



## Kentucky court allows on-site inspection of electronic medical records in malpractice case

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A federal magistrate judge in Kentucky recently ordered Deaconess Health System (Deaconess) to allow a plaintiff in a medical malpractice case to perform an on-site inspection of Deaconess' electronic medical records (EMR). Deaconess, which uses Epic Systems as its EMR vendor, must also provide the plaintiff with an audit trail of the records at issue. (*Borum v. Smith*, W.D. Ky. No. 4:17-cv-17, 2017 U.S. Dist. LEXIS 109249 (July 14, 2017)).

The plaintiff is the Administratrix of the Estate of Nicole Borum. Dr. Jung Wook Kang Smith prescribed an antidepressant to Ms. Borum three weeks before she committed suicide. The plaintiff claims that the defendants failed to closely monitor Ms. Borum's condition despite a product warning that the antidepressant could increase the risk of suicide in young adults, and thus close supervision was required. The plaintiff argued that an on-site inspection of Ms. Borum's EMR is necessary for the plaintiff to thoroughly depose Dr. Kang Smith.

In ordering an on-site inspection, the court rejected the defendants' claims that the inspection would violate Deaconess' software licensing agreement with Epic, the Copyright Act and HIPAA. The court held that an in-person inspection was necessary to enable the plaintiff to develop a complete understanding of Ms. Borum's medical record as it exists within the EMR system.

The plaintiff also requested an exact electronic copy of Ms. Borum's medical records in native format as well as an audit trail. Deaconess contended that providing a native copy is technically impossible, so the court ordered Deaconess to instead provide the plaintiff with a printout of the entire audit trail.

It is unclear why an on-site inspection is necessary if the plaintiff receives a complete audit trail. The court did not specifically address this issue.

However, the court drew the line at the plaintiff's request to create an EMR for a hypothetical test patient. The purpose of discovery is to learn facts that already exist, and allowing the plaintiff to create a test patient and populate the EMR with hypothetical information would instead create new facts that did not exist at the time of Ms. Borum's treatment. The court also said that Deaconess is not required to make the EMR available during Dr. Kang Smith's deposition because doing so would be potentially burdensome or harassing.

This decision raises questions about the scope of discovery and when a request to inspect an EMR is overly burdensome for providers.

# Authors

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