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Following the road to ESI preservation with three court questions, *InsideCounsel*

By asking three questions and following four practical tips, you can ensure the timely and proper preservation of documents

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In litigation, the absence of evidence can be more troubling than the evidence that exists. In this era of emails and electronic document storage, evidence preservation requires the identification and retention of potentially relevant and discoverable electronically stored information (ESI). On May 29-30, 2014, the Committee on Rules of Practice and Procedure met to consider changes to Fed. R. Civ. P. 37(e) that highlights the dangers inherent to the failure to preserve and retain ESI.

Whereas Rule 37(e) currently provides a safe haven against actions "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" the Rules Committee has sent to the Judicial Conference, for consideration at its September 2014 meeting, proposed amendments to Rule 37 that provide for sanctions for the loss of discoverable information "that should have been preserved in the anticipation or conduct of litigation." Therefore, upon notice of a potential claim, it is now more important than ever to take timely and appropriate steps to preserve ESI by asking three questions: when the duty to preserve arises, what must be preserved, and how must the duty to preserve be met.

The duty to preserve arises when one "reasonably anticipates" litigation. The duty to preserve will not attach simply because…

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