

VIII.B | PRESERVATION

A party has a duty to retain ESI that may be relevant to pending or reasonably anticipated litigation. The scope of a party's preservation obligation is determined on a case-by-case basis. Rule 26(f) requires the parties to confer as soon as practicable and plan for discovery. The discussion of preservation issues, to include each party's records management policies and procedures ideally should occur before suit is filed but certainly no later than the Rule 26 conference. The parties should exercise reason and good faith when they discuss issues concerning ESI. On the topic of preservation, counsel should be informed and otherwise prepared to articulate both good cause for the preservation of ESI and the costs and burdens of maintaining ESI.