

EMRs and Litigation: Issues Decided and What's Next

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Following President George W. Bush's 2005 mandate, nearly every health care system has converted from hard copy paper records to an electronic medical records (EMR) system. We are now beginning to receive guidance from the appellate courts on how to handle some of the unique EMR litigation issues. The following is an overview of EMR cases that may impact the standard of care in medical professional liability cases.

Attempts to Deny Doctor Access to EMR

One of the goals of EMR adoption was to make the patient's entire chart accessible so physicians would have a complete medical history at their fingertips. In a novel argument, a patient sought to limit his doctors from accessing his complete EMR record in *Ortega v. Colorado Permanente Medical Group*, 265 P.3d 444 (Colo. 2011), arguing that he did not waive the privilege to records for treatment rendered in another state at an earlier time.

In *Ortega*, the plaintiff sued his Kaiser physicians, who were a part of a multi-state provider of health services. Kaiser boasted an integrated EMR that enabled the plaintiff's Colorado physicians to access his records from a California Kaiser facility. The plaintiff notified the defendants that he did not waive the physician-patient privilege regarding his California records. The Colorado Supreme Court held that Ernest Ortega could not prevent the defendants from accessing the California EMR information in preparing their

defenses. Because Mr. Ortega's Kaiser physicians had access to the complete EMR when treating him, all of the plaintiff's EMR information was relevant to the defendants in preparing their defenses. The *Ortega* decision illustrates that a patient cannot raise privilege and deny a physician's use of the entire EMR in preparing a medical defense if it was accessible at the time of treatment.

Failure to Follow Embedded EMR Warnings

EMR systems typically have embedded warning systems that provide health care providers with notice of potentially detrimental patient outcomes, most commonly to prevent medication errors. When this occurs, the EMR will require acknowledgement of the warning and either a modification of the treatment based on the warning or an override that allows the treatment as suggested, despite the warning.

Failure to acknowledge the embedded warnings may create a new standard of care theory of liability. In *Kolozsvari v. Doe*, 943 N.E.2d 823 (Ind. Ct. App. 2011), pharmacists repeatedly ignored and overrode embedded warnings regarding medications and failed to provide the suggested instructions to be given to the patient from the EMR. The pharmacists moved to have the matter dismissed, arguing that there was no duty to warn the plaintiff of the dangers from the embedded EMR warnings, but the Indiana Court of Appeals disagreed. The court held that the standard of care could include the duty to acknowledge

and report the embedded EMR warnings to the patient. Other courts, when posed with this issue, may make an identical ruling and recognize the failure to acknowledge EMR warnings as a factor for the jury to consider in determining whether the standard of care has been breached.

No PreComplaint Discovery of ‘Live’ EMR System Use

The majority rule regarding pre-complaint discovery is that it shall be limited to what is necessary for a plaintiff to draft his or her initial pleading, and this general rule has not been disturbed with the adoption of EMR systems. *In re Clapp*, 241 S.W.3d 913 (Tex. App. Dallas 2007), is another example where a court seems reluctant to break from long-standing precedent despite the adoption of new technology.

In *Clapp*, the plaintiffs sought to conduct precomplaint discovery, which included requests for a videotaped deposition of a custodian of records utilizing the EMR system and a copy of the entire native EMR data. The defendants objected to the request of the patient information as violative of Texas R. Civ. P. 202.1, which sets the parameters of precomplaint discovery. Although Rule 202.1 permitted the discovery of medical records pre-suit, it did not allow depositions or production of computerized data in native form. Applying strict construction of the precomplaint discovery rule to the new EMR system, the court did not permit the plaintiffs to engage in an extensive discovery process of the EMR system before the complaint was drafted and denied their requests.

Duty of Care to Coordinate Health Care Through the EMR

In *Laskowski v. U.S. Department of Veterans Affairs*, 918 F. Supp. 2d 301 (M.D. Pa. 2013), expert witnesses from both parties agreed

that the EMR provides health care providers the ability to manage a patient’s entire course of treatment from a computer station. Because this issue was undisputed, the court formally recognized that physicians had the duty to monitor and coordinate patient care of others through the EMR.

Stanley P. Laskowski brought an action against the Department of Veteran Affairs for the mismanagement of his post-traumatic stress disorder (PTSD) following his military service in Iraq. It was alleged that he was over- and under-medicated in his PTSD treatment by the staff of the local veterans hospital. At trial, the experts for both sides agreed that the physicians had a duty to coordinate care by certified registered nurse practitioners through the EMR, and, in light of the agreement, the district court found that the plaintiff met his burden of proof on this issue.

The *Laskowski* case is unique because both sides acknowledged that the benefit of being able to monitor all care through the EMR system brings the added responsibility to ensure that the total care is managed appropriately. Physicians may not only be held accountable for their part in caring for the patient, but they may also be deemed responsible for others in coordinating the total care of a patient.

What Is Next?

EMR systems will continue to incorporate the latest technological advances, and there will be new areas ripe for litigation controversies that we cannot predict today. One area in medical malpractice that will become more of an issue is the incorporation of smart devices into the practice of medicine. Between patients and health care providers increasingly communicating via text messaging and social media, scrutiny and

requests for information from these devices will increase. Further, smart phones are also being used as medical devices for remote patient monitoring and, for some health care providers, are another way of recording patient information, including the use of a camera to document how a patient appears at a given time. Whether the information from these mobile smartphones finds its way into the official patient chart or in answers to discovery remains to be seen.

Another foreseeable issue is the use of patient treatment metrics based on leveraged information from the EMR. As EMR systems provide treatment recommendations based on patient treatment metrics, it may result in a large group of patients being impacted by an error. Also, as EMR systems become larger and more integrated, a computer error could trigger certain classes of patients to seek compensation for their injuries.

Lastly, issues will persist as to the hard copy printout of the EMR. To this day, EMR developers have not made the hard copy easy to follow, and this is unlikely to change. Further, and unlike the pre-2005 paper record, it may be impossible to preserve the

precise record available to a health care provider at a given time due to system upgrades, changes in “drop-down” options and EMR template changes. For all the time, money and effort invested in EMR development, it does not appear that the designers contemplated how to reproduce the record as it appeared in the past, especially to those who do not have access to the “live” EMR system.

EMR systems are not perfect, and neither are the health care practitioners tasked with their usage. EMRs will continue to challenge medical professional liability practitioners for years to come. Moving forward, let’s not forget that patients and their attorneys share the common goal of determining the relevant facts in a cost-efficient manner without burdening the courts. Old-fashioned courtesy, common sense and reliance on those with specialized technological knowledge of the EMR can help us achieve those goals.

