

ESI Meets Court Order

Save to myBoK

By Ron Hedges

I've written for AHIMA on various subjects, including preservation and spoliation of electronically stored information (ESI). This month, I want to ask you to think about both.

To start, consider this premise: The parties to a civil action agreed to an order "on Defendant's Motion for Entry of an Order Requiring Preservation of Evidence." For the purposes of the example, here text from an order of a state court:

1. The Plaintiff is required to place the Defendant on notice of whether or not surgery will take place and to give the Defendant reasonable opportunity to obtain a physical; examination/MRI scan or like medical examination as may be warranted in advance of any elective surgery.
2. The Plaintiff is required to place the Defendant on notice of whether or not any evasive procedures are to take place, and to give the Defendant reasonable opportunity to obtain a physical examination, diagnostic studies, or like evaluations as may be permitted... and/or ordered by this Court in advance of any surgery.

The text raises a number of questions which I would pose to you:

1. The defendant's motion appears to have been intended to require the plaintiff to preserve information about any surgery. Does the agreed-to order accomplish this?
2. Assuming the plaintiff is required to preserve information, what kind of information would you expect the plaintiff to preserve?
3. What sources of ESI might be subject to preservation?
4. What form or forms of ESI might be subject to preservation?
5. How should the plaintiff go about preserving ESI?
6. What, if anything, might the plaintiff ask from the defendant before producing anything that has been preserved?

These questions raise another related issue. Exactly who would be responsible for the preservation?

1. The plaintiff?
2. The surgical facility?
3. The surgeon?
4. The insurance company that may be paying for the surgery? (assuming there is any insurance available)
5. The government agency that may be paying for the surgery?

Some further questions:

1. What responsibility might the plaintiff have for the actions of non-parties?
2. Assuming there is a failure to preserve, who should be held responsible for any spoliation?
3. What might an appropriate sanction(s) be?

The questions I pose above are not merely hypothetical. These and other questions are addressed on a regular basis by parties and non-parties and by the attorneys who represent each.

Think about the situation and on the obligations imposed on your organization's information governance personnel and records information management personnel. Then weigh in in the comments section [on the [Journal of AHIMA website](https://bokold.ahima.org/doc?oid=301466)].

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***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

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