

MEDICAL MALPRACTICE DEFENSE

DECEMBER 2015

ELECTRONIC MEDICAL RECORDS AND THE DISCOVERABILITY OF AUDIT TRAILS AND ACCESS LOGS

BY AUBRI N. SHEREMET, ATTORNEY

More and more, hospitals are receiving requests from patients and their attorneys to produce audit trails and access logs. Pursuant to HIPAA and HITECH, healthcare facilities are required to provide a patient, upon request, with an audit of unauthorized or improper disclosures to third parties; or, in the case of HITECH, disclosures to third parties pertaining to treatment, payment and health care operations. See § 164.528(1) and § 13405(c)(1) (A).

Although neither HIPAA nor HITECH require an entity to disclose an access log, plaintiffs' attorneys are requesting this information on the guise that the access log is part of the patient's medical record. Arguably, the access log is not a medical record as defined by the Medical Records Access Act, which states that "information oral or

recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." See MCL 333.26263(i). Due to this fact, each hospital should review its own definition of "medical record" in order to determine, in response to a pre-litigation request for an access log, whether the request can be denied.

When the request is made after litigation has commenced, we are finding that the Courts are ordering production of access logs, ruling that even if not part of the medical record, the access logs are relevant to the underlying litigation, and therefore are discoverable. It is imperative that defense counsel is knowledgeable

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Smith Haughey Successes

Smith Haughey attorneys [Cheri Chandler](#) and [Gary Eller](#) recently obtained a no cause in a suicide case in Monroe County. They represented an emergency medicine physician who treated the plaintiff, a chemical engineer who worked at a nuclear power plant. The plaintiff had purposefully jumped into a circulating pond at the plant to stop a process of putting wood flour into the system to temporarily plug condenser tube leaks. The plaintiff was concerned about the way the process was being performed and the possibility of a permit violation. The allegations were that our client did not diagnose the jump as a suicide attempt, failed to consult a psychiatrist or in the alternative,

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On The Lighter Side Of The Law

BY A. JOSEPH ENGEL, ATTORNEY

Last month I traveled to Boston to prepare an expert for his deposition in a challenging cardiology case. The physician – a department chair at a well-known medical institution – has a 20-pound resume, works 90 hours a week, and has the non-stop energy of a typical triple A personality. We met after his sixth interventional procedure of the day, but before his seventh. When we finished our lengthy prep session at 7:30 p.m., the doctor hailed a cab, pointed eight blocks north, and suggested I catch the evening’s game at the oldest, most classic American League baseball stadium in existence – Fenway Park. I obeyed. On arrival, I ran into an Irish-tinged Boston police sergeant, told him I was in town for one night and was hoping to check off a ‘bucket list’ experience, and asked him to kindly point me to the nearest ticket window. He paused slightly, then turned abruptly and stalked off, admonishing me to “stay right there.” No smile. Three minutes later he returned, grunted “follow me,” and then marched off down the street – attorney in tow – to what appeared to be a side gate to the 100-year-old ballpark. He strode through the rusty, wrought iron opening without stopping and walked me along a cavernous concourse to steps heading up to a “Section 17.” He handed me a ticket, pointed up the stairs, shook my hand, and said “welcome to Boston, enjoy your night.” He then disappeared into the crowd. I did not, unfortunately, catch his name. After losing, quite quickly, my non-wicking sport coat to the back of my box seat, I commandeered a Fenway Frank, a Goose Island draft, and sat back to enjoy America’s favorite past time in the steamy 88 degree heat of a late summer Boston night. The following morning, the doctor “hit it out of the park” at his 8 a.m. discovery deposition. The practice of law does, on occasion, enrich life in unexpected ways.



Contact Joe Engel at
jengel@shrr.com
or 616-458-6247

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regarding the time and effort required by hospital personnel to access, collate and disseminate access logs. With this knowledge, we can present an informed argument to the Court regarding the time and cost associated with production of an access log for the patient’s entire hospital admission. We are finding that some courts have been responsive to this argument and will limit the production to a specific date of the patient’s admission. We also anticipate that as we see more of requests for access logs, we will likely see more requests for the depositions of hospital IT personnel. It is important to have an open dialogue between

hospitals and their defense counsel regarding what information is included on the access log as some entities have more restrictive parameters than others. For example, if the access log demonstrates only the name of the provider that accessed the chart, then counsel can make a persuasive relevancy argument, as the information plaintiff seeks will likely not be found in the access log. On the other hand, if the access log parameters are not restrictive and would result in thousands of pages of documentation and require hundreds of hours to extract the information, defense counsel would have a better

argument that production of the access log was overly broad and unduly burdensome.



Contact Aubri Sheremet at
asheremet@shrr.com or
616-458-9294

Smith Haughey Welcomes Two Attorneys to its Medical Malpractice Defense Team

Attorneys Rose P. Kleff and Patricia S. Hertel



Rose Kleff joins Smith Haughey as a recent graduate of Western Michigan University Cooley Law School. While in law school, she served as an intern for the U.S. Attorney's Office for the Western District of Michigan as well as for Justice Bridget McCormack at the Michigan Supreme Court. Rose also graduated from Grand Valley State University with a BS in Nursing.

Rose calls Grand Rapids home and enjoys spending time with her family — including her 9-year-old son and 6-year-old daughter — and being active in the community.



Patty Hertel joins Smith Haughey fresh out of law school. She previously worked as an intern during her undergraduate studies at Calvin College and as a summer intern at Smith Haughey in 2014, so she is a familiar face in the Grand Rapids office. Patty graduated from Michigan State University College of Law in May.

A Grand Rapids native, Patty is happy to be back in the area. When she is not in the office she enjoys taking advantage of Beer City, USA and catching a Grand Rapids Griffins hockey game on the weekend.

Update: Greer v Advantage Health Systems

BY STACY M. KRAMER,
ATTORNEY

In May 2014, the Michigan Court of Appeals decided *Greer v Advantage Health Systems*, a case that presents a significant issue concerning a plaintiff's recovery of medical expenses, in a medical malpractice action. The *Greer* Court evaluated whether a plaintiff

is entitled to recover the amount of her unadjusted medical bills or the amount actually paid by the insurer in satisfaction of those bills, pursuant to a pre-negotiated contract between the healthcare provider and insurer. The Court of Appeals resolved the debate in the plaintiff's favor, holding it is the amount billed, not paid, that a plaintiff may recover. Accordingly, in the event of an adverse verdict, the defendant-provider cannot reduce the verdict by the amount of the insurer's discount, which results in a windfall to the plaintiff.

The Michigan Supreme Court

granted defendants-appellants' application for leave to appeal and further allowed several *amicus* briefs to be filed, including one by attorney Stephanie C. Hoffer of Smith Haughey Rice & Roegge (SHRR). In its *amicus* brief, SHRR raised an alternative view for the Court to consider, namely, that the "differential" in the amount billed versus the amount paid is not a proper measure of economic damages for medical expenses. In short, economic damages in tort litigation do not — and should not — include money that a plaintiff (or her insurer) never paid and never will have to pay.

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Smith Haughey Rice & Roegge

100 Monroe Ctr., NW
Grand Rapids, MI 49503

This newsletter is published by:

Smith Haughey Rice & Roegge

Offices in Ann Arbor, Grand Rapids,
Muskegon and Traverse City

1-877-833-7477

www.shrr.com

info@shrr.com

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The Court heard oral arguments in October. Given the implications this case may have on other areas of tort litigation as well, the defense community looks forward to the Supreme Court’s guidance on the proper measure of economic damages.



Contact Stacy Kramer at
skramer@shrr.com or 616-458-2335

Eight Medical Malpractice Defense Attorneys Listed in Best Lawyers list

Smith Haughey is proud to announce that nine of its Medical Malpractice Defense attorneys have been named to the 2016 Best Lawyers list. Best Lawyers is the oldest and most respected peer-review publication in the legal profession. A listing in Best Lawyers is widely regarded by both clients and legal professionals as a significant honor, conferred on a lawyer by his or her peers (Copyright 2015 by Woodward/White, Inc. of Aiken, SC). All included lawyers must first be nominated by their peers, and then voted for by a certain number of listed lawyers who take part in the survey.

Grand Rapids

- Carol D. Carlson
- A. Joseph Engel III
- Brian J. Kilbane
- Paul M. Oleniczak
- John C. O’Loughlin
- L. R. “Bud” Roegge

Ann Arbor

- Cheryl L. Chandler
- Edward R. Stein



Smith Haughey Successes

hospitalize the plaintiff. The plaintiff did commit suicide three days later. The jury's decision was determined in less than one half hour and the verdict was unanimous.

Jason Sebolt and Stacy Kramer secured the dismissal of a hospital from a lawsuit involving allegations of nursing malpractice arising out of home health care services rendered to the plaintiff. The plaintiff supported her claims with an Affidavit of Merit signed by her sole nursing expert, an out-of-state hospital nurse. During discovery, Jason deposed the plaintiff's expert and elicited testimony that she was unqualified to render standard of care testimony against the hospital, as she admittedly lacked any familiarity with the local standard of care applicable to home health nurses in a similar locality. Stacy wrote and argued the successful Motion for Summary Disposition.

In a case alleging obstetrical mismanagement leading to a uterine rupture with significant damages, Carol Carlson and Stacy Kramer convinced a judge to dismiss the entire case where the plaintiff had filed two identical Complaints in an effort to cover her untimely and premature filing. The plaintiff served her pre-suit Notice of Intent to File Claim ("NOI") on the last day of the limitations period. Case law provides that when a NOI is served on the last day of the limitations period, a subsequently-filed Complaint is time-barred because there is no time remaining in the statute. Nonetheless, the plaintiff filed the first Complaint prematurely

on a Friday, and the second Complaint the following Monday. Stacy moved to dismiss the Monday Complaint, on the basis that there was already another action pending between the same parties involving the same claims. The plaintiff asked the Court to consolidate the cases, which were admittedly filed as a "precautionary measure," noting that dismissal of the Monday Complaint may legally operate to extinguish the underlying claims. Through a series of additional defense motions, the Court ultimately rejected the plaintiff's request for consolidation and dismissed the Monday Complaint. Stacy then filed a Motion for Summary Disposition of the Friday Complaint as barred by the statute of limitations. The Court agreed that because the plaintiff waited until the last day of the limitations period to serve her NOI, no time remained in the period to toll, and dismissed the case as untimely.

Through a series of strategic motions, Chris Genter, Paul Oleniczak, and Stacy Kramer secured dismissal of a multi-count Complaint. The plaintiff had alleged malpractice against Dr. A, claiming he negligently performed plaintiff's surgery, and against Dr. B, claiming he failed to timely diagnose and treat plaintiff's postoperative complications. The plaintiff included ancillary claims of ordinary negligence against the hospital's nursing staff. The Court granted SHRR's initial Motion for Partial Summary Disposition of all claims against Dr. A that were premised on his decision to surgically intervene on the plaintiff's condition and Dr. A's performance of the surgery itself, as

barred by the applicable statute of limitations. Following the Order of Dismissal, SHRR filed an Affidavit on behalf of Dr. A, attesting to his non-involvement in the plaintiff's postoperative care, which resulted in Dr. A's subsequent dismissal from the lawsuit. In further attempts to narrow the claims in the Complaint, SHRR filed another motion, which requested that all claims of ordinary negligence be stricken, as the claims sounded in medical malpractice. The Court granted the Motion, and all claims against the hospital nursing staff were dismissed with prejudice, as the Court agreed that plaintiff's single Affidavit of Merit signed by a physician was ineffective to commence a malpractice claim against the nurses. When the plaintiff later failed to timely disclose his expert witnesses during discovery, SHRR moved for summary disposition of all remaining claims. Stacy wrote and argued the successful motion, which resulted in the dismissal of the plaintiff's Complaint.

Chris Genter, Chris Spain and Stephanie Hoffer successfully obtained a motion for summary disposition, resulting in the dismissal of their hospital client which was alleged to be vicariously liable for the underlying physician defendants. The Court found that there was a preexisting relationship between the plaintiff and his physician prior to the incident in question and that there was no evidence presented by the plaintiff to establish that a second physician covering for his partner, was an agent of the hospital.