



Medical Information Discovery in the Digital Age

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The brass clock on the desk reads 11:30 p.m., and the beleaguered attorney is preparing for a deposition or trial in a healthcare case by picking his or her way through thousands of pages of medical records, stacked up around the office like the columns of the Parthenon. With the advent of the Electronic Medical Record (EMR), this picture may soon be relegated to moist-eyed memory, along with carbon paper, the Dictaphone and floppy disks. President

Bush has set a goal of national conversion to EMR within the next ten years. Healthcare attorneys must adapt their pre-trial discovery tools to keep up. Sooner rather than later, they will need to know what to request and where to find it. The time-honored Notice for Production of “All records and documents to be relevant to the treatment of Mary Jones” may yield a few sheets of paper at best. Similarly, an objection to discovery stating that the request is “burdensome,” without more, is likely to result in a nanosecond denial by a judge with even the most rudimentary computer knowledge. Producing parties face particularly daunting challenges: assuring that disclosure complies with federal and state confidentiality laws; that privileged material is not inadvertently disclosed; and that all pertinent electronic material is appropriately preserved.

The healthcare industry has slowly awakened to the indisputable advantages of health information technology. In many EMR systems, patient records can be accessed from terminals, laptops, or personal digital assistants (PDA's) anywhere in the hospital, from remote locations utilizing wireless technology, or from the caregiver's home. Radiology, sonography, and nuclear medicine studies may be viewed on-line via the Picture Archiving Communications System (PACS). E-mail communication speeds consultations between physicians and e-mail consultations with patients can, in many cases, eliminate the need for time and resource-consuming patient visits. The industry publication *Materials Management in Health Care*, in its April, 2005 issue, pronounced the EMR to be an initiative that “fundamentally changes clinical processes and workflows.”

Recognizing the potential billions of dollars in cost-savings and thousands of lives saved by timely access to critical information, President Bush, in January 2004, outlined a plan to convert the healthcare industry to EMR by 2014. An Executive Order three months later established the Office of National Coordinator of Health Information Technology, and charged it with the development of a National Health Information Network. Indicative of the bipartisan appeal of EMR, Senate Bill S.2421 was introduced by Sen. Edward Kennedy on May 13, 2004 to facilitate the transition by a series of incentives and penalties. The initiative has gathered momentum in the past few months with the introduction of two bills in the House: the National Health Information Incentive Act (H.R. 747, February 10, 2005) and the 21 st Century Health Information Act (H.R. 2234, May 10, 2005). Both bills call for financial assistance to create electronic medical

information systems and tools. The private sector has jumped on board with both feet. *The New York Times* reported on April 26, 2005 that I.B.M. had announced that it was working on a prototype for a national health network, testing data sharing standards between hospitals, regional health groups, and emergency rooms for up to two hundred million anonymous and simulated patient records. I.B.M. expects the system to be operable by the end of this year.

The discovery methods health care attorneys have used to obtain access to paper health records – the format and language of the requests, even the means by which the requests will be fulfilled – will undergo a paradigm change in the coming years. Medical information in an EMR may reside in several locations: nurses’ and physicians’ notes in one field; laboratory reports in another; and radiology and sonography on the PACS system. In the hospital setting, the software prompts the healthcare provider to select any of these fields to access the pertinent information. However, the data sets in the EMR do not fit easily into the categories of traditional discovery requests, and those requests therefore must be crafted with the architecture of the EMR in mind.

The proposed Amendments to the Federal Rules of Civil Procedure may steepen the learning curve for those seeking or objecting to discovery of information in the EMR. Proposed Amendments to Rules 16 and 26 set up a process by which the parties can work out the logistics of electronic discovery at or before the first discovery conference. Before one rejoices at the entry of the Civil Rules into the digital age, one must learn to be wary of the crevasses posed by nomenclature. Proposed Rule 34 differentiates between a “document” and “electronically stored information,” and a request for one may not necessarily encompass the other. Similarly, Proposed Rule 26(b)(2) provides that the producing party may object to production of or access to data “not readily accessible,” such as data stored in disaster recovery media, or “legacy” data stored on obsolete systems. The requesting party may move for production, the Advisory Committee stated in its April 14-15, 2005 meeting, in situations involving “undue burden or cost.”

The Proposed Amendment to Rule 33(d) permits a party to respond to a request for business records (including medical records) by permitting access to its electronically stored information. This mechanism presents particular difficulties for the producing party, however. It must assure compliance with HIPAA’s dictate that only the minimum information necessary to fulfill the request be disclosed. The record may contain information protected by state or federal confidentiality statutes, such as HIV/AIDS, substance abuse or mental health treatment which cannot be disclosed without specific authorizations from the patient or, in some circumstances, a court order with findings required by statute. Counsel for the producing party must therefore review the material in advance with IT professionals. The producing party will doubtless wield the sword of “minimum” to restrict discovery, while the requesting party will parry with “necessary,” and courts will find more, not fewer, discovery disputes on their dockets.

Electronic medical information is not limited to the “chart,” or the “record.” In the digital age, physicians often communicate with each other and with patients by e-mail. In addition, physicians – and patients – make their own notations on their personal computers, outside the confines of the medical record. Issues here can become so tangled as to make Shakespeare’s Puck in *A Midsummer Night’s Dream* explode with glee. Does the discovery request limit itself to “documents,” “files,” or “electronically stored information?” Are the e-mails properly construed as part of the “record?” Do they contain privileged information, or confidential information to be utilized for Quality Assurance purposes, and thus protected by state confidentiality statutes?

With so many millions of bytes of information “in play,” privileged information may inadvertently be caught in the discovery net and disclosed, or material pertinent to the case may

be lost through operation of the producing party's routine deletion policy. Proposed Amendment to Rule 26(b)(5)(B), colorfully known as the "Clawback Provision" would require the return of inadvertently disclosed privileged material upon timely request of the producing party. Objection to return of the material would be resolved on motion.

The Proposed Amendment to Rule 37, the so-called "Safe Harbor" provision, has engendered more controversy than almost any other, and at the April 2005 meeting the Civil Rules Advisory Committee, while approving the Amendment in principle, voted to redraft the Rule. Deletion of crucial e-mails has loomed large in the news since the five opinions in *Zubulake v. UBS Warburg, LLC*, 2005 WL 627638 (S.D.N.Y. Mar. 16, 2005), where Southern District of New York Judge Shira A. Scheindlin ruled that an adverse inference jury instruction would be granted to plaintiff in light of the defendant's inability to produce requested e-mails about plaintiff. The adverse inference charge was given at the recent trial of this action, and the jury in this employment discrimination matter awarded Laura Zubulake \$29,400,000. More recently, Florida Circuit Court Judge Deborah Maass issued a sanction of a different sort in the fraud trial of *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 674885. E-mails highly pertinent to plaintiff's claim had been lost or deleted by Morgan Stanley. Judge Maass, in effect, flipped the burden of proof onto the defendant, instructing that jury that it may presume the existence of a fraud. She also instructed the jury that it may presume that the absent e-mails would have been adverse to Morgan Stanley's position at trial. That jury returned \$604,000,000 in compensatory damages, and \$850,000,000 in punitives.

The Safe Harbor provision recognizes that the resources to store the multitude of e-mails generated by a large organization are finite. The Proposal holds that sanctions will not lie if e-mails sought have been deleted by the routine operations of the producing party's deletion policy. This, of course presupposes three conditions: first, that the organization has a clear, documented deletion policy; second, that the e-mails were deleted in accordance with that policy (and before the producing party was on notice of the possibility of litigation, per Judge Scheindlin's opinion in *Zubulake V*, 2004 WL1620866 (S.D.N.Y. 2004)); and third, that no court order required preservation of the e-mails. Indeed, there is a concern on the Committee that the Safe Harbor can undo, to some extent, the principles enunciated in *Zubulake* and its progeny. If there is a court order requiring production and the producing party does not comply, it may be vulnerable to the capital punishment of sanctions, a default judgment, as Southern District of New York Judge Loretta Preska levied in *Metropolitan Operav. Local 100 Hotel Employees and Restaurant Employees International Union*, 212 F.R.D. 178 (S.D.N.Y. 2003).

The medical profession is shaking off the bonds of pencil and paper in the interest of patient care and fitfully entering the digital age. Healthcare attorneys who need to traffic in medical information can do no less, as that information is transitioned from ink and graphite to bits and bytes.

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