

## Winning with Electronic Discovery



Discovery should no longer be limited to only paper. It is estimated that more than 30% of corporate communications never appear on paper. An attorney who presents the opposing attorney with well written, developed and planned electronic discovery has a powerful weapon, that may be used as a strong negotiating tool.

Electronically discoverable data can be found in many places other than the hospital or office computer system. Some of the other sources of data include: voicemail and pager system records, cell phone and land line billing records, instant messaging or text messaging records, email (sent, received, deleted), data files and the metadata contained in the files, deleted files, electronic medical records, software and programs, back-up and archive tapes, temporary files, internet firewalls and web blocking software, internet history files, website log files, internet cache files, internet cookies, websites, message posting boards or listserv, internet service provider information, calendar files and digital photographs.

As soon as litigation is likely to be pursued, attorneys must act quickly to preserve evidence. The attorney should send a spoliation letter outlining what the other side should preserve for future production. This letter should be sent to all possible defendants, other plaintiffs or third parties who may have knowledge pertinent to the case. This letter should be as specific as possible to avoid overreaching and state what should be done to preserve the evidence. *If you would like assistance in drafting such a letter, call your legal nurse consultant.* By placing the other side on notice you may be able to preserve information that

may otherwise be lost during the normal course of business. This will set up the other side for a possible claim of negligent or intentional spoliation of evidence. A court order could also be obtained requiring immediate preservation of the data.

You should retain an expert early that specializes in discovery of electronic data. This expert may assist with reviewing the other sides computer systems and software, determining the type of data that may be available, its location and the difficulty in obtaining or preserving it, harvesting the data in its original formats from the other side's systems while maintaining the chain of custody and preserving it, monitoring compliance with discovery from both sides, as well as, the more well known roles for an expert.

Parties should request "images" of hard drives or servers, personal computers, laptops, PDAs, memory cards or sticks, and flash drives. You may need to request that parties stop using their computers until they can be imaged, because valuable information could be lost in the regular course of business. Simply by opening a file, the metadata will be altered. This metadata contains information such as the last person to view or edit the file, revision history, prior edits, length of time to create or edit a document, comments inserted and other potentially valuable information. Simply copying the files may lose important evidence stored in slack file space, deleted files or other locations. Copies of back up tapes will have only the most current files, not past revisions. Imaging preserves an exact copy of the hard drive at the time of the image. You should obtain more than one image to keep one undisturbed while the other is used as a working copy. You should also request a paper copy with the image so that they can be compared.

Your legal nurse consultant can assist you with your electronic discovery by: advising you on the types and extent of electronic data to request, identifying sources of data, interfacing with key individuals involved in the

litigation to determine how and where the documents are stored, assisting in drafting the electronic discovery, participating in supervising compliance with electronic discovery, assisting you in complying with electronic discovery requests by gathering information and drafting responses and advising you on the steps necessary to preserve and protect the electronic data. ♦

## References & Resources

If you have a need to quickly and easily create diagrams, charts, timelines and illustrations for use at deposition, settlement brochures or conferences, trial or presentations, you owe it to yourself to check out the software program **SmartDraw**. SmartDraw includes over 60,000 ready made symbols, templates and clip art images for all types of diagrams and charts. Simply copy and paste your SmartDraw drawings in Powerpoint, Word or any other software for ready-to-go presentations. You can print in numerous print formats, from standard sizes to huge posters for courtroom exhibits. SmartDraw is very easy to use. You can decide for yourself by downloading a 30 day free trial at [www.smartdraw.com](http://www.smartdraw.com) or for more information on using this software in the legal profession go to [www.smartdraw.com/specials/legalsoftware.asp](http://www.smartdraw.com/specials/legalsoftware.asp). ♦

## STUDY: OLDER DOCTORS NOT STAYING CURRENT

Harvard Medical School analyzed 62 studies over the past 40 years and found that the quality of care patients received was inversely proportional to a doctor's experience and age.

"Nearly three-quarters of the studies found that older doctors were less likely to adhere to guidelines for cancer screening, to use proper medications to treat heart attacks or to adopt other evidenced based treatments. One of the most striking results came from a 2000 study of 4,546 internists, cardiologists and family physicians, which found that patient mortality increased by 0.5% for every year after a doctor graduated from medical school."

One reason for this, experts speculate, is because of the inability of Continuing Medical Education to keep up with the explosion of medical information. Physicians need help distinguishing what they need to know and what needs to be at their fingertips, because there are over 10,000 clinical trials annually.

Each of the 24 specialty boards now require their members take periodic exams to maintain their board certification, but older doctors are usually exempt from these requirements. In the largest specialty, internal medicine, about half of the 150,000 practicing internists have been grandfathered in because they passed the board exams before 1990. ♦ *Source: Washington Post*

Quotable: Success seems to be largely a matter of hanging on after others have let go. ~ William Feather

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