ABSTRACT:
The duty to preserve potentially responsive information compels a potential litigant to preserve data that a future adversary may demand. One person’s trash may be another’s treasure.

The Rules Enabling Act imposes limitations on the scope of the Federal Rules of Civil Procedure (Federal Rules), creating a gap between protections the Federal Rules provide to litigants, and the protections afforded certain litigation-related actions that often must take place before litigation is instituted. Because the duty to preserve potentially responsive electronically stored information may arise before a lawsuit is filed, decisions regarding the scope of that preservation duty may have to be made in the absence of a clear standard that provides practicable guidance regarding what a court should preserve.

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subsequently would require to be preserved, simply because the Federal Rules, which regulate the discovery process, are applicable only to pending lawsuits. This dilemma is complicated by the choice of law issues that may be attendant to the common-law duty to preserve. While Federal Rule 1 calls for the interpretation of the rules of procedure to achieve the just, speedy, and inexpensive resolution of disputes, the inapplicability of the Federal Rules to pretrial activity of the party that bears the obligation to preserve suggests that prudent counsel and cautious litigants may feel compelled to expend enormous sums to preserve electronically stored information that need not be preserved, will never be produced in discovery, and that may greatly exceed the economic value of the claims presented. One of the most troubling electronically stored information (ESI) issues involves providing guidelines for limiting the scope of the duty to preserve, especially during the pre-litigation period where there is no judicial umpire, but the implicit danger of sanctions for spoliation.

This article suggests a mechanism for narrowing the gap between protections the Federal Rules provide to litigants, and the current state of uncertainty regarding the scope of the pretrial duty to preserve ESI that currently plagues potential litigants before litigation is instituted. It proposes that both procedural and conflict of law issues are best resolved by applying, by analogy, the protections of Federal Rules 26(b)(2)(C) and 37(e) (or comparable state-law provisions) to guide preservation efforts before a lawsuit is commenced. Because the scope of the duty to preserve is defined by the scope of discovery, and because the duty to preserve is neither absolute nor intended to cripple organizations, the Federal Rules-based limitations on the scope of discovery should provide analogous limits on the scope of the pre-litigation duty to preserve.

Courts have the power to sanction parties for failure to preserve preservable material, even if that failure to preserve pre-dates the filing of the complaint. The source of the power to sanction violations of the pre-litigation duty is the court’s inherent power. In short, if a litigant breaches a common-law preservation duty before a lawsuit was commenced, and therefore before the Federal Rules of Civil Procedure are applicable, the Federal Rules are not the source of a trial court’s power to punish that litigant for acts that occurred before the court obtained jurisdiction.

Although at first blush it may seem like this issue is nothing more than an academic distinction, it has enormous practical significance to litigants. For example, assume an organization—whether governmental or private—recognizes the occurrence of an event that triggers the substantive duty to preserve ESI, but no lawsuit has been filed. Assume further that reasonable minds could differ about just what should be preserved. It may be that there is no known attorney for a potential plaintiff who could be contacted with an eye toward reaching an agreement about what should be preserved, or it may be that an attorney is known, but he or she demands more expansive and expensive preservation than the organization feels is called for. Assume further that the cost of “preserving everything,” even from sources that are not readily accessible because of undue burden or cost, greatly exceeds the realistic evaluation of the economic value of the case. What should the organization do? Must it preserve everything, regardless of cost or degree of relevancy, or may it make good faith decisions regarding what it believes is reasonable under the circumstances, even if this means that some ESI that may fit within the low threshold of potentially relevant information may be lost or destroyed? Further,
assuming the organization does make a decision to preserve less than all potentially relevant ESI, because the cost of preserving all ESI would be unreasonable given the potential value of the claim that foreseeably could be brought, or because its relevance is marginal or it is viewed as duplicative, what would be the consequences to it if litigation is brought, and the court ultimately determined that the organization failed to preserve unique ESI that was relevant, indeed essential, to the plaintiff’s case? May the organization be sanctioned for its pre-litigation failure to preserve and, if so, what sanctions could the court impose?

In light of the significant sanctions that courts may impose because of a pre-litigation failure to preserve ESI, the contours of limitations on the pre-litigation duty to preserve need to be clear and capable of being articulated by counsel to clients, so that informed judgments may be made and presented to the reviewing courts with detailed support and analysis, guided by a body of developing case law. Furthermore, those limitations should parallel the Federal Rules that will apply after litigation is commenced.

It is suggested that application by analogy of the protections afforded in Federal Rules 26(b)(2)(C) and 37(e) is the mechanism to provide those contours. In the ESI context, the cost-benefit protections of Federal Rule 26(b)(2)(C) and Federal Rule 37(e)’s “safe harbor” should apply by analogy to define pre-litigation preservation conduct that is not directly governed by those Rules. It would, for example, be anomalous to conclude that a good faith failure to preserve information after a lawsuit is commenced should be afforded greater protection than an identical failure before suit is filed simply because the Federal Rule 37(e) “safe harbor” cannot apply prior to litigation. It would be equally anomalous to sanction a party because it breached the duty to preserve information that, under Federal Rule 26(b)(2)(C), is later determined by the court not to be discoverable.

The uncertain scope of preservation obligations before litigation is filed, coupled with the risk of onerous sanctions when relevant ESI is not preserved, encourages over broad pre-litigation preservation efforts, resulting in the expenditure of vast sums to preserve ESI that need not be preserved. Given that a party is provided far more detail concerning the range of potentially discoverable information after litigation is commenced, a party’s pre-litigation failure to preserve should not result in more onerous sanctions than a party’s failure to preserve post-filing. Although not explicitly applicable pre-litigation, application by analogy of Federal Rules 26(b)(2)(C) and 37(e) to the pre-litigation duty to preserve provides the best mechanism for defining the limits of the duty to preserve and providing litigants with practical guidelines in a perilous area where a misstep could have significant ramifications.