

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. **Trigger.** The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:
 - a. A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or
 - b. Specific triggers (which could appear in the text or Advisory Committee Note):
 - i. Written request or notice to preserve delivered to that person (perhaps in a prescribed form).
 - ii. Service on, or delivery to, that person of a
 - A. Complaint or other pleading,
 - B. Notice of claim,
 - C. Subpoena, CID or similar instrument.
 - iii. Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.
 - iv. Statutory, regulatory, contractual duty to preserve.
 - v. Steps taken in anticipation of asserting or defending a potential claim (e.g., preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).
2. **Scope.** The rule should specify with as much precision as possible the scope of the duty to preserve, including, e.g.:

- a. **Subject matter of the information to be preserved.**
 - b. **Relevant time frame.**
 - c. **That a person whose duty has been triggered must act reasonably in the circumstances.**
 - d. **Types of data or tangible things to be preserved.**
 - e. **Sources on which data are stored or found.**
 - f. **Specify the form in which the information should be preserved (*e.g.*, native).**
 - g. **Consider whether to impose presumptive limits on the types of data or sources that must be searched.**
 - h. **Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.**
 - i. **Consider whether the duty should be different for parties (or prospective parties) and non-parties.**
3. **Duration. The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.**
4. **Ongoing Duty. The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.**
5. **Litigation Hold. The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.**
6. **Work Product. The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).**
7. **Consequences/Procedures. The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.**
- a. **Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).**
 - i. **The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)**

