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Electronic Discovery: Preserving Electronically Stored Information

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Advances in technology have caused significant changes in the way civil discovery is conducted. Before the advent of the computer age, most documentation was easily identified as paper. Today, however, documentation is more likely to take the form of an email, text message, or computer file. Just as society's method of communication has evolved, so has the law. California's Electronic Discovery Act (Code of Civ. Pro. § 2016.010 et seq.) allows litigants to obtain electronically stored information ("ESI") through the discovery process. As a result, when a party reasonably anticipates litigation (whether by filing a lawsuit or by being sued) there is a duty to preserve all ESI that may be discoverable.

What is "ESI"?

ESI should be defined as broadly as possible. ESI includes any information stored electronically, magnetically, digitally, or optically, such as email, voicemail, instant messages, text messages, sound or video recordings, word processed documents, spreadsheets, and other similar electronic media. Devices used to store, produce, and transmit ESI include computers, laptops, servers, cellular phones, handheld wireless devices, and the like. ESI also includes information about electronic data called "metadata." Metadata is a hidden recorded history about an electronic file's creation, modification, location, and size, which can be vital to a document's significance in litigation.

When does the duty to preserve ESI arise?

The duty to preserve ESI arises when a party reasonably anticipates litigation. Since there is no bright-line rule as to when litigation can be "reasonably" anticipated, it is best to preserve ESI at the time a dispute arises, whether a lawsuit has been threatened or not.

Who does the duty to preserve ESI extend to?

In the case of a common interest development (homeowners associations, planned developments, condominium projects, community associations, maintenance associations, etc.), directors, officers, committee members, managers, agents, and employees all have a duty to preserve ESI once litigation is anticipated. Additionally, any vendor, consultant, or other third party who may have ESI related to the dispute has a duty to preserve that ESI. For example, if the dispute is over financial expenditures, the Association should notify its accountant in writing to preserve ESI in his or her possession that is related to the dispute. The same applies to other

vendors, depending on the nature of the dispute. If a director utilizes his work email account, computer, or cellular phone to conduct association business, his employer would also be subject to the duty to preserve ESI under its control. Extending this preservation duty to the director's employer as a result of communications outside the scope of the director's employment can have negative implications for the director as well as the Association if the ESI is not properly preserved. Therefore, directors and committee members should be careful from where they send and receive email, and from what account. Directors should consider setting up a separate email account solely for association business. Associations may also consider creating their own domain name and supplying email addresses to its directors and committee members.

What do I need to do to preserve ESI?

Once litigation is anticipated, refrain from deleting or destroying any ESI that exists. Enact procedures to prevent future deletion or destruction of ESI and ensure that all automatic computer operations that delete ESI by age, capacity, or other criteria are turned off. Do not overwrite or erase any back-up media and do not use any defragmenting or compression programs, or metadata scrubbers. Note that when ESI is "deleted" it can still be recovered. Therefore, be careful to preserve all ESI at the appropriate time. The penalties for failing to preserve ESI can be significant, and the penalties for purposely deleting or destroying ESI can be even worse.

How do I properly dispose of ESI when litigation is not anticipated?

The Association should implement a policy on ESI destruction and deletion for use during times when litigation is not anticipated. If the Association has such a policy in place (for example, ESI will be purged after five years if no litigation is anticipated), it will be harder for a challenging party to claim that evidence has been improperly destroyed than if ESI is randomly deleted.

In a time where email and text messages are often a more common means of communication than speaking face-to-face, associations must be aware of when the duty to preserve ESI arises and to whom it extends. Every time you push the send button, you are creating a potentially discoverable document. Protect your association from potential discovery challenges and penalties by enacting proper policies on the use and storage of electronic information.