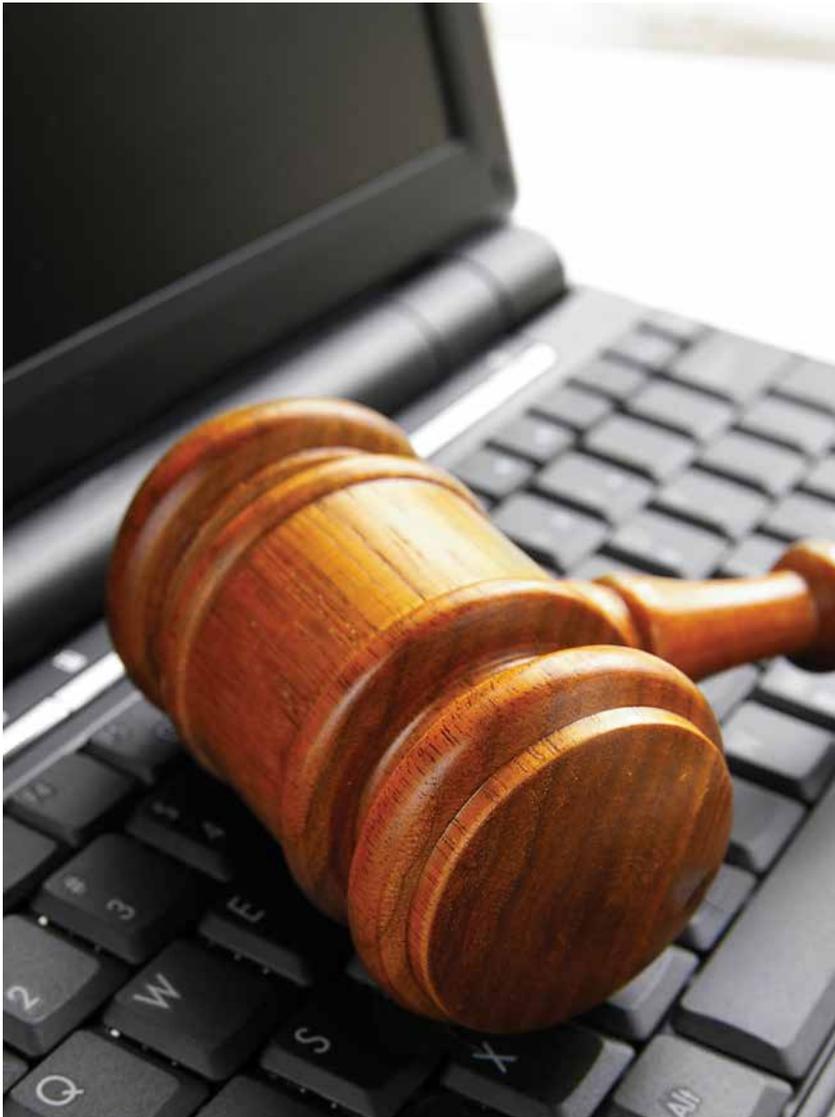


Avoiding the Hammer: Defensible Strategies for FRCP Proposed Rule 37(e)

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Following these four principles for developing and implementing a preservation program for electronically stored information will help your organization be prepared for e-discovery and avoid adverse inferences, default judgments, and whatever other steps a court may take to restore “evidentiary balance” under the FRCP proposed rule 37(e). As a bonus, it will also aid with satisfying public disclosure requirements and accessing historical organizational records.



The Supreme Court is considering changes to the Federal Rules of Civil Procedure (FRCP) that could significantly impact the consequences for not properly preserving electronically stored information (ESI). As early as December 1, 2015, courts could be empowered to take a number of corrective actions, including entering default judgment, to address lost ESI.

To avoid the most damaging findings or inferences for lost ESI, records and information management (RIM) professionals and counsel need to develop and implement a defensible ESI preservation program, which should include these four principles:

1. Distribute litigation holds.
2. Track custodians.
3. Maintain documentation.
4. Collect information.

These principles should be the cornerstones of an ESI preservation program that is consistently implemented and regularly updated.

The Proposed Rule

Proposed Rule 37(e), “Failure to Preserve Electronically Stored Information,” states:

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 the information, and the information cannot be restored or replaced through additional discovery, the court may:

- (1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;
- (2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation,
 - (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.

Intent of the Changes

The proposed rule is intended to mitigate the over-preservation of ESI, which can pose a substantial financial liability, and to resolve a conflict between circuit courts as to making adverse inferences for lost ESI.

The circuit courts have split on whether negligence (or gross negligence) or acting in bad faith were the standards for applying adverse inferences.

For example, the 2nd Circuit Court in *Residential Funding Corp. v. DeGeorge Finan. Corp.* (306 F.3d 99 (2d Cir.) (2002)) used a showing of negligence to equitably restore the "evidentiary balance" and place the risk on the party that lost the information.

This is compared with the 10th Circuit Court which has held that an adverse inference must be predicated on bad faith and that "when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party." The proposed

subdivision (e)(2) would resolve the split by requiring intent.

The proposed Rule 37(e) is limited to ESI and is based on the common law duty to preserve evidence. The Committee Note expressly stated that the rule "does not attempt to create a new duty to preserve." And hard copy or tangible evidence is not affected and would still be subject to current law.

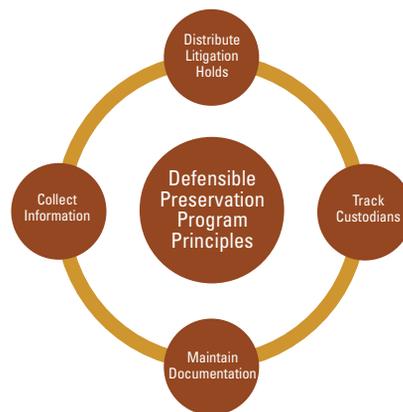


Figure 1. Four Principles of a Defensible Preservation Program

Subdivision (e)(1)

Subdivision (e)(1) is applicable where information should have been preserved; reasonable measures to preserve the information were not taken; information was lost as a result of not taking reasonable measures; and the information is not available through additional discovery.

The rule does not assign a burden to either party, and courts have discretion about how best to determine prejudice in a particular matter. If the court finds that a party has been prejudiced, it may take such steps that are "no greater than necessary to cure the prejudice." While the court has wide discretion, courts cannot order measures under subdivision (e)(1) that are reserved under subdivision (e)(2) upon a finding of intentional loss.

Subdivision (e)(2)

Subdivision (e)(2) requires showing of fact for intent and identifies

presumptions and actions that may be taken by the court. It applies where one party has intentionally acted to deprive another party of information; it does not require a showing of prejudice.

The subdivision resolves the split in the circuit courts by rejecting the negligence and gross negligence standards. The court may find that a party intentionally acted to deprive another party of information during pretrial motions, a bench trial, and while determining whether to issue adverse inference instructions to a jury.

Benefits of a Preservation Program

A defensible ESI preservation program may help forestall a court from applying the most forceful remedies, including adverse inferences or jury instructions, in the proposed Rule 37(e). Such a program that utilized litigation holds, tracked custodians, documented preserved records, and collected information on preserved records may be sufficiently reasonable to help clients avoid adverse inferences to prejudice. The consistent application of those principles might also help rebut an argument that ESI was intentionally lost.

Principle 1: Distribute Litigation Holds

Litigation holds are important tools that clarify and begin a party's preservation obligation once litigation is reasonably anticipated. To avoid penalties for spoliation under the proposed Rule 37(e), an organization should stay aware of possible legal actions so it can issue timely litigation holds.

Timing of Holds

A litigation hold should be the first step of an organization's defensible and reasonable preservation plan. It should be put in place as soon as litigation is expected, before most other actions are taken to preserve, as a

delayed litigation hold can have serious consequences.

Communicating Holds

Litigation holds inform custodians who might possess potentially relevant records that they are not to destroy those potentially relevant data, whether it be ESI or hard copies.

Courts generally look favorably on a reasonable litigation hold policy and view the activities performed under it as acting in good faith.

The hold is generally communicated by counsel to key personnel for immediate implementation.

Since the parties to the litigation hold fulfill different roles, it is necessary that the initial litigation hold be clear, generally understandable, and require a response from custodians verifying their understanding and implementation.

In accordance with *The Sedona Conference® Commentary on Legal Holds Guidelines*, the litigation hold should clearly communicate and define the information to be preserved and expressly suspend records disposition. [Editor's note: Although the terms "litigation hold" and "legal hold" are often used interchangeably, The Sedona Conference® distinguishes *legal hold* as a broader concept that also includes holds for the purposes of audit or investigation.]

The hold should contain information as to the legal duty to preserve, a summary of the matter, examples of information to be preserved, possible data sources, and time periods covered.

The receiving party should suspend its records disposition schedule or destruction schedule as a result of the litigation hold. Many custodians fail to consider ESI as the sort of re-

cord that needs to be preserved. Some believe they have ultimate say over how e-mails, calendars, or memos they have created are to be dispositioned and destroyed. Other custodians simply delete documentation to make more space in their system.

This is an unacceptable and reckless way of managing ESI and, under

the proposed Rule 37(e), such recklessness can have a significant impact on a party's liability. A litigation hold that is communicated effectively should diminish unauthorized destruction of information.

Issuing Reminders

The initial distribution of a litigation hold is not always sufficient. Litigation can last several years, involve records created after the hold was distributed, and extend past when custodians leave or retire. Litigation hold reminders and updates should be periodically distributed.

Updated litigation holds should include the scope of the original litigation hold, as well as any revisions to what ESI should be preserved.

Realizing Benefits

As a legal duty, the correct application of a litigation hold that includes ESI shifts part of the burden to the opposing party. Additionally, litigation holds save both parties money and time by forestalling possible conflicts over what records were preserved or should have been preserved. Both parties suffer when organizations fail to issue timely and complete litigation holds that are uniformly followed.

Courts generally look favorably on

a reasonable litigation hold policy and view the activities performed under it as acting in good faith.

Principle 2: Track Custodians

Parties are accountable to the opposition and the court for the information collected and presented in support of their case. Proper ESI preservation can be verified only if the records and information can be traced back to their origin. Tracking custodians and their data helps satisfy that obligation and benefits the overall legal and RIM processes.

Identifying Custodians

It should be clear which individuals hold responsibility for an organization's information. Custodians should be identified during collection interviews with key personnel. After custodians are identified, the subject matter of their records, the types of records they create, what levels of secure or privileged information they maintain, and the physical location of ESI should be determined. This information should be updated regularly.

Tracking Custodians

The practice of tracking custodians, which also is consistent with the ARMA Generally Accepted Record-keeping Principles® Principle of Accountability, is one that should be performed consistently and periodically to account for changes in personnel. An organization will be better prepared for future litigation by maintaining and regularly updating its working knowledge of the custodians and the types of ESI they maintain.

In addition to being important for litigation needs, tracking custodians is important for organizations that are subject to the Freedom of Information Act (FOIA) and similar public disclosure laws. Under these types of laws, requestors need to identify only an office or agency and provide a reasonable description of the records sought in their request for documents. As the records custodian, the identified office or agency is

responsible for identifying who and where the responsive records are stored.

RIM professionals with offices and agencies subject to public disclosure laws could respond more efficiently to records requests by maintaining an updated list of custodians.

Principle 3: Maintain Documentation

To avoid penalty under the proposed Rule 37(e), RIM professionals should maintain accurate and detailed documentation of their organization's records.

ESI exists in many forms across most organizations. While organizations frequently attempt to centralize e-mail and other ESI, this effort is often undermined by employees making personal copies and being delinquent in filing records, so decentralization persists.

Maintaining detailed documentation on ESI and other records is a practical option for mitigating problems with decentralized records. Using the ARMA International guideline *Establishing Alphanumeric, Numeric, and Subject Filing Systems* allows organizations to implement uniform file classification systems.

Documenting ESI

The manner of documenting ESI depends on the size of the organization and the amount of ESI being produced and preserved. Documentation efforts should capture the information from when the records were created and edited, who transmitted the records and to whom, and the various versions produced.

This information should be contemporaneously tracked to reduce mistakes and improve overall accuracy for data that is potentially relevant to litigation. Documentation should be reliable, in adherence to ARMA's Principle of Integrity. Reliable recordkeeping is defensible should any conflicts arise.

A data map should be maintained with the records inventory to identify who controls the ESI and other records, where they are stored and in what format or condition, and how often custodians catalog records in their possession.

Read More About It

- ARMA International. "Generally Accepted Recordkeeping Principles. Available at www.arma.org/principles, (last accessed 04/10/15).
- Judicial Conference of the United States, Committee on Rules of Practice and Procedure, 2014. Available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf, (last accessed 04/10/15).
- *Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, The. Sedona, AZ: The Sedona Conference, 2013. Available at <https://thesedonaconference.org/download-pub/65>, (last accessed 04/10/15; registration required.)
- *Sedona Conference Commentary on Proportionality in Electronic Discovery*, The. Sedona, AZ: The Sedona Conference, 2013. Available at <https://thesedonaconference.org/download-pub/1778>, (last accessed 04/10/15; registration required.)
- Sedona Conference WG1, The. "The Sedona Conference Commentary on Legal Holds: The Trigger & The Process." *The Sedona Conference Journal*, Vol. 11, Fall 2010. Available at <https://thesedonaconference.org/download-pub/3992>, (last accessed 04/10/15; registration required.)

Refreshing Documentation

Periodic review and verification of the data map provide assurance of being able to locate ESI when it is needed. The search for potentially relevant or responsive records is far more manageable when the location and format of ESI previously have been identified.

Documenting records' custodians and transmittal history has the added benefit of substantiating ESI's chain of custody and identifying possible witnesses. This can be invaluable to counsel as litigation progresses.

Principle 4: Collect Information

Discovery occurs in the beginning stages of litigation; however, the collection of information is an ongoing process. As soon as litigation is reasonably anticipated and before collection begins, at least a preliminary case assessment should be performed to identify the key information and issues of anticipated or filed litigation.

Identifying Issues

As presented in *The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process, Part III Applying Quality Measures in E-Discovery*, knowledgeable personnel, such as the RIM professional, IT personnel, and counsel, should work together to identify all the rel-

evant issues so as to accurately identify the scope of ESI collection.

This process should be repeated periodically during the course of litigation. The iterative process of assessing ESI and other information that existed before litigation began and while it is ongoing is facilitated by adhering to the three principles outlined above.

Continuing Collection

While collection at the onset of litigation will ideally capture the majority of potentially relevant ESI, collection efforts should continue during the course of litigation to avoid penalty under proposed Rule 37(e). New findings and legal positions might require amending the initial scope of collection; records that were once determined unresponsive might suddenly be critical to the litigation.

Additionally, expense and proportionality should be applied to any assessment of the scope of collection of ESI. For more information about this, see *The Sedona Conference® Commentary on Proportionality in Electronic Discovery*, which addresses the need to balance the expense and burden of ESI against the potential value and uniqueness of the information.

Collecting All Formats

A major issue with ESI is the for-

mat of the data. Courts have not been able to keep up with the advances in technology, but both permanent and transitory data are subject to preservation and discovery.

Custodians generally understand that permanent records, such as e-mails and files stored locally and on servers, are subject to collection, as these forms of ESI are typically what are thought of when addressing elec-

tronic collection. However, voice mail, text messaging, instant messaging, video chats, and other interactive media should also be collected if they are reasonably accessible and are used for substantive conversations relevant to the litigation.

RIM professionals and counsel should assess the need to preserve and produce transitory records consistent with the local rules and jurisdictions.

Reasonable Measures

The four principles – distribute litigation holds, track custodians, maintain documentation, and collect information – are reasonable measures. They will be part of the discussion courts have as they interpret and implement proposed Rule 37(e)(1).

These principles' consistent and competent implementation will also help communicate to courts the intent to preserve ESI, or at least that there was no intent to lose ESI, and that may be critical to avoiding the court's use of proposed Rule 37(e)(2). Whatever side an organization is on in litigation, avoiding proposed Rule 37(e) – or at least part 2 – will be critical to its litigation objectives.

The dutiful execution of these four principles falls largely on RIM professionals and counsel and is critical to the litigation objectives of their organizations or clients. Implementing litigation holds, tracking custodians, documenting preserved records, and collecting information will further objectives and fulfill obligations, as well as aid with satisfying public disclosure requirements and accessing historical organizational records.

This is true regardless of whether the Supreme Court or the U.S. Congress enact the proposed Rule 37(e). However, if the proposed rule is enacted, these recommended principles will help counsel, custodians, RIM professionals, and their organizations avoid adverse inferences, default judgments, and whatever other steps a court may take to restore “evidentiary balance” under it. Those principles and the court's steps can be the difference between successfully resolving litigation or suffering a fatal judgment and liability. **END**

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