

CHICAGO LAWYER®

MED-MAL MATTERS

Picture a conference room with two attorneys, a witness and a court reporter. The witness is a nurse employed by a defendant hospital. The case involves a patient who suffered a small subdural hematoma after a fall and was hospitalized for observation. He died the next day after the bleed spread and the increased intracranial pressure caused herniation of his brain stem.

The medical record contains multiple and progressive changes to the patient's condition that, the plaintiff alleges, should have been communicated to a neurosurgeon. Doing that would have led to additional imaging and neurosurgical intervention. The nurse being deposed charted the existence of multiple phone conversations with a consulting neurosurgeon without any details about the information conveyed or orders given. The and the plaintiff's attorney is eager to learn the details of those conversations.

But when the nurse is asked what she told the neurosurgeon and what he said in response, the defense attorney interjects, "If you know," and the nurse answers "I don't know" or "I don't remember" to each question.

Setting aside the impropriety of witness-coaching like "if you know," in the past, with paper charts or printouts of electronic records, the inquiry would effectively end there. The provider's entries into the record system and her testimony were usually the sole evidence of clinical communication.

Today, however, most non-in-person clinical communication does not occur via telephone. Increasingly, providers are using electronic clinical communication programs and apps that automatically store the information shared.

Tablet and smartphone capabilities have increased dramatically over the past 10 years and their use by professionals has increased dramatically as well, particularly among healthcare providers. This is particularly true when it comes to clinical communication. Many hospitals and health systems have adopted mobile healthcare applications to provide a secure, HIPAA-compliant platform to allow nurses, doctors, pharmacists and other providers to communicate with each other about their patients.

One of the most popular types of apps/software programs allows providers to send text messages about patients and share other information like photographs of wounds. One popular vendor is called Vocera. This system provides secure, HIPAA-compliant text messaging that is



MAKING AN E-TRAIL

A record of all electronic communication is critical

By **THOMAS A. DEMETRIO** and **KENNETH T. LUMB**

encryptable and traceable. It can be used on the provider's choice of device, including iPhone, iPad, Android and desktop computers. One particular Vocera app, known as Vocera Edge, provides cloud-based communication between providers. It also, according to Vocera, allows nurses to document to the electronic record while receiving "filtered, prioritized alarm and task notifications."

Other apps from various vendors that provide similar capabilities include PatientSafe/Patient-Touch, PerfectServe, and TigerConnect, to name a few. All of them are HIPAA-compliant systems that allow providers to communicate *in writing* about their patients. In order to comply with HIPAA, a system or app must preserve the information inputted and be capable of providing a log of all inputs, addenda and other changes to the record.

By definition, a HIPAA-compliant text-messaging app preserves and stores the messages, photos and other information shared between providers. That information is clearly relevant in a medical negligence case and is indisputably discoverable.

In order to discover it, however, one has to know about it and ask for it from the appropriate entity, which may or may not be a hospital. The information

is not necessarily stored in a hospital's electronic record system. The apps provide significant room for customization and may or may not be integrated with the system the hospital uses for its medical record. Where a hospital does not save the information, however, the vendor will. Otherwise, the product is not HIPAA-compliant.

Plaintiff's attorneys should request all information regarding any clinical communication tools in use at the facility, including all manuals and "cheat-sheets" handed out to users. Production requests should also include all electronic information from those communication tools such as messages and photos, and all audit data. Vocera, for instance, advertises that it can provide details about the date and time in each stage in the life cycle of a message — when it was sent, delivered, and read, and by whom.

Now picture that same nurse's deposition with the actual text messages as exhibits. She'll know. CL

Thomas A. Demetrio is a founding partner of Corboy & Demetrio, representing victims of medical malpractice and personal injury.
TAD@CorboyDemetrio.com

Kenneth T. Lumb is a medical-malpractice attorney and managing partner at Corboy & Demetrio.
KTL@CorboyDemetrio.com