

# E-DISCOVERY IN HEALTHCARE: WHAT LEGAL AND HEALTHCARE PROFESSIONALS NEED TO KNOW

## **Bridgett Novak:**

Welcome to Consider This, the popular podcast series brought to you by the Organization of Legal Professionals. I'm your host, Bridgett Novak. This series will focus on the legal industry, current trends, substantive issues, and career perspectives. Each program will run approximately 15 minutes. We hope you stay tuned for this program and join us for others in the future.

Hello, and welcome to today's program. Today we'll be discussing E-Discovery in Health Care, What Legal and Health Care Professionals Need to Know. The program will focus on how non-health care workers, and for our purposes that means people working in the legal industry, need to get up to speed regarding health care concepts, and learn what is required when it comes to managing health related documents and records, and how those in the health care industry need to manage those records. We will discuss the need for health care workers to become much more familiar with the litigation process, and discuss the role the legal industry can play in that process.

Our guest is David Kearney, Director of Technology Services at Cohen and Grigsby Law Firm in Pittsburgh. Thanks so much for joining us, David. How does the storing of data in a health care environment differ from the typical business environment, David?

## **David Kearney:**

Well, at a minimum, health care organizations should identify, if they haven't already done so, the components of the legal health records, and how they will ensure that the legal integrity of the health record and its various components are assembled and maintained.

## **Bridgett Novak:**

So it's not just a difference in how the information is stored, but what kinds of information, too, right?

## **David Kearney:**

Exactly, and it's because sections of the health record often originate in different business units. Within an organization or a facility, consideration needs to be given to both the operational needs of the various business units, as well as the requirements for ensuring a sound legal document of patient care.

## **Bridgett Novak:**

And do those requirements differ per industry, or is it pretty much nationwide we're all obligated to the same requirements?

## **David Kearney:**

Health care organizations are obligated to the same requirements, to document the patient's care, and to make sure that the health record allow that record to serve as the legal health record, and that is to prove health care services provided to that patient. It serves as a method of communication among health care providers caring for a patient, and it, also, provides supporting documentation for reimbursement of services provided to that patient.

**Bridgett Novak:**

So are you saying that each individual has a unique legal health record, or does each institution have a different legal health record for that person?

**David Kearney:**

Each institution needs to define what they're capturing for a particular patient or patient type, depending upon the health care facility. Each health care facility is a little different, because they offer various levels of care, but all in all, under that organization's umbrella, they have to define what they're capturing for each patient. Not individually for each patient, but their patient group as a whole.

**Bridgett Novak:**

So once again, the legal health record though goes with the individual?

**David Kearney:**

Yes. The legal health record is defined by the organization, but it, also, finds its way, funnels its way down to the organization or the individual. Each individual does not have their own legal health record, but it's the organization providing the care that says for every patient, we are capturing this information that makes up the legal health record for our organization, so there is a consistent record captured for that particular organization.

**Bridgett Novak:**

And who within the health care organization is responsible for those records?

**David Kearney:**

It's actually the health information manager, HIM. They are typically the custodians of health records, and are responsible for the care, custody and control of the health record. These professionals, they have to have the knowledge to know not only how the record is used internally, but they have to know how the record would be used in litigation or investigation, which are very similar at times, and this requires an intimate knowledge of electronic health record systems and the litigation lifecycle.

The HIM professional really needs to be able to communicate with in house council, outside council, and even perhaps at times opposing council with the certification of the data that they're going to produce for a patient. E-Discovery is a process, and not only exclusive at the federal level, but it may be required to follow the same rigor depending upon the state or jurisdiction.

**Bridgett Novak:**

Sounds like you're describing somebody with a unique set of skills. Technology, but, also, legal understanding.

**David Kearney:**

Yes. Actually the HIM professionals really have the deep understanding of the organization where they're employed, and they, also, have a very heavy knowledge on the medical environment in which they're employed, and now with E-Discovery and the possibility of those records ending up in a litigation or investigatory process, these health information managers are extremely important. They know how these records are used. They know how the records are maintained, and they know the information as to where the patient records are being pulled from.

If you look, most people go to multiple doctors. They just don't go to one doctor, where that doctor keys in information about a patient's visit. They go to a lab, and then they go to have their imaging done. They go to different areas to have specialty work done. All of that information really needs to be pulled into electronic health record systems, so the HIM, the health information managers are extremely important, and they're extremely valuable to organizations to understand how the data lives, where it lives, and, also, how it needs to be prepared for litigation.

**Bridgett Novak:**

Once again, we're talking to David Kearney, Director of Technology Services at Cohen and Grigsby Law Firm in Pittsburgh. In addition to the HIM or health information manager, who else has access to these legal health records in terms of working with them, moving them, confidentiality issues. How are those protected going forward?

**David Kearney:**

Well, the foundation of the protection really comes from the HIPPA requirements. Others have access to this information, that's clinicians and other folks working in health care, but ultimately the health information managers have to know exactly who accessed those records, how they were accessed, and to what extent they were accessed. In order for evidence to be used in a litigation or an investigation, they have to be in an environment where they're unaltered, and when they are altered, they have to capture the information, who changed the documents, who changed the records, what modifications were made, times they were made, any revisions that were made to that document.

Ultimately, the responsibility comes back to the health information managers.

**Bridgett Novak:**

That's great that they all have to track though who touched this, at what point, and they made what amendment. I've, also heard the phrase bounced around, electronic health records or EHRs, and legal medical records, LMRs. Are those different than legal health records?

**David Kearney:**

They are. Electronic health record, it's an electronic record of patient health information, and it's generated by one or more encounters in any care delivery setting. An electronic health record is a compilation of your health care or a patient's health care being provided by various organizations. That's really the electronic record of patient care.

Now the legal medical record is generated at or for a health care organization as its business record, and it is the record that would be released upon request during a litigation or a legal or investigatory event, and it must be maintained for business or evidentiary purposes.

**Bridgett Novak:**

And what about the designed record set? Is that yet something different?

**David Kearney:**

It is, and there's a lot of these variations of the health record and record sets. A designated record set is really a group of records maintained by or for a covered health provider. The HIPPA privacy rule defines the designated record set as a group of records maintained by or for a covered entity that may include patient medical and billing records, the enrollments, payment claims, a court decision, and cases or medical management record systems maintained by or for a health plan, and really what the designated record set is, it's all encompassing. It's more than just related to decisions about a patient's health.

**Bridgett Novak:**

Okay. I've got one more term to ask you about then. I've come across the term electronic discovery reference model. What does EDRM represent or stand for?

**David Kearney:**

No. And that's a really interesting point, and there are a couple of areas that those who are not working in the legal industry or exposed frequently to litigation, there's a couple of areas that everybody that is working with evidence or

materials that could be used as evidence in a court case should be familiar with, and one of those, as you mentioned, is the electronic discovery reference model.

The electronic discovery reference model is a process that has become really a standard due to ... In the past, there was a lack of standards, so the electronic discovery reference model is really a set of standards. It's how evidence is processed throughout or used throughout the litigation lifecycle really at the technical level, and a key component to the electronic discovery reference model is the information management piece, which is used really at the far left or at the start of the EDR model, and it's really a key to this, the whole process of managing evidence or managing information.

This is where hospitals, health care providers really have a chance to get it right. If you are managing your data up front, then you know where your data is in your organization. It's really easy to pull that information, which is really evidence if used in litigation. It's really easy to pull that information together, and say, "Okay, here's the information based upon a request maybe for a patient," and how it lives throughout the litigation lifecycle.

**Bridgett Novak:**

So can you talk a little bit more about the core components that those working in a health care institution need to do, or need to at least have a basic understanding of to make sure they're always prepared for litigation if it comes up?

**David Kearney:**

A couple of areas that those working in health care really need to be attuned to, one, is the electronic discovery reference model, which we just talked about. The other is the federal rules of civil procedure, which really drive this whole process, and the federal rules of civil procedure dictate how a particular litigation traverses through its processes towards trial. So those two areas are really key to the non-technical, non-attorney types. Folks in health care need to be familiar with how evidence is used and how it lives within their organization in order to be able to respond to a document request or evidence request.

**Bridgett Novak:**

And how will they determine how much of a person's record or documents are necessary? The legal team inside their own organization or the opposing council will tell them?

**David Kearney:**

Well, initially, a health care organization needs to have a response plan that when a litigation arises, these are the steps that need to happen, and those steps need to be compiled, and created, and audited, and managed by various stakeholders within a health care system. That does include attorneys, that includes their in house council, but that, also, includes the clinicians. Because the clinicians work with this data every day, they may have a take on how evidence could be used, how these records live, what particular information is input into these records. IT, IT is extremely important to be at the table, because they can explain on the system side where various components of these electronic records live, how they're managed, and how all this information is backed up, other areas where information is being pulled from.

**Bridgett Novak:**

Excellent information, David, and I assume that you'd be available for any of our listeners who have additional questions for you. They can just contact you at Cohen and Grigsby?

**David Kearney:**

Absolutely.

**Bridgett Novak:**

That's all the time we have today for this program. Thank you for joining us for this discussion of E-Discovery and Health Care, What Legal and Health Care Professionals Need to Know. Our special guest has been David Kearney, Director of Technology Services at Cohen and Grigsby Law Firm in Pittsburgh. Thank you, David.

That's all the time we have today. I want to thank our audience for tuning in, and remind you that we will be producing these programs on a regular basis, and that you can listen to this program again and check out future programs in the podcast section of the OLP website. That is the OLP.org.

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Have a wonderful day, and thank you for listening to Consider This.

**REFERENCES** <https://youtu.be/yy1f7VA-zpA>

## CREDITS

*Subject Matter Expert:* Regina Glenn

*Interactive Design:* Danielle Kaardal Meyer

*Instructional Designer:* Carmen Garland

*Project Manager:* Andrea Thompson

*On Screen Talent:* Bridgett Novak, David Kearney

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