Toxic Fallout from EMR's
or
Audit Trail Nightmares

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Overview

- Move to focus on discovery as a weapon
- Numerous areas for problems both procedurally and factually
- Offensive and defensive strategies

Safety Rules / Reptile In Action

Danger Areas

Electronic Medical Record

- Complicated
- User error opportunities
- Audit trails
- Spoliation issues if not explained

Requests for Production for EMR

- What is the “official record” of care?
- Phillips v Harmon, 297 Ga. 386 (2015) acknowledged there is one but did not define it in holding preservation of parts of documents NOT part of chart required
- Is the audit trail part of the information covered by a request?
- Look to OCGA 9-11-34(a)

OCGA 9-11-34(a)

- (a) Scope. Any party may serve on any other party a request:
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- (1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (*including* writings, drawings, graphs, charts, photographs, phono-records, and *other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form*), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of subsection (b) of Code Section 9-11-26 and which are in the possession, custody, or control of the party upon whom the request is served

So what is an audit trail?

- For layperson, a record of changes made to a database
- Data that NEVER disappears
- For an EMR, it reflects every entry and change including the time a caregiver made a note
- From that standpoint alone, defense needs to know what audit trail says BEFORE testimony given so witness won't impeach self
- Examples: MD in chart misnamed by another care provider; MD thinks only saw part of record; RN charting with another's password

Get request for audit trail—now what?

- Make sure request is clear on which trail(s) sought
- Type of EMR system(s) in use
- How equipment works and records
- Regulations on data required to be kept
- Policies and Procedures that impact record

Objections to Production

- Overly broad and unduly burdensome? To retrieve data? Really?
- Work product, trial prep, atty/client and peer review: REALLY
- Understand what producing—get help from IT and don’t just rely on risk or what think is audit trail
- Make redactions—suggest cut off any entries after discharge UNLESS actual care record changed

30(b)(6) Witnesses

- Several could be required
- Inexperienced and focused IT personnel
- Numerous and detailed topics
- Chance to show not interested in care
- Medical knowledge/care delivered irrelevant
- Retain outside expert if needed

Production never enough

- Plaintiff files motion to compel ALL audit trails and for sanctions
- Why required early focus on limiting plaintiff inquiry up front
- Need be able explain why cannot get all or why not produced all—focus on language of request
- Again, GET OUTSIDE HELP from experts on system if need be
- Hospitals are not IT companies and are prone to errors like any individual

Spoliation-the worst of the worst

- Phillips v Harmon—held that hospital had spoliated evidence by throwing away per routine fetal monitoring strips with RN notes evne though not part of chart
- Under unique circumstances of brain damaged baby, should have kept
- Can expect similar argument with data and audit trails
- Need know what evidence have of system failure due to program creator

Evolving area of discovery

- Old school requests do not match current technology
- Need educate court including use of live witnesses if need be at hearings
- Go on attack as soon as get request for trail and force plaintiff to ID which program and which type of data for audit trail plaintiff wants (be careful—make sure you know what you do have)
- Make sure you know what you are producing
- AND HANG ON!!!