

UCLA PRACTICES FOR PRESERVATION OF ELECTRONICALLY STORED INFORMATION [ESI]

Prepared by Campus Counsel, as of November 1, 2009

The information and practices that follow are intended for UCLA administrative, academic and research units. They are subject to change periodically and it is advisable to consult with Campus Counsel for assistance or questions. For more information, please contact Senior Campus Counsel Amy Blum at (310) 825-2284.

A. **Overview**

1. Identify when duty to preserve arises
2. Inquire regarding "key players" and existing data
3. Provide notice of duty to preserve
4. Decide what to retain
5. Collect and retain data
6. Create and maintain written records of efforts

B. **Specifics**

1. Identify When Duty To Preserve Arises

- A. Duty arises when faculty or staff "reasonably should know that the evidence may be relevant to *anticipated* litigation"
- B. Factors to weigh in determining when litigation is reasonably anticipated include but are not limited to:
 1. Court complaint filed
 2. Threat by individual with some degree of specificity
 3. Individual's litigation history
 4. Press or industry interest
 5. Demand letter received
 6. Specific and repeated inquiries/complaints
 7. Complaint with EEOC, DFEH, OCR
 8. Accident occurs on campus
- C. Work with appropriate campus offices to make determination

2. Conduct Inquiry

- A. Determine who are the “Key Players” likely to have potentially relevant material
- B. Determine who are the relevant IT representatives that have the ability to preserve E-Mail and other electronic information
- C. Determine what active data exists with key players
 - Contact key players and discuss their retention practices and what they have saved in readily accessible storage
 - Obtain identity of other individuals who are likely to have potentially relevant information
- D. Determine back-up tape use and retention procedures
 - Contact IT representatives and discuss retention practices for active data and archives, and back up tape accessibility and retention practices
- E. Make a decision about retention of ESI
 - This will be made in consultation with Counsel

3. Provide notice of duty to preserve

- A. Send letters to all identified “key players”
- B. Send letters to identified IT personnel
- C. Receive confirmations from all recipients
- D. Send reminder notices periodically

4. Decide what to retain

- A. Save all potentially relevant ESI on active systems
 - Local Area Network (Desktop)
 - Email Server
 - Hard-drive
 - Portable storage

B. Back-up tapes [Case-by-Case assessment]

- Duplicative of active data:
 - If active data is already being preserved, then recycling of tapes can continue
- *SOLE* source of potentially relevant data:
 - If ESI on back up tapes is not available from readily accessible sources, then tapes may need to be preserved
- Used as archive:
 - If data on tape is made available upon request, it is similar to active data

C. Preserving does not necessarily mean producing. Decision about what to produce will be made after litigation is filed

5. Collect and retain data

A. Current Procedure

- Each person conducts search for ESI and hard-copy files
- For Enterprise Messaging and similar programs, segregate active data into folders identified by Enterprise Messaging or other providers with a similar system. Provider will notify the individuals with instructions about the location of the folders.
 - General communications
 - Privileged communications
- For other Email programs, segregate active data into General and Privileged communications and work with IT representative to establish best method for on-going preservation
- For all other ESI (non-email), segregate active data into General and Privileged communications and work with IT representative to establish best method for on-going preservation

- Move any newly created data related to the potential claim into the identified folders, or other preservation method, periodically
- IT representative preserves data and notifies the designated record-keeper
- If back-up tapes must be preserved, IT representative will remove the relevant tape(s) from rotation and preserve

B. Safe Harbor

1. Before litigation is reasonably anticipated, routine operations that destroy ESI are okay
 - If recycling of back-up tapes is part of routine operations, its okay
 - If deleting accounts is part of routine operations, its okay
2. After litigation is reasonably anticipated:
 - Case-by-case determination for historical back up tapes
 - If measures to preserve active data are implemented, new back-up tapes can be recycled according to routine operations

CAUTION: When employee under duty to preserve is separated, you must ensure that the ESI continues to be preserved.

6. Create and maintain written records of efforts

A. Maintain written record of:

- Retained reasonably accessible ESI
- Retained ESI not reasonably accessible
- ESI not retained and reasons for decision
- Notices and receipts of preservation requests
- Confirmations of preservation
- Notices of release from preservation duty