Risks and Results of Data Spoliation

By Ron Hedges, JD

The September e-HIM Best Practices article answered some basic questions about preservation of records in the context of civil litigation. This article will consider the question, "What if something goes wrong?"

Spoliation Defined

Health information management (HIM) professionals are likely to play some role in litigation that involves their employer. They may have to locate, collect, and process information—or "records"—however that might be defined. To illuminate the importance of HIM's role, it's imperative to talk about what can happen if something that lawyers and judges call "spoliation" occurs.

There are a number of definitions of spoliation. For the purposes of HIM, this definition will apply: "Spoliation is a legal term for the loss of information that should have been preserved and that is relevant to a claim or defense." That simple definition gives rise to a number of questions. For example:

- What does "loss" mean? Must the information be irretrievably "gone?" What if the information can be retrieved, albeit at significant cost? What if the information is available from some other source?
- Does "loss" imply or require a specific "state of mind?" With state of mind referring to what an individual was or wasn't thinking when they carried out an action. Must a party intend to make the information unavailable in a particular litigation? What if the party simply intended to do something that resulted in the loss of the information, such as creating and applying a policy that routinely eliminates information? What if the party was simply negligent in its attempt to preserve the information?
- How relevant must the lost information be? What if the lost information is of marginal importance, as opposed to being something that could be central to a claim or defense?
- Has the other party, the one that has been deprived of the information because the information has been lost, been prejudiced because of the loss?

There is no simple answer to any of these questions. Indeed, the federal and state courts across the nation are split on what a party must show to allow a court or jury to find that there has in fact been spoliation. Why? There are a number of reasons, but two stand out:

- The courts are divided on what state of mind must be shown. Some courts say that a party must act with the intent to deprive the other party of the information. Other courts say that any purposeful act that results in the loss of the information is sufficient. Others say that negligence, or gross negligence, is sufficient for a finding of spoliation.
- Once state of mind has been proven—whatever that state of mind is—the courts are divided on what else must be proven. Some courts say that because intent has been shown, relevance and prejudice may be inferred—however that might be defined. The idea is that if information is lost, the other party cannot know what the information was and how it has been prejudiced and it would be unfair to require the other party to prove what it cannot know. Other courts say that the other party must always prove state of mind, relevance, and prejudice.

There is no simple answer to these questions because, as noted above, "it" depends on where the litigation is pending.

Consequences of Spoliation

Assume for the sake of discussion that a party has been found to have spoliated relevant information with the requisite state of mind and that the other party has incurred prejudice. What can be done to level the playing field?

Here are some examples:

- A court could award attorneys' fees and costs to the injured party, as measured by what the injured party had to do to prove the spoliation.
- A judge could allow the injured party to conduct additional discovery and require the spoliator to pay for that discovery.
- A judge could declare that certain facts that had been in dispute have been established.
- A judge could allow a jury to hear evidence that spoliation had occurred and could consider that evidence in rendering a verdict.
- A judge could allow a jury to infer something occurred or didn't occur because relevant information has been spoliated
- In extreme circumstances, a judge could impose a sanction that would end a case in favor of the injured party.

Obviously, none of these outcomes would be something anyone would like to see happen.

What This Means for HIM

As a practical matter, spoliation should be nothing of consequence to individuals or their employers. Every now and then, a decision is issued in which a party is found to have engaged in spoliation. When that happens, the consequences may become known in the legal and corporate communities and may also become a learning tool for others as well as a salutary tale about the importance of the preservation of relevant information. Based on legal statistics, however, parties rarely seek sanctions against another party for spoliation and, when parties do, sanctions are rarely imposed.

HIM professionals should appreciate the importance of the management of information, or information governance. Management allows for information to be preserved for litigation purposes. The word "preservation" implies that information that is subject to a litigation hold will not be "lost" but, instead, be available in litigation. "Management" also implies a reasonable and documented process that can be used, if need be, to refute any allegation of spoliation.

Review Relevant Processes and Policies

While the risks of spoliation are real, HIM professionals shouldn't panic. Instead, individuals should focus and review the processes they have in place to retain and preserve information. If policies are lax or nonexistent, they should be brought up to legal standards to avoid spoliation.

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Read articles on litigation rules and preservation policies in the September 2014 *Journal of AHIMA* digital edition: "HIPAA's Place in Court-Ordered Discovery" and "How and Why to Preserve Health Records."

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