

DUTY TO PRESERVE ELECTRONICALLY STORED INFORMATION; SANCTIONS

(a) DUTY.

- 1) Prior to service of a citation or notice as specified in subsection (b) of this Rule, a party's duty regarding electronically stored information is to not act with the intent to deprive another actual or potential party to a lawsuit of the use of that information in the lawsuit that the party knows about or reasonably anticipates. Absent service of a citation or notice as specified in subsection (b) of this Rule, a party may manage electronically stored information in accordance with its usual course of business or ordinary practices and such actions do not constitute an intent to deprive another party of the use of the information in any lawsuit.
- 2) After service of a citation or notice that complies with subsection (b) of this Rule, a party has a duty to take reasonable and proportional efforts to preserve electronically stored information relevant to the dispute or lawsuit in compliance with subsections (b)(1) and (b)(2) of this Rule.
- 3) In the event of any dispute, the party seeking discovery of electronically stored information has the burden to prove the existence of a duty to preserve the specific electronically stored information at issue under this Rule.

(b) NOTICE.

- 1) Notwithstanding its usual course of business, a party must take reasonable and proportional steps to preserve electronically stored information after:
 - A. Service of a citation; or
 - B. Service of a notice to preserve electronically stored information. The notice shall be conspicuously styled "NOTICE TO PRESERVE ELECTRONICALLY STORED INFORMATION," and it shall state with specificity the claim or claims of the anticipated action. The notice shall be served on the party or the party's designated agent for service of process as provided by law.
- 2) A party's duty to preserve electronically stored information under this subsection is limited to electronically stored information in its possession, custody, or control that is directly relevant to the claim or claims identified in the citation or notice and any known or reasonably anticipated defenses or counterclaims concerning the asserted claim or claims.
- 3) The Notice in subsection (b)(1)(B) may contain specific requests to preserve certain sources or types of electronically stored information but such identifications or demands are not determinative of the scope of any duty to preserve; the party's duty to preserve remains bounded by reasonableness and proportionality and the party obligated to preserve electronically stored information is in the best position to

determine the scope, means, methods and manners of reasonable and proportional preservation.

(c) AVAILABLE RELIEF.

- 1) A party may petition the court for relief from a notice to preserve electronically stored information. The court shall grant such relief if:
 - A. The notice was not properly served;
 - B. The notice failed to state with specificity the claim or claims of the anticipated action; or
 - C. The notice is otherwise unduly burdensome as may be determined by reference to Rules 192 and 196.
- 2) Any party may petition the court for relief regarding the scope of preservation required in connection with service of a citation or a notice to preserve electronically stored information. The court shall grant relief if:
 - A. The party seeking preservation reasonably has made demands regarding the scope or preservation that are not reasonable or proportional and the party subject to the duty to preserve has a reasonable belief that a dispute regarding preservation needs clarification
 - B. The party seeking preservation reasonably has actual knowledge that the party subject to the duty to preserve is not taking reasonable and proportional efforts to preserve relevant electronically stored information.
- 3) A motion for relief under subsections (c)(1) and (2)(A) is not necessary if a party takes reasonable and proportional steps to preserve electronically stored information even if those steps are different from those demanded by a party seeking preservation.
- 4) A motion for relief under subsections (c)(2)(B) is not necessary for a party to later assert that a party with the duty to preserve relevant electronically stored information failed to take reasonable steps under subsection (d).
- 5) A motion for relief under this subsection may be filed in a proper court of any county where venue of the anticipated suit may lie or where the actual lawsuit has been filed.
- 3) The filing of a petition does not constitute waiver of any otherwise valid objections to personal jurisdiction in subsequent litigation.

(d) SANCTIONS. If electronically stored information that should have been preserved in accordance with this Rule is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court, upon finding prejudice to another party from the loss of the information:

- 1) May order measures no greater than necessary to cure the prejudice; or
- 2) May, only upon 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 if lesser remedies are inadequate to cure the prejudice.