

## **Electronic Discovery Procedures**

On April 12, 2006, the U.S. Supreme Court approved certain amendments to the Federal Rules of Civil Procedure ("FRCP") concerning discovery of electronically stored information (the amended rules of the FRCP, rules 16, 26, 33, 34, 37, 45 and Form 35, are collectively referred to as the "Amendments"). The Amendments took effect on December 1, 2006, and codified a party's obligations with respect to the discovery of electronically stored information.

Electronically stored information, or "ESI", includes, but is not limited to, voice mail messages and files, back-up voice mail files, e-mail messages and files, backup e-mail files, deleted e-mail, data files, program files, backup and archival tapes, temporary files, system history files, Web site information stored in textual, graphical or audio format, Web site log files, cache files, cookies and other electronically-recorded information.

The Amendments address court management of discovery and the manner in which ESI is produced by parties and third parties in federal court litigation. Even though the Amendments primarily affect parties to litigation, companies still have an obligation to preserve ESI under common law.

### **How do the Amendments Affect Your Company?**

If your company has not already done so, it should implement and maintain a document retention/destruction policy. An appropriate first step in developing a document retention/destruction policy is to establish a committee of employees representing IT, management and human resources (the "ESI Committee") that will work directly with your company's counsel to draft and implement a plan that addresses various issues relative to ESI and the Amendments. Once the ESI Committee has created the written document retention/destruction policy, it should take necessary steps to ensure that all of its employees, as well as its attorneys, are aware of, and know how to comply with, such policy.

Any document retention/destruction policy that is implemented and consistently maintained in good faith is appropriate. There is no 'right' or 'best' document retention/destruction policy, so long as it is consistent. It is a good idea to periodically consult your counsel to ensure that your company's policy is being properly implemented and maintained and is well known to your employees.

### **Reasonably Anticipated Litigation and the 'Litigation Hold'**

If your company reasonably anticipates litigation, it must suspend its routine document retention/destruction policy, if such policy is then in place, and implement a 'litigation hold' to ensure preservation of relevant documents. In addition, once litigation has been filed, or is reasonably anticipated, your ESI Committee should send out notice to your company's employees instructing them to freeze the deletion of any data or databases that may be relevant to the pending litigation. The duty to preserve documents after a 'litigation hold' is in effect requires constant communication prior to, and during the course of, litigation to ensure that all employees are abiding by the 'litigation hold'. Your company could be subject to court

sanctions if it destroys relevant documents as a result of its failure to communicate the proper instructions to its employees regarding the 'litigation hold'.

Once a 'litigation hold' is put into place, your obligations under the FRCP take effect. In order to fully comply with its obligations under the FRCP, your company should: 1) identify the responsive ESI (from all persons and locations that may have relevant ESI); 2) preserve the responsive ESI; 3) collect the responsive ESI; 4) process and filter the ESI (access and duplicate, usually through an electronic information service); 5) search, retrieve and analyze the ESI while excluding privileged or otherwise confidential material; 6) produce the ESI (the FRCP allows a party to produce in the form it is ordinarily kept, unless a requesting party otherwise specifies a different form that is not unduly burdensome).

## **Conclusion**

In summary, if your company has not yet established a document/retention policy, it should strongly consider establishing an ESI Committee to develop such a policy. However, even if your company maintains a document retention/destruction policy, it has a duty to preserve, retain and produce all potentially relevant ESI if your company is a party to federal litigation or reasonably anticipates federal litigation. Because the foregoing requirements may seem onerous and daunting, we encourage your company to work together with its attorneys to create, implement and consistently maintain a document retention/destruction policy and further familiarize itself with the Amendments.