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Emerging issues in electronic record-keeping and discovery

E-DISCOVERY

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As our dependence on information technology in all sectors of life has grown, the type of information stored in electronic form, whether Word documents, Excel spreadsheets and e-mails — whether on servers, PDAs or even cell phones — has increased tremendously. This information often remains stored long after it has been deleted from the device on which it was originally created.

Effective Dec. 1, 2006, new amendments to the Federal Rules of Civil Procedure — which govern litigation in the federal courts — include rules governing the production (and consequently the retention) of electronic information. In addition to changing how litigants deal with e-discovery issues, these changes will significantly impact how corporations and organizations should organize, manage and monitor electronic information and systems at all times, as well as in the face of actual or anticipated litigation.

> e-discovery is playing an increasingly critical role in many legal proceedings

Electronic evidence is unique in that it can be inadvertently destroyed or altered through just a couple of strokes on a keyboard — with devastating consequences. Several recent cases confirm that the duty to preserve information potentially relevant to a claim arises when parties (and/or their attorneys) reasonably anticipate litigation.

Failure to preserve such information can result in monetary sanctions, or, worse, a finding of spoliation of evidence. A finding of spoliation can result in a jury instruction that evidence was destroyed and the jury may assume the evidence was harmful to the destroying party's case. Although the new civil procedure rules contain a "safe harbor" for inadvertent destruction of information that is not in bad faith, the safe harbor is a narrow one at best.

Once litigation has commenced, parties will now have to disclose potential sources of electronic information and agree upon guidelines to govern how they will deal with e-discovery during the litigation, including the format of production and any cost-sharing or cost-shifting agreements, if warranted.

These developments highlight the value of proactive planning to avoid e-discovery problems, including:

• Developing and implementing a formal document retention policy to formalize rules for saving and destroying documents, including electronic documents.

• Educating employees on the importance of compliance and monitoring and enforcing the policy.

• Making litigation preparedness a part of daily life. Being prepared includes increasing company-wide awareness of the types information, including electronic information, that must be disclosed in litigation, educating all employees about the issues which arise with careless destruction or retention of information, and training employees to document and store their work in an organized fashion. Being proactive can ultimately help in preparing for and defending in litigation.

• Establishing ongoing working relationships between in-house counsel, outside counsel, and IT personnel.

• Providing guidance to IT personnel about document retention and destruction, as well as instruction on the enforcement of your document retention policy. As soon as you reasonably anticipate litigation, engage outside counsel and your IT personnel to work cooperatively to avoid the destruction of potentially relevant evidence.

• Creating and organizing data storage systems which can simplify later identification, retrieval, and production of responsive information, including electronic information.

• Instituting a specific plan for suspension of the document retention policy, which includes suspension of usual document destruction and backup tape recycling. Identify key employees from legal and IT departments who should be involved and managing systems as soon as litigation is anticipated, pending or imminent.

• Determining how to distribute evidence preservation (also known as "litigation hold") instructions to all employees and to ensure enforcement of any suspension and preservation protocols when you reasonably anticipate litigation.

Since advance planning can prevent unpleasant surprises, the development of protocols and systems now is well worth the effort and expense. NHBR

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