Outsmarting Smart Technology: Legal Ramifications in the Assisted Living Setting

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ELECTRONIC MEDICAL RECORDS
Basic EMR Concepts

- What are the benefits?
- HITECH Act and electronic medical records
- Goal
  - To improve care and reduce costs by eliminating errors
Basic EMR Concepts

• Impact
  ○ Chart is not what it used to be – can be any combination of text, graphics or other information in digital form, created, maintained, modified, retrieved or distributed via computer
    ✷ Emails (open or deleted)
    ✷ Voicemails
    ✷ Data files
    ✷ Word processing
    ✷ Calendars
    ✷ Wireless text messaging

• Growing digital capacity is leading to creation of digital landfills
EMR Issues

- Improper training / use
  - "Garbage in, garbage out"
    - Users must know how to use system or there will be errors
  - "Power users"
    - Avoid over-reliance on one user to answer questions – their absence could create a void that is hard to replace
  - Disgruntled workers
    - Usually associated with mischief, including identity theft
EMR Issues

- "Login" is the new signature
  - Login will reveal the timing of entries
  - Stress avoidance of entries under another person's login to ensure the record is accurate

- Changes to the medical record
  - No uniform method to make changes because each system is different
EMR Issues

- Metadata
  - Embedded, unseen data tracking **every** keystroke, deletion, change (who, what, when, where)
    - Metadata may be relevant when date, time, entry or source of document is in dispute
    - E-Discovery services / vendors are available to assist parties in identifying metadata issues
    - Delete does not mean "good-bye"
    - Alterations and "after the fact" entries are 100% clear

- System failures
  - What is the backup?
    - Use handwritten notes?
    - How do you integrate handwritten notes once the system is restored?
EMR Issues

- EMR systems not designed with litigation in mind
  - Difficult / expensive to print hard copy of information on the screen
    - In some instances, what is produced on paper looks nothing like what is on screen
  - Evolving EMR systems make it difficult to produce "snapshot" of record as it appeared in the past
    - May need technical support to assist in production of record and depositions to show what record looked like in the past
  - Depositions – will you need to utilize computerized record as opposed to hard copy?
    - Client may not be comfortable with hard copy record and may need electronic record to provide complete response
    - If you utilize the electronic record, you will be educating your adversary on system capability and its limitations
How EMR Systems May Impact Claims

- Corporate Negligence
  - Potential claims
    - Failure to train staff to use system
    - Failure to enforce policies and procedures
    - Unsafe / unreliable EMR system
    - Alteration or destruction of information
Being Prepared for E-Discovery

- Litigation hold letter
- Duty to locate date and preserve data before a legal dispute arises
- Meet early with IT staff to become familiar with document retention policies and computing infrastructure, including obtaining the EMR system vendor information
- Recognize that email, Facebook postings, tweets, blog entries, web site, etc., may be discoverable
Potential EMR Discovery Requests

- Policies and procedures regarding
  - EMR corrections
  - Precautions / data entry if EMR system "goes down"
  - Backup and restoration of EMR data
  - Safeguards to prevent security breaches
  - EMR documentation standards
  - Login and passwords

- Accounting of data points entry

- Who has access to system?

- Vendor information, including contracts, manuals, system updates and product information
Potential EMR Discovery Requests

- Where and how the archived EMR is stored?
- Identity of IT team
- Training confirmation
- Documentation on system maintenance
- List of health care providers with access to system and dates associated with access
- If EMRs are printed, how are the hard copies retained?
Additional Issues With EMR and ESI

- **Software vendor as potential third party**
  - Sales contract issues / negotiated points
  - What can they do to help with electronically stored information (ESI)
  - Do "meaningful use" functions impact ESI handling

- **HIPAA**
  - Non-waiver protective order

- **Security – inspection issues**

- **Cost issues of vendor**

- **Possible need of expert assistance with EMR and ESI**

- **Search terms when accessing documents**
VIDEO SURVEILLANCE
• Cameras monitoring exterior of facility
• Cameras in common areas
• Cameras in residents rooms
  ○ Resident privacy rights
  ○ Interference with private business
SOCIAL MEDIA
Social Media

• New role in discovery and litigation

• In the workplace

• Managing a crisis
Top 10 Social Networking Websites & Forums (as of January 2013)

1. Facebook: 61.8%
2. YouTube: 21.3%
3. Twitter: 1.85%
4. Pinterest: 1.22%
5. Yahoo! Answers: 0.90%
6. LinkedIn: 0.83%
7. Google+: 0.73%
8. Tagged: 0.55%
9. Instagram: 0.37%
10. Tumblr: 0.34%

Source: Experian Hitwise
Facebook Reaches One Billion Users
More than 1 billion active users
552 million daily active users
58% of users return daily
Average user has 130 friends
25% of users don't bother with any kind of privacy control
One out of every seven minutes spent online is on Facebook
250 million photos added daily
Accessed by 7,000 different types of devices every day
More than 1 million websites have integrated with Facebook in various ways
50% of smartphones connect to Facebook every hour of every day
Social Media Usage – Adults

Pew Internet Report: Older Adults and Social Media

Older Adults and Social Media - Social networking use among those ages 50 and older nearly doubled over the past year, Mary Madden, Senior Research Specialist, August 27, 2010: "While social media use has grown dramatically across all age groups, older users have been especially enthusiastic over the past year about embracing new networking tools. Social networking use among internet users ages 50 and older nearly doubled—from 22% in April 2009 to 42% in May 2010.

- Between April 2009 and May 2010, social networking use among internet users ages 50-64 grew by 88%--from 25% to 47%.
- During the same period, use among those ages 65 and older grew 100%--from 13% to 26%.
- By comparison, social networking use among users ages 18-29 grew by 13%—from 76% to 86%."
5 Nurses Fired For Facebook Postings

Nurses Fired From Tri-City Medical Center In Oceanside

POSTED: 7:18 am PDT June 10, 2010

OCEANSIDE, Calif. -- Tri-City Medical Center in Oceanside has fired five nurses for allegedly discussing patient cases on Facebook.

"We recently identified an incident involving hospital employees who used social media to post their personal discussions concerning hospital patients," Tri-City CEO Larry Anderson stated, adding that an internal investigation "yielded sufficient information to warrant disciplinary action."
Nurses Fired Over Cell Phone Photos Of Patient

Case Referred To FBI For Possible HIPAA Violations

POSTED: 5:22 pm CST February 25, 2009
UPDATED: 1:46 pm CST February 26, 2009

LAKE GENEVA, Wis. -- Nurses accused of photographing a patient and posting the pictures on the Internet have been fired.

The investigation started with an anonymous call from an employee at Mercy Walworth Medical Center in Lake Geneva, with the allegation that a nurse took pictures of a patient with her cell phone and posted them on her Facebook page.

Last week, the nurse told 12 News she never posted the pictures on the Internet. Investigators have since interviewed the nurse and said she offered more details.

"There were two nurses that independently took a picture each of an X-ray of a patient," Walworth County Undersheriff Kurt Picknell said.

The patient was admitted to the emergency room with an object lodged in his rectum. Police said the nurse explained she and a co-worker snapped photos when they learned it was a sex device. Police said discussion about the incident was posted on her Facebook page, but they haven't found anyone who actually saw the pictures.

The nurse removed her Facebook page from the Internet last week. Without more, Picknell said this conduct does not appear to violate any state laws. He has referred the case to the FBI.

"We've notified federal authorities of this allegation to see if there are federal violations, most notably HIPAA violations, patient rights," he said.

The hospital did not return a call seeking comment.
OB-GYN under fire for posting patient info on Facebook

Published February 06, 2013 | FoxNews.com

A St. Louis OB-GYN is sparking controversy after she posted negative comments about one of her patients on Facebook, according to various reports.

According to the TheBump.com, a popular website for moms-to-be, Dr. Amy Dunbar of Mercy Medical Center posted the following on Facebook:

"So I have a patient who has chosen to either no-show or be late (sometimes hours) for all of her prenatal visits, ultrasounds, and NSTs. She is now three hours late for her induction. May I show up late for her delivery?"

Critics around the blogosphere are saying Dunbar violated the patient's privacy – even though she never mentions the patient by name.
Client Considerations – Plaintiff or Defendant

- Shut down all social media sites for the duration of the litigation
- Increase privacy settings
- Do not discuss any aspect of the litigation or its participants
- Refrain from inappropriate language or socially questionable activities
- Give your counsel your log in information so your accounts can be monitored
Employee's Use of Social Media

- NLRB's governance of an employee's right to engage in "concerted activity"
- Whom does the NLRB govern?
  - Statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level
  - Health care and child care institutions – hospitals, medical and dental offices, social services organizations, child care centers and residential care centers with a gross annual volume of at least $250,000 are under NLRB jurisdiction; for nursing homes and visiting nurses associations, the minimum is $100,000
Law they enforce gives employees the right to act together to try to improve their pay and working conditions, with or without a union.

If employees are fired, suspended or otherwise penalized for taking part in protected group activity, NLRB will fight to restore what was unlawfully taken away.

These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court.
Section 7

• “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.”
Is the Activity Concerted?

- Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of others.
Does It Seek to Benefit Other Employees?

- Will the improvements sought – whether in pay, hours, safety, workload or other terms of employment – benefit more than just the employee taking action? Or is the action more along the lines of a personal gripe, which is not protected?
Is It Carried Out In A Way That Causes It To Lose Protection?

- Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product or revealing trade secrets, may cause concerted activity to lose its protection.
Restricting Social Media While at Work

- Can employer restrict employee's ability to discuss work issues on social media while at work?
  - If employer allows employees access to social media while at work, then it's not likely that discussions about working conditions can be prevented.
  - If, however, employer prohibits use of social media at work, then yes, discussions about working conditions on social media while at work can be deemed violative of employer policies.
Social Media Crisis Management Plan

- Designate who will monitor
  - If you are online, you must monitor online
    - Facebook
    - LinkedIn
    - Twitter
    - YouTube
    - Blogs
  - Ning
  - MySpace
  - Flickr
  - Google+

- Tip: Google alerts has free tools
Social Media Crisis Management Plan

- Designate who will respond
  - Who will physically put up a response
  - Who will be the person "speaking"
  - Does the responder have access to passwords and social media accounts
Social Media Crisis Management Plan

- Responder must have technical directions for adding an urgent message to your web site home page
- Urgent message feature on your site should be accessible from any remote Internet location
- Responder should have the ability to review the rest of the content and photos and remove in case it is no longer appropriate in light of the crisis event

GUARD THIS PROCEDURE VERY CAREFULLY AND DO NOT ALLOW UNAUTHORIZED PERSONS TO HAVE ACCESS TO IT
Social Media Crisis Management Plan

- Spokesperson should be:
  - Comfortable in front of television and reporters
  - Skilled in identifying key points, knowledgeable about organization and crisis
  - Able to establish credibility and sincerity
  - Able to answer questions
Social Media Crisis Management Plan

- Designate a prepared response
  - Do you have a 140 character tweet to reply to social media wildfire?
  - Do you have approved messaging?
  - Do you have an account or microsite or Frequently Asked Questions page that can be updated quickly?
  - Do you have the ability to:
    - Get a video from CEO on YouTube
    - Embed a message or video on your Facebook page
    - Tweet at any time
Social Media Crisis Management Plan

- Tone of response
- Thank you for pointing out "problem"
- Polite, personal, do not escalate
- Invite to contact you offline
- Acknowledge the issue and its resolution
- Thank them for their feedback
  - People complain less if they feel like they were heard
- Explain action you are taking and take it
- Check back with the customer
- Key is honesty, transparency
- Not the mistake, but how it is handled
What to Include in a Crisis Statement

• Four R's
  - Regret – shock and sadness
    ✷ Primary concern is for those affected
  - Reform – intention to work closely with investigating authorities
    ✷ Promise to provide additional information when it becomes available
  - Restitution – what can be done
    ✷ What are you doing? (expenses for medical or other tragedy-related costs, on-site care, tickets to return)
  - Reassure – statement about your commitment to safety
    ✷ Mission statement
Social Media Crisis Management Plan

- Designate what should be removed
  - Removal of posts may cause worse public backlash
  - Removal of lewd comments against employees or customers can be removed as public backlash would be unlikely
  - Deleting negative comments rather than addressing them (or faking positive) will only escalate attention to the negative
  - Poor taste in advertising should be removed if public backlash and properly addressed
10 Point Overview
Social Media Crisis Management

1. Have a plan
2. Have designated look out
3. Have a designated responder or response team
4. Have a designated ready response to situations
5. Determine what to remove
6. Determine if you need a response
7. Determine where to respond
8. Have a policy
9. Keep up on the law
10. Implement fairly
EMAIL
• Discoverable
• Retention policy
• Automatic deletion
• Preservation after incident
BRING YOUR OWN DEVICE "BYOD"
Company Owned/Provided Devices

- Employer's monitoring
- Notice to employee
  - INSERT MDWCG LOG ON WARNING
BYOD

- Mandate a security policy for all devices
  - Mandatory passwords
- Define the relative ownership of information on the device
  - Right to wipe company device in event device and information is compromised
BYOD

- Define an acceptable use for the device
  - Questionable applications
- Develop an exit strategy
  - Procedures for when an employee separates from the company
THANK YOU

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