

Healthcare providers across the country recognize the benefits of electronic health records (EHRs) to improve care, reduce costs and improve efficiency. But as medical professionals, we know the challenges of keeping up with technology. The Healthcare Information and Management Systems Society (HIMSS) has developed some suggestions for you as you plan EHR implementation for your practice. This brochure discusses the EHR as a legal record.



WHAT IS THE LEGAL ELECTRONIC HEALTH RECORD (EHR)?

- The health record is a healthcare organization's most important business and legal record.
- Legal requirements, well defined for maintaining paper health records, are additionally complex for electronic records.
- Health records must be maintained in a way that is legally sound or they risk being challenged as invalid.

EHR selection criteria must include ensuring that a given EHR is appropriately designed and can be appropriately used to ensure adherence to federal and state rules, as well as institutional requirements and additional certification standards that may apply to their organization.

WHY DOES THE EHR NEED TO BE A LEGAL RECORD?

Simply, a healthcare organization must have a health record. Its "health record" must, by definition, meet all statutory, regulatory, and professional requirements for clinical purposes as well as for business purposes. If the record does not qualify as a legal record, it becomes hearsay and therefore is much less legally valid for business or for medical-legal purposes. Unless the practice intends to maintain separate paper records that comply with legal requirements, its EHR, to be a legal record, must conform to the same requirements as health records in general and for business records on computers more specifically.

WHAT IF MY EHR DOES NOT MEET THE REQUIREMENTS FOR A LEGAL RECORD?

- As an invalid business record, a problematic EHR can be challenged by payors for billing or Pay for Performance (P4P).
- With an invalid medical-legal record, risk of adverse litigation outcomes and costs rise.

Regardless of format, whether paper, hybrid, or electronic, the health record must meet the requirements of the legal and business record for the organization.

LEGAL EHR BASICS

Don't assume that a given EHR will meet your requirements for a legal record. As the EHR marketplace increases awareness of these matters, products will continue to improve. Here are four areas to look at:

How is documentation created?

- Is the author of each element of documentation accurately recorded, including vitals, chief complaint, history of present illness, orders, plans, and prescriptions?
- How are different, successive versions of the encounter (before signature) treated?
- Do signature procedures and tools meet your state's and your organization's requirements?

How is documentation managed and preserved over time?

- After signature, if a correction, clarification, or amendment is added, is it clear what is original and what is not and can all original documentation be recovered if needed?
- How is documentation protected from being altered, in all parts of the system including the underlying database?
- How are new templates, guidelines, forms, etc., created, preserved, retired?
- Are all clinical messages and clinical behaviors (prompts, etc.) reproducible and recoverable?
- Do other periodic and necessary tasks, such as report-creation and auditing, also expose documentation to additional security risks?
- Are critical support functions, such as auditing, always operable and reasonably accessible or do they require vendor supports or other extra costs?

How does documentation interact with billing?

- Does the system prompt users to add documentation for "improved revenue"?
- Does the system allow the sending of billing information without completion of documentation?
- Does the system send billing information for tests without means to ensure the tests were actually done?

How is documentation presented?

- When asked to produce a view or a printout of an encounter, does the system offer a view that conforms to your organization's definition of its legal record?
- If documentation has been amended or otherwise altered, is that clearly identified in the viewed and printed version?



A document that cannot stand the simple tests of validity posed by existing legal business document and health records rules can be a greater hazard and liability than no document at all.

LEGAL EHR REFERENCES

For many practices, especially smaller ones, the starting point may be to put into writing your policies and procedures for health records, a critical first step to preparing for an EHR to ensure it meets your legal needs.

Important elements of health records policies:

- Unique health record created and maintained for each patient
- Content requirements including author, date, time and authentication
- Access, privacy, confidentiality and security policies
- Policies and procedures for amendments, corrections, timeliness, completeness, and late entries
- Policies and procedures for forms, templates, voice recognition and dictation
- Policies and procedures for records retention, records archiving and destruction, coding and abstracting, data quality management, and reporting.

Examples of basic policy outlines can be found from commercially available references and support.

DO YOUR HOMEWORK ON THE LEGAL EHR

It is the buyers' and users' responsibility to ensure that your health record adheres to applicable rules and regulations. Your EHR vendor may be able to help. Here are some suggestions for how to ensure that assistance.

Software Contracting. Most EHR software contracts include reference to user risk. Make certain you understand the responsibility of the vendor in case medical-legal actions require their demonstration of the software's capabilities to support the legal health record.

Implementation and Training. Make sure that your implementation and training includes demonstrations of not simply how to use the software, but how to use the software in correct compliance with your organizations records requirements.

Professional Support. Depending on the existing expertise in your office, you may find yourself in need of short-term assistance to cover risk topics and to ensure compliance with relevant rules and regulations for your geographic location.

Maintenance. Reproduction of past records must include how the system operated at that past time. Therefore, make sure that your maintenance agreement offers guidance on back-up support directed to ensuring the integrity and reproducibility of the documentation in the system over time and over successive version changes or upgrades. In some cases, third-party storage of copies of your EHR system may be required to protect document validity.

This information is not intended as legal advice. Please contact your legal counsel as appropriate.

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For more information on HIMSS, visit www.himss.org. For more information on HIMSS Ambulatory initiatives, contact Mary Griskiewicz at mgriskiewicz@himss.org.