MEMORANDUM

Date: November 14, 2007

From: Locke Lord Bissell & Liddell LLP

Subject: **Changes In The Discovery Of Electronic Communications: Are You Ready?**

Introduction

On December 1, 2006, a series of amendments to the Federal Rules of Civil Procedure ("FRCP") governing discovery in court litigation took effect. The amendments adapted the discovery rules to better accommodate the role of electronically stored information (such as e-mail) in court proceedings.

Even if your company does not currently have ongoing court litigation, the new rules will have a profound and far-reaching impact on your business. All companies must now be sensitive to the fact that a wide array of electronic communications and documents will be the focus of litigation in the future. For example, if you are sued by an employee for discriminatory termination, that employee's attorney can seek the production of, among other things, all e-mail communications related to the termination decision. You will likely be required to produce the e-mail in electronic—not paper—form. Oftentimes, the electronic version of an e-mail contains hidden data that does not print in a hard copy, such as information about when the e-mail was edited, who did the editing, and who may have been blind-copied on the e-mail.

Courts and plaintiff's lawyers are waking up to the reality that e-mail and other forms of electronic communication are the predominant form of business communication and contain a great deal of essential information regarding a company's activities. In light of this, all companies should take proactive steps to prepare for the possible discovery of electronic communications. Courts can impose severe sanctions in situations where a company negligently or intentionally destroys or deletes relevant electronic communications.

The Rules Changes

The changes to the Federal Rules are relatively technical and apply only during active court litigation. In summary, however, the new rules incorporate five significant changes to the way in which parties handle the production of documents in litigation:

- Parties to litigation must now discuss and agree on a plan for handling the production of e-mail and other electronically-stored documents, including the form in which such documents will be produced.

- The new rules require that the producing party be able to distinguish between categories of electronically-stored documents—those that are "readily accessible" and those that are not. A party will be required to

produce accessible electronic documents, but will not initially be required to produce documents that are not readily accessible unless the opposing party convinces the court of the need for these documents. However, a party relying on inaccessibility as an excuse for not producing certain documents may need to prove to the court that retrieving these documents will be unduly burdensome.

- The new rules require, in general, that parties produce documents in the form in which they are "ordinarily maintained." In other words, if you maintain e-mail messages in an electronic format, that is the format in which you will generally need to produce them to the other side during litigation.

- The new rules address the fact that, because of the large volume of electronically-stored documents, parties may inadvertently produce documents that are covered by the attorney-client privilege or the work product doctrine. Typically, a privilege covering a document is waived if the document is disclosed to the other side. The new rules allow parties to take back documents that were inadvertently disclosed as part of a large production of electronic documents without destroying the privilege.

- Lastly, the new rules recognize that information stored electronically may from time to time be lost during the good faith, routine operation of IT systems. The rules permit a court to impose sanctions for a party's failure to provide certain electronically stored information only when that party did not take adequate steps to preserve the information.

Spoliation

During the discovery phase of litigation, the opposing party may ask your company to produce various electronic documents or pieces of electronically stored information. If you are unable to comply with this request because the documents and information have been deleted from your systems in bad faith, a judge can award sanctions against your company (e.g., monetary fines) or instruct the jury to assume that the deleted information was damaging to your position and was purposely deleted to avoid disclosure.

The deletion of evidence in bad faith is called "spoliation." Spoliation of evidence can be devastating and often can determine the outcome of litigation. For example, in *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005), the court granted a former employee's motion for sanctions against Echostar Communications after Echostar failed to suspend the automatic deletion of electronically stored information when it learned of the plaintiff's complaint of sexual harassment. Echostar's document retention policy provided for the automatic deletion of all electronic information after 21 days, and the deletion of a former employee's files 30 days after his or her departure. The employee in this case had informed Echostar of his belief that he had been sexually harassed before he left the company, but Echostar failed to preserve the electronically stored information relevant to his complaint. The court found that sanctions were appropriate for this behavior.

In addition to court-ordered sanctions and negative inferences, severe spoliation of evidence can amount to a federal obstruction of justice crime, as in the case involving former accounting giant Arthur Andersen.

Proactive Steps To Prepare For Electronic Discovery And Protect Your Company From Liability For Spoliation

A relatively recent survey by the ePolicy Institute revealed that most employers did not have a written e-mail retention and deletion policy as of 2004. Nearly 24% of those polled said that they did not know the difference between electronic business records that must be retained versus insignificant messages that may be deleted.

In light of the changes to the Federal Rules of Civil Procedure, and in view of the dangers of spoliation liability, it is imperative that all companies have a coherent document retention policy that applies to electronic communications. Adhering to a document retention policy will make life much easier in the event that you need to retrieve documents during litigation. Companies with solid electronic document retention programs will also substantially minimize any possibility of spoliation liability. A good document retention policy should specifically address the duty of employees to retain important e-mail communications, and your company should have the computer hardware and software in place to facilitate the retention of such materials.

In addition to creating a coherent document retention policy covering electronic documents such as e-mail, the following items should be considered in preparation for the new electronic discovery process:

- Determine which sources of electronically stored information are not relatively accessible due to undue burden or cost. Be prepared to explain why there is undue burden or cost as to those sources. Knowing, before litigation begins, which sources fit the definition of "not reasonably accessible" will help make your response to any future electronic discovery requests more efficient and smooth.

- Be prepared to implement a "litigation hold"—a cessation of all deletion or destruction of documents relevant to litigation—upon notice of an actual or potential claim against your company. Establish a process where the person responsible for implementing a litigation hold is notified every time notice of *potential* litigation is received by *anyone* within the company.

- Educate all employees about your retention policy, and use examples to explain why it is so important to follow them.

- Ensure that electronic documents are maintained either in their original format or in a reasonably usable format. A reasonably usable format is one that does not differ in functionality from the original format of the document. For example, documents should not be stored in a format that removes the metadata or the ability to search the document.

- Become familiar with the basic operation of your company's IT system. Help executives and legal counsel to understand them as well, so that you are prepared to develop a plan for electronic discovery that is favorable to your company's interests in the early stages of litigation.

By taking some proactive steps now, you can avoid some potential nightmares later.