Hoppin' Down the EMR Audit Trail

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The recent discovery trend in medical malpractice litigation is to not only request a copy of the patient's medical record, but to also request the defendant's electronic medical record (EMR) "audit trail," which can show a true history of the chart entries including the identity of persons who have reviewed its information. In some instances, the EMR's audit trail is as highly scrutinized as the care rendered to the patient. Before producing the audit trail, several issues should be answered.

What Is the Relevance of the Information in the Audit Trail?

In the few cases reported, the issue of "relevance" is the first logical step in determining whether the audit trail should be produced. The two successful arguments for audit trail production are (1) to prove an alteration when the information within the patient's record is suspect, as in Bentley v. Highlands Hospital, 2016 U.S. Dist. LEXIS 23539 (U.S.D.C., E. Dist. KY) (Feb. 23, 2016) and Vargas v. Youssef, 2015 N.Y. Misc. LEXIS 2176, 2015 NY Slip Op. 31048 (U) (Sup. Ct. Kings Cty., June 10, 2015), and to establish the receipt of medical information by others. Gilbert v. Highland Hospital, 2016 N.Y. Misc. LEXIS 1672; 2016 NY Slip Op 26147 (March 24, 2016). General requests for the audit trail without more purposeful information may be objected to unless there is a specific reason for the inquiry.

Can a Privilege Apply to Portions of the Audit Trail?

This is an area of potential debate because there is no consensus on the issue. The cases Hall v. Flannery, 2015 U.S. Dist. LEXIS 57454 (U.S.D.C., S. Dist. IL.)(May 1, 2015) and Moan v. Massachusetts General Hospital, 2016 Mass. Super. LEXIS 28 (Mar. 31, 2016) demonstrate the differences in how courts may address this issue. In Hall, the trial court ordered the production of the complete audit trail, which contained embedded information regarding information the peer review committee viewed during a formal review and actions taken by the risk management team once litigation was anticipated. In Moan, the hospital was excused from providing the names of the individuals who investigated the medical care on behalf of the peer review committee. In both cases, privilege was asserted by the defendant with respect to the production of the audit trail.

Arguments can be made for and against the application of privilege to the audit trail. On the one-hand, the audit trail is similar to the chart as "original source" evidence, because it contains the timing of chart entries at the time the care is rendered, which does not carry a privilege. However, practically speaking, an unredacted audit trail that contains information from the peer review or attorney investigation could potentially show where there are concerns, weaknesses or deviations from accepted medical standards

that would not have otherwise been made available.

It remains unclear where Pennsylvania appellate courts will side on this issue, but when it does, it should draw the attention of many interested parties.

Is There a Way to Minimize the Costs?

With electronic discovery, both plaintiffs and defendants share a common interest in managing litigation expenses. Neither side wants to incur significant costs for information that is trivial in retrospect. That being said, lawyers have ethical duties to explore the important issues in a case. The Myers v. Riverside Hospital, 93 Va. Cir. 189 (Cir. Ct. Newport News 2016) case provides a practical and fair example on how to handle the issue of producing an audit trail with information that may or may not assist a patient's case, but results in considerable expense to the defendant.

In Myers, the dispute was not whether the defendant health care provider would produce the "audit trails, metadata, EMR, or other identifiable health information," but how it would be provided. The plaintiffs requested that the defendant load the information on USB drives and provide them to counsel, because they wanted access to the information on their own terms, at any time. The defendant hospital, however, did not want to produce its information on a USB drive due to the expense, and requested that plaintiff's counsel be given access to a computer terminal at one of its locations, at an agreed-upon time.

To compromise, the trial court held that the defendant provide the plaintiff with a good faith estimate of the costs associated to load the information on a USB drive. If the plaintiff believed the estimate to be reasonable, then the defendant would produce the USBs and bill the plaintiff for the costs associated with its production. If the plaintiff felt that the defendant overstated the costs associated with the USB production, a hearing on that issue would be held. The court reasoned, "So long as plaintiff shoulders the expense of preparing the electronic materials in her preferred format, defendant does not incur any additional cost. And if plaintiff so values the ease of accessing the materials at her own convenience, plaintiff must be willing to pay for that right."

Myers represents an example of expense cost-shifting for information that may be difficult, time-consuming and expensive to produce. By shifting the costs of such an endeavor, it compels the requesting party to seriously consider whether the potential gain from the metadata and audit trail is worth the expense in advancing their medical claim. In some instances, it just may not be worth it.

Once the Audit Trail Is Provided, Is It Being Interpreted Correctly?

Once the audit trail is produced, then what? How can the audit trail findings be presented to the jury? The limited precedent demonstrates that qualified expert testimony is required for the jury to consider the information elicited from the audit trail. Simple conjecture or inferences that an EMR record was altered based on a review of the audit trail is not enough, and expert testimony to support that position may be required as in Desclos v. Southern New Hampshire Medical Center, 2006 N.H. LEXIS 101 (July 11, 2006). Like any expert on voir dire, EMR alteration experts who review an audit trail must be properly qualified and use

trusted methodology in coming to their conclusions. Green v. Pennsylvania Hospital, 30 Pa. D & C. 5th 245 (2013), rev'd and rem'd other grounds, 123 A.3d 310 (Pa. 2015).

In Green, the trial court precluded an informatics expert from offering expert testimony regarding EMR alterations. During voir dire, she admitted that she had never worked with the specific EMR system either as a nurse or as an informatics consultant. Further, she had never seen the audit logs generated by this EMR system prior to this case. Lastly, when asked by the court as to how she reached her professional conclusion that the EMR was altered, the expert stated, "I can't give you specifically what was altered, nor by whom. I can only look at what the audit trail shows as people having documented and then trying to track it back to the medical record and not being able to find entries that support that notation in the audit log."

Consistent with well-established legal precedent, the trial court in Green held that the EMR alteration expert must have some prior working knowledge on the specific EMR system in use by the defendant and its particular audit trail. Further, a simple comparison of the audit trail to the EMR chart is not the proper methodology for proving a records alteration based on the complexity of the systems. For a serious allegation of record alteration to be presented to a jury for consideration, it should be based on competent and qualified expert testimony.

Moving forward, all practitioners should keep in mind the relevance of the request and costs associated with the production of the audit trail and other embedded EMR information. Neither side appreciates a goose chase and both sides share the goal of moving a case forward in a cost-efficient manner. Further, if it becomes an issue, do not lose track of the big picture that privilege is important for both sides and its further erosion does not benefit our clients. Lastly, neither party benefits from junk science—make sure your EMR audit trail experts truly know what they are talking about before presenting conclusions to a jury.

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