NEW TECHNOLOGIES, NEW WORRIES

Medical Malpractice and False Claims Act Liability in the Age Of Electronic Health Records (EHR) and Health Information Exchange (HIE)
OVERVIEW

MAJOR EHR FUNCTIONALITIES

There are four core functionalities of EHR systems:

- documentation of clinical findings,
- recording of test and imaging results,
- computerized provider-order entry, and
- clinical-decision support.
Potential Medical-Liability Benefits of Electronic Technologies

- **After successful implementation**

  1. EHR systems may reduce discontinuities and errors in care, reducing adverse events and claims.

  2. EHR systems including integrated clinical-decision support may improve clinical decisions, reducing adverse events and claims.

  3. Better documentation of clinical decisions and activity, through both user-entered data and metadata, may improve the ability to defend against malpractice claims when care was appropriate.
4. Compliance with clinical-decision support care guidelines may constitute helpful evidence that the legal standard of care was met.

5. Secure messaging may improve patient satisfaction, improve communication, and reduce propensity to sue.

6. Secure messaging may improve patient communication of clinically significant information, reducing adverse events and claims.
As EHRs and HIEs become widespread

1. Adherence to clinical-decision support recommendations may protect providers from liability.

2. Rise of HIEs may facilitate sharing of information about cases, leading to better care and fewer claims.
Medical-Liability Concerns Created by Electronic Technologies

During initial implementation of EHRs

1. Individual mistakes in using EHRs or system wide EHR failures/bugs.
2. Transition from paper to electronic record may create documentation gaps.
3. Failure to implement procedures that a prudent or reasonable provider would implement to avoid errors during the transition period may leave providers vulnerable to suit.
4. Inadequate training on EHR systems may create incorrect or missing data entries.
5. Failure of clinicians to use EHRs consistently may lead to gaps in documentation and communication.
6. System wide EHR “bugs”, failures, auto-populated fields and drop down menus could adversely affect clinical care, leading to injuries and claims.
Liability Risks and Benefits As Health Information Technology Systems Mature

- Effects on Care Processes
  - Information Overload
  - Alert Fatigue
  - Preformatted data Entry Fields
  - Software Glitches
1. Electronic communications offer both improvements and impairments to the physician-patient relationship.

2. E-mail advice multiplies the number of clinical encounters that could give rise to claims and may heighten the risk of claims if advice is offered without thorough investigation and examination of the patient.

3. Failure to reply to patient e-mails in a timely fashion could constitute negligence and raise patient ire.

4. AMA and American Medical Informatics Association Guidelines regarding emails.

5. Health Information Portals Coming Soon.
Effects on the Litigation Process

5. Effect of typos, mix-ups, screw ups on patient confidence/perception of quality of care.

6. More extensive documentation of clinical decisions and activity creates more discoverable evidence for plaintiffs, including metadata.
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Long Term Effects on the Standard of Care

7. Information access may alter standard of care with imposition of duty to act on all information available.

8. Information access may alter practice environment.

Allocation of Liability/Contracts and Indemnification

9. Who is to blame: EHR Developer, Provider Organization or Physician?
Ten Suggestions

1. Health care professionals and provider organizations can decline to sign contractual provisions that immunize the system developer.

2. Health care professionals and provider organizations can select systems that are designed to minimize the risk of user error or misuse and maximize the ease of record retrieval. Insist upon customization to the practice patterns of real and not hypothetical clinical staff.

3. Employees of provider organizations can insist upon contractual indemnifications that immunizes the employee from poorly designed HIE/EHR systems.
4. Do not delete, alter or supplement electronic data of any kind without including accurate statements about the justification, date and objective.

5. All provider organizations and professionals should insist upon thorough training, including education about organizational expectations regarding the use of the system.

6. Identify appropriate practice conditions for optimal use of EHRs, whether these involve the length of office visits, the placement of computer terminals, ease in accessing external records or other factors.
7. Establish redundant protocols during implementation to be sure nothing is lost in any state of the transition.

8. Manage patients’ expectations about secure messaging and accessing of EHRs.

9. Be sure emails to both colleagues and patients are limited to information directly relevant to patient care.

10. Be careful not to over-rely on the EHRs’ pre or auto-populated fields, not to select the “closest” match in a drop down menus if it is not appropriate and, if possible, disable the copy and paste feature of the EHR.
Electronic Data Statutory Concerns

Increased revenue OR increased risk
Medicare

The Centers for Medicare & Medicaid Services (CMS) processes claims electronically, and on any given day it pays 4.4 million claims worth more than $1 billion.

$1 Billion more in reimbursements in 2011 than 2006

Emergency rooms applying Electronic Records Technologies increased claims for the highest paying procedures

Hospitals that receive EMR incentives reported a 15% greater rise in Medicare payments from 2006 -2011 (47% increase v. 32%)
EMR’s

EMR’s are here to stay
- Improve quality of care
- More global approach to health care
- Correlation of data

EMR incentives
- CMS has awarded $10.3 billion in EHR incentive payments
Statutory risks related to EHR

Upcoding
- Billing for more extensive care than actually delivered or for services unsupported by adequate documentation

Unbundling
- Separating out services

Stark and anti-kickback evidence

HEAT (Health Care Fraud Prevention Team)
- has recovered over 10 BILLION in the last 3 years
Medical Community Response

Flip Side

- Doctors may have simply been underbilling before the advent of computer assisted billing
- Increased efficiency
- Programs actually do assist the physician and the facility
Statutory Ramifications of a Violation

Collection issues
False Claims Act
State Regulations
Medicare Exclusion
False Claims Act

Generally
- knowing submission of a false claim to the government
- causing another to submit a false claim
- making a false record to get a false claim paid

Penalties
Claimants

Audits
– Health Care Systems, facilities and practices

Federal Agencies
– OIG
– CMS
– U.S. Attorney’s office
Whistleblowers

The really scary one

Insiders
  – Excluded or terminated physicians
  – Office staffers
  – Administrators

Why? BECAUSE THEY GET PAID
  – Whistleblowers receive a portion of the governments recovery
Whistleblower Recoveries

Upcoding – admission v. outpatient
Unnecessary blood testing
Hospice care claims
Cardiac perfusion studies
Close to home - Temple University Hospital
Duty to Self - Report

Patient Protection and Affordable Care Act
- imposes duty to self report AND REPAY
- 60 day time period after “identification”

Failure to self report renders the overpayment a “claim” under the FCA
- “reverse false claims”

Applies to FCA, Stark and Anti-Kickback
Practical Applications

Human Review
Training of billing personnel
Perform internal audits
Don’t get greedy
Employment agreement applications