
IS YOUR NEW EHR SYSTEM LEGAL?

At this juncture, we do not yet know all of the issues that may arise from the use of electronic health records and how these will play out in the courts. While we have not yet seen cases regarding this topic, one potential concern reported in the literature is the possibility that some records generated by EHR systems may not be admissible in a legal proceeding.

The primary purpose of a medical record is of course to support patient care, but it is also key to establishing a physician's defense in the event of a claim or lawsuit. In order to be useful, however, the record must be able to be admitted as evidence in court. In their efforts to convert records from a paper system to an electronic system, some physicians have overlooked the question of whether their new system of record-keeping will allow them to generate a document that will be considered a legal health record and thus admissible. "Just because an EHR system creates something that looks like a medical record doesn't mean that document fits the legal definition of a medical record."

Generally speaking, statements made outside of court by a party to a lawsuit are considered hearsay and are not admissible as evidence. The Federal Rules of Evidence* define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Documentation in a medical record – whether paper or electronic – is technically hearsay; however, there is an exception to the hearsay rule for records made in the regular course of business as are medical records. In order to qualify for this exception, records must be:

- Documented in the normal course of business
- Kept in the normal course of business
- Made at or near the time of the matter recorded
- Made by a person within the business with knowledge of the acts, events, conditions, opinions, or diagnoses appearing in it.

The basic rules that allow a medical record to constitute a business record and thus be admissible in court are the same for both paper and electronic records. "The key to the admissibility of business records at trial is that they are prepared and maintained in accordance with the Federal Rules of Evidence (803(6)). The person testifying or certifying the records for trial must be conversant with the policies and the processes used to ensure accuracy of the records."

In order for an electronic health record to be admissible, the system upon which it is maintained must be proven to be accurate and trustworthy. Factors that may be used to determine this include:

- Type of computer used and its acceptance as standard and efficient equipment
- The record's method of operation
- The method and circumstances of preparing the record including:
 - The sources of the information on which it is based
 - The procedures for entering information into and retrieving information from the computer

- The controls and checks used as well as the tests made to ensure accuracy and reliability of the record
- The information has not been altered

As such, the AMA suggests that there are three important things to consider when shopping for an EHR system that will allow for admissibility:

- How well does the system show authorship? Does it clearly show who entered what portion of the record?
- How does the system deal with changes? Does it track alterations to the record as well as who made each change and when? Does it save the original?
- How well does the system's audit function support the accuracy and validity of the record? Are there cross-checks in place?

In addition to querying your potential vendor on factors that support admissibility, it is also a good idea to consult your attorney, who can advise you on requirements specific to your jurisdiction.

References

¹ Dolan, PL. Is your EMR legal? A Document Can Look Like a Medical Record, but not Meet the Legal Definition, AMedNews, October 13, 2008.

² AHIMA. Update: Maintaining a Legally Sound Health Record – Paper and Electronic. Journal of AHIMA 76 no. 10 (2005):64A-L.

³ Quinsey, CA. Foundational Concepts of the Legal EHR, Journal of AHIMA 78 no. 1 (2007):56-57

⁴ AHIMA. The legal Process and Electronic Health Records. Journal of AHIMA 76 no. 9 (2005): 96A-96D

⁵ Journal of AHIMA 76 no. 10 (2005):64A-L.

⁶ Dolan, PL.

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