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New Electronic Discovery Rules Now In-Effect In California

By Sarah Gates

What does this have to do with me? The short answer: everything! By now we are all accustomed to using technology such as e-mail in our everyday lives. While it is undeniable that e-mail is a necessity in today's world, it's important to recognize one simple fact: The message you hastily send today may be "Exhibit A" in a court of law tomorrow. **Bottom-line:** If your e-mail discusses a subject that you'd rather not share with the world, reconsider sending the information by e-mail.

After more than a year in the making, California's Electronic Discovery statutes became effective on June 29, 2009. The act effectively does two things to current California civil discovery rules. First, it expands the scope of the civil discovery act to include Electronically Stored Information, often referred to as "ESI". ESI includes information which exists in electronic or digital format such as e-mail, photos, written or scanned documents or images. Typically, ESI exists both on home and workplace computers, laptop computers or other devices such as blackberries and i-phones. Second, the new Discovery statutes lay out ground rules as to the manner in which ESI is to be requested and produced.

What does all of this mean? It means that disclosure of e-mail and other ESI in the course of civil litigation is quickly becoming commonplace. The reality is that we cannot simply send an e-mail and expect that it will never become "evidence" in the courtroom. Should we stop using e-mail? Of course not. However, one should be aware of the likelihood that workplace or personal e-mail may be disclosed in litigation, or simply that e-mails may be saved indefinitely and forwarded to others without your knowledge.

The enacting of new discovery rules make now the perfect time to brush up on how best to utilize e-mail to your advantage while balancing the potential for unintended disclosure.

E-mail Etiquette

Remembering a few simple tips when composing or responding to an e-mail can reduce the chances that your communications will be misinterpreted and may also reduce litigation costs:

- **The Basics -** Check your spelling and punctuation. While seemingly a no-brainer, this tip is worth repeating. Make sure your message is spelled and punctuated properly and your e-mail will have a better chance of being understood and interpreted as intended.
- **Just Don't Do It -** Refrain from sending jokes, offensive material or purely personal communications via company e-mail. If you do use e-mail for these purposes, delete these messages immediately from your inbox, sent items and deleted items boxes so they do not clog company servers for eternity.
- **Delete All Non-Essential Non-Business E-mail -** If you receive daily non-business e-mails such as horoscopes or even industry publications, read them and delete them. There is no reason why your employer should archive such material. Additionally, if these types of e-mails are not deleted, they often become part of a massive e-mail database which must be reviewed by attorneys in litigation. This makes the discovery process more costly.
- **Professionalism -** When you send a work related e-mail, you do so as a

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representative of your employer. It's important to note that e-mails also leave a more significant "paper" trail than hardcopies because there will automatically be multiple copies (sender, recipient, cc, bcc) the moment the e-mail is sent. Additionally, the life span of an e-mail can be infinite. Once backed up by an archiving system, the e-mail is preserved indefinitely.

- **Effective Communication -** Communicating effectively should always be the goal. Not only is effective communication more efficient, but there is less chance that the e-mail will be misinterpreted or that an inference of illicit conduct will be drawn. The effectiveness of your e-mail communication can be enhanced doing the following:

  1. Include a subject line. This makes the e-mail easier to sort later and provides context for the message itself.

  2. All attachments should be properly and descriptively labeled.

  3. Keep messages short and focused, but use complete sentences. Short paragraphs are easier to understand as the information can be digested more efficiently.

  4. Avoid generalities and stick to relevant details while weeding out unnecessary information. This will help limit the number of messages sent back and forth.

  5. If appropriate, consider an old fashioned phone call. Talking to one another is often the best communication tool.

- **Avoid Assumptions -** Remember that there are no verbal or non-verbal cues with e-mail, so they are often misunderstood. If you are unsure what the writer of an e-mail means, ask.

- **Watch Your Language -** Remember your audience and use appropriate formality. You never know who will be reading your correspondence in the future. Each e-mail you send should reflect your employer's commitment to quality, culture and regulatory compliance. Additionally, the tone of your e-mail should reflect your relationship with the intended recipient. For example, if you are a consultant to the person you are e-mailing, the tone of your message should reflect that you are providing a service, not issuing a directive.

- **Use "Reply All" With Caution -** Ideally, your message should be sent only to those to whom the e-mail applies. However, pay particular attention to the recipients of the e-mail to make sure all necessary parties are included.

- **Practice "Courteous" Forwarding -** When forwarding an e-mail to a new party, make sure the original message is one which is appropriate to pass on to others. Some e-mail messages contain information or commentary that was not intended to be shared.

- **Start Fresh -** Avoid opening and using an old e-mail to begin a new conversation, especially if the conversation begins as business and eventually leads to a personal or unprofessional discussion.

- **Avoid Graphics And Backgrounds -** These nifty little e-mail details turn into attachments when the e-mail is forwarded from one recipient to the next. If your e-mails are subject to discovery, review of those added attachments by attorneys can greatly increase the cost of litigation.

Privileged Emails - Protecting Your Communications

E-mail in the context of the attorney-client privilege presents a unique set of issues. In order to prevent inadvertent disclosure of privileged information and to provide the communication a better chance of withstanding attack, all communications which are intended to be protected by the attorney-client privilege should be identified as such.

Each e-mail should convey the fact that privileged information is being communicated. This can be accomplished by:

- Adding "PRIVILEGED & CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION" to the subject line of each privileged e-mail.

- If a conversation evolves into a privileged communication, update the subject line.

- Include a short statement in the e-mail itself which conveys the intent that the conversation be confidential.

- If you are acting at the direction of an Attorney, indicate that in the e-mail itself.

While the new Electronic Discovery Rules include a "claw back" provision[1] for inadvertent disclosure of privileged documents, the smarter practice is to be proactive and protect the privileged communications from the beginning.

The use of e-mail is certainly a necessity in today's world, but one should nonetheless be cautious as Electronic Discovery rules continue to develop. Practicing good e-mail etiquette may not only increase efficiency but may also help to protect privileged communications. ■

1 Section 2031.285 of the Code of Civil Procedure provides a mechanism for claiming privilege on documents already produced. Once the claim of privilege has been made, the party receiving the information is precluded from using or disclosing it until the claim is resolved.

Legal Update

By Darryl A. Ross

Application Fees Rise

Looking to close the budget gap, the California legislature approved increased fees for both facility license applications, and annual license renewals. Effective July 28, 2009, both fees were increased by 10%. A copy of the fee schedule can be found at: http://ccld.ca.gov/res/pdf/Fees.pdf.

Agreement to Arbitrate Found Invalid

An agreement to arbitrate medical malpractice claims was not enforceable because the statutory 30 day rescission period had not expired. (Rodriguez v. Witzling, (2009) 176 Cal. App. 4th 1461)

Plaintiffs' decedent signed an arbitration provision 4 days before surgery. She passed away a few days after surgery, and before expiration of the 30 day rescission period provided for in California Code of Civil Procedure § 1295(c). When the family sued the physician for wrongful death, the physician successfully moved to enforce the arbitration provision. The appellate court reversed and held that "a statutory prerequisite to an enforceable arbitration agreement under (California Code of Civil Procedure) section 1295 is that the person signing the agreement must have 30 days to review the agreement and reconsider whether he or she knowingly and voluntarily intends to waive the right to a jury trial or, alternatively, desires to rescind the agreement." Here, since the plaintiffs' decedent died before the 30 days period to rescind expired, the court of appeal held the arbitration provision to be unenforceable.

> ...comparison of individual nursing home ratings can be misleading and create significant confusion for consumers.

HHS Urged to Adopt Nationwide Nursing Home Rating System

Thirty-one state Attorneys General urged Department of Health and Human Services to adopt a national criterion-referenced evaluation methodology for rating nursing homes.

In a letter to HHS Secretary Kathleen Sebelius, the Attorneys General stated that "while the current Five Star System for rating nursing homes unveiled by CMS on December 18, 2008 establishes nationwide criteria for nursing homes, it uses normative methodology with fixed quotas to determine individual nursing home ratings on a state-by-state basis making it impossible to evaluate nursing home across state lines. As a result of the current Five Star methodology, comparison of individual nursing home ratings can be misleading and create significant confusion for consumers."

The Attorneys General called for a temporary suspension of the current CMS model and called for a "nationwide criterion-referenced evaluation methodology for establishing proficiency at all levels for nursing homes as opposed to the normative state-by-state methodology presently utilized by CMS." ■

Holiday Spirit

Wroten & Associates is pleased to sponsor attendance of senior residents to a holiday performance of "The Nutcracker" in December 2009.

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Medicare Secondary Payer Mandatory Reporting

What you need to know.

By Cynthia Uptmore

In 2007, President Bush signed the Medicare, Medicaid, and SCHIP Extension Act (MMSEA) of 2007.[1] This Act gives broad powers to the Secretary of Health and Human Services to protect Medicare's interests in litigation. MMSEA Section 111 requires Group Health Plans, liability insurers, and self insurers, which are referred to as "Responsible Reporting Entities" or "RREs" to (1) reimburse Medicare for past (conditional) payments made, and (2) protect Medicare's interest going forward by setting aside an agreed amount for future medical benefits. A conditional payment is a payment Medicare makes for Medicare covered services in liability, no-fault, and workers comp situations where another payer is responsible for the payment and the claim is not expected to be paid promptly. Basically, Medicare makes the conditional payment to prevent the beneficiary from using his or her own money to pay the claim. Medicare has the right to recover any conditional payments.

How will this law impact you and your facility?

You may be asking why this law is important for you to understand and follow. The law will apply any time monetary payments are made to residents or their family members, who are Medicare beneficiaries. If you are an administrator, owner, risk manager or general counsel for a skilled nursing facility or involved in resolving disputes or managing litigation at your facility, you must be aware of this law and the consequences of not following it. Section 111 of MMSEA adds reporting rules and includes penalties (civil monetary penalty of $1,000 for each day of noncompliance for each individual for which the information is required and should have been submitted) for noncompliance with Medicare beneficiaries who receive settlements, judgments, awards and other payments.

Medicare is a health insurance program for: (1) people age 65 or older; (2) people under age 65 with certain disabilities; and (3) people of all ages with End Stage Renal Disease.[2] The purpose of Section 111 Medicare Secondary Payer reporting process is to enable CMS to pay appropriately for Medicare covered items and services furnished to Medicare beneficiaries by determining whether Medicare is the primary or secondary payer.

> ...regardless of whether or not there is an admission or determination of liability, the facility must report settlements, judgments, awards, or other payments.

If a facility makes a settlement payment to a Medicare beneficiary, regardless of whether or not there is an admission or determination of liability, the facility must report settlements, judgments, awards, or other payments.

How do you set up reporting?

Section 111 requires RREs to register with the CMS Coordination of Benefits Contractor (the COBC). The RRE will be responsible to electronically transmit the necessary claim data to the COBC. Information on registration and account setup can be found at www.Section111.cms.hhs.gov.

What claims need to be reported?

Settlements, which CMS calls Total Payment Obligation to the Claimant (TPOCs), must be reported if over $5,000, made to a Medicare Beneficiary after January 1, 2010.

What information needs to be reported?

The injured Medicare beneficiary's:

- Social Security Number
- Date of Birth
- Injury or Incident information regarding alleged cause of injury and diagnosis (ICD-9 Codes)
- RRE insurance information
- Injured Medicare Beneficiary's Attorney Information

When does reporting start?

According to CMS, Section 111 mandatory reporting will be implemented in phases. On April 1, 2010 all liability insurance (including self-insurance), no fault insurance, and workers' compensation RREs will be required to submit their Claim files. CMS will issue revised versions Section 111 User Guides from time to time. Updates to Section 111 may also be found at the CMS Section 111 Web page at www.cms.hhs.gov/MandatoryInsRep.[3] You may also go to our website - www.wrotenlaw.com for a direct link to this site.

What should you do?

Share this information with your executive team and others who may be involved with managing litigation or making payments, such as your insurance carrier, legal department, risk management team, finance, Human Resources and patient accounts.

This law is still evolving. A number of revisions have been made since its inception. Be on the lookout for future updates. ■

1 See 42 U.S.C. §1395(y) 2 MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting. User Guide Version 2.0, July 31, 2009, p.11. 3 MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting. User Guide Version 2.0, July 31, 2009, p.8.

ALTERNATIVE DISPUTE RESOLUTION

When is Mediation the Best Process to Resolve a Dispute?

By Regina Casey

Mediation is a process in which a third party or mediator assists parties in a dispute to resolve a conflict. The process is private, voluntary, informal and non-binding. There are circumstances when mediation may be a better method of dispute resolution than direct negotiations between the parties, arbitration or litigation. This article will discuss the circumstances when mediation may be the preferred method to resolve a dispute.

Success with Direct Negotiations is Unlikely Due to the Personalities of the Parties

The negotiating style of one of the parties may be so adversarial that direct negotiation may diminish the likelihood of a reasonable timely settlement. A party may be extremely emotional, irrational, suspicious or simply uncomfortable with the negotiation process.

The mediator can provide an environment in which the parties can communicate constructively and reduce the tension often created when there is conflict. Through active listening and guided questioning, the mediator can often diffuse a highly emotionally charged situation so the parties can reach a reasoned decision rather than an emotional one.

Imbalance of Power Between Parties

There may be a wide disparity in the level of education, sophistication and knowledge of the parties that results in an imbalance of power. When there are considerable power imbalances between the parties, direct negotiation may benefit the stronger parties who tend to take advantage of their superior power, knowledge or communication skills to coerce their weaker adversaries. A mediator's obligation with regard to negotiation power is to ensure that each party in mediation has sufficient capacity to effectively represent their interests in mediation. Each party must have a certain threshold of negotiation effectiveness to be able to appropriately take part in mediation. It is a mediator's ethical obligation to be impartial, that is to not favor any party over any other party, and be neutral, which is not favoring any particular result. Therefore, it is not the mediator's role to level the playing field and balance bargaining power, but the mediator can capacitate each mediating party and determine whether each mediating party has sufficient capacity to effectively represent his or her interests in the specific mediation.

Attempts at Direct Negotiation Fail

Many times the parties who have attempted to negotiate directly come to an impasse. To break this stalemate, a mediator is required to help diffuse the controversy by encouraging parties to generate options. The mediator can serve as a catalyst who focuses the parties on their interests rather than the conflict. Sometimes it is not even apparent to the parties what their true interests are as their thinking is clouded by anger or other emotions. The mediator may assist the parties in brainstorming options to resolve their dispute based on their underlying interests. The mediator is in a position to identify the obstacles to settlement and guide the parties in overcoming these obstacles.

Advantages Over Litigation and Judicial Determination

Mediation has many advantages over litigation, including more control by the parties of the cost, time, process and outcome of a dispute. Not only does mediation reduce time and expense associated with litigation, it gives the parties control of the process. The parties choose the mediator, when and where to mediate, what information is to be exchanged and the outcome. Through the mediation process, communication can be improved so that trust is built and the bitterness often associated with adjudication can be avoided. Mediation may provide a basis for future negotiations between the parties and generally support an ongoing relationship between the parties, which is important when the dispute is between a facility and a resident who is still residing at the facility or when the dispute is between a contracted vendor and the facility and there is a desire to continue the business relationship.

> **Circumstances when mediation may be the preferred method to resolve a dispute:**
>
> - Personalities of the Parties
> - Imbalance of Power Between Parties
> - Attempts at Direct Negotiation Fail
> - Control of Cost, Time, Process and Outcome

Conclusion

When a dispute arises, careful consideration should be given to which method of dispute resolution should be employed. In our last newsletter we discussed when direct negotiations may be effective. This article addressed when mediation is the better approach. In the next newsletter we will comment on when arbitration should be considered the best process to undergo to resolve the conflict. ■