



Alerts

EMR and E-Discovery Part Four: Reading Complexities

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Health Care Alert

In part four of our series, EMR and E-Discovery, author David Levitt unpacks the difficulties associated with reading EMR in its native state and the additional complexities that accompany counsel's ability to access EMR, which is only produced in PDF form.

Recap of Part Three:

- Modern health care involves the use of sophisticated diagnostic tools that are managed by software; many require log-on IDs and may capture metadata regarding who did what and when.
- Healthcare institutions should have steps in place to gather, preserve, and review that information on a regular basis, or when an incident occurs that might give rise to a claim.
- Many EMR systems include dropdown menus that contain a selection of certain options to describe presenting symptoms or other information, but the options may present a less-than-accurate picture to the next practitioner (or even the same practitioner at a later visit), which creates liability issues.
- Dropdown menus are typically not included in the PDF print-out received by attorneys.
- Healthcare institutions should consider whether practitioners should be trained to provide feedback when an alert appears regarding whether it was followed or, if not, the reasons why not.

EMR is managed by sophisticated software that is very expensive to license. Further, without the proper software, it is not possible to read the EMR in its native state, even if produced in electronic form.

We have encountered this issue in other contexts. For example, the days when architects, product developers, and inventors used pencil and paper to create drawings are in the rather distant past. In modern times, such professionals use computer-aided drawing programs to create their work. These CAD formats allow a much deeper dive into a drawing than is available in a 2D print. Thus, the CAD drawing in itself can provide information that is not otherwise visible, and this is further complicated by the metadata that may show when the drawing was first created, possible interim modifications, and the date last modified.

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Even though CAD has been around for decades, most law firms have not purchased their own CAD licenses. Even if drawings are produced in CAD format, the lawyers would not be able to open the files so produced. CAD readers have been developed that allow some glimpse into the underlying CAD-format drawings, but this is different than reviewing the CAD file itself. The readers also do not provide access to the metadata.

The issue is far more complex as to EMR, because the programs that contain the data are more massive and multi-faceted. Production of EMR in native format would be meaningless to the recipient, unless the recipient had the necessary software and had received the necessary training in using it.

One should not underestimate the training piece. As one recent author noted, audit trails are often not self-explanatory, and interpreting them correctly requires technical expertise that is specific to that implementation of the software. Brouillard, *EHR Audit Trails Might Reveal More than You Think: Hall v. Flannery, a Sign of the Times*, Inside Medical Liability, Third Quarter 2015.

Indeed, the inability of counsel without access to or training in the software may itself be one of the reasons that, up to now, EMR has been produced in PDF form. Nonetheless, one can anticipate that this state of affairs will not continue – and that means to access metadata will be developed to enable counsel to glean necessary information. Even if that development is still in the not-so-near future, healthcare defendants should not be surprised to receive requests to view the chart as the physician saw it at the relevant time, and to receive requests for access at an authorized computer terminal if necessary. Therefore, institutions and their counsel should be thinking about how to respond to such requests sooner rather than later.