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Required production of audit trails is judicial overreach

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

That sound you hear is the glee with which plaintiffs' attorneys in Cook County have received the current Law Division case management order that requires production of "audit trails, if any" in every case.

Without explanation, consultation, or consideration of the potentially massive burden that this requirement will impose on health care providers in the middle of a pandemic, the current case management order improperly requires the production of what plaintiffs' counsel seem to believe is the key to showing that every defendant in a case alleging negligence by a health care provider is hiding something.

Instead of being part of the medical record, this new undefined, unlimited requirement to produce an "audit trail" would be akin to having required a forensic examination by the health care provider of the paper record in response to every request for production in the time before electronic medical records. That would have been an absurd requirement, not only because of the extreme expense, but because no one would know whether there was an issue, what the issue was, or what needed to be examined.

The blanket requirement that an audit trail be produced in every case improperly usurps the requirement of Supreme Court Rule 201(a) that "discovery requests that are disproportionate in terms of burden or expense should be avoided" and that proportionality is required to be considered by the court before making a ruling on the scope of discovery pursuant to Supreme Court Rule 201(c)(3).

Antithetical to the current one-size-fits-all order, the Committee Comments state that the proportionality issue "requires a case-by-case analysis." The Committee Comments acknowledge that a proportionality analysis of online access data of the kind at issue here, including data in metadata fields and information that cannot be obtained without transforming it into another form often may indicate that it "should not be discoverable." The majority of the time, this information is completely irrelevant and an unnecessary and unreasonable burden. When and if it is relevant, the requesting party should make a showing prior to the order to produce this information.

Even assuming that an audit trail is discoverable, there is a basic misunderstanding about the status of an audit trail under federal law. Nowhere does the term "audit trail" appear in the HIPAA or HITECH Act and their production is not required by those statutes. HIPAA requires that covered entities have security safeguards in place to monitor for unauthorized access. Indeed, an access report is not a part of a patient's electronic medical record.

Under HIPAA, the "designated record set" is defined in part as "a group of records maintained by or for a covered entity that is …used, in whole or in part, by or for the covered entity to make decisions about individuals." 45 CFR Sec. 164.501. An access report is not used to make health care decisions. An access report is not part of the designated record set to be produced to a patient under the access provisions of the HIPAA Privacy Rule. In responding to a request for records, a covered entity is not required to create new information that does not already exist in the designated record set.

To put a point on what is not required by federal law, a proposed amendment to the rules implementing the HITECH Act that would have required the production of an "access report" was never enacted. On May 31, 2011, a proposed rule was published in the Federal Register seeking to add a requirement for the production of an "access report" to patients setting forth: (a) The date of access; (b) the time of access; (c) the name of the natural person, if available, otherwise the name of the entity accessing the electronic designated record set information; (d) a description of what information was accessed, if available; and (e) a description of the action by the user, if available (e.g., "create," "modify," "access," or "delete"). 76 FR 31437-3143 (May 31, 2011 Proposed Rules).

The Circuit Court of Cook County cannot amend federal law or rules that control the status and requirements of covered entities with regard to medical records.

Even if the rule had been enacted, broad requests for any and all audit trails were discouraged: "We believe that it is in both the covered entity's and individual's best interests to use written requests to narrow access reports, so that the individual only receives the information of interest, and the covered entity does not have the administrative burden of responding to an overly broad request." 76 FR 31440 Relating to the proportionality requirements of Supreme Court Rule 201(c)(3) and the current circumstances for medical providers, it was acknowledged by those that proposed the rule, that broad requests would be an administrative burden to the health care system, which was in part why that portion of HITECH Act amendments was not enacted.

The word "judge" is also a verb. In managing discovery, justice requires that judges judge and do justice between the parties in the case that is before them. The rules require an analysis of the propriety of specific discovery requests in the context of the particular case before the court and the blanket rule on "audit trails" set forth in the current case management order is improper.