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Prove It! Why Reps and Principals Need to Keep the Evidence

By Eric Engel
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“Oh yeah? Prove it!” Among schoolyard taunts, that one has a germ of truth. If you can’t prove you’re right, you probably won’t win. If you probably won’t win, there’s usually little sense in starting the fight — you’ll waste your time and money.

So if you’re an independent representative or a principal in a fight, how do you prove you’re right? Evidence. For lawyers, evidence is ammunition — if we have enough of the right kinds of evidence, we can win the battle for you. And if the other side understands that you have the evidence, a reasonable settlement is much more likely, trial can be avoided, and time and money saved. But the dark underside is that if you once had the evidence, but it has been lost or destroyed, that can become a serious detriment to you — it can be the end of your case.



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So what is the evidence that can help you prove your claims? It can be almost anything, starting with oral testimony of parties and witnesses. But for representatives and principals these days it is primarily e-mails, texts, spreadsheets, reports and database records including Customer Relationship Management software systems such as Salesforce.com, and photographs. Good old fashioned documents, like letters and faxes, continue to come in handy.

More Than Testimony Is Needed

While it is legally true that the testimony of even one witness might be enough for a verdict in your favor, that does not mean that the testimony of one witness will win the battle for you. Most people (judges and jurors included) understand

intuitively that the least reliable evidence is oral testimony, especially when it is from people who are interested in the outcome of the dispute. Even witnesses who testify in the utmost good faith can misperceive, or their memory can become distorted over time. That is why judges and jurors place heavy emphasis on documents, including electronic data of all kinds. Documents that were created before the particular dispute arose are often the most compelling — they show the parties' communications, understandings and activities in the regular course of business and they are seen as less likely to have been deliberately skewed to win a dispute.

The Importance of Good Documents

The lesson is clear: Make sure there are good documents evidencing your rights and the facts, *before* a dispute arises. For agents and principals, it all starts with a good written contract that is actually signed by all parties. Such a contract is always the best evidence of the parties' agreement. It is such strong evidence that, if the written terms are clear enough, in many cases it is the only evidence that the court will even consider to determine the terms of the parties' agreement. So, to make sure you can use this strong evidence of your agreement, as soon as the contract is signed get and keep a fully signed copy. Don't count on the other party to keep and produce it on demand — they may not and you may be unable to prove the terms. Don't rely on keeping an unsigned copy such as a Word or PDF file before signature — it might not be treated as agreed and effective.

In most cases, a complete copy is considered as good as the original, so don't stress over who keeps the original — just make sure your original or copy is the final, complete agreement with all required signatures and all blanks filled in. And whatever you do, make sure everyone is signing the same version — when different copies of an agreement are signed, or when there are multiple originals, there is a risk of inconsistencies between the contract versions. (Just ask Frank and Jamie McCourt, who signed multiple originals of an agreement, some of which said that Frank's sole property was "inclusive," and others of which said it was "exclusive," of the Dodgers baseball team. Ownership of a \$2-billion major league baseball team turned on a difference of two letters in two versions of contracts, both of which were signed.)

Confirm Facts

So once you have your contract, how do you make sure you have the evidence you will need to protect yourself in the event of a dispute? While oral agent-principal and customer communications are vital to effective sales and maintaining trust and relationships, make sure that important facts and events are clearly confirmed in writing. Write an e-mail, especially if something happens that is an exception to the contract rules, such as an unusual commission split or reduction, or an agreement on handling of a house account that is not clearly spelled out in the contract.

Write in plain English and maintain the same friendly, cooperative, trustworthy tone that holds you in good stead in your sales efforts. Just confirm the facts or agreement in simple, accurate terms. Unless you are a practicing lawyer, don't try to play one — it will probably be destructive to your ongoing trust-based relationships, will likely have errors, and it won't be nearly as effective as getting the facts documented in plain English. And make sure you have good basis for what you write — stretching the truth will not only damage your relationships, a demonstrably false written statement can color everything against you in the eyes of a judge or jury. If your agents, principals or customers say or write something that is clearly wrong and significantly against your interests, make sure you correct the point in writing before it becomes entrenched as if it were true. Always try to do so respectfully and without accusation — preserve your relationships of trust by assuming from the outset that it's an innocent misstatement, not a deliberate effort against you.

So now that you've created your documents, what's next? Save them! The documents you so carefully created will do

you no good if you don't save them — in fact, they can actually turn against you. The law throughout the United States requires that individuals and businesses take affirmative steps to preserve their evidence that may be relevant, beginning as soon as they reasonably anticipate becoming involved in a dispute. Lawyers sometimes call this obligation to preserve evidence a "litigation hold," but it actually applies as soon as the parties "reasonably anticipate" that a dispute could arise, which often coincides with the first claims and demands for a change in position.

Evidence Preservation

For representatives and principals, this evidence preservation rule applies particularly to documents, spreadsheets, e-mails and texts concerning the relationship, including those exchanged between the agent and principal and those involving customers or third parties such as other involved reps. Save copies contemporaneously, don't delete e-mails and texts that could be significant, and always make backups. Don't count on your phone, tablet or laptop to keep running; failure or loss at some point is inevitable — it's only a matter of when. Don't rely on printouts of electronic documents — increasingly, courts are requiring that electronic "original" files must be produced. Subscribe to an online backup service to automatically keep copies of your data and communications, or regularly and carefully use your own backup systems. If a dispute seems to be arising, make sure you preserve those backups too — don't allow them to be overwritten or lost due to inactivity. And once arisen, the obligation to preserve potentially relevant evidence is ongoing until the dispute is finally resolved — consult with your lawyer about what and how to preserve additional evidence that may be developed during the course of the dispute.

Finally, don't try to rely on an assertion that you're not good with electronics — a "luddite defense" probably will not work, as courts increasingly expect you to take reasonable steps to get technical assistance to meet your legal obligations. If you don't have your own resources, your lawyer should be able to help you find competent consultants who can assist you.

The legal consequences of failing to preserve and produce electronic data can be severe — even the legal name for it, "spoliation of evidence," sounds dire. First, judges and jurors are understandably skeptical of parties' assertions that really good evidence once existed but cannot be presented because it has been lost. But in more extreme circumstances courts can dismiss a party's entire case or bar defenses if that party allowed potentially significant evidence to be lost or destroyed. Finally, even if you manage to dodge those bullets, the evidence you lost or destroyed might have actually been much more helpful than you imagine — it might have been the ammunition that your lawyer needed to help you win the case.

Non-Exclusive Examples of Common Electronic Media That May Contain Evidence

1. Networked hard drives and data rooms, which may be on multiple servers and Network Attached Storage. This includes networked databases and servers such as SQL, Access, Salesforce, ACT! and GoldMine, QuickBooks, TurboTax, etc.
2. Internet-based data storage systems, whether for data sharing, collaboration or backup, including "cloud" computing systems (such as CRM software (including Salesforce, ACT! and GoldMine) Microsoft Office 365, TurboTax, H&R Block at Home, Google Docs, Amazon S3, iDrive, Carbonite).
3. Social networking (such as Facebook, Google+, and LinkedIn), blogs, microblogs (such as Twitter), chatrooms, wikis, photo and video sharing websites (such as YouTube, Instagram and Flickr).
4. Individual workstation hard disks, such as employee computers or specialized office workstations, laptops, netbooks and tablets, whether in current use or not.
5. Employee home computers, laptops, netbooks and tablets, if data is taken out of the office.

6. E-mail, which can be on many different systems including:
 - A. E-mail on network servers, which may include “archives” of e-mail or backup media on which e-mail is stored.
 - B. Employee workstation, laptop, netbook or tablet copies or archives of e-mail.
 - C. Employee cell phones or smartphones (such as Blackberry, iPhone, Android, Windows) or cellular phone copies of e-mail and text messages.
 - D. Webmail on internet services (such as AOL, Gmail or Yahoo).
 - E. Home e-mail systems of employees.
7. Instant Messaging Services (such as AOL AIM, Google Talk, Blackberry Messenger, Microsoft Instant Messenger, and Yahoo Instant Messenger).
8. Text Messaging Services (such as on cell phones and smartphones).
9. Recordable disks, such as CDs, DVDs, Zip disks and floppy disks.
10. Backup tapes or disks, whether for routine backup, archival or disaster recovery.
11. External or portable hard disks, such as USB hard drives.
12. Flash drives, such as USB “thumb” or “jump” drives.
13. Memory cards and memory sticks of all types.
14. Digital still and video cameras, and their recording media.
15. Voicemail system messages and phone call logs.
16. Logs and images stored in various office devices, such as digital fax machines and photocopiers.

This is not an exclusive list and is intended only as a starting point. Older media for electronic storage may still exist, and new media is being developed constantly.



Eric Engel

Eric S. Engel has been practicing law with Conkle, Kremer & Engel, Professional Law Corporation, in the Los Angeles, California, area, for almost 30 years. He is a trial and appellate business litigator who serves representatives and principals. His career is marked by a number of firsts, including the Orange County trial that led to the first precedent in California enforcing an agent’s right to treble damages and attorney fees against a principal and its owners based on an oral contract, *Reilly v. Inquest Technology, Inc.*, 218 Cal. App. 4th 536 (2013). (*Agency Sales*, January 2014, “Fallout From an Oral Contract”). For more information visit www.conklelaw.com.

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