

# What Lies Ahead in 2016?

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By Ron Hedges

This is the last *Legal e-Speaking* post of 2015. I thought I would use it to predict what 2016 might bring in litigation and beyond. When looking ahead to the next year, there are many possible things that HIM professionals should keep an eye out for, but five stand out to me:

1. On December 1, 2015, amendments to the Federal Rules of Civil Procedure went into effect. These amendments address a number of topics but focus on electronically stored information (ESI). My article “Federal Changes Proposed for eDiscovery Rules,” which appeared in the August 2014 issue of *Journal of AHIMA*, gave an overview of the amendments. In 2016 expect a flurry of judicial decisions that apply specific facts of a particular civil action to the broad language of the amendments. The amendments are getting a lot of hype. We will see how hype meets reality in 2016. Specifically, look for decisions which, among other things:
  - Limit the scope of the duty to preserve
  - Define what is relevant to a “claim or defense” and hence discoverable
  - Limit the scope discovery from reasons of proportionality
  - Define what are “reasonable steps” taken by a party to avoid the imposition of “curative measures” after ESI has been lost
  - Impose curative measures when ESI has been lost
2. Focusing on health records, look for expanded use of the electronic health record (EHR) in litigation. Discovery of the EHR of a patient/litigant will likely lead to disputes about, among other things, the “form or forms” in which the record should be produced (for example, in “native” or in TIFF). When a civil action goes to trial, expect disputes about the authenticity of whatever portion of the record is offered into evidence (in other words, is the record what it purports to be) and who might be qualified to testify about the content of whatever is offered.
3. Focusing on technological innovation, expect to see more and more “apps” being offered which create, store, and transmit protected health information (PHI) about an individual to, for example, insurers and healthcare providers. (See, for example, the article by Laura Landro in the *Wall Street Journal*, “[Doctors Prescribe New Apps to Manage Medical Conditions](#)”). It may be too soon to see civil litigation brought by a user of such technology for a “failure” that harmed her, be the harm resulting from breach of confidentiality or design defect, but we will see it eventually. Expanding beyond apps, watch for, among other things, the continued rise of telemedicine and disputes about the need for “in-person” versus online consultation with physicians and how the EHR of such consultations will be defined, created, transmitted, and stored.
4. Expanding on my previous points in #3 above, expect regulators to expand their investigation of compliance—and failures to comply—with the confidentiality and security requirements imposed by HIPAA for PHI. In this regard, the Office of Inspector General (OIG) of the United States Department of Health and Human Services (HHS) has already called for increased scrutiny. (See the OIG reports released September 2015, “OCR Should Strengthen its Oversight of Covered Entities’ Compliance with the HIPAA Privacy Standards” and “OCR Should Strengthen its Followup of Breaches of Patient Health Information Reported by Covered Entities”). Moreover, watch for “nontraditional” regulators of healthcare providers such as the Federal Trade Commission (FTC) to investigate lapses in confidentiality or security to the extent these are within the jurisdiction of a particular regulator. Another example of this is the settlement announced on November 6, 2015, by the Office of the Attorney General of Connecticut between the state of Connecticut and Hartford Hospital and EMC Corporation arising out of the loss of an unencrypted laptop.
5. Coming full circle back to AHIMA, look for continued discussion of information governance (IG) within the framework of the Information Governance Principles for Healthcare (IGPHC)®. (See, for example, the article by Lynette

Czarkowski and Jill S. Clark in the November-December issue of *JAHIMA*, “Drafting a Blueprint for Information Governance). EHR and, more generally, ESI is exploding in terms of volume and variety in the healthcare field and should be integral to any IG framework. We will see how healthcare providers govern EHR and ESI in 2016.

“See” you in the new year.

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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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