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Reasonable Anticipation of Litigation Under FRCP 37(e): Triggers and Limits

Under common law and as expressly referenced in amended Federal Rule of Civil Procedure (FRCP) 37(e), a party must preserve documents and electronically stored information (ESI) when it reasonably anticipates litigation. Although applying this standard typically is straightforward once litigation has begun, determining when the duty to preserve has been triggered and the scope of that duty often involves a multi-factor analysis that can be difficult for courts and counsel to apply consistently.

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Federal common law requires potential litigants to begin preserving relevant documents and other tangible evidence when they reasonably anticipate litigation (*Crown Battery Mfg. Co. v. Club Car, Inc.*, 185 F. Supp. 3d 987, 998 (N.D. Ohio 2016)). This standard also applies to ESI under amended FRCP 37(e), which expressly incorporates reasonable anticipation of litigation as a trigger for a party's duty to preserve relevant ESI under the rule's sanctions framework. Although FRCP 37(e) offers little guidance on how to apply the reasonable anticipation of litigation standard, and case law under FRCP 37(e) is still developing, the rule does not attempt to create a new duty to preserve. Courts and counsel therefore may continue to rely on existing case law interpreting the reasonable anticipation of litigation standard. (See 2015 Advisory Committee's Note to FRCP 37(e); see also *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 2017 WL 930597, at *8 (N.D. Ala.

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Mar. 9, 2017); *Gonzalez-Bermudez v. Abbott Labs. PR Inc.*, 2016 WL 5940199, at *23 n.10 (D.P.R. Oct. 9, 2016).)

However, even under existing case law, determining when the duty to preserve has been triggered under FRCP 37(e) and the scope of that duty often remains difficult. This determination requires counsel to carefully analyze the specific facts and circumstances, particularly where a party alleges that an adversary's duty to preserve arose before litigation commenced (see *Jenkins v. Woody*, 2017 WL 362475, at *14-15 (E.D. Va. Jan. 21, 2017) (citing *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010))).

To protect a client from sanctions under FRCP 37(e), counsel charged with handling preservation efforts should:

- Help the client identify when it should reasonably anticipate litigation and ensure the client begins preserving relevant ESI at that point.
- Adequately define the scope of preservation at the time a party's preservation duty is triggered, and reassess the scope throughout the course of the litigation in case the universe of potentially relevant information expands.
- Determine when to lift a litigation hold (or reinstate the routine, automatic destruction of ESI pursuant to a document retention program) in situations where litigation was once reasonably anticipated but ultimately never materialized.

Search Litigation Hold Toolkit for a collection of resources to help counsel preserve documents and implement a litigation hold.

IDENTIFYING WHEN LITIGATION IS REASONABLY ANTICIPATED

The standard for reasonable anticipation of litigation is an objective one. If a reasonable person would have expected litigation, a party's duty to preserve generally is triggered (see *Ala. Aircraft,* 2017 WL 930597, at *10).

The service of a summons or complaint clearly triggers a defendant's preservation obligations (*McIntosh v. United States*, 2016 WL 1274585, at *32 (S.D.N.Y. Mar. 31, 2016) (finding a party's obligation to preserve evidence "arises when the party has notice that the evidence is relevant to litigation," which is "most commonly when suit has already been filed") (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)); see also *Jenkins*, 2017 WL 362475, at *14 (stating that a defendant's duty to preserve evidence is triggered, at the latest, on service of the complaint)).

However, if no complaint has been filed, identifying the trigger for when a party should have reasonably anticipated litigation is more challenging, as it varies based on the facts and circumstances. Considerations when determining whether a party might be charged with reasonably anticipating litigation include:

- A plaintiff's own contemplation of litigation.
- A defendant's own contemplation of litigation.
- Receipt of written or verbal notice of potential claims against a party, either from counsel or a potential adversary.

CONTEMPLATION OF LITIGATION BY A PLAINTIFF

A plaintiff's duty to preserve might be triggered as soon as the plaintiff believes that a basis for a viable claim has arisen and seriously contemplates pursuing litigation, such as by taking steps to consult or retain counsel or experts (*Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591-92 (4th Cir. 2001) (finding the plaintiff was on notice of his need to preserve a vehicle shortly after his accident, particularly after he concluded that the failure of the airbag to deploy contributed to his injuries); *Cohn v. Guaranteed Rate, Inc.*, 318 F.R.D. 350, 354 (N.D. Ill. 2016) (on a motion for sanctions in part under FRCP 37(e), finding the plaintiff's consultation with counsel and explicit references to her intention to pursue litigation against the defendant were sufficient to trigger her preservation obligations)).

Additional factors counsel should consider in determining whether a plaintiff's contemplation of or preparation for litigation might have triggered preservation obligations include whether the plaintiff has:

- Conducted legal or factual research to assess the strength of potential claims or defenses.
- Held any meetings or presentations during which the potential litigation was discussed.
- Drafted a summons, a complaint, or any documents to support a summons or complaint.
- Discussed the potential litigation with key witnesses or likely information custodians.

(See, for example, *Virtual Studios, Inc. v. Stanton Carpet Corp.*, 2016 WL 5339601, at *5-10 (N.D. Ga. June 23, 2016) (finding the plaintiff's duty to preserve was triggered years before litigation, when the plaintiff's representative first became aware of the defendant's impermissible use of the plaintiff's copyrighted images while looking at the defendant's in-store displays and website).)

CONTEMPLATION OF LITIGATION BY A DEFENDANT

As with a plaintiff, courts are likely to find that a defendant who consults or retains counsel or experts before litigation commences has triggered the duty to preserve (see, for example, *Ala. Aircraft*, 2017 WL 930597, at *9-10 (finding the defendant's consultation with in-house litigation counsel about its potential liability for breach of contract before any action was filed indicated that it reasonably anticipated litigation and therefore should have preserved related ESI under FRCP 37(e))). Absent this type of evidence, however, determining when a defendant might have reasonably anticipated litigation before a case started may be difficult.

The types of evidence counsel should consider when analyzing whether a defendant reasonably anticipated or should have reasonably anticipated litigation before litigation began might include:

- The nature and viability of the plaintiff's claims and the likelihood that the plaintiff would seek formal redress. For

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example, courts have found that a defendant should have reasonably anticipated litigation before litigation commenced in the following circumstances:

- right after an inmate's death, where the jail had a policy of starting an investigation immediately after an inmate dies, the defendant was involved in a high number of lawsuits involving inmate deaths in his custody, and the defendant testified that it was common for lawsuits to follow inmate deaths (*Jenkins*, 2017 WL 362475, at *15 (imposing spoliation sanctions under FRCP 37(e)));
- when a physical altercation was captured on videotape (*Alston v. Bellerose*, 2016 WL 4098726, at *2 (D. Conn. July 28, 2016)); and
- on the day a customer suffered an in-store injury, reported the incident immediately, and simultaneously stated her intention to seek medical attention for her injuries (*Stedeford v. Wal-Mart Stores, Inc.*, 2016 WL 3462132, at *1, *9 (D. Nev. June 24, 2016)).

- The relationship, any existing history, or the course of dealing between the potential parties (see, for example, *Tohono O'odham Nation v. Ducey*, 2016 WL 7338341, at *7 (D. Ariz. Dec. 19, 2016) (finding the defendants should have reasonably anticipated litigation when they held a meeting to discuss ways to block the development of the plaintiff's tribal lands, where the defendants had a history of litigation over the plaintiff's desire to develop a resort on the same lands); *Crown Battery*, 185 F. Supp. 3d at 998-99 (finding the defendant golf cart manufacturer's duty to preserve arose months before litigation started when its business relationship with the plaintiff battery maker soured and the defendant took $2.3 million worth of batteries without paying for them)).
- The defendant's knowledge of a similar or related dispute between similarly situated parties (see *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1190-91 (D. Utah 2009) (finding the defendants' duty to preserve was triggered five to six years before the complaint was filed because they were aware of disputes between similarly situated industry actors over the same floppy disk controller errors)).
- The impact of any documents that govern the relationship between the potential parties, including contractually required methods of resolving disputes or settlement agreements governing future conduct (see, for example, *Ala. Aircraft*, 2017 WL 930597, at *9-10 (finding the defendant's termination of a contract, coupled with the plaintiff's statements that the termination was a clear violation of the contract, triggered the defendant's duty to preserve before litigation had commenced)).
- Internal oral or written communications that show the defendant was on notice of potential litigation (see, for example, *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, 2016 WL 5870218, at *3 (N.D. Cal. Oct. 7, 2016) (finding the defendants' duty to preserve text messages was triggered when they had an internal meeting in which they acknowledged that there would be a lawsuit); *Zubulake v. UBS Warburg* LLC, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (finding the defendant should have reasonably anticipated litigation four months before the plaintiff filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), based on corporate personnel's use of a privilege header on emails about the plaintiff's termination sent months before the EEOC charge and deposition testimony from employees that they feared litigation around the same time)).

FORMAL AND INFORMAL NOTICE OF CLAIMS

A formal, written letter threatening litigation might also trigger the receiving party's obligation to preserve evidence (see, for example, *Gonzalez-Bermudez*, 2016 WL 5940199, at *24 (finding a letter from the plaintiff's attorneys warning of potential litigation triggered the defendants' duty to preserve ESI under FRCP 37(e)); see also *Marten Transp., Ltd. v. Plattform Advert., Inc.*, 2016 WL 492743, at *6 (D. Kan. Feb. 8, 2016) (finding the plaintiff's cease-and-desist letter clearly triggered its own duty to preserve)). In some cases, even an informal warning might be sufficient to trigger the recipient's preservation obligations, such as:

- Verbal notice that an adversary considers certain conduct to violate a contract and, if the conduct occurs, the adversary will follow with certain action (*Ala. Aircraft*, 2017 WL 930597, at *10 (finding the plaintiff's verbal notice to the defendant

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that the plaintiff considered their contract to be breached and was "likely going to do something about it" triggered the defendant's preservation obligations)).

- Text messages from a plaintiff to a defendant threatening a lawsuit two years before litigation started, even where the plaintiff subsequently apologized for the text messages and appeared friendly, but did not expressly retract the threat (*Clear-View Tech., Inc. v. Rasnick*, 2015 WL 2251005, at *2, *7 (N.D. Cal. May 13, 2015)).

On the other hand, courts have held that written demand letters that do not adequately warn of litigation might be insufficient to trigger the duty to preserve (see, for example, *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (finding a plaintiff's demand letters that described the defendant's potential trademark infringement were insufficient to trigger the defendant's duty to preserve because the letters did not threaten litigation outright and even suggested the possibility of a non-litigious resolution); *Ind. Mills & Mfg., Inc. v. Dorel Indus., Inc.*, 2006 WL 1749410, at *4 (S.D. Ind. Feb. 16, 2006) (similar); but see *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 510-11 (D. Md. 2009) (distinguishing *Cache* and holding the defendant's duty to preserve relevant evidence began when the defendant received the plaintiff's letter stating that the plaintiff had consulted two attorneys and, if forced to litigate, the plaintiff could receive damages in excess of the disputed contract amount)).

Sending preservation demand letters to an adversary requesting that certain evidence be preserved before bringing formal claims has become an increasingly popular practice in recent years. These demand letters are likely to trigger a party's duty to preserve once the party receives the letter (see *Stedeford*, 2016 WL 3462132, at *9-10). However, where a request to preserve evidence does not sufficiently warn the receiving party of potential litigation and does not clearly indicate that the evidence described in the letter might be relevant to potential litigation, some courts have found that the notice was insufficient to trigger the recipient's duty to preserve (see, for example, *McIntosh*, 2016 WL 1274585, at *33 (finding there was no duty to preserve where the "tone, informality, and other characteristics" of a letter might not have forecasted litigation to a reasonable observer, and the letter did not clearly convey that videotape evidence might be relevant to future litigation)).

DETERMINING THE SCOPE OF PRESERVATION BEFORE LITIGATION

A potential litigant is not expected or required to "preserve every shred of paper, every e-mail or electronic document, [or] every backup tape." Instead, parties that reasonably anticipate litigation should preserve "unique, relevant evidence that might be useful to an adversary" or "is reasonably likely to be requested during discovery." (*Zubulake*, 220 F.R.D. at 217; see also *Marten Transp. Ltd.*, 2016 WL 492743, at *5, *10 (denying the defendant's motion for sanctions under FRCP 37(e) in part because the lost ESI was outside the scope of the duty to preserve).) In the context of FRCP 37(e), this analysis requires a potential litigant to assess:

- Which individuals are potential custodians of ESI that must be retained.
- The categories of ESI that the party must preserve.

Noting the expense that preservation can impose on parties, the 2015 advisory committee note to FRCP 37(e) suggests that proportionality might be relevant to a party's determination of the scope of preservation (see 2015 Advisory Committee's Note to FRCP 37(e)). Although no court has yet addressed this issue, the recently proposed Third Edition of the Sedona Principles expressly direct parties to consider proportionality when determining preservation scope (The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Principle 5 & cmt. 5.a. (Mar. 2017) (Public Comment Version)).

IDENTIFYING CUSTODIANS OF ESI

The "duty to preserve extends to those employees likely to have relevant information – the 'key players' in the case" (*Zubulake*, 220 F.R.D. at 218). Identifying these key players is a fact-specific inquiry that might require counsel to interview potential custodians to determine who might have discoverable information about potential claims.

Counsel should keep in mind that potential custodians are not limited to a party's employees and officers. A party's duty to preserve can also extend to ESI it owns or controls but is in the possession of a third party (see *GenOn Mid-Atl., LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 353-56 (S.D.N.Y. 2012); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195-97 (S.D.N.Y. 2007) (finding the defendant had a duty to preserve documents and ESI even though the majority of these materials were in a non-party's possession), aff'd *sub nom.*, *Gordon Partners v. Blumenthal*, 2007 WL 1518632 (S.D.N.Y. May 17, 2007)).

Search Possession, Custody, and Control of ESI for information on the applicable federal rules on the possession, custody, and control of ESI, the traditional tests courts use to determine control over documents that non-parties possess, and emerging jurisdictional issues about cloud-based ESI.

Identifying the appropriate custodians and third parties with relevant information is a dynamic process. As litigation proceeds, or if pleadings are amended, counsel might need to identify and consult with other custodians of ESI that might become relevant as discovery reveals new facts or as claims or allegations are added or modified in a case.

IDENTIFYING WHAT ESI MUST BE RETAINED

A party must take reasonable steps to preserve all relevant ESI under FRCP 37(e), including emails, shared files, social media, and data sources (*Marten Transp., Ltd.*, 2016 WL 492743, at *5; see also, for example, *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 387-88 (S.D.N.Y. 2015) (holding the duty to preserve applied to social media posts and text messages)). The preservation duty includes an obligation to identify, locate, and maintain "information that

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is relevant to specific, predictable and identifiable litigation" (*Stedeford*, 2016 WL 3462132, at *5).

A party's understanding of relevance can change as the nature and claims of a case crystalize, requiring counsel throughout the litigation to evaluate the facts and assess whether the scope of the client's preservation obligations has changed. When defining and reevaluating the scope of preservation to determine whether to reduce or expand it, items for counsel to consider might include:

- If litigation has not yet commenced:
  - the contents of any demand letter or notice threatening litigation from an adversary;
  - the contents of any preservation notice from an adversary;
  - other oral or written communications with opposing counsel that provide greater detail into the scope, breadth, or nature of potential claims; and
  - interviews with or information provided by already identified potential custodians or key witnesses.

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- If litigation is ongoing:
  - the complaint's allegations and claims;
  - information provided in initial disclosures under FRCP 26;
  - information provided in response to written discovery requests, such as interrogatories, requests for admission, and requests for production;
  - statutes and administrative regulations which might require retention (or allow destruction) of certain relevant ESI; and
  - the court's scheduling order, the parties' discovery plan, an order in another case, or a party's own information-retention protocols, which might dictate or clarify a party's preservation obligations (see 2015 Advisory Committee's Note to FRCP 37(e)).

Counsel should ensure the client implements a litigation hold that adequately addresses the scope of the duty to preserve. The decision to implement a litigation hold with a narrowly defined scope or, more drastically, to forgo a litigation hold altogether should not be undertaken lightly, even if counsel for a potential defendant anticipates weak claims from the potential plaintiff. On the other hand, a costly or expansive litigation hold might not be appropriate if the allegations are impossible, misdirected, or not viable (for example, if the claims are unequivocally outside the applicable statute of limitations or the potential plaintiff lacks standing to assert the claims).

Search Implementing a Litigation Hold for more on key issues companies should consider when instituting a litigation hold and the consequences of failing to implement one appropriately.

LIFTING THE PRESERVATION OBLIGATION

In addition to periodically reassessing whether to expand or limit the scope of a litigation hold, counsel should also determine when circumstances permit the hold to be lifted entirely. For example, a party might be able to safely relax, reduce the scope of, or end its preservation obligations (and, if appropriate, reinstate any routine document destruction program) when:

- The relevant statute of limitations for previously threatened claims has unequivocally expired.
- The dispute is resolved through, for example:
  - the renegotiation of an agreement;
  - a mediation between the potential parties;
  - a final judgment;
  - the expiration of the time to appeal to the highest court; or
  - payment on a claim.

(See, for example, *Cacace v. Meyer Mktg. (MACAU Commercial Offshore) Co.*, 2011 WL 1833338, at *2 (S.D.N.Y. May 12, 2011) (finding a preservation obligation that had been triggered years before a lawsuit was filed was lifted temporarily when the parties began negotiating a licensing agreement).)

However, counsel should thoroughly document all reasons for lifting an existing litigation hold. If litigation unexpectedly begins or renews and relevant ESI has already been lost as a result of lifting a litigation hold, counsel might be able to rely on these notes or consult the documentation in order to successfully defend the reasonableness of the client's conduct.

Search Litigation Hold Lift Notice for a sample legal hold lift notice counsel can use to notify employees of an organization that a litigation hold is no longer in effect, with explanatory notes and drafting tips.

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