

E-Discovery: A Spoliation Trap for the Unwary

Although the term e-discovery, short for electronic discovery, has been around for many years, there is general apprehension surrounding its meaning, applications and implications. Currently, e-discovery rules have been carved out exclusively within the realm of federal courts. As federal courts continue to embrace the digital age, it will not be long before Illinois state courts adopt some form of federal e-discovery rules.

Certainly most everyone in hospital administration roles are familiar with the concept of discovery. E-discovery is not much different; it is simply the identifica-



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tion and production of electronically stored information or "ESI."

A facility may be expected to produce ESI

during litigation, and it is important to be aware of where relevant data may be stored, how the various information technology ("IT") systems interact, and how hospital employees utilize the systems. Electronic data can be stored virtually anywhere including desktop/laptop computers, printers, copiers, telephone and voicemail systems, on web-based data storage services, cellular devices, external hard drives, floppy disks, CD-ROMs, DVDs, memory sticks, iPods and backup tapes may house ESI.

Every risk manager is familiar with the concept of preservation and spoliation in pre-litigation stages. The same principles exist in e-discovery. Like ordinary paper-based pre-litigation obligations, an occurrence when there is a reasonable expectation of litigation triggers e-discovery-based preservation duties. In other words, once a party reasonably anticipates litigation, it must suspend its routine document retention and destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. ESI must be similarly preserved. As such, it is important to designate a knowledgeable IT person to oversee the storage and assist with production of ESI.

With old-fashioned paper-based production, preservation is fairly simple – once the information is identified, just do not shred the document and continue to maintain it in the ordinary course of business. With ESI, preservation is more complicated as inadvertent destruction of data can occur. For instance, with ESI, simply opening a file can alter certain properties, which may give rise to a spoliation claim down the road. For example, every Microsoft Word document contains a created date, modified date and last accessed date properties. If, after preservation duties are triggered, a Microsoft Word document is opened, the "last accessed date" attribute will be permanently modified, potentially leading to spoliation claims.

Another difference between the production of paper-based materials and ESI, is that in the paper world, shredding a document permanently destroys it. With ESI, deleting a file does not always mean the file is irretrievable. Through the use of special software, documents that were thought to have been deleted can be restored, as the data associated with the file remains on the system until it is overwritten by other data. It is important to note that simply booting up a computer may overwrite this "deleted" but restorable data, resulting in the perma-

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nent deletion of these materials and possibly leading to a future spoliation claim.

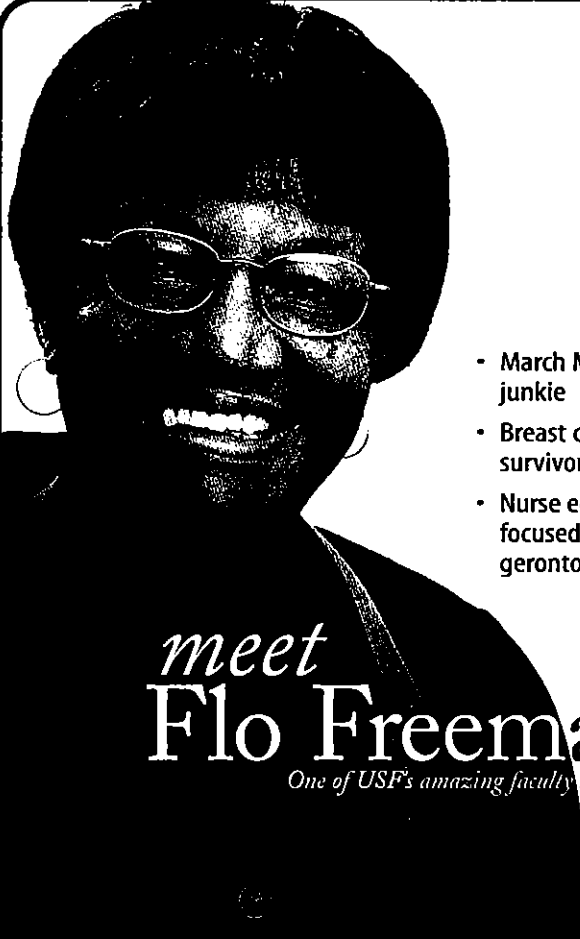
Why not just bypass these ESI traps by printing documents implicated by a litigation hold? The answer reveals another complexity about ESI – it contains metadata, or data about the data, which may also be discoverable. As previously mentioned, all ESI contains various properties that provide additional information about the document itself (including who created the document, when it was last accessed, when it was last modified, etc.), which is not preserved when the document is simply printed. Printing the documents and then deleting the electronic version is likely to result in a spoliation claim.

Between 93% and 97% of all information is now created electronically. The government has recently taken interest in encouraging health care providers to utilize more technology. One of the largest health care measures in the American Recovery and Reinvestment Act of 2009 includes over \$19 billion for healthcare providers to acquire and implement health information technology systems. As incentives for health care providers generate more ESI, the expansion of e-discovery beyond federal courts is imminent.

Proper preparation will help avoid future spoliation claims as well as contain the high costs often associated with production of ESI. Risk managers must coordinate their preparation efforts with key IT personnel, ensure that employees understand and strictly follow current retention policies, and that documents intended for routine destruction are permanently destroyed.

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