

What Do You Mean by "Electronic Health Record?"

Save to myBok

By Ron Hedges

My blog posts have, for the most part, focused on electronically stored information (ESI) in the context of civil litigation. In this blog I want to shift my focus slightly to raise some questions about the electronic health record and what must be produced in response to a discovery request in a civil action brought in a United States District Court.

Let's assume that a malpractice action has commenced against a hospital and a surgeon regarding complications that a plaintiff encountered after surgery. Both the hospital and the surgeon "went electronic" prior to the surgery and all information about the plaintiff's surgery and post-surgical treatment reside in electronic systems maintained by the two defendants. The plaintiff serves a discovery request under Federal Rule of Civil Procedure 34(b) for production of her electronic health record (EHR). The defendants and their attorneys must respond to the request to produce. What should they be thinking about? (Let's also assume that the defendants have preserved everything that has to do with the plaintiff's surgery and subsequent treatment).

To begin, the defendants and their attorneys need to ask themselves a fundamental question: What does the plaintiff mean by "her EHR?" Is there even such a thing? That question leads the defense attorneys to request a meet-and-confer with their adversary to pose that question. Here's an example of what the defendants might say in response:

"You asked us for the plaintiff's EHR but we must tell you that there is no such thing. There is no agreed-to or common definition of the EHR and, even if there was, we can't give it to you. Let me explain.

You are asking for data maintained on various computer systems that we (the doctor and the hospital) maintain. First, we have separate systems that run on different software so we cannot give you ESI that might be "combined" into a single production. However, one of us (the surgeon) did enter notes about the surgery and post-surgery events into a computer station at the hospital and these notes are available from both the hospital and the surgeon because the notes were automatically forwarded to Cloud-based storage shared by both defendants. Also, the surgeon entered additional notes on her cell phone and tablet and these notes also reside on Cloud-based storage.

Second, the hospital has a large volume of data pertaining to the surgery and post-surgery events. These include the following:

- Notes written by the surgical nurse
- Notes written by surgical support personnel that observed the surgery
- Recordings of the plaintiff's vital signs recorded automatically from the beginning to the end of the surgery
- Post-surgical notes written by nurses
- Post-surgical notes of observation made by clinicians who checked on the plaintiff
- Recordings of the plaintiff's vital signs recorded automatically from sensors embedded in the plaintiff's bed

We have more and we can describe these to you later. We want you to know up front that, subject to we are about to tell you, the data exists in multiple forms.

Third, we should tell you that some of this data was "dynamic" in nature. In other words, subsequent entries may have modified earlier ones and some records were what we consider to be "ephemeral," that is, the records existed until a clinician observed the information and then it was overwritten automatically.

Once we became aware of your client's allegations we locked down existing data and it has been preserved. We are happy to provide you with anything that is relevant to your client's claims or our defenses but we do not have anything that constitutes "her EHR." Please tell us what you want.

Is this a farfetched scenario? Do electronic health records (note the plural) exist in one form and in one system such that everything can be collected and produced at once? Or is "EHR" a catchword intended to encompass an amorphous collection of ESI? These questions are likely to be posed during litigation and in response to requests for production by adversaries. Your answers may avoid unnecessary and potentially costly disputes about what ESI exists and how it can be turned over.

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

Ron Hedges, JD, is a former US Magistrate Judge in the District of New Jersey and is currently a writer, lecturer, and consultant on topics related to electronic information.

Original source:

Hedges, Ron. "What Do You Mean by "Electronic Health Record?"" ([Journal of AHIMA website](#)), March 15, 2016.

Driving the Power of Knowledge

Copyright 2022 by The American Health Information Management Association. All Rights Reserved.