

Applying Legal Holds to Electronic Records

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by Sandra Nunn, MA, RHIA, CHP

Historically, applying a legal hold has been a straightforward process for the HIM professional in charge of release of information. When a record consisted of a file folder whose content was a structured set of paper documents, sequestering a medical record was as simple as pulling and outguiding the hard-copy record and placing it in a drawer under lock and key.

This simple workflow has now been completely transformed with the widespread adoption of electronic health records. Placing a legal hold on an electronic record is enormously more complex.

Requirements to place legal holds on electronically stored information were added to new requirements to release copies of records electronically or to provide access to an organization's electronic systems in amendments to the Federal Rules of Civil Procedure. The amendments went into effect December 1, 2006, and apply to all cases in federal courts. States have begun revising their own laws in response.

The Trigger

Triggers for legal holds on electronic records are much the same as they were for paper records. The table opposite describes some of the triggers that an HIM director would recognize as grounds for consulting with the organization's legal services and instigating a legal hold order.

It is not what triggers the need for a legal hold on electronic records that makes it different from such a demand for paper records; it is the technical expertise that will be required to fulfill such a request. The key to compliance with the Federal Rules of Civil Procedure and adaptations of these rules at the state level involves a thorough knowledge of the regulations and a thorough knowledge of the HIM manager's EHR and other corporate records.

The HIM manager, in conjunction with legal services, must establish from whom legal hold orders will emanate. It is easy to state that legal hold orders will always issue from legal services; however, in cases that require quick action, it is best for HIM to place a legal hold if legal services cannot be immediately consulted.

Other steps HIM professionals can undertake in anticipation of the need to place legal holds on electronic records include:

- Reviewing any changes their particular states may have made to state law in reaction to the updates to the federal rules
- Reviewing any similar regulations or laws that can force preservation of records beyond normal retention timeframes, such as the IRS's ability to suspend the destruction of tax records
- Reviewing current practices for fulfillment of record copy requests, both for medical and other types of records

Working with legal services to create a litigation response team is an important step in moving toward a viable electronic discovery model. Common members of such teams include representatives from HIM and other records areas, legal services, information services, clinical services, human resources, and financial services, including health plan representatives if the enterprise is an integrated delivery system.

Litigation response team members can nail down the scope of court orders and subpoenas, determine the key data or record owners that must be involved, and investigate the extent to which in-depth information will need to be produced (e.g., metadata, e-mail, server logs, etc.). Team members also can pinpoint where the records and their subcomponents are located and what measures and costs will be needed to retrieve and hold them, suspend changes to them, and reproduce them.

The Electronic Discovery Response Plan

A successful electronic discovery response plan revolves around a collaborative relationship among legal services, information services, and record management services, including HIM. When a triggering event occurs, the logical first step is the development of an organizational chart or grid of all the people who may have created, received, or shared potentially relevant information. Also listed on such a grid would be the data owners of all the source systems required to produce information or records for the litigation.

This grid allows the litigation response team to determine:

- The data or record owners who may be key witnesses
- Those knowledgeable about how and where the electronic records involved in the case were created, stored, and destroyed
- The division of labor involved in interviewing, investigating, and gathering information from those involved
- The electronic information requiring preservation

Once the staff involved in producing information and records are identified, the response team can commence mapping out the physical location of potentially responsive electronic documents and records. The team will need to know where the records reside for a given span of dates. For example:

- Where is backup data stored? Where are documents saved on the network?
- Where is e-mail kept?
- Are records archived on local drives or removable media?
- Is it possible to retrieve deleted files for production?
- Can records be produced in their original formats if they have been stored in another format (e.g., can a Word document be restored to Word format if it has been archived in PDF format)?
- Is there adequate IS staff to support extensive retrieval of electronic records from active and legacy systems?

Organizations should develop a protocol to reconcile what was requested with what was actually gathered to support this complex record-gathering process. Omission of requested records and the content behind the records (metadata) can look like a deliberate effort to hide information.

Other requests, such as policies and procedures for creating and maintaining data and records and graphics for workflows and processes, must also be available at the organization's fingertips to demonstrate good faith information management practices. The response team must also develop a method for the organization's attorneys to review large volumes of data and information in order to prepare a defense.

Standardized guidelines for electronic record gathering, accounting, and numbering must be established to be certain everything produced is reviewed and noted by corporate attorneys.

Triggers for Legal Hold Orders

An HIM director would recognize the following triggers, among others, as grounds for consulting with legal services and instigating a legal hold order.

Trigger	Trigger Description
Legal notice	Complaint Subpoena Summons
Formal notice	FBI agent

Governmental investigation	Equal Employment Opportunity charge
Untoward/sentinel events	Bad baby case Harm/Injury to a patient
Notice of credible threat	Source/nature of threat deemed credible by legal/risk Request for records from a well-known medical malpractice attorney

Source: Baldwin-Stried Reich, Kim. "The Legal Health Record: The Legal Hold Process." AHIMA Webinar, August 12, 2008, slide 18.

Documentation Requirements for Fetal Monitor Strips

Period	Flagship	Local 1	Local 2	Rural
2000–2008	Electronic Niche System–OB SaveNet	Paper	Optical Disk Archive	Electronic Niche System–Net Nurture
1993–1999	CD Archive from Previous Niche System	Microfilm	Paper	Electronic Niche System–Gyn Solutions
1985–1992	Microfilm	Roll film	Paper	Floppies

A hospital that includes fetal monitor strips in its legal EHR may face documenting a range of media in a variety of settings. Here, a sample grid indicates four different hospitals within a large healthcare system. The rows describe the range of storage media by facility over a 21-year retention period.

EHR Readiness Assessment

One of the fundamental things an HIM director can do to begin readiness for e-discovery and the application of legal holds on electronic records is develop thorough documentation of the organizational EHR. This step follows logically from the documentation for the legal EHR and the designated record set developed by HIM staff to comply with HIPAA regulations.

Litigation will frequently involve requests for electronic medical records, and documenting the source systems and locations of these records gives the organization a model for documenting records from other types of systems, such as human resources or financial electronic systems.

The first step in the process is to formally designate HIM as the custodian of the legal electronic health record. Once this occurs, it is the responsibility of the HIM director to know:

- All the source systems of the EHR
- The EHR components retained in each source system and in the core EHR system

- The responsible parties for each of those systems in terms of data integrity, metadata management, and retention of system records over decades of time

Fulfilling the responsibility of custodianship will involve formal documentation of the EHR's content as well as formal policies and procedures for updating and maintaining what constitutes the EHR.

As an example, consider an organization that has determined fetal monitor strips will be a documented part of its legal EHR. Today these strips may be created in electronic systems, often niche applications, supporting labor and delivery departments. There may be several hospitals in the organization that have been delivering babies over periods of 25 or 30 years, capturing the data with multiple methods and storing them in various formats.

The table above demonstrates the type of documentation needed to demonstrate compliant retention of 21 years for these vital strips and to allow a sufficient span to apply a legal hold over years of records.

Additional concerns for the HIM director, now custodian of the EHR, involve the decommissioning of electronic systems and the destruction of records beyond their retention lifecycle; that is, ensuring that those fetal monitor strips stored over the past 21 years are safely and securely destroyed.

Applying a legal hold to a fetal monitor strip record or group of records could mean placing a hold not only on one electronic system, but several. It might also mean placing holds on other media, including optical disks, CDs, microfilm, or paper, depending on the nature and scope of the lawsuit.

The daunting task of documenting the content of the EHR and its source systems will prepare the HIM professional to knowledgeably support legal services in the placement of legal holds on electronic health records and, by extension, on records documented in other types of systems.

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