

Transcript Details

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ReachMD

www.reachmd.com
info@reachmd.com
(866) 423-7849

E-Discovery Protection: Insurance Coverage & Electronic Records

POLICY COVERAGE THAT PROTECTS HEALTHCARE PROVIDERS AGAINST THE COST OF THE E-DISCOVERY

As physicians, we are constantly worried about getting sued, but guess what there is a new risk associated with the cost of litigation and that is complying with electronic discovery request made as a result of a claim or litigation. I am Dr. Larry Kaskel and this is Business of Medicine, and my guest today is Mr. Patrick Odoherly, Vice President of Pro-Assurance, a medical malpractice insurance company and we are going to discuss policy coverage that protects healthcare providers against the cost of the E-discovery and why that exposure is not necessarily covered by a professional liability or malpractice coverage.

Dr. KASKEL:

Mr. Odoherly, welcome to the show.

Mr. ODOHERTY:

Thank you, Dr. Kaskel.

Dr. KASKEL:

Well, I had never heard of this before and I am a little disheartened. I pay 10s of thousands of dollars for medical malpractice. I have some colleagues that pay 100s of thousands of dollars for medical malpractice and I am now learning that we are not even fully protected. What is E-Discovery?

Mr. ODOHERTY:

That is a good question? E-Discovery stands for electronic discovery and as the defined with an our policy, E-Discovery means the process of collecting, reviewing, preparing and producing electronic data and documents as required in a formal legal or regulatory proceedings.

Dr. KASKEL:

All right. So 10 years ago, did that exist? And you know did you acquire data then?

Mr. ODOHERTY:

Not really 10 years ago, if you remember if you had alawsuit, you would have copied your medical records and sent them off to your defense counselor and the cost associated with copying those medical records.

Dr. KASKEL:

Was that covered?

Mr. ODOHERTY:

No, that was not a reimbursable cost under the policy.

Dr. KASKEL:

Interesting. Did not know that either. All right so it would seem to me that E-records would be less expensive because all I have to do is print and send, but apparently it is not that easy.

Mr. ODOHERTY:

Yes, you have preservation requirements and all kinds of other issues to deal with in that process and that is what makes it very complex.

Dr. KASKEL:

What happened in December 2006 that kind of changed everything?

Mr. ODOHERTY:

Well, the federal rules of civil proceedings was modified to include electronic discovery rules and it was at federal level and understand I am not an attorney.

Dr. KASKEL:

But you play one on TV?

Mr. ODOHERTY:

Right, but you know in each state, there are several states that have adopted their own specific rules and there are many other states working on rules. So you may end up with several different versions of the E-Discovery very soon which we have to comply with.

Dr. KASKEL:

And does Pro-Assurance cover numerous states or use as a one state you are more popular in?

Mr. ODOHERTY:

We have a footprint of the Mid-Atlantic States on down and then up through the mid-west as really our core states and we operate in several different states.

Dr. KASKEL:

Is there some consistency for you guys or is every state right now kind of trying to figure it out?

Mr. ODOHERTY:

I think the best answer is every state is trying to figure out right now.

Dr. KASKEL:

All right, so I guess I can assume that my current policy because I never heard of this does not have E-Discovery coverage. Is that a safe bet to assume?

Mr. ODOHERTY:

No, that is not probably not a safe bet. It is interesting because it depends on how it is done. If it is done by direction of your defense firm, then it is covered of that. It is not specifically excluded in that now, policies at this point. It is still kind of an unknown from that perspective, so if you copy the records, the time and effort that you spend yourself would not be covered, but if somebody came in at direction of the defense attorneys then arguably that would be covered, but it would be up your own carrier to decide whether or not they were going to basically provide that service.

Dr. KASKEL:

So, I should call my carrier obviously and say do I have this coverage and if I do not have the coverage, what typically does the fees run to get everything copied? How much money we are talking about? You know about estimates, in a very small case where the patient was only seen 3 times, so is there not many medical records.

Mr. ODOHERTY:

No that is not. It is usually not your core system that is a problem, it is the E-mails and where the data resides outside of your main system that tends to be the problem. For example, you may have a PDA or a cellphone that was not preserved at the point of litigation and they may find access to that in the future and the date it does not exist because it has been deleted and then you have not complied with the initial request.

Dr. KASKEL:

Interesting. Now if I have a fully electronic medical record and every communication is documented in there, am I in better shape?

Mr. ODOHERTY:

You are in better shape, but at the same point of time, for example, if you went in a looked at the record prior to a deposition, you will modify the meta data of the record at the moment you go into look at it. The point that you modified that meta data you have basically destroyed the evidence as far as code is concerned.

If you have just tuned in, you are listening to Business of Medicine on ReachMD. I am your host Dr. Larry Kaskel. My guest today is Mr. Patrick Odoherly, he is a Vice President of Pro-Assurance, which is primarily a medical malpractice insurance company and we are talking about E-Discovery and whether or not we are covered with our current policies or not?

Dr. KASKEL:

Patrick, let us say I want to get a policy and I do not have it, how much will the policy cost just really to cover that particular item?

Mr. ODOHERTY:

That is a good question. It is rated based on individual providers for the small groups. From that perspective, we look at basically a starting premium of the \$1000 per individual provider and that provides a \$25000 dollar per the request limit with the \$75000 aggregate.

Dr. KASKEL:

Is that number usually enough to cover them?

Mr. ODOHERTY:

In a fairly average practice, yes. When you get into questions that pop up are going to be for example, if you have a homegrown E-mail system, then obviously it becomes a lot more expensive, but for a typical physician practice, that is probably adequate. Healthcare facilities obviously much larger systems than all those who had been written on an account specific basis. So that is priced basically on the systems that we really have to do a consultation and in-depth consultation with the organization to find out the systems that they have and how those systems interact.

Dr. KASKEL:

I am hoping there are many physicians out there listening to this show and they go and they look at their policy, so when we do look at our policy, what is the fine item print we should be looking forward to see if we are covered for the discovery costs?

Mr. ODOHERTY:

Another excellent question. I think you are probably not going to find anything specific in the policy. The good news is you probably will not find a specific exclusion for the cost. If you did find a specific exclusion for the cost, then obviously you would have a big problem.

Dr. KASKEL:

Patrick, as I listen to you, I am thinking that perhaps it is not a very good idea to let any employee use their personal E-mail at work.

Mr. ODOHERTY:

Yes, that is true. You need to have written policies and procedures about E-mail, text messaging, cellphone use; even some drive access the systems can create major problems.

Dr. KASKEL:

They all do it Patrick.

Mr. ODOHERTY:

I know they do. That is really why we jumped on this.

Dr. KASKEL:

You know, I would like to have a policy, an umbrella policy just to cover my employee although screw things out.

Mr. ODOHERTY:

Well, that is kind of what this does. I mean that is an excellent point and this covers more than just medical professional liability. This covers any request for electronic records that comes in for your practice. Regardless it could be point of practices case, it could be even a divorce proceeding that the physician is going through where the wife wants access to the business systems. Our idea is that we want to protect the physician at every stage of the game, so that there is no inadvertent HIPPA violations or anything from the inadvertent disclosure of the information in other than medical professional cases as well.

Dr. KASKEL:

Do you know if anyone besides Pro-Assurance is offering this?

Mr. ODOHERTY:

No, we are the first at this moment in time.

Dr. KASKEL:

Congratulations.

Mr. ODOHERTY:

Thank you, Sir.

Dr. KASKEL:

Is there a way that I cannot have to buy this extra insurance and self insure as if I was to do a self-insurance malpractice fund, you know with a group of other physicians?

Mr. ODOHERTY:

Yes, and you know you could self insure. The question would be you would have to go out and find your own E-Discovery vendor and make sure that that was the right E-Discovery vendor and you have to set your own policies and procedures. You would have to lock down your systems, your cells or you would then have to copy the data as it exists and what is called there is a thing called _____ software, which will actually copy documents without opening them and again that is the preservation of the meta data that you are required to preserve at the moment of potential litigation. So this is in just when the sue papers arrive. This could be that you had a bad outcome on the surgical table yesterday and you think that you may end up in a lawsuit; at that point, you really are obligated to start locking all these records up and preserving them.

Dr. KASKEL:

Do you give any sample policies to doctors who purchase these policies?

Mr. ODOHERTY:

Yes, absolutely. And likewise, I want to point out to that one of the key aspects of this coverage is the risk management piece. So we provide a lot of proactive risk management. We help give you very generalized policies and procedures. That what you should do if you have thumb drive use that all has to be preserved as well. There is an interesting situation that popped up at a Virginia Hospital where the residents were using thumb drives to go home and work on patient records at night. When the got in litigation, you know the system will show that the thumb drive access the system at a certain time and who accessed it. Unfortunately, the residents were throwing the thumb drives away when they were done with them, which created a whole cyber liability risk but we won't touch on that right now, but it

is when the litigation came up, they could not produce the thumb drive. So they got what is called a negative inference from the court, which basically says whatever the point of says is on that thumb drive is on that thumb drive. That is not the situation I do not think we want any of our physicians to ever be involved in.

Dr. KASKEL:

It really sounds like we should all get out of this business. It is getting crazy. There is nowhere to hide anymore. Not that we need to hide, but it is just everything is potential risk, everything.

Mr. ODOHERTY:

Yes, and we hope our product helps you know alleviate that concern by physicians, but that is obviously not anything that is going to be good for society.

Dr. KASKEL:

Patrick, how are sales going and had you go about even getting the word out? Did you send the letters out to all your customers and say this is a new service we are offering. Would you like it? Or do you just roll into their next premium when they sign up again?

Mr. ODOHERTY:

It is still relatively a new product. So we have not finished the full marketing piece yet. We are going to roll that out very soon, probably within, hopefully by the end of this month and then we will do a big push on the coverage at that point, but we will be very thankful to get access to you this early in this process.

Dr. KASKEL:

Do you have any sample cases or something you can throw out to scare us a little and say well you know I know this one case where we did this and the doctor had to pickup the tab for another you know \$100,000.

Mr. ODOHERTY:

You know, I tell you the big ones when you look at E-Discovery as an issue, you have the Morgan Stanley case, which is you know 1.2 billion dollars in sanctions alone there is actually a Zurich case regarding the World Trade Center where they claim they did not name specific organization as name insured on their insurance policy and through the E-Discovery they determined that policy was actually printed out on September 11 and then modified. Now they got sanctioned and the law firm got sanctioned around 1.25 million in just sanctions for not producing that document. So those are the kind of the scary real world cases. There is actually an anesthesiology case down in Florida where the anesthesiologist quoted 4 minutes into the procedure that he attended the full procedure and that in combination with missing 90 minutes of vital signs in the system was enough to bring that case to settlement. So the plaintiff attorneys look at this is kind of a panacea to get the settlement. They want to find the missing information seen.

DICTATION ENDS ABRUPTLY.