

Developing a Litigation Response Plan

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The e-discovery amendments to the Federal Rules of Civil Procedure (FRCP) and the Uniform Rules Relating to the Discovery of Electronically Stored Information (approved in August 2007 at the National Conference of Commissioners on Uniform State Laws) are creating new roles and responsibilities for legal counsel and HIM and IT professionals.

Organizations must begin thinking about how they will respond to e-discovery requests for information. The process by which electronic information is produced in response to threatened or impending litigation is changing, and those closely involved with it must be knowledgeable on the requirements for producing information.

This article outlines three important e-discovery concepts:

- an organization's duty to preserve documents in the face of threatened or pending litigation;
- the legal hold; and
- the development of an organization's e-discovery response plan.

Evolving Discovery Levels

The Advisory Committee on the Rules of Civil Procedure amended the FRCP to specifically address the discovery and production of electronically stored information. Congress established the legal rules that dictate allowable methods for discovery at the federal court level.

For state courts, state legislatures establish the legal rules. Therefore, state and local jurisdictions have their own specific rules regarding discovery.

In Illinois, legislative efforts are under way to mandate production of electronic records on CD or DVD, along with a predetermined fee schedule for the production. It might seem that providing copies of records on CD or DVD is less expensive and burdensome than producing copies of paper documents, but at this point in time it is not. Health IT infrastructure and functional design limitations, coupled with HIPAA privacy and security requirements, do not make this a practical solution yet.

The FRCP, state legislative efforts regarding e-discovery, and the Uniform Rules Related to the Discovery of Electronically Stored Information will soon define the e-discovery process for all healthcare organizations.

Legal counsels throughout the country are becoming educated about e-discovery, information systems, and records management, all in an effort to protect organizations and their information. As a result, discussion of HIM and IT operations has moved to the boardroom, and HIM and IT professionals are in a unique position to help shape and design their organizations' e-discovery processes.

New Requests, New Responsibilities

In general terms, discovery is the formal pretrial legal process used by parties to a lawsuit to obtain information. Discovery helps ensure that neither party is subjected to surprises at trial.

The scope of information that can be obtained through discovery is broad and is not limited to what will be used at trial. Federal courts and most state courts allow a party to discover any information relevant to the claim.

Because of the broad nature of this standard, parties often disagree about what information must be exchanged and what is considered "privileged." These disputes are resolved through court rulings on discovery motions.

Historically, discovery encompassed the production of relevant information or paper documents. This information is generally produced after a subpoena or subpoena duces tecum has been served upon an individual or organization. Other common discovery devices include depositions, interrogatories, requests for admissions, document production requests, and requests for inspection of records.

The legal process involving the discovery of electronically stored information varies significantly from the discovery process that legal, HIM, and IT professionals know today. FRCP sections 16, 26, and 34 compel parties and their counsel to enter into early discussion of key issues about discovery of electronically stored information.

In e-discovery, the court is alerted early in the litigation, and the district judge, magistrate judge, or special master may take an active role in addressing the handling of discovery of electronically stored information, when it is expected to occur.

While the FRCP amendments apply to civil cases brought before federal (district) courts, it is anticipated that these amendments coupled with the Uniform Rules Relating to the Discovery of Electronically Stored Information will define the standards for discovery and production of electronic information at the state and local court levels.

As a result, it is incumbent upon legal counsel and HIM and IT professionals to evaluate how their roles and responsibilities will change with regard to the discovery and production of electronically stored information.

E-discovery will be most effective when legal counsel has a good understanding of the rules, communicates and negotiates with opposing counsel and the court, and involves HIM and IT professionals in the process.

The Duty to Preserve

The basic principles regarding preservation of relevant electronically stored information are essentially the same as those governing the preservation of relevant paper-based business records. That is, at the moment when litigation is reasonably anticipated (known, threatened, or pending), the normal disposition and processing of information in either format should be suspended.

For example, today some healthcare organizations make a copy of the paper-based record (usually the patient's medical record) at the time litigation is known. The original paper-based record is then given to risk management or legal counsel, who secure the record in a locked file. Access to the original paper-based medical record is then usually controlled or monitored to prevent unauthorized access or tampering.

The duty to preserve relevant electronically stored information also supersedes an organization's record retention and management policies that would normally result in the destruction of electronically stored information.

This duty arises from statutes, regulations, common law, the inherent power of courts, and court rules governing the imposition of sanctions. This is illustrated as follows:

- FRCP Rule 34, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes: "Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." FRCP 34 has placed the discovery and production of electronically stored information on equal footing as paper documents when presented before the court.
- Sarbanes-Oxley Act, section 802: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than twenty years, or both." Sarbanes-Oxley is applicable to those healthcare organizations that are not tax-exempt and operate for profit.
- *Silvestri v. General Motors*, 271 F.3d 583 (4th Cir. 2001): "The duty to preserve material evidence arises not only during litigation but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." In this case, the court imposed extreme sanctions and applied the federal

common law of spoliation of evidence for what it deemed to be the willful, malicious, or intentional destruction of evidence.

The basic premise of common law doctrine is to avoid spoliation (intentional destruction, alteration, or concealment) of evidence for use at trial. The courts have inherent powers and rules that govern the imposition of sanctions for spoliation.

The Legal Hold

Once litigation can be reasonably anticipated, an organization should establish a legal (litigation) hold, and reasonable measures should be taken to identify and preserve all information relevant to the claim.

A legal hold (also known as a preservation order) may or may not be issued by a court. An organization's key determination in establishing a legal hold is when litigation is "reasonably anticipated." For example, once an individual or organization is served with a complaint, subpoena, subpoena duces tecum, or receives notice of a government investigation, litigation can be reasonably anticipated. A legal hold should then be immediately established and reasonable measures taken to identify and preserve relevant information.

The duty to preserve could arise well before an individual or organization is served with any of these documents or notices. Determining when the legal hold should be established is not a rote decision. When faced with potential litigation, the facts of each situation must be carefully weighed.

Organizations and their legal counsel may consider the following general factors prior to establishing a legal hold:

- The potential litigation risk to the organization (type, source, and credibility)
- The potential risk of information loss if a legal hold is not established
- Identification of all individuals identified as potential "record custodians"
- Assessment of the level of knowledge, sources, and location of information within the organization relevant to the potential claim
- Process by which the establishment of the legal hold will be communicated within the organization
- The timeframe for reviewing the legal hold and when it can be lifted

The E-Discovery Litigation Response Team

In business, as well as in healthcare, the discovery of electronically stored information is not a simple, inexpensive, or straightforward process. The true costs to search, cull, and retrieve electronic information (including information that is contained in back-up tapes and legacy systems) that may be relevant to a lawsuit could far outweigh the costs of providing photocopies of a patient's medical records. Organizations must establish a plan and process to understand the true costs and burdens of producing electronic information.

Effective e-discovery administration requires a team of interdisciplinary professionals serving on a litigation response team. Legal counsel should oversee the e-discovery process and head the team. They will advise senior management and the governing board about any and all impending litigation, and they can define and delineate the measures the organization should take in the identification, preservation, search, retrieval, and production of responsive electronic and other potentially relevant information.

IT and HIM professionals should also be appointed to the team. They are best equipped to advise legal counsel about the forms, formats, methods, status, costs, location, and production burden of potentially responsive information. They also possess knowledge of the technical and administrative processes surrounding the use, management, storage, retention, and destruction of information within the organization.

Those working in healthcare today know that HIPAA introduces even greater challenges and restrictions with regard to the production of "privileged" but potentially responsive information. HIPAA mandates greater privacy and security protections than what most businesses face. In the face of litigation, healthcare organizations must establish added measures to avoid unwarranted disclosure of electronic health information or the organization may face civil and monetary penalties.

The time to prepare for e-discovery is now. An e-discovery plan should be prepared well in advance of litigation, and it should be tailored to the needs of the size, scope, and complexity of the organization.

By becoming familiar with the FRCP, the Uniform Rules Relating to the Discovery of Electronically Stored Information, and state legislation involving electronic document production, legal counsel and HIM and IT professionals have the unique opportunity to work together to define and shape e-discovery processes for their organizations and states.

Tools for Developing Plans and Policies

AHIMA has developed a set of model policies for e-discovery and a sample healthcare e-discovery plan, available in the FORE Library: HIM Body of Knowledge (BoK) at www.ahima.org. The practice brief “Developing a Legal Health Record Policy” appears in the October 2007 issue of *J AHIMA* and is also available in the BoK.

The plan and policies are not intended to be a “one size fits all” solution to the complexities involved with healthcare e-discovery. They were developed to help HIM and IT professionals prepare for e-discovery by assisting in the development of policies and procedures for their organization.

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