

Washington Healthcare News

wahcnews.com

Articles, Interviews and Statistics for the Healthcare Executive

VOLUME 4, ISSUE 5

MAY 2009

Electronic Medical Records: Friend or Foe?

By Carol Sue Janes

Senior Attorney
Bennett, Bigelow & Leedom, P.S.



Hypothetical: A medical malpractice lawsuit alleges a failure to diagnose the aortic dissection that caused the sudden death of the patient. Two days before his death, the patient had visited a medical clinic, where the patient had shown normal vital signs except for a slight fever, and a mild shortness of breath. Based on the initial clinical presentation, the tentative diagnosis was pericardial rub or possible systolic murmur. The clinic's electronic medical records (EMR) showed that the clinic had promptly ordered blood work, a blood culture, and an echocardiogram, with a follow-up appointment in one week.

Benefits of EMR. EMR are be-

coming more and more common for health care providers. Providers are recognizing that EMR offer many advantages over handwritten records. They can be accessed quickly and easily by multiple providers at different locations. A provider can obtain all types of medical information (e.g., chart notes, test results, pharmacy records, and radiographs) from a single access point. Some EMR systems provide cross-checks for error reduction, such as notifying the provider regarding possible drug interactions. EMR systems may also prompt the provider and office staff to document follow-up after a patient appointment, such as documenting review of test results or radiographs, follow-up notification to the patient, and scheduling of any additional appointments. EMR are more legible and safer from destruction. EMR systems can protect confidentiality by password access and other appropriate safeguards quite well. EMR are searchable by content, both for use for patient care and for appropriate research purposes. They can result in cost reduction by reducing paperwork. Some systems also allow for patients to view their medical records directly via online access.

Litigation with EMR

Production of records. Certain features of EMR deserve special

attention from a litigation perspective. As an initial matter, providers using EMR need to consider how records will be produced for litigation. Production of an EMR patient record takes more careful consideration than merely making a photocopy of the chart and duplicates of any radiographs. Legal counsel and the health care provider will likely work with in-house IT staff or IT consultants to determine how to access and produce the EMR correctly.

User ID and time stamp features. The EMR likely contains information showing the "footprint" of when and how the provider and other staff created and accessed the EMR. The information may be visible to the provider, or may be invisible and stored in the form of "metadata" within the system. The metadata may be accessible and subject to disclosure in medical malpractice litigation. The existence of the electronic "footprint" makes it important for each individual to have a unique log-in credential rather than, for example, a physician and the physician's medical assistant sharing the same credential, so that it is clear after the fact which individual was accessing and making entries in the record. Disclosure of metadata should exclude the data showing when the provider reviewed the

EMR with a risk manager or counsel for purposes of litigation.

Providers should pay careful attention to how any time stamp feature functions in the EMR systems they use. The timing of the provider's review of records may be important, particularly in the context of litigation. If a provider viewed a record twice, the software may only maintain a footprint record of one viewing and not the other. In addition, certain "preview" modes of review may not trigger the time stamp footprint, even though the provider in fact reviewed the information and took action on it. In the hypothetical case above, the EMR record only showed a time stamp for the physician's last review of the patient's lab work, after the patient's death, but did not document the physician's review of the lab work the day after the clinic visit because she had viewed it that day

by looking at it in an e-mail in the "preview" mode. The time stamp feature was able, however, to accurately show when the physician had reviewed the patient's prior records, and when and who had promptly scheduled the patient's echocardiogram, lab tests, and follow-up appointment.

System prompts and default entries. EMR systems often include prompts for documentation, which can provide helpful reminders to ask key ROS and diagnostic questions, can simplify the thorough documentation of pertinent findings and negative findings, diagnoses, and indications for treatment, and can facilitate complete documentation for billing purposes. In the hypothetical case, although the plaintiff's counsel had asserted that the patient had experienced prior episodes of syncope, which might have led to a different ten-

tative diagnosis, the EMR demonstrated that the physician had asked about associated symptoms and the patient had revealed no relevant symptoms, and the ROS showed that the patient's systems were negative for syncope.

EMR systems can even make suggestions for diagnostic options, suggested treatment plans, and patient instructions for post-treatment. Many of these features, particularly for primary care providers, may be triggered by the documentation of the patient's initial presenting symptom, so the provider may need to be particularly thoughtful with this documentation in order to make the best use of the software's features. The provider should also be prepared to probe outside the software's templates and suggested chart entries. Some EMR systems provide default field entries for certain auto-



**HEALTHCARE
REIMBURSEMENT**
PRODUCT LIABILITY LITIGATION
BEHAVIORAL HEALTH
**TAX-EXEMPT
ORGANIZATIONS**

CIVIL LITIGATION & TRIAL PRACTICE
INSURANCE COVERAGE & BAD FAITH LITIGATION
HOSPITALS & HEALTH SYSTEMS
FRAUD AND ABUSE COMPLIANCE/DEFENSE
HEALTH INFORMATION TECHNOLOGY AND REGULATION
HEALTH PROFESSIONALS & ORGANIZATIONS

FEDERAL TAXATION
EMPLOYMENT LAW
ACADEMIC MEDICAL CENTERS
HEALTH PLANS
**BUSINESS STRUCTURES
AND TRANSACTIONS**
MALPRACTICE

All Healthcare Law. All the Time.

We know the healthcare industry inside and out. We know the issues you face. We know how to address them. So you can focus on your business. We've got you covered.



Bennett Bigelow & Leedom, P.S.

Tel 206.622.5511 www.bbllaw.com

mated fields. For example, a field might have three possible options for the provider to choose from: normal risk, low risk, or high risk. The system might default to the normal risk entry. But if the provider overlooks that field, and the system automatically generates a “normal risk” entry that is not accurate, then it may appear that the provider entered inaccurate data, or did not identify a risk level that should have been considered. The provider should become very familiar with what the software’s default settings are, and develop documentation habits regarding these settings. This may require additional typewritten notes to provide more detailed explanations than the default settings may offer.

Effect on patient interactions. A provider may want to consider how the use of the EMR system affects their personal interactions with a patient during an appointment. If the system is designed for use during the patient appointment, it may provide many benefits, with prompts and automated entries. It can also distract from personal in-

teraction with the patient, including eye contact and opportunities to make medical observations of the patient. The provider may want to develop new interaction habits around the use of EMR to prevent any loss of opportunity to build personal rapport with the patient.

Secured access. Those keeping EMR must also undertake appropriate safeguards to prevent loss of the EMR from computer failures or access by unauthorized users. Washington law allows juries to make an adverse inference against a health care provider whose health care records are no longer available. In addition to the federal HIPAA protections for the security of health information, state law requires notification to individuals whenever the keeper of “computerized data that includes personal information” reasonably believes that an unauthorized person has acquired access to the information. RCW 19.255.010.

Stark and anti-kickback considerations. Hospitals wanting to offer EMR access to outside phy-

sician clinics must also be aware of federal physician self-referral (“Stark”) and anti-kickback laws under which the hospital’s information sharing may be viewed as a benefit conferred in exchange for referrals. Hospitals should review such arrangements so that they fit under a Stark law exception or anti-kickback safe harbor.

EMR are an important development in providing medical care and documentation. They can provide valuable assistance with defense of a medical malpractice action, as they did in the hypothetical case. But providers must be aware of the challenges as well as the benefits of using EMR, in order to provide the best care for the patient and the best defense in any litigation.

Carol Sue Janes is a Senior Attorney with Bennett, Bigelow & Leedom, P.S. This law firm represents a full spectrum of health care clients including physicians, hospitals, and academic medical centers. She can be reached at 206-622-5511 or csjanes@bblaw.com.

Reprinted with permission from the Washington Healthcare News. To learn more about the Washington Healthcare News visit wahcnews.com.