A Guide to Electronically Stored Information Preservation Responsibilities

By Thomas W. Tobin and Daniel M. Braude

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ABSTRACT
A guide for clients, lawyers, information technology staff and others interested in the litigation-related obligation to preserve electronically stored information (ESI) in United States litigation.

THE IMPORTANCE OF PRESERVING ESI
The litigation-related duty to preserve relevant evidence, which extends to both electronic and hard copy materials, is well established and widely known in the legal community and the business world. Despite broad familiarity with this obligation, many corporate litigants continue to be subjected to severe sanctions due to judicial intolerance for the failure to preserve electronically stored information. While some such sanctions involve the imposition of legal fees, in many instances courts have issued severe adverse jury instructions, effectively destroying a litigant's chance of prevailing or waging an effective defense.

In contrast to the stereotypical Enron-style destruction of evidence (i.e., deliberate document shredding), courts have made it clear during the past decade that the destruction of evidence, including ESI, need not be willful for a court to impose sanctions. Rather, a litigant's "lackadaisical attitude" toward its discovery and preservation obligations, including the passive acts of failing to issue a written legal hold, collect ESI from key players or cease routine destruction of ESI, have triggered severe sanctions. The result, as many commentators have speculated, was over-preservation of ESI in an effort by litigants to avoid severe sanctions. This long-held perception culminated in a significant amendment to Rule 37(e) of the Federal Rules of Civil Procedure on December 1, 2015.

Under Amended Rule 37(e), federal courts are now prohibited from relying on inherent authority when imposing spoliation sanctions and are limited as to when the most severe forms of sanctions can be imposed when ESI is lost or destroyed. Specifically, where a party took "reasonable steps" to preserve ESI, a federal court may not impose an adverse inference or dispositive sanction for spoliation absent a finding "that the party acted with the intent to deprive another party of the information's use in litigation." 

Critical questions remain unanswered in the immediate wake of the amendment to Rule 37(e). Will federal courts interpret a conscious disregard of the duty to preserve as being an "intent to deprive another party of the information's use in the litigation?" Will federal courts make greater use of their inherent authority to sanction litigants for general discovery misconduct? Will state courts, which are obviously not impacted by the amended rules, adjust their approach to spoliation sanctions?

1 This guide represents the views, thoughts and ideas of the authors and not necessarily those of Wilson Elser. It is not intended to be specific legal advice and should not be relied upon for that purpose.


3 Amended Rule 37(e) provides as follows:

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.
Only time will tell whether the recent revision to Rule 37(e) will usher in an era of reduced preservation efforts. But regardless of the recent rule amendment, in today’s legal climate, a company’s seemingly innocent delay in implementing an appropriate method, and “reasonable steps,” to preserve ESI may still be highly problematic. The duty to preserve relevant evidence, including ESI, remains too important to ignore, not only for those individuals engaged in litigation on a daily basis but also for company management seeking to control costs and expenses.

THE PRESERVATION MANTRA

■ Act swiftly to manage risks and control costs.
■ The duty to identify and preserve is extensive and may be urgent.
■ Failure to produce can almost always be cured, but failure to preserve may be fatal.
■ Implement a company-wide legal hold policy with associated legal hold procedures, and then follow up and audit to ensure compliance!

THE PRESERVATION TRIGGER

The duty to preserve relevant evidence and to follow appropriate legal hold procedures is triggered once an organization can reasonably anticipate litigation or a government investigation. This occurs as soon as there is a “credible threat” that the organization will become involved in litigation or will be the target of an investigation.

In some circumstances, the preservation trigger is easy to identify. An obvious example is when a lawsuit has actually been initiated against a company. At the same time, the trigger for the preservation obligation may look entirely different depending on which side of the obligation one is on. Potential events that may indicate a reasonable anticipation of litigation, and thereby trigger the preservation obligation, include:

■ Receipt of a claim letter demanding payment of damages
■ Announcement of a threatened lawsuit, either by or against a company
■ Consideration of filing a lawsuit, including retaining outside counsel
■ Knowledge of similar litigation within the company’s industry
■ Substantive management or supervisor discussions of a potential lawsuit
■ Knowledge of a contractual dispute with another company
■ Notice of a claim filed with an administrative agency
■ Receipt of a letter questioning a hiring decision
■ Occurrence of an incident causing significant property damage
■ Occurrence of an incident causing significant injury
■ Occurrence of an incident that otherwise has a reasonable possibility of resulting in a lawsuit or investigation
■ Providing notice to a company’s insurance carrier of a potential claim
■ Receipt of a letter demanding a company’s preservation of documents
■ Notice of a governmental investigation or inquiry.

This is not intended to be an exhaustive list of potential triggers. Due to the severe ramifications that may result from noncompliance with the preservation obligation, management and in-house counsel may prefer to take a conservative approach and deem a trigger to have occurred even when in doubt.

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5 For a plaintiff, this duty may arise when evaluating the prospect of litigation, when litigation counsel is hired or when failed negotiations lead to the conclusion that litigation is the only option to preserve or protect one’s rights.

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TIMING & SCOPE OF THE PRESERVATION OBLIGATION

The obligation to preserve relevant materials is broad in scope and requires swift action to prevent possible loss of evidence. Immediate action may be needed in issuing a legal hold to potential document custodians to avoid sanctions for spoliation of evidence, particularly when litigation is already pending.

Determining the scope of the duty to preserve when initiating a legal hold requires a close examination of the triggering event, likely with a timeline focusing on who, what, where, when and why.

Once a preservation obligation has been triggered, reasonable good-faith efforts must be taken to preserve potentially relevant hard-copy documents and ESI. This relatively broad obligation frequently requires suspending the routine destruction of electronic documents, such as email subject to automatic deletion. As a general rule, courts will not impose sanctions for the destruction of ESI pursuant to a document retention policy, provided that the policy was implemented for good faith business purposes. However, once the preservation obligation is triggered, it is necessary for an organization to immediately suspend routine ESI destruction, such as by communicating this obligation within a formal legal hold to key players, including those with access to their documents and information technology (IT) staff.

When in doubt, be conservative and take reasonable steps to quickly and broadly preserve evidence relevant to the claims and defenses in the litigation or investigation. This will assist in building credibility with any court later asked to review preservation efforts.

LEGAL HOLD IMPLEMENTATION

Upon a company becoming aware of litigation, anticipated litigation or a governmental investigation, a manager or in-house counsel should be designated as the Legal Hold Manager to implement the legal hold process and oversee subsequent monitoring and auditing of the process. This duty includes confirmation that all “key players” are identified and notified of the hold.

The Legal Hold Manager, often working closely with outside counsel, will issue one or more legal holds instructing recipients to preserve relevant documents. The legal hold, and any subsequent holds, should be distributed to potential document custodians as well as appropriate IT personnel and management. The following information should be included:

- A description of the event or issues involved in the litigation or investigation
- A discussion of the definition of “relevant” and the scope of the preservation obligation
- Instructions to preserve potentially relevant evidence, including ESI
- Instructions to halt policies of routine document deletion or destruction
- A description of categories of documents and other items to be preserved
- A list of potential document custodians and recipients of the hold, when feasible
- A request for identification of additional potential document custodians
- A request for identification of additional potential locations of relevant evidence

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7 Types and locations of ESI include, but most certainly are not limited to:

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8 Although the Legal Hold is protected by attorney-client privilege, in certain circumstances it may be subject to disclosure. In that regard, the utmost care is required when drafting the hold.
MONITORING & AUDITING LEGAL HOLDS

Notice of a legal hold must be followed by proper monitoring and auditing of compliance by document custodians and IT personnel.\(^9\) Obtain written acknowledgements from custodians and IT personnel indicating their receipt, understanding and agreement to comply with the document preservation requirements. Repeat the process of monitoring and auditing at various stages throughout the legal hold process. Keep these acknowledgments in a secure location.

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\(^9\) See, for instance, European Directive 95/46/EC. The Directive (which will be supplanted by the General Data Protection Regulation in 2018) restricts the transfer of personal data to a country or territory outside the European Union unless that country or territory ensures an “adequate” level of protection for data subjects’ personal data.

\(^10\) Zubulake v. UBS, 229 F.R.D. 422 (S.D.N.Y. 2004) (Zubulake V) (“It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”)

DOCUMENT CUSTODIAN & IT PERSONNEL INTERVIEWS

The Legal Hold Manager should conduct and/or coordinate interviews of identified document custodians and IT personnel to enhance compliance with the legal hold policy. This is an important step in the monitoring and auditing of a legal hold. Interviews can be used to confirm that custodians and locations have been fully identified and that routine deletion practices have been halted. Special attention should be given to custodians who are considered to be “key players” in the litigation. Information gathered during such interviews will often assist with determining the appropriate scope of preservation and will inform the Legal Hold Manager of necessary information to include in an amended legal hold. Custodian and IT personnel interviews will assist the Legal Hold Manager in determining:

- Relevant time frames and whether ESI creation is ongoing
- Whether there are any additional unidentified key players
- Whether to create “forensic copies” of network or local storage media
- Whether potentially relevant data may be contained on mobile devices
- Whether any ESI is located off site or is in possession of third parties
- Whether metadata is an issue in the subject litigation
- Whether ESI should be immediately harvested
- Whether the IT department has the requisite skill, software and equipment to appropriately preserve ESI, for example, with forensic imaging
- Whether any ESI has already been deleted and remains available only on backup media
- Whether the company’s systems architecture, cycling of backup media, electronic document metrics and relevant document types pose any specific concerns.
DOCUMENTING THE PRESERVATION PROCESS

Perfection in the preservation of documents is not required. However, courts require that a party make at least reasonable good-faith efforts to identify, preserve and collect relevant documents. Every step of the process, including the Legal Hold Manager’s decisions and rationale, should be memorialized with an eye toward illustrating reasonable decisions made in good faith. Always consider how best to explain and defend these decisions and the preservation process.

PROPORTIONALITY PRINCIPLES APPLY

Although the obligation to preserve discoverable materials is broad, the scope of the duty to preserve is tempered by general principles of reasonableness and proportionality:

“Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’ Such a rule would cripple large corporations.”

In certain instances it may be defensible for an organization to determine that preservation is not required or is necessary only on a small scale. This is true where there is either a low likelihood of the materials containing relevant information or where the preservation cost or burden is excessive and unreasonable compared with the potential relevance or value of the information. In contrast to disputes over proportionality at the document review and production stages of discovery, decisions at the preservation stage are frequently made unilaterally by the preserving party. Therefore, to reduce the possibility of later being sanctioned for failure to preserve materials, an organization should consider a conservative approach to preservation until a detailed preservation agreement can be negotiated with potential adversaries.

OUTSIDE ESI TECHNICAL CONSULTANTS

Many companies, often including those with large and sophisticated IT departments, do not have the necessary resources to preserve ESI; for example, where preservation requires retention of metadata or forensic imaging. Even where in-house staff is capable of appropriately preserving ESI, in many instances ESI and related issues are so extensive that an outside consultant can be used effectively to assist in developing and implementing a data identification and preservation plan.

Roles of outside consultants may range from the creation of forensic copies of ESI to maintain chain of custody to the use of data sampling to identify data sources that are reasonably likely to contain relevant information. Importantly, the use of an outside technical consultant may eliminate the need for in-house IT personnel to testify as to a company’s document retention and preservation efforts. If the involvement of ESI technical consultants is expected or needed, doing so early will likely yield significant cost savings and other efficiencies in efforts to identify, preserve, collect, process, review and produce ESI.

MEET & CONFER WITH OPPOSING COUNSEL

The Federal Rules of Civil Procedure were first amended to address issues related to the discovery of ESI in December 2006. Most notably, since that time the rules have required counsel to discuss the discovery of ESI at the Rule 26 “meet & confer” conference held at the outset of litigation. Many states have followed suit and now also require that counsel “meet & confer” on ESI and other issues, possibly within 100 days of service of process.

Although the requirement to “meet & confer” regarding ESI creates an obligation at the outset of litigation, early discussion of ESI issues may allow an organization to narrow the scope of its preservation obligations. Contrary to popular belief, the sooner a litigant can openly and cooperatively come to an agreement with opposing counsel on preservation obligations, the better.

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11 See Zubulake IV; also see Federal Rule of Civil Procedure 26(b)(1), as amended December 1, 2015 (limiting the scope of discovery to “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case ...”).
Prior to entering into an ESI agreement, it may be wise to make conservative decisions for defensibility purposes. Once an agreement is reached, preservation obligations may well diminish. If an agreement cannot be reached, a motion for protective order should be considered.

NOT REASONABLY ACCESSIBLE ESI

A legal hold should account for “not reasonably accessible” media, which most often includes backup tapes used for disaster recovery purposes rather than for ordinary business purposes.12 As a general rule, a party is not obligated to preserve all backup tapes even after the preservation obligation is triggered.13 However, a party may be required to preserve at least some backup tapes by withdrawing them from weekly or monthly tape rotation cycles to comply with the obligation to preserve relevant documents.

When it comes time to search and produce documents, it may be necessary to affirmatively advise an adversary of what media will not be searched on the basis of it being “not reasonably accessible.”14 However, because the scope of preservation is much broader than that of production, it is likely that at least some backup tapes should be preserved. In contrast to backup tapes, absent a showing of special need and relevance, litigants are typically not required to preserve, review or produce deleted, shadowed, fragmented or residual ESI.

SEEK ADVICE FROM LAWYERS EARLY & OFTEN

Lawyers familiar with ESI issues can be of great assistance. Expect them to have and routinely use:

- Legal Hold Policies & Procedures Templates
- Preservation Notice Templates
- Template Objections & Responses to Requests for ESI
- 30(b)(6) ESI Witness Preparation Outlines
- Motions to Compel / Responses to Motions to Compel Templates
- “Meet & Confer” Outlines

When the preservation duty has been triggered, move quickly. Ultimately, ESI responsibilities may include a wide range of issues, such as keyword searching and document review and production. Although a failure in one of these areas can typically be cured, the failure to preserve may be fatal. Assessment of preservation obligations is always fact-dependent. In furtherance of the duty to make reasonable, good-faith preservation decisions, the rationale for decisions should be preserved. Seek the adversary’s understanding and approval of the decisions made. Absent that, consider obtaining judicial approval. The ultimate goals are risk management and cost control while maintaining a defensible preservation procedure. The way to get there is cooperation, accuracy and consistency, documenting the decision-making processes every step of the way.

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12 See The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible: https://thesedonaconference.org/publications.
13 See Zubulake V.
14 This may be due to the cost of searching; the cost of searching balanced against other factors, such as the availability of similar ESI in other locations; or the technical IT burdens on the business. Such positions are often met with challenges and requests for sampling. An adversary may take the position that the benefit exceeds the burdens.
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Tom Tobin is a seasoned trial lawyer who focuses on complex commercial transportation and product liability defense matters. During his career of more than 30 years at the firm, Tom has developed extensive experience representing manufacturers, including clients in the motor vehicle, railroad, maritime and aviation industries. He serves as co-chair of Wilson Elser’s Product Liability and e-Discovery practices and chair of the firm’s Railroad practice.

Tom’s legal practice is enhanced by the technical insight and perspective he gained through his prior work as a mechanical engineer and patent attorney at Union Carbide Corporation. In the product liability context, Tom’s appreciation for the balanced decision-making process that engineers employ when designing and developing products and processes enables him to effectively defend clients’ design strategies and refute alternate designs presented by opposing counsel.

As the founding chair of Wilson Elser’s e-Discovery practice, Tom has substantial experience managing e-discovery projects, from directing preservation of electronically stored information to coordinating document review and production. In addition, Tom routinely consults with domestic and international clients regarding records management practices.

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Dan Braude, co-chair of Wilson Elser’s e-Discovery practice, focuses on complex litigation involving product liability and commercial disputes, with an emphasis on related electronic discovery and document preservation issues. Dan counsels clients on information governance issues including challenges associated with changing technology, cloud computing, and related data privacy and information security issues. In addition, Dan serves as an adjunct professor at Pace University School of Law where he teaches a course on e-discovery.

Dan serves as a resource within the firm and for clients on a wide range of topics relating to electronically stored information (ESI). He manages electronic document review efforts, evaluates and employs methods of technology-assisted review, and supervises teams of contract attorneys on large-scale review projects. Additionally, Dan assists clients with electronic document retention issues and designs legal hold procedures to assist with defensible and cost-effective ESI preservation. He routinely serves as discovery counsel in commercial and product liability matters, frequently on behalf of manufacturers engaged in pattern litigation, and represents Wilson Elser as its designated e-Discovery Liaison for large firm clients.
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