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MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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A Word from the Practice Chair

In this quarter's newsletter, we address two important "Information Age" issues which make the already challenging work of delivering health care services a bit more daunting. Our Rockford partner, Mike Denning, evaluates the very real likelihood that exchanges between health care providers and patients may be recorded on those miraculous handheld devices now a part of everyday life. Tyler Pratt, one of the practice leaders in our firm's Champaign office, walks us through some of the new litigation challenges associated with the creation, use and discovery of data stored in Electronic Medical Record platforms.

While technological marvels have positively changed the way we all live and work, they have also created some unique and complicated problems which can have a tremendous impact on the practice of medicine. We hope this quarter's newsletter provides some insight into ways to manage and address those problems.

Heyl Royster remains committed to serving the needs of our clients in Illinois and the surrounding states. Our new St. Louis office is an example of that commitment. Heyl Royster lawyers are available to handle legal work in Illinois, Missouri, Iowa, Wisconsin, and Indiana.

We routinely hear from our friends who deliver healthcare services that today's legal challenges are more formidable than ever. Our aim is to work with our healthcare clients to help manage those challenges in an efficient and effective way. To that end, our Professional Liability Practice is available to meet with your team to discuss and develop effective measures for dealing with your ongoing legal challenges.

We hope you are having an enjoyable and prosperous summer.

Richard K. Hunsaker
Chair, Professional Liability Practice
rhunsaker@heylroyster.com

Don't Quote Me, but...

By: Michael Denning, mdenning@heylroyster.com
(with assistance from Adam Rosner, Summer Associate)

The smart phone has turned ordinary citizens into broadcasters, filmmakers and spies. Wait – spies? Absolutely.

Almost every modern smart phone includes an "app" or tool to record sound. Most people, whether they know it or not, can record conversations with others simply by activating an application and hiding their smart phone in their pocket or in another nearby location. A distrustful or unhappy patient could record a conversation with a doctor. A doctor could record an interaction with a problematic patient. It could happen. But is it legal? And is the recording admissible in a civil trial, including a trial concerning allegations of medical malpractice?

Illinois, like almost every other state, has laws dealing with "eavesdropping" and the electronic recording of conversations. In comparison to other states, Illinois' eavesdropping law is among the strictest. It requires both parties to consent to the recording or transcription of a private conversation. In fact, before the eavesdropping statute was amended in 2014, not only did the statute require the consent of both parties for a recording, but it was irrelevant as to whether the parties intended for the conversation to be private. This meant that both the context and location of the communications did not factor into determining whether the parties could record, as both parties had to consent no matter the circumstances. The statute was struck down as unconstitutional in *People v. Clark*, 2014 IL 115776.

Prior Eavesdropping Statute Unconstitutional

In *Clark*, the defendant used an eavesdropping device to record a conversation between himself, opposing counsel, and the judge while in court, without the consent of the other individuals. *Clark*, 2014 IL 115776, ¶ 1. The defendant was charged with two counts of eavesdropping. According to the defendant, there was no court reporter and no recording devices present in the court room, so he recorded for the purpose of keeping an accurate record. Defendant filed a motion to dismiss the indictment, arguing that the statute violated his substantive due process rights and his First Amendment right to gather information by recording public officials performing their public duties. *Id.* ¶ 3.

The court found the eavesdropping statute to be overbroad and extended beyond its legislative purpose in protecting private conversations. *Id.* ¶ 21. Essentially, the statute criminalized the recording of all conversations except in limited situations and it deemed all conversations to be private and not subject to recording even if the parties involved in the communication had no expectation of privacy. The court noted that individuals have an interest in the privacy of their communications, but "the statute's blanket ban on audio recordings sweeps so broadly that it criminalizes a great deal of wholly innocent conduct, judged in relation to the statute's purpose and its legitimate scope." *Id.* ¶ 22.

The Eavesdropping Statute Today

Following *Clark*, the Illinois legislature amended and passed a new eavesdropping statute allowing for people to record communications while in public places without the consent of both parties, but still protecting private communications:

> A person commits eavesdropping when he or she knowingly and intentionally:
>
> 1. Uses an eavesdropping device, in a surreptitious manner, for the purpose of overhearing, transmitting, or recording all or any part of any private conversation to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation;

2. Uses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation;
3. Intercepts, record, or transcribes, in a surreptitious manner, any private electronic communication to which he or she is not a party unless he or she does so with the consent of all parties to the private electronic communication.

720 ILCS 5/14-2.

The statute defines "private conversation" as "any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation." 720 ILCS 5/14-1(d). The key language to interpret is "reasonable expectation." What is a "reasonable expectation" of a private communication?

Can a patient record a visit without the consent of the physician?

To answer this question, one must look to factors such as the location and context of the communication. The statute's objective is to allow people to record communications while in public when there is no "reasonable expectation" of privacy. Even though the statute does not directly define "reasonable expectation," it does state that it "shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution." 720 ILCS 5/14-1(d). During the Senate debate hearings for this bill, Senator Raoul stated that a "protected conversation would be attorney-client communications." S.B. 1342, 98th Gen. Assemb., 141st Reg. Sess. at 72. Therefore, following this reasoning, if the communications between a physician and patient are protected by physician-patient privilege, there should be a "reasonable expectation" of privacy and a person would need consent from both parties to record it.

Fundamentally, if you are at home or in your office having a private conversation, all parties to it must consent for anyone to record it. A conversation in public, however, can legally be recorded absent the other party's consent. There is some uncertainty as to what constitutes a private conversation versus a public one. Nonetheless, physician communications in the medical setting with patients are more likely to be protected from recording due to their uniquely and historically private nature.

Thus, without permission, a patient likely cannot legally record communications during a visit in the physician's office, as there is almost certainly a "reasonable expectation" of privacy during that conversation. For the same reasons, a physician certainly cannot legally record an interaction with a patient without their knowledge and consent.

Furthermore, the statute explicitly states that any recording obtained in violation of the act is **inadmissible** in a civil trial. See 720 ILCS 5/14-5. Interestingly, this portion of the statute does allow for the admission of such evidence if all parties to the conversation consent to its admission. One could imagine a narrow scenario where both the plaintiff/patient and the defendant/doctor might agree to the admission of such a recording, and then argue different interpretations of it.

Conclusion

Recorded communications are becoming increasingly more common in today's society. The good news in Illinois is that private conversations are still protected from unauthorized recording. As a physician, there are some obvious ways to keep all communications with patients

confidential. Of course, all interactions with patients in a doctor/patient capacity should be had in private. If that is done, the "reasonable expectation" of privacy for both parties will be difficult to dispute. Furthermore, a physician should give serious consideration to any request by a patient to record any portion of a medical encounter. Depending on the patient and circumstances and due to the potential for the wide dissemination of any such recording, seeking the advice of counsel in the face of such a request would be wise.

Michael Denning concentrates his practice in the defense of medical malpractice and nursing home claims. Mike regularly defends physicians, clinics, hospitals, advanced practice nurses, and long term care facilities in professional liability and institutional negligence claims involving significant injuries or death. Mike also handles a myriad of administrative issues for long term care facilities, including involuntary discharge proceedings, licensure issues, fraud and abuse claims, and other litigation.

EMR Metadata – Friend or Foe?

By: Tyler Pratt, tpratt@heylroyster.com

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 Illinois Supreme Court Rules and 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 and Illinois Rule 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.

With respect to hearsay, in an early decision, the Illinois Supreme Court held that computer-generated information (akin to metadata) does not qualify as hearsay. In doing so, the Court recognized the difference between computer-generated information and information stored on a computer. The Court held computer stored information may be hearsay, but computer generated information is not. Federal courts have applied a similar rationale.

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?
- Is there a reason why the ESI or metadata may not be discoverable pursuant to the Committee Comments to Illinois Supreme Court Rule 201(c)? That is, is the information sought: A) "deleted," "slack," "fragmented," or "unallocated" data on hard drives; (B) random access memory (RAM) or other ephemeral data; (C) on-line access data; (D) data in metadata fields that are frequently updated automatically; (E) backup data that is substantially duplicative of data that is more accessible elsewhere; (F) legacy data; (G) information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; or (H) require extraordinary affirmative measures to obtain/produce?

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 forego 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.

Tyler Pratt concentrates his practice in the area of civil litigation, with an emphasis on medical malpractice, professional liability, and professional regulation/licensure. He regularly defends physicians, nurses, hospitals, and clinics in professional liability claims involving significant injury or death. Tyler also represents clients in trucking, business and commercial, and estate litigation as well as estate planning matters, including powers of attorney, probate administration, wills, and trusts.

For More Information

If you have questions about this newsletter, please contact:

Richard K. Hunsaker
Heyl, Royster, Voelker & Allen, P.C.
701 Market Street
Peabody Plaza
P.O. Box 775430
St. Louis, Missouri 63177

Phone (314) 241-2018
E-mail: rhunsaker@heylroyster.com

Please feel free to contact any of the following attorneys who concentrate their practice in the defense of physicians, dentists, nurses, and medical institutions:

Peoria, Illinois 61601
300 Hamilton Boulevard
P.O. Box 6199
Phone (309) 676-0400; Fax (309) 676-3374

David R. Sinn - dsinn@heylroyster.com
Nicholas J. Bertschy - nbertschy@heylroyster.com
Roger R. Clayton - rclayton@heylroyster.com
Mark D. Hansen - mhansen@heylroyster.com
Rex K. Linder - rlinder@heylroyster.com
J. Matthew Thompson - mthompson@heylroyster.com

Champaign, Illinois 61824
301 North Neil Street
Suite 505
P.O. Box 1190
Phone (217) 344-0060; Fax (217) 344-9295

Renee L. Monfort - rmonfort@heylroyster.com
Daniel P. Wurl - dwurl@heylroyster.com
Jay E. Znaniecki - jznaniecki@heylroyster.com

Chicago, Illinois 60602
33 N. Dearborn Street
Seventh Floor
Phone (312) 853-8700

Andrew J. Roth - aroth@heylroyster.com

Edwardsville, Illinois 62025
105 West Vandalia Street
Mark Twain Plaza III, Suite 100
P.O. Box 467
Phone (618) 656-4646; Fax (618) 656-7940

Richard K. Hunsaker - rhunsaker@heylroyster.com
Ann C. Barron - abarron@heylroyster.com

Rockford, Illinois 61105
120 West State Street
Second Floor
P.O. Box 1288
Phone (815) 963-4454; Fax (815) 963-0399

Douglas J. Pomatto - dpomatto@heylroyster.com
Jana L. Brady - jbrady@heylroyster.com
Michael J. Denning - mdenning@heylroyster.com
Scott G. Salemi - ssalemi@heylroyster.com

Springfield, Illinois 62791
3731 Wabash Avenue
P.O. Box 9678
Phone (217) 522-8822; Fax (217) 523-3902

Adrian E. Harless - aharless@heylroyster.com
John D. Hoelzer - jhoelzer@heylroyster.com
Theresa M. Powell - tpowell@heylroyster.com
J. Tyler Robinson - trobinson@heylroyster.com

St. Louis, Missouri 63177
701 Market Street
Peabody Plaza
P.O. Box 775430
Phone (314) 241-2018; Fax (314) 297-0635

Richard K. Hunsaker - rhunsaker@heylroyster.com

Heyl Royster is a regional Midwest law firm with more than 120 lawyers and seven offices located in Illinois (Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield) and Missouri (St. Louis). The firm provides legal services for businesses and corporations, professionals, healthcare organizations, governmental entities, universities, insurance carriers, and other major institutions. Heyl Royster lawyers have successfully defended clients in all of the federal courts and in each of the 102 counties in the State of Illinois, as well as in courtrooms in Indiana, Iowa, Missouri and Wisconsin. Our attorneys also counsel clients on all aspects of business life. Through our lawyers' participation in bar and industry activities, we identify and help develop trends in the law which we believe will be of benefit to our clients.

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