

Electronic Medical Records May Be Subject to On-site Inspection

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On-site expert review of electronic medical records ("EMR") may no longer be a last resort in professional liability matters in New Jersey. A three-judge panel in New Jersey's Appellate Division recently upheld a trial court's decision to allow a plaintiff's expert to review the EMR on-site with supervision of the defendant hospital's personnel. *Estate of Lasiw v. Pereira*, No. A-1231-21, 2023 N.J. Super. LEXIS 41 *(Super. Ct. App. Div. Apr. 18, 2023). As a result, plaintiffs may increasingly serve notices to inspect and motions to compel on-site review of the EMR as a result of this decision.

In reaching its decision, the Appellate Division weighed plaintiff's right to discoverable electronically stored information ("ESI") against defendant's right to avoid undue burden or costs. Defendants argued that allowing the expert to inspect the EMR on-site would be "unduly burdensome, both in time and expense[.]" and that the plaintiff bears the burden to prove they "need" the metadata. *Id.* at *25, *26. Defendants also raised concerns of unintended disclosure of confidential information and cyberattack. The Appellate Division found these concerns unpersuasive and held that "[p]laintiff's request to have her expert review decedent's EMR, on screen and under defendants' supervision and control, in order to identify what metadata she wants copied and produced, strikes us as an eminently reasonable way to proceed under the circumstances." *Id.* at *31.

The Court did set some parameters for the on-site inspection: the duration of inspection would be limited to four hours, defendant's personnel would maintain control of the EMR system and computer mouse, counsel could be present, recording would not be permitted, and plaintiff's counsel and expert were to comply with defendant's COVID-19 protocols. During the inspection plaintiff's counsel "may request specific metadata be copied and produced" and defendants' counsel can object to any such requests. *Id.* at *35.

There are strategies with earlier document and metadata production in the case that could potentially avoid such a request. However, if faced with a notice to inspect EMR, defendant's counsel would be wise to demand a meet and confer with plaintiff's counsel to push for strict parameters to avoid disruption to the healthcare provider's operations, unintended confidential information disclosure, and cyberattack vulnerabilities, among other potential burdens.

If you have any questions about this or another matter, please contact Michael W. Horner (hornerm@whiteandwilliams.com; 856.317.3658), Kevin C. Cottone (cottonek@whiteandwilliams.com; 215.864.7108), or Brittany Cruz (cruzbb@whiteandwilliams.com; 215.864.6215).

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