



LEGALEASE

"Simplifying Legal Issues"

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Electronically Stored Information

Issues and solutions concerning possible electronic evidence

Most agree that technology has had a positive impact on society. This is especially true in a setting as large and complex as a university. Computers can store vast amounts of data, and an e-mail can quickly and efficiently convey important information. Information retrieval can be so much easier now than even a decade ago when it was not uncommon for a person to spend hours digging through countless file cabinets for a single piece of information.

However, while technology has made life easier in many ways, a whole new set of issues and problems has emerged. In order to destroy information, it is no longer necessary to physically shred massive amounts

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Introducing the Attorneys

Jeanine Arden Ornt, *Vice President & General Counsel*

Jeanine Arden Ornt is the Vice President and General Counsel at Case Western Reserve University. Among other responsibilities, Ms. Arden Ornt is responsible for providing legal counsel and strategic advice to the University as part of the President's leadership team. Prior to her move to Cleveland, Ms. Arden Ornt was the first General Counsel to the entire University of Rochester, including both the Medical Center/Strong Health and the River Campus. Before that, she served as the first General Counsel to the University of Rochester Medical Center & Strong Health, Advisor to the Senior Vice President for Health Affairs, and Vice President & General Counsel for Strong Health Affiliates. Prior to joining the University of Rochester, Ms. Arden Ornt was a Partner in Private Practice, specializing in corporate law and health care. Ms. Arden Ornt received her Juris Doctor with honors from Albany Law School in 1980, served on the law review and was appointed lead articles editor. Currently, among other professional activities, Ms. Arden Ornt serves on the NHLBI Advisory Council, Joint Commissions on Accreditation of Healthcare Organizations' Sentinel Events Advisory Group, National Association of College and University Attorneys Annual Program Committee and teaches at the Case School of Law. [jao8@case.edu]

Colleen Tremi, *Deputy General Counsel*

Ms. Tremi joined the Office of General Counsel full-time in 2003. She focuses on employment law, faculty-related matters, EEO issues, and disability issues. She previously worked in the office as an Assistant University Attorney since 1996. From 1994 to 2003,

of documents; people can – and routinely do – effect the same result with one click of a button. The convenience of this method of document destruction can lead to challenges when litigation arises.

Changing Times Mean New Rules

Congress has confronted these new challenges by amending the Rules of Civil Procedure relating to discovery (i.e., the production of documents during litigation).

“It is important to understand how ESI is generated, stored, archived, and destroyed.”

Electronically Stored

Information, or ESI, is subject to discovery just as any hardcopy document is. Once a lawsuit is filed, the parties must immediately discuss issues concerning ESI. Issues considered during such a meeting would include identifying what ESI is important to the litigation and the location of such ESI.

Reasonably Accessible ESI

Notwithstanding its importance and discoverability, Congress recognized the impracticality of retrieving some forms of ESI. Therefore, parties generally need not turn over ESI which is not “reasonably accessible.” (If ESI is stored in a readily usable format, it would likely be deemed “reasonably accessible.”) However, under some circumstances, even ESI which is not “reasonably accessible” may be required to be disclosed. Therefore, it is very important to understand what information is stored electronically and how it can be accessed if necessary.

Courts generally will not sanction a party for information lost due to routine maintenance or file deletion. However, parties must put a “hold” on all routine file maintenance once they become aware of pending litigation. This means that certain routine IT operations would have to be suspended.

Possible Consequences for Mismanaging or Destroying Discoverable ESI

There are several consequences that may result from the destruction of discoverable ESI. Courts may impose sanctions when requested ESI has been destroyed. A court would treat such a circumstance the same as if one had physically shredded a requested paper document. Furthermore, courts may

make a negative inference concerning the destroyed ESI. For instance, a court could instruct a jury to assume the destroyed information was harmful to your case. There is also the possibility that destroyed ESI could have helped your case had it been available.

Tips on ESI

It is important to understand how ESI is generated, stored, archived, and destroyed. By understanding your ESI, it will be much easier and faster to determine what information can be accessed when needed. This would save time and resources should the ESI become subject to discovery. In addition, understanding your ESI will help day to day business run more smoothly.

In analyzing your ESI, also remember that ESI includes more than just e-mails. ESI also includes digital recordings, digital images, voicemail messages, backup tapes, off-site storage media, and other such items. Take time to recognize your ESI and how to access it.

It could prove helpful to implement a routine system for the maintenance of ESI. Identify when and what electronic information should be stored and destroyed. During discovery, court sanctions may be avoided if a routine maintenance system has been in place.

Finally, remember that ESI is not the only evidence implicated during discovery. While ESI is becoming a very important part of day-to-day life, there is still voluminous information contained in paper documents. The handling of such potential evidence should also be assessed. Along with ESI, you should determine when and what documents are to be destroyed. Determine how and where the documents should be stored.

By taking time to recognize, understand, and appropriately maintain ESI you can potentially save time and avoid sanctions and other negative results in litigation. A good system of document storage and retrieval will go a long way to making this new world of technology and information navigable.◇

If you have any questions about ESI or any other legal matters, please do not hesitate to contact us.

CONTACT US

Phone: (216) 368-4286

FREQUENTLY ASKED QUESTIONS

What are the office hours for the Office of General Counsel?

Office hours are 8:00 a.m. until 5:30 p.m. Monday-Friday, with walk-ins available (appointments suggested). Attorneys are available on-call for emergencies, during after-hours and holidays by contacting the Office of Security at 368-3333.

Is there a notary public available? Yes

What are the alcohol permit procedures? Applicants for alcohol permits should contact the Office of Student Affairs at 368-2020.

How does one obtain legal advice? By contacting the office via e-mail, phone, or fax you will be routed to the appropriate attorney best suited to handle your request.

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she specialized in employment law, education law, and litigation with the firm of Taft, Stettinius & Hollister. She previously served as in-house counsel to Ursuline College. Ms. Trembl served as a law clerk to the Honorable Alice M. Batchelder on the U.S. District Court and the U.S. Court of Appeals for the Sixth Circuit. Ms. Trembl received her bachelor's degree from Albion College, and her Juris Doctor from the University of North Carolina, Chapel Hill. [colleen.trembl@case.edu]

Peter Poulos, Senior Counsel and Chief Litigation Counsel

Mr. Poulos has represented the University for many years in his capacity as a partner at the law firm of Taft, Stettinius & Hollister. He has expertise in intellectual property litigation, as well as general litigation. Mr. Poulos earned his Juris Doctor, summa cum laude, from Case Western Reserve University School of Law. [peter.poulos@case.edu]

Michele L.S. Krantz, Senior Counsel

Michele Krantz joined the University's Office of General Counsel in 2006. Prior to working at Case, Ms. Krantz was an attorney with the Cleveland Clinic Health System East Region (formerly Meridia Health System) for 12 years. She also practiced law in Washington D.C., first with a private law firm and then with the United States Department of Health and

Human Services, representing the Office of Inspector General. Michele clerked for the Honorable Daniel H. Huyett 3rd, of the United States District Court for the Eastern District of Pennsylvania following her graduation from law school. Ms. Krantz received her Bachelor of Science with Distinction from Cornell University and her Juris Doctor from the University of Pennsylvania. She served as Comment Editor on the Law Review. [michele.krantz@case.edu]

Arlishea L. Fulton, Associate General Counsel

Arlishea Fulton joined the University's Office of General Counsel in 2007. She focuses on general corporate, transactional and real estate matters. From 1999 until joining the University, Ms. Fulton was an associate attorney at the law firm of Ulmer & Berne LLP where she was a member of the Business Law and Real Estate practice groups. She represented various entities in connection with formations and general business and commercial matters, as well as parties to commercial real estate transactions. Ms. Fulton received her Bachelor of Science, Magna Cum Laude, from the School of Business & Industry at Florida A&M University, and her Juris Doctor from Case Western Reserve University School of Law. [arlishea.fulton@case.edu] ♦

