



# THE LEGAL ISSUE

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## "You've Got Mail" – And We *May* Ask You to Keep It

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

The University of Colorado has had, since 1938, an obligation under the Federal Rules of Civil Procedure to preserve and, if requested, produce to an opposing party paper documents that may be relevant in a federal lawsuit. On December 1, 2006, changes to the federal rules took litigation into the *information age* and extended this obligation to specifically cover "electronically stored information" that is reasonably accessible by the University. Additionally, the University has an obligation to preserve and produce electronic information or records unless to do so would be an "undue burden or cost" to the University. Although this obligation exists under the federal rules, state courts are likely to adopt procedures similar to the federal courts.

*What are electronic records?* The vast majority of University business and communications are completed through the use of electronic records or media. Electronic records may include electronic mail, voice mail recordings, Microsoft Word documents, spreadsheets, calendars, digital photographs or recordings, and other records or information maintained in an electronic or digital form. Electronic records, in many respects, are rapidly replacing the paper world just as electronic mail is replacing snail mail. Just as many different forms of electronic records exist, the hardware that is used to store, manage, and transmit such electronic records is continually expanding. Electronic records may be stored or maintained on University servers, desktop or laptop computers, compact disks, flash drives and other portable devices, disks, and other electronic data storage devices. The federal rules, importantly, compel the University: (1) to have a clear understanding of the type of electronic records that may be relevant in a particular case; and (2) to know where to locate such electronic records so that they may be preserved (this is a significant responsibility shared by all University employees). University Counsel will work closely with our information technology professionals to identify and maintain (if necessary) electronic information at the University.

### **What triggers or creates an obligation to preserve electronic records?**

The University's obligation to preserve and produce electronic information or records is "triggered" or created based on certain events, such as when the University receives a summons and complaint (including from state or federal agencies), certain types of subpoena, a notice of claim under the Colorado Governmental Immunity Act, a demand letter from an attorney, or when a serious event takes place on campus. These are generally referred to as "triggering events." Under the federal rules, "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" Committee Note to Federal Rule 37. Therefore, upon receipt of any of the documents that may be considered a

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## **“You’ve Got Mail”**

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“triggering event,” an employee should immediately call a University Counsel office so that University Counsel may begin immediately placing a litigation hold on relevant electronic records. All University employees should be prepared to assist University Counsel in identifying and retaining relevant electronic records.

### **What didn’t the federal rules change?**

The changes in the federal rules create obligations to preserve and produce electronic records, but the changes did not eliminate or modify common protections for communications, such as the attorney-client privilege or the work product doctrine. Additionally, the federal rules did not expand the ability of opposing parties in litigation to receive records or information from the University as part of discovery. Opposing parties must still demonstrate that the records or information they seek is relevant to the case, or is reasonably likely to lead to the discovery of records or information relevant to the case.

Moreover, the federal rules do not prohibit the routine deletion or destruction of electronic records, provided such destruction is conducted in “good faith.” Therefore, automated electronic record destruction completed in accordance with routine University practices (or in accordance with the University’s Record Retention Policy, upon its adoption) are permissible, *provided* that University Counsel has not specifically requested that such electronic information or records be preserved. Additionally, the federal rules do not dictate how individual employees must manage (including how they preserve or destroy, i.e., delete) their electronic records.

However, routine deletion or destruction of electronic records must be done in “good faith” under the federal rules. “The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” Committee Note to Federal Rule 37; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Therefore, if University Counsel directs you to save or maintain electronic records, you (and the University) may not rely upon your prior practice of deleting similar records to excuse the deletion of records you were specifically directed to preserve. Simply put: if you wonder whether you should keep an electronic record once you’ve been directed by University Counsel to retain certain records, please call University Counsel to obtain direction. If in doubt – save!

### **What happens if an electronic record central to a case is destroyed?**

If an electronic record central to a case is accidentally or intentionally destroyed after a triggering event the University may be sanctioned. This may include monetary sanctions, denial of certain testimony favorable to the University, or even an “adverse inference” ruling, which means that the judge could instruct a jury that it should infer that the lost or destroyed electronic record (which the University believes would support the University’s case) *supports the opposing side’s case*. Maintaining electronic records includes preventing a records’ deletion. Therefore, ensuring that electronic records are maintained on a system that is continuing backed up is important. If you have questions about where your electronic records should be maintained, contact your campus University Counsel office.

## **Beyond the Abstract: A ‘Real Life’ Application for U**

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

The following is a hypothetical situation provided to illustrate some of the possible electronic records that *may* be relevant in litigation.

John Doe, an assistant professor in the College of Excellence, has been denied a promotion to associate professor from assistant professor and has left the University. Dr. Doe has filed a federal lawsuit against the University claiming that he was denied his promotion because he is male, in violation of Title VII of the Civil Rights Act of 1964. Dr. Doe’s lawsuit alleges that the primary unit was pressured by the college’s Dean, a woman, to deny his promotion because she wanted

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## Beyond the Abstract: A 'Real Life' Application for U

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to bring in more women to eliminate the "good old boy" mentality in the college's faculty. Dr. Doe mentions in his lawsuit a series of e-mail communications and personal hand written notes that he heard about among the primary unit members during the course of its month-long review which he says supports his claims. Additionally, he claims that a few internal memoranda between the primary unit and the Dean's advisory committee criticize two of his articles in his dossier as being "inconsistent with professional standards in his discipline," despite the fact that last year similar articles were given widespread praise as "exceptional works" by a primary unit committee when it recommended promotion of his female colleague, Sally Roe, to associate professor. Dr. Doe also claims that the Dean's advisory committee had agreed by e-mail before his review even started that since there were not any women in his department, he should not be promoted. Dr. Doe claims that the Dean's advisory committee had a secret, off-campus meeting with the primary unit to seek to influence the primary unit's decision, which Dr. Doe claimed was cloaked in the guise of a "holiday party." You are the Dean of the College of Excellence, and you were just personally served with a copy of the lawsuit. The Dean believes the lawsuit is without merit, and is confident the records support this position.

### What happens from here?

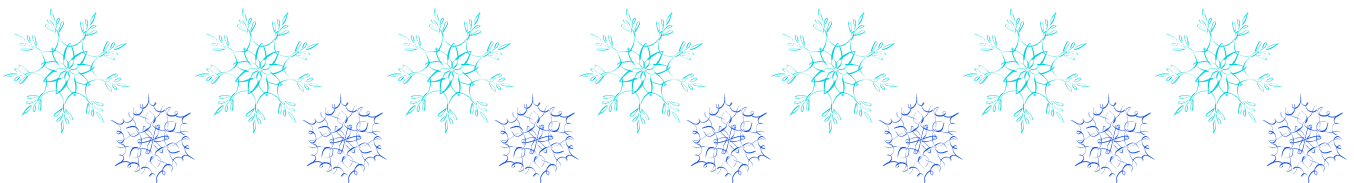
First, you should immediately call University Counsel and advise them that you have been served with a lawsuit. University Counsel will review the lawsuit and advise you by letter (and probably in person) of the paper and electronic information and records you should maintain. Additionally, you may expect University Counsel to discuss with you the claims set forth in the lawsuit. Your obligation to maintain records does not begin and end with you as the Dean. Your help will be essential in identifying persons who may have relevant records, and in ensuring that others assist in identifying and maintaining relevant electronic records.

### What electronic information and records may be subject to a "litigation hold"?

The following electronic information or records would likely be subject to the litigation hold:

- (1) the Dean's e-mail communications with the primary unit members and Dean's advisory committee before, during, and after the primary unit's review;
- (2) the Dean's e-mail communications with anyone else related to Dr. Doe's and Dr. Roe's promotion;
- (3) electronic versions of the internal memoranda (if any) between the primary unit and the Dean's advisory committee related to Dr. Doe's and Dr. Roe's promotion;
- (4) e-mail communications among primary unit members related to Dr. Doe's and Dr. Roe's review;
- (5) e-mail communications among the Dean's advisory committee members related to Dr. Doe's promotion;
- (6) electronic versions of any records related to Dr. Doe's and Dr. Roe's promotion;
- (7) e-mail communications between or among academic administrative leadership related to Dr. Doe's and Dr. Roe's promotion;
- (8) any e-mail communications regarding the gender composition of the faculty in the College;
- (9) electronic calendar records for the primary unit and the Dean's advisory committee members; and
- (10) e-mails related to the holiday party.

Moreover, remember that paper copies of all relevant records or documents related to Dr. Doe's denial of promotion must also be maintained, including paper copies of the electronic records described above. Relevant paper records would include not only the internal memoranda and personal hand written notes specifically mentioned by Dr. Doe, but also paper copies of his (and Dr. Roe's) dossier, articles, and the paper communications among the members of the primary unit(s), the Dean's advisory committee(s), and the Dean. Coordination of the retention of records (*paper or electronic*) should be made through University Counsel.



# The Federal Rules: *Common Questions and Answers*

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

## *Record Retention and Organization*

- Q:** If I receive a letter from University Counsel asking me to keep my electronic records, should I create a separate e-mail folder and electronic document folder and place e-mails and relevant documents in such folders?
- A:** Yes, putting e-mails in a separate folder will allow you (and us) to retrieve your relevant e-mails without having to sort through unrelated e-mails. This is also true for Microsoft Word documents, spreadsheets, and similar documents. This process will assist University Counsel in preserving (and presenting) the most relevant evidence and will save you retrieval time if at a later date a particular e-mail or document becomes relevant.

## *Access by Opposing Party*

- Q:** If we save everything that's related to a lawsuit, won't that give the opposing party access to all of the University's privileged or confidential communications?
- A:** The new federal rules do not give opposing parties greater rights to University communications, such as e-mail, than they had before the new rules went into effect. In the process of requesting documents and communications from the University, an opposing party must still establish that what they are requesting is relevant to the matter or is reasonably calculated to lead to the discovery of admissible evidence.

## *My Home Computer*

- Q:** I occasionally work on University matters on my home computer. Will an opposing party have access to my home computer?
- A:** According to the proposed University's Record Retention Policy, University business should be conducted on University computers. If you work on University matters on your home computer, it's possible that the electronic documents on your computer may be relevant to a complaint and you may be asked to produce the electronic documents or the computer. Therefore, it's in your best interest to conduct all University business on University computers and through University servers.

## *Aren't Paper Copies Good Enough?*

- Q:** I always print out my e-mails and save the printed copies of the e-mails in a labeled folder. Can I delete the e-mail once it's printed?
- A:** If you receive a letter asking you to maintain your e-mails, you should not delete the e-mails if they are reasonably related to the complaint. Although the electronic version of the e-mail may seem identical to the paper version, the electronic version contains important data such as to whom the e-mail was sent, the date and time when it was sent (or received), and other information that may be relevant at a later date.
- Q:** I maintain paper copies of my Microsoft Word documents. Can't I just delete the electronic versions of these documents once I receive a letter from University Counsel asking me to preserve such documents?
- A:** Electronic versions of documents may contain important information regarding the creation of the document and its revision. For example, changes offered through "track changes" in a Microsoft Word contract document may be relevant in determining the course of a contractual negotiation and whether parties intentionally added/removed relevant language. The Committee Note to Federal Rule 26, for example, provides: "Production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as

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“embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image.” Therefore, if you’re asked to keep electronic versions of documents, please do so.

**Q:** I have ten versions of an electronic record (i.e., a contract) starting with the first draft and ending with the final draft that was signed. You asked me to save my electronic versions of the contract. Can’t I delete everything but the final version?

**A:** No, all versions of the electronic document should be maintained. Although a prior version of the final draft may seem irrelevant, it may be very important in the course of litigation.

### ***Don’t we Have Software Programs that can do this Automatically?***

**Q:** Why can’t the University just back up my e-mails so that I don’t have to save or organize any of my e-mails?

**A:** The purpose of saving e-mails and electronic versions of documents is so that these records may be easily retrieved at a later date. These e-mails or documents may assist the University in disproving claims in a lawsuit (including possibly claims against you). While the University may elect to back up e-mail communications or electronic versions of documents saved on a server, having these e-mails or documents organized will assist in their retrieval.

### ***What’s Related to a Complaint?***

**Q:** If I receive a letter asking me to save e-mails and records related to a matter, how do I know if something is related?

**A:** You must exercise your judgment: if you have a question as to whether a communication or electronic record is related to a complaint, you should save the e-mail.

### ***O.k., so How do I Save an E-mail?***

**Q:** If I send an e-mail, how do I save it?

**A:** If you send an e-mail in Microsoft Outlook you can open the “sent items” folder, click on the e-mail to capture it, and then drag it to your labeled folder for saving.

**Q:** Does this mean I have to save all of my e-mails?

**A:** You only need to save the e-mails related to the matter. You may continue to delete unrelated e-mails.

### ***Attorney Communications: Is that a Triggering Event?***

**Q:** I received a letter from an attorney demanding that a student be given credit for a course the student did not complete, and threatening to sue the University if this does not happen. Should I send that letter to University Counsel?

**A:** Yes, any communications received from an attorney related to any aspect of the University’s business should be immediately sent to University Counsel.

**Q:** If I receive a call from a person claiming to be an attorney and threatening to sue the University, do I have to start saving everything immediately related to the attorney’s concerns? What should I do?

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## The Federal Rules: Common Questions and Answers (Continued from page 5)

**A:** Simply because an attorney contacts you doesn't mean that the University will automatically begin saving everything related to that matter. Many times attorneys call the University and a matter is resolved (typically because the attorney does not have accurate information and once informed, discontinues asserting any claim against the University).

### *How Long Must I Save This Stuff?*

**Q:** How long do I have to continue to save my e-mails and electronic records related to a matter?

**A:** The length of time you'll be asked to maintain your e-mail and records will vary and will depend, to a great extent, on the nature of the complaint. More than likely, if it appears that the matter will be protracted, University Counsel will coordinate the retrieval of the electronic records from you so that you do not have to maintain prior records indefinitely.

**Q:** What if you ask me to save my e-mails and electronic records and I do hear from you for a year: may I assume that you don't need these items?

**A:** No, do not delete e-mails or records related to a matter unless you get express written consent or instructions from University Counsel. If you have questions, please ask University Counsel.

**Q:** I have a Blackberry (wireless device for e-mail, etc.) and use this often to read, send, and reply to e-mails. Is there anything special I need to do with these communications?

**A:** If these e-mails are through your University e-mail account (as they should be), the server should already be capturing these communications for you to place into appropriate folders at a later time. Maintaining folders that organize your e-mail communications may be very useful later if the communications become relevant in litigation.

### *More Questions? Let us Know.*

**Q:** Who do I contact with questions?

**A:** Please contact your campus or system University Counsel office if you have any questions. We're here to help.

