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E-DISCOVERY:
PLAN NOW TO PREVENT PROBLEMS LATER

By Linda Singer Roth

New federal rules regarding electronic discovery are changing the way we all think about preserving documents when the possibility of litigation arises – or at least they should be. While there has always been an obligation to search electronic systems for documents and data responsive to discovery requests, the new rules strengthen and clarify that obligation. It is no longer acceptable to simply make a good faith search for documents and produce whatever you manage to find. Now, parties and their counsel working together are required to be educated about the electronic systems that store data and to have a clear plan for preserving, retrieving and producing that data when litigation is anticipated, threatened or initiated. Failure to meet this obligation can result in serious sanctions. Fines may be imposed against a non-complying litigant, evidence may be suppressed or a court may instruct jurors that they are free to infer that missing documents and data would have been damaging to the party who failed to adequately search its electronic systems. In really egregious cases, claims may be dismissed or judgment may be granted in favor of a prejudiced party.

As a practical matter, the new rules mean that companies need to think in advance about where they store data. Data may reside in obvious places like company servers and hard drives but it may also reside in less obvious places like laptops, home computers, cell phones, Palm Pilots, Blackberries, Treos, instant messaging files,

back-up systems and legacy computers. Companies also need to think in advance about how to best preserve and retrieve their information. To do this, companies need to create, implement and ensure compliance with a reasonable records retention policy. Such a policy should at least: (i) provide guidance about how to dispose of documents that are old and/or no longer useful to the company; (ii) include a procedure for creating a "litigation hold" on documents that relate to ongoing or anticipated litigation and must include a plan for turning off automatic delete functions in company computer systems especially e-mail systems; (iii) set forth who and how systems will be searched and how relevant and responsive data will be gathered and replicated for production; (iv) spell out how a company will deal with metadata (computer codes and hidden data revealing history, revisions and "data about data"); and (v) specify how relevant company personnel will be educated and trained about policies and procedures concerning document retention and electronic discovery.

Electronic discovery can be time consuming and costly. In addition, the penalties associated with failing to comply with electronic discovery obligations can be significant and often can have a profound effect on the eventual outcome of a case. Some planning and preparing now, however, can help minimize costs later and make the sometimes overwhelming task of document discovery orderly, thorough and manageable.

About Linda Singer Roth, Counsel

Linda focuses her practice on commercial litigation. She has handled numerous matters involving breach of contract, unfair competition, misappropriation of trade secrets, fraud, real estate, construction disputes, partnership disputes, computer law, product performance and products liability. Linda can be reached at lroth@tarterkrinsky.com.