

Over the next several weeks the *E-Discovery Alert* will focus on the strategy and tactics for handling sixteen specific ESI issues throughout pretrial discovery. Whether it is a "meet and confer" or request for production these are the critical issues to focus in requesting or producing ESI. The legal issue excerpts will be derived from the *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics* (2008-2009). The *Guide* is cross-referenced and hyperlinked with the *Arkfeld on Electronic Discovery and Evidence* (2nd ed.) treatise and part of the CD-ROM.

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**ISSUE: □ DO YOU HAVE AN OBLIGATION TO TO ISSUE A LITIGATION HOLD FOR ESI?**

**RESPONSE: □ YES**

Resources:

Excerpt from *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics* (2008-2009), § 3.5 -  
Preservation Obligation and Litigation Hold:

### § 3.5 PRESERVATION OBLIGATION AND LITIGATION HOLD

When faced with a potential lawsuit, attorneys on both sides have a responsibility to inform their clients of the duty to preserve and disclose relevant hard copy documents and ESI. Unlike traditional paper-based discovery, failure to immediately preserve ESI can result in its loss. ESI can easily be inadvertently or intentionally deleted or altered. Loss of ESI can occur during daily operation of a computer, rotating backup tapes, editing database records and deleting user files. Data on computer systems can be overwritten in seconds or may remain for months or years. For this reason, it is important that, if the relevant information is stored electronically, one must act quickly to preserve the data.

#### A. Preservation Obligation

Oftentimes, attorneys are under the impression that the duty to preserve arises when they receive a preservation letter from the opposing party, a preservation order from the court or a discovery request from the opposing party. This is simply not the case. As noted by FED. R. CIV. P. 37, Advisory Committee Note of 2006, "[a] preservation obligation may arise from many

sources, including common law, statutes, regulations, or a court order in the case.”

Depending on the common law in your jurisdiction, the obligation to preserve evidence arises when litigation is:

- “Reasonably anticipated”
- “Pending, imminent, reasonably foreseeable”

To minimize the risks of the destruction of evidence and avoid sanctions, electronic evidence should be preserved as soon as a party is put on “notice” that potential litigation may arise. This “triggering event” can arise from many different sources including the threat of a lawsuit, administrative proceedings such as an EEOC complaint, prior lawsuits, the filing of a complaint, discovery requests or orders, and common law to name a few. Unless there is a statutory, regulatory duty to preserve, or a court order, the determination of when the obligation to preserve arises involves a specific factual inquiry into the “triggering event” which requires an understanding of the potential cause of action, legal elements and factual propositions in the case.

### Cross-references

- § 1.2(C), Preservation
- § 1.5, Ethical Obligations
- § 3.5, Destroying, Concealing or Protecting ESI
- § 7.3(C), Discovery and Preservation Orders — Rule 16(c)
- § 7.4(I), Protective Orders — Rule 26(c)
- § 7.4(K), Meet and Confer — Rule 26(f). The parties are “to discuss any issues relating to preserving discoverable information . . .”
- § 7.9, Litigation Hold and Sanctions
- § 7.9(A)(1), Preservation Obligation
- § 7.9(A)(1)(a), Triggering Factual Events

### B. Scope of Preservation Obligation

FED. R. CIV. P. 26(b)(1) permits discovery of matters that are not privileged and “relevant to any party’s claim or defense” as long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence . . . .” “For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. . . .”

In addition, a party may have an obligation to preserve ESI in the possession of outside parties. FED. R. CIV. P. 34(a). A request under FED. R. CIV. P. 34 must be directed to documents or electronically stored information “in the responding party’s possession, custody, or control . . . .” For example, if your client is outsourcing the processing of payroll data, then your client has an obligation to preserve the data, if it is responsive and relevant to the litigation.

### Cross-references

- § 7.7(D), Possession, Custody or Control
- § 7.9(A)(1), Preservation Obligation
- § 7.9(A)(2), Scope of Preservation Obligation
- § 7.9(A)(5)(a), Affirmative Continual Obligation to Preserve and Disclose

### C. Litigation Hold

A litigation hold is a directive to your client and others to preserve electronic data or other information pertaining to the litigation. A litigation hold directive should include information regarding the summary and basic nature of the case, the relevant parties and the claims. The directive should include instructions to halt any paper or electronic information destruction policies. Also, retention schedules should be reviewed and revised to ensure preservation of both electronic and hardcopy information. The directive should advise parties as to privilege protection that is given to ESI involving the attorney-client relationship as well as work product. This information should be labeled protected and sent to a specific storage area — either physical or electronic storage.

#### Cross-references

- § 7.9(A), Litigation Hold (for an extensive discussion of cases regarding specific hold obligations for ESI)

### D. Limited “Safe Harbor” Provision — FED. R. CIV. P. 37(e)

Rule 37(e) provides:

Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Rule 37(e) is an entirely new “safe harbor” provision to the FRCP. In recognition of the fact that companies cannot preserve all the data they generate, its purpose is to provide limited protection against sanctions for parties that have disposed of potentially discoverable data in the normal course of “good faith” business operations that occur regularly in the operation of a data system.

However, this new “safe harbor” provision still requires proper litigation hold procedures to be initiated.

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### E. Requesting Party Strategy

- It is important that if the relevant information is stored electronically one must act quickly to request the producing party to preserve ESI by sending a preservation request, entering into a preservation agreement and/or seeking court assistance by a protective order or injunction.
- The requesting party may decide not to notify the opposing party to preserve ESI in order

to gain negotiating leverage or seek sanctions for failing to preserve ESI.

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#### F. Producing Party Strategy

- Try to negotiate with opposing counsel to obtain an agreement about what must be preserved, who must preserve information, and the scope of production.
- Consider sending a “preservation” notice to opposing counsel about what has been preserved and request his reasonable input of whether other ESI needs to be preserved.
- Attempt to negotiate during the 26(f) meet and confer, the parameters of a preservation agreement.

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#### G. Checklist

##### Requesting Party

- Meet with your client and computer experts regarding what ESI the opposing party has been using.
- Immediately seek out ESI and send a preservation letter.
- Discover whether the opposing party’s document retention policy was suspended in a timely manner to ensure relevant ESI was preserved.

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##### Producing Party

- Ensure that your client contacts you when a potential “triggering event” or “notice” occurs that litigation is reasonably anticipated.
- Determine if there has been a “triggering event” that requires preservation of ESI.
- Suspend client’s document retention program.

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\* \* \* denotes content that has been omitted