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Discovery of Electronically Stored Information

Unfortunately, litigation or the threat of litigation is a fact of life for all businesses. One of the costliest parts of any lawsuit is discovery – the exchange of information and documents relevant to the issues involved. Today, most information is kept in some type of electronic format. New federal rules have been established to deal with the specific issues involving production of electronically stored information. In addition, some state courts have already adopted these new rules, and it is expected that most courts will adopt similar rules.

Electronic information includes, for example, e-mail and attachments, databases, text documents, spreadsheets, instant and text messages, and digital voicemail messages. Electronic discovery ("E-Discovery") requirements can be onerous because of the way that electronic information is created, modified, stored, communicated, and deleted throughout a business' computer system. It is estimated that each employee generates more than 800 megabytes of data per year.

Every business must be aware of what electronically stored information it keeps and its obligations in the event that it becomes a party to a lawsuit. Just as important, companies must have a formal policy regarding data deletion. Keeping outdated e-mails or other data on individual employee PCs, servers or back-up tapes can lead to trouble.

The most notable aspect of the new rules is that they require parties to a lawsuit and their counsel to address electronic production issues explicitly and early, both to avoid the loss of relevant information and to ensure production in usable formats. The new rules also seek a balance between the need for preservation and disclosure of electronic data and the burden and expense of preserving and producing such information. The key to this balance is accessibility of the data. All relevant information which is reasonably accessible must be produced. However, even inaccessible data which is retained may have to be produced under certain circumstances.

Every business should be prepared to comply with the new E-Discovery rules long before any litigation is on the horizon. Therefore, every business should:

- Establish a well thought-out records retention policy that takes into account any statutory or regulatory obligations.

- Ensure that someone is in charge of records retention and that he or she knows what to do and is qualified to do so.

- Disseminate the records retention policy to all employees and test the employees.

- Set up a response team each time there is a lawsuit in order to preserve documents.

- Consult outside counsel regarding the records retention policy.

- Retain an outside vendor, if a specific case warrants it, to assist in organizing E-Discovery.

- Encourage outside counsel to raise preservation issues at the earliest opportunity.

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• Be very careful to avoid destruction of documents when it is clear that there is a duty to preserve, as sanctions can be imposed when documents are destroyed.

These suggestions are not intended to be all-inclusive, but are guidelines. Every business owner should consult with counsel to discuss what may be required for his or her business.

Disclosing Defects When Selling Your Home

As the "Baby Boom" generation approaches retirement, selling the family residence and downsizing is often a key element of a successful strategy. However, careful thought should be given to completing the Property Defect Disclosure Statement required under Illinois law.

The Illinois Residential Real Property Disclosure Act requires sellers of residential real property to complete an extensive disclosure document. The required disclosures include a significant laundry list of potential home defects, and must be provided to the prospective buyer before the sale can be concluded.

What is a conscientious seller to do? First, the seller is not liable for any error, inaccuracy, or omission of any information if the seller had no knowledge of the error, inaccuracy, or omission. Second, if the seller had a reasonable belief that a material defect or other matter not disclosed had been corrected, then the seller is off the hook. Third, a seller is not responsible if he is relying on information provided by a public agency or by certain licensed individuals, such as engineers, land surveyors, or pest control operators, and the seller had no knowledge of the error, inaccuracy, or omission.

Finally, while the seller is not obligated to make any specific investigation or inquiry in an effort to complete the disclosure statement, he must disclose material defects of which he has actual knowledge. Careful attention to the disclosure statement up-front will save time and expense later because violations of the Act may result in the assessment of damages and attorneys fees on the seller. The following points should be carefully considered as the disclosure statement is prepared:

• Read each disclosure carefully and literally. If you have a particular item of concern in connection with a requested disclosure, it probably means you need to disclose and explain it.

• Refer back to the sales documentation for your residence (if purchased after 1994, when the Act was passed) and see if your seller made any disclosures to you when you bought the home. If he did, you may need to address them.

• If you are aware of existing reportable defects in your home, it is probably worth your while to repair them now (and retain documentation) so that they don't need to be reported when the home is sold.

• If you have experienced defect problems in the past, but have successfully remedied them, then you don't have to disclose the item. BUT be certain to retain the documentation supporting your expenditures for the successful repair.

• Beware of the "AS IS" exception set out on the disclosure form. If the non-disclosed defect is serious, the courts have ignored the "AS IS" language and have imposed liability on the seller.

• Also, while the statute of limitations for violation of the Act is one year, usually from closing, the defective disclosure may also entitle the buyer to claim common law fraud, which has a significantly longer limitations period.

In conclusion, the safest course is to repair and document any reportable defects well in advance of sale. But, in any event, be certain to disclose any existing defects at the time you execute the Disclosure Statement.

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