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Brave new health care tech world brings medical liability issues

Don Fluckinger, Features Writer

CAMBRIDGE, Mass. -- In a legal sense, health IT can be both a blessing and a curse, as it closes medical liability issues associated with paper records but opens new ones associated with computers, according to a legal expert who broke down specifics at the World Congress 3rd Annual Leadership Summit on mHealth. http://www.worldcongress.com/events/HL11028/index.cfm?confCode=HL11028

Learn more about health IT's role in medical liability

Liability and EHRs: How electronic information changes legal landscape
http://searchhealthit.techtarget.com/healthitexchange/healthitpulse/liability-and-ehrs-how-electronic-information-changes-legal-landscape/

For e-prescribing to reduce medical errors, alerts cannot be ignored
http://searchhealthit.techtarget.com/news/2240018752/For-e-prescribing-to-reduce-medical-errors-alerts-cannot-be-ignored

Little or no legal precedent has been established for mHealth technology, said attorney and Harvard School of Public Health law professor Michelle Mello. She added, however, that principles of general health IT cases can apply to mHealth -- even though there haven't been many of those yet, either.

Mello spent much of her presentation dwelling on the negative side of health IT risk, outlining pitfalls that CIOs and hospital leadership must consider to avoid potentially losing a malpractice suit. However, she did make it a point to conclude by saying that, despite medical liability risks, she's bullish on health IT and its potential to improve public health.
http://searchhealthit.techtarget.com/tip/Moving-paper-EHR-processes-to-electronic-medical-forms

Risks in early EHR implementation phases

Early stages of electronic health record (EHR) implementations are the most fraught with risks, which come in two sets, Mello said -- the first as hospitals transition from paper to electronic workflows, the second as they work the bugs out of the EHR system.

One big risk is for providers to make errors as they are learning how to use an EHR system -- especially in the current climate, in which some doctors are being pushed into EHR adoption even though they might not be enthusiastic about switching over from paper. Here physicians may make errors of commission -- for example, entering data into the wrong patient record -- but also those of omission, when they fail to document care in the detail they might have used in a paper workflow.
http://searchhealthit.techtarget.com/news/2240035407/As-one-doctor-quits-over-EHR-use-experts-lament-opportunities-missed

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Another risk during the implementation phase is a system crash that renders the EHR system unavailable. Compounding that risk is research showing that, while EHR systems in general reduce errors over

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- Powered by SearchHealthIT.com paper workflows, hybrid paper-and-electronic workflows -- which might be used as a backup system or as a transition phase as a hospital switches from paper to electronic records -- actually breed more errors.
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Mello said IT leaders need to ensure "thoughtful" EHR implementation with these principles in mind. One federal malpractice case in South Carolina, for example, revolved around a patient care error committed by a provider during a training period. While the court exonerated the hospital for a negligent radiology implementation, as the plaintiff had contended, Mello said, it "provided very little guidance as to what a responsible implementation plan would look like." It did, however, credit the hospital for building in workflow redundancies and anticipating errors by doing things such as printing lab results to two locations during the training period.
http://searchhealthit.techtarget.com/tutorial/EHR-implementation-tutorial-From-vendor-selection-to-maintenance

Five tips for lowering health IT medical liability risks

- Tailor new HIT systems to current workflows, not the other way around.
- Review vendor contracts. Don't sign agreements that indemnify the vendor from liability risks -- they will try to get away with it.
- Create an atmosphere that allows physician practices to spend more time with patients during EHR implementations, as they are learning new systems.
- Manage patient expectations regarding physicians' availability to answer electronic communications.
- Train the users well during clinical application implementations.

Medical liability changes as IT systems mature

One way health IT amplifies risk is through raw math. Increased patient contact with providers -- especially when physicians are more available through mHealth technology and other means -- offers increased opportunities for malpractice.

"Simply by doing more for patients," Mello said, "we're creating more medical legal risk."

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When physicians rely on technology too much, they can cut corners and provide care that juries find negligent. Mello provided three examples:

- Cutting and pasting a previous physician's report on a patient instead of writing his own.
- Drawing inferences from a patient's electronic record to make a care decision rather than directly consulting the patient.
- Making a care decision after using electronic communications, up to and including telemedicine consultations, when a patient's case required an in-person visit.

Although using email can improve care and promote new patient interactions, it's also another emerging topic of medical liability. Studies prove that the more unsatisfied patients are with their care, the more likely they are to sue, Mello said -- and email can be a Petri dish for breeding patient dissatisfaction.

In lawsuits, questions can arise over whether a physician answered email quickly enough. Even when physicians do respond in a timely fashion, there's the possibility that, "in the effort to return messages quickly, the provider does it in a way that's unsatisfactory to the patient, by either consistently delegating this responsibility to a low-level employee rather than taking the time to respond personally or sending curt, parsimonious replies, which is always a risk on the iPhone," Mello said.

Simply by doing more for patients, we're creating more medical legal risk.

Michelle Mello, law professor, Harvard School of Public Health

"There's a risk these kind of messages will be received by patients as curt, not sufficiently thorough, not sufficiently sympathetic [or] they'll fail to strike the right tone [and] therefore will provoke the ire of a patient who would have responded much better to a phone call or in-person consultation," she added.

Future could be so risky, health IT leaders gotta wear shades

As IT systems become the norm across the country, Mello said it's incumbent upon hospitals to monitor what courts consider the standard of care, which is the legal yardstick used in malpractice cases.

IT managers and clinical leaders may need to draw up (and enforce) policies to mitigate risk and bolster best practices in three areas:

- How and when alarms will be turned on or off to avoid information overload.
- When clinical decision support tools can be ignored or overridden.
- If paper workflows will continue -- as in, if everyone else is using EHR systems, a physician could demonstrate negligence just by using paper itself.

Health IT systems also offer the opportunity to create more documentation than paper workflows. Plus, regulations and insurers are requiring more documentation in general. More raw math: That presents more opportunities for negligent physicians to demonstrate malpractice.

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Metadata, too, can be used by plaintiffs to prove -- or at least create the impression of -- negligence, especially when time stamps for care documentation don't match the physician's story. In one malpractice case Mello described, an anesthesiologist used quiet moments during a long surgery to pre-enter his post-operative notes into a medical information system. That metadata was used against him.

"It didn't look good when the patient subsequently developed complications from anesthesia and accessed metadata showed the anesthesiologist had made clinical notes about things that did not yet occur," Mello said.

Let us know what you think about the story; email Don Fluckinger, Features Writer.