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Transparent Electronic Health Records and Lagging Laws

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Millions of patients are accessing their medical records online via secure electronic patient portals. They are also increasingly uploading data directly into their records, and many clinicians now offer patients ready and ongoing access to the notes that document encounters. In response, patients report improved understanding of their care, better recall, enhanced adherence to care plans, and an increased sense of control over their health (1).

Although these changes hold promise for improving the value and safety of health care, some opportunities are hindered by legal constraints dating back to when patients rarely saw their physical charts. To reflect new technical and cultural realities, this legal framework will require ongoing consideration and revision, ideally reflecting strong clinician and patient input and leadership. To highlight potential legal issues and suggest strategies for active clinician involvement, we describe areas that often engender discussion and debate.

Disagreement Over Content

As patients increasingly read their medical records, they will disagree with content, find errors, and request changes. Online access makes poor-quality documentation more apparent, particularly when notes are copied forward, templates predominate, and the patient's story is obscured or disappears. The Health Insurance Portability and Accountability Act (HIPAA) guarantees patients the right to access and control distribution of their protected health information (2). Although it permits patients to request

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amendments, HIPAA reserves most decision-making authority for providers, and the general legal principle is that the provider owns the record. However, “ownership” will become less clear as records increasingly include information uploaded or contributed by patients, from device data to corrections or new text. The legal status of patient-derived content will need clarification, and clinicians, patients, and lawyers will need to join in crafting smoother processes to resolve disputes and revise documentation.

A Litigious Society

Conceivably, clinicians sued for malpractice may claim that plaintiffs who can review and at times contribute to their online records bear increased responsibility for their outcomes, including bad ones. However, merely accessing records does not prove that the patient has reviewed them, and juries are unlikely to expect patients to understand a note, test finding, or radiographic report. Conversely, malpractice plaintiffs are often motivated by fear of a cover-up, feeling misinformed, or a desire to determine whether an error occurred. Transparent access may build trust, allay fears, and help identify important errors before adverse consequences ensue, reducing clinicians’ malpractice liability overall (3–5).

Access to Minors’ Medical Records

With few exceptions, HIPAA grants parents control of minors’ medical records as their representatives and allows them to prevent their children from accessing online notes. However, providers can exclude parents if they have a reasonable belief that a child is being abused or think that parental access is not in the child’s best interest. Parents can also lose control if the minor has a right to seek independent treatment (for example, a condition-based exception, such as pregnancy, or care sought by an emancipated minor). Furthermore, 14 states have “mature minor exceptions,” allowing minors in some circumstances to consent to medical care without parental involvement, and 3 others allow minors to consent regardless of age or maturity (6). In these situations, consenting minors can control their health information without parental permission (7). Adding to this complexity, a 2002 federal rule allows state laws that afford greater parental control to overrule federal laws when conflicts exist.

Because of the burden of case-by-case consideration and potential liability arising from disagreements, many providers simply deny electronic access to minors and their parents. This is unfortunate, particularly for adolescents for whom online access could be a natural way to learn about their health and how to interact with the health care system. Providers can promote these benefits by encouraging vendors of electronic health records (EHRs) to develop capabilities for differential access, such as allowing adolescents but not parents to view information about sexual health (8). Clinicians and patients could also work to convince legislators or the U.S. Department of Health and Human Services to undo the regulation allowing state law to preempt federal law.

Mental Illness and Clinicians' Notes

HIPAA prevents persons from viewing their psychotherapy notes if they reside in a segregated part of paper or EHRs. It otherwise allows access to mental health notes, with some state laws overriding HIPAA and offering broader access that includes psychotherapy notes. Mental health professionals are now exploring the effects of open and, at times, cogenerated online notes as part of the therapeutic process (9). Overall, clinicians and patients need to advocate for a more uniform landscape, such as a general principle of open access unless the clinician believes it would harm an individual patient.

Suspected Abuse and the EHR

All states require clinicians to report known or suspected child abuse, most require reporting elder abuse, and some require reporting spousal abuse. Fearing inadvertent viewing by the abuser, abuse victims may feel endangered by online access to records and could decide not to confide in their clinician. Although clinicians can choose to hide or not document suspected abuse online, most current EHRs make this inconvenient. To protect patients, clinicians and patients could advocate for laws prohibiting documentation of abuse from appearing in online portals.

Sharing Notes and Privacy

Many patients, family members, and other caregivers report benefits from sharing clinicians' notes. Much sharing is informal, with patients reviewing their records with family members or providing passwords to persons they trust. Unfortunately, patients face substantial privacy risks from sharing passwords, and clinicians and patients should advocate for separate, patientauthorized "proxy access" for caregivers.

Patients could post clinicians' notes on social media and potentially threaten their reputation, particularly if notes are altered or the commentary is libelous. Currently, it is difficult for clinicians to have such material removed, and the Communications Decency Act prevents them from holding a Web host accountable (10). Clinicians would benefit greatly from legal mechanisms that protect them from online defamation.

Clinician Leadership and Next Steps

Patients' electronic access to clinicians' notes will fundamentally change the medical record as providers modify how they write notes and patients amend, annotate, and add information. Overall, we anticipate that these changes will benefit patients and providers and deepen the clinician–patient relationship. However, current legal regulations will become increasingly problematic as medical records evolve into new formats and roles. Clinicians should join consumers, policymakers, regulators, informatics experts, ethicists, legislators, and lawyers to help establish a legal landscape that supports this evolution (Table).

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Table 1**Problem Areas and Approaches to Resolution****General**

Give patients access to their full records by default

Conduct studies addressing the effects of fully transparent medical records (e.g., track changes in malpractice claims, capture patient-identified medical errors, study behaviors in adolescents with access to records, examine the effect on patients with mental illness)

Disagreement over medical record content

Clarify the legal status of patient-derived content

Establish mechanisms that permit transparent and parallel documentation of patient and clinician disagreement and commentary

Develop simpler universal processes than current HIPAA requirements to resolve disputes and revise documentation

Minors' access to medical records

Promote separate electronic health records for teens that address conditions justifying parental exclusion

Encourage electronic record vendors to separate and at times shield parts of the record involving reproductive health, thereby facilitating appropriate shared access for teens and their parents

Work toward making electronic health records available to teens as the default, and adopt uniform federal policies that replace state-by-state variation

Mental illness and clinicians' notes

Explore legal mechanisms that offer open access to all clinicians' notes, including those written by mental health professionals, unless the clinician believes access would harm an individual patient

Suspected abuse of patients

Encourage consistency among states in documentation of practices that address abuse or suspected abuse

Consider federal legislation prohibiting the placement of documentation of abuse or suspected abuse on online patient portals

Shared notes and privacy

Develop universal "proxy access" mechanisms for family members and caregivers

Develop legal mechanisms to protect clinicians from online defamation