

Medical Litigation Newsletter - December 2012 Edition

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Illinois State Law on Original Medical Record Retention

By: Dawn A. Sallerson

Like most states, Illinois addresses how long health care providers must store medical records statutorily. Also like most states, those statutes have not changed much to reflect the reality of electronic medical record keeping. However, Illinois law has two unique features that justify retaining the original medical record in its original format, even if that format is paper and the medical office is going paperless. First, there is at least one regulation in Illinois specifically mentioning “original medical records” as opposed to just “medical records.” Illinois also is one of the few states that recognize a claim for the negligent spoliation of evidence. For these two reasons, practitioners should err on the side of caution and retain their original medical records for at least 10 years, and longer with notice of pending litigation.

Inadvertent Disclosure: New Rules in Illinois Supreme Court

By: Steven M. Puiszis

The Illinois Supreme Court recently announced two new rules that may impact medical litigation in Illinois. The first is Supreme Court Rule 201(p), which creates a procedure for asserting the protection of attorney-client privilege or the work-product doctrine over information inadvertently produced in discovery. The rule is modeled on Fed. R. Civ. Pro. 26(b)(5)(B). The rule specifies that once the party asserting a claim of privilege or work product

over inadvertently produced information notifies other parties about that claim, the parties that received the information must return, sequester or destroy the information and any copies. The rule further provides that any party who received the inadvertently produced information may not use or disclose the information until the privilege or work product issue has been resolved, and must take reasonable steps to retrieve the information then in the possession of any third parties. The rule also permits the party that received the information to promptly present that information under seal to a court for a determination as to whether the privilege or work product protection was waived under the circumstances presented.

Hinshaw Representative Matters

We are pleased to report the following:

Dawn A. Sallerson Partner in Hinshaw's Belleville, Illinois, office and Hinshaw Legal Nurse Consultant, Kara Miller, represented an OB/GYN in a case involving postoperative bleeding after a hysterectomy, which plaintiff patient contended almost resulted in her death. The case was tried in St. Clair County, Illinois. The patient had various comorbid conditions, which became the focus of claimed damages along with residual right lower quadrant pain. The patient contended that the drop in her hemoglobin, vitals, and other hemodynamics were proof of internal bleeding at the time of closure or were, at a minimum, evidence that her condition following surgery was not timely diagnosed and treated. The defense presented an OB/GYN physician to defend the surgical technique and a cardiologist/internal medicine physician to dispute the claimed damages and delayed diagnosis. The defense experts testified that the preoperative lab value was falsely elevated and a portion of the drop in hemoglobin value was a result of chronic diuretic use and hemodilution from IV fluids. The jury returned a verdict of not guilty in favor of the OB/GYN.

Jill M. Munson, attorney in Hinshaw's Milwaukee office, successfully defended a dermatologist against claims that he failed to timely diagnose a malignant melanoma and failed to inform the patient a second biopsy could have been performed. The case was tried to a jury.

Michael F. Henrick, Partners in Hinshaw's Chicago office, obtained a defense verdict on behalf of a treating physician in a medical malpractice case. The case involved an alleged sexual battery and intentional infliction of mental distress by the treating physician. The doctor's employer was also a defendant and was alleged to have engaged in negligent supervision. It was tried in Lake County. The jury was out for approximately one hour.

Kevin J. Burke and Chad D. Kasdin, Partners in Hinshaw's Chicago office, obtained a defense verdict on behalf of defendant urologist in a case tried in Cook County, Illinois. The urologist had performed a laser prostatectomy on plaintiff patient. Following the procedure, the patient began to experience urinary incontinence, which led to the surgical placement of an artificial urinary sphincter. The surgery had to be repeated a few months later due to mechanical failure of the device. The patient claimed ongoing urinary leakage requiring diapers and pads in addition to depression. The jury deliberated for approximately 90 minutes before rendering its verdict.

Rhonda Ferrero-Patten, a Partner in Hinshaw's Peoria, Illinois, office represented the defendant neurosurgical resident physician, who was alleged to have failed to recognize developing spinal epidural hematoma following a surgical repair of a T6 burst fracture with instrumentation that allegedly resulted in paraplegia 14 hours after the procedure. Hinshaw argued that the resident physician met his standard of care and that the paraplegia was caused by something other than a spinal epidural hematoma. Plaintiff patient has since been confined to a wheelchair. The patient sought \$15 million in damages. The hospital at which the resident physician was working at the time of the incidents paid \$7.5 million dollars after the jury was selected. A jury returned a not guilty verdict in favor of the resident physician.

Thomas R. Mulroy and Diane E. Webster, Partners in Hinshaw's Chicago office, tried a wrongful death medical malpractice case in Cook County. Defendant nephrologist had been managing a patient on anticoagulant medication as an inpatient at a hospital. On the day of discharge, the patient suddenly went into a violent seizure and was diagnosed with a massive subarachnoid hemorrhage. Plaintiffs argued that the nephrologist was negligent because he had been contacted the evening before by a nurse, advising him that the patient was complaining of a severe headache despite having been given morphine and several vicodin pills. Plaintiffs argued that this fact, along with the fact that the patient's anticoagulation levels were over the therapeutic limits, meant that the standard of care required an emergency CT scan and neurology consult to rule out the beginnings of a subarachnoid bleed as the cause of this headache. Plaintiffs asked the jury for \$7.7 million. The jury returned a verdict of not guilty.

Kevin J. Burke and Diane E. Webster, Partners, in Hinshaw's Chicago office, represented an internist in a medical malpractice action involving an alleged failure to timely diagnose and treat a spinal hematoma in a 61 year old female after undergoing a femoral popliteal bypass graft surgery rendering her paraplegic. Plaintiff specifically alleged the internist was negligent in relying on medical advice given by a neurosurgeon over the telephone, rather than transfer the patient to a hospital where a neurosurgeon could perform an in-person consultation which would have necessitated immediate neurosurgery to evacuate the hematoma. Due to the multiple defendants' alleged negligence, the patient became paraplegic, wheelchair-bound, and subsequently had both legs amputated. The patient also suffered bilateral pulmonary emboli and required placement of a permanent suprapubic catheter. After 3.5 weeks of trial, the plaintiff asked in excess of \$21 million and the jury returned a not guilty verdict in favor of the defendants.

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