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New Federal Rules Obligates Diligence In Saving & Producing Electronic Information

On December 1, 2006, new federal rules of procedure became effective relating to "electronically stored information", or ESI, which will dramatically affect litigants in future lawsuits. These new rules impose an obligation on all parties to a lawsuit to preserve relevant ESI evidence on their computers and other electronic systems and to disclose and produce this information at the inception of the lawsuit without being asked to do so by other parties to the lawsuit.

Every party to a lawsuit now has a duty to preserve its ESI. This duty is triggered when the party first understands that litigation is "reasonably anticipated." In many cases this duty will arise well before the filing of a lawsuit. Thus, when a company officer or employee recognizes that a lawsuit may be forthcoming, the company has an obligation to preserve all evidence relevant to the potential lawsuit. Information that must be preserved and produced includes all ESI from "reasonably accessible sources", including e-mail, business databases, and computer files.

The penalties for failing to preserve ESI may be significant. Courts are empowered to impose sanctions against the offending party, including exclusion of critical evidence necessary to prove the party's claim or defense, dismissal of the party's claim or defense, issuance of jury instructions adverse to the offending party, and, ultimately, entry of judgment against the party.

Prepare now to fulfill your "preservation" and "production" obligations. Establish and institute a "Document Preservation Plan" and an "ESI Discovery Response Plan". These plans should be designed to preserve the ESI, minimize the risk of lost ESI, lessen the likelihood of business disruption while gathering and producing the ESI, and minimize the risk of incurring court sanctions. Among other things, these plans ought to require that key company personnel, and in particular, key IT personnel, and both in-house and outside counsel, know the company's operating systems and computer systems. When ESI preservation obligations arise in anticipation of litigation, a "litigation hold" must be implemented so that employees know that they may not delete ESI; and, the system must be monitored to ensure that the company's ESI preservation obligations are met. When effective preservation and discovery response plans are absent, litigation costs and risks will be higher. Implementation of such plans and good faith efforts in efficient administration of them will provide evidence of compliance with a litigant's preservation and discovery obligations.

SNSFE trial and dispute resolution attorneys are available to assist you in developing and implementing document preservation plans and ESI discovery response plans. Please call us with your questions. ■

For more information, contact Jack Haan at 312.621.4400 or JHaan@SNSFE-law.com.

***A diligent
party should
prepare
preservation
and
response
plans now.***