

Litigation Holds

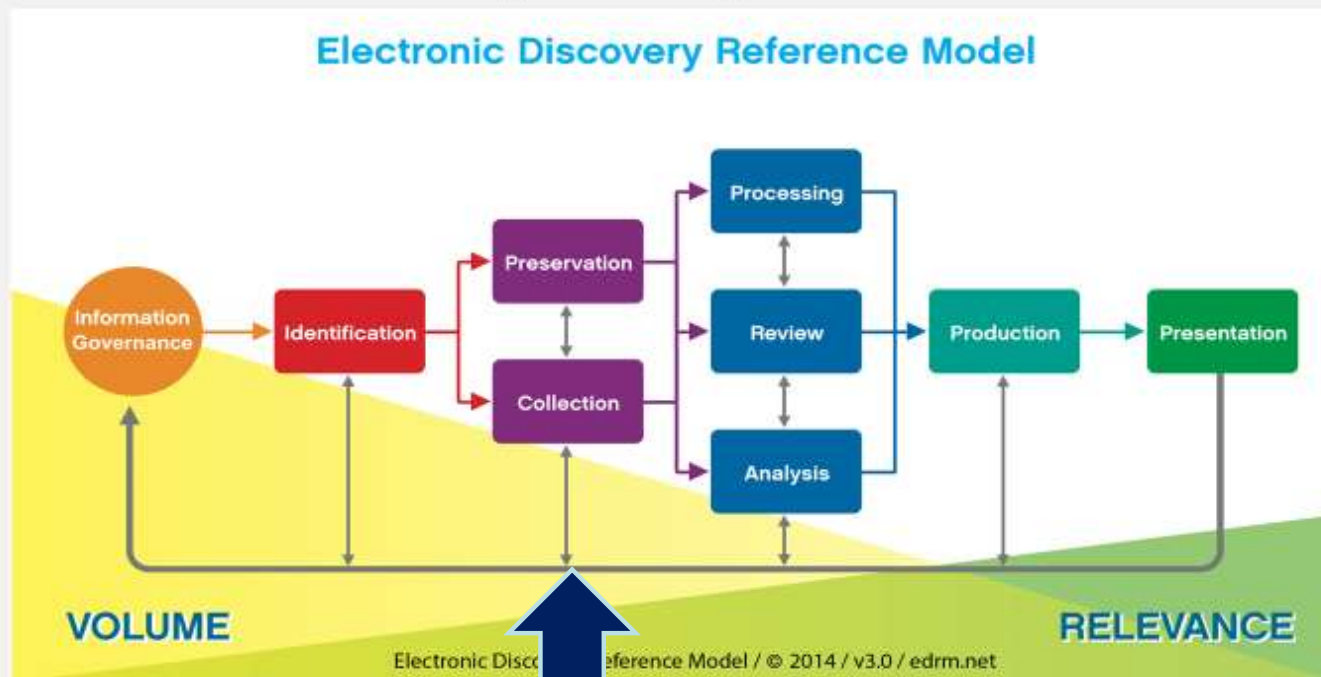
Presented By:

- **Nicole Marie Gill – Chair and Managing Member, CODISCOVR**
- **Julian Swearingin – General Counsel, The Drone Racing League**
- **James Office – Vice President and General Counsel, Brothers Trading Co., Inc.**



Setting the Scene

Electronic Discovery Reference Model (EDRM)



Why Preserve?

Duty to Preserve – FRCP 37(e)

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Rule 37 – Failure to Preserve

Case Law – Failure to Preserve

In re Google Play Store Antitrust Litigation, Case No. 21-md-02981-JD, 2023 WL 2673109 (N.D. Cal. Mar. 28, 2023),

- Plaintiffs inquired about a lack of Chat messages in Google’s document productions during the discovery phase of the multidistrict litigation. Google waited several months to respond and inform plaintiffs and the Court that Google Chats at the company are set to auto-delete after 24 hours, and that the company made no effort to suspend the auto-deletion even after the litigation had commenced. Google instead relied on individual employees under litigation hold to determine the necessity of preserving their Chats.
- Judge found that Google’s failure to take steps to preserve internal communications on its Chat message system constituted “inten[t] to subvert the discovery process.” The court found that sanctions were warranted, based on several factors:
 - **Google’s obfuscation over its Chat retention procedures:** The Court’s Standing Order for Civil Cases required parties to take “necessary, affirmative steps” to preserve documents related to the case. Google never informed the Court or the plaintiffs of its position that it was not required to preserve Chats at an enterprise level, and “falsely assured” the Court in a case management statement that it had taken appropriate steps to preserve evidence without mentioning the Chats. Google did not reveal its approach to Chats until directly questioned about it by plaintiffs, and then only responded to the question many months later.
 - **Google’s intentionality in not preserving Chats:** The Court found it clear from the record that individual employees at Google were conscious of the litigation risks inherent in written communications and valued the “off the record” nature of Chats. Google could have preserved Chats at an enterprise level, but made the decision not to do so.

The Trigger – When to Preserve

One of the principal rules of preserving data is that when an organization reasonably anticipates litigation (as either the initiator or the target of litigation), the organization has a duty to undertake reasonable actions to preserve data **relevant to the parties' claims and defenses** and **proportional to the needs of the case**.

The standard sounds simple enough but the application to practice is more than ambiguous. The answer lies within the meaning of the term “reasonably anticipated,” and the meaning can vary from case to case. Common sense might indicate that the duty to preserve evidence is triggered when a lawsuit is filed. The fact of the matter is that the duty can arise even before a lawsuit is filed if a party is on notice that future litigation is likely.

The Sedona Conference, Commentary on Legal Holds, Second Edition: The Trigger & The Process, 20 SEDONA CONF. J. 341 (2019). *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007).

Practical Advice– When to Preserve

Implement a legal hold at the first inkling of litigation – doesn't mean a complaint has been filed!

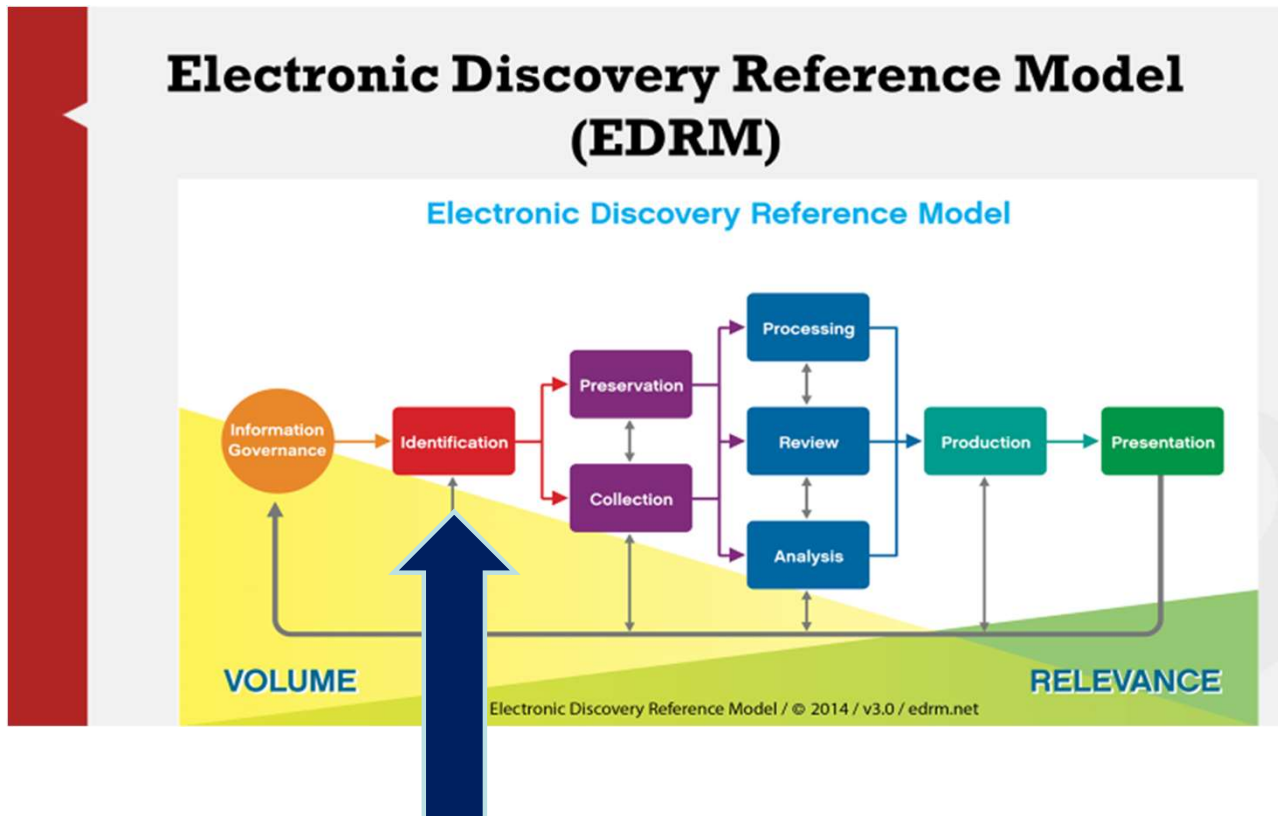
“In the usual situation, ‘the obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation . . . Thus, the duty to preserve evidence arises ‘most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.’”

Herbert v. Lynch, No. 722CV6303NSRVR, 2024 WL 20942, at *5 (S.D.N.Y. Jan. 2, 2024)

Jim and Julian, what does the Trigger look like for you?



What to Preserve



Take a step back to the Identification stage to locate sources of ESI and determine its scope, breadth and depth

Custodial and IT Interviews

Interviews with custodians – individuals with relevant information – and IT to understand:

- **Who:** who has relevant data?
- **What:** what type of data is there?
 - Email – what provider and what types of licenses does the company have
 - Share Drives – what archival processes are in place, what happens to former employee data, etc.
 - Cell phones – what types of cell phones are used and are they company issued
 - Messaging applications
 - Social media
- **Where:** where is the information?
 - Are archives and backups on prem or in the cloud
- **When:** when were the relevant custodians employed, when is data deleted under data destruction policies, etc.

Data Mapping

Data mapping involves creating a comprehensive inventory of an organization's potentially discoverable data.

Data maps for eDiscovery should generally include the types and formats of data that the organization has as well as the locations, custodians, and record-retention requirements of that data.

Practical Advice – What to Preserve

Go broad . . . But not too broad

The scope of the duty to preserve is broad, and includes evidence the defendant should have reasonably foreseen would be relevant to a potential claim or action.

Martin v. Stoops Buick, Inc., No. 114CV00298RLYDKL, 2016 WL 1623301, at *5 (S.D. Ind. Apr. 25, 2016)

Though a party need not preserve all documents in its possession—again, perfection is not the standard—it must preserve what it knows and reasonably ought to know is relevant to possible litigation and is in its possession, custody, or control.

DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 929 (N.D. Ill. 2021)

Jim and Julian, what does your preservation workflow look like?



How to Preserve – Litigation Holds

The process by which companies instruct their employees to preserve specific data for potential litigation.

Neither an internal employee nor another relevant individual (both referred to as a custodian) can delete or destroy the data — whether it's electronically stored or on paper — without the risk of the organization facing legal ramifications.

It's absolutely crucial for organizations to implement a legal hold process that is defensible, repeatable, and efficient.

DOCUMENT PRESERVATION NOTICE
PLEASE READ IMMEDIATELY

TO: [***Employees who may be in possession, custody, or control of relevant documents***]
FROM:
CC: [***In-House Legal, IT, Human Resources, and Records Management Personnel***]
DATE:
RE: Document Preservation Notice

As you may be aware, (the "Matter"), [DESCRIBE MATTER]

In connection with the Matter, the Company is legally obligated to take steps to preserve all potentially relevant information, including hard-copy documents and all forms of electronically stored information ("ESI") that could relate in any way to the topics listed in Section II below ("Relevant Material"). You are receiving this Notice because you may possess, manage or control Relevant Material that must be preserved. Please contact me immediately if you believe you have received this Notice in error.

Please read the entire Notice and follow the instructions carefully. **Your compliance is mandatory.** When you have finished reading the Notice, please follow the steps contained in Section IV below to acknowledge that you have read, understand and will comply with these instructions. If you have any questions regarding the contents of this Notice and how best to comply with it, including questions concerning which documents need to be preserved, please contact me by email or call me on my cell phone at _____ or at the office at _____. If you have any questions related to how to preserve relevant email or any other electronic materials, including information located on personal devices or email accounts, please contact _____ Director of IT.

This is a **privileged and confidential** communication being circulated by the Company's legal department in consultation with our outside counsel. You should take precautions to keep this Notice confidential and should not share it with others.

The obligations described in this Notice supersede any routine retention or discard procedures that you currently follow and are ongoing until you are explicitly directed otherwise that this Notice is no longer in effect. If you receive another directive of any kind, including

those related to company document retention practices or other litigation, you should not assume that the directive overrides or modifies the instructions here.

I. YOUR OBLIGATIONS

Until further written notice, you must not destroy, discard, alter, modify, or delete any Relevant Material that was created, modified, sent, or received on or after _____, including drafts, work papers, personal notes, emails (both sent and received), and other electronically stored documents. This obligation applies both to existing documents and to documents that you may create or receive in the future. This obligation also applies to documents for which you believe duplicate copies may exist in other employees' files.

If you regularly delete emails or other documents that may constitute Relevant Material in the ordinary course of your work routine, you must immediately cease that practice. If you are concerned that certain Relevant Material may be deleted or destroyed in the ordinary course of business, please contact me immediately. For instance, if you are aware of automated procedures in place that may result in the deletion of Relevant Material without manual intervention, please let me know so that we can work with the IT department to ensure that such procedures are disabled. Failure to preserve Relevant Material in whatever format it exists could present significant obstacles to our positions in this Matters and could result in serious fines or other penalties. Please keep this Notice close at hand and refer to it often to ensure that you meet the preservation requirements.

For now, you are only obligated to keep these materials as-is. You should not begin to segregate or collect relevant documents at this time as doing so may alter the documents' metadata. If additional steps need to be taken to review, segregate or collect the documents and data that you retain, you will be contacted individually either by a member of the Company's legal department or by an attorney with _____, our outside counsel. Except for those discussions, you should avoid discussing this Matter with anyone, including other employees.

II. SUBJECT MATTER OF MATERIALS TO BE PRESERVED

Any Relevant Material (in whatever form it exists, whether paper or electronic) must be preserved. The categories of information that are potentially relevant and thus must be preserved include, *but are not limited to*, all communications, documents, and/or information regarding the events, subject matter, and circumstances related to the _____ and matters, such as:

[MATTER SPECIFIC TOPICS]

Please note that this list of topics represents only our best assessment at this time of the topics and kinds of information that could potentially be relevant to this dispute. *You should interpret these categories broadly. If you have any doubt or questions regarding whether certain materials should be preserved, always err on the side of caution and preserve the information.*

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CIRCULATED AT THE DIRECTION OF OUTSIDE COUNSEL

III. POSSIBLE FORMS AND LOCATIONS OF RELEVANT INFORMATION

Information in both paper and electronic format should be retained if it relates to the subject matter of the dispute described above, including any relevant documents or information that you create or receive after the date of this Notice. All information related to the topics above, including both working/draft copies and formal business records, must be retained. Likewise, you must retain any relevant documents that you may have inherited from another former or current employee or that you may have transferred to a personal device to facilitate working remotely.

The following materials must be saved if they contain potentially relevant information, regardless of where they may physically reside:

- emails and attachments; calendar entries, meeting invitations, and contacts; Microsoft Word, Excel, PowerPoint, Access, Project, and Visio documents; PDF files; photographs and images; e-faxes; text messages, instant messages, and voicemails; video, audio, and other multimedia files; databases, data extracts, and reports; and social media content.
- hard-copies of letters, reports, agreements, internal/external communications, correspondence, memoranda, calendars, journals, summaries or records of conversations or work assignments, formal/informal notes (typed or handwritten), envelopes, books, bulletins, and diaries, including copies of such documents that are not identical duplicates of the originals (e.g., with highlighting, handwritten comments, or margin notations).

Relevant documents may be found on a diverse array of data sources, including but not limited to:

- Corporate desktop or laptop computers; personal or departmental file shares; server-side email mailboxes (including one's "Inbox," "Deleted Items," "Sent Items," or any other subfolder); email archive files (e.g., PST or NSF files); optical disks (including CDs and DVDs), removable thumb drives or external hard drives, and other types of portable electronic storage media; backup tapes and other disaster-recovery systems; and internet, blog, intranet, extranet, portal, social media, or cloud-based sites and services; and Blackberries or other company-issued mobile devices
- Personal computers; personal iPhones, Android devices, or other smartphones; personal iPads or other tablet devices; personal email accounts (e.g., Gmail, Yahoo, Hotmail); thumb drives; social media sites (e.g., Facebook); and cloud-based storage locations (e.g., Dropbox).

This list is not all-inclusive and is intended to provide you with general guidelines regarding the possible forms and locations of potentially relevant materials. You should preserve any Relevant

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Material regardless of its form or location. If there are other employees who maintain certain files for you that may be relevant to this litigation, please notify me immediately.

IV. CERTIFICATION OF COMPLIANCE

Compliance with the procedures outlined in this Notice is critical, and any failure to comply could result in serious ramifications for the Company and for you. Within three (3) days of receiving this Notice, please send me an email stating that you acknowledge receiving this Notice and that you understand your obligations. Please include a list of any other employees you believe may have potentially relevant information in their possession, but do not forward this Notice to them on your own.

Thank you for your prompt attention to, and ongoing cooperation with, this matter.

Understand What Data is Under Your Control

- **FRCP 26(a)(1)(A)(ii)** requires parties to provide “a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”
- **FRCP 34(a)(1)** permits a party to serve on any other party a request “to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody or control.”
- **FRCP 45(a)(1)(A)(iii)** requires the recipient of a subpoena “to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person’s possession, custody, or control; or permit the inspection of premises.”
- Courts have also held that the concept of possession, custody, and control also implicates Rules 33 (Interrogatories to Parties), 30(b)(6) (notice or subpoena directed to an organization), and 37(e) (failure to preserve electronically stored information).

Understand What Data is Under Your Control

- **Legal Tests to Determine Possession, Custody, and Control – depends on jurisdiction**
 - **The legal right standard** has been described by courts as the legal right to control or obtain the documents upon demand.
 - **The legal right plus notification standard** requires that parties must not only have the legal right to obtain the information but must notify the opposing party about potentially relevant information that is held by third parties.
 - **The practical ability standard** requires a party to preserve, collect, search, and produce documents and ESI irrespective of that party's legal entitlement or actual physical possession of the documents if a party has the "practical ability."

Understand What Data is Under Your Control

The court found that two defendants, HH and HHC, did not have possession, custody, or control of HotSOS data. This decision was based on the lack of evidence showing their ability to access, control, possess, or demand the data, thus relieving them from a duty to preserve the data under Rule 37(e) Plaintiff

Wilson v. HH Savannah, LLC, No. CV420-217, 2022 WL 3273718, at *4 (S.D. Ga. June 1, 2022)

Jim and Julian, how do you issue litigation holds, what do your holds look like, and how do you ensure continued compliance?



Litigation Holds – Practical Advice

- Understand your data – involve IT, talk to your colleagues/relevant custodians
- Suspend automatic deletion
- Be broad in your application of the litigation hold
- But balance the cost/risk of over-casting the litigation hold with the risk of spoliation
- Ensure continued compliance