

## Professional Malpractice

### Electronic Medical Records and E-Discovery: What's a Risk Manager To Do?

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**H**ealth care in the United States is rapidly evolving. Changes and new challenges are altering the way health care is perceived, organized and delivered. These changes affect health-care providers, organizations and patients, presenting new issues that impact litigation, particularly in the case of a medical malpractice claim. Continuing education of providers and attorneys is necessary to maximize success both in the courtroom and in handling day-to-day risk management.

#### Electronic Medical Records

One of the most significant current developments is the transition from the paper chart system to electronic medical records (EMR).

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The Patient Protection and Affordable Care Act and the Health Information Technology for Economic and Clinical Health Act (HITECH) have spurred the change to EMR to occur rapidly in the coming years. Additionally, the Centers for Medicare and Medicaid Services have put in place incentives and compliance deadlines (otherwise known as meaningful use requirements) to further ensure that the vast majority of providers are moving in the direction of electronic records. For many providers, the change from paper to electronic records will occur quickly in order to meet required deadlines and thereby reap the benefits of the monetary incentives.

Within the next few years, virtually all health-care providers will operate within an electronic record system. Many providers are operating solely within electronic records systems, and, as a result, evidentiary issues are already arising in the litigation context. It is critically important that from the very onset of the conversion to an EMR system, providers and their attorneys are aware of the legal issues that electronic medical records can create, so as to not run into problems during litigation.

#### • ESI in the Hospital Setting

Electronically stored information (ESI) is abundant in all hospitals. Such information includes electronic health

records, electronic prescriptions, voice and e-mails, cell phone data, instant messages and texts; it also includes tracking devices such as those used to track staff, as well as monitoring equipment, such as EKG machines, fetal monitors and analgesic pumps. The review and investigation of electronic discovery has given rise to new methodologies such as computer forensics, wherein scientific methods are employed to analyze hard drives, servers and the like in efforts to determine whether the information contained therein was altered, fabricated, modified and/or destroyed.

#### • Federal Rules of Civil Procedure

Electronic discovery is already a growing part of the part of the litigation process and electronic medical records will only continue to expand this area. In 2006 the Federal Rules of Civil Procedure were amended to include provisions specifically regarding ESI, and many states have followed suit. This has opened the floodgates for litigants seeking information stored on electronic devices.

EMR falls within that category of electronic discovery that is subject to those requirements. Specifically, Fed. R. Civ. Pro. 26 requires parties to disclose the existence and location of any and all stored electronic information that the party intends to rely upon in support of its position. Note also that electronic dis-

covery is not limited to the medical record itself. EMR systems have discoverable information that is not included within the printed record. Fed. R. Civ. Pro. 26(b)(2) provides for discovery of electronically stored information that the possessing party may not deem to be readily accessible due to undue burden or cost. Such information is likely to be subject to discovery if relevant to the claims asserted. System computers may be subject to hard drive requests from the providers' computers, as well as the health-care organization's computers. The analysis of system data and the depositions of IT personnel who are knowledgeable about a particular EMR system are likely to become more common.

#### **Discovery Issues/Alterations to Records**

EMR can be a very useful tool in the discovery process. Many EMR technologies help eliminate errors and alterations of the records, as well as providing useful information about a particular entry in a patient's record.

It is important that the system used by the organization or provider have the capability to track any alterations or modifications to the record. This requires the system to identify the employee or provider entering the information in the record, as well as the time and date on which such information was entered. This information should be accessible to the administrator for ease of discovery. When an issue of a modification or alteration of a record does arise within the course of litigation, counsel for the opposing party can request the system information regarding any and all changes or alterations that have been made. This can become a very costly and time-consuming process if the system in place is not one that makes this information accessible and easy to provide.

##### *• System Safeguards and Controls*

The majority of EMR systems provide safeguards to check for errors in an entry and to track changes. For instance, late entries can be tracked by most EMR

systems. Thus, if a provider enters information and then hours or days later inputs new information into the same entry, the second input of information can be tracked back to that provider who entered it, and the time and date at which it was entered can be discovered. While this capability may be helpful within an organization, it raises new issues with respect to record integrity. It can raise evidentiary issues during litigation regarding the veracity of that entry and why the provider input the information at a later time or date.

Many EMR systems have a lockout control — a time after which a particular entry on a patient's chart is no longer open for alteration or modification. The lockout should go into effect within a short time period measured in hours, such as 12 hours or 36 hours. That prevents an entry from being added days later absent a system override requiring the provider to contact the administrator. This protects against providers changing entries in light of later developments or poor outcomes in a patient's care, and ensures that the medical records are, to the fullest extent possible, a contemporaneous account of the patient's care.

##### *• Protecting Patient Information*

Another issue brought about by the onset of EMR is the safeguarding of patient data or patient health information. HITECH imposes many requirements for providers regarding the protection of electronically stored patient health information. With the conversion to EMR systems, more people have access to an individual patient's chart than ever before. Providers now have greater compliance obligations to satisfy with regard to ensuring that electronically kept patient health information is protected. Similarly, counsel for providers and health-care organizations must also be aware of these requirements when advising their clients how to ensure that patient data is protected.

##### *• Potential Spoliation of Records*

In addition to record modifications and alterations becoming issues

during the course of discovery, failing to ensure the integrity of electronic medical records can lead to spoliation of evidence, which is the intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding. See *Rosenblit v. Zimmerman*, 166 N.J. 391 (2001) (discussing spoliation in the context of a medical record alteration by a defendant physician). This is one of the most serious issues that can occur with an incorrectly managed electronic medical record. The result can be the imposition of extremely harsh penalties, including the preclusion of evidence, the dismissal of claims or an adverse inference being applied to the information in question. The inability of a health-care provider or organization to use the patient's electronic medical records at the time of trial ultimately results in the inability to best defend the matter. Additionally, an adverse inference to any modification or alteration in a patient's records will also result in an inability to effectively defend a matter, or at the very least it will present yet another obstacle to be overcome.

Education and preparedness of the health-care provider are the keys to maintaining secure and accurate electronic medical records. Great care must be taken in selecting a system and using the controls available within that system to ensure the accuracy and integrity of the records. There must be staff education, and procedures in place, to deal with certain common issues such as correction of an inaccurate entry. Procedures must also be implemented for handling records at issue in a specific claim or litigation, to ensure that the veracity of the record will not be challenged during the discovery process. If the provider has taken all of these steps, the electronic medical record will be a helpful tool rather than a troublesome issue during the course of litigation. ■