

Sorting out Discovery Requests: Are Subpoenas and e-Discovery Requests the Same?

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By Kimberly A. Baldwin-Stried Reich

While healthcare facilities are familiar with the process of discovery-often in the form of subpoenas-many are just seeing their first e-discovery requests. Do e-discovery requests differ from subpoenas, and do they require different responses?

The answer is not a simple yes or no. In some instances a subpoena is an e-discovery request, and in other instances it is not. A subpoena is just one of a number of common discovery devices used to obtain information that may be relevant to a lawsuit and responsive to discovery.

The Same or Different?

When is a subpoena an e-discovery request and when is it not?

"That's a good question," says James DeSanto, PC, of DeSanto and Morgan in Libertyville, IL. "Whether or not a subpoena will be classified as an e-discovery request will generally depend upon the discovery plan that is agreed upon by the attorneys early on in the litigation process."

Factors that affect this decision include the scope and complexity of the matter, whether or not the preservation and discovery of electronically stored information is going to be a significant issue in the matter, and whether a discovery plan was developed and agreed upon by the parties to litigation.

"The discovery of electronically stored information is a discussion that the attorneys may have early on in the litigation process," says DeSanto, "and they may also involve the court in the matter if they determine that the preservation and handling of electronically stored information is going to be an important component of the case."

Most medical malpractice cases are heard in the state and local courts, DeSanto notes, where electronic discovery currently is less common than in federal courts. E-discovery is more costly and more complex than traditional discovery.

Other Types of Requests

In addition to subpoenas, organizations may receive a variety of other e-discovery requests.

Preservation letters are a written communication issued by the organization's internal legal counsel directing HIM or IT managers to preserve or maintain certain electronically stored information relevant to a matter that may be the target of an investigation or legal proceeding or by which the organization received formal notice of impending litigation. (Preservation letters are also known as "legal holds" or "freeze notices.")

Preservation orders are legal notices issued by the court demanding preservation of certain documents, files, or other electronically stored information relevant to a matter currently being litigated.

Subpoena ad testificandum is a written order commanding a person to appear and give testimony at trial or other judicial or administrative tribunal.

Subpoena duces tecum is a written order issued by the court commanding a person to "appear and bring" all documents, media, books, and other records outlined in the subpoena. The form of the subpoena will vary by state statute, but generally a valid subpoena contains a number of standard elements such as the name and jurisdiction of the court, the case docket number, and signature stamp or official seal.

Court orders are written orders issued by a state or federal court or other administrative tribunal or state commission ordering a healthcare organization to release EHR information or other protected health information and produce this information in court. Written court orders are e-discovery requests that are served upon healthcare organizations in a manner similar to that of subpoenas, but they may also be issued orally in court to an attorney who represents the healthcare organization or provider.

Interrogatories are sets of written questions served on the one party to another in civil litigation. They are an extraordinarily useful tool for obtaining information in discovery. With regard to EHRs and HIEs, the HIM and IT manager may be asked to testify about the "good faith" operations of their organization's information systems.

Requests for production are legal notices prepared by legal counsel after gaining a general sense of the opponent's technological infrastructure and system capabilities. Typically, a request for production will be divided into three basic areas: e-mail, electronic documents, and data compilations.

30 (b)(6) Deposition Notices for Custodians of EHR require an HIM or IT manager to be a witness for the organization. The deposition differs from those that HIM managers are familiar with and may have taken in the past in their role as the "official custodian or keeper of the record." The 30 (b)(6) witness's role is to testify on the operations of the organization, such as the infrastructure of the IT department or how information is processed through a health information exchange.

Proposed order appointing third-party neutral expert is an order issued by a judge appointing a neutral third party who is an expert in the information systems, computer hard drives, and related technology used by the parties to litigation. The third-party expert is generally responsible for reviewing and collecting data from both parties and producing the resultant data according to the agreement of both parties.

Proposed order appointing a special master is an order issued by a judge appointing a special master to inspect the information systems, computer hard drives, and related technology of the parties to litigation. The special master is generally responsible for reviewing and collecting data from both parties and producing the resultant data according to the agreement of both parties.

Keeping Policies and Procedures Current

Until such time that the process surrounding the admissibility and authentication of electronically stored information is ubiquitous, it is important to remember that an e-discovery request is any legal document (including a subpoena) that is issued by legal counsel or a court to facilitate the collection, analysis, and preservation of electronically stored information.

Depending on the nature, scope, and complexity of the investigation, the HIM or IT manager may be called upon to participate in the search, collection, analysis, and production of responsive documentation.

Over time, as more cases are tried and heard before the courts, and as the legal profession becomes knowledgeable about and accustomed to discovery of electronically stored information, the processing and response to calls for the preservation and production of electronically stored information will be straightforward.

In the meantime, HIM and IT departments should prepare for electronic discovery subpoenas by reviewing and revising their organizational policies and procedures surrounding the processing of subpoenas. A key consideration is the assurance that there is a clear delineation of the person or department who will be responsible for accepting and reviewing all subpoenas that involve requests for records whether they be paper-based or electronic.

Another very important factor should be a requirement that the subpoena is reviewed prior to it being accepted to confirm it is valid. Once a subpoena is deemed to be valid, it should then be quickly assessed to determine whether or not the organization has been (or will be) named as a party to the litigation.

Subpoenas in which the organization is not named as a party to litigation are known as third-party subpoenas. The organization is required to preserve and produce electronically stored information in response to such subpoenas, but its duties and responsibilities are vastly different than those required if the organization has been named in litigation.

Responding to Federal Subpoenas

The majority of healthcare litigation occurs in state and local courts, while the vast majority of complex matters, such as regulatory investigations or class action lawsuits, occur in federal court.

The duties surrounding response to a subpoena issued by a state or local court are established according to state or local jurisdictional law. In those instances, HIM professionals work with legal counsel and risk management to determine appropriate responsibilities.

The duties and responsibilities regarding the response to a federal subpoena are standard among all federal courts. Rule 45 (d) of the Federal Rules of Civil Procedure outlines the duties required in response to a federal subpoena. A summary of duties in producing documents or electronically stored information is outlined below:

- **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
- **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
- **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.
- **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. The court may nonetheless order discovery if the requesting party shows good cause.

The key to the continued success of the HIM profession in responding to subpoenas and e-discovery request is to recognize that the process is changing and evolving. Understanding and anticipating the changes through a review of the organization's discovery policies and procedures is essential.

Collaborating with legal counsel and IT colleagues is also important and will help shape the future of electronic discovery. "The attorney can play a crucial role in helping to educate HIM professionals about the legal system, but HIM professionals can educate attorneys about the information systems, forms, formats, uses, and locations of all potentially relevant information," DeSanto notes. "I think the legal process is eventually going to change, and there is going to need to be a lot of communication and education between all of the disciplines."

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Read more on responding to e-discovery requests in an extended version of this article that features 10 steps in preparing for and processing requests, as well as sample subpoena forms.

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