

# AN UPDATE FROM GDC

## AUGUST, 2012

Garson DeCorato  
& Cohen LLP

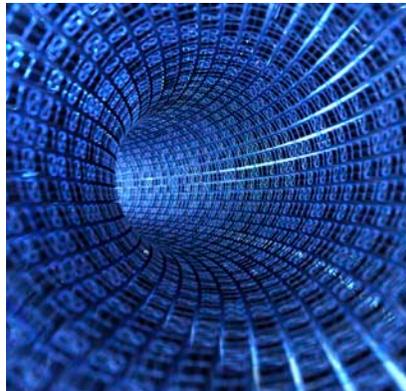
Attorneys at Law

### Electronic Discovery in Healthcare Litigation

**E**lectronic discovery in healthcare litigation is no longer coming to New York courts; it's here. An e-discovery pilot program under the auspices of the Office of Court Administration is underway in Suffolk County specifically for medical malpractice actions. Directed by Justice Peter Mayer, the program is seeking to implement uniform rules, including the use of a new e-discovery conference order, and early resolution of e-discovery issues in medical malpractice actions. The goal is to evaluate existing court rules so that any necessary changes can be made before making e-discovery conferences mandatory statewide in medical malpractice litigation. This, coupled with two recent appellate decisions, requires all medical providers and healthcare institutions to meet new preservation and e-discovery obligations. Failure to meet these requirements can be case determinative because if you do not comply with mandates for e-discovery, the merits of your case will be irrelevant. In other words, if you lose your data, you lose your case.

In the past, hospitals had medical record rooms where paper charts were stored. Now hospitals have Health Information Management Systems (HIMS) to manage the vast amounts of data on patients that are

contained throughout the institution. Potentially relevant electronic information such as data for fetal heart monitoring, echocardiograms, e-mail, billing, and even voicemail may be stored in the subsystems of individual departments. In addition, unstructured data not contained in the electronic medical record, such as an excel spreadsheet for sign outs or text messages between cell phones, may exist in ad hoc systems created by individual healthcare providers on local computers. Identifying, locating and preserving all of this information is a challenge healthcare institutions and providers must undertake to satisfy their e-discovery requirements.



The law in New York is clear. In 2011, New York State trial courts issued the first decisions involving e-discovery disputes. In early 2012, two Appellate Division decisions affirmed that

New York State courts have adopted the strict and rigorous e-discovery standards already in place in the Federal Courts. In Voom HD Holdings v. Echostar, 93 A.D.3d 33 (1st Dept. 2012), the court held that once a party “reasonably anticipates litigation” it must issue a litigation hold and suspend routine document retention and destruction practices. The Court stated that failure to ensure that all potentially relevant data is preserved will

result in sanctions, including an adverse jury inference or striking of the party's pleading.

In another recent New York appellate decision, U.S. Bank National Association v. Greenpoint, 94 A.D.3d 58 (1st Dept. 2012), the Court held that the party producing the data is the one that should bear the cost. This is a significant change from prior decisions that required the party seeking the information to pay for the cost. The prior law held plaintiffs back from making over-broad, wholesale demands for every bit of data because they would have to pay for the production. Now that plaintiffs have no financial incentive to restrain e-discovery demands, there will likely be a surge in discovery requests resulting in increased costs to hospitals and physicians.

Best practices require that healthcare institutions be proactive in meeting the challenges of e-discovery. Unlike many prior defendants on the losing side of an e-discovery spoliation motion, healthcare providers are already obligated to preserve relevant information on patients for many years. The difficulty in a large institutional setting is knowing what information exists, where it is, what format it is in, and how best to preserve and produce it. Mapping all the data systems and identifying key players who control those systems will ensure a timely and cost effective means to implement a litigation hold to prevent data loss.

Preservation is the key to avoiding the harsh penalties from an e-discovery catastrophe. If the data is

preserved, it can always be searched for and retrieved later. Once destroyed, it is very costly to try to recreate it from backup tapes or other secondary sources. If it can't be recreated, then you are at risk of losing your case. Just as medical records rooms gave way to Health Information Management, it is time to start thinking of moving to Health Information Governance. Unlike traditional records management, information governance incorporates privacy attributes, electronic discovery requirements, storage optimization, and metadata management. In essence, information governance is a framework encompassing each of these elements to ensure effective and efficient preservation, use and control of electronic information.

Healthcare providers must avoid an ad hoc method to addressing e-discovery requests. Efficient processes must be developed now to handle the growing number of e-discovery demands. This will avoid unnecessary costs, such as searching for data that could have been previously identified through data mapping, and ensures e-discovery compliance. In addition, healthcare providers should consider a litigation preservation server where all relevant data can be securely stored and readily available for production.

Electronic discovery is rapidly expanding in state court medical malpractice litigation.

Healthcare providers must be ready to respond. A proactive, practical approach before the e-discovery demand is received will reduce costs and the risk of a case-losing sanction.



## TAKEAWAYS

- BE PROACTIVE RATHER THAN REACTIVE
- ISSUE LITIGATION HOLDS WHENEVER LITIGATION IS REASONABLY ANTICIPATED
- ENSURE LITIGATION HOLDS ARE FOLLOWED
- MAP ALL ELECTRONIC DATA SYSTEMS
- MAKE RESPONDING TO E-DISCOVERY DEMANDS A UNIFORM PROCESS

**Joshua Cohen** is a senior partner and the head of GDC's E-Discovery counseling and management team. He frequently lectures on E-Discovery in healthcare and Electronic Medical Records. He is a member of the New York State Court System's E-Discovery Working Group by appointment of Chief Administrative Judge. This group is charged with providing assistance to the court system on the many electronic discovery issues in the courts.

### Recent lectures:

"Healthcare's E-Discovery 911 Call: Preventing Another E-Discovery Heart Attack"

Exterro Webinar, June 2012

<http://www.exterro.com/resources/on-demand-webcasts>

"E-Discovery in Obstetrical Malpractice Actions"

ACI 10th Annual Obstetrical Malpractice Conference Philadelphia, PA. June, 2012

"Implementing the EMR: Balancing the Risk"

North Shore – Long Island Jewish health System, June, 2012

"Effective Communication and Teamwork in Delivering Safe Care to the Obstetrical Patient"

Mercy Medical Center, June 2012

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