

Client Guide: Preparing For A Litigation Crisis

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Preparing for a litigation crisis is a little like preparing for a tornado. No one wants to think about either one hitting campus, but it's best to be prepared if one does.

Unfortunately, that's where the similarity ends. While you may be inclined to cover your head and hide in response to both situations, a litigation readiness plan requires a more nuanced approach. This Client Guide identifies the key factors to consider and can be used to handle government investigations and high-risk internal investigations as well. Armed with a well-developed plan, you won't even think of running and hiding if faced with a significant litigation event.

RESPONSE TEAM. Murphy's Law dictates that any crisis will erupt on a Friday afternoon around 4 pm, particularly if the whole campus is on spring break. Thus, your plan should identify the few key personnel who will form an initial response team, including (i) their deputies in case anyone is unreachable and (ii) home and cell phone numbers for all. Your plan also should contemplate how notice of an adverse event will be escalated to the response team regardless of how it first comes into the institution. For example, you might consider setting up an "alert" mailbox and requiring all personnel to use it when they learn of (i) a lawsuit or subpoena, (ii) any communications from a government agency or accreditor, or (iii) any other circumstances that could pose material risk to the institution.

INSURANCE. When confronted with a significant litigation threat, a natural instinct is to "get your arms around the problem" before involving outsiders. Ignore that instinct. Involve your insurance broker as soon as possible. Task your broker with (i) identifying which policies may provide coverage and (ii) giving notice. Delayed notice may leave an institution on the hook for costs that otherwise may have been covered. Early involvement also means the institution will know if its choice of counsel is constrained by the policy and/or if the policy entitles the institution to valuable crisis management response services. Thus, a litigation readiness plan

Litigation Checklist

Including a checklist like this in your litigation readiness plan will ensure that essential tasks don't fall through the cracks.

- Engage Response Team
- Give Notice to Insurers
- Retain Counsel & Other Experts
- Implement a Litigation Hold
- Make Mandatory Disclosures
- Calendar Initial Deadlines & Obligations

should include information about insurance coverage and broker contact information. It also should call for the development of policies and procedures that encourage regular evaluation of insurance needs in light of emerging risks.

RETAIN QUALIFIED COUNSEL & EXPERTS. Qualified attorneys can guide an institution around pitfalls and position the institution for a successful defense. Their presence also provides breathing room to candidly evaluate facts outside the glare of public scrutiny. A number of considerations go into selecting qualified counsel beyond just availability, familiarity with the institution and rates. Other key considerations include the firm's subject matter expertise and reputation in the judicial forum or with the applicable government agency at issue. Where allegations against individuals are likely, due consideration also must be given to conflicts of interest and/or counsel for individuals. Your plan should identify the institution's preferred outside counsel (and their subject matter expertise) and a generic request for proposal that could be modified on short notice in the event that new counsel is needed for a particular matter. If your institution faces frequent large litigation, consider developing a panel of preferred vendors with whom you negotiate favorable pricing **before** a crisis hits.

PRESERVE INFORMATION. Institutions have an affirmative obligation to retain documents, including electronic data, when litigation is filed **or even reasonably foreseeable**. Institutions that fail to heed this obligation face serious repercussions. Thus, your litigation readiness plan should account for how to issue a "litigation hold notice." This document notifies all applicable custodians of the institution's obligation to preserve data. The institution may have to take additional steps beyond issuing the notice, including but not limited to imaging hard drives and interrupting ordinary document destruction schedules. Accordingly, your plan also should call for the regular evaluation of policies and procedures that can help or hinder document preservation efforts, such as those pertaining to the recovery of institutional property upon employee separation and updating data retention schedules.

MAKE MANDATORY REPORTS OR DISCLOSURES. The institution should be prepared to fulfill any mandatory reporting or disclosure obligations to the Department of Education, accreditors and state licensing agencies. Thus, the litigation readiness plan should contemplate **what** disclosure obligations the institution likely would have and **who** will review and approve such communications before they are issued.

UNDERSTAND AND CALENDAR INITIAL OBLIGATIONS. The initial response team should seek to discern **what** is being requested of the institution by **when**. When responding to a government investigation, for instance, a response deadline is stated in the civil investigative demand. Failure to meet these deadlines (or ask for an extension in advance) can put the institution on bad footing (or even risk a default judgment). Plan for how deadlines will be tracked initially and updated as the matter proceeds.

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About the Author. There is a first-generation graduate of an Associated Colleges of Illinois member institution. She has served on the ACI Board since 2018 and chairs its Communications Committee. Before joining Rathje, she served as in-house counsel to one of the largest providers of higher education in North America. She has extensive experience litigating high-risk matters and advising on litigation readiness. She frequently writes on higher education legal news and topics here:

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