Chicago Daily Law Bulletin®

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September 9, 2020

The law and rules should govern case management

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.

It was recently claimed that the arguments advanced in this space on the impropriety of requiring the production of audit trails in every medical malpractice case were "typical arguments I'd expect from a partner at a defense firm." If by that it was meant that those arguments were grounded in Illinois law, the Illinois Supreme Court Rules, and federal law and rulemaking, it would be hoped that they would be typical of what to expect.

In opposition to the arguments advanced, there was no rebuttal of the extraordinary requirement of the recent order that turns Rule 201(a)'s requirement to avoid "disproportionate" discovery on its head and abandons the "case by case" analysis for the discovery of electronically stored data required under Rule 201(c)(3). It is simple to claim that the production of audit trials is not a burden when one is not required to reference a particular case, at a particular time, or to a particular electronic medical record system. That is the point of the case-by-case analysis; in some cases it may be relevant and easy to obtain an audit trail and in others it may be difficult and irrelevant. The blanket order ignores that distinction in the Supreme Court Rules and as one court put it "the discovery rules envision that the responding party will search for, identify, and produce the information specifically requested by the other party. They do not permit the requesting party to rummage through the responding party's files for helpful information." *Carlson v. Jerousek*, 2016 IL App (2d) 151248, Para. 29.

It is also telling that definition of audit trail had to be provided, as the term "audit trail" nowhere appears in the applicable acts or rules and is likewise absent from the case management order. There is a reason: each system is different and the requirement for this production may be different in each case.

Under no other order or rule is a single other class of document required to be produced in every case; not policies of insurance, not medical records, not accident reports. With regard to every other class of document a request must be made that is then subject to objection and, with regard to electronic data, the burden is on the proponent of the discovery to show that production is proportional to the expected benefit. The current Category 2 case management order in the Law Division imposes the burden on the defendant in the absence of any request and imposes the burden on the party ordered to produce the documents to show why they should not be produced. What amounts to a sua sponte protective in favor of every plaintiff and against every defendant, and in the absence of a discovery request, is a fundamental usurpation of the discovery process, especially given the protection of electronically stored information under the rules.

In the vast majority of cases, the audit trail will be irrelevant and its production will impose a burden that is unnecessary and waste of everyone's time and required in the absence of the required proportional balancing. Not only is there the burden of the production, but, as will often be the case, counsel for plaintiff will be unable to interpret the data, which will likely lead to depositions of defendants' personnel, all of which will likely lead to no one knowing more than they did before this process started. This requirement is being imposed at a time when medical providers are dealing with the pandemic and producing the documents in the first instance is a burden that will only be compounded if requests for depositions of IT personnel are made.

In addition, the court system is backlogged and other measures are being taken to advance cases more quickly to move them toward resolution or trial. As with having dispositive motions filed before expert discovery (which was previously addressed in this space on Aug. 26) and simultaneous disclosures of experts (which will be addressed in the future), the imposition of requiring audit trails to be produced in every case is likely to slow, not speed, the preparation of cases for trial as the parties are required to spend time on discovery that is not likely to lead to anything relevant, much less admissible.

The requirement to produce audit trails appears to be based upon the unfounded claim that the audit trail is part of the medical record. It is not. 45 CFR Sec. 164.501. As referenced previously, and contrary to the citations to 45 CFR Sec. 164.312(c) and 45 CFR Sec. 164.316 covered entities are only required to provide security safeguards, nothing more. Indeed, access to the designated record set expressly does not include information compiled in anticipation of civil litigation. 45 CFR 164.524(a)(1)(ii). Federal law, not state law, rule, or court order, defines what constitutes the medical record and access to it and the Supremacy Clause of the Constitution does the rest of the work.

Procedure matters. Only following the established procedure provides a fair process that can lead to just outcomes. Unilateral modifications to civil procedure will not advance cases or tend toward "justice between and among the parties" as is required at case management conferences by Supreme Court Rule 218(c).
