



# RISKY BUSINESS

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## President's Corner Patti Vail

As I reflect on my year as WSHRM President, I am proud that our organization has a long history of providing educational opportunities and networking for risk management professionals. We have so many wonderful volunteers willing to give their time to make WSHRM a strong, successful group. We have a camaraderie that would be the envy of other professional organizations. The willingness to be open with sharing information and the relationships that we have built over the years is impressive.

Now we are winding down the 20th anniversary year of WSHRM. We have had another successful Fall Conference with approximately 90 attendees. We are approaching the new year with excitement in planning future programs to maintain a cost-effective way to provide continuing education opportunities for our members and non-members. Watch for upcoming details and conference summary.

The WSHRM Web site has been updated. Please visit [wshrm.org](http://wshrm.org) to see the new look. We will be placing our conference brochures, membership brochures, newsletters and conference dates there so you can make plans to

attend our educational opportunities. We removed the "members only" section because it was not utilized very often and we did not feel it was necessary to require a password to view the brochures or newsletters. We hope that you visit the site, share it with colleagues and encourage membership.

We are thankful to the WSHRM members who have volunteered to join the Board this coming year. They are Kyle Fromm, Jim Gibson and Matt Wahoske. We have had several members express interest in joining the Board and we appreciate their willingness to share their time with the organization. We currently have people interested in the upcoming Board positions for 2011 and 2012. If you are interested in serving on the

Board, please e-mail me at [patti.vail@wfhc.org](mailto:patti.vail@wfhc.org). We would like to have several years of volunteers "in the wings" to prepare future members for officer positions by pairing them with current officers on committees.

We are so fortunate to have a wonderful group of sponsors who believe in WSHRM's message and wish to lend their continued support to our organization. It is through their generosity that we are able to continue to provide two educational programs per year. As you know, there are always plenty of risk management topics to cover and we are thankful for their generous support. Our Fall Conference sponsors were Corneille Law Group; CNA Healthpro; FinCor Solutions;

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## Strategies to Prepare for Electronic Discovery in Healthcare

*The first article in this edition of Risky Business, on E-Discovery, was reprinted with permission from ASHRM; however, permission was limited to a one time distribution which did not include posting the article on the WSHRM website. For access to a copy of the January 2010 Risky Business with the ASHRM article, please contact Kim Hoppe at [khoppe@rmpsi.com](mailto:khoppe@rmpsi.com). Thank you.*



# Discovery of Electronic Health Records

By Erroll R. Imre, JD

The word “discovery” has a slightly different meaning in litigation than it does in normal usage. While the word is ordinarily used as a noun to refer to an event that has already happened – those involved with litigation use the word to refer to the process by which each side essentially tries to find out what the other side knows, or at least has in its possession and hopefully knows about. This usually involves taking depositions and submitting written questions (interrogatories), but it also involves actually obtaining copies of documents. These days, those documents may not reside in paper form in a filing cabinet, but rather as a series of ones and zeros on a hard drive, disk, or other electronic means of storage. Interestingly enough, this makes the discovery process both easier and much more complicated.

For the sake of simplicity and brevity, this article will focus on the Federal Rules of Civil Procedure pertaining to electronic records and the discovery process. Since many states essentially adopt the same or similar language for their own rules of civil procedure, this

will provide a meaningful primer. As always, consult local rules and seek the advice of counsel for your own particular situation.

The pertinent parts of Rule 34 of the Federal Rules of Civil Procedure provide as follows:

A party may serve on any other party a request... to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control:

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;...

The request... may specify the form or forms in which electronically stored information is to be produced.

The response may state an objection to a requested form for producing elec-

tronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- i. A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- ii. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
- iii. A party need not produce the same electronically stored information in more than one form.<sup>1</sup>

As suggested earlier, there are also rules that address the extent of permissible discovery, including with respect to electronic records. Rule 26 of the Federal Rules of Civil Procedure provides (in pertinent part):

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery

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## President’s Corner *cont. from p. 1*

Gutglass, Erickson, Bonville & Larson; Gonzalez, Saggio & Harlan; Hall, Render, Killian, Heath & Lyman; Johnson Insurance; Marsh USA; Medical Protective; MMIC Group; Pemicic; Quantros; rL Solutions and Sentry Insurance.

Thank you for allowing me to be your WSHRM President for 2009. It was a pleasure working with the Board and serving the organization. Thank you to the Board, volunteers and sponsors for making 2009 a very successful year.

# Electronic Records, cont. from p. 2

of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence...

## Specific limitations on electronically stored information

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- i. the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- ii. the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- iii. 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 the discovery in resolving the issues.<sup>2</sup>

Accordingly, medical records and other documents that are created and/or stored electronically are essentially subject to the same discovery as paper records have always been. It would be extremely unlikely that one could successfully argue that pertinent medical records are "not reasonably accessible because of undue burden or cost," but such an argument may well win the day if a plaintiff's attorney were to ask, for example, for all of the non-privileged e-mail communications that may pertain to any analysis, discussion, or review of the facts and circumstances of the medical event that gave rise to the lawsuit.

If the electronic health records that are subject to discovery are to be introduced as evidence, they will need to be properly authenticated. The medical record is often the key to a successful defense and if an electronic record cannot be properly authenticated, the best possible defense to a claim of malpractice may be lost. A work group of the American Health Information Management Association assembled an excellent and comprehensive reference addressing this issue, titled Update: Maintaining a legally Sound Health Record – Paper and Electronic. The following points are offered as a summary of some of the highlights from this article:

**Authentication for Legal Admissibility.** The key here is being able to show that the system is accurate and trustworthy. This is essentially done by presenting facts pertaining to the computer used and the manner and operation by which the record is created.

**Authentication of Entries.** Electronic signatures used in EHRs can serve to authenticate entries, provided the software can ensure an

accurate link between the user and the saved entry.

**Documentation Principles.** Free text entries allow for complete, specific and objective entries, in keeping with normal documenting practices. Eliminate the use of abbreviations when formatting the EHR system.

**Linking Each Patient to a Record.** Ensure each data field in the record is linked to the patient's name and record number, and that the patient's name and record number appears on every page/screen shot.

**Timeliness and Chronology of Entries.** The EHR system must be able to date-stamp and time-stamp each entry, including late entries.

**Corrections, Errors, Amendments and Other Documentation Problems.** The system must be able to track corrections or changes and note the date and time as well as the person making the entry, all without destroying the original entry.

**Permanency.** All entries, regardless of form or format, must be permanent. Procedures need to be in place to protect against data degradation and loss of integrity over time, as well as during system conversions/upgrades.

**Data Integrity: Access, Audit Trail and Security.** Policies and procedures must be in place to ensure data reconciliation, to assess data corruption or mismatches, to manage different iterations of documents, and to define when the record is complete and permanently filed.

**Disaster Recovery and Business Continuity.** Policies and procedures must be in place to ensure full data

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# Electronic Records, cont. from p. 3

backup in case of any type of disaster, natural or man-made.<sup>3</sup>

Beyond ensuring that a sound electronic medical record system and accompanying policies and procedures are in place, it is important to specifically address the discovery of electronic medical records and other documents. In this regard, the following action items have been recommended by the ECRI Institute:

- Review the discovery requirements in your jurisdiction with legal counsel.
- Review your policies and procedures to ensure that they appropriately address discovery obligations; revise them as necessary.
- Ensure that representatives from executive leadership, risk management, and information technology services actively collaborate with legal counsel to address and understand electronic discovery obligations.
- Identify those documents and records that may be subject to a privilege which would arguably prevent them from being discovered.<sup>4</sup>

For help with this or any other risk management and patient safety questions, please contact The RM&PSI.

## References

1. Federal Rules of Civil Procedure, Rule 34.
2. Federal Rules of Civil Procedure, Rule 26.
3. AHIMA e-HIM Work Group on Maintaining the Legal EHR, "Update: Maintaining a Legally Sound Health Record – Paper and Electronic," *Journal of AHIMA*, Vol. 76, No. 10, Nov. – Dec. 2005, 64A-L.
4. ECRI Institute, "Discovery: Paper Records and Electronic Information," *Healthcare Risk Control Risk Analysis*, Volume 2, Medical Records 3, July 2008.

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## Member News

### Welcome New Members

*The Board of Directors, on behalf of the entire membership, extends a warm welcome to our new WSHRM members:*

#### Pat Chritton

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## News 'n Notes

### Introduce a Fellow Risk Manager to WSHRM

If you know of a colleague who is not a current member of WSHRM, please feel free to forward a copy of this newsletter and introduce them to this wonderful organization. As a WSHRM member, inform them of the valuable educational programs and endless networking opportunities with colleagues in the areas of risk management and patient safety.

### WSHRM Web Site

The WSHRM Web site, [www.wshrm.org](http://www.wshrm.org), is now up and running! A brief demonstration of the enhanced site was provided during the WSHRM annual meeting in September of 2009.

The WSHRM board encourages our members to check out the new enhancements and please provide a board member with your feedback on ease of access and available resources that are now on the site. We sincerely appreciate the patience of our WSHRM members during this transitional overhaul of the WSHRM Web site.

### WSHRM Logo Wear

If you are interested in WSHRM Logo Wear, you can order direct from Land's End Business Outfitters online at [www.landsend.com](http://www.landsend.com) or by calling 1-800-338-2000. The WSHRM customer number is #3022724 and the logo number is #9821499.



## Case Law Update:

### **A Review of *Konkel v. Acuity*; Third-Party Non-Patients (Still) Lack Standing Under Chapter 655 to Assert a Claim for Medical Malpractice Despite Allegations of Unnecessary Medical Treatment**

By: Michael L. Johnson and  
Jason J. Franckowiak  
*Otjen, Van Ert & Weir, SC*

On August 11, 2009, the Court of Appeals of Wisconsin issued a decision in *Konkel v. Acuity, et al.*, 2009 WI App 132, in which the Court determined that a subrogation claim by the insurer of a tortfeasor seeking to recover, from a treating physician of the tortfeasor's victim, the costs associated with an allegedly unnecessary surgery performed by the treating physician was a claim for medical malpractice which the tortfeasor lacked standing to bring, based upon both the legislative purposes underlying Chapter 655 Stats., and the language of 655.007 Stats..

On April 8, 2005, Lisa Konkel was involved in a motor vehicle accident in which she sustained personal injuries. Ms. Konkel treated with a number of healthcare providers as a result of those injuries, including a neurosurgeon. An anterior cervical discectomy and fusion at level C4-6 was performed on May 9, 2006 by Konkel's neurosurgeon. There were no complications associated with the surgery and Ms. Konkel continued to treat with her neurosurgeon following the fusion. Ms. Konkel never had any complaints regarding the treatment provided by her neurosurgeon.

On October 18, 2007, Ms. Konkel filed a civil action against Nancy Lynch and her insurer, Acuity, alleging that Ms. Lynch's negligence was the cause of the April 28, 2005 automobile accident and her subsequent injuries. On January 25, 2008, Ms. Lynch and Acuity filed a Third-Party Complaint against Ms.

Konkel's neurosurgeon and his employer, alleging that Acuity and Lynch were entitled to indemnity for any amount awarded to Ms. Konkel as attributable to the May 9, 2006 fusion surgery. Acuity and Lynch alleged that the May 9, 2006 surgery was "medically unnecessary."

The third-party Defendant neurosurgeon moved for summary judgment on the basis that (1) Acuity, as a third-party non-patient, did not have standing to bring a medical malpractice action; (2) Acuity's claim was in direct conflict with the legislative purpose of Chapter 655 of the Wisconsin Statutes; and (3) that public policy served to bar Acuity's third-party claim because it would significantly affect the relationship between physician and patient.

Acuity subsequently amended its third-party complaint to add a subrogation claim. Acuity took the position that in addition to being entitled to indemnity, it was also subrogated to the rights of Ms. Konkel. The trial court granted the neurosurgeon's summary judgment motion. Acuity appealed.

On appeal, Acuity abandoned its indemnification argument, and proceeded on its subrogation claim. Acuity argued that it was entitled to "stand in the shoes" of Ms. Konkel in seeking reimbursement from Konkel's treating neurosurgeon for allegedly unnecessary medical care. In support of its argument, Acuity relied entirely on cases that were decided before the enactment of Chapter 655. Acuity argued that because the statutory framework of Chapter 655 did not specifically mention

the subrogated claims of third parties, there was no indication that the legislature intended to exclude subrogation claims arising out of allegedly unnecessary medical procedures. The Court of Appeals noted that Acuity's position ignored the fact that "Chapter 655 was created in response to a 'perceived crisis in Wisconsin's health care system' related to the rapidly increasing number of medical malpractice lawsuits, which in turn 'were working a detriment to healthcare providers, patients and the public in general.'" The Court of Appeals determined that allowing such medical malpractice claims by third-party non-patients, like Acuity and Lynch, would directly conflict with the legislative goals of Chapter 655.

Acuity further argued that this determination would amount to a "loophole," providing immunity for those healthcare providers who render allegedly unnecessary care. The Court of Appeals responded by noting that pursuant to Chapter 655.007, any "patient or the patient's representative having a claim or any spouse, parent, minor sibling or child of the patient having a derivative claim for injury or death on account of malpractice" remains statutorily entitled to pursue a claim for medical malpractice under Chapter 655.

In an attempt to convince the Court that its subrogation claim fell outside the realm of Chapter 655, Acuity colored its claim as one for reimbursement of payments instead of a claim based on malpractice. Acuity attempted to analogize its claim with the patient's claim in *Northwest General Hospital v. Yee*,

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## Case Law Update, cont. from p. 5

115 Wis.2d 59 (1983). In *Yee*, the Court concluded that Chapter 655 did not apply because that suit stemmed from a hospital's action to recover fees from a patient for medical services, and did not involve allegations of bodily injury, as did Acuity's action.

The Court of Appeals determined that Acuity's argument that the neurosurgeon's treatment was medically unnecessary amounted to an allegation of medical malpractice. As a result, the court determined that Acuity's action against the third-party Defendant neurosurgeon was governed exclusively by the provisions of Ch. 655.

The Court's conclusion that Acuity's claim was a *de facto* malpractice claim was further supported by the neurosurgeon's argument that if the third-party claim alleging unnecessary surgery had been brought by the patient herself, rather than by Acuity, a third-party non-patient, there would be no question that the claim amounted to one for medical malpractice. The Court noted that Acuity sought to stand in Ms. Konkel's shoes while at the same time avoiding the exclusive procedure that would govern any claim that Ms. Konkel wished to assert against her physician. The Court held that where an insurer seeks to step into the shoes of its insured, the nature of the claim remains the same as if the insured had pursued it herself.

The Court of Appeals next considered whether Acuity and Lynch had standing to bring a medical malpractice claim. The Court concluded that because neither Acuity nor Lynch was a "patient" or "a patient's representative" as those terms are identified under 655.007 Stats., they lacked standing to pursue a medical malpractice action against a healthcare provider like the third-party Defendant neurosurgeon.

Acuity also advanced an argument that Chapter 655 was unconstitutional insofar as Acuity's preclusion from seeking reimbursement for the cost of the allegedly unnecessary surgery resulted in disparate treatment. Acuity argued that there was no rational reason why a physician should be liable when it is his patient that makes a medical malpractice claim, but the physician is protected from liability when it is a third-party tortfeasor and his insurer that pays for the surgery and makes the same claim. Acuity asserted further that liability should not be dependant upon who pays for the unnecessary surgery. In dismissing this argument, the Court of Appeals noted that Ms. Konkel had submitted an affidavit indicating that she was satisfied with the treatment rendered by her neurosurgeon and had no desire to make a claim against him.

Finally, Acuity argued that it would be against public policy to allow a healthcare provider to render unneces-

sary medical care and then to "charge it off" to an alleged tortfeasor. The Court agreed with the argument advanced by the respondent neurosurgeon that if such claims were permitted, "virtually every personal injury case will involve an allegation that some of the care occasioned by the accident was malpractice and, therefore, not the responsibility of the tortfeasor." The Court also noted its concern about the potential effect that this type of claim would have on the relationship between physician and patient. If Acuity's claims had been allowed to proceed to trial, the Court recognized that Ms. Konkel would potentially be placed in a position whereby her testimony regarding the treatment rendered by her neurosurgeon might subject him to additional damage claims and thus potentially straining the physician-patient relationship.

On November 12, 2009, the Supreme Court denied review of the decision of the Court of Appeals. Thus, it remains the law that third-party non-patients lack standing under Chapter 655 Stats to assert a claim for medical malpractice against a healthcare provider under the guise of an allegation of unnecessary medical treatment. The Court of Appeals holding continues a recent trend by Wisconsin courts to restrictively interpret the potential universe of claimants who may assert a medical malpractice claim to those categories specifically identified in §655.007 Stats.

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Risky Business is a publication of the Wisconsin Society for Healthcare Risk Management (WSHRM), a chapter of the American Society of Healthcare Risk Management. It is published on a quarterly basis and distributed to WSHRM members with information pertinent to the field of Risk Management.

Information contained in this publication is obtained from sources considered to be reliable, however accuracy and completeness cannot be guaranteed. Articles cannot be construed as legal advice.

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## Board Meeting Schedule

Members are welcome to attend board meetings and encouraged to contact any board member with agenda items. To reserve a spot, contact Patti Pate at 608/250-1084 or patty.pate@deancare.com.

- January 29, 2010 (Conference call)
- April 29, 2010 (Madison, evening before the Spring Conference)
- June 11, 2010 (Wauwatosa)

- September 22, 2010 (Waukesha, evening before the Fall Conference)
- December 3, 2010 (Madison)

Anyone interested in a 2011 board position and has questions relative to volunteering for a WSHRM board position and what it involves, please contact Patti Vail at 414-447-2713 or at patti.vail@wfhc.org.

As WSHRM Immediate Past President, Patti is responsible for organizing the Nominating Committee's efforts in the following areas:

- Solicit and obtain sufficient qualified volunteers for all Board/Officer positions to be filled.
- Provide nominees with current job descriptions for the positions they are slated for.
- Present the proposed slate of candidates to the Board for approval at least 90 days prior to the WSHRM annual meeting in the fall.

## Education Events

2010 education events include:

- Spring Conference – April 30, 2010  
Crowne Plaza, Madison  
Theme: E-discovery & Cyber Risks (Twitter/Facebook). Four experts presenting from an attorney, patient, risk manager and claim perspective.
- Annual Meeting & Fall Conference  
September 22-24, 2010  
Marriott West, Waukesha

If you are interested in serving on either the WSHRM spring or fall conference planning committees, please contact Kim Hoppe at 262/644-5566 or by e-mail: khoppe@rmpsi.com.

If your facility or organization is interested in being a sponsor or exhibitor at any of WSHRM's educational programs please contact Judi Nelson at 715/356-8995 or nelsonj@hyhc.com