

LEGAL ADVISORY

Office of the General Counsel

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SUMMARY

With the passage of the California E-Discovery Act, the University's obligations to preserve and produce electronically stored information ("ESI") in state court litigation now parallel its obligations in federal court litigation. The University must preserve relevant ESI when litigation is reasonably anticipated (or filed, if there was no advance notice) to ensure compliance and minimize the University's exposure to monetary and evidentiary sanctions.

If you have questions concerning your obligation to preserve ESI, please contact your campus or medical center counsel or risk manager.

You may also contact:

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This legal advisory is issued by the Office of the General Counsel to provide updates regarding important legal and regulatory developments that affect the University. For additional information or assistance with a specific legal matter, please contact the Office of the General Counsel.

CALIFORNIA PASSES NEW E-DISCOVERY LAW

California's Electronic Discovery Act, which took effect on June 29, 2009, imposes requirements regarding the production of electronically stored information ("ESI") in state court litigation. Similar rules took effect in federal courts in December 2006. The duty to preserve and produce ESI imposes a much greater burden than was the case when only the production of paper documents was required. Implementation of the new state rules may have an impact on University operations given the prevalence of state court litigation across the University system.

California's new law largely tracks the federal rules and provides that:

- Either party may request ESI in the discovery phase of a lawsuit.
- The party requesting ESI may specify the form in which it is to be produced; otherwise it must be produced in the form in which it is ordinarily maintained or a form that is reasonably usable.
- A party may object to producing ESI that is "not reasonably accessible" (such as backup tapes or legacy data) due to burden or expense; however, if the requesting party moves to compel production and demonstrates good cause, the court may order production.
- Entities like the University must ensure that relevant ESI is not overwritten by routine computer operations when litigation is reasonably anticipated.

Attorneys are now required to meet early in a lawsuit to discuss the preservation and production of ESI. In order for the University to be well-positioned for that discussion and satisfy its discovery obligations in litigation, it is critical that the following steps take place:

- Administrators and supervisors should promptly inform their risk manager or local counsel when they become aware of disputes that may lead to either state or federal litigation.
- The campus or medical center should then take steps to identify and assess all sources of relevant ESI and advise the University's attorneys regarding the sources, form, and accessibility of the ESI.
- Measures to preserve the ESI should be implemented as soon as possible.

If the University fails to preserve ESI and relevant information is lost or destroyed as a result, the University could incur monetary or evidentiary sanctions that could compromise its ability to prevail in litigation. The extent of preservation required will depend on the circumstances of each situation. Campus or medical center counsel and risk managers will determine what is required in each instance, typically with the assistance of local information technology authorities.