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Discovery of Electronically Stored Information in Litigation

Disclosure of electronically stored information (ESI) has been an emerging issue for physicians and medical practices in recent years. As the number of healthcare providers storing their patient records and information exclusively by electronic means continues to increase, access to that information in the medical malpractice litigation setting has become an important issue. Plaintiff's attorneys seek complete and unrestricted access to all information they expect to be available. When they do not get everything they believe they should get, for whatever reason, they seek harsh penalties which may include instructions to the jury that they may infer that the undisclosed information would have been damaging to the defendant's case.

In New York, the great majority of medical malpractice lawsuits are brought in State courts. Thus far, the New York State Legislature, unlike its Federal counterpart, has not formally codified the standards for sanctions or penalties for failure to disclose electronically stored information. As such, the courts are to be guided by the prevailing cases that address this issue.

At the present time, the seminal case on this subject is the 2012 Appellate Division case of *Voom HD Holdings*. The Court held that a party seeking sanctions for loss or destruction of evidence must show:

- That the party having control over said evidence had an obligation to preserve it at the time of its destruction;
- That the evidence was destroyed with a "culpable state of mind"; and
- That the destroyed evidence was relevant to, and supportive of the seeking party's claim or defense.

The *Voom* court went on to state that if the evidence is found to have been willfully or intentionally destroyed, the relevancy of the evidence is presumed. However, if the evidence is found to have been negligently destroyed, the seeking party must demonstrate relevance.

The current state of the law on this issue will continue to evolve as technology continues to advance in this area. The potential sanction of a jury instruction as to the inferences that may be drawn regarding evidence that is not produced is a very powerful weapon that can be used against healthcare provider defendants at trial. It may be prudent for physicians and practice managers to review their record and data storage protocols periodically so that if one is involved in litigation, this issue can be avoided.

As always, please feel free to contact us at Academic if you have questions on this issue.

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