Administrative Law Division
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E-MAIL AS IT PERTAINS TO CIVIL/CRIMINAL HEARINGS

1. Your supervisors and chain of command have the capability of seeing all e-mails sent from your computer. Except for a few applicable privileges, such as attorney-client or attorney work product, electronic products, such as e-mail, are as readily discoverable in a civil or criminal hearing or subject for release as a result from the Freedom of Information Act and similar requests. A good rule of thumb is to consider how the content of your e-mail would reflect on yourself or the Army if it was broadcast on the news. Be cautious about e-mailing negative observations based mainly upon interpersonal conflicts and the subject of the e-mail. If such communications are necessary, consider using the telephone.

2. What should be preserved and when?

a. As a general rule, electronically stored information is discoverable, and must be preserved, as long as it likely contains information the disclosing party may use to support its defenses. Courts are likely to grant discovery of this information and will generally permit discovery of personal computer hard drives, electronic databases, and all information existing on a server.

b. The duty to preserve electronic evidence is when a party first becomes aware that a current dispute may result in formal litigation. Keep in mind that the duty to preserve evidence is not necessarily when you tell the employee there is an issue, but could happen well before with inter-office correspondence.

3. What if you just delete the e-mails you don't want to share? Under the Federal Rules of Civil Procedure, stopping e-mails from being deleted when legal action is anticipated or actually pending is a **legal requirement** imposed on all organizations, including government agencies. Failing to comply with stopping of e-mail deletions may cause several unwanted consequences including spoliation (the hiding or destruction of litigation evidence), court sanctions such as fines and the imposition of an adverse inference instruction by the judge. An adverse inference instruction presumes that the failure to produce the requested records was because the records would have been harmful to that party.

4. Bottom line is to always being careful of what goes into e-mails and safeguard those that may be discoverable. You may be asked to produce e-mails or other electronic correspondence that could be two years old or older. If you don't want it on a billboard, don't e-mail it.