

New York Law Journal

Technology Today

WWW.NYLJ.COM

VOLUME 261—NO. 87

An **ALM** Publication

TUESDAY, MAY 7, 2019

State E-Discovery

Audit Trail ‘Meta Data’ Leaves Tell-Tale Signs in Medical Malpractice Actions

By
**Mark A.
Berman**



An audit trail of an electronic medical health record “shows the sequence of events related to the use of a patient’s electronic medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records” (*Vargas v. Lee*, 2019 N.Y. App. Div. LEXIS 2071, 2019 NY Slip Op 02142 (2d Dep’t March 20, 2019)) and hospitals are required to maintain them under federal and state law (see 45 CFR 164.312[b], 10 NYCRR 405.10[c][4][v]). Audit trails can thus be the “silver bullet”



SHUTTERSTOCK

for a plaintiff or a defendant depending on the facts of the case.

Just as the 2018 decision by the New York State Court of Appeals in *Forman v. Henkin*,

30 N.Y.3d 656 (2018), made clear that the rationale for allowing “liberal discovery” of social media “encourages fair and effective resolution of disputes on the merits, minimizing

MARK A. BERMAN is a partner at Ganfer Shore Leeds & Zauderer and chair of the New York State Bar Association’s Committee on Technology and the Legal Profession.

the possibility for ambush and unfair surprise,” recently the Second Department in *Vargas* held that such policy equally applies to the production of an audit trail of a patient’s electronic medical health record. Courts are requiring the production of audit trails when they are relevant to a discrete time period, the “timing” of medical treatment and/or gaps or inconsistencies revealed by medical records. Critically, in *Vargas*, recognizing the evidentiary necessity to properly authenticate medical records at trial, the Second Department also noted that disclosure of an audit trail may be needed to assist in the preparation for trial by enabling “counsel to ascertain whether the patient records that were eventually provided to them were complete and unaltered.” Counsel for both plaintiffs and defendants need to heed the guidance provided in *Vargas*.

In *Vargas*, plaintiffs contended that since the allegations of medical malpractice included “the failure to timely and properly diagnose and treat plaintiff’s medical complications following surgery, the requested portion of the audit

trail was relevant to the timing and substance of plaintiff’s care following surgery.” After specifically noting that “plaintiffs’ request was limited to the period immediately following the injured plaintiff’s surgery,” the Second Department held that “the requested audit trail

Courts are requiring the production of audit trails when they are relevant to a discrete time period, the “timing” of medical treatment and/or gaps or inconsistencies revealed by medical records.

was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the post-operative care that was provided to the injured plaintiff.”

In *Miller v. Sauberman*, 2018 N.Y. Misc. LEXIS 5954, 2018 NY Slip Op 33142(U) (Sup. Ct. N.Y. Co. Dec. 4, 2018), defendants would not produce the audit trail and “meta data” concerning plaintiff’s patient health records, “identifying each user entering, making, editing,

viewing, printing and otherwise acting upon plaintiff’s medical record.” Plaintiff contended that “meta data” was “important and relevant to ascertain the identity, source and timing of the changes that were made to plaintiff’s medical record,” as there were multiple versions of the medical records that contained conflicting entries for the same items on the same record for the same days.

The motion court ruled that plaintiff “made a sufficient showing for the production of metadata as defendant has yet to provide a credible explanation for the different and conflicting versions of plaintiff’s medical record.” The motion court further noted that, while the audit report was intended to show “all edits, changes, or modifications to any single record” from May 8, 2014 through April 10, 2018, “the report produced no changes or modifications.” Thus, “[u]nder these circumstances, where there is no explanation for the different and conflicting versions of plaintiff’s medical record, and where the issue as to when plaintiff developed bed sores is clearly material to

plaintiff's malpractice claim," the motion court ruled that concerning a limited period, "plaintiff is entitled to the metadata for his medical record to determine if the medical record was altered, and if so, when and by whom."

In *Dennehy v. Harlem Hosp. Cent.*, 2018 N.Y. Misc. LEXIS 4370, 2018 NY Slip Op 32496(U) (Sup. Ct. N.Y. Co. Oct. 2, 2018), plaintiffs contended that because their allegations were premised on "defendants' failure to properly and timely diagnose and treat Mrs. Lam, and because the hospital records exchanged by defendants are missing entries and show significant gaps in time, the audit log would reveal the timing of Mrs. Lam's treatment, which providers made the entries, and when the records were accessed and by which providers." In opposition, defendants asserted that "neither Dr. Clark's testimony nor the records suggest that Dr. Clark revised the notations of other medical personnel, that Dr. Clark's notes were improperly or erroneously altered, or that Dr. Clark's treatment of Mrs. Lam as set forth in the medical charts would be compromised

or contradicted by any audit information or metadata."

The motion court thus found that plaintiffs "have not laid a proper foundation in support of the belief that there are entries and notations missing from Mrs. Lam's medical records and Dr. Clark's notes, or that there is information contained within the metadata of Mrs. Lam's records that would account for any 'significant gap' in time in Mrs. Lam's treatment at Harlem Hospital on August 1, 2016." The motion court noted that "[p]laintiffs have also failed to allege or demonstrate that Dr. Clark or any other medical personnel revised, deleted, or doctored Mrs. Lam's medical data, or that any notations or entries, or lack thereof, differs from or contradicts the information contained in the medical records previously provided to plaintiffs or elicited at defendants' depositions."

However, the motion court ruled that "to the extent that such information may be relevant to defendants' alleged failure to timely diagnose and treat Mrs. Lam, plaintiffs' request may be material and germane to the issue of liability in this

case." The motion court further found that "plaintiffs' request may not be overly broad or unduly burdensome since the records requested reference a relatively short, finite period of time." Lastly, the motion court noted that "defendants' concern that the audit trails may implicate attorney-client work product or other confidential privileges can be resolved through a redaction of logs and entries that contain such information." As such, the motion court held that "in light of all relevant facts and circumstances, defendants are directed to submit the audit trails or metadata for Mrs. Lam's August 1, 2016 medical records for an *in camera* inspection by the court within 30 days of this order."

Reprinted with permission from the May 7, 2019 edition of the NEW YORK LAW JOURNAL © 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-05-19-07

GS Ganfer Shore
LZ Leeds & Zauderer LLP

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com