

Litigation - USA

Dramatic changes to Federal Rules of Civil Procedure proposed

Contributed by [Mendes & Mount LLP](#)

April 03 2012

Preservation and spoliation

Rule 45

Some dramatic changes in the Federal Rule of Civil Procedure are being proposed. The most immediate change will likely be to the obligations of parties to preserve documents and electronically stored information (ESI), plus the penalties imposed should parties fail to do so. The second area of change relates to subpoenas.

Preservation and spoliation

As part of the process for the adoption of new federal rules, the Advisory Committee on the Federal Rules of Civil Procedure has requested comments on possible changes to the federal rules relating to preservation and spoliation of evidence. The New York State Bar Association formed a Special Committee on Discovery and Case Management in Federal Litigation to review the advisory committee's recent proposals concerning preservation and spoliation of evidence, including ESI.

There is currently no rule governing preservation; courts have established guidelines under their intent authority. Establishing rules regulating conduct in these actions will clarify what is expected and lead to uniformity in practice. Therefore, amendments to Federal Rules of Civil Procedure 26 and 37 are proposed. The special committee, accepting the invitation from the advisory committee for suggestions on such amendments, has proposed a new Rule 26(h), specifying that the duty to preserve documents and ESI arises when a subpoena is received by a non-party, or when a person becomes aware of facts that would lead a reasonable person to expect to become a party to an action. This duty shall continue for all existing and subsequently created documents or ESI until (where an action has been commenced) the termination of the party or non-party's involvement, or (where no action is commenced) until a person becomes aware of facts that would lead a reasonable person to believe that he or she will not be a party to an action.

A person whose duty to preserve has been triggered must take steps to preserve discoverable documents or ESI in regard to the claims and defences of which the person is and should be aware, taking into consideration several factors, including:

- the importance of the information;
- the amount in controversy; and
- the burden and expense of preservation.

The documents or ESI shall be preserved in a form as close to (if not identical to) their original condition without material loss of accessibility.

As an adjunct to this, a new Rule 37(g) is proposed that specifies a variety of penalties to be imposed, depending on the level of culpability of the spoliating party and the remedial requirements necessary to the case, taking into account the importance of the information lost to the party seeking its discovery.

Much of the framework for the proposed rules was derived from Judge Shira Scheindlin's opinions on e-discovery, particularly those in the *Zubalake* cases.

However, in early November 2011 the advisory committee decided not to pursue any rule change dealing with preservation, but only those dealing with penalties for spoliation. Nevertheless, the discussion engendered makes clear that 'best practice' for preservation of evidence includes, in all but the most exceptional cases, the issue of a written 'litigation hold' to those 'key players' in an organisation most likely to possess

Author

[Stephen T Roberts](#)



documents or ESI that will be important in a case. This litigation hold must be periodically reviewed and renewed. Early consultation with in-house or external litigation counsel is essential.

The advisory committee considered a proposed new rule regarding penalties for spoliation at its meeting on March 22 2012.

Rule 45

The advisory committee has drafted proposed amendments to Rule 45 concerning service of a subpoena. Among the important changes will be the abolition of the requirement that a discovery subpoena 'issue out of' the court where compliance is to be made. Instead, nationwide service of process will be implemented, and a discovery subpoena for a case pending in the Southern District of New York will be valid in the Southern District of California, for example. Enforcement of the subpoena can be heard in the district where compliance is to be made or in the trial court, at the option of the party from which compliance is sought.

The advisory committee also proposes compelling an out-of-state party or officer of a party to travel more than 100 miles to testify at trial on a showing of good cause. This resolves a split among the courts. The amendments would further broaden the existing requirement that notice be provided to other parties before a subpoena is served.

Changes are also proposed requiring that all parties receive notice on the service of a subpoena to a non-party.

The advisory committee decided on revisions to Rule 45 on March 22 2012. By May 1 2012, the advisory committee will submit its recommendations regarding spoliation and Rule 45 to the federal Standing Committee. The federal Standing Committee will likely approve the recommendations in June and submit them to the federal Judicial Conference. The Judicial Conference will approve the proposal at its September 2012 meeting and transmit it to the US Supreme Court, which will have until May 1 2013 to transmit the proposal to Congress. If Congress does not act, the proposal becomes a rule on December 1 2013.

For further information on this topic please contact [Stephen T Roberts](#) at [Mendes & Mount LLP](#) by telephone (+1 212 261 8000), fax (+1 212 261 8750) or email (stephen.roberts@mendes.com).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2010 Globe Business Publishing Ltd