

LawClips

June, 2011
Vol. 11, No. 2

Topic for the Month

Electronic Compliance

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New Rules Regarding Electronic Discovery in Wisconsin

The State of Wisconsin has passed new discovery rules for litigation dealing specifically with Electronically Stored Information (ESI). These rules significantly impact clients whose cases rely heavily on ESI improving their claims or in defending claims brought against them.

Discovery includes requests for production of documents and interrogatories (written questions). In answering requests for documents and introducing documents when answering interrogatories, the party needs to include all stored ESI that would otherwise be available as a hard-copy document. As with all document requests, a party must produce documents that are kept in the usual course of business or must organize and label the documents to correspond to the categories in the discovery request. This is true for ESI as well.

The party requesting the ESI may, but is not required to, choose the form or forms in which it wants ESI produced (i.e., which may include native file productions or productions in some generic file format, such as PDF (Portable Document Format), or TIFF (Tagged Image File Format) images). If the requestor does not specify a form, the responding party must identify the form it intends to use for producing ESI. If possible, the parties should agree to the form of the ESI produced in advance of the requested production where ESI discovery is an important aspect of the case.

The new law requires the preservation of ESI in the face of pending or threatened litigation. This is not a passive obligation but rather an affirmative one. As soon as it is reasonably clear that litigation is probable, the client's attorney has the responsibility to monitor the client's compliance with the preservation of such information. Failure to prevent the destruction of ESI, even if unintentional, can result in charges of evidence spoliation and subject that party to sanctions from the Court. Therefore, it is imperative that active steps be undertaken by all concerned to preserve and protect ESI, which may be material to the parties' litigation. However, absent exceptional circumstances, a Court may not impose sanctions on a party for failing to provide ESI lost as a result of the routine, good faith operation of an electronic information system.

Companies should develop and implement an electronic records system, which includes a procedure for governance and compliance with

all applicable legal regulations on the retention and production of electronic records. In addition, there should be a written policy on how those electronic records are maintained and organized, including identification, retrieval, preservation and disposition.

Before litigation or a government investigation is threatened or otherwise anticipated, a client should consider adopting and implementing a litigation response plan that provides a road map to quickly identify the types and location of records, paper and electronic, in its custody and control. The plan should also provide a protocol for retrieval and preservation of this information. For more information on setting up a document retention policy, visit www.wisbar.org, Wisconsin Lawyer Magazine, May 2011 issue, Electronically Stored Information: Know When to Hold It and When to Hit Delete.



Michael Kirschling

Care needs to be given by clients in how they manage, maintain, identify, retrieve, preserve and dispose of ESI. Such actions can have a great impact on a client's case where ESI is an integral part of the matter. For more information regarding electronic discovery contact Attorney Michael J. Kirschling or Attorney



Christina Peterson

ADDITION OF NEW ASSOCIATE

Please join us in welcoming Joshua M. Koch as a new associate with the Stellpflug Law Firm. Josh is a native of Green Bay and is a graduate of Green Bay West High School. He graduated from UW-La Crosse with a bachelor's degree in political science and a minor in history. In 2009, Josh graduated cum laude from the University of Wisconsin Law School. While in law school, he served as a judicial intern for Wisconsin Supreme Court Justice David Prosser. Josh's practice areas include estate planning, agricultural law, real estate development law, employment law, worker's compensation law, general litigation and appellate practice. We feel Josh is a great addition to the Stellpflug Law team. Welcome Josh!



Joshua M. Koch