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presents

Litigation Readiness:
A Roadmap to Data Preservation
and Legal Holds



Elan Hersh, Esq.

Background and Experience

Elan Hersh is a Partner at Akerman LLP and leads Akerman's eDiscovery Services practice. Elan advises clients on electronic discovery (eDiscovery), information governance, litigation readiness and response, cross-border discovery issues, and data privacy. Elan leverages his unique knowledge of the technical and legal dimensions of eDiscovery to advise clients on defensible and cost-effective strategies for data preservation, collection, review, and production, with an emphasis on controlling the scope of discovery. Elan represents clients in all aspects of eDiscovery throughout the country in both state and federal court and represents foreign corporations who are defending lawsuits in the United States.

Prior to launching Akerman's eDiscovery Services practice, Elan represented medical device manufacturers in mass tort and products liability disputes, where he specialized in litigating issues concerning electronically stored information (ESI).

Elan is a frequent author and presenter on issues concerning ESI and the law.



Emily Bartkowicz, CP, CEDS

Background and Experience

Emily Bartkowicz is a 20-year veteran of the legal industry and currently serves as the Litigation Support Manager with Akerman eDiscovery Services. Emily specializes in assisting firm clients and attorneys with a variety of e-discovery and litigation support-related projects, including case management, forensic collection coordination, document collections and document productions. Emily also works with the Director of eDiscovery Services to manage marketing and business development initiatives, technology innovations and financial reporting for the department.

Prior to joining Akerman eDiscovery Services, Emily was a products liability paralegal working primarily in medical device and mass torts defense work, including multi-district litigation. Emily also has vast experience in general commercial litigation, medical malpractice, construction and real estate litigation.

Emily is a Certified eDiscovery Specialist, a Registered Paralegal with the Florida Bar, and holds advanced certifications in eDiscovery, Trial Practice, and Discovery from NALA. She also sits on the leadership board for Women in eDiscovery.

Agenda

- Introduction
- Consequences for Failure to Preserve
- The Duty to Preserve
- The Legal Hold Process and Procedures
- Non-Party Preservation
- Practical Tips

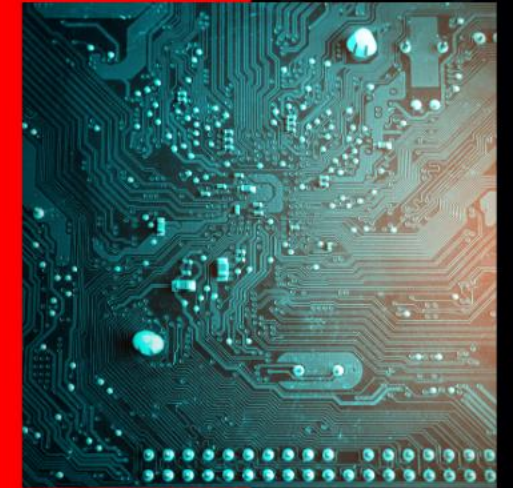


Consequences for Failure to Preserve

- *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 341 F.R.D. 474 (S.D.N.Y. 2022) (preservation missteps lead to award of attys fees, costs, and disclosure of spoliation to jury)
- *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 5245340 (N.D. Ill. Oct. 6, 2022) (spoliation sanctions imposed on litigant and their counsel)
- *Schnatter v. 247 Group, LLC*, No. 3:20-cv-00003, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022) (sanctions imposed on Papa John for deleting text messages from mobile phones)
- *Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-CV-02789, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022) (adverse inference instruction given to jury for deletion of relevant Slack data)

The Duty to Preserve

1. What is the duty to preserve?
2. When is it triggered?
3. What does it require?
4. What is scope of preservation?



Key Considerations For Meeting Preservation Obligations

- Reasonable Anticipation Of Litigation Requires Credible Probability
- Adopt and Consistently Follow a Preservation Policy
- Take Early and Proportionate Action to Identify Custodians and Notify Them
- Consider Key Factors to Determine Scope of Preservation

Elements of the Legal Hold Process

An organization should consider documenting the procedure of implementing and maintaining the legal hold in a specific case when appropriate.

- Who should receive the notice and when?
- Confirm receipt and acknowledgement
- Periodically review and amend when necessary and followed up by periodic reminders
- Is timely released



Elements of the Legal Hold Notice

- **Effectively communicates the purpose**
 - The obligation on the individual to cease any further destruction of relevant information
- **Provides necessary details**
 - The nature of the dispute and the key issues
 - The types of records sought
 - The time frame at issue
- **Provides preservation instructions and resources for assisting**
 - Address potentially challenging data source or preservation hurdles

Revise and reissue if the hold parameters change



Releasing the Hold

- Under what circumstances should a hold be released?
- Send written notice to custodians
Consider other pending holds
- Remember third-parties
Best practice: Data from third parties should be destroyed (indicated by a certificate of destruction) or returned to your organization for destruction.

Non-Party Preservation

Trigger: Subpoena or Notice to Preserve

Understand FRCP Rule 45 and any applicable state laws

What is the non-party's duty to preserve?

- *Luellen v. Hodge*, No. 11-CV-6144P, 2014 WL 1315317 (W.D.N.Y. 2014)
- *Quincy Mutual Insurance Co. v. W.C. Wood Co.*, 2007 WL 1829378 (Mass. Super. Ct. 2007)
- *Lofton v. Verizon Wireless*, 308 F.R.D. 276, 287-88, (N.D. Cal. 2015)

Practical Tips

- Take Early Action When Credible Threat of Litigation Exists
- Track Hold Notices and Acknowledgements
- Include newer types of data sources in litigation hold letter
- Work with IT Department to Implement Hold
- Conduct Detailed Custodian Interviews
- Document Your Work
- Send Periodic Reminders to Custodians
- Release Hold at Litigation Conclusion





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THANK YOU