

## TRENDS IN ELECTRONIC DISCOVERY: AUDIT TRAILS, SOCIAL MEDIA, AND WEARABLES

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### RESOURCES AND MATERIALS

#### AUDIT TRAILS

- Pertinent Caselaw (attached)
  - *Borum v. Smith*, No. 4:17-CV-17-JHM, 2017 WL 3014487 (W.D. Ky. July 14, 2017)
  - *Bentley v. Highlands Hosp. Corp.*, No. 7:15-CV-97-ART-EBA, 2016 WL 762686, (E.D. Ky. Feb. 23, 2016)
- Helpful statutes and regulations:
  - Regulations related to audit trails:
    - 45 C.F.R. 164.312(b) (covered entity must implement mechanisms that record information system activity)
    - 45 C.F.R. 170.210(e) (incorporating by reference ASTM E2147-18); see also 45 C.F.R. 170.315(d) (setting forth minimum requirements for audit trails, requiring a record of the patient, user, data accessed, date and time of access or activity, and the type of action (such as a change or deletion))
  - Does Kentucky law entitle a patient to access his or her audit trail?
    - KRS 422.317 (upon request, provider must provide one free copy of the “patient’s medical record”)
    - 902 KAR 20:016 § 3(11)(f) (defining medical record)
  - Does federal law entitle a patient to access his or her audit trail?
    - 45 C.F.R. § 164.524(a) (HIPAA’s right of access)
    - 45 C.F.R. § 164.501 (defining the designated record set)
    - 45 C.F.R. § 160.103 (defining protected health information)
    - See Paul Tang, Vice Chair, HIT Policy Committee, Letter to Karen DeSalvo, National Coordinator for Health Information Technology, Department of Health and Human Services (January 22, 2014), [https://www.healthit.gov/sites/default/files/facas/PSTT\\_Transmittal010914.pdf](https://www.healthit.gov/sites/default/files/facas/PSTT_Transmittal010914.pdf) (HHS has specifically declined to extend to patients an

automatic “right of access” to their audit trails as part of its rulemaking process)

- For further reading:
  - Sarah Clark and Grant Grissom, “Discovery in Medical Negligence Cases: Requests for Audit Trails and Metadata,” *Common Defense*, Spring/Summer 2021
  - Chad Brouillard, *Further Evolving Trends—Electronic Health Record Liability*, 58 DRI FOR THE DEF. 80 (August 2016)
  - Peter Garrett and Joshua Seidman, *EMR vs. EHR – What is the Difference?*, HHS’S OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH INFORMATION TECHNOLOGY HEALTH IT BUZZ BLOG, (January 4, 2011), <https://www.healthit.gov/buzz-blog/electronic-health-and-medical-records/emr-vs-ehr-difference>

## SOCIAL MEDIA

- Pertinent Caselaw:
  - *Thompson v. Coleman*, 544 S.W.3d 635, 639 (Ky. 2018) (affirming trial court’s order compelling inspection of decedent’s social media account in wrongful death case)
  - *Handle v. Commonwealth*, 2013 WL 6729962, at \*6-7 (Ky. Dec. 19, 2013) (affirming trial court’s refusal to compel production of kidnapping victim’s Facebook and MySpace usernames and passwords under RCr 7.24)
- Authentication Considerations
  - KRE 901
  - Third party vendors
- Ethical Considerations:
  - KBA Ethics Opinion E-434 (Nov. 17, 2012) (relating to attorney use of social media)
  - Kentucky Rule of Professional Conduct 3.4 (regarding destruction or concealment of material of potential evidentiary value)
    - See also *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013) (regarding attorney instructing client to remove information from Facebook profile) (attached)

- For further reading:
  - Amy Cooper, "Georgel is Not the Law of This Commonwealth: Discovery of Social Media Data in Kentucky," *Common Defense* Spring/Summer 2021

## WEARABLES

- Sample Discovery Opinions (attached):
  - *John Bartis, et al. v. Biomet, Inc., et al.* (E.D. Missouri, 2021):
    - Plaintiffs alleged they sustained injuries after the implantation of an artificial hip manufactured and marketed by Defendants. One plaintiff, Hollis, claimed he would continue to have pain and lack of mobility due to the defective device.
    - Defendants filed interrogatories, to which Hollis admitted that he consistently wears a Fitbit device. Defendants requested production of all data from the Fitbit or any other wearable device he used. Hollis objected, and Defendants filed a motion to compel production of the data.
    - The Court found that Hollis' post-explantation activity levels are relevant, and a portion of the Fitbit data should be produced, especially in light of the low burden of production.
    - "There is surprisingly little precedent on this issue given the ubiquitous presence of wearable devices."
    - Whether wearable device data is discoverable depends on the facts of the particular case. Here, Hollis stated at his deposition that he can walk and jog without pain. This decreases the relevance of the Fitbit data, but it is still relevant. Also, Hollis stated in written discovery responses that he has difficulty walking due to pain. In light of the low burden of obtaining the data, the relevance of the data, and Hollis' inconsistent characterizations of his mobility, the court granted the motion to compel production of the Fitbit data (allowing Hollis to redact info about his heart rate, sleep records, and physical location).
    - Hollis argued that the Fitbit data could be inaccurate. Per the Court, this was a question of admissibility, not discoverability.

- *Spoljaric v. Savarese* (New York Supreme Court, Suffolk County, 2020)
  - Plaintiff alleged he had personal injuries from a car accident caused by Defendants' negligence. After Plaintiff's deposition, Defendants filed discovery requests asking Plaintiff to authorize release of his Fitbit device data from Fitbit. Plaintiff refused. Defendant Savarese moved to dismiss Plaintiff's complaint, or alternatively for an order precluding Plaintiff to present testimony concerning his injuries due to failure to comply with discovery demands.
  - The Court denied Savarese's motion. The Court also denied Savarese's request for Plaintiff to authorize the release of his Fitbit records, because Savarese failed to show that the request was reasonably calculated to yield information material and necessary to her defense. Savarese had argued that Plaintiff had lost 50 pounds since the accident, and she was entitled to see how Plaintiff lost the weight despite his alleged injuries.
  - The court noted that at his deposition, Plaintiff said he barely checked his Fitbit. The court stated that diet is more important than exercise for weight loss, so there was little merit to Savarese's argument. Further, the suggestion that Plaintiff was secretly able to exercise was speculative.
  
- *State of Wisconsin v. George Burch* (Wisconsin Supreme Court, 2021)
  - Criminal Defendant, Burch, appealed a conviction of first degree intentional homicide based on two pretrial evidentiary rulings. One of those rulings was to admit evidence from the victim's boyfriend's Fitbit device at the time of the homicide.
  - The victim and her boyfriend had gone to a bar together. After getting separated and getting into an argument, the boyfriend returned to their home alone. The next day, the victim's body was found near a field. Some of her blood and hair were found outside of their neighbor's house. Police initially suspected the boyfriend was the perpetrator, but shifted away from this theory after learning his Fitbit showed he only took 12 steps during the hours of/around the victim's death. The homicide was eventually connected to Burch, and he was charged.
  - Regarding the boyfriend's Fitbit device records, Burch argued that the trial court should have required the State to produce an expert to establish the reliability of the science underlying the Fitbit's technology. He also argued the State failed to properly authenticate the records.
  - The Wisconsin Supreme Court applied the erroneous exercise of discretion standard. Based on case law, the standard for requiring

expert testimony was whether the issue is outside the “common knowledge” of “the average juror.”

- In not requiring expert testimony, the trial court had noted that pedometers have been around for many years, and Fitbit step counters have been on the market since 2009. Even if jurors are not familiar with the mechanics of the technology behind counting steps, they are familiar with what a Fitbit does and how it is operated. The Supreme Court found that the trial court’s decision was within its discretion.
  - Regarding authentication, the Supreme Court found that the trial court was within its discretion in ruling that the Fitbit records were self-authenticating through an affidavit from a Fitbit records custodian.
- Examples of Wearables/Implantables:
    - Fitness trackers (Apple Watch, Fitbit, Garmin Vivosport, Nike+ Fuelband)
    - Implanted medical devices (pacemakers, implantable cardioverter defibrillators, modern spinal cord stimulators)
    - GPS/tracking software (Strava, Life360, etc.)