

## MEDICAL DEFENSE AND HEALTH LAW

APRIL 2019

### IN THIS ISSUE

*Electronic medical record (EMR) metadata is becoming increasingly important in the defense of medical negligence cases. This article discusses some common pitfalls associated with EMR metadata as well as strategies to avoid those pitfalls.*

## Common Pitfalls of EMR Metadata

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Metadata is data that is automatically created and leaves snippets of information behind which can later reveal when an item was created, edited, revised, printed, accessed, tampered with, or produced. Without question, one of the most important roles metadata plays in litigation is its impact on the credibility and veracity of the evidence—both written and oral. Take this example: a surgeon testifies he created a note in the medical chart immediately after surgery, however, the metadata suggests the medical record was not created until hours or days after the surgery. If the discrepancy was a one-time occurrence, this could be a minor issue that could be explained. However, what if the discrepancy was found to be habitual or fraudulent? Such systemic issues would be detrimental to the surgeon's credibility.

### **Significance of EMR Metadata**

In medical malpractice cases, an EMR's metadata is created by audit control systems and obtained through requesting an audit trail, though some EMR programs will automatically include the metadata when printed. The audit control system automatically records who, when, where, how, and sometimes why, a healthcare professional accessed the patient's medical record. Often, when counsel request an audit trail it is to determine changes to a medical chart, when those changes were made, pin down witnesses on timing issues, establish a timeline of events, prove knowledge and intent, and to substantiate or discredit witnesses. While metadata can

be useful for these purposes, it is not without faults.

Time stamp discrepancies and the identification of authors and reviewers are just a few issues. For example, let's assume that a nurse administered medication at 7 a.m., but did not make the note until 7:30 a.m. because she got called away for an emergency. The EMR metadata would be time-stamped 7:30 a.m., though the medication was administered at 7 a.m.

By way of another example, what if a physician and a nurse are entering information into the computer or reviewing other notes, while using only one person's log-in information. That information would only show that user taking those particular actions.

### **Discoverability and Admissibility**

Despite its faults, the Federal Rules of Civil Procedure recognize that metadata is both discoverable and admissible. With respect to discoverability, the requesting party must establish relevancy and the proportionality of the request. In considering metadata requests, it is worth mentioning that many federal courts require that requests to produce specifically seek production of metadata and many courts have denied metadata requests when the requesting party simply asserted that the information "may provide discovery on the 'timing and substance' of plaintiff's care." Instead, courts have recognized that metadata is relevant if the authenticity of a document is

questioned or if establishing who and when the information was received is important to the claims or defenses of a party. It is important to remember that establishing discoverability is a low threshold and the information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

That said, metadata requests must also be proportional to the needs of the case. A party need not produce documents if the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues. A request for metadata is unduly burdensome where a party seeks duplicative document production. In sum, if a requesting party satisfies the relevancy requirements and overcomes a responding party's proportionality argument, a court will likely require disclosure of the metadata.

With respect to admissibility, the greatest challenges are authenticity and hearsay. In order to overcome these hurdles it may be necessary to retain an expert witness to authenticate the metadata. However, this could depend on the significance of the information to the case and whether the opposition will object. It is still unclear whether metadata can be self-authenticating due to it being created in the ordinary course of business, but it should be

noted that the Federal Rules of Evidence allow evidence that describes a process or system to be authenticated by producing evidence sufficient to support a finding that the item is what the proponent claims it is. As a general principle, there is no hard and fast rule when it comes to authenticating metadata. Instead, it is something that will be driven by the circumstances, the type of underlying data, and the source of the data and metadata. Extreme care must be exercised in order to ensure it is properly authenticated.

### **Common Pitfalls and Strategies to Avoid Them**

The greatest risk is nondisclosure, mistake, or the inadvertent loss and destruction of EMR metadata that could lead to sanctions and/or spoliation claims. In order to avoid spoliation claims, it is incumbent upon administrators and legal counsel to timely identify the information in existence and take necessary precautions to preserve such information. Protective measures should be taken immediately when one reasonably believes that the information might be discoverable in connection with future litigation. It is important to note that the duty to preserve can arise before litigation commences.

In addition to preserving information, identifying all potential custodians and the types and locations of information is critical. This can include information contained on servers, computers, laptops, tablets, cellphones, and smartphones. Simply

preserving the EMR and related metadata is insufficient and an early assessment of custodians and types and locations of information must be completed.

While EMR metadata can be discoverable, there are potential objections that could be raised to preclude its production and eliminate fishing expeditions by opposing counsel. In determining whether opposing counsel is on a fishing expedition and to otherwise preclude disclosure, consider the following questions:

- Can you show that the burden or expense of producing is disproportionate to the likely benefit?
- Can you show the information has already been produced through more accessible means, and therefore the request is duplicative?
- Can the information be put into a printed format and produced as opposed to an electronic format which may be more burdensome, unnecessary, and expensive?

It may be obvious, but the content and impact of the EMR metadata must be completely analyzed and discussed with the client prior to production. Given the timing issues raised above, and the likelihood that further explanation will be necessary, sufficient time should be dedicated to evaluating and discussing with the client the impact the metadata will have on the litigation prior to production. In order to avoid some of these issues, preventive measures should be taken before claims

accrue and having an action plan in place to anticipate issues will ensure the accuracy of the EMR and metadata.

### **Conclusion**

The take-away is that while metadata and EMRs can be useful, they often do not tell the whole story and practitioners must use extreme caution. The use of metadata can become a minefield for spoliation claims; become a fishing expedition with exorbitant costs; contain misleading or inaccurate information; and impact the credibility of witnesses and litigation in unanticipated ways. Now, more than ever, it is critical that healthcare professionals carefully and timely chart patient records. It is equally important that administrators and attorneys understand that a proverbial smoking gun is making note of every move, and has the potential to significantly impact a case. Metadata can contain a wealth of information and so long as practitioners learn of its existence and how to use it, benefits can be derived and damage can be mitigated.

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