

# Hospital Answer Stricken for Destroying Paper Medical Record after Scanning into the EMR



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On Wednesday, October 25, 2017, the Arkansas Court of Appeals handed down an opinion affirming a severe sanction against a hospital in a medical malpractice case. The trial court had stricken the hospital's answer, where hospital personnel destroyed the patient's paper medical chart, after scanning it into the electronic medical record, per the hospital's stated policy.

On November 8, 2017, the hospital filed a petition for rehearing in the Court of Appeals and for review by the Arkansas Supreme Court. If the Court of Appeals decision stands, it will have serious implications for how Arkansas hospitals do business.

A more thorough analysis of the opinion and its possible impact follows.

## **I. SUMMARY OF FACTS**

Mr. Peters was admitted to Turning Point, an adult psychiatric treatment facility affiliated with Saint Mary's Regional Medical Center ("Saint Mary's"), following a suicide attempt on December 10, 2013. Saint Mary's emergency room records reflected that Mr. Peters's son, Jay, had been appointed as his father's legal guardian prior to his admission.

Mr. Peters was released from Turning Point "on his own recognizance" on December 26, 2013. The discharge records showed that (1) Mr. Peters "denied further suicidal intentions," (2) he "had engaged in no self-destructive behavior since admission," and (3) his healthcare providers "felt that [Mr. Peters] had reached maximal benefit of hospitalization." Mr. Peters committed suicide on January 6, 2014, ten days after his release from Turning Point.

On January 10, 2014, an attorney hired by Mr. Peters's estate sent a seven-page letter, entitled "Important Notice Regarding Document and Data Preservation," to Saint Mary's. This letter notified Saint Mary's that Mr. Peters's family planned to investigate a potential claim against the hospital. Among other things, Saint Mary's was directed "not to destroy, conceal or alter **any paper or electronic files.**" (Emphasis added).

Saint Mary's chief quality officer asked the hospital's director of the health-information-management department "to sequester the paper portion of Mr. Peters's records." This employee did as instructed, placing the records in her desk drawer. However, before the parties could meet and confer regarding the requests made in the letter, the director of the health-information-management department was replaced. Her replacement located Mr. Peters's records in the desk drawer and "in the ordinary course of business, . . . took the complete paper portion to . . . the third-party vendor that scans medical records into Laserfiche." The paper copy of Mr. Peters's chart was scanned and then shredded.

Mr. Peters's estate filed suit on May 6, 2015. During the course of discovery, four different sets of the medical records were produced. This prompted Mr. Peters's estate to make a demand for a physical inspection of the paper copy of Mr. Peters's chart. The estate was particularly interested in determining whether the original, paper copy included guardianship orders, as the scanned copy did not.

As a result of the request, the parties discovered that the paper copy of the records had been destroyed. Mr. Peters's estate, in turn, filed a motion to strike Saint Mary's answer, "arguing that [its] ability to obtain a full and fair trial had been irretrievably compromised as a result of the evidentiary destruction of the medical records." The circuit court held a hearing and ultimately granted the estate's motion and struck Saint Mary's answer.

## **II. THE COURT OF APPEALS' DECISION**

On appeal, the Court of Appeals affirmed the circuit court's decision in all respects. In its fourteen-page opinion, the Court addressed three issues: (1) whether spoliation of evidence occurred; (2) whether the letter sent on behalf of Mr. Peters's estate imposed a duty to preserve the original, paper copy of Mr. Peters's medical records; and (3) whether the circuit court erred by striking St. Mary's answer.

### ***A. Spoliation***

The Court of Appeals first noted that Arkansas's appellate courts had never addressed spoliation, or "the intentional destruction of evidence," with respect to the conversion of paper medical records into a different format. Given the lack of authority on this subject, the court opted to rely primarily on a case involving a construction-related accident. The court reinforced the general rule in Arkansas that "a circuit court is not required to make a specific finding of bad faith on the part of the spoliator." Mr. Peters's estate maintained that it should have had an opportunity to inspect the original, paper chart before its destruction. Saint Mary's countered by arguing that no spoliation occurred because the entire chart was scanned to Laserfiche.

The court sided with the estate on this point, reasoning that "the parties and the fact-finder would be required to speculate as to what was in the stack of documents and what was actually in front of the caregivers when the decision to discharge Mr. Peters was made." For the court, "the manner in which [Saint Mary's] destroyed the records [was] irrelevant because . . . a finding of bad faith [was] not necessary." The court also noted that a letter directing Saint Mary's to preserve the original, paper chart was sent before the records were destroyed. Thus, the circuit court's ruling that spoliation had occurred was affirmed.

### ***B. Duty to Preserve***

The Court of Appeals next addressed whether Arkansas law obligates a hospital to preserve paper copies of a patient's medical records. Again, the court acknowledged the lack of case law on point, instead pointing out the general rule in other jurisdictions: "[A] party has an obligation to preserve relevant evidence upon receiving notice of being sued and when he or she should know that it may be relevant to future litigation." The opinion also recognized that other courts have been reluctant to allow corporate defendants to "hide behind" document retention policies.

The Court cited favorably to language from a federal appellate decision, which suggested that "a court should consider whether the record retention policy is 'reasonable considering the facts and circumstances surrounding the relevant documents.'" Mr. Peters's estate argued that Saint Mary's had an obligation to preserve the original, paper chart because it was reasonably foreseeable that the document might be relevant to a potential claim, especially in light of the letter sent on behalf of the estate only four days after Mr. Peters's death.

The Court of Appeals again resolved this issue in favor of the estate. First, the Court emphasized that Saint Mary's was unquestionably on notice of a possible suit prior to the destruction of the records because it had received the letter sent on behalf of the estate on January 10, 2014. Moreover, the court considered

the fact that Saint Mary's agreed to retain the original, paper chart as directed by the letter. The court found that "[i]t was not unduly burdensome for [Saint Mary's] to maintain the papers records." However, the court made clear that Saint Mary's "was not required to keep all the patients' paper records, just Mr. Peters's." As such, the circuit court's finding that Saint Mary's had violated a duty to preserve was affirmed.

### ***C. Sanction of Striking Saint Mary's Answer***

Finally, the Court of Appeals assessed the striking of Saint Mary's answer. The court set forth the applicable standard, which allows a circuit court to award severe sanctions for discovery violations. Such sanctions, including the striking of a defendant's answer, are reviewed on appeal using an abuse-of-discretion standard. The court noted that the circuit court conducted two hearings on the issue of sanctions, "directed thoughtful questions to both parties," and considered the severity of the sanction in light of the possible prejudice to Mr. Peters's estate. The circuit court's ruling was, therefore, permissible under Arkansas law and the state's abuse-of-discretion standard.

### ***D. Judge Glover's Concurring Opinion***

Judge David Glover, writing separately from the three-judge panel, noted that he voted "reluctantly [to] affirm this case." After explaining the relevant legal framework and difficulties presented on appeal with an abuse-of-discretion standard, Judge Glover expressed "grave concern for the breadth of the sanctions levied against [Saint Mary's] stemming from the destruction of the paper medical records." According to Judge Glover, less severe sanctions may have been preferable on the facts, especially in light of the absence of case law directly on point. He concluded his concurring opinion by urging Saint Mary's to seek review of the Court of Appeals' decision from the Arkansas Supreme Court.

## **III. IMPLICATIONS**

This case raises a number of issues relevant to the Arkansas hospital community.

Most importantly, it presents a dangerous open question regarding a hospital's duty to preserve original, paper copies of medical records after scanning them into an electronic medical record system. We expect there to be debate about the scope of the holding, with some arguing that the decision imposes an outright obligation on hospitals to preserve paper medical records for patients, especially those who experience a bad outcome.

We interpret the court's holding to be somewhat narrower, particularly when viewed in light of the particular facts of the case. Saint Mary's received a letter instructing it to preserve any and all records related to Mr. Peters, including the original, paper chart. Not only did Saint Mary's receive this request before it shredded the records, it agreed to maintain the paper chart. One can argue that these facts limit the duty to preserve paper medical records.

It is likely wise, however, for Arkansas hospitals to (1) adopt, and consistently follow, document retention policies; (2) refrain from destroying a patient's paper medical records upon receipt of a formal notice of a possible claim; and (3) consider keeping a patient's paper medical records for a certain period of time if the patient or is or her family members or visitors mention, even casually, the prospect of a lawsuit following an unexpected or poor medical outcome.