E-Discovery: Preparing for the Coming Rise in Electronic Discovery Requests

by Chris Dimick

Changes to federal discovery rules will have lawyers searching for newly discoverable electronic data and HIM professionals digging deeper into their computer systems.

Options had dried up for the 58-year-old man. Previous surgery and radiation therapy had failed to eradicate his brain tumor, so it was back to the operating table at the University of Miami/Jackson Medical Center in December 2002.

For seven hours, Miami doctors worked on the man. But when he awoke, a tragic but possible complication of the surgery manifested. The man was rendered a quadriplegic.

Nine months later, a malpractice lawsuit was filed against the hospital, with the 58-year-old man's attorneys initially focusing on his surgeon's competency. But after an electronic discovery (or e-discovery) request revealed flaws in the surgery's electronic anesthesia record, the focus of the lawsuit shifted.

In addition to finding more than 90 minutes of undocumented vital signs in the record, the plaintiff's attorneys also found that the attending anesthesiologist recorded his attendance at the entire surgery only minutes after the seven-hour procedure began. In other words, the anesthesiologist stated he attended the complete surgery before the surgery was finished.

This fact was found because e-discovery gave lawyers access deep into the case's electronic records. In the data, they found a hidden electronic time stamp attached to the anesthesia record-a standard function of the system.

Even though the anesthesiologist did stay for the entire surgery, and even though the data flaws most likely did not contribute to the patient's complications, plaintiff attorneys knew they could use the errors in the record-keeping system to discredit the competency of the anesthesiologist.

The plaintiff lawyers never got the chance to present the data in court. Seeing an uphill battle, the hospital's lawyers settled the lawsuit.

This type of discovery would never have been possible with paper records. Metadata such as time stamps-data about the data-are an example of unique electronic information waiting to be obtained with an e-discovery request.

This development should interest more than medical lawyers. It has implications for HIM professionals who, as managers of their organizations' medical records, will be required to process e-discovery requests.

What's Discoverable Now?

With an increasing number of healthcare organizations moving to electronic health record (EHR) systems, healthcare lawyers and HIM experts alike predict the number of e-discovery requests to skyrocket in the coming years.

Recent modifications to the Federal Rules of Civil Procedure (FRCP), which govern the process for civil lawsuits filed in US district courts, will only make e-discovery requests more frequent. The modifications mark a milestone in how discovery will be conducted regarding the disclosure of electronic records, and they mark a shift in what HIM professionals need to know about their organizations' electronic record systems.

The recent FRCP changes apply only to federal courts, but many attorneys feel they will trickle down to state and local courts soon. This has HIM professionals wondering just what in their systems is now discoverable.

"It may not even be an electronic record, it may be other information like e-mail, voice files, instant messages, Blackberry information-anything relevant to a case is potentially discoverable, paper or electronic," says Kim Baldwin-Stried, MBA, MJ, RHIA, CPHQ, an independent HIM consultant based in Highland Park, IL.

A wealth of digital information can accumulate about a patient that is housed outside an organization's legal medical record. Attorneys in search of additional information pertinent to a lawsuit may view this data as digital Easter eggs waiting to be discovered.

Metadata-The Data about the Data

Among those Easter eggs are metadata. Metadata are getting attention from lawyers and HIM professionals alike for their sturdy representation of time in court cases.

In both paper and electronic systems, entries in the record document when an event took place. But metadata capture something that a paper document can't: the time that the entries themselves were made, explains Michael Vigoda, MD, MBA.

Vigoda, director of the Center for Informatics and Perioperative Management in the Department of Anesthesia at the University of Miami/Jackson Medical Center in Miami, FL, authored a case report detailing the lawsuit involving the anesthesiologist. As in that case, metadata can serve as an "expert witness" on when documented events actually occurred.

Metadata do much more than capture time. They can show when a document was accessed, who looked at it, and if it was altered from its native format-things that could prove relevant in a court case, according to Marilyn Lamar, a health IT attorney based in Oakbrook, IL.

In establishing the facts of a case, metadata thus also tell a lot about a record's integrity and its subsequent reliability as evidence.

For this reason, e-discovery requests for metadata will increase with time, says Mark Mattioli, a healthcare attorney at Post and Schell, PC, based in Philadelphia. Many in the healthcare field are not aware that metadata are available for e-discovery, he says. "I think what is going to be a real sea change for a lot of hospital clients is their understanding that that kind of information is discoverable."

Knowing what sits behind a document and how to get at that information is important in responding to a metadata e-discovery request. HIM professionals will need to learn how to access metadata before the first request for information is submitted, Mattioli says.

Running the Numbers

Newly discoverable electronic information will not just come from metadata or other hidden files. Access to information in electronic form gives attorneys the ability to search large groups of files in order to extract statistical data that could be used in court, Mattioli says.

Manually searching through thousands of documents to find systemwide trends was too time consuming and expensive to be common in the past. But today, Mattioli notes, a computer program could scan hundreds of thousands of medical documents in seconds, producing legally relevant information.

"You couldn't sit there with two million pieces of individual data, look at it, and say, 'Hey, hospitals X, Y, and Z seem to be falling out with this particular diagnosis code," Mattioli says. "But that can be done with electronic data."

Like the use of metadata, the manipulation of data through e-discovery will also become more prominent with time.

Prompting for Prompts and Alerts?

Questions remain whether prompts and alerts generated by clinical decision support systems will produce litigious information, either provided as part of an organization's legal record or obtained through subsequent e-discovery.

It is possible, however, that such systems could be searched to retrieve information on how a practitioner responded to a medical prompt or alert, such as a treatment plan suggested by prescribing software. This information could hold weight in a lawsuit if it shows whether a physician regarded or dismissed medical advice.

The technology is in its infancy, and it might be some time before such information sways court cases, says Ed Shay, an attorney at Post and Schell and member of the American Health Lawyers Association. "The key question with prompts and alerts relates to the functionality of the EHR, whether it tracks how a physician responds to a given alert."

However, since some prompt and alert systems have been criticized by physicians as too sensitive, it is unclear if current information would be relevant in court, according to Shay. Clinical decision support systems will likely get better with time, and they may become regarded among physicians as a standard in real-time practice. That is when their use in lawsuits might increase.

Although case law will most likely define the future role of prompts and alerts in litigation, for now HIM professionals and their organizations should develop policies regarding if, when, and how they store the information.

"I would go back to the information management plan, deciding what will be defined as the legal EHR for external release," Baldwin-Stried says. "Have legal counsel develop a policy about prompts. It is not necessarily going to protect [the organization], but it's basically saying, 'This is how we view decision support.' Organizational policy and procedure should provide some overriding guidance on that."

E-discovery and HIM Professionals

While discoverable information will evolve with the creation of more complex electronic record systems, the most advanced system means nothing to the e-discovery process if there aren't people who know how to store, manage, and access the information.

That is where HIM professionals come in. Since e-discovery requests will likely fall upon the shoulders of HIM and IT professionals, experts say those in the industry should realize that there is much to be learned about processing an e-discovery request. "[E-discovery] is not your father's discovery," Shay says. "This is much more complicated."

The standards for what exactly is discoverable and what electronic documents and information need to be saved as part of the record are still being developed. But that is no excuse for an HIM professional to sit back and see where the future takes the e-discovery process, stresses Baldwin-Stried.

"We have to look at ourselves as conductors of an orchestra [and] know how information flows within the organization, both internally and externally," she says. "It is going to require a very collaborative relationship with IT and working with attorneys in the culling, synthesizing, and processing of information in discovery."

The frequency and reach of e-discovery requests in the future may surprise some HIM professionals, Shay says. "Healthcare providers, because they haven't had a lot of experience with e-discovery, might underestimate the power of e-discovery versus discovery of paper records."

The changes in the FRCP came from the increasing volume of records being stored electronically in all business fields. "The rules in and of themselves have not changed all that much, in terms of whether electronic health information is discoverable or not discoverable," Mattioli says. "What has changed, and what the new federal rules really require, is that now HIM professionals need to think proactively about those issues."

That is why Baldwin-Stried recommends that HIM professionals understand the organization's entire record system, which will help them better manage information.

The FRCP changes have mainly affected cases unrelated to healthcare, but that will soon change. "There haven't been really many cases where electronic medical records have been at the forefront discussing what is discoverable there," Mattioli says. "But it's certainly coming; it just hasn't been litigated yet. I see it as being a major issue."

As attorneys become more educated on the new rules, the number of e-discovery requests will rise, predicts Baldwin-Stried. "What the FRCP changes have done is made electronic information equally as discoverable as paper records. That is key," she says. "There is going to be a lot more sampling and testing in these systems."

"Attorneys," she says, "will become much more savvy about e-discovery."

HIM professionals will have to learn right alongside them. "This is going to be a way of life," Baldwin-Stried says. "HIM professionals have to understand [that] not only are we processing the data now, we are culling, preserving, retaining, and communicating about our systems. E-discovery is just part of our field's evolution."

Preparing for E-Discovery

There is no guarantee that HIM professionals will have to process an e-discovery request tomorrow. But they will one day. HIM experts suggest several steps that can be taken at even the smallest facility in order to prepare for a possible request.

Knowing how to respond to an e-discovery request doesn't just make HIM professionals better prepared in the event of litigation. Learning the ins and outs of the organization's electronic record system translates into better records management in general.

Get to Know Your System, Even Better

Organizations will have to consider how they release information from multiple electronic systems, says Sandra Nunn, MA, RHIA, CHP, enterprise records manager at Presbyterian Healthcare Services in Albuquerque, NM.

The FRCP changes raise the stakes for HIM professionals who still need to learn their electronic systems. Knowing how to access certain electronic information could be a requirement in order to aid both a plaintiff and the healthcare organization's lawyers in a legal case.

"Some of the new rules require that before we even get into litigation that we have an understanding as to where our records are stored, what's stored, what's accessible, and what isn't accessible," says Mattioli. "This puts really a whole new spin on the way we have conducted discovery in the past."

Dusting off an organization's information management plan is a good start in preparing for e-discovery. Although HIM professionals have always known what clinical departments have fed copies into the legal health record, they now have to learn just what systems are used by those different departments, Nunn says.

"You have to know how those systems operate [and] who is the owner of that system," she says. "HIM people are going to be less department-centric and part of a larger group of people. They will develop a greater organizational awareness."

Have a Plan

The best way to begin preparing for an e-discovery request is to assume that the task will not be easy.

"There is a freight train coming toward some in HIM," says Lamar. "The records these electronic systems are generating will be vast-a lot of new information for people to search through and manage."

Developing an overall records management plan will prepare an organization for any request for information, Nunn says. However, she believes that many organizations are not ready for an e-discovery request.

People imagine an e-discovery request will require them to produce information from one or two systems, she says. In reality, it may involve many systems.

It is unrealistic for the courts to expect an EHR to store every piece of electronically generated information-every e-mail, every clinical prompt. Therefore, organizations must establish specific guidelines for the retention and destruction of the

electronic data they handle. Knowing how to enact a legal hold on electronic data is just one lesson to learn before any lawsuit or discovery request is presented.

Enacting strict deletion policies protects an organization during a discovery process because it can show a judge when and why certain documents were retained or destroyed as part of routine practice. If a legal hold is ordered and some records vital to a lawsuit are destroyed, a judge could find the organization liable and enforce steep sanctions.

"You have to establish good-faith operational procedures," says Baldwin Stried. "When we are talking about e-discovery, the courts don't expect you to be perfect and maintain everything, but you do need to define your procedures so you can prove you did what you needed to do in good faith."

Enacting a legal hold can be a challenge in electronic systems. "In the paper world, it used to be with legal holds, 'Okay, here is the legal file, let's put the paper chart in there, and that's it-freeze it,'" Nunn says. "Now you have to figure out how you are going to put that hold on an electronic system. That is not a common thing for IT people. So HIM people are going to have to work with them to find out how we are going to freeze a whole set of information so that it doesn't go to automatic destruction."

Talk It Over

Learning what is contained in a system and what could potentially be requested is important in preparing for e-discovery.

Attorneys will ask for data but usually can't give guidance on how they are to be obtained. The organization must establish that on its own.

"Understand what types of data are stored, understand your policies regarding the destruction of data, understand what you need to do if you receive a litigation hold letter asking to stop deleting data," Mattioli advises.

To better understand their systems, many healthcare organizations organize task forces aimed at preparing for e-discovery requests and managing their EHR systems.

At Presbyterian Healthcare Services, HIM and other officials throughout the organization have routinely met on a task force aimed at organizing their various record systems, Nunn says.

This group, in which Nunn is a member, works on standardization, develops policies and procedures, builds compliance models, and works out retention schedules for its records throughout the organization. Included in the group is a subcommittee focused on addressing the federal e-discovery rules.

The task force also discusses how the organization's system requirements fit together; for example, how e-discovery requirements mesh with the HIPAA security rule. Nunn communicates with department heads to ascertain where certain types of records and information "live" in the system.

She also is implementing the organization's Information Technology Infrastructure Library, which will aid in developing standard IT practices and create a systems inventory.

HIM professionals have always needed to know where all paper medical records were and how they were organized, Nunn says. "It is the same with electronic records. You have to figure out where all [content] comes from and where it lives in case you have to produce it."

Designating an e-discovery liaison is another good step. This point person is responsible for understanding the detailed workings of the organization's system and the requirements of e-discovery rules.

Store Only What's Vital

The last step is simple.

If you store it, it's probably open to e-discovery.

Therefore, several HIM professionals suggest that the only records that should be routinely stored are those included in a preset records management plan.

"I wouldn't store everything unless it has a business use, or a legal use, because if you are storing everything because you might need it, then you are going to have to produce it," Baldwin-Stried says.

Keeping everything without organization just makes more work for HIM come an e-discovery request.

That's guaranteed.

Preparation Checklist

- **Read** the AHIMA practice brief "The New Electronic Discovery Civil Rule" for an overview of pretrial requirements and the relevance of each section of the rule to healthcare organizations. (September 2006 *Journal of AHIMA*)
- **Read** the *Journal* article "E-Discovery and HIM" for information on how amendments to the Federal Rules of Civil Procedure will affect HIM professionals. (October 2006 *Journal of AHIMA*)
- **Review** your organization's information management plan and revise for e-discovery requests as necessary.
- **Review** your organization's legal hold policy and update to include important electronic records.
- **Review** your organization's electronic records storage, retention, and destruction schedules.
- **Document** the different electronic systems throughout your organization that feed the legal health record.
- **Convene** a task force with the HIM, IT, and legal departments to discuss e-discovery policies.
- **Designate** an e-discovery liaison within your organization (usually from the HIM or IT department).

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