THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

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MESSAGE FROM THE CHAIR:

Ted Eastmoore

What's your Section up to? So, you belong to the Trial Lawyers Section of The Florida Bar. You pay dues. You call yourself a member. But what does that mean and what does that get you? And how do you access Section information and benefits? Read on.

The Trial Lawyers Section is one of the most active Sections of The Florida Bar. We have 7,000 members. We are plaintiffs lawyers, we are defense counsel, and we are commercial litigators. The Section is governed by an Executive Council of 24 members from around the state. When the Section speaks, we do so in the interest of all lawyers who practice trial law in Florida. Here are a few of our major programs:

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The Section is actively involved in the legislative process. We employ an effective and respected lobbyist and monitor proposed legislation which potentially impacts the practice of law in Florida. Our goals are to promote Judicial Independence, preserve Access to Courts, and to secure adequate Judicial Funding. When proposed legislation impacts one of these areas, we evaluate it and take a position which supports our platform.

Discovery Handbook:

The Section, in conjunction with the Conferences of Circuit and County Court Judges, publishes The Handbook on Discovery. The Handbook is in its 14th edition and covers topics from discovery abuse, effective motion

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The Expanding Use of Electronic Health Records: Consulting Federal E-Discovery Rules and Case Law as Guides for State Litigation

By Anne M. Fulton-Cavett*

Health information technology is transforming the delivery of health care in the United States. In its 2001 report, *Crossing the Quality Chasm: A New Health System for the 21st Century,*[1] The Institute of Medicine recognized that health information technology would play a central role in the redesign of the health care system to support improvements in quality and patient safety. Electronic health records (EHRs) are one of the mechanisms that will drive this transformation.[2] Although EHRs go back as far as the 1960s,[3] progress on implementing such records has not expanded as quickly as many had hoped. One commentator in 2009 reported that fewer than one in five of the nation's approximately 600,000 doctors and 5,000 hospitals used EHRS.[4] Another reported that less than 10 percent of health care providers in the United States were using them.[5]

Against this backdrop, it is important to note that in 2004 President George W. Bush had called for an electronic health record for most Ameri-

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practice, and remedies, including electronic discovery issues. Each Judge in Florida has the Handbook. Many rely upon it routinely, keeping a copy by them on the bench. The Handbook is available electronically to all Section Members on our webpage.

Civil Trial Certification and Florida Law Update Seminar and Advanced Trial Advocacy Seminar:

Annually, the Section provides continuing education to its members in these two outstanding courses. Civil Trial Certification is a two-day course. It provides not only a refresher for those sitting for the Civil Trial Law Board Certification Exam but also provides a great update for all practicing trial lawyers. Advanced Trial Advocacy is an intense 5-day course where attendees learn and practice all aspects of trial from opening statement to closing argument and all phases in between. Participants are videotaped and critiqued. The course counts as one trial credit for those applying for Board Certification in Civil Trial Law.

Teachers Law School:

This program, instituted last year, provides two days of instruction to 80 high school civics teachers on the importance of the Judicial Branch. Participates learn from sitting state and federal judges, from officers of The Florida Bar, and from well-respected trial attorneys. The program was so well received in Orlando in its inaugural year that the Section will offer the program again this year in Tampa. Truly, the School positively energized the participants who will, in turn, positively impact thousands of Florida high school students.

Chester Bedell Mock Trial Competition:

All 12 Florida Law Schools are invited to participate in this prestigious competition. This year, 22 trial teams will compete for the state title. Each individual competition is presided over by a sitting jurist and judged by practicing trial attorneys sitting as jurors. The final round in this year's January contest will take place in the Ceremonial Court Room in Tampa's Sam Gibbons Federal Courthouse, with United States District Judge Mary Scriven presiding.

Where can you access additional information on these and other Section programs? Look to the Section's webpage--http://www.flatls.org/--- you will find important dates, can download Section publications, and follow Section news. You can also follow the Section on FaceBook and Twitter.

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cans by 2014 and had established a new office within the U.S. Department of Health and Human Services, the Office of the National Coordinator for Health Information Technology, to coordinate and promote health information technologies. This office established four goals to guide the adoption of health information technologies in the private and public health sectors: (1) the adoption of EHRs; (2) the development of a secure national health information network to permit the exchange of health information among clinicians; (3) the use of personal health records by patients; and (4) the improvement of public health through quality measurements, research, and dissemination of evidence.[6] Although Bush pressed for use of EHRs for most Americans by 2014, government incentives to implement such a system were not enacted until Congress passed the American Recovery and Reinvestment Act of 2009, a part of which included the Health Information Technology for Economic and Clinical Health Act (HITECH).[7]

Although use of EHRs is related to improving patient care and safety, medical and legal commentators have noted that their use, especially as called for in HITECH, raises new risks of medical malpractice liability and other litigation issues.[8] One of the most significant of these issues facing health care providers and their legal counsel centers around the existence and application of electronic discovery (e-discovery) and civil procedure rules that currently are evolving in federal and state jurisdictions across the United States. In December 2006, the Federal Rules of Civil Procedure were amended to address the discovery of electronically stored information (ESI); these are directly applicable to EHRs. Several states have likewise adopted rules specific to the discovery of ESI. Of the states that have adopted e-discovery rules, either by court action or legislative enactments, most have adopted rules similar to the Federal Rules of Civil Procedure.[9] Some states have not adopted e-discovery rules, and several states are undertaking or considering e-discovery rules.[10] This article addresses the increase in the use of EHRs in the health care industry and the implications of these evolving e-discovery rules to practitioners who represent health care providers.

The Impact of HITECH

According to the Healthcare Information and Management Systems Society, the consensus definition of an EHR is:

The Electronic Health Record . . . is a longitudinal electronic record of patient health information generated by one or more encounters in any care delivery setting. Included in this information are patient demographics, progress notes, problems, medications, vital signs, past medical history, immunizations, laboratory data, and radiology reports. The EHR has the ability to generate a complete record of a clinical patient encounter, as well as supporting other care-related activities directly or indirectly via interface, including evidence-based decision support, quality management, and outcomes reporting.[11]

The new EHR requirements may pose more risk for medical malpractice liability.

HITECH provides both positive and negative incentives to health care providers to implement EHR systems by 2014. The positive incentives are provided by Medicare and Medicaid bonus payments under the Act, starting in May 2011, to those health care providers that demonstrate "meaningful use" of a certified EHR system. The negative incentives involve penalties or deductions in Medicare and Medicaid payments, starting in 2014, with increased penalties or deductions through 2018, for those health care providers that are not meaningfully using a certified EHR system. The health care providers eligible for EHR stimulus payments under the Medicare program include physicians, dentists, podiatrists, optometrists, and some chiropractors. Those eligible for EHR stimulus payments under the Medicaid program include physicians, dentists, certified nurse midwives, nurse practitioners, and physician assistants practicing in a rural health clinic or federally qualified health clinic.[12] Hospitals are also included as eligible health care providers for EHR stimulus payments. Medical-legal commentators, as well as health care commentators, have recently noted that eligible health care providers have been searching for software and service partners to help them find the quickest path to the incentive dollars and avoid future penalties.[13] Thus, it can be reasonably expected that the health care provides that qualify for the initial incentive payments, and their legal counsel, will be significantly affected by e-discovery issues in medical malpractice cases. It can also be reasonably expected that more health care provides will continue to meet the Medicare and Medicaid requirements to avoid the penalties, thus increasing the number of health care provides that will be impacted by e-discovery issues.

Rules released by the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services on July 13, 2010 also outline the specifics of Stage 1 "meaningful use" for EHRs and clinical quality measure reporting that health care provides must meet to qualify for the incentive payments in 2011 and 2012.[14] Health care providers should evaluate these rules when considering the impact that HITECH will have on e-discovery issues because

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they provide a baseline for electronic data capture and information sharing that, in turn will provide a baseline for EHRs that may be subject to discovery and/or disclosure in litigation. The criteria will also undergo two additional stages of rulemaking; Stage 2 (estimated in 2013) and Stage 3 (estimated in 2015) will continue to expand on the baseline established by the Stage 1 rules.[15] Thus, health care providers must remain diligent in evaluating these future rules when considering e-discovery issues.

While the consensus definition of an EHR provided by the Health/Care Information and Management Systems Society may provide the foundation for e-discovery issues, the recent Centers for Medicare and Medicaid Services Stage 1 rules regarding meaningful use for EHRs will also be relevant. Meaningful use includes both a core set and a menu set of objectives that are specific for eligible professionals (i.e., physicians, dentists, podiatrists, etc.) and hospitals. For eligible professionals, there are a total of 25 meaningful use objectives; 20 of the objectives must be completed to qualify for an incentive payment, but only 15 are core objectives that are required. The remaining required objectives may be chosen from the list of 10 menu set objectives. For hospitals, there are a total of 24 meaningful use objectives, with 14 core objectives that are required and the remaining five objectives may be chosen from the list of 10 menu set objectives.[16] These meaningful use objectives for both eligible professionals and hospitals may create complications for health care providers with regard to e-discovery issues. For instance, although the ultimate goal underlying this program is to promote use of EHRs for most patients by 2014, some of the objectives do not require use on 100 percent of a health care provider's patients. As examples, (1) an up-to-date problem list of current and active diagnoses is required for 80 percent of patients; (2) active medication and active drug allergy lists are required for 80 percent of patients; (3) recording and charting of changes in vital signs—such as height, weight, body mass index, and blood pressure—is required for more than 50 percent of patients over age two; and (4) care summaries are required of more than 50 percent of referral or transitioned patients. Because health care providers may choose five objectives from a list of 10 menu set objectives, this will inevitably create differences in what EHR objectives health care provides will chose and, in turn, create different e-discovery issues for health care providers.

HITECH and the recently enacted Stage 1 rules regarding meaningful use of EHRs have created ESI considerations that are unique to the health care industry. EHR systems will contain information relevant to patient care but also relevant to litigation and be subject to discovery. Therefore, legal counsel must be knowledgeable about the content, features, and functionality of those systems. As one commentator stated, lawyers are not expected to be technology experts, but they must be able to understand where relevant ESI exists and what steps must be taken to satisfy preservation and discovery obligations. This commentator also noted that the expectation is that lawyers will have enough familiarity with a client's EHR system to ask probing questions and should consult technology experts when necessary to satisfy discovery obligations.[17]

> The new EHR requirements contain useful patient information but may also be subject to disclosure and used in malpractice litgation.

E-DISCOVERY OBLIGATIONS

It is only a matter of time before courts are squarely charged with resolving a litigant's obligations to preserve and produce ESI that is unique to the health care industry, such as EHRs.[18] The scarcity of reported decisions addressing e-discovery in health care litigation probably exists for two main reasons. First, although EHRs were in use before 2009, the year HITECH was enacted, they were not used extensively in the health care industry. Second, though the federal e-discovery rules have existed for almost a few years, only recently have states enacted e-discovery rules, and most medical malpractice cases are filed in state courts.[19]

Since most of the states that have adopted e-discovery rules or statues

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have modeled them after the 2006 amended Federal Rules of Civil Procedure, it would be reasonable to consider those rules, as well as federal case law, as a foundation for evaluating e-discovery obligations.[20] In 2006, the American Health Information Management Association recognized that the new changes to the Federal Rules related to e-discovery would greatly affect how health care organizations manage their electronic records. The Association provided an overview of the e-discovery rules and reviewed their relevance and application to health care organizations for health information management professionals so they could prepare their departments and organizations for the challenges associated with e-discovery.[21] In its September 2010 article, "Commentary on Legal Holds: The Trigger & The Process," the Sedona Conference utilized the Federal Rules and federal case law addressing e-discovery issues in addressing ESI preservation obligations and legal holds, and also provided guidelines intended to facilitate compliance by providing a framework an organization can use to create its own ESI preservation procedures.[22] It is highly recommended that health care providers review and consider the information provided by the Sedona Conference in its journal, as this organization has been recognized as a leader in e-discovery issues.[23]

E-discovery and the Federal Rules. As a result of changing practices, the U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure to address the unique aspects of e-discovery. The specific amendments applicable to e-discovery include:

Rule 16(b)—pretrial conference for early attention to e-discovery issues;
Rule 26(a)—initial disclosure and duty to disclose ESI for data compilations;
Rule 26(b)(1)—early attention to e-discovery and disclosure;
Rule 26(b)(2)—ESI that is inaccessible because of undue burden of cost need not be provided;
Rule 26(b)(2)(C)—sets factors out for the judge to consider in deciding to order a search and production of information not reasonably accessible;
Rule 26(f)(3)—directs parties to discuss any issues relating to disclosure or discovery of ESI;
Rule 26(f)(4)—provides for early attention/discussion to privilege and work product issues after ESI is produced;
Rule 33(d)—adds ESI to interrogatory requests;
Rule 34—provides for discovery of electronic health records and recognizes possible need for testing of documents and ESI;
Rule 34(a)—provides that electronically stored documents are equally as discoverable as paper documents;
Rule 34(b)—adds ESI to production requests; and
Rule 37(f)—provides that the court may not impose sanctions for failure to provide ESI lost as a result of the routine good faith operation of an electronic system and also addresses litigation holds and court orders entered addressing preservation.

The duty to preserve EHR attaches when a party can reasonably anticipate litigation.

The Sedona Conference stated in its "Commentary of Legal Holds" that the primary purpose in the e-discovery rules was to process improvements designed to encourage early party agreement while providing guidance for courts facing losses due to preservation failures. It also noted that the amendments did not define preservation obligations given the difficulty in drafting an appropriate rule, citing the Advisory Committee minutes of April 14-15, 2005. It appears that these considerations prompted the Sedona Conference to provide pragmatic suggestions and guidance in carrying out preservation obligations. As stated therein, the key to addressing these issues is reasonableness and good faith, and where ESI is involved there are also practical limitations due to the inaccessibility of sources as well as the volume, complexity, and nature of electronic information.[24] While the pragmatic suggestions and guidance provided by the Sedona Conference are helpful to health care providers in addressing e-discovery issues involving EHRs, we must also consider the implications of court decisions pertaining to ESI preservation obligations and the consequences of failing to fulfill those obligations.

Federal case law. Some key federal district court cases addressing critical e-discovery issues that judges, lawyers, and commentators have discussed and analyzed were authored by U.S. District Judge Shira Scheindlin of

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the Southern District of New York. In these cases, Scheindlin wrote a series of thoughtful decisions addressing the electronic evidence retention and search obligations of parties in civil litigation.

The first series of decisions derived from the same litigation involving a sex discrimination claim by Laura Zubalake against UBS Warburg LLC are al entitled *Zubalake v. UBS Warburg LLC,* commonly referred to as *Zubalake 1,*[25] *Zubalake II,*[26] *Zubalake IV,*[27] and *Zubalake V*.[28] It is interesting to note that all of these cases addressing e-discovery issues were decided *before* the 2006 amended Federal Rules of Civil Procedure existed. However, Scheindlin's decisions are still instructive today on the duties of preservation and production of ESIs.

In *Zubalake IV,* Scheindlin held that [o]nce a party reasonably anticipates litigation; it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.[29]

In *Zubalake V,* the judge summarized the client and counsel's obligations with regard to production of electronic evidence, stating that a party and its counsel have a duty to locate relevant information and a continuing duty to ensure preservation. Within this decision Judge Scheindlin also provided a road map for the client and counsel to follow on identifying sources of potentially relevant information to place "on hold"—and to preserve this information. Both the client and counsel are under a duty to make sure that discoverable information is not lost. While Judge Scheindlin placed these obligations upon both the client and counsel, she also stated that counsel must be more conscious of the contours of the preservation obligation, and that a party cannot reasonably be trusted to receive the litigation hold instruction once and to fully comply with it without the active supervision of counsel. As a result of finding that the UBS Warburg client and its counsel had failed, in terms of their duty to locate relevant information, to preserve it, and to timely produce that information, Judge Scheindlin ultimately issued sanctions against UBS Warburg in the form of an "adverse inference instruction," wherein the jury was informed that it may infer that the "lost" ESI would have been adverse to UBS Warburg's case, and she also issued an award of attorney fees and costs. On April 6, 2005, a jury awarded Zubalake $9.1 million in compensatory damages and $20.2 million in punitive damages.

Six years after the last *Zubalake* decision, on January 15, 2010, Judge Scheindlin issued a comprehensive analysis of the current state of the law surrounding the issues of preservation and spoliation of ESI in *Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities, LLC.*[30] In this case the judge addressed the issues of parties' preservation obligation and spoliation in great detail, including detailed and informative discussions of the varying levels of culpability in failing to uphold discovery obligations, the required burdens of proof for sanctions, and the appropriate remedies upon a finding of spoliation. In the introduction to her opinion, Judge Scheindlin stated, "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records, paper or electronic, and to search in the right places for those records, will inevitably result in the spoliation of evidence."[31]

The judge also provided an additional road map to preservation of electronic evidence when she stated:

. . . the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.[32]

Several legal commentators have evaluated the *Pension Committee* case, and one has commented that, to the extent that the case provides a guideline for e-discovery, the following rules appear to apply.

A written litigation hold should be properly and timely issued whenever it reasonably appears a dispute has arisen.

Follow-up to that litigation hold must be done diligently and carefully. If in-house or outside counsel assigns it to a paralegal or other administrative staff, he or she must first make sure that the staff member is trained in issues of e-discovery and, second, he or she must personally supervise and regularly follow up on the activity of the person to whom the collection is assigned, or the client, and inferentially the lawyer, could be held negligent.

Key players should be promptly identified and their records obtained and secured.

Each employee affected by a litigation hold should be individually contacted to make sure the employee is actually paying attention to the hold notice and complying with its directives.

Electronic records of departed employees should be preserved.

System backup tapes should be preserved where they are the sole source of the electronic data.[33]

In *Rimkus Consulting Group v. Cammarata,*[34] Judge Lee Rosenthal commented that judge Scheindlin did

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the courts a great service by laying out a careful analysis of spoliation and sanctions issues in e-discovery in the *Pension Committee* case. Judge Rosenthal also highlighted a critical point relating to spoliation of ESI when she stated:

Spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information. Much of the recent case law on sanctions for spoliation has focused on failures by litigants and their lawyers to take adequate steps to preserve and collect information in discovery. . . .[35]

IMPLICATIONS OF INCREASING EHR USE

As EHR technology advances and EHRs are used more prevalently, health care providers and their legal counsel must be more sophisticated in gaining a better understanding of the information they can obtain from electronic information systems, especially those utilized in recording health care information. Health care providers and their legal counsel must also be diligent in being prepared for e-discovery requirements established by rules or statutes as well as the obligations associated with preservation of ESI and legal holds requirements. Based on the current state of the law with regard to ESI, a number of practice tips are recommended.

EHR development. Health care providers have a choice as to how engaged their medical practice will be with electronic health information technology, as well as what EHR system they will use. A health care provider may choose to use information technologies 100 percent of the time or may choose to limit its information technologies to the EHR objectives selected from the Stage 1 meaningful use objectives established by Medicare and Medicaid, which may not require 100 percent EHRs for all patients.

As is evident from the medical literature, health care providers are facing vast choices in selecting EHR systems, which in the past emphasized the functionality needed to support clinical processes but now also encompass good records-management practices for a number of different business purposes.[36] Organizations such as the American Health Information Management Association have been providing information and recommendations to health care providers and health information professionals for several years regarding EHR technology and the impact of e-discovery issues in litigation, including the recommendation of having legal counsel involved with the development of an EHR system that conforms and complies with the medical and medical-legal needs of health care providers, and to have a litigation response plan in place.[37] If counsel retained to defend a health care provider in a case was not involved in preparing the litigation response plan for that provider, he or she must quickly become knowledgeable about the content, features, and functionality of the provider's EHR system. As noted above, although counsel is not expected to be a technology expert, he or she must be able to understand where relevant ESI exists and what needs to be secured to satisfy e-discovery obligations. Identifying and understanding a provider's EHR system may also require counsel to obtain input from records management, health information, and information technology personnel.

Once EHR preservation is required then lawyers must institute a litigation hold for relevant documents.

Preservation of ESI. The duty to preserve evidence relevant to litigation is fundamental and exists in common law, independent of the discovery rules that exist in any jurisdiction. Under the current state of the law applicable to evidence, including ESI, the duty to preserve attaches when a party reasonably should know that the evidence may be relevant to anticipated litigation. Thus, this duty may arise before litigation is commenced. As legal commentators and courts have recognized, the preservation obligations require reasonable and good faith efforts, but it is unreasonable to expect parties to take every conceivable step to preserve potentially relevant data data.

Once the duty to preserve has been triggered, counsel must identify all sources of potentially relevant ESI, then must implement a written "legal" or "litigation" hold on that ESI and recognize that different data within an EHR system may require different preservation efforts. Furthermore, follow-up to the litigation holds must be done diligently and carefully, and although this may be delegated to a qualified person, counsel is ultimately responsible for ensuring that the hold is being properly followed. This hold also requires that key players be promptly identified and their records and ESI obtained and secured. Finally, system backup tapes should be preserved where they are the sole source of the electronic data. The duty to preserve ESI is a continuing duty throughout the litigation process.

Although use of EHRs is integrally related to improving patient care and safety, they also have their own risks, which require further consideration. Data loss or destruction, inappropriate correction of the EHR entries, inaccurate data entry, unauthorized access, and errors related to problems that arise during the transition to

EHRs are potential e-discovery issues counsel needs to address during the preservation period. Although these concerns may not be unique to EHRs, discovering these issues may be more challenging than had traditionally occurred with paper medical records. Issues relating to claims of spoliation—which could be the intentional, negligent, or grossly negligent destruction, mutilation, alteration, or concealment of EHRs—must and can be avoided.

Counsel should especially consider the pragmatic suggestions and guidelines provided by the Sedona Conference on preservation obligations and legal holds to assist counsel in considering, evaluating, and implementing procedures for complying with these obligations. He or she may find that these suggestions and guidelines will assist in meeting the obligations established by e-discovery rules and court decisions.

E-disclosure and e-discovery relating to EHRs. The specific disclosure and discovery obligations of health care providers and their legal counsel depend on the e-discovery rules or statutes that exist in the jurisdiction where a medical malpractice or other case is being litigated. Thus, as with any medical-legal issue, practitioners must be familiar with their own state's e-discovery rules and the application of those rules to their cases. In those states that have adopted e-discovery rules similar to the Federal Rules of Civil Procedure, relevant federal district court decisions pertaining to use of those rules should assist counsel in considering and resolving e-discovery rules, procedures, statutes, and case law in their jurisdiction.

CONCLUSION

With the current increasing use of electronic records in the health care industry, and projected expansion in the years to come, the paper hospital record may soon be viewed as a historical curiosity. Health care providers and their counsel must continue to work together to prepare for this "sea change" and consider its implications for e-discovery issues in medical malpractice cases.

Endnotes

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1 Comm. On Quality of Health Care in America, Crossing the Quality Chasm: A New Health System for the 21st Century (Institute of Medicine Mar. 2001).

2 EHRs are sometimes referred to as electronic medical records, or EMRs, though I use the abbreviation EHR throughout this article.

3 By 1965 it was reported that at least 73 hospitals and clinical information projects, and 28 projects for storage and retrieval of medical documents and other clinically relevant information, were underway. Comm. On Improv-

ING THE PATIENT RECORD, THE COMPUTER-BASED PATIENT RECORD: AN ESSENTIAL TECHNOLOGY FOR HEALTH CARE 111 (Richard Dick et al. eds. Institute of Medicine 1977).

4 Fred Schulte, *Stimulus Money Fueling Market for Electronic Medical Records Systems,* INVESTIGATIVE REPORTING WORKSHOP, AM. UNIV. SCHOOL OF COMMUNICATIONS (Nov. 6, 2009), http://investigativereportingworkshop.org/investigations/electronic-medical-records-stimulus/story/stimulus-money-fueling-market/.

5 Anita Gutierrez-Folch, *Government Pushes for Electronic Medic al Records by 2014,* FINDINGDULCINEA.COM, INC. (Oct. 1, 2009), www.findingdulcinea.com/news/health/October/Government-Pushes-for-Electronic-Medical-Records-by-2014-.html.

6 Joel B. Korin & Madelyn S. Quatrone, *Electronic Health Records Raise New Risks of Malpractice Liability,* LAW, COM (June 19, 2007), www.law.com/jsp/cc/PubArticleCC.jsp?id=900005483988.

7 Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17 2009).

8 Korin & Quattrone, *supra* note 6.

9 Texas has adopted its own version of e-discovery rules that do not follow the Federal Rules of Civil Procedure, and two other states have adopted the Texas e-discovery model. Note that, although most medical malpractice cases are filed in state courts, and thus not governed by federal procedure rules, in those states where e-discovery rules or statutes are similar to the federal procedure rules, federal court decisions regarding e-discovery issues may be considered authoritative.

10 *State Court Rules & Statutes Regarding ESI,* KROLLONTRACT.COM, https://wwwkrollontrack.com/library/staterules_krollontrack_nov2010,pdf.

11 *See* ELECTRONIC HEALTH RECORD, HEALTHCARE INFO. & MGMT. SYS. SOC'Y, www.himss.org/ASP/topics_ehr.asp.

12 Am. Med. Ass'n, AMA Summary and Analysis: 2011 Medicare Physician Payment Proposed Rule (July 1, 2010), www.ama-assn.org/amal/pub/upload/mm/399/hsr-cms-proposed-medicare-reg.pdf.

13 Top Ten Electronic Health Record System Expectations/Requirements: Beyond "Meaningful Use," EBGLAW.COM (Mar. 31, 2010), www.ebglaw.com/shownewsletter.aspx?Show=12669.

14 *Medicare & Medicaid EHR Incentive Program, Meaningful Use Stage 1 Requirements Overview,* CENTERS FOR MEDICARE AND MEDICAID SERVICES (Aug. 24, 2010), https://www.cms.gov/EHRIncentivePrograms/Downloads/MU_Stage1_ReqOverview.pdf.

15 CMC HER Meaningful Use Overview, CENTERS FOR MEDICARE AND MEDICAID SERVICES (last revised Apr. 20, 2011), https://www.cms.gov/EHRIncentivePrograms/30_Meaningful_Use.asp#BOOKMARK4.

16 See *Medicare & Medicaid EHR Incentive Program, supra* note 14.

17 Katherine G. Maynard, EMRs Prompt Electronic Discovery in Litigation, Managed HealthCare Executive (July 1, 2009), http://managedhealth-careexecutive.modernmedicine.com/mhe/Exclusives/EMRs-prompt-electronic-discovery-in-litigation/ArticleStandard/Article/detail0614189.

18 *Id.*

19 *State Court Rules & Statutes Regarding ESI, supra* note10 (most state e-discovery rules or statutes became effective in 2008 or 2009, and some have or will become effective in 2011).

20 N.H. Bell Bearings, Inc. v. Jackson, 969 A.2d 351 (N.H. 2009) ("[b]ecause electronic discovery has been more predominant in federal courts, we look to those courts for guidance;" finding that certain limitations imposed in federal courts on certain e-discovery to be both sensible and persuasive).

21 AHIMA e-HIM Work Group on e-Discovery, *New Electronic Discovery Civil Rule,* 77 J. OF AHIMA 68:A (Sept. 2006), *available at* http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_031860.Hcsp?dDocName=bok1_031860.

22 The Sedona Conference Working Group on Electronic Document Production & Retention, *Commentary on Legal Holds: The Trigger & The Process,* 11 SEDONA CONF. J. 265 (Fall 2010), www.thesedonaconference.org/dltForm?did=legal_holds_sept_2010.pdf.

23 As was recognized by the Federal District Court of Kansas in *Williams v. Sprint / United Management Co.,* 230 F.R.D. 640, 643 n.8 (D. Kan. 2005), the Sedona Conference is a non-profit legal policy research and educational organization that sponsors working groups on cutting-edge issues of law. The Working Group on Electronic Document Production & Retention is comprised of judges, attorneys, and technologists experienced in e-discovery and document management matters. The Sedona Conference was also cited as an authority in the field of e-discovery by the Arizona Supreme Court in *Lake v. City of Phoenix*, 281 P.3d 1004 n.1 (2009).

24 *Commentary on Legal Holds, supra* note 22, at 267-68.

25 217 F.R.D. 309 (S.D.N.Y. 2003).

26 216 F.R.D. 2 80 (S.D.N.Y. 2003).

27 220 F.R.D. 212 (S.D.N.Y. 2003).

28 229 F.R.D. 422 (S.D.N.Y. 2003).

29 220 F.R.D. at 218.

30 685 F.Supp. 2d at 456 (S.D.N.Y. 2010) (amended order).

31 *Id.* At 456.

32 *Id.* At 463-67.

33 Mark Neubaer, *The Burdens of E-Discovery Grow Even Larger,* STEPTOE & JOHNSON, LLP (Feb. 2010), www.steptoe.com/publications-6645.html.

34 688 F.Supp. 2d 598 (S.D. Tex. 2010).

35 *Id.* At 598. While Rosenthal was complimentary of Scheindlin's efforts in the *Pension Committee* case, she took a different approach in analyzing the culpability level necessary for imposing sanctions for preservation failures. These different approaches to determining spoliation have been the focus of discussion in recent months. *See Pension Committee and Rimkus Consulting; Differing Approaches to Determining Spoliation,* WINSTON & STRAWN, LLP (Apr. 2010), www.winston.com/siteFiles/Publications/Rimkus%Briefing.pdf; *see also Dueling Opinions: Scheindlin's Pension Committee vs. Rosenthal's Rimkus,* DISCOVERY RESOURCES (Mar. 18, 2010), www.discovery-resources.org/technology-counsel-dueling-opinions-scheindlin%e2%80%99a-pension-committee-vsrosenthal%e2%80%99s-rimkus/.

36 *Avoid Legal Missteps with a Litigation Response Plan,* AHIMA Advantage (2008), www.umass.edu/eei/2009Workshop/pdfs/Litigation%20Response%20Plan.pdf.

37 *Id.*; *see also* AHIMA e-HIM Work Group on e-Discovery, *supra* note 21.

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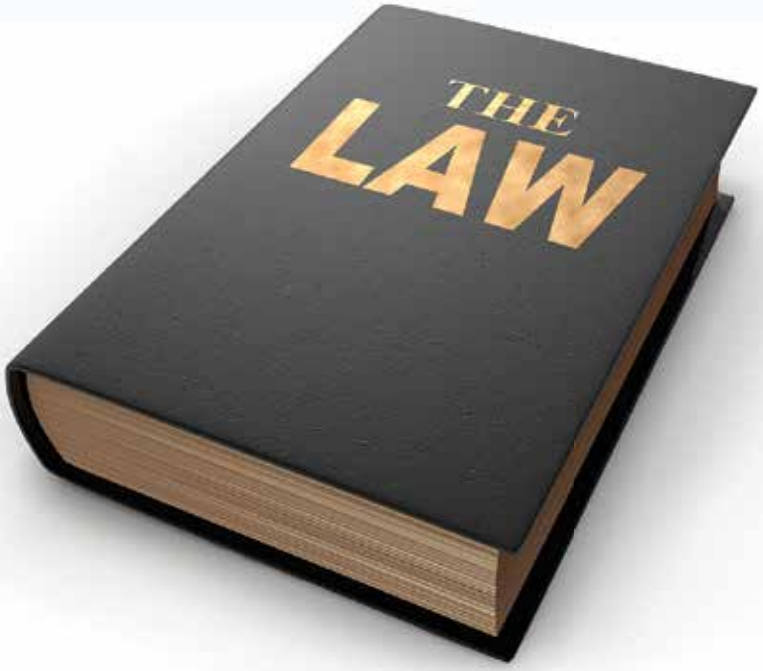

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