Medical Litigation Newsletter

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Illinois State Law on Original Medical Record Retention

By: Jennifer C. Pitzer

Like most states, Illinois addresses how long health care providers must store medical records statutorily. Also like most states, those statutes have not changed much to reflect the reality of electronic medical record keeping. However, Illinois law has two unique features that justify retaining the original medical record in its original format, even if that format is paper and the medical office is going paperless. First, there is at least one regulation in Illinois specifically mentioning "original medical records" as opposed to just "medical records." Illinois also is one of the few states that recognize a claim for the negligent spoliation of evidence. For these two reasons, practitioners should err on the side of caution and retain their original medical records for at least 10 years, and longer with notice of pending litigation.

Pursuant to 735 ILCS 5/8-2001, medical records must be available upon request to any person who either received treatment from the health care facility or health care practitioner, or anyone authorized by that person.

Three statutes in Illinois address medical record retention. The Hospital Licensing Act and the X-Ray Retention Act both speak directly to the issue. Additionally, home health agencies are also subject to a statutory limit through the Local Records Act.

The Hospital Licensing Act provides in part that:

> Every hospital shall preserve its medical records in a format and for a duration established by hospital policy and for not less than 10 years, provided that if the hospital has been notified in writing by an attorney before the expiration of the 10 year retention period that there is litigation pending in court involving the record of a particular patient as possible evidence and that the patient is his client or is the person who has instituted such litigation against his client, then the hospital shall retain the record of that patient until notified in writing by the plaintiff's attorney, with the approval of the defendant's attorney of record, that the case in court involving such record has been concluded or for a period of 12 years from the date that the record was produced, whichever occurs first in time.
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> 210 ILCS 85/6.17

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Hinshaw Representative Matters

Dawn A. Sallerson and ***Madelyn J. Lamb***, Partners in Hinshaw's Belleville, Illinois, office and Hinshaw Legal Nurse Consultant, Kara Miller, represented an OB/GYN in a case involving postoperative bleeding after a hysterectomy, which plaintiff patient contended almost resulted in her death. The case was tried in St. Clair County, Illinois. The patient had various comorbid conditions, which became the focus of claimed damages along with residual right lower quadrant pain. The patient contended that the drop in her hemoglobin, vitals, and other hemodynamics were proof of internal bleeding at the time of closure or were, at a minimum, evidence that her condition following surgery was not timely diagnosed and treated. The defense presented an OB/GYN physician to defend the surgical technique and a cardiologist/internal medicine physician to dispute the claimed damages and delayed diagnosis. The defense experts testified that the preoperative lab value was falsely elevated and a portion of the drop in hemoglobin value was a result of chronic diuretic use and hemodilution from IV fluids. The jury returned a verdict of not guilty in favor of the OB/GYN.

Michael P. Malone and ***Jill M. Munson***, attorneys in Hinshaw's Milwaukee office, successfully defended a dermatologist against claims that he failed to timely diagnose a malignant melanoma and failed to inform the patient a second biopsy could have been performed. The case was tried to a jury.

Stacey L. Seneczko and ***Michael F. Henrick***, Partners in Hinshaw's Chicago office, obtained a defense verdict on behalf of a treating physician in a medical malpractice case. The case involved an alleged sexual battery and intentional infliction of mental distress by the treating physician. The doctor's employer was also a defendant, and was alleged to have engaged in negligent supervision. It was tried in Lake County. The jury was out for approximately one hour.

Kevin J. Burke and ***Chad D. Kasdin***, Partners in Hinshaw's Chicago office, obtained a defense verdict on behalf of defendant urologist in a case tried in Cook County, Illinois. The urologist had performed a laser prostatectomy on plaintiff patient. Following the procedure, the patient began to experience urinary incontinence, which led to surgical placement of an artificial urinary sphincter. The surgery had to be repeated a few months later due to mechanical failure of the device. The patient claimed ongoing urinary leakage requiring diapers and pads in addition to depression. The jury deliberated for approximately 90 minutes before rendering its verdict.

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While the statute says nothing about "original" medical records, it clearly creates a duty to maintain medical records for at least 10 years, and longer if litigation is pending.

Pursuant to the Hospital Licensing Act, the Illinois Department of Public Health (DPH) issued rules on medical record retention. Unlike the controlling statute, the Illinois Administrative Code (IAC) does raise the original medical records issue. Under 77 Ill. Adm. Code 250.1510(e)(1), a hospital must preserve "all *original* medical records or photographs of such records . . . in accordance with a hospital policy based on American Hospital Association recommendations and legal opinion." (emphasis added). Although the IAC appears to also permit copies, many statutes do not explicitly request "original medical records." Therefore, any policy based on 77 Ill. Adm. Code 250.1510(e)(1) should at least account for the status of the original documents. Again, caution dictates maintaining the original itself. This regulation is also unique because it explicitly incorporates American Hospital Association (AHA) recommendations. Generally, the AHA recommends maintaining medical records for at least 10 years. The AHA's resources would be extremely useful to crafting a medical records policy in Illinois because of the statutory reference.

The X-Ray Retention Act provides that "Hospitals which produce photographs of human anatomy by the X-Ray or roentgen process at the request of licensed physicians for use by them in the diagnosis or treatment of a patient's illness or condition shall retain such photographs or films as part of their regularly maintained records for a period of five years." 210 ILCS 90/1. If an attorney sends the hospital written notice of his or her intention to file a lawsuit where the X-Rays or roentgen process would be involved, the hospital must keep the records on file for 12 years from the date they were taken. 210 ILCS 90/1. However, this statute only applies to hospitals, not physicians. *Miller v. Gupta*, 672 N.E.2d 1229 (Ill App. 1996).

Finally, the Local Records Act requires that "except as otherwise provided by law, no public record shall be disposed of by an officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." 50 ILCS 205/1. This act is applicable to home health agencies and requires that they maintain records for a minimum of five years beyond the last date of service.

In the event of a closure, a health care facility may still have a duty to maintain records. The public must be given 30 days notice before the closure of any health care facility, and provision must be made for the continued maintenance of any records. 735 ILCS 5/8-2001(f).

Aside from these statutory provisions, medical service providers must also know the status of their original medical records because patients may have an independent cause of action against them if medical records are lost or destroyed. Illinois allows plaintiffs to file claims for negligent spoliation under a tort theory of liability. The Illinois Supreme Court has refused to recognize a truly independent tort of spoliation, but instead held that spoliation fits into the existing negligence framework. *Boyd v. Travelers Insurance Co.*, 652 N.E.2d 267 (1995). To state a cause of action, the plaintiff must show: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) proximate causation; and (4) damages. The First District

Illinois Appellate Court applied the *Boyd* framework to a claim based on lost X-rays in *Michael Jackson v. Michael Reese Hospital*, 689 N.E.2d 205 (1997). The *Jackson* court discussed each of the elements in turn. First, it examined the circumstances that could create a duty. Quoting *Boyd*, the court noted that while there is no common law duty to preserve evidence, such a duty can arise due to agreement, contract, statute, special circumstances, or through affirmative conduct. The test is whether "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil litigation."

As far as establishing the duty element, the court indicated that in order to successfully plead that a hospital took affirmative steps to retain the documents, the plaintiff should allege that: (1) the defendant knew that the medical records were material to future litigation, and (2) chose to treat the records in a specific way because of the litigation. The plaintiff may also attempt to allege that the medical records are part of a continuing course of treatment, but such allegations must be pled with specificity and show that treatment continued up until the lawsuit was filed. Finally, if a plaintiff chooses to rely on accreditation or professional organization standards, he or she must plead specific recommendations that the hospital is not in compliance with in order to establish a duty. This means that the plaintiff could potentially rely on nonstatutory recommendations about storing original medical records to plead his or her case. This is particularly relevant in Illinois, where hospital licensing regulations specifically incorporate an outside body's recommendations and standards.

The plaintiff only has to plead the loss or destruction of documents to show breach of duty. Destruction of documents is a broader concept than it would appear at first glance. It can also refer to record alteration, i.e. adding new information at a later time without proper documentation or cutting and pasting documents together. This could be especially problematic because some systems require that handwritten notes be incorporated into an electronic record. Failure to incorporate exactly could create a spoliation claim. Additionally, destruction of a small piece of information in a medical record could lead to a spoliation claim. For example, DPH regulations require that all health care providers authenticate entries to medical records. 77 Ill. Adm. Code 250.1510(c). Authentication occurs when the author of the medical record identifies it and confirms that the contents are what the author intended. Practically, the authentication requirement means that all medical records must contain the signature or initials of the person who wrote them. Imperfect record scans that cut off signatures or initials are in violation of the regulation requiring authentication. This would likely be sufficient for a plaintiff pursuing a claim for spoliation to successfully pled breach of duty.

As far as causation, the plaintiff must plead facts that would show that: (1) the loss of the medical records caused the plaintiff to be unable to prove the underlying claim, and (2) but for the loss of the evidence, the plaintiff had a reasonable probability of success. Allegations that the plaintiff could not secure an expert to review the file or testify are insufficient.

Rhonda Ferrero-Patten, a Partner in Hinshaw's Peoria, Illinois, office represented defendant neurosurgical resident physician, who was alleged to have failed to recognize developing spinal epidural hematoma following a surgical repair of a T6 burst fracture with instrumentation that allegedly resulted in paraplegia 14 hours after the procedure. Hinshaw argued that the resident physician met his standard of care and that the paraplegia was caused by something other than a spinal epidural hematoma. Plaintiff patient has since been confined to a wheelchair. The patient sought $15 million in damages. The hospital at which the resident physician was working at the time of the incidents paid $7.5 million dollars after the jury was selected. A jury returned a not guilty verdict in favor of the resident physician.

Thomas R. Mulroy and ***Diane E. Webster***, Partners in Hinshaw's Chicago office, tried a wrongful death medical malpractice case in Cook County. Defendant nephrologist had been managing a patient on anticoagulant medication as an inpatient at a hospital. On the day of discharge, the patient suddenly went into a violent seizure and was diagnosed with a massive subarachnoid hemorrhage. Plaintiffs argued that the nephrologist was negligent because he had been contacted the evening before by a nurse, advising him that the patient was complaining of a severe headache despite having been given morphine and several vicodin pills. Plaintiffs argued that this fact, along with the fact that the patient's anticoagulation levels were over the therapeutic limits, meant that the standard of care required an emergency CT scan and neurology consult to rule out the beginnings of a subarachnoid bleed as the cause of this headache. Plaintiffs asked the jury for $7.7 million. The jury returned a verdict of not guilty.

Kevin J. Burke and ***Diane E. Webster***, Partners, in Hinshaw's Chicago office, represented an internist in a medical malpractice action involving an alleged failure to timely diagnose and treat a spinal hematoma in a 61 year old female after undergoing a femoral popliteal bypass graft surgery rendering her paraplegic. Plaintiff specifically alleged the internist was negligent in relying on medical advice given by a neurosurgeon over the telephone, rather than transfer the patient to a hospital where a neurosurgeon could perform an in-person consultation which would have necessitated immediate neurosurgery to evacuate the hematoma. Due to the multiple defendants' alleged negligence, the patient became paraplegic, wheelchair-bound, and subsequently had both legs amputated. The patient also suffered bilateral pulmonary emboli and required placement of a permanent suprapubic catheter. After 3.5 weeks of trial, the plaintiff asked in excess of $21 million and the jury returned a not guilty verdict in favor of the defendants.

Finally, the plaintiff must plead his or her damages with particularity. He or she must allege how the loss or destruction of the records rendered him or her unable to prove each element of the underlying cause of action.

The statute of limitations on a spoliation claim is five years.

Cautious practice dictates that medical care providers maintain the hard copies of original medical records for at least 10 years, even if the office in question is in the process of going electronic.

Inadvertent Disclosure: New Rules in Illinois Supreme Court

By: Steven M. Puiszis

The Illinois Supreme Court recently announced two new rules that may impact medical litigation in Illinois. The first is Supreme Court Rule 201(p), which creates a procedure for asserting the protection of attorney-client privilege or the work-product doctrine over information inadvertently produced in discovery. The rule is modeled on Fed. R. Civ. Pro. 26(b)(5)(B). The rule specifies that once the party asserting a claim of privilege or work product over inadvertently produced information notifies other parties about that claim, the parties that received the information must return, sequester or destroy the information and any copies. The rule further provides that any party who received the inadvertently produced information may not use or disclose the information until the privilege or work product issue has been resolved, and must take reasonable steps to retrieve the information then in the possession of any third parties. The rule also permits the party that received the information to promptly present that information under seal to a court for a determination as to whether the privilege or work product protection was waived under the circumstances presented.

The second rule is Illinois Rule of Evidence 502 and is substantially similar to Fed. R. Evid. 502. Subsection (a) of the rule addresses the concept of subject matter waiver of attorney-client privilege or work product and limits it to disclosures made in an Illinois proceeding or to an Illinois office or agency. A subject matter waiver is further limited to intentional waivers, and the waiver only extends communications or information concerning the same subject matter which in fairness ought to be considered together.

Subsection (b) addresses inadvertent disclosures and provides that an inadvertent disclosure does not constitute a waiver if the disclosing party took reasonable steps to prevent the disclosure and also promptly took reasonable steps to rectify the error.

Subsection (c) addresses disclosures that occur in federal or another state's proceedings and specifies that such a disclosure does not constitute a waiver if the disclosure does not constitute a waiver under the law governing the federal or state proceeding where the disclosure occurred or if it would not be a waiver under this rule had the disclosure occurred in an Illinois proceeding.

Subsection (d) permits a court to enter a nonwaiver order. It also provides that any disclosure occurring in the litigation pending before the court after the entry of a nonwaiver order does not constitute a waiver of attorney-client privilege or work product protection in that proceeding or in any other proceeding.

Subsection (e) provides an agreement between the parties on the effect of a disclosure in an Illinois proceeding (sometimes referred to as a clawback or quickpeek agreement) binds only the parties to the agreement unless it is incorporated into a court order.

Steven M. Puiszis, a Chicago-based Partner at Hinshaw & Culbertson LLP, assisted in the drafting of the original versions of these rules, submitted them to the Illinois Supreme Court Rules Committee for the Illinois Association of Defense Counsel (IDC), and testified on behalf of the IDC in support of these rules.