

215.7 Duty to Preserve Electronically Stored Information; Sanctions

(a) **Duty.** A party has a duty to take reasonable and proportional steps to preserve electronically stored information relevant to the dispute or lawsuit after:

- (1) Service of a citation;
- (2) Service of a notice that complies with 215.7(b); or
- (3) From the time a claim of privilege under 192.5(a) arises.

(b) **Notice.** A written notice to preserve electronically stored information or of litigation triggers the duty described in 215.7(a). The notice shall state with specificity the claim or claims of the anticipated action. A party receiving such notice must take reasonable and proportional steps to preserve electronically stored information, which may differ from steps that the party seeking preservation demands.

(c) **Failure to Preserve Electronically Stored Information.** A court may order sanctions described in 215.7(d) if electronically stored information that should have been preserved is lost because:

- (1) a party failed to take reasonable steps to preserve it;
- (2) it cannot be restored or replaced through additional discovery; and
- (3) the trial court finds prejudice to another party from loss of the information.

(d) **Sanctions.**

- (1) the party may present evidence concerning the loss of the evidence;
- (2) the court may order measures no greater than necessary to cure the prejudice but must not comment on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence; and
- (3) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may:
 - (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.

(e) **Safe harbor.** Unless a party is subject to the duty to preserve described in 215.7(a), a party's management of electronically stored information in accordance with its usual course of business or ordinary practices does not constitute an intent to deprive another party the information's use in the litigation for purposes of 215.7(d)(3).