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Don't Get Spoiled by Spoliation: The Importance of Litigation Hold Notices

Litigation and Dispute Resolution


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CHEAT SHEET

- ***Identify who should be contacted.*** This is the first step in the litigation hold process; it ensures against the destruction of documents that may be relevant to the plaintiff's lawsuit.

- ***Provide a notice/letter.*** All identified employees should be notified and instructed to ensure that they are complying with the company's directives.
- ***Preserve necessary information.*** You must ensure that any and all relevant information that is located on a computer network is preserved in some form. Backup tapes or disks should be retained and not overwritten.
- ***Secure offsite information.*** No stone should be left unturned in the quest to determine where these documents may be located.

"The fault, dear Brutus, is not in our stars, but in ourselves."

William Shakespeare

You haven't even had the chance to eat your oatmeal this morning before the receptionist calls your office. She informs you that a sheriff is waiting for you in the lobby; he has a large stack of papers in his hands. You make the trek to the elevator with a palpable sense of gloom. You've been here before — your company is being sued. Your previous experiences with this scenario do little to lessen the nervousness with which you approach the sheriff. After confirming your name, you are handed a stack of papers rivaling *War and Peace*. A cursory review during the elevator ride back to your office provides the specifics: A former employee working in the logistics department claims he was improperly terminated about a year ago in retaliation for seeking benefits under your company's workers' compensation policy when he was injured on the job. Now he wants lost wages, punitive damages and attorney's fees paid by your company. After closing the door to your office and throwing away the oatmeal you no longer have the appetite to acknowledge, you call the company's CEO: "Are you sitting down? We have a problem."

After going over the allegations of the plaintiff's lawsuit, you diligently calendar your company's response deadline and request his file from human resources. Following a meticulous review of that file, you start the process of drafting an answer to defend against the claims asserted. A month or so later, you file the company's response to avoid a default scenario and, to honor your CEO's stated goal, even serve written discovery on the plaintiff to "go on the offensive." While your discovery requests remain outstanding, you perform exhaustive legal research and uncover what you believe will be a difficult burden for the plaintiff to overcome. The research couldn't come at a better time, as your next monthly meeting with the company's leadership is only a few days away; it's always nice to be the bearer of good news.

At the meeting, you confidently inform the company's leadership of the lawsuit, its procedural status and your confidence that based on the research you have recently performed, there's a strong likelihood of a verdict in your company's favor (perhaps via a motion for summary judgment). You resist the urge to pat yourself on the back, especially when the CEO commends your work in front of the entire board and states her relief in having you in the company's corner. At the meeting's conclusion, you stroll back to your office unaware of the ticking bomb awaiting you in a large manila envelope on your desk.

The envelope does not catch your eye until about 30 minutes later — right about the time you finish responding to a few emails. Upon opening it, you learn that the plaintiff has not only responded to your company's written discovery but has served his own written discovery. For good measure, he gives notice of the deposition of several company employees. A document-requests review

demonstrates the usual suspects you expected to receive: the plaintiff's worker's compensation file, emails to and from the plaintiff relating to his eventual termination and the plaintiff 's employee file including any and all reviews of his performance with the company.

There are, however, a few requests that make your heart skip a few beats. For instance, the plaintiff's requests insinuate that the company should have emails from the early part of his employment indicating that he provided notice of his belief that he could suffer injury as a result of outdated safety measures at the company. There is also a request for any video of the injury-causing incident itself.

Undeterred, you start the process of drafting responses to the written discovery and inform all deponents of their respective deposition dates. Out of an abundance of caution, you also make a phone call to the IT department to determine how to obtain the requested emails and to human resources to determine whether there would be any video footage of the incident.

A few days later, the roadmap you had meticulously planned for this litigation has been turned completely upside down. First, the IT department informs you that all emails from the plaintiff during the early part of his employment were just purged from the server consistent with the company's document-retention policy. "They can't be reclaimed now," you are told. Moreover, while human resources can't confirm that a video of the incident ever actually existed, all videos around the applicable timeframe were recently recorded over pursuant to the video system's programming. That evidence, to the extent it ever existed, has (possibly like your continued employment as counsel for the company) been destroyed.

You do your best to finalize the written-discovery responses to cautiously indicate that while the emails and video requested may have existed at one point, those materials have recently been purged pursuant to your company's document-retention policy. So as to not risk the wrath of your CEO, you initially decide to wait to receive the response (if any) from the plaintiff before going into complete panic mode. "No reason to sound the alarm," you convince yourself, "at least not yet."

A few weeks later, however, your worst fears are confirmed when you are served with the plaintiff's motion for spoliation and sanctions. In that motion, the plaintiff argues that your company should have reasonably anticipated his claim at the time of his termination or, at the very latest, at the time you were served with his complaint. It was at that moment, the plaintiff argues, that your company had a duty to safeguard and preserve any and all relevant evidence relating to his claim. Because the subject emails and video are integral pieces of evidence in support of his claim, the plaintiff requests that the presiding judge sanction your company by either granting him immediate default judgment or by providing the future jury an adverse-inference instruction directing it to assume that the lost evidence, if available, would have been favorable to his case (and harmful to your company). Of course, the plaintiff also requests his attorney's fees in being forced to bring the spoliation-of-evidence claim before the judge.

Realizing you have inadvertently placed the company in a bad position, you inform the CEO of the current predicament and accept full responsibility when she informs you that she is taking you off the case and retaining outside counsel instead. You agree to work with outside counsel to do whatever it takes to put out this fire, and, at a minimum, to lessen the amount of damage it causes. Upon informing outside counsel of what transpired, he responds that the plaintiff's spoliation claim should be fairly easy to defeat if the company can simply produce the litigation hold notice that was sent to all applicable employees after you were initially served with the complaint. "Intent," he informs you, "is a huge consideration for the judge. If we can show that all pertinent employees were instructed to

maintain all possible evidence, we have a great argument that these materials were discarded accidentally." You regrettably inform outside counsel that a litigation hold notice was never sent out to the applicable personnel in your company — a mistake, you promise yourself, that will never happen again.

A litigation hold notice is a written directive instructing specified employees and other personnel to preserve certain relevant documents and electronically stored information (ESI). The notice is usually sent either in anticipation of a possible lawsuit (i.e., when the company has a reasonable basis to suspect that a lawsuit will be filed) or, as in most cases, to preserve potentially relevant evidence upon the service of a lawsuit. Notably, the marshaling and preservation of such documents and materials is merely the first step in this important litigation-management process. It is just as important that the company suspend any document retention (or, more appropriately, destruction) policies that may be in place to ensure that no potentially relevant evidence is inadvertently destroyed.

Of course, the question begs to be answered: What should be considered potentially relevant evidence? At the initial stage of litigation (or the first anticipation that a claim may eventually be filed), any and all documents and/or materials that have any tendency to make a fact more or less probable than it would be without the evidence, or could be of consequence in determining the action, should be considered relevant. More bluntly, anything that has any connection whatsoever to the plaintiff or the plaintiff's claim should be considered relevant and initially preserved. While the time and expense to perform a thorough search, and to maintain more documents than may actually be necessary, may seem prohibitive, those efforts will surely pale in comparison to the repercussions of possible sanctions at trial (or the sheer loss of credibility) a claim of spoliation may cause.

The first step in the litigation hold process is to determine the individuals who should be contacted in order to safeguard against the destruction of ESI, documents and other materials that may be relevant to the plaintiff's lawsuit. The claims asserted by the plaintiff are usually the best indicator of which individuals should receive the litigation hold notice. For instance, if specific individuals are identified in the plaintiff's complaint, those individuals should certainly be considered. If the plaintiff worked in a specific department or with a specified group of employees, those individuals should likely be included as well. Finally, an internal investigation may lead to additional personnel who should be instructed to preserve any and all relevant evidence. For instance, in the hypothetical scenario outlined in the beginning of this article, any and all witnesses to the injury-causing incident should be established and targeted for the litigation hold notice.

Second, all such identified employees should be provided a notice/letter that explains the need to preserve all documents/materials relevant to the plaintiff and the plaintiff's claims. Those individuals should likewise be instructed to ensure that their relevant departments and/or employees are complying with the company's directives as well. Oftentimes, individuals outside the company will be involved in a particular incident and may have documents that an employee considers relevant to the plaintiff's claim — an independent contractor, for instance. If that is the case, those individuals and the role they played in connection with the plaintiff's claims should be discussed with the company's counsel before being contacted by the company and/or any individual employees of the company to confirm their position, their role in the plaintiff's claim and whether the company would have any attorney-client privilege or other protections in connection with its potential communications with that individual.

Potential spoliation sanctions

The repercussions associated with not engaging in the litigation-hold notice process can be devastating. Courts in most jurisdictions can impose the following sanctions if there is a finding of spoliation of evidence:

- **Adverse inference instruction:** For example, a court will inform the jury that certain employees, after learning that the plaintiff had sued your company, deleted/destroyed documents/materials/ESI that would have been used by the plaintiff in presenting and supporting his case. The jury will then be allowed to infer that the deleted/destroyed information would have been helpful to the plaintiff in proving his case and, conversely, that the same information would have been harmful to your company in the defense of its case.
- **Precluded evidence or testimony:** Here, a court will prohibit the company from introducing any evidence relating to the deleted/missing materials or from permitting any testimony regarding the content of those materials (even if helpful to your company's defense).
- **Costs:** The company may be forced to reimburse the plaintiff for any and all expenses and attorney's fees he incurred in connection with his claim for spoliation. Default Judgment: Although very rare, a court can actually grant the plaintiff a default judgment, instantly entitling him to judgment against your company in the full amount sought in the complaint. In most cases, however, the sanction of default judgment is used only where there is clear intent demonstrated on behalf of a company or its employees to purposefully destroy relevant evidence.
- **Credibility:** While not an official sanction, the mere filing of a spoliation claim against your company can cause significant reputational harm. Parties involved in litigation are required to submit their pleadings on a good-faith basis that there is, or will be, evidence to support the contentions being advanced. While evidence of spoliation may not actually exist, the fact that the company is even forced to deal with such a claim could be damaging in how a court perceives your company's credibility throughout the ongoing litigation.

Which, incidentally, serves as a good starting point for discussion of the litigation hold notice itself. The document should be clearly designated as "privileged and confidential," "attorney-client privileged" and "attorney work product." The litigation hold notice is, after all, a communication between attorney and client regarding an anticipated or pending legal claim. Accordingly, to convey the seriousness of the instructions being communicated and, more importantly, to prevent the disclosure of the content of the litigation hold notice during the course of discovery (as well as the people who received the litigation hold notice), the applicable privileges and protections should be clearly stated on the face of the notice — most preferably at the top of the page and in bold.

The litigation hold notice should also communicate that the plaintiff (whose name should be provided) has filed a lawsuit (with the specific venue provided) against the company related to certain specified claims (which should also be generally described). Such information gives the recipient the who, what and where of the pending litigation. The notice should further clearly communicate that controlling law imposes specialized document-retention requirements to prevent the loss of any relevant evidence and to prevent any of the negative consequences associated with the destruction (purposeful or inadvertent) of such evidence.

A problem that attorneys often encounter is communicating the importance of legal matters and scenarios to laypeople without sounding like an attorney. Ironically, we spend three years in law school dedicating ourselves to thinking and communicating like an attorney, then the rest of our

careers trying to unlearn the wherefores and Latin phrases that were the bane of our existence several years prior. Consider that employees engaged in such areas as marketing and accounting won't necessarily have the same knowledge of relevance or discovery that a skilled attorney possesses. Consequently, it is of the utmost importance to communicate the necessity of adhering to the terms of the litigation hold notice to the selected employees without forcing them to reference a *Black's Law Dictionary*. A good tip is to have someone not trained in the practice of law review the content of the litigation hold notice before its delivery (such as your administrative assistant). If he or she is able to understand what is being conveyed without having to ask you a series of clarifying questions, you should be on the right track.

The litigation hold notice should also clearly indicate that certain steps should be implemented, according to the company's obligations under law, to preserve all documents, ESI, and other materials that relate to the plaintiff or to the subject matter of the claims being asserted by the plaintiff. Again, the individuals receiving the litigation hold notice should be reminded that just as important as actively preserving such materials is the obligation that they not discard, delete, destroy or alter such materials. This reminder should also establish that the company's customary document retention policies, to the extent they exist, should be modified to ensure that no such materials are inadvertently destroyed.

Many times, it will be to the benefit of the company to specifically reference, without limitation, the types of documents that should be maintained beyond the customary emails and Word/Excel documents that the company's employees would probably expect. For instance, handwritten notes, drafts of documents, memos, presentations, charts, graphs and texts should all be maintained if related to the plaintiff or to the claim being asserted. Moreover, remind the applicable employees that documents and ESI created and/or stored on their home or personal computers should likewise be included in the preservation process. Of course, while it barely needs mentioning to the experienced litigator, employees should be explicitly reminded that they should not dispose of, alter or otherwise wipe any computers, hard drives, servers or cell phones during the course of the litigation that may in any way contain relevant information. A simple message directing any employee with questions regarding what materials should be preserved to contact the company's counsel may prevent a mistake that could be very costly down the line. In addition, instructing any employee who is aware (or learns) of relevant records being deleted to immediately contact company counsel could also serve to address any possible spoliation concerns at the soonest possible moment.

The object of a litigation hold notice is to steadfastly convey the importance of preserving any and all possible relevant materials, even when doubting the relevance of those materials. When an employee doubts whether something is relevant or needs to be preserved, the presumption should always be to preserve. Indeed, it is also helpful to explicitly remind all pertinent employees that taking matters into their own hands in an attempt to "help" the company by destroying a document can, in reality, only harm the company. A skillful way of communicating this message is to indicate that the warning is not a result of the company's belief that anyone would act unethically but is instead a reminder that even the innocent and unknowing destruction of such materials can lead to severe and negative consequences for the company. In fact, the negative inference that can be applied by a court can oftentimes be more harmful that the evidence itself.

Checklist for the litigation hold process

1. Communicate the service of the plaintiff's complaint (or a good-faith anticipation of a possible litigation) with general counsel, company leadership and outside counsel. It may also be

beneficial to communicate with any insurance carriers regarding possible coverage.
2. Determine who the plaintiff is, the relevant timeframe of the plaintiff's claim, the individuals likely having relevant documents/materials concerning the plaintiff and the bases for the plaintiff's claims against the company.
3. Identify the applicable personnel who should receive the litigation hold notice. At the initial stage of a litigation, it is best to be overly broad as opposed to selective. Be sure to consider any former employees who may nonetheless have relevant evidence concerning the plaintiff or the plaintiff's claim.
4. Draft and deliver the litigation-hold notice to all selected personnel. Be prepared to answer any and all questions regarding the litigation-hold process and to follow up with these personnel during the course of the litigation.
5. Communicate with the IT department to determine its ability to obtain information from all possible company sources (i.e., computers, smart phones, ESI, etc.). Based on the scope of the possible relevant information at issue, consider the use of a possible outside computer-forensics company to "mirror" hard drives and servers.
6. Clearly communicate that any and all document-retention policies must be reviewed and possibly suspended to ensure that there is no inadvertent destruction of potentially relevant evidence.
7. Continue to monitor all applicable personnel to ensure ongoing compliance with the terms of the litigation hold notice throughout the course of the litigation.
8. Provide the applicable employees notice when the plaintiff's claim has concluded (so as to suspend the need to abide by the terms of the litigation hold notice) and preserve all gathered information pursuant to your company's document-retention policies.

A final consideration of the litigation hold notice process is whether to confirm receipt of the notice by having each applicable employee sign a confirmation that he or she has received and read its contents. There are positives and negatives to this approach. On the positive side, it is beneficial to have a record that demonstrates that all such employees were duly advised and recorded their understanding of the company's policies. However, a negative aspect may be that if an employee refuses (for whatever reason) to sign the acknowledgment, or, perhaps, the company is simply unable to logistically track down each and every employee who receives the notice, the resulting impression could be that while some employees confirmed their understanding of the company's policies, others ignored it, refused it or, perhaps, were specifically circumvented by the company.

Third, you must then ensure that any and all relevant information that is located on a computer network is preserved in some form. Backup tapes or disks should be retained and not overwritten. As most attorneys will freely admit, we are sometimes lost in the ever-expanding cloud (literally and figuratively) of ESI and other forms of e-discovery. As such, we recommend that you coordinate a plan of action with your IT department to determine the most productive and cost-effective means of tracking down and maintaining any such materials. If, in your case, an IT department does not exist, there are several forensic computer experts available to assist in ensuring that any and all relevant evidence is obtained and preserved during this process.

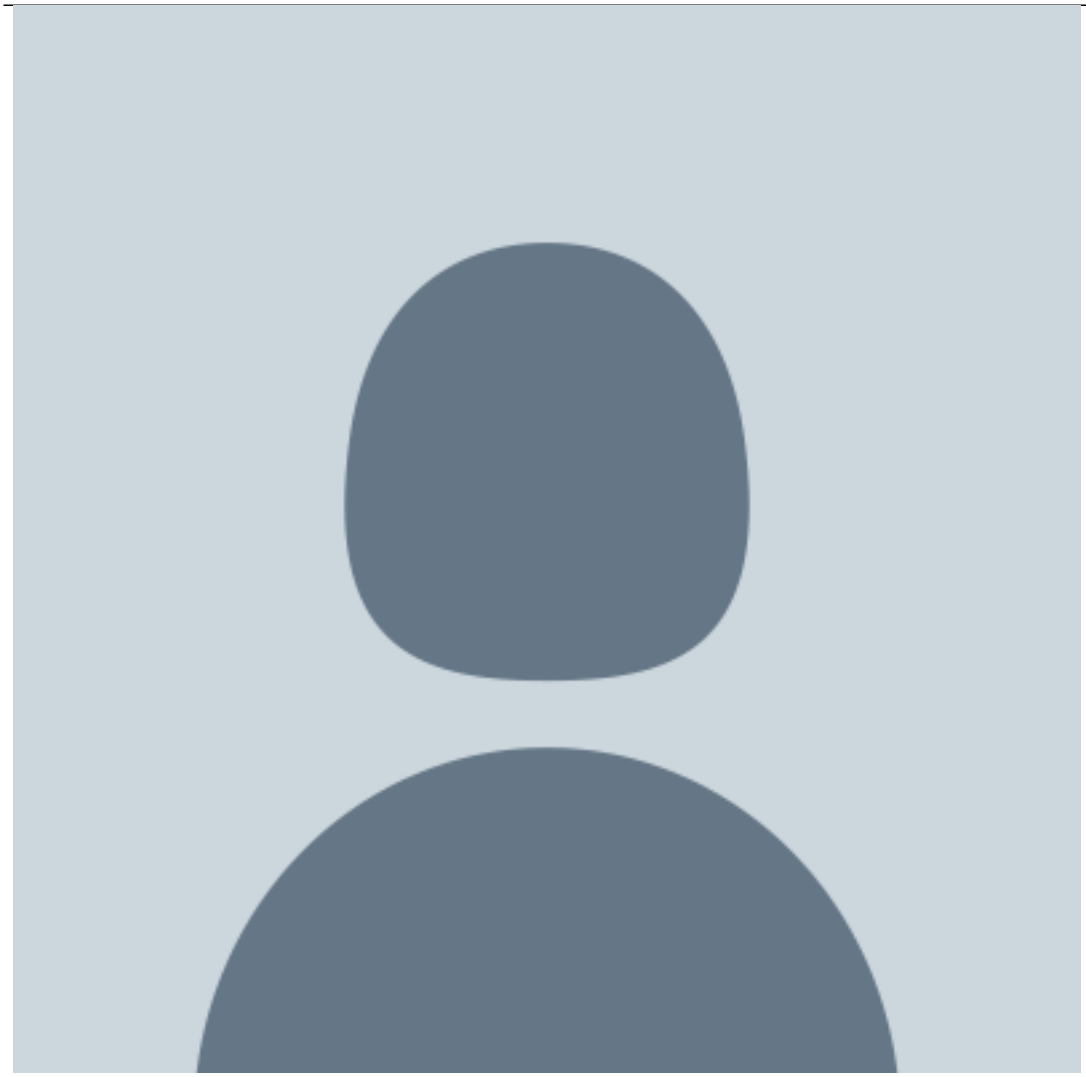
Finally, also consider any documentation or materials that may exist outside the bricks and mortar of the company itself or beyond the waves and wires of the company's computers and servers. For instance, most companies will have a document-retention policy that requires documents to be stored offsite for a specific amount of time before eventually being destroyed. No stone should be left

unturned in the quest to determine where these documents may be located. While the time and expense associated with this process may be burdensome and the discovery of relevant evidence may many times uncover information that is harmful to your company's case, it can conversely provide the evidentiary support to assist your company's successful defense of the plaintiff's claim.

Of course, merely sending out the litigation hold notice to all pertinent employees may not be enough. We recommend that you follow up with the selected employees to determine that they have taken the proper steps to comply with the stated instructions and to make yourself available for any questions or concerns. Drafting and delivering the litigation hold notice is only the first step of this process. To the extent a claim of spoliation ever rears its ugly head, you will be prepared to attack the allegation head-on by demonstrating not only the initial steps the company took to preserve all relevant evidence but the subsequent steps to ensure the process was being adhered to throughout the course of the litigation.

Unfortunately, the practice of law is becoming increasingly rancorous. Matters that may have once been resolved over a cup of coffee are now routinely met with claims of bad faith, abuse of process and claims of spoliation. We live in an increasingly contentious legal world in which any advantage, real or perceived, will be quickly seized on by our opposition. While establishing and formalizing the litigation hold process will not serve as a cure-all in every case, it certainly serves as a good start to avoid potentially devastating pitfalls before it is too late.

Amy Burton Loggins



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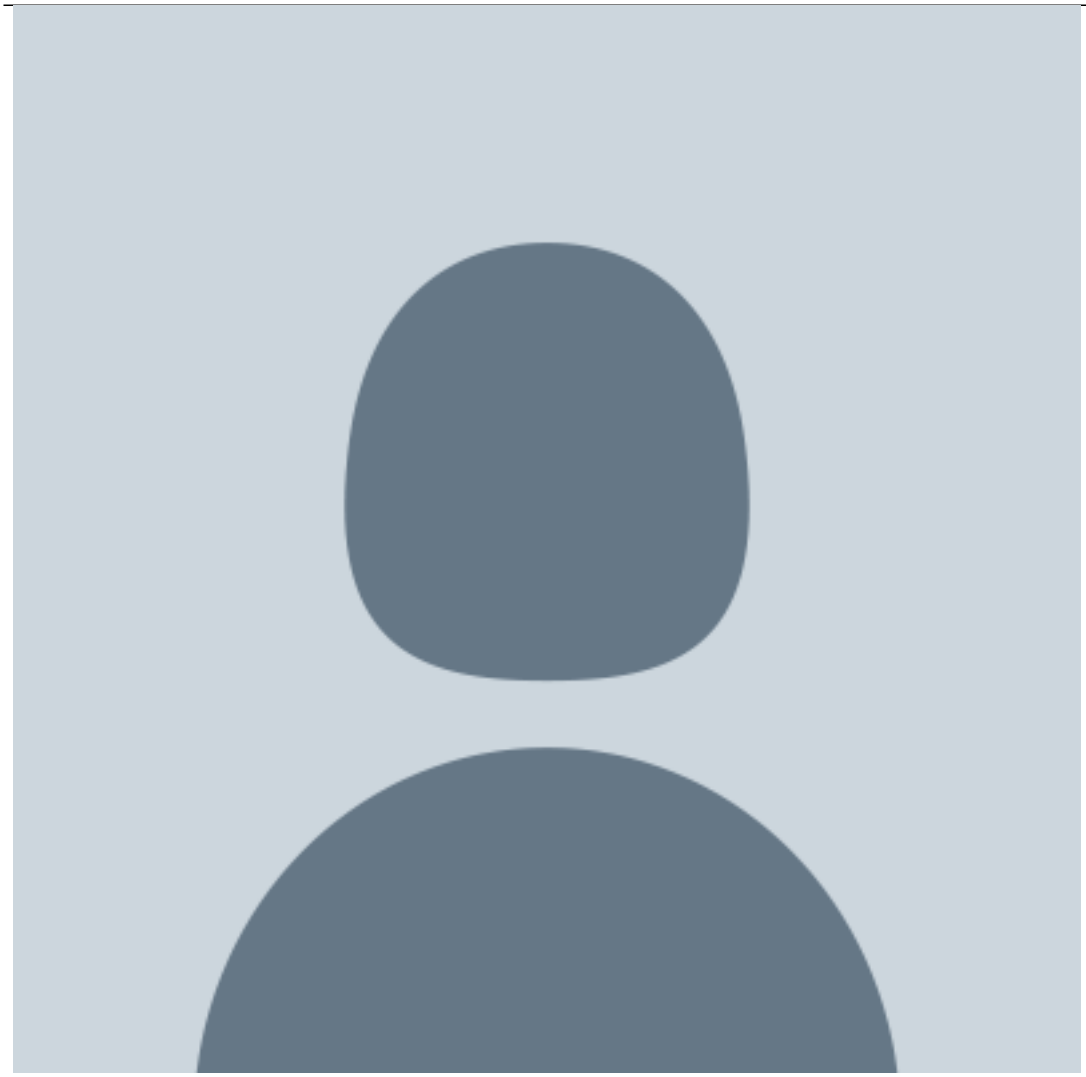

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