A New Legal Approach to Health Care

James Woods and his family recently settled an 'unsettlable,' acrimonious medical malpractice case arising out of the death of his brother, Michael, in the emergency room at Kent Hospital, Warwick, R.I. The case settled in the third week of trial when Sandy Coletta, the chief executive officer of the hospital, Woods, and their attorneys met over dinner. Coletta acknowledged the medical error and apologized; Coletta and Woods agreed to work together to create new and innovative approaches to hospital and emergency room care.

LAST IN A TWO PART SERIES

This article continues "*Healing Practices in Law and Medicine*," which appeared on February 12 in Verdicts & Settlements.

Mark Decof, the Woods' family attorney, talked of the Kent Hospital Annual Meeting, where both Coletta and Woods spoke to those in attendance, including physicians, other health care providers, and hospital management. Woods said one of the miracles of the process was that the apology, acknowledgement and the Institute would help keep his mother, who had endured what no mother ever should, the loss of her son, alive for a longer period. The reception to Woods was not only warm and positive, but also brought a standing ovation.

Decof said the Woods case causes him to be encouraged that lengthy, harsh, adversarial litigation is preventable. He stated, 'This case can be looked at as a model for how claims can be addressed in the future. It is an example of how management at hospitals can take the bull by the horns, irrespective of advice management was getting from litigation counsel. It takes participants getting involved with genuine desire to make this type of process happen. It opens up a whole new way of communicating. The ice has been broken. I'm hoping that it will happen with other cases.' He also noted that the parties agreed, prior to any meeting, that any admission and/or apology offered in the meeting were confidential and could not be used at trial if the case didn't settle in that meeting. Decof also noted, referring to the meeting, 'nothing but good could come from it.' Woods said, 'This remarkable action of accountability has turned a bitter event into a landmark opportunity for hope.' Further, he noted, 'It's best to resolve differences without invoking the court system.'

Decof now has a relationship with Coletta, which he hopes will help pave the way to resolving these types of cases with a similar approach, which will include non-adversarial, direct, respectful, and open negotiations. Without this type of process, the case would have gone to verdict and any possibility for acknowledgement, apology, and healing would have been lost. The collaboration involved in the work of the Institute, to say nothing of the apology, could not have happened without these people acting from deeper impulses and this process, which allows that to happen.

Coletta told me that the hospital culture, at the time she became CEO, was not "an open one." She said no one had ever talked to Woods directly because there was no protocol for that; the system had no mechanism to do it. When I asked her how she sees herself, after the Woods case, working with attorneys for the hospital after adverse medical events, she responded that 'we need to accept our weaknesses just as we celebrate when we do well. Kent and hopefully all hospitals will be more willing to step up and address issues when they happen.'

She also wants to remove roadblocks, which, although intended to protect the hospital, 'only get in the way, preventing us from doing the right thing.' Coletta stated that, if the hospital didn't do what they were supposed to do, litigation and trial shouldn't be the option chosen. The decision to proceed to trial had been made based on an assessment that causation between the error and the outcome was not clear. She added, that hospitals shouldn't think of litigation as a 50:50 bet; 'litigation isn't a game' and shouldn't be thought of as one. Coletta, the non-lawyer in the equation, said, quite simply, 'It wasn't about causation, it was about how we did something wrong.' This came in the face of the attorneys advising, 'It just isn't done.'

The Woods case illustrates that Kent, the client, was willing to take a different approach to resolving an angry situation, one different than playing the odds of winning the causation bet at trial. Could attorneys, rather than stay confined to the conventional wisdom of what litigators should do and how they should act, take the lead in facilitating non-adversarial practices in health care, ones that allow us to practice law in a healing, hopeful way, one in which future patients and our communities in general are, at least informally, parties to the process? Could we be helping health care providers to build, rebuild, and mend their relationships with patients and their communities? The Woods case suggests that the answers to both these questions is 'Yes,' when there is an opening for shifts in thinking by all involved.

Even more profoundly, attorneys can play a role in creating those shifts. Those attorneys who can make this shift will lead the way. Unless and until we make these shifts, we, the attorneys, will be left behind. My experience in conversation with health care providers about non-adversarial processes after adverse medical events - involving disclosure, apology, when appropriate, compensation and improved protections for future patients - is that attorneys are often marginalized throughout the process, except for the compensation discussions. The health care providers see us as getting in the way, telling them what they cannot or should not do, rather than advising them on how to do it quickly, safely, cheaply, and compassionately.

As Kent redesigns its health care delivery system, the legal system associated with it could also be redesigned, creating two parallel and interconnected systems that will protect patients, families, physicians, hospitals, and our communities through openness, starting with the principle of doing the right thing. Think of the emotional underpinnings preceding the Woods case settlement: acrimony, name-calling, hostile and unpleasant publicity, sleepless nights, anger, sadness, and fear. What it brought in the end was hope, compassion, courage, generosity, humanity, and community-building.

Attorneys' roles can shift, providing a different type of counsel and support to health care providers, moving from gladiator to counselor, negotiator, listener, settler, and participant. Steps we can take to create the space for these shifts include dialogue to help attorneys rethink and expand on our responses to adverse medical events, as well as training in disclosure, apology, and compensation. All can be truly transformative, giving attorneys the opportunity to play a healing role, as well as giving voice not only to the patient but to the health care providers who, like the patients and families in the litigation process, suffer in silence with little or no voice in the process.

This case is tremendously hopeful and healing on so many levels. My hope is that we use it as a model to move forward so that attorneys can be an active part of this non-adversarial good work, giving, as it does, a voice to the patients and their families, while helping them strengthen their connection with their health care providers. Shifts in thinking need to take place all the way around, not just with the health care providers, but with hospital management, insurers, and attorneys. At Kent, these shifts in thinking have already occurred or are in process All of us can participate in redesigning the health care system and its juncture with the legal system, working as a team. This is a rare opportunity in which we, as attorneys, can bring our skills, expertise, experience and humanity to truly assist in healing health care.

James Woods, his attorney, Mark Decof, and Sandy Coletta, the CEO of Kent Hospital, will speak at the Collaborative Law Symposium, chaired by Kathleen Clark and sponsored by the ABA Dispute Resolution, Health Law and Trial and Insurance Practices Sections, on April 7. (www.abanet.org/dispute/conference/2010/collab.html.)

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Cloud Computing: Risks, Rewards, and Impact on E-Discovery

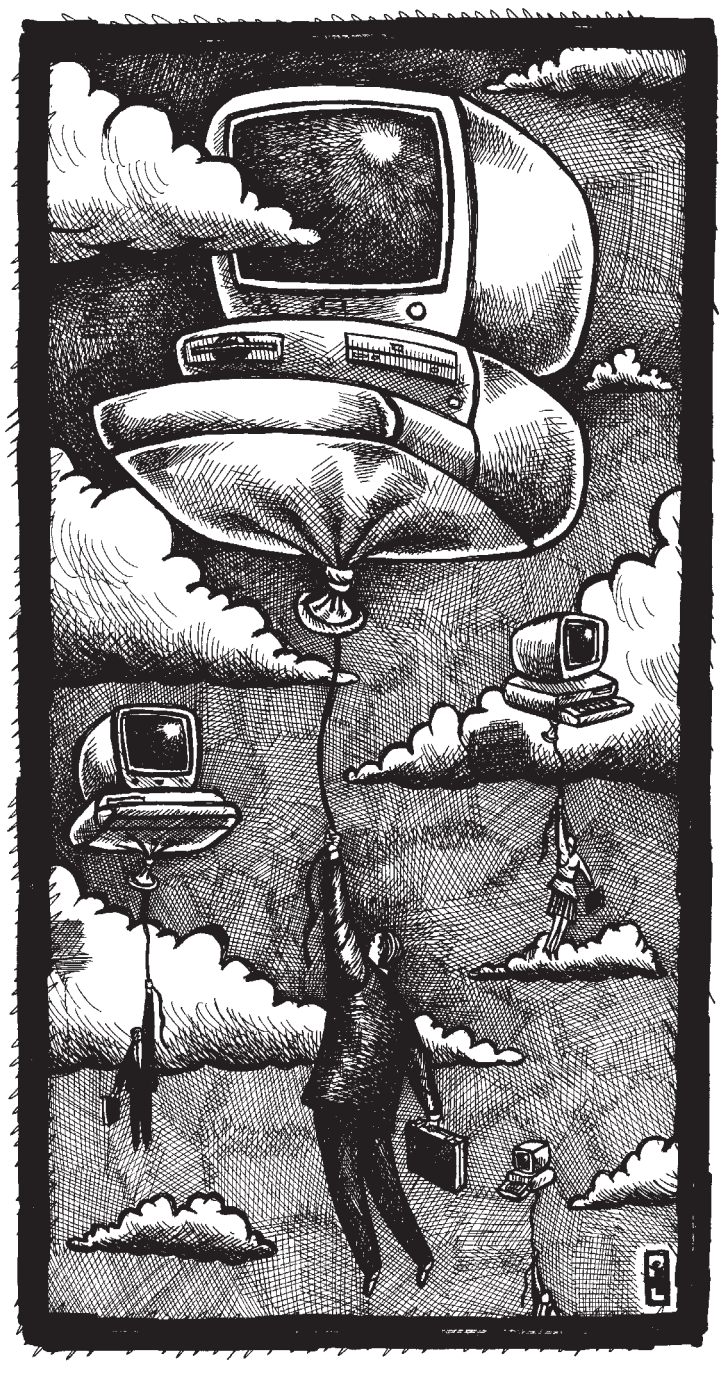
What is cloud computing? Cloud computing is a general term for the delivery of hosting and other services over the Internet. Instead of storing data in-house, the data and data applications are stored remotely, with access to the data provided via the Internet (the "cloud" in "cloud computing"). Whatever the specific form, the singular characteristic of cloud computing is separation of the computer hardware from the service. The major advantage of a cloud computing solution is its elasticity - the consumer is charged by use, can make as little or as much use of the service as desired, and need not purchase, maintain, or upgrade any computer hardware. Once data is hosted in the cloud, all the consumer needs is a personal computer and access to the Internet.

Several aspects of cloud computing significantly impact electronic discovery. Accordingly, these issues must be known and understood by both client and counsel before e-discovery commences. Indeed, these issues ideally should be considered by the client in deciding whether "cloud computing" is an appropriate choice for the company.

First, while "cloud' references provide a useful metaphorical tool, in reality the data still sits on a server somewhere. Care should be taken to ensure that this physical location, and the electronic security protecting the data residing on the server, is appropriate and sufficiently robust. One aspect of turning hosting duties over to a third-party is that you lose control over these security and data protection issues, as some or all of those security and protection duties devolve to the hosting company. Not all "clouds" are the same, and you should make sure you understand the security parameters and limitations of your particular cloud.

Likewise, if you are storing data in a cloud as part of a complex and sensitive litigation, it is critical that counsel understands who else is storing data in the cloud, and learns how the system is designed to ensure that the risk of commingling or unauthorized access to the data is negligible. Often, there are economies of scale in having all electronic discovery from all parties in a lawsuit hosted on the same cloud, and accessed by a single service provider. But these benefits will rarely outweigh a security breach that leads to the loss of, or the unintended sharing and commingling of, information. Here, counsel might consider retaining an independent technologist to review and assess the cloud's security protocols and systems to ensure that they are not unnecessarily placing the client's data at risk.

Second, the information that sits in the cloud is not all necessary searchable. It is possible that data sits in the cloud, but that the cloud lacks the necessary search component required to search and retrieve that data. For example, the information may be stored in a unique format proprietary to the client that is not recognized by the cloud. This in turn means that a client may find it impossible to readily access that information. It also means that, when counsel seeks to effectuate a production and collect responsive information during litigation, the resulting data set will not include any information from those files, possibly without counsel being aware that certain data exists that has not been searched and collected. Therefore, it is imperative that, before counsel works with cloud based systems, they make the inquiries necessary to establish the format(s) of the data stored in the cloud and confirm that all the data in the cloud can be searched and produced.



Third, while cloud computing presents a compelling business value proposition, we would recommend that prior to adopting such cloud based technology, a company consider cloud evaporation scenarios and how they might impact the company and any pending litigations. Here, for example, are three unanticipated cloud evaporation scenarios we have seen occur: your cloud is acquired by a competitor and you need to migrate the data in the cloud out of the cloud to another cloud or internal system; the cloud goes bankrupt causing the cloud to evaporate and with it your data, if you don't migrate it out or, if possible, purchase the machines in the cloud; the cloud provider has a security breach and the data stored in the cloud is compromised requiring either migration to a new cloud or system and an information audit. In all three "evaporation" scenarios, companies are suddenly required to make quick and likely expensive decisions with potentially far-reaching consequences for the security of their data. In addition, all three scenarios invite potential challenges to chain of custody, particularly in the event of a security breach. Considering these and other evaporation scenarios now, rather than in the heat of the moment, will help prevent such events from wreaking havoc on the company and any attendant litigations.

Fourth, cloud based systems present novel privilege issues. All privileges are founded on restricted access. Should privileged information be shared with a third-party, the privilege vanishes. Usually, privilege is readily maintained because a company's sensitive information remains in-house in the company, until it is shared with outside counsel to whom the privilege still applies as part of the litigation. Cloud computing, however, necessarily involves migrating data outside the company and to a third-party host. Quite apart from any catastrophic breach in the cloud, it is likely that the specific elements of privilege, and the importance of maintaining that privilege, will not be as understood or appreciated by those that manage the cloud infrastructure on your behalf. Extra care must be taken to ensure that the data managed is not accidentally accessed by a third-party or by a system administrator accessing privileged data in the context of resolving a technology issue.

Fifth, cloud based computing represents an attractive value proposition, but look for hidden costs that might arise as a result of the size of the data set, the difficulty of retrieval, or the need to repeatedly access and manipulate the data hosted on the cloud. It may make sense to migrate only a portion of a company's data to a cloud based computing system, while retaining in-house control over other areas of information.

Sixth, litigations may continue to the point that the cloud no longer actively supports the data format in which your information is stored in the cloud. The issue then arises as to how you deal with the upgrade, and the impact of any such upgrade on the required preservation of that data. For instance, may upgrades may limit or eliminate the types of metadata that can be extracted during production., leading to potential spoliation claims by your adversary.

Before adopting or deploying cloud based solutions for your enterprise, or for a specific litigation matter, client and counsel should carefully evaluate these six issues, including comprehensive conversations with the IT, business and legal units. Otherwise, the company and the firm may be exposed to unanticipated and unnecessary risks and costs.

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