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PRF NEWS

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# How Physicians Can Minimize Liability and Risk during EHR Transitions

BY MEERA SUBASH, MD

Many providers still suffer from the trauma of transitioning from paper to electronic medical records. But how about moving from one electronic health record (EHR) to another? Transitioning to a new EHR can also have hidden costs and risks. However, an organized approach, proper planning, and early discussions with your new EHR vendor, can minimize many of these risks.

A 10-year review conducted by the MedPro Group, a large health care liability insurance provider, revealed that 76 percent of claims related to the EHR involved user-related issues. The most common user-related issues included incorrect or incomplete information in the EHR, errors due to pre-populating of text, errors from propagating of copied/pasted information, and missing information from paper records that was not uploaded during the conversion process

These claims were most frequently in the outpatient setting and often related to diagnosis or medication-related allegations. Interestingly, key risk factors noted more frequently in EHR-related claims than in other claims included failure to read the content of the patient's medical record, insufficient documentation of findings, and failures in tracking and reporting of results.

## EMERGING RISKS WITH EHR EVOLUTION

As EHR systems become more sophisticated, it is important for practices to recognize emerging risks and create specific risk-prevention strategies. Engaging with your new EHR vendor early can help your practice anticipate issues during the EHR transition and reduce liability exposure. Major areas of emerging risk include:

***Metadata risks*** – Metadata relates to "hidden" data that may not initially be visible to users, such as time stamps, signatures, keystrokes, and note authors. Being aware of metadata is important because this retrievable information can come to light in an audit or during a request for electronic records as part of a legal discovery process. Medical practices can equip themselves with the knowledge of these "hidden" data by hiring a third party to conduct an external audit regularly. These audits can provide detailed information to medical practices on compliance and documentation integrity.

***Data security risks*** – Data security is an ongoing concern with EHRs that has only been exacerbated by the trend of storing personal health data in cloud-based systems. Health care related cybercrimes (and malicious attempts) are increasing every year. The most common offenses are theft of private patient data and loss of access to medication lists, labs, and diagnoses—all leading to significant downtime for physicians. Education and training should be made available to physicians and medical staff to increase their awareness of cyber risks. Regular security audits, strategies such as secure encryption, and contracting with outside cybersecurity consultant services can aid in reducing risk. Different EHRs have different security vulnerabilities, so having a detailed conversation with your new EHR vendor can be very helpful.

***Records preservation and retention risks*** – Retention of previous records should be addressed at the start of discussions with your new EHR vendor so you can negotiate appropriate transition provisions to meet governmental requirements. While no statutory requirements surrounding medical record retention exist in California, the California Medical Association has stated that "while a retention period of at least ten years may be sufficient, all medical records should be retained indefinitely or, in the alternative, for 25 years."

## PHASES OF THE EHR ADOPTION PROCESS

A new EHR adoption process can be subdivided into the following four phases, and each phase has its own challenges, costs, and liability exposures. Knowing which issues to discuss with your preferred vendor upfront can greatly help reduce risk.

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## Inside PRF News

# Being an Expert Witness

## — A Physician's Perspective

**BY AIMEE D. EYVAZZADEH, MD, MPH**

When you already love what you do, being able to use your medical training and expertise to provide help for others who need it is extremely validating—even when it's outside of your usual clinical environment. Being an expert witness has been that kind of experience for me. Every case that I have agreed to provide an opinion on has left me feeling like I've really made a difference.

In the last five years I've agreed to serve as an expert in about 15 cases. One point I'd like to make up front is that you have to like and trust the attorney you are working with. Lawyers may contact me with offers, but I always have the final say in whether I will agree to participate. But in reality, the only time I've declined a case is when it made no sense.

I've almost always been an expert witness for the defendant physician, but I have been an expert for the patient plaintiff on two occasions. I think one of the things that makes physicians hesitate about being an expert is that it may mean that you are going against your profession. We are taught from the beginning of our training that we should never talk poorly about another physician. But from my perspective, being an expert isn't about that at all. It's about reviewing facts, sticking to them and providing an opinion based on science, data, and nothing more. Sometimes you're brought in as an expert because a doctor admits fault and you're needed to provide an expert opinion as a way to get to a settlement between the two different parties involved. I can say that being an expert is especially satisfying when you can use your knowledge to benefit a physician defendant in order to diminish the consequences of a frivolous lawsuit.

There are usually two times that an expert gives their opinion—at a deposition and at a trial or arbitration. So far, all of my testimony has been at depositions in cases that were to be decided by arbitration. At a deposition you should be the most researched and knowledgeable person in the room—at least in the specific medical field you're being asked about. "The buck stops with you" comes to mind when I think of being an expert. Having said that, you still need to be prepared for opposing counsel to ask "left-field" questions unrelated to your expertise if they think it will benefit their client. An important lesson to learn is to keep your answers concise and never answer more than you have been asked. This can be challenging because as the "expert" there is a natural tendency to feel like you're there to teach about your specialty—but in reality you are there simply to answer the questions.

One of the negatives to expert testimony is that it can take a long time to set up. Your deposition could get scheduled, cancelled, rescheduled, and then cancelled again. You may have rearranged your whole schedule only to find out less than three days later that it was cancelled. I charge my usual in-office hourly rate for depositions, and it would not be out of the question to ask for payment first before booking a deposition.

Being an expert inspires me to reassess my own practice of medicine to make sure that I continue to provide the very best and safest medical care. I have always hoped that my opinion has helped to change practice patterns within a hospital system or clinic to benefit their larger patient population. I enjoy being an expert, and if you have the opportunity to do so, you may be surprised by how much you will learn about yourself and others along the way. ■

*Aimee D. Eyvazzadeh, MD, MPH, is a fertility expert in San Ramon, California.*

## PRF Insureds Share Their Expert Witness Experience

An overwhelming majority of PRF Insureds who participated in a recent survey revealed that serving as an expert witness was a positive experience. Respondents also indicated they were sufficiently prepared for the role.

The survey, conducted during June and July of 2020, yielded responses from 38 PRF Insureds. Of those, 21 said they had served as an expert witness resulting from an attorney's request (with one respondent indicating a refusal of an attorney's request). Among the 21 with expert witness experience, everyone said they were sufficiently prepared, and all but two said it was a positive experience.

The table below shows the survey results. ■

### EXPERT WITNESS EXPERIENCE SURVEY

| Questions Answered by 38 PRF Insureds | # Yes | % Yes | # No | % No |
|---|---|---|---|---|
| Have you served as an expert witness? | 21 | 55% | 17 | 45% |
| How did this occur? (Attorney Request) | 22 | N/A | N/A | N/A |
| Was it a good experience? | 19 | 90% | 2 | 10% |
| Were you sufficiently prepared? | 21 | 100% | 0 | 0% |

# Being an Expert Witness

## — An Attorney's Perspective

**BY KEVIN R. MINTZ, JD**

Although the professional worlds of medicine and law are generally separate, a physician may be called upon to testify regarding the care of a patient in a variety of legal settings. Not all medical testimony, however, is *expert* testimony. For example, physicians may be asked to testify about the care they have provided to their own patients—such as in a personal injury lawsuit. In that setting a doctor's testimony relates to their own diagnoses, treatment, outcome, and future course for the patient. Those *contemporaneous* observations and conclusions are not technically *expert* opinion.

Expert medical opinion testimony differs in that it is a *retrospective* evaluation of care that has already been provided. This testimony may also include an evaluation of the causal relationship between an event and the patient's condition, injuries, or future care needs. Typically a patient (or patient's counsel) will seek to retain (and pay) a doctor to perform a retrospective assessment of a medical/legal issue related to the standard of care and causation of harm. The observation that many physicians categorically avoid acting as experts while others are eager to participate is a clear indication that serving as an expert is not for everyone! The following points are offered to illuminate many issues that may help in deciding to become involved as an expert witness.

### THE PROCESS IS TIME CONSUMING

First, the process is time consuming because, if done right, it requires serious and critical analysis and attention. You may be required to review dozens to hundreds of pages of medical records that include photocopies of office records, hospital charts, and lab results, as well as imaging or pathology reports. Be prepared to have a fresh stack of post-it notes available to allow you to return to findings of interest or concern.

In addition, if you are retained as an expert it should be understood that your personal appearance at a deposition or other formal testimony will almost certainly be required. The location of the deposition is often local, but the trial venue may be across the country. Although an effort may be made to fit your schedule, note that meeting dates and times may change—sometimes on short notice.

### LITIGATION IS A CONTACT SPORT

Litigation is a confrontational process that requires public speaking—both aspects of which can be challenging and anxiety producing. The cross-examination experience often involves a detailed inquiry into your educational and professional background, a grilling on multiple references from the medical literature, and being confronted with contrary expert opinions. It is important to be certain that you are the correct expert for the issues in the case and that the opinions you are offering are squarely within your area of expertise. Witnesses failing to "stay in their lane" will likely suffer under vigorous cross-examination.

### PROVIDING EXPERT OPINION TESTIMONY IS ALSO NOT WITHOUT RISK

Many professional organizations have codes of conduct or ethical guidelines that apply to expert testimony, and some actually monitor that testimony. If it is perceived that the testimony, particularly that critical of another practitioner, is flawed, professional societies have taken disciplinary action. As an expert you should not bend to pressure to provide favorable testimony that is unsupported or questionable. Any desire to be helpful should stay within the bounds of well-informed, objective and accurate opinion. Sometimes the opinions provided as a consultant are simply going to be unfavorable. It is not, however, an expert's job to advocate for a position that is not fully supported.

Further, an expert's live sworn testimony or verified written testimony is given under penalty of perjury and is recorded. That testimony is maintained in perpetuity in various databases such that any unsupported advocacy can resurface later and be a source of embarrassment if it proves inaccurate or inconsistent with new testimony. A good reputation is hard earned, quickly lost, and rarely regained.

### CONTROL WHAT YOU CAN

Once becoming an expert, it is critical to obtain the available pertinent records, images, testimony, and clinical information to fully assess the facts and address the issues. If an examination of the patient is required, it should be insisted upon. Basing opinions on incomplete information is destined for a bad experience. Remain in control of your time and reputation, and feel free to disengage if you are not getting the required information or are being provided with incorrect or misleading information.

### GET PAID

Getting paid is also an essential part of the process. The substantial commitment of time warrants a clear structure to assure payment, and it is also acceptable to disengage if payment becomes a problem. There are agencies that solicit providers to be listed as experts. Be mindful that affiliation with such agencies is often viewed with suspicion.

### BOTTOM LINE

Experts are an essential part of medical-legal processes, and a request to participate is something to actively consider. If you were to find yourself sued for medical malpractice, you would certainly want a qualified and willing expert capable of evaluating your care. Your testimony could also be essential to a patient who has suffered as the result of improper care. Serving as an expert is serious business and warrants equally serious consideration. Think it through before you decide. ■

*Kevin R. Mintz is the managing partner of the Oakland-based law firm of Rankin, Shuey, Ranucci, Mintz, Lampasona & Reynolds. He specializes in the defense of medical malpractice civil actions and administrative disciplinary matters.*

**EHR Transitions** *(cont. from page 1)*

***Planning and Selection*** – In addition to discussing transition provisions from the "old" EHR to the new EHR, practices should ask about the vendor's support agreement. This agreement limits how long most users will be able to use the software even if the license term is longer, so practices must have a sense of how much IT support and updating will be provided for a new EHR. Understanding whether renewal of support will be automatic or will require giving notice is also important. If possible, insert caps on future price increases into the agreement. Finally, it is important to know the terms of non-renewal in case the practice decides not to continue with this vendor in the future.

***Adoption and implementation*** – This phase can be fraught with several known and hidden costs, including the hiring of external resources and "at the elbow" support that will be needed for successful implementation. Hidden costs include the time staff and physicians devote to system conversion, productivity losses in providing clinical care, and time spent training teams on the new system. Staff and provider learning curves with new EHRs can take time. During these times, the risk for error is inevitably higher without the proper training and mastery of EHR design, flow and model content.

***Optimization and workflow redesign*** – This is where practices can gain the most value from their new EHR implementation because EHRs often determine workflow patterns. By optimizing workflows around the EHR itself, practices can maximize efficiencies, improve quality and safety, and reduce the chaos of transitioning from the current workflow.

***Replacement and data migration*** – The EHR replacement and data migration phase is often the most intricate. The following "10 Tips to Successful Data Migration During an EHR Change" are as summarized by iElectronicHealthReporter.com in February 2017:

1. Find an experienced vendor with experience migrating data from your current EHR.
2. Focus on your staff workflows. Confirm that the new system can load sufficient data from your previous EHR to support the workflows of your staff.

***It is helpful to be aware of and anticipate user-related and technical issues during the transition process. It is also important to understand emerging risks associated with EHR switches.***

3. Create an internal implementation team consisting of "power users," strong project managers, and interprofessional team members.
4. Change one system at a time. Stagger transitions between systems to allow the staff to assimilate to one system at a time and avoid the sensation of being overloaded.
5. Be prepared to devote significant staff time. Expect chart prep time to take longer until the entire EHR is fully migrated. Confirm the accuracy of data that is mapped automatically and verify data that has to be manually inputted.
6. Be patient. There will be resistance to change. Count on your "power users" to assist with training and review work completed.
7. Make training a priority. Training must be mandatory for a successful data migration. Try to relieve "power users" with reduced clinical duties to assist more with the transition.
8. Schedule regular communication with the new EHR provider. Consistent meetings and troubleshooting can reduce the duration of issues and shorten the transition period.
9. Measure revenue. Completing a financial reconciliation can be a good early indicator if the new EHR adoption was successful or if workflows need to be modified.
10. Minimize time using multiple EHR systems. Eliminate ambiguity about which EHR is the "system of record." This can reduce patient safety errors and minimize revenue losses. Announcing a planned "go-live" date can help delineate when the new EHR is the "system of record" and the previous EHR system is to be used in "read-only" or "historical reference" mode.

The transition to a new electronic health record is a complex process that requires coordinated communication among your practice leadership, staff members, health information technology services, and the new EHR provider. It is helpful to be aware of and anticipate user-related and technical issues during the transition process. It is also important to understand emerging risks associated with EHR switches. Addressing these potential liabilities with your new EHR vendor early can help your practice create proactive risk-prevention strategies at each phase of the EHR adoption process and execute a successful transition.

An excellent resource is *The Office of the National Coordinator for Health Information Technology Health IT Playbook*, which can be found at **https://www.healthit.gov/playbook/**. ■

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