



message from partner-in-charge

It is my pleasure to introduce Pepper Hamilton LLP's **Orange County Update**. Our clients and friends often ask Pepper attorneys for advice and education on subjects of interest. This newsletter, and its future editions, will not only focus on timely topics relevant to our clients' business needs, but also will discuss industry challenges, changes and innovations – and of course, the many legal issues that arise from such changes.

Our first two articles focus on technology – particularly e-discovery and virtual house calls. More information about these topics can be found on Pepper's Web site, www.pepperlaw.com.

I hope that you enjoy the **Orange County Update** and welcome your suggestions for topics to include in future editions. As always, if you have any questions about any of the information contained in this newsletter, just give us a call and we'll do our best to help.

Enjoy!

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Information Management Plan Essential to Handling E-Discovery Issues

E-discovery and e-documents – e-mails, spreadsheets, word processing documents, text messages, voice mails, etc. – are not new to business litigation. But this facet of litigation has new importance due to the amendments to the Federal Rules of Civil Procedure that became effective on December 1, 2006.

Attorneys have a professional responsibility to comply with the new e-discovery amendments, but lawyers need considerable assistance from business and technical professionals to manage e-information before, during and after litigation.

Managing electronic information requires an information management plan, which is essentially a document retention policy for electronic information. The plan must balance the legal requirements of the business (for example, special regulatory requirements to retain documents in health care, banking, government contracting and higher education) with best practices for data backup and destruction to maintain the health of the IT infrastructure.

Here are a few critical issues that clients, attorneys and IT professionals should consider in creating an information management plan.

Generally speaking, electronic data exists in three types - active data, back-up data and residual data. Active data is readily accessible data used for daily tasks and usually stored locally on a hard drive. Hidden behind the files that are accessed is metadata or embedded data which provides valuable business information about when documents were created, accessed, modified, etc.

This metadata can contain a mother lode of litigation-sensitive information required to be produced under the

new rules. Another source of e-discovery information is back-up data located in storage disks, tapes or a special network. Understanding the process for data back-up is an important part of compliance with the e-discovery rules.

Residual data also must be produced. Pressing the delete key does not typically erase all information about the document. Remember also that electronically stored data exists not only in e-mail and voice mail, but in mirrored disks, shadow drives, removable thumb drives, deleted files and instant messages, to name just a few. Generally, retrieval of residual data is costly and requires special forensic expertise. We expect residual data to be the subject of debate as to whether such data is readily accessible under the new Rules.

Information management plans should assist the business in identifying business records subject to the plans, mapping and inventorying their existence, retaining files for certain periods of time, documenting retrieval policies, setting a destruction schedule and auditing compliance. Roles and responsibilities for information and records management must be clear and consistently applied. Education of employees on the information management policy and compliance with the policy are critical. Information best practices need to address the strategic value of preserving information versus destroying unnecessary data across all data types and on all storage media. It is important to understand that, absent a legal requirement to the contrary, a company may and should plan for destruction of information as a natural part of records management. Businesses are not required to preserve equipment, information, metadata or storage devices except if there is a litigation hold or a regulatory requirement. When in doubt, the client should check with legal counsel.

From a litigation perspective, a litigation hold must be instituted to avoid any accusation of spoliation of evidence. While litigation holds are exceptions to the normal information management policy, companies should educate employees early on the procedures involving such holds. Appoint a committee to decide how to tailor the litigation hold appropriately to the case, how to address questions regarding the hold and to decide when the hold may be lifted. Remember that the chair of this committee may be called upon to defend the scope of the hold against spoliation arguments. Consider documenting the steps taken to implement a litigation hold.

Litigation preparedness and compliance with the e-discovery rules can be significantly enhanced by a team approach to information management. An interdisciplinary team including representatives from the relevant business operations, legal, finance and risk management, should guide the company's administration of the information management policy.

Having an IT specialist well-versed in the company's information management and capable of communicating IT information in plain English as part of the litigation process is key. This trained IT professional in conjunction with the company's lawyers and business operations executives can take the lead proactively as part of the administration of the information management policy and reactively in administering the litigation hold. The IT specialist should identify what relevant data exists and is reasonably accessible and how to implement and defend the methodologies of data gathering. Additionally the IT specialist can assist in identifying potential sources of electronic evidence which the company should request of the other side in discovery and can highlight issues in the other side's production of electronic documents such as printing e-mails where metadata is stripped out.

One final point: having a plan is essential, but not worth much if the company does not enforce compliance with it. Failure to follow an information management plan can set a company up for severe sanctions, as well as the possibility of losing a case by failing to find critical evidence.

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Virtual House Calls: Legal Challenges to Remote Caregiving

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Technology has given health care providers and caregivers unprecedented reach into patient homes to observe behaviors, monitor vital signs and communicate with the patient and family as part of the individual's treatment plan. It is allowing advances in care beyond the visiting nurse or nursing home. Intel's proactive health strategic research project has developed wireless sensor network technology, which when embedded throughout a patient's "Smart Home" can provide data on eating and sleeping patterns or prompt the patient to take medications. "Nursebots" will take vital signs and provide alerts and cautionary advice.

These medical and technological advances allow better care for patients with chronic illnesses, mental or physical disabilities or temporary acute illnesses who are confined at home or who can be treated more effectively at home. It's a trend that's bound to increase as technology continues to advance.

The legal system, unfortunately, does not always keep pace with technological advances. Remote caregiving

Crossing state lines to provide medical care for treatment is legal only for caregivers licensed in multiple states - a very expensive process - or through a telemedicine license.

raises numerous legal challenges – telemedicine, reimbursement, privacy, confidentiality, and security of communication – that health care practitioners must address to get the full potential from advances in technology and to avoid compliance problems.

Practicing Medicine Across State Lines

State medical boards provide licenses for each state. Crossing state lines to provide medical care for treatment is legal only for caregivers licensed in multiple states - a very expensive process - or through a telemedicine license. This is one area where nurses clearly have an advantage over doctors. Nursing is moving toward multi-state nursing licenses, which do not exist for physicians.

The government has recently made great strides in allowing caregivers to use mobile technology. In October 2005 Health and Human Services and CMS published proposed rules which sanctioned health care organizations providing physicians with technology for e-prescribing and interoperable electronic health records



Peppercast: Criminal Background Checks

Over the past 10 years, an increasing number of employers are choosing to conduct background checks in an effort to ensure a safe and productive workplace. Listen to a podcast with Hope Comisky, a partner with Pepper Hamilton's Labor and Employment Group, as she discusses the rise in use of background checks and the types of litigation employers may face when they decide to conduct them.

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without violating anti-kickback statutes or the physician self referral (Stark) law.

Telecommunication can be used to provide support to the patient and family, share documents, allow a forum to resolve questions, continue relationships beyond face-to-face, and provide a setting for virtual teams of caregivers. To be effective, such new social structures demand training in organizational dynamics, privacy, confidentiality, and recognition of tampered data and identify fraud.

Medicine in the digital age requires new thinking to bring cost effective and quality medical care to patients in home settings. Along with the promise of remote treatment advances come many challenges relating to technology, regulation and the building of new virtual teams and social structures to support the remote environment. For remote caregiving to succeed, the legal and ethical issues of home monitoring and ubiquitous computing must be addressed side by side with the technology advances.

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boston au poivre

Pepper opened its newest office on October 23, 2006, at 101 Federal Street in downtown Boston. The Boston office will focus initially on private equity, tax and general corporate work, and the firm plans to build the office systematically with Boston-based lawyers who will practice in the Pepper tradition of providing sophisticated, personalized service to sophisticated clients. The first addition to the Boston office is a distinguished, internationally recognized tax practitioner, Leonard Schneidman. Len, who is well known for his experience in U.S. and international tax planning and the tax aspects of corporate transactions, joined Pepper in September from Foley Hoag in Boston.

new york au poivre

Pepper expanded and relocated its New York office on October 17, 2006, to 420 Lexington Avenue, Suite 2320. The office will serve as the center of Pepper's international practice, and will focus on international work, cross-border transactions, private equity, corporate restructuring and other corporate work. Pepper partner James D. Rosener, head of the firm's international practice, is taking the lead on the expansion. Robert S. Hertzberg, co-chair of Pepper's Corporate Restructuring and Bankruptcy Practice Group will lead the expansion of the corporate restructuring practice there. Lawyers in the New York office are proficient in several foreign languages, including Arabic, French and Mandarin.