

Trends in E-Discovery: Four Cases Provide a Glimpse of Healthcare Litigation's Future

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Paper-based and electronic record keeping systems each record valuable information about a patient's medical care. Electronic systems, however, capture something more—they record information about the record itself.

This "information about the information," called metadata, has caught the attention of both the medical and legal professions. Discovery on electronic records can overwhelm a case, as defense attorney Catherine J. Flynn attests in describing a liability lawsuit: investigation of the record "has taken a life of its own, and we've done virtually no discovery on the medical aspects of the case."¹

For purposes of liability proceedings, metadata have been defined as "evidence, typically stored electronically, that describes the characteristics, origins, usage and validity of other electronic evidence."²

The electronic discovery marketplace is growing and evolving almost as rapidly as the healthcare information infrastructure. The e-discovery market is projected to reach \$1.2 billion in sales by 2014.³ Meanwhile, experts expect that in 2012, "the e-discovery market will remain interesting and dynamic."⁴ Issues related to social media and management of information and e-discovery in the cloud will involve application of a new computerized technique called "predictive coding" for the identification and culling of potentially relevant information for litigation.

EHR adoption and the growth of health information exchange networks will give rise to a whole new array of healthcare tort claims. These may range from holding healthcare providers or insurance companies liable in negligence for economic losses and emotional distress damages arising from the loss or theft of patient information to wrongful death lawsuits resulting from the use of computer technology.

Although the type, nature, and jurisdiction of future healthcare litigation will vary, the four current cases highlighted below provide a glimpse into what tomorrow's healthcare litigation will look like, with valuable lessons to learn from each case.

Predictive Coding

Da Silva Moore v. Publicis Groupe & MSL Group, No. 11 Civ. 1279 (ALC) (AJP) (S.D.N.Y. Feb. 24, 2012). An influential opinion by Judge Andrew Peck of the Southern District of New York on the use of a new computer-assisted technique called "predictive coding" in electronic discovery. Judge Peck endorsed the use of computer-assisted predictive coding technology in discovery, although he did not mandate its use in *Da Silva Moore*. Rather, he specifically stated:

[Predictive coding] certainly works better than most of the alternatives, if not all of the alternatives. So the idea is not to make this perfect, it's not going to be perfect. The idea is to make it significantly better than the alternative without nearly as much cost.⁵

Impact/Lesson Learned: The use of predictive coding techniques in electronic discovery, including healthcare e-discovery, will continue to increase until the use of this tool is commonplace. Currently, there is no universally accepted definition of predictive coding in e-discovery; e-Discovery Journal defines it as a "process whereby a definition, made up of various rules, is created. Records in a collection are then evaluated to determine how well they match the definition."

Personal Responsibility

State of New Jersey vs. Dharun Ravi. Former Rutgers University student, Dharun Ravi was found guilty on March 16, 2012, in New Jersey State Superior Court on all 15 counts he faced for using a webcam to spy on his roommate. This landmark case will have implications on both emerging privacy laws as well as the individual responsibility one must exercise in the creation and transmission of electronic information about another individual.

Impact/Lesson Learned: No matter what the venue, when it comes to the creation, use, and transmission of electronic information (especially protected health information) one must undertake a certain measure of personal responsibility and consider the security and integrity of the information they are about to create and transmit and how it may impact the life of another.

Improper Use of Technology

Fritzie Burkett & Cameron Burkett, Co-Independent Administrators of the Estate of Genesis Burkett, deceased, vs. Advocate Health and Hospitals Corporation, an Illinois Corporation d/b/a Advocate Lutheran General Hospital. One of the earliest known medical malpractice lawsuits to be filed alleging that the improper use of computer technology resulted in the wrongful death of an infant.

Impact/Lesson Learned: The advancement of EHRs and health information exchange will bring both benefits and risks. When it comes to the use of computer technology and tools, such as clinical decision support systems (CDS), every hospital and healthcare provider must take the responsibility to ensure that all users are properly trained and undertake ongoing quality improvement activities regarding the methods in which the technology is being used.

Data Breach

HHS vs. Blue Cross and Blue Shield of Tennessee. On March 13, 2012, Blue Cross and Blue Shield of Tennessee (BCBST) agreed to pay \$1.5 million to the US Department of Health and Human Services to settle a 2009 breach of protected health information resulting from the theft of unencrypted computer disk drives. This payment is in addition to an estimated \$17 million spent by BCBST in investigation, notification, and risk mitigation efforts. Leon Rodriguez, director of the Office for Civil Rights (OCR), noted:

"This settlement sends an important message that OCR expects health plans and health care providers to have in place a carefully designed, delivered, and monitored HIPAA compliance program. The HITECH Breach Notification Rule is an important enforcement tool and OCR will continue to vigorously protect patients' right to private and secure health information."⁶

Impact/Lesson Learned: BCBST spent a total of \$18.5 million to mitigate and resolve a 2009 HIPAA breach involving over 1 million individuals. In addition, the health plan was required to "review, revise, and maintain its privacy and security policies and procedures, to conduct regular and robust trainings for all BCBST employees covering employee responsibilities under HIPAA, and to perform monitor reviews to ensure BCBST compliance with the corrective action plan." Through the HITECH Act, OCR will take on a greater role in the protection and enforcement of patients' rights regarding the privacy and security of their health information.

Shaping the Future of E-Discovery

The establishment of the new electronic healthcare information infrastructure is important to all of us, and collectively the healthcare industry must work to get it right. Through adoption of EHRs and health information exchange, e-discovery in healthcare will soon become a routine process.

In recognition of these changes, the HIM profession has already begun to move away from the management of information and focus on the governance of information instead—a concept commonly known as Information Governance (IG). Although no universally accepted definition has yet developed, the general consensus among thought leaders today is that IG encompasses the management of both structured and unstructured data content and that its principal components include records management, e-discovery, archiving and storage, privacy and security, compliance, and data stewardship.⁷

With so many new developments taking shape, HIM professionals must take an active role in helping define and establish the healthcare e-discovery process of the future. Given the complexity of healthcare information management, it is likely that one day healthcare e-discovery practice will become a unique job skill. HIM professionals are well qualified to take on this important job, because they can help legal professionals understand how EHRs are structured and how data are coded using classification schemes.

With knowledge of how information is used within the organization they can also help search, preserve, and identify sources of information that may be relevant to litigation or a regulatory investigation. Their expertise can save valuable time and help to reduce litigation costs. In addition, HIM coding professionals also play a crucial role as "expert witness" when it comes to the testing and sampling of data and helping the legal profession to interpret and understand the quality and integrity of coded data.

Today, the majority of states have adopted procedural rules that address e-discovery issues, with most states having adopted variants of the 2006 Amendments to the Federal Rules of Civil Procedure.⁸ The majority of healthcare medical malpractice is heard in local or state court.

Therefore, it behooves both HIM and legal professionals to begin working together now, if they have not already, to identify and review any rules regarding e-discovery that have been established within their jurisdiction.

The e-discovery process is as interesting as it is challenging because, unlike paper, "our digital fingerprints will never fade from the lives we touch," and knowing exactly whose digital fingerprint touched which life and when is exactly what utilizing e-discovery in healthcare is all about.²

Notes

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Article citation:

Reich, Kimberly A. Baldwin-Stried . "Trends in E-Discovery: Four Cases Provide a Glimpse of Healthcare Litigation's Future" *Journal of AHIMA* 83, no.5 (May 2012): 44-46.

