Defining the Legal EHR: Simple or Complex?

*by **Chris Dimick***

Just how complicated is defining the legal electronic record for disclosure? There's nothing new to the need for a legally sound record of care. HIM professionals have helped meet that requirement with paper-based records for years. But just how new and complex is it to define the contents of an electronic record?

There are various schools of thought. Some experts say that by keeping it simple and relying on current practice based on paper records, one can ensure a legally sound electronic record minus the hassle.

But others say the shift in healthcare to electronic systems complicates things enormously and requires in-depth analysis of just what constitutes a legal EHR.

While not everyone agrees on how complicated the matter must be, there is one agreed-upon fact. The legal EHR is serious business and must be maintained correctly. Failure to do so could ruin a healthcare provider.

Keep It Simple

You don't have to reinvent the wheel when determining the legal EHR, according to Barry Herrin, FACHE, Esq., a partner in the Atlanta law firm Smith Moore, LLP. Herrin heads the firm's privacy and health information management practice.

HIM professionals inherently know what needs to be included in a legal electronic record. This comes from years of working with the paper legal record and from knowledge of rules and regulations, Herrin says. Just because the format changes doesn't mean the legal record has to significantly change.

The discussion on what goes in the legal EHR shouldn't focus on the change of document format, since that change doesn't necessarily alter what records should be included in the legal record, he says.

Yet the ability of electronic systems to capture more information than was ever possible in the paper world confuses the issue of what data are fit for the legal record.

People get caught up in the "sex appeal of technology," Herrin says. "They buy a system that has incredible functionality—it can manipulate and store all kinds of data that you found to be just cumbersome to do in paper form. And so now you have been sucked into the vortex."

As a result, Herrin says people tend to complicate the issue by trying to whittle down the record from this new universe of information. Instead, he suggests that organizations begin by considering their existing legal health record, "then make deliberate, thoughtful choices about what you want to expand that to include."

As an example, Herrin says, consider Post-it notes in the paper world. A nurse might stick a Post-it on a chart to notify the next shift that a patient is hard of hearing and needs special care. When the next shift arrives, a nurse will read the note and then choose to discard it without documentation or record the information with a notation in the patient's chart.

In the electronic world, that Post-it note could be an e-mail or an online chat entry. Would the difference in media have any impact on saving the message?

No, says Herrin, because there is no compliance reason to do so. "Simply because it is available for storage doesn't mean we have to store it," he says. If it was necessary to save such notes, "we would have been keeping the Post-it note all along."

It's possible that an organization could just look at the content of its current paper legal record and apply those criteria to its electronic legal record without making any changes, Herrin says. However, "you have to be 100 percent dead sure that the way you account for your paper record is compliant" with rules and regulations like those of the Joint Commission and Medicare Conditions of Participation.

Not that Easy?

Looking at the paper legal record gives a good base line for defining the contents of the legal EHR, says Keith Olenik, MA, RHIA, CHP, but the paper legal record can't be used as a mold for the electronic legal record. There are too many differences between the EHR and the old paper record.

That's why Olenik, founder of the Olenik Consulting Group based in Kansas City, MO, says that HIM professionals cannot just rely on past experience with the paper legal record when determining their legal electronic record.

"While we may have thought it was simple in the paper world, I think we took a lot of things for granted and we weren't asking a lot of questions about our paper record from a content standpoint," Olenik says.

Because people were comfortable in their processes, he says, details were often missed and policies and procedures were not as accurate as necessary. Add to that the questions in the industry about just what data should be included in the legal record, and Olenik believes you have a legitimately complex issue.

No Clear Requirements for Digital Data

Lack of clear requirements from the government and other agencies complicate matters, says Olenik. "The realities of healthcare are that government regulations are not often what they appear to be," he notes. There is no one neat list of what needs to be included in the electronic legal record. The rules and regulations for electronic records are changing, Olenik says, and it is up to HIM to keep compliant.

Just because something wasn't part of the paper record doesn't mean it shouldn't be included in the electronic legal record, Olenik says. That's because of the new ability to capture and reproduce digital media such as audio and video files. "I think that is the big unknown, and that is why the content question is not as simple as what used to be in the paper record," he says.

For example, in the paper world a radiologist would create a textual report detailing images such as MRIs, which would be placed in the paper legal record. But now that diagnostic imaging of these procedures can be placed in the electronic legal record with relative ease, some question if the textual report is good enough or if the actual MRI images should also be included. These types of records never would have been considered in the paper record, but now they must be considered for the legal EHR, Olenik says.

Deborah Kohn, MPH, RHIA, FACHE, CPHIMS, principal of Dak Systems Consulting, based in San Mateo, CA, says that HIM professionals now must think of the legal EHR as including all aspects of patient care such as digital x-rays or other documents once generated using analog devices and stored in other departments. Those documents are now electronic and need to be managed under one roof-the legal EHR, she says.

In the past, perhaps an HIM professional responding to a subpoena for records would visit different departments such as cardiology and radiology to collect their analog videos and films relevant to the case. Today, those documents can be electronic, but HIM professionals still need to be able to collect them, Kohn says. That adds to the complexity of managing legal EHRs.

"You have to make a list of where every item that you want included in the legal record is physically located," she says, "and you have to figure out if the item is digital or analog—figure out where all these things reside in a hybrid world."

Rounding up the Record

Herrin believes that managing a legal EHR represents a greater concern to HIM professionals than determining its content. Producing a snapshot of current care is not enough, the history of care provided over time is needed to tell the story.

Presenting the chronology of care in each version of a document may not be easy to come by, depending on the EHR system in place and the processes that govern its use. Managing a legal EHR requires that HIM professionals understand the system's functionality and processes.

Most healthcare facilities are not 100 percent electronic, and operate a hybrid paper and electronic record. This causes issues when mapping out the content for a legal EHR. HIM professionals in this hybrid environment have to think about what documents in the legal record will look like when they are reproduced, Olenik notes. Sometimes information that is recorded electronically can be incomplete when a document is printed out.

Procedures for how the legal EHR is reproduced in response to a subpoena must be determined as well, says Kohn. "Most of us are in that hybrid world, so we are faced with many questions like 'what do we print, what do we not print, and what do we include?'"

Keep Sight of Fundamental Needs

Still, don't get lost in an electronic morass, Herrin warns. The legal EHR has to do three things: provide adequate clinical documentation, present that documentation in a way that tells the patient's story of care, and capture all information that complies with external and internal mandates.

Connecting those dots is up to each individual organization, given the lack of universal standards for a legal electronic record. Determining a strong legal EHR definition and having strictly followed record retention and destruction policies will help organizations should litigation present itself. "That is what the courts are looking for," Kohn says.

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Article citation:
Dimick, Chris. "Defining the Legal EHR: Simple or Complex?" *Journal of AHIMA* 79, no.1 (January 2008): 60-61.