



## New Federal Rules Elevate E-mail As a Risk for Boards and Presidents

BY PAMELA J. BERNARD

**D**o you know where your university's e-mails are stored? If your answer is that your director of information-technology services can tell you, you may have exposure in an emerging area of risk for colleges and universities.

In December 2006, the Federal Rules of Civil Procedure were amended to require institutions to preserve electronically stored information when litigation or other legal disputes arise. These new rules mean colleges and universities must 1) understand what electronic information they have; 2) know where it resides; and 3) have mechanisms in place to trigger "litigation holds." Litigation holds are instructions to employees and trustees to preserve electronic information so the information is not destroyed. Left unattended, a system's automatic deletion of discarded e-mails or the routine "cleaning" of a departed employee's laptop can constitute improper destruction of relevant evidence in a lawsuit.

A single oversight can result in dire consequences for the institution, including high-dollar sanctions; the wrath of a judge and a jury; and damage to reputation. Not knowing how to preserve electronic information quickly and accurately also weakens your ability to defend lawsuits. Our legal adversaries understand that demanding broad litigation holds might result in a large early settlement from an unprepared defendant.

Unlike corporations whose IT functions may be centralized, universities face greater challenges because their operating units typically are highly decentralized. Many colleges or schools within an institution have their own IT groups that report directly to a dean. Faculty members work evenings or weekends from home, storing electronic information on a variety of devices other than their work computer. And, many colleges and universities pride themselves on lean staffing, so they may not have the staff needed to quickly and accurately respond to litigation holds.

What should boards and presidents do now?

- "Map" your systems. E-mail is a hot area for our legal adversaries to mine when they seek information that could damage the institution. Whether

done by the internal IT department or an outside company working with IT, the institution needs to understand the infrastructure of its information systems, identify the types of data on them, determine who is in charge of administering them, and understand how they are backed up.

- Understand disputes. The institution's legal counsel must educate key staff members about the kinds of disputes that can trigger litigation holds. Colleges and universities without in-house legal counsel need to designate a high-level administrator to recognize when a dispute may require a litigation hold, and they should have ready access to outside counsel to help evaluate it.

- Bring legal and IT staff together. To react to a litigation hold they both must already understand the systems and legal requirements. For example, the affected internal IT system administrator must understand the responsibility to "turn off" automatic deletion instructions for e-mail deleted from an inbox. IT staff must be able to identify quickly which employees and which information systems will be affected so they can take a snapshot of the data or prevent the relevant back-up copies from being overwritten.

- Review your computing policies. Your computing policies may need review to address the balance between users' expectation of privacy and the institution's need to review e-mails in anticipation of litigation.

The requirements of the federal rules regarding preserving electronic information should become part of the institution's risk inventory. Boards can designate oversight through an appropriate committee, and a president can designate a key staff member to organize the institution's efforts. Like many risks in academe, this is a risk that cannot be managed effectively by a single unit.

Managing such complex risks requires close articulation between the legal and IT staffs and across multiple IT systems, with a designated point person who really knows where your university's e-mails are stored.

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The amended Federal Rules of Civil Procedure now require institutions to preserve electronically stored information.