Electronic Medical Records
Issues with Discovery of e-Medical Records in Litigation

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E-Medical Records / Today's Agenda

• The Golden Rule
• E-Discovery and EMR
• Benefits to Health Care
• Benefits to Defense Bar
• Benefits to Plaintiff's Bar
• Natives v OCR'ed Images
• Database Discovery
• Tips When Dealing with HCP IT Personnel
• Q & A
E-Medical Records / EMR? What’s That?

CASE IN POINT
LOST IN TRANSLATION

I ORDER YOU TO PUT A LEGAL HOLD ON ALL ELECTRONIC DATA, NOT JUST PAPER DOCUMENTS

by Tom Fishbane

E-Medical Records / The Golden Rule

Illinois Supreme Court Rule 214
• “Any party may by written request direct any other party to produce…specified documents…”
• “A party with the written request shall produce the requested document as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request.”
**E-Medical Records / E-Discovery and EMRs**

- Even for personal injury suits, smart use of EMRs / ESI can make a big difference in litigation
- 98%+ of business communications are now created and stored electronically
- Social media, mobile communications and increased adoption of database applications by Health Care Providers (HCPs) amplify the issue
- EMRs provide for interesting case study about ESI, generally:
  - Allow HCPs to store and exchange information about a patient's medical and treatment history in more efficient manner
  - There is evidence that use of EMRs can improve patient care and save health providers money
  - Can prove problematic in medical malpractice cases
- As result, small hospitals are 33% less likely to adopt EMRs if there are state laws that clearly allow for use of ESI in court
  - Burden of e-discovery is larger for such hospitals, because fixed costs of compliance are larger, relative to potential benefits of EMR

**E-Medical Records / Benefits to Health Care**

- Increases medical providers’ access to information (including but not limited to patient history) to allow for better diagnosis and treatment
  - Obviously, better for patients
  - By helping to prevent medical mistakes, EMR may actually reduce the risk of a malpractice lawsuit
    - *Evidence of this in studies about neonatal mortality*
- EMR systems can reduce administrative overhead
- Reductions in insurance premiums (2% to 5%) to physicians who implement and utilize EMR systems
- Recent pushes by regulators are being coupled with federal dollars to incent conversion or upgrades to EMR systems
E-Medical Records / Benefits to Defense Bar

- Can quickly analyze case to determine liability, exposure
- Can help prove hospital protocols were followed by providing better and more legible documentation with an audit trail
- MUCH easier to read than that illegible chicken scratch that doctors call “hand-writing”
- Tend to be more accurate and reflect more detail, since they are often kept in real time on an iPad or similar device that streamlines data entry
- Easier to organize and review data
- Easier to validate all data was collected
- Can drastically reduce time, cost and risk associated with review

E-Medical Records / Benefits to Plaintiff’s Bar

- EMRs include more detailed information about patient care that is available in a traditional paper record
- More settlement leverage, due to perceived or real increase in health care provider’s discovery costs
- Makes it easier for plaintiff’s bar to find:
  - Evidence of wrongdoing
  - Issues inherent in structured data (i.e., databases) and “data mining”
  - Inappropriate corrections to the medical record that would be revealed by electronic data stamps
  - Inaccurate data entry
  - Unauthorized access
  - Data loss or destruction
  - Errors related to problems that arise during the transition to EMR
- Chronology governed by unmodifiable time stamps
- Makes it readily apparent, via access records, whether physician made error(s) due to failure to refer to a patient history
- In the course of discovery, for a single malpractice case, ESI could reveal a system-wide error in the EMR system’s clinical guidelines and alerts that could affect large class of patients
E-Medical Records / Electronic Medical Charts

- Form of structured data that ties together multiple databases that contain information about a patient
- Computerized data is far more easily searched, located, organized, and updated than data memorialized on paper
- Production of computer data on discs or by file transfer significantly reduces the cost of copying, transport, storage and management
- Production of electronic data greatly decreases the risk of the loss of data

E-Medical Records / Privilege Issues

- HIV, mental health, substance abuse and employee records are all privileged and require additional protections built into e-Discovery processes of electronic health information within the various source systems and databases
- Attorneys need to be aware of privacy laws when engaged in discovery of medical records, electronic or otherwise
- While plaintiff waives privilege to certain records when he/she puts care relating to that specific ailment at issue, other treatment can be privileged and access to discovery must be strictly monitored
- Data breaches can create liability for law firms
E-Medical Records / Natives v. OCR’ed Images

- Native files are documents or databases produced in their original format
- TIFFs and PDFs are “flat” images of native files
- HCPs, firms with legacy review tools have traditionally produced images unless otherwise requested
- Discuss early on to avoid misunderstandings

E-Medical Records / Natives: Pros and Cons

- **Arguments For**
  - Dynamic and searchable
  - Best format for searching
  - All metadata retained
  - No conversion cost or complex load files required

- **Arguments Against**
  - Difficulties with Bates numbering at page level, redaction, annotation
  - Need native app or viewer
E-Medical Records / Importance of Metadata

- Metadata, commonly described as “data about data” is defined as “information describing the history, tracking, or management of an electronic document.”
- Can assist in proving authenticity of content of ESI, as well as establish the context of the content
- Can yield information such as file name, author, creation and last modified dates, recipients of the file, print-out dates, edits and more
- Court typically find that parties are entitled to it, especially if they specifically ask for it

E-Medical Records / Images: Pros and Cons

- Arguments For
  - Very amenable to production (ease of Bates numbering, redaction, annotation)
  - Legacy review tools may require them
  - May be viewable in tool law firm already has, like Abode Acrobat (PDF – not sure this is really an advantage)
  - It’s what many lawyers know – feels more like paper to them
  - Misconceptions about propriety of holding back metadata may suggest this is right format to some
E-Medical Records / Images: Pros and Cons

- **Arguments Against**
  - Dead and frozen, rather than dynamic and searchable
  - The hidden information, the ability to search millions of pages of text for smoking gun language, and to peek at its living history, is lost
  - Metadata often not retained
  - Data loss can occur during conversion process
  - Unless caught by sometimes expensive QC, can result in missing pages, skewed images, duplicates
  - Conversion-related data loss and OCR errors make searches unreliable
  - Requires complex load files for review tools
  - Conversion/OCR process costly
  - Some file types display poorly as images (Excel)
  - Source originals offer more options for programatic review, while images are far more inefficient in that regard

E-Medical Records / OCR Challenges

- Skewed image files are harder to recognize through OCR and cannot be converted to XLS spreadsheets because the columns are not aligned
- Thus, natives always more preferable to receive
E-Medical Records / OCR Challenges

- A comparison of a skewed PDF page and the converted XLS output
- With columns being misaligned in the PDF, the XLS excludes columns and joins values incorrectly

E-Medical Records / OCR Challenges

- Ability to OCR extremely dependant on quality of original
- Hand-writing will not be picked up for searches
E-Medical Records / Databases: Pros & Cons

• Arguments For
  o Places the parties on equal footing in ability to verify and validate any patient-related information
  o Can be analyzed for trends, anomalies
  o Many HCP DBs can easily recreate, export reports to other formats
  o Many HCP DBs interface with other HCP systems, providing rich patient history

• Arguments Against
  o Structured data can be manipulated, skewed in unreliable ways
  o Can be costly, unduly burdensome to review and produce
  o Canned reports cut cost
  o Canned reports offer assurance data was not improperly manipulated, skewed
  o HUGE privacy issues may require burdensome data scrubbing

GET AN EXPERT INVOLVED
Can better work with incomplete data dumps prevalent in structured data productions
Can clearly define what other party should produce

E-Medical Records / Database Review Options

• Produce a copy of electronic medical chart as it was created and kept in the ordinary course of business
• Provide remote access to electronic medical chart via a secure link which could be set up to protect the confidentiality of other patient records
• Install third-party print drivers to send electronic files to a disc thereby enabling the data to be searched.
• Use database to gather the electronic data and produce the data in a searchable format which is exportable to Oracle or other standard databases
• Provide canned reports
E-Medical Records / Know Your People

- Discovery is (and has always been) a “process about people”
- Consider people who should be involved (clients, potential witnesses, IT) and start gathering that information to better understand your case and the type of documents you are interested in
- **Then** involve IT to help you identify, preserve, collect ESI
  - Stopping with CIO / IT is a common error and can come back to haunt you—talk to actual custodians
    - Understand specific record keeping of doctors and staff
    - Understand what IT is capable of doing… and NOT doing
      - “Don’t know what you don’t know” syndrome
      - Need forensically sound tools, methodologies
      - HCP IT resources are often outdated and thinly staffed
  - Consider whether IT personnel would be good witnesses
  - If internal IT does collection, consider third party audit
    - Wise investment
    - Most HCP IT personnel do not have necessary DB experience or knowledge of forensically sound practices

E-Medical Records / Q & A

Any questions?
Feel free to ask now or contact me later

Sean M. Byrne
E-Discovery Solutions Director
Axiom Law
33 West Monroe Street, Suite 300
Chicago, Illinois 60604
(312) 772-2063
sean.byrne@axiomlaw.com