Protect E-Mail to Minimize Medicolegal Liability

BY SHERRY BOSCHERT
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SAN FRANCISCO — Give e-mail correspondence with patients the same care and attention you'd give to paper records, faxes, or phone calls in order to minimize medicolegal liability, Dr. Jeffrey L. Brown advised.

Physicians should be reasonably certain that the person requesting information by e-mail is authorized to receive it, just as would be done with phone calls, he said at the annual meeting of the American Academy of Pediatrics.

At a minimum, your e-mail system should include an automated response to any e-mails received from patients, acknowledging that an e-mail message has been received and saying that you will respond within a set period of time, such as 24 or 48 hours, said Dr. Brown of Cornell University, New York, and in private practice in Rye Brook, N.Y. He has no association with companies that market e-mail systems or services.

The automated response should alert patients that confidentiality cannot always be assured in e-mail correspondence, and that you cannot respond to urgent questions posed by e-mail. Patients should contact your office by phone for urgent matters.

The response also should inform patients that if they do not get a reply from you to any e-mail message within a reasonable period of time—"usually 48 hours," Dr. Brown said—the patient should call your office, because you may not have received the e-mail. If you are away from the office when patients e-mail, the automated response should let them know that, and give the date of your return.

In the other direction, e-mails sent by physicians must be compliant with the Health Insurance Portability and Accountability Act (HIPAA). As with faxes, conventional e-mails must protect the confidentiality of sensitive information such as Social Security numbers, medical identification numbers, laboratory results, diagnoses, medications, and more.

To ensure confidentiality in e-mails, use an encrypted message system, Dr. Brown advised. Solo practitioners or small practices may want to do an Internet search for the term "encrypting e-mail systems" to find a list of encryption providers, he said. Typically, an outgoing e-mail would be sent to the provider, encrypted, and returned to the physician's system before going out to a patient.

Confidential e-mail from physicians should contain a warning disclaimer similar to those used on fax transmissions. A typical disclaimer says the following: "Important notice: This e-mail contains confidential and privileged information. It is intended only for the individual or entity to whom it is addressed. If you are not the intended recipient, or if you have received this transmission in error, you are hereby instructed to notify the sender and to erase its content and all attachments immediately. Copying, disseminating, or otherwise utilizing any of its content is unlawful and strictly prohibited."

"If you don't want to use this one, ask your attorney to fax you something," and use the disclaimer you find in the attorney's fax, Dr. Brown suggested.

Treat e-mail messages like other patient correspondence, and file them appropriately, he added. Before erasing e-mail, save the patient's original e-mail and your response as hard copies in the patient's chart or electronically if you use electronic charts.

Take precautions to protect confidential information on laptop computers and hard drives, as you would for other medical records. Use encryption software or change passwords frequently to prevent unauthorized access. Erase all confidential information from hard drives before disposing of them. ■

Tips for Staying Out of Trouble

► Do not use your personal e-mail address to reply to e-mails from patients.
► Do not answer a new patient's e-mailed medical questions without first establishing a formal relationship. "You have no idea who they are and what their problems are," he warned.
► Do not forward a patient's e-mail correspondence or address to a third party without first getting the patient's consent.
► Do not use an indiscreet topic in the heading of your response. "Don't write, 'Your pregnancy test is positive' in the subject line," he said. Instead, use the same strategies you'd use when leaving a voice mail on a patient's answering machine. "Say, 'I have your lab work,' or something like that," he suggested.
► Do not leave e-mail messages on a computer screen where they can be read by others.
Source: Dr. Brown

LAW & MEDICINE

A Matter of Privilege

Editor's Note: Welcome to our first installment of Law & Medicine, our new legal column written by Miles Zaremski, J.D., past president of the American College of Legal Medicine. Each month, Mr. Zaremski, who practices in Northbrook, Ill., will discuss an aspect of health law that affects physicians. We welcome your comments on the column; write to us at fpnews@elsevier.com.

The case of *Russell Adkins, M.D. v. Arthur Christie et al.* may not sound very exciting on its face, but could be a significant one for practicing physicians because of its potential effect on peer review.

BY MILES ZAREMSKI, J.D.

Dr. Adkins, an African American, brought suit in federal court against the hospital where he had been practicing, as well as against its administrator and its staff physicians (all located in Georgia) for allegedly discriminating against him by summarily suspending his privileges. Dr. Adkins also alleges his privileges were not renewed because of his race, and that he was not accorded due process.

During discovery, Dr. Adkins sought documents from the hospital's peer review committee relating to peer review of all physicians at the hospital during the 7 years that he was a member of the medical staff. The defendants objected, arguing that the information that Dr. Adkins sought was privileged under Georgia's peer review statute which states: "[T]he proceedings and records of medical review committees shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee."

Although the federal trial judge found the privilege applicable to federal civil rights actions, he disagreed with what the defendants argued, and ordered them to produce descriptions of events giving rise to peer review without producing the documents themselves. When the defendants asked that the case be dismissed, the court inspected the documents at issue, but went ahead and dismissed the case. Dr. Adkins appealed to the 11th Circuit Court of Appeals in Atlanta, asserting the trial court improperly recognized the peer review privilege.

The appeals court decided that the privilege protecting peer review documents would not be recognized in Dr. Adkins' civil rights lawsuit, and reversed the decision of the federal court below. After a legal analysis, the court ruled on Oct. 22 that in federal law, privileges such as the one protecting peer review information from disclosure are not favored absent extraordinary circumstances, since privileges can well cloud the truth-seeking process. In a discrimination case such as this one, protecting peer review information does not trump the right to seek the truth for an asserted violation of a person's—in this case, a physician's—civil rights. At the same time, the U.S. Supreme Court *has* recognized the psychotherapist-patient privilege in one of its own decisions.

The conundrum raised by the 11th Circuit's opinion is not in adding to the "mushiness" of federal decisions addressing when and under what circumstances a peer review privilege should be recognized, but in its failure to recognize how the peer review statute will be applied and interpreted by a state judge considering the very same privilege in light of the same or a quite similar case—for example, civil rights or antitrust cases—that was filed under *state* law.

Regulating health care is state based. Congress has never enacted a federal peer review statute and has never announced its intention to do so. Moreover, peer review statutes were created to further health care within a particular state by enabling physicians in that state to freely and candidly discuss and review medical care within their institutions and hospitals—thus policing themselves. Consequently, since health care is state based and since regulation of that care is state based, then the interpretation and application of the privilege against disclosure of peer review materials by a federal court should be gleaned from how a state court would use the privilege in the same or similar circumstances.

If the particular state peer review statute does not allow for any disclosure, then a federal court should do the same analysis; if a state court "balances" various factors, for example, to first look at the peer review information before allowing it to be disclosed or limiting the time period when the documents were created, then, likewise, a federal court should arrive at the same result. In the end, health care does not change simply because an aggrieved party, like Dr. Adkins, sues in a federal court, and not in a state court.

After the appeals court ruled against them, the defendants in the *Adkins* case asked the U.S. Supreme Court to take on the case; on Jan. 7, the court said it would not do so. Had it accepted the *Adkins* case, the Supreme Court would have had a real opportunity to instruct its lower federal courts that when confronting the protections afforded by a state peer review statute, they should look to how the state statute is interpreted by the state courts in which the federal court sits. With this approach, there would be uniformity in application by *all* courts throughout both the federal and state systems of jurisprudence.

As it now stands, physicians should continue to note that if they serve on peer review committees, they should be guided by the protections provided in their respective state peer review law. A member of such a committee must realize, however, that the information generated by a peer review committee may well not be privileged from disclosure if the request for information arises from a lawsuit in a federal court. ■