How and Why to Preserve Health Records During Litigation

By Ron Hedges, JD

The term preservation, when used in a legal context, refers to placing information identified as relevant to a civil or criminal US court case in a legal hold to ensure the data is not destroyed or tampered with.

Health information managers, or anyone who works with records, will likely become embroiled in litigation when their employer—be it a hospital system, a medical practice, an insurer, or another entity involved in healthcare—is involved in a legal case. The employer may be a plaintiff, a defendant, or a nonparty that has information sought by others for use in their litigation. Health information managers may have to locate, collect, and process information relevant to that litigation, and should understand how to preserve information and when such preservation is appropriate. Health information management (HIM) professionals should also know what to do if something goes wrong with their processes.

Duty to Preserve Data

HIM professionals have a duty to preserve information that has been identified as important in a court case. But it is first important to distinguish that duty from a separate question: Why does a healthcare organization create and retain records?

An organization may create records for different reasons. These include:

- Business reasons: records related to how business is conducted
- Medical reasons: records related to the care and treatment of patients
- Billing reasons: a subset of business reasons that can be related to direct charges and/or to seeking reimbursement from third-party payers
- Regulatory reasons: records that the organization is required to create under federal, state, or local laws or regulations

Once a record is created it is presumably retained. Remember this distinction: retention is distinct from preservation. Presumably, healthcare organizations have a records retention schedule or schedules that specify how a particular record is classified, where it is kept, and when it can be destroyed.

Records retention or records destruction requirements, which dictate the time that a given record must be retained, can be driven by the reason the records are created. For example, Equal Employment Opportunities Commission rules require that certain employee information be retained for a number of years.

With this background it is easier to explain why it is important to keep in mind the distinction between retention and preservation and the duty to preserve. The duty to preserve trumps retention requirements. What that means is simple: When required to preserve certain information, that information is no longer subject to records retention rules. Records managers must preserve that information regardless of whether a records retention schedule allows its destruction.

This is because the US, with one exception, is a common law country. That means that many of the country's litigation-related rules did not originate in statutes or regulatory codes but, rather, were derived from judicial decisions. The duty to preserve arose from one of those decisions, rendered in England in the early 1700s. The reason for preservation is to ensure—or attempt to ensure—that relevant information can be produced and used in a civil action.

When to Preserve Information

The question of "when does the duty to preserve arise" is vital for an HIM professional to understand. If preservation begins too late, bad things can happen. The decision to preserve will presumably be made by an attorney, but it never hurts to know what his or her thought processes are behind the decision.

Think of a "trigger"—this word is often used when answering the question of when to begin preservation, and refers to a triggering event that sends preservation into action. Generally speaking, the triggering event is when an organization knows of litigation or reasonably anticipates that litigation will commence. This can be a simple event. For example a trigger can occur when:

- An organization is served with a summons and complaint
- An organization is served with a subpoena

However, everything is not black or white when deciding what a triggering event might be. That decision might be very fact-sensitive. For example:

- A disgruntled employee tells his supervisor that the employee has been passed over for a promotion because of his age
- The same employee submits a letter to the employer's human resources department
- The employee hires a lawyer who writes a letter to the employer suggesting an informal resolution of the problem
- The employee goes to the state Equal Employment Opportunity Commission, which commences litigation against the employer

This example suggests a continuum of events. Which of these events might trigger the employer's duty to preserve? Again, this is a decision that one's attorney will presumably make and inform healthcare staff on how to proceed.

Determining What Data to Preserve

A duty to preserve exists and you have been instructed to preserve relevant information. The next question, once the duty has arisen, is to decide what to preserve. This is known as the scope of preservation.

The duty to preserve extends to physical objects as well as "things" that exist in computer systems, including electronic health records. The content stored in electronic health records is best defined for litigation purposes as electronically stored information (ESI). The term comes from the Federal Rules of Civil Procedure, the rules that govern civil litigation in federal courts. Companies can easily become involved in litigation that has nothing to do with any electronic health records. For example, a dispute about the late delivery of toilet supplies or the number of vacation days a group of employees are entitled to would not involve health records.

But when cases do involve information stored in the medical record, a few basic questions need to be answered by health records managers, the organizations that employ them, and the organization's attorney before preserving information:

- What time period or periods are concerned?
- What ESI needs preserving?
- Who is the custodian of specific ESI that must be preserved?
- How should decision-makers answer these scope questions?

The answer to that last question, at least in theory, is "parties may obtain discovery… that is relevant to any party's claim or defense," according to the Federal Rules of Civil Procedure. In other words, scope is defined by what a party states they want and is approved by the court. A party's claims or defenses also define the time periods in issue. The scope of what must be produced and hence preserved may be broader than "that [which] is relevant."

The duty to preserve may go beyond what is located in an organization's file room or the server in the basement. The Federal Rules of Civil Procedure also speak of production of things within a party's "possession, custody, or control." For example, assume a company has some records "in the cloud" and those records are relevant to a claim the employer has asserted. The duty to produce and hence preserve the information likely extends to that cloud-based data. A warning makes sense here: the duty to preserve is broader than the obligation to produce. Generally speaking, you only produce in response to requests from the other side. You may sit on relevant data and never produce it. But that doesn't mean that you don't have to preserve it.

Three Things to Consider with Preservation

When considering litigation and the need to preserve data, HIM professionals should consider three things:

- Why content might need preserving
- What event might trigger preservation
- What is the scope of preservation

The October issue's e-HIM Best Practices will explore potential consequences if information is not preserved and is instead spoiled.

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