic data containing any information about Sal Webster.
3. ABC Company must refrain from operating (or removing or altering fixed or external drives and media attached thereto) standalone personal computers, network workstations, notebook and/or laptop computers operated by Sal Webster, Gary DiSans, or Mary Corn.
4. ABC Company must retain and preserve all backup tapes or other storage media, whether on-line or off-line, and refrain from overwriting or deleting information contained thereon, which may contain electronic data.
5. In order to alleviate any burden upon ABC Company, the undersigned is prepared to immediately enlist the services of a computer forensic expert to properly and non-invasively create back-up images all drives and media in the custody and control of ABC company that may contain electronic data relevant to this matter. This can be accomplished through a stipulation setting forth a similar procedural framework outlined by the court in Coburn v. PN II, Inc. (D. Nev. Mar. 28, 2008), 2008 WL 879746.

Please contact me immediately if you have any questions regarding this request. Absent a meaningful response, my client will be forced to move *ex parte* for an emergency preservation order, and will seek all associated costs and fees.

Sincerely,

Opposing Counsel

<sup>1</sup> "Electronic Data" shall include, but not be limited to, all text files (including word processing documents), spread sheets, e-mail files and information concerning e-mail (including logs of e-mail history and usage, header information and "deleted" files), Internet history files and preferences, graphical image format ("GIF") files, data bases, calendar and scheduling information, computer system activity logs and all file fragments and backup files containing electronic data.