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E-DISCOVERY HOT TOPIC TIPS

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Electronic Discovery is targeted to be an area of increased litigation spending in 2011. [1] As the aggressive use of e-Discovery in litigation continues to gain popularity, the importance of evaluating your e-Discovery exposure becomes even more critical.

HOT TOPIC TIPS

Tip #1: Did you know "eDiscovery" is not just about e-mail?

The term "Electronically Stored Information" is actually defined very broadly and includes: Word processing documents, Instant messages, Electronic voice mail, Data on cell phones, Databases, GPS data, Video, Websites and Social media such as Twitter and Facebook.

Tip #2: Did you know eDiscovery must be discussed by Counsel *prior* to the very first Case Management Conference?

There's no hiding from e-Discovery anymore. The California Rules of Court were recently amended and now require litigants to meet and confer and specifically discuss e-Discovery schedules, scope, the associated costs, and preservation of such evidence.

Tip #3: Did you know there are multiple types of "meta data"?

Although it may sound like science-fiction, meta data is real, and if you haven't been asked to hand it over yet, you soon will.

System meta data: System meta data is the information which is automatically generated by a computer system, such as the time an email or document was created, date of creation or date it was modified.

Substantive meta data: Substantive meta data reflects substantive changes made by the author. This includes revisions made by a party reviewing the document.

[1] Fulbright & Jaworski, 7th Annual Litigation Trends Survey Report, November 2010

Embedded meta data: Embedded meta data is information such as the text, numbers and content which is inputted by the user but not typically viewable on the screen or on a print out, such as excel formulas or sound files in power point.

Meta data is typically demanded in discovery, so the receiving party has the same ability to access, search and display the information as the propounding party. However, production often occurs in static format (such as TIFF or .pdf) with a meta data extraction.

Tip #4: Did you know that an entity's duty to preserve evidence may be triggered *before* litigation commences?

The duty to preserve is triggered whenever litigation is reasonably anticipated, threatened or pending. Once the duty to preserve is triggered, the entity must undertake reasonable and good faith efforts to preserve documents which are reasonably calculated to lead to the discovery of admissible evidence, including ***E-mail, and other electronically stored information.*** The term "reasonable anticipation" of litigation essentially means when the entity is on notice of a credible probability that it will become involved in litigation.

So how do you know if there is a "credible probability" of litigation? This must be determined based on a good faith and reasonable evaluation of the relevant facts and circumstances known at the time.

The duty to preserve is generally **NOT** triggered by vague rumors, indefinite threats or threats of litigation not made in good faith.

Tip #5: Did you know that California e-Discovery law includes a "Safe Harbor" provision?

It pays to implement and follow a document retention policy for a variety of reasons. An added benefit in litigation is the "Safe Harbor" provision found in California Code of Civil Procedure. While the safe harbor does not alter any obligation to preserve discoverable information, absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system, such as a document retention policy.

Tip #6: Did you know that collection of electronically stored information in litigation is more complicated than it seems?

I'm willing to bet you could have guessed that much! Forensically speaking however, while it may be "adequate" to have in-house e-mail users or the IT department collecting their own data, the preferred practice is to have an outside technician who has no substantive stake in the outcome of the case collect data based on specific production protocols. Some healthcare companies do have privacy and compliance issues which add special challenges, but generally, the more removed the party collecting the data is from the litigation itself, the better. Use of a third party to collect data provides a credible chain of custody, a witness to testify about the specifics of the process should it be questioned, and trained technicians will do the least amount of damage to the data during the collection process thereby preserving the integrity of your information.

Sarah Gates is a Senior Attorney with the firm of Wroten & Associates and maintains a diverse litigation practice and specializes in handling complex discovery and e-discovery, case investigation as well as witness and trial preparation. Ms. Gates' practice focuses on the defense of nursing homes and residential care facilities and includes provision of ancillary services to the long-term care provider such as restraining orders, unlawful detainers and development of litigation guidelines and best practices.