

Ediscovery Update

Judge Xavier Rodriguez



Agenda

- Pre-petition/complaint preservation letters
- Legal Hold Notices
- Duty of Competence
- ESI protocols
 - a. What are we talking about
 - b. When are they necessary and what should/should not be in them
- The rise of Rule 26(g)
 - a. A response to the overly strictness of 37(e)
 - b. Should this rule be utilized more in achieving proportional requests?
 - c. Interplay between duty of competence and Rule 26(g)
- Have courts been overly restrictive in discovery rulings or are they achieving proportionality?

Pre-petition/complaint preservation letters

- Require thoughtfulness and should not be boilerplate; asking for everything to be retained means a court will likely say that no reasonable notice was given as to what causes of action or claims were being asserted
- <http://www.craigball.com/Perfect Preservation Letter 2020.pdf>



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The Duty to Preserve

What's the Difference?

Legal Hold Notice

A Legal Hold Notice goes to your clients

Preservation Letter

A Preservation Letter goes to the other side

Elements of a “Perfect” Preservation Letter

Reasonable, proportionate and focused on **relevance**.

Ties scope to the **facts and issues** of the case

Serves as an explicit, decisive **trigger** for the duty to preserve

Seeks to **halt systematic destruction** of evidence

Serves as a **blueprint for meet-and-confer**

Educates re: sources, forms, risks and methods

Esteems the “how” and “how much” issues faced by the other side

Defines standards reasonably **applicable to both sides**

Addresses **mobile, metadata and forensic** preservation, as appropriate

Conveys **competence, attention to detail and professionalism**

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Elements of a “Perfect” Preservation Letter

Peals v. QuikTrip Corp., No. 4:20-CV-22- KPJ, 2021 WL 2043185 (E.D. Tex. May 21, 2021)

Preservation Letter instructed QuikTrip to preserve “all photographs and video of the incident,” but did not state how much footage to preserve or reference cleaning fluids as the cause of Plaintiff's alleged fall.

Court: “On these particular facts, QuikTrip could not have reasonably known that it should have preserved additional footage or known that its custodial staff would be a ‘key player’ in this lawsuit.”

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