

Legal and Practical Implications of the Use of E-Mail.

E-mail is increasingly a part of the daily flow of communications in business settings. This appears to be true of the University as well, both with respect to intra-office communications and with those that reach beyond the campus. Sending an e-mail frequently offers a more expedient alternative to “telephone tag” and a more informative alternative to voice mail. The intelligent and appropriate use of e-mail requires, however, an appreciation of the certain basic considerations.

Some who use e-mail may assume that it is merely an electronic counterpart of ordinary mail and that it shares the expectation of privacy implicit in the use of ordinary mail. This is not the case. Unless the e-mail is encrypted or stored in some proprietary format, it is typically stored in ASCII file format that may be read by those with access (authorized or unauthorized) to the mail server for the recipient’s e-mail account. While the University does not do so, some employers routinely monitor the e-mail of their employees, which makes e-mail correspondence from University persons to those employees subject to being monitored. E-mail that is transmitted through the Internet can also be intercepted by miscreants at the various stops it makes on its way to the recipient.

There is also a significant risk of compromise of privacy occurring due to errors on the part of the sender of e-mail. It is all too easy to send e-mail to the wrong recipient due to lapses of attention regarding the address provided by the automatic address completion feature of an e-mail program or by simply mistyping an address. In the latter instance, mistyping even a single letter can result in the receipt of the e-mail by an unintended party. Additionally, by its nature, e-mail communications may not long remain private in the hands of the recipient. While significant effort and some expense is required for a recipient to copy and forward to others a letter received in the mail, e-mail is readily forwarded with little effort and virtually no expense.

Others may treat e-mail casually based on their view that it is “not a real document,” particularly since there is nothing conveyed on paper with a signature affixed. While it is true that e-mail may not satisfy the technical legal requirements for a document or a signature in certain contexts, e-mail content can be just as damaging as that found in a paper document. Employers have been found guilty of retaliation based in part upon e-mail exchanges among managers regarding improper reasons for taking adverse action against an employee. Likewise, employers have been found guilty of sexual harassment based upon “jokes” and graphic images circulated through the use of e-mail. Courts routinely grant orders for the production of e-mail in the course of litigation, and it is no longer unusual for e-mail to provide crucial evidence in a case.

Some may not be aware that e-mail can be considered a record, whether it has been printed out and filed or whether it simply resides on a hard drive, CD-R, or back-up tape. In a university setting, an exchange of communications among faculty and/or staff pertaining to a student’s involvement in the education process will be considered part of the student’s education record that the student has the right to access under the Family Educational Rights and Privacy Act. Similarly, an exchange of e-mail among UAH faculty and/or staff concerning the conduct

of official business would, in most instances, be subject to disclosure upon a request being made under the Alabama Public Records Act.

Still others may believe that e-mail is merely an ephemeral collection of electrons that evaporates into the “ether” when erased by the recipient. This is an erroneous view, for several reasons. First, many e-mail programs have an option (which may be “turned on” as the default setting) to maintain a copy of all messages sent. Second, the operators of mail servers commonly make back-ups of all messages contained on the server. These back-ups may be maintained for months. Third, many recipients of e-mail will forward it to others before deleting it. Finally, for some time after being deleted it is typically possible to “undelete” all or portions of any deleted file on a PC’s hard drive, including e-mail message files. Law firms representing plaintiffs often hire computer professionals to locate and retrieve these “deleted” e-mail messages in an effort to find evidence of improper motives for adverse employment actions.

It is important that UAH faculty and staff make judicious and appropriate use of e-mail. This is necessary to protect the interests of the University and the privacy and other rights of individuals to whom the e-mail correspondence pertains. Suggested measures to protect those rights and interests include the following: (1) Assume that any e-mail sent will be made available to the public. (2) Give careful consideration to whether it is necessary and appropriate to use e-mail to convey sensitive or personal information (such as Social Security Numbers). If so, consider using encryption. (3) Give the same thought to the consequences of what is said in an e-mail message that would be given to saying the same thing in a letter or memorandum. (4) Resist the temptation to send copies of e-mails to those who do not have a “need to know.”

Thoughtful use of e-mail will keep this useful tool from becoming a liability.