Medical Malpractice Law
Dede K. Zupanci and Zeke N. Katz
HeplerBroom LLC, Edwardsville

Electronic Health Records and E-Discovery:
A Primer for Defense Counsel

We’ve come a long way, baby, but in some regards, it’s just like starting over. The use of paper as a primary means of documentation and communication continues to decline. The transition from paper to electronic documents has found its way into the medical and legal fields as well. During the written discovery phase of a medical malpractice lawsuit, plaintiff’s attorney will request the patient’s complete medical record, including physician orders, progress notes, nursing documentation, and test results. Terrance K. Byrne, The Federal Rules of Civil Procedure, Electronic Health Records, and the Challenge of Electronic Discovery, 28 J.L. & Health 379, 381 (2015). It is likely that the medical records relevant to litigation today will be maintained by the provider in electronic format, known as electronic health records (EHR).

The evolution of digital health records is fueled by relatively new federal statutes and state court rules. Lawyers now must learn how to navigate, use, and produce the EHR. This article seeks to familiarize defense counsel with the general principles, as well as some of the nuances, that arise during this transition from the production of hard copy to electronic records.

The Affordable Care Act, the American Recovery and Reinvestment Act and the Health Information Technology for Economic and Clinical Health Act

On February 17, 2009, the Health Information Technology for Economic and Clinical Health (HITECH) Act was enacted under the American Recovery and Reinvestment Act of 2009. Pub. L. No. 111-5, § 13101, 123 Stat. 115 (2009); also see 21 Ill. Prac., The Law of Medical Practice in Illinois § 13:14 (3d ed.). HITECH was passed to promote and accelerate the use and development of EHRs by health care providers in order to improve the quality and efficiency of health care. Anna M. Bryan, et al., Electronic Discovery and Healthcare Litigation: Government Influence on Conversion to Electronic Health Records, and How It Has and Will Continue to Impact the Discovery Process, 23 Health Law. 1, at 3 (2010). This expansion and innovation is accomplished via economic incentives and penalties that encourage health care providers to utilize EHRs, including Medicare and Medicaid bonus payments or reimbursements to those health care providers that can show a “meaningful use” of EHRs. Anne M. Fulton-Cavett, The Expanding Use of Electronic Health Records: Consulting Federal E-Discovery Rules and Case Law as Guides for State Litigation, 40-The Sum Brief 46, at 47 (2011).

As a result of the HITECH Act’s incentives and penalties, health care providers have increased their use of EHRs. Fulton-Cavett, Expanding Use, supra, at 47. This increased use of EHRs subsequently exposes health care providers to potential complications and challenges that coincide with e-discovery and the production of electronic data in medical malpractice litigation. Id. As the number of health care providers using EHRs increases further, there will be a resulting increase in e-discovery and document production requests with respect to EHRs. Id.
Illinois Supreme Court Rules Addressing E-Discovery

Illinois Supreme Court Rules 201(b)(1) and 201(b)(4) have been amended to include electronically stored information (ESI) within the scope of potentially discoverable material. Rule 201(b)(4) defines ESI as “any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which [ESI] can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.” Ill. S. Ct. R. 201(b)(4) (eff. July 1, 2014). A patient’s EHR fits within this definition of ESI, and is therefore subject to document production. Rule 214(a) permits the written request for production of documents including ESI, and Rule 214(b) states that “if a request does not specify a form for producing [ESI], a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” Ill. S. Ct. R. 214(a)-(b) (eff. July 1, 2014).

Rule 201(c) incorporates proportionality to prevent the possible deluge of data that may be responsive to an overly-broad document production request for ESI. Ill. S. Ct. R. 201(c). Rule 201(c) prevents a party’s potential abuse of the discovery process by permitting the court to weigh the encumbrance and cost of discovery of ESI against the ESI’s benefits and significance to the overall litigation by providing that “the court may determine whether the likely burden or expense of the proposed discovery, including [ESI], outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.” Ill. S. Ct. R. 201(c)(3). Production of ESI in response to a discovery request may not be physically voluminous, especially when compared to the current reality of reams of paper stuffed inside stacks of bankers’ boxes. However, ESI has the capacity to encompass enormous amounts of data well beyond that which can be produced in physical format and for which document review would be tremendously time consuming. In anticipation of the prospect of an overly-burdensome production of ESI, Rule 214(c) permits a party to object to another party’s production request “on the basis that the burden or expense of producing the requested materials would be disproportionate to the likely benefit in light of the factors set out in Rule 201(c)(3).” Ill. S. Ct. R. 214(c).

Practice Pointers for Defense Counsel Regarding E-Discovery and EHRs

Document production requests for EHRs in medical malpractice litigation have become fairly routine. It will be paramount for defense counsel representing health care providers to understand how EHRs, as opposed to hard copy medical records, will impact the health care provider’s responses to a plaintiff’s request for production of health records. Lawyers must educate themselves regarding the data that can be obtained from a health care provider’s EHR system, as well as any other electronic data systems that the health care provider may have in place. Fulton-Cavett, Expanding Use, supra, at 51. As e-discovery rules and case law evolve, defense counsel for health care providers must adjust and adapt their best practices regarding the production, as well as preservation, of EHRs. Id. They must also be cognizant of those health care providers’ various policies and procedures that dictate how patient information is entered, transmitted and retained.

Lawyers should have a basic comprehension of the construction and layout of a health care provider’s EHR system in order to suitably respond to a document production request, as well as to fulfill any document preservation obligations, in a medical malpractice lawsuit. Id., at 48. They “must be knowledgeable about the content, features, and functionality
of those [EHR] systems.” Id. Defense counsel need not be experts in data systems technology, and in fact may need to outsource additional technology expertise during the medical malpractice litigation either in response to contentions surrounding document production, or for expert witnesses to be utilized at trial. Id. “Identifying and understanding a provider’s EHR system may also require counsel to obtain input from records management, health information, and information technology personnel.” Id. at 52. A practitioner’s essential understanding of EHRs can be distilled to knowledge of (1) how and where the EHR data is stored, (2) how that EHR data may be altered, and (3) how or what steps must be taken for that EHR data to be preserved. Id.

Potential Issues Stemming from Production of EHRs

It is often the case that a health care provider maintains various portions of a patient’s EHR in different formats or even in different electronic data systems. For example, an EHR may be comprised of scanned pages, of both handwritten and typed data, as well as data that was created in an entirely electronic format. Bryan, Electronic Discovery, supra, at 3. This combination of scanned and electronically entered data may present challenges to document production if plaintiff’s counsel contends that the patient’s EHR was ever altered or amended during her care and treatment. Id. When records are scanned into the EHR system, it may be difficult to determine whether those records were ever altered or amended, and if so, when those alterations or amendments took place. Id. Also, in some instances hard copy records are destroyed after they are entered into the EHR system. Id. In contrast, the portions of a patient’s EHR that have been entered electronically are monitored within the EHR system with respect to who entered the data, when and where that data was entered, and whether that data was ever amended or altered. Id. This additional information is commonly referred to as metadata, and will be addressed below.

Another potential challenge faced by a lawyer when producing a patient’s EHR is that a single health care provider may operate a variety of electronic data systems, with data from more than one of those systems being potentially responsive to a plaintiff’s request for a complete EHR. For example, there may be separate programs and systems used to access “medical records, radiology records, human resource information, billing information, emails, garage access cards, closed or locked unit access card systems and ‘intranets.’” Id., at 4. Each of those various data systems may have different levels of compatibility. When responding to a production request, defense counsel must have a basic understanding of the number of electronic data systems that a health care provider may implement as part of a patient’s EHR, as well as how those systems interact.

Further adding to the challenge of producing electronic data from a variety of platforms within a single health care provider is the reality that the staff of a health care provider, whether they are physicians, nurses or anyone else involved with a patient’s care and treatment, may use personal electronic devices to record or communicate patient information. Id. The data from these personal electronic devices may qualify as part of the patient’s EHR and is therefore discoverable. Id. Locating this data, as well as ensuring its preservation, is a daunting task for any practitioner facing the request for production of an EHR during medical malpractice litigation. Id.

Metadata must also be recognized as part of an EHR with respect to potential document or data production. Commands and modifications that are executed on a computer, or any other electronic device, are tracked and recorded as metadata. Id. at 3. HITECH requires that a health care provider’s EHR system “[r]ecord actions related to electronic health information. The date, time, patient identification, and user identification must be recorded when electronic health information is created, modified, deleted, or printed; and an indication of which actions(s) occurred must also be

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recorded.” Id., at 3 (citing Department of Health and Human Services, Interim Final Rule, 45 C.F.R. Part 170 (Jan. 13, 2010) (codified at 45 C.F.R. § 170.210(e) (July 28, 2010))). This metadata is not often readily available via the basic user interface of an EHR system, and instead must be specifically retrieved, sometimes with additional software. Defense counsel should understand the basic parameters, purpose, and function of metadata as part of the health care provider’s comprehensive EHR system.

Conclusion

Defense counsel for health care providers will need to be familiar with their clients’ EHR systems in order to accurately and completely respond to discovery requests. EHR systems and e-discovery are evolving and defense counsel for health care providers must continue to keep up to date on changes to rules or statutes that impact health care providers’ responsibilities surrounding the production of EHRs in response to discovery requests. Fulton-Cavett, Expanding Use, supra, at 53. As these rules and statutes become the subject of future litigation, case law regarding production of EHRs in the medical malpractice context will also inevitably increase, and provide guidelines for how these rules and statutes are practically interpreted in Illinois courts. Id.

About the Authors

Dede K. Zupanci is a partner in the Edwardsville office of HeplerBroom LLC. Her practice focuses on the defense of medical malpractice actions, as well as other healthcare litigation. She is a 2002 graduate of Saint Louis University School of Law.

Zeke N. Katz is an associate attorney at HeplerBroom LLC. Mr. Katz graduated from Colgate University in 2006 with a Bachelor of Arts degree in Philosophy & Religion. He received his J.D. from Chicago-Kent College of Law in 2014. He is admitted to practice in Illinois. He focuses his practice in the areas of medical malpractice and insurance defense. He is a member of the American Bar Association, Illinois State Bar Association and Chicago Bar Association.

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