Beware the Liability Pitfalls of Electronic Records

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WASHINGTON — From a liability perspective, health information technology remains a double-edged sword whose parameters still need to be spelled out, experts maintained at a meeting sponsored by eHealth Initiative and Bridges to Excellence.

"It's going to provide protection in some places and increase liability in others," said attorney Marcy Wilder, a partner with Hogan & Hartson.

When it comes to electronic clinical decision support (CDS) tools, Jud DeLoss, vice chair of the HIT Practice Group at the American Health Lawyers Association, recommended that physicians document their reasoning when they disregard the tool's suggestion.

Although it would be "difficult to pull off," attorneys could create a class of victims for whom they argue that clinical decision support was not followed, leading to detrimental results, he said. Conversely, attorneys could charge that a physician overly relied on the tool "and did not actually engage in the care they said they did.

Ms. Wilder pointed out another gray area created by HIT: delineating who contributed what sections to a patient's electronic health record. "Look at the paper system," she said. "We have handwriting and signatures, which are simple tools to identify who's responsible for which clinical applications, which provider made the diagnosis, who authorized the change in medication. It is both easier and more difficult to do that with electronic health records."

The simplicity and efficacy of identity authentication "is going to depend upon the extent to which the vendors that are building the systems get this right," she added.

Although systems are in place to address identity authentication in health care facilities, problems may arise when data from shared information warehouses such as a regional health information organization are incorporated into an electronic medical record, Ms. Wilder said. "That's where it's going to be very messy, and I think it will be a long time before we are going to be using shared data warehouses in part because of those kinds of liability issues."

Physicians also are concerned about the validity of the portion of an electronic medical record that they did not make. Mr. DeLoss said the concern is that physicians might inadvertently end up becoming part of a malpractice suit by signing off on their portion of a medical record that also includes an entry by a physician who has a pending malpractice case.

Mr. DeLoss and Ms. Wilder added that as use of electronic medical records becomes more prevalent, physicians may have a duty to be familiar with a patient's entire medical record if it is available. They also recommended that physicians spell out with hospitals via contracts which party is liable for problems that arise from software donated to them by hospitals. ■

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