

Using Information Governance Principles to Respond to Litigation

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By Ron Hedges, JD

AHIMA's Information Governance Principles for Healthcare (IGPHC), published in late 2014, can be seen as a set of best practices for litigation. Attorneys and litigation support personnel would do well to keep the activities outlined in these principles in mind when responding to litigation, and consider the possible consequences of a failure to preserve information contained in electronic health records (EHRs).

While this article seeks to illustrate a single best practice for each of the eight IGPHC principles as it relates to litigation featuring EHRs, this is just one example. The principles are broadly applicable to all types of data and information—such as staffing information, financial and contract information, etc.—that could become a part of evidence in litigation.

Detailing the Principles and Best Practices

To review, the eight principles of the IGPHC are: Accountability; Transparency; Integrity; Protection; Compliance; Availability; Retention; and Disposition. The principles offer best practices that attorneys and litigation support personnel can use in the representation of healthcare providers and affiliated entities involved in litigation to preserve, collect, review, and produce relevant EHRs—either as a plaintiff, a defendant, or a non-party served with a subpoena or similar legal process.

Accountability Best Practices

Accountability is premised on the designation of a senior leader who is responsible for the development and implementation of an information governance program. That program should have various attributes, including documented and approved policies and procedures to guide its implementation.

Once litigation becomes reasonably anticipated, an individual—be it an attorney or a litigation support person—should be designated to develop and implement a strategy for the identification, collection, review, and production of any EHR data relevant to the litigation. Simply put, "the buck starts and stops" with that accountable individual.

Transparency Best Practices

The transparency principle states, among other things, that information governance policies should be documented in an "open and verifiable manner" and be readily available.

Transparency during litigation serves two purposes. First, it allows those engaged in litigation to trust in the process used to identify, collect, review, and produce EHR data. Second, should there be some dispute about the adequacy of the process, transparency protects against arguments that the process was ad hoc or designed and executed in a haphazard manner. An open and documented litigation process is a simple best practice in response to litigation needs.

Integrity Best Practices

Integrity means that an information governance program should be designed in such a way that information has a "reasonable and suitable guarantee of authenticity and reliability." This explanation makes a litigation-related best practice self-evident.

Broadly speaking, EHRs can serve no useful purpose in the absence of authenticity and reliability. Authenticity is central to the admissibility of EHR data, or, indeed, any document, into evidence during litigation. Similarly, reliability is essential to the

trustworthiness of EHR data. Any best practice should incorporate integrity to reasonably ensure that EHRs are what they are purported to be and that their content is reliable. These are the touchstones of production of EHRs in response to discovery requests and admission of EHR information as evidence. Integrity for litigation purposes means that, when preserving, collecting, reviewing, and producing EHR data, information remains in the form or forms in which it was created and maintained.

It is important to note that EHRs are not typically one monolithic system, but often encompass multiple feeder systems among which there are frequent inconsistencies in data and information—which has presented many issues relative to integrity in litigation. There can also be what appears to be internal inconsistencies within an EHR when multiple views (based on user) are presented and questioned in litigation. This is yet another example of the integrity challenges that can occur during litigation.

Protection Best Practices

Protection as defined in the IGPHC focuses on an information governance program as a means to safeguard information from, for example, corruption. Protection also encompasses the program as a means to ensure the confidentiality of information. Corruption of EHRs and avoidance of the loss of confidentiality fall readily within a best practice for litigation.

Corruption or "loss" of EHR information, either to make information unavailable or unsearchable, can lead to serious consequences to the party or non-party that produces that information. At the worst, a sanction might be imposed that would sound the death knell of a party or a finding that a non-party was in contempt. Likewise, a failure to maintain confidentiality of EHR data might lead to the imposition of sanctions on an entity for a HIPAA violation.

Protection for litigation purposes means that an EHR record that is subject to some type of confidentiality should be tagged as such so that throughout the litigation cycle the tag follows the information. This allows confidentiality needs to be addressed by an attorney and their support personnel.

Compliance Best Practices

The compliance principle in the IGPHC simply states that an information governance program shall be "constructed to comply with all applicable laws, regulations, standards, and organizational policies." This principle is directly applicable to the litigation context as a best practice.

Healthcare providers and affiliated entities are constantly involved in litigation in one way or another. Perhaps the litigation will involve a claim for unpaid goods and services. Perhaps it will involve a claim arising out of alleged overbilling or deviation from a standard of medical care. Whatever the nature of the litigation, compliance with the statutes and rules that govern the conduct of litigation is absolutely fundamental. Compliance in this context is a quintessential best practice. This simply means that attorneys and litigation support personnel must learn the "rules of the road" for any jurisdiction in which there is litigation.

Availability Best Practices

Availability is intended to ensure that information is maintained in a manner that ensures "timely, accurate, and efficient retrieval." Again, this principle finds a ready fit as a litigation best practice.

The previous discussion of compliance directed the attention of attorneys and litigation support personnel to the rules that govern litigation. Those rules invariably impose time limits on the production of EHR information in response to demands made by other parties. Failure to respond to those demands can have serious consequences. Likewise, accuracy and efficiency in retrieval are essential to avoiding inadequate or piecemeal production of an EHR record in response to demands which can, in turn, lead a party to run afoul of time restrictions. Availability is a best practice that allows litigation to run its course in a timely and cost-effective manner.

Retention Best Practices

Retention simply means that information should be maintained "for an appropriate time, taking into account its legal, regulatory, fiscal, operational, risk, and historical requirements," according to the IGPHC. At face value, this principle applies to decision-

making that is above litigation needs. Nonetheless, retention again suggests a best practice when applied to legal proceedings.

From a litigation perspective, attorneys and litigation support personnel should think in terms of what happens in the absence or failure of information or evidence retention. In other words, what if retention requirements are ignored and EHR data that should have been retained for a certain time period are no longer available to be preserved for litigation purposes?

For litigation-related purposes, one best practice to be derived from the retention principle is simply this: The accountable person and those working with him or her should, as soon as litigation is reasonably foreseeable, review all retention policies to reasonably ensure that both retention and preservation duties are being met for relevant EHRs and, if there is a failure of either, to document the failure and take steps to remediate the results of the failure. This best practice will enable a healthcare provider or affiliated entity to defend against the loss of relevant EHR data and eliminate or minimize any adverse consequences.

Disposition Best Practices

Disposition can be seen as an extension of retention. Disposition means that a healthcare provider should get rid of information that is no longer subject to any retention requirements. The flip side of disposition is, of course, a failure to comply with those requirements through either endlessly hoarding information or discarding it at will. Best practices for disposition are on par with those proposed for retention, and apply to litigation. Retention and disposition policies must be followed together in both the litigation and HIM worlds in order to stay compliant to the law.

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