Legal Issues for Higher Ed
Technology Professionals:
An Hour with Lawyers
to Help Avoid Many Hours with Lawyers

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Poll: Who has joined us today?

I am attending this program because:

• I am an **attorney** looking to learn about issues of importance to technology professionals.
• I am a **technology professional supervisor** looking for lessons on how to stay out of the courtroom.
• I am a **technology professional employee** looking for lessons on how to keep my supervisor *in* the courtroom.
• I am the **parent** of one of the presenters.
• I clicked on the wrong link and now can’t close my browser window.
Disclosure:
I HATE EMAIL
Use and Misuse of Email

Why I Never Learned to Stop Worrying and Love the @__.com (or .edu):

- It's too easy;
- It lasts too long;
- It's too impersonal;
- FOIA;
- Rule 26;
- Forward;
- Reply All

Send!!!
Rule = Documentary material/ESI should not be easy to create because it's not easy to manage

Yet Email is:

1. Perfect for memorializing unformed ideas inartfully, and
2. Resistant to destruction
Why Your Lawyer Dislikes Email

• Email is a great way to intentionally create evidence because:
  • Contemporaneous
  • In the witness' voice
  • Password protected

• But, the good guys rarely sit around thinking about how to document their own righteousness
  • So then who is it that often ends up with this powerful evidence-creation tool at their disposal?
Rarely helpful to Defense:

"Cindy,
Let's discuss your promotion over dinner. Of course, I will choose a very public and well-lit restaurant and several colleagues will be there. Nevertheless, if you would rather, we can just talk about it in the office on Monday. Your choice will have no effect on my decision.
Best,
VP Johnson"
Why Your Lawyer Dislikes Email

Our technological ability to create and store huge amounts of email has greatly outpaced our human, legal and technology systems

- *People* do not actively manage their email accounts as if they were file cabinets
- The *legal (e-discovery) system* has not adapted to the enormous amount of irrelevant ESI
- *Email systems* are usually set up to save automatically, delete with some effort, and file or organize with maximum effort
Poll: Email systems

My institution’s email system is:

- Homegrown and served on campus.
- Through a cloud service.
- Some combination based on architecture.
- Some combination based on identity of user (student, faculty, staff, alumni, football coach).
- Western Union Telegrams
From: Sally Student
To: Prof. Smith
Subject: SS's 203 Answers

"Prof. Smith, attached please find my answers to the take-home exam for POLS-203"

1. Documentary Material?
2. Transmitted or stored by College?
3. Has legal or operational value?

= 6 Months
"Wanna meet at Jack's for lunch at 12:30? My treat."

1. Documentary Material?
2. Transmitted or stored by College?
3. Has legal or operational value?

= 0.00
Fixing Email

- End users must understand the system that they use and be held accountable for using it responsibly
- Email records should be clearly identified and managed as such
- Custodians must understand their records retention responsibilities
- Backup systems should be minimized for disaster recovery purposes
- Unnecessary email should be treated as a burden and eliminated
Managing Email

• Default for inbox, sent, trash folders is to automatically delete after specified term
  • i.e., 30-90 days
• Moving email to specified folder saves
• Folders are deleted when no longer in use or when retention period for email records have expired
• Space it allotted based on records retention needs
First Steps

1. Train people on how to use this powerful communication and storage tool effectively
   • Nurture culture of responsible use

2. Configure systems so as to promote thoughtful, responsible use
   • Default settings, backups, storage ability

3. Identify email records and designate custodians
   • 1 type of record = 1 custodian

4. Publicize and enforce policies
First Amendment Issues
The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

U.S. CONST. AMEND. I
The First Amendment

"State colleges and universities are not enclaves immune from the sweep of the First Amendment...Quite to the contrary, 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"

The more things change…

“Check your typewriter policy”

- Steve McDonald
  General Counsel
  RISD

SUNY Police Commissioner Bruce McBride
modeling state-of-the-art technology
First Amendment rights in the digital environment

Let’s check that typewriter policy…
The First Amendment protects citizens rights to speak and to petition for redress of grievances.

- 1st Amend. binding on public colleges.
- Many private colleges adopt by policy/contract or are governed by similar state law (e.g. California).
Poll: Public v. Private

My institution is:

- Public
- Private, not for profit
- Private, for profit
- Public, but you wouldn’t know it from our lousy appropriation from the legislature.
- I would tell you, but then I’d have to kill you (note, not worth it for the poll).
Out in the “Analog” world:

- Three types of fora:
  - Traditional
  - Designated or limited
  - Non public forum
Out in the “Analog” world:

• Three types of fora:
  • Traditional (e.g. city sidewalk).
  • Designated or limited (e.g. quad or student union if so designated).
  • Non public forum (e.g. President’s Office; classroom; residence hall room).
When we want to regulate most types of speech

Courts are skeptical and apply strict scrutiny:

• Policy must further a “compelling” government interest; and
• Policy must be narrowly tailored to achieve that interest.
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- Policy must be narrowly tailored to achieve that interest.

- Complying with Federal or State law may be a compelling interest (copyright infringement; child pornography; blackmail and other crimes).
- Responding to advocacy of violence (provided there is a clear and present danger) including fighting words and true threats (reasonable person standards), may be a compelling interest.
When we want to regulate most types of speech

Courts are skeptical and apply strict scrutiny:

- Policy must further a “compelling” government interest; and
- Policy must be narrowly tailored to achieve that interest.

- Even if you have a compelling interest, policy must still be narrowly tailored so it doesn’t squelch more speech than it has to.

**Important: Viewpoint Neutrality is Key**
All speakers treated equally regardless of their message
When we want to regulate most types of speech

Courts are skeptical and apply strict scrutiny:

- Policy must further a “compelling” government interest; and
- Policy must be narrowly tailored to achieve that interest.

- We solve this problem through neutral time, place and manner restrictions on speech
  - Can only protest during lunch hour (time)
  - Can only protest in the quad or the union (place)
  - Can yell but cannot use a bullhorn (manner)

Remember: Speech isn’t always “spoken.”
The First Amendment

• How does this translate to the Web or Social Media?
  • Courts have ruled that the First Amendment applies in cyberspace

• Public Forum or House Organ (limited public forum or non public forum)?
  • On blogs: Allow comments? Censor?
From the SUNY System Administration Social Media Policy:

“In general, SUNY invites discussion of important ideas and issues through Social Media. However, SUNY reserves the right to remove posts or comments that are obscene, defamatory, offensive, contain threats of violence, abusive, spam or advertising, or unrelated to the content or information. SUNY also reserves the right to remove posts or comments that violate applicable laws including, but not limited to, copyright and trademark, or those that violate the use policies promulgated by the applicable Social Media provider.”

Important: Viewpoint Neutrality is Key
All speakers treated equally regardless of their message
Freedom of Speech

What about speech by employees in technology offices?
Freedom of Speech

• Public employees have First Amendment rights (sort of).
• Two Supreme Court cases on point: *Pickering v. Bd. Of Educ.* and *Garcetti v. Ceballos*
• *Pickering*: deals specifically with faculty speech (in the form of a public school teacher).

• Speech constitutionally protected if:
  • speech addresses “*matters of public interest* in connection with operation” of their institution; and
  • *interest in speaking outweighs interest of employer* in promoting efficient delivery of services
• *Garcetti*: Prosecutor wrote an internal memo critical of boss, was reassigned and denied promotion, and claimed it was retaliation.

• Court rejected claim saying that for (non-faculty) public employees, when they “make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”
Putting the cases together:

- *Garcetti* has an interesting sentence saying the Court does not decide the issue of *faculty* speech; lower court cases are split.

- For non-*faculty* employees in IT offices of public institutions, we believe *Garcetti* applies squarely.
  - Speaking as private citizen or as part of official duties?
Putting the cases together:

• For non-faculty employees in IT offices of public institutions, we believe *Garcetti* applies squarely.
  • Speaking as private citizen or as part of official duties?
  • If speaking about a matter related to job, no protection.
  • If private speech not on issue of public concern, no protection.
  • If private speech on issue of public concern and interest in speaking outweighs damage, then may be protected.
BYO / Privacy
The What

Accounts:
• E-mail
• Social Media
• Browsing History
• Not Invented Yet

Devices:
• Cell Phones (incl. texts)
• Computers
• Tablets
• Not Invented Yet

Personal vs. Institutional
Privacy Issues

• Ownership
• Liability
• Compliance
• Security
• Access

• Institutional Responsibility is a Given;
• **Control is not**
1. What information will the institution need to access in order to meet its obligations?

2. Where is that information maintained?

3. How will the institution get that information when it needs it?
   - Physical?
   - Remote?
   - Policy?
The Law

- 4th Amendment – "Reasonable Expectation of Privacy"
- Case Law
- Federal Statutory
  - ECPA & SCA
- State Laws
  - Some state constitutions (IL, CA, DE, CN) extend protections to private sector
- Common Law
  - Invasion of privacy or "intrusion on seclusion"
  - Must violate law or "social norms"
Access vs. Privacy

• At public – access will be based on the employee's expectation of privacy

• At private – access will be based on policy, but should be in-line with expectations of privacy

• Either way: Managing peoples' expectations is the key
Access vs. Privacy in Court

Did the employer **articulate**, **publicize**, and **enforce** a clear policy?

- **If Yes?** Courts will honor, *mostly*
- **If No?** Courts *often* find reasonable expectation of privacy

Young Law = **Analysis Fact-Specific**
Whose Information

• Who pays the bill for account or device?
  – Not always determinative

• Was it used in the course of conducting institutional business?
  – If yes, then ask:

• Does it contain information that is relevant to ongoing or anticipated case, investigation, audit, or FOIL?
  – If yes, we have legitimate purpose and searching is okay
"Personal"?

- Best case: Prohibit use of personal accounts and devices for institutional business
- Realistically:
  - Codify preference for institutional resources
    - Never require use of personal resources
  - Explicitly state that any use of personal accounts or devices subjects them to institutional inspection and use (to the extent use was work-related)
Accessing Our Data

• Lack of control could leave institution unable to defend itself or meet its obligations

• Consider acquiring lock-out authority

• If possible, use subpoena
  • Too easy

• Have a clear policy defining use/ownership

• Issue a clear directive

• Use Disciplinary Procedures
  • If necessary
Nearly half of the students in a class are caught cheating;

Administration sends an email to "Resident Deans" sharing pointers on how to advise affected students;

This email is leaked to Boston Globe;

Administration searches email accounts of 16 Resident Deans who received the email;

Faculty learn about the search several months later and go ballistic;

Apocalypse in likely in Cambridge.
The Good

• Purpose of search was absolutely legitimate
• Harvard only searched "staff" accounts
  • Resident Deans have 2 email accounts, one for administrative use, and one for faculty stuff
• Harvard only looked at headers (to see if email was forwarded)
• Harvard policy clearly allows searches for internal investigations
• The different policies that applied to the different accounts were not clearly explained
• Didn't tell the subjects about the searches until after it made the papers!
• Didn't tell the subjects about the searches until after it made the papers!
• Like all faculty everywhere, Harvard's have unrealistic expectations
  • Strong culture of co-governance
• Now faculty are expressly less likely to use Harvard accounts, which none seemed to realize should be absolutely disallowed by policy
How to avoid a similar fate

• Don’t be sneaky
  • They didn’t do anything wrong
• Be clear about policy and expectations
• Be aware of perceptions and manage them