The Legal Health Record and E-Discovery: Where You Need to Be

Webinar
June 9, 2009

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Table of Contents

Disclaimer ........................................................................................................................................... i
Faculty ........................................................................................................................................... ii
Objectives ......................................................................................................................................... 1
Electronic Discovery Challenges ........................................................................................................ 1
Definitions ......................................................................................................................................... 2-3
Legal EHR subset of the EHR ............................................................................................................ 3
Definitions ......................................................................................................................................... 4
Polling Question #1 .......................................................................................................................... 4
Admissibility ...................................................................................................................................... 5
Regulations ........................................................................................................................................ 6
Current State ..................................................................................................................................... 6
E-Discovery Model ............................................................................................................................ 7
E-Discovery Readiness ....................................................................................................................... 7-8
PRETRIAL CONFERENCE .................................................................
Federal Rules of Civil Procedure – Pretrial Conference ................................................................. 9-10
Federal Rules of Civil Procedure ................................................................................................... 10-11
RECORD MANAGEMENT & DATA INVENTORY ........................................................................... 11
Polling Question #2 .......................................................................................................................... 12
Records Management ....................................................................................................................... 12-13
Retention Strategy .......................................................................................................................... 13
Data Inventory Example ................................................................................................................... 14
Retention Strategy ............................................................................................................................ 14-15
LITIGATION RESPONSE .............................................................................................................. 15
Litigation Response Strategy ........................................................................................................... 16
Sample 30(b)(6) Deposition Questions ............................................................................................. 17
Litigation Response Strategy ........................................................................................................... 17-19
LEGAL HOLD ................................................................................................................................. 19
Legal Hold Definitions ....................................................................................................................... 20
Legal Hold Action Plan ..................................................................................................................... 20-21
Special Considerations .................................................................................................................... 21
MetaData .......................................................................................................................................... 22
E-mail Management .......................................................................................................................... 22-23
Portable Devices ............................................................................................................................... 24
Back-up Function .............................................................................................................................. 25
Destruction ......................................................................................................................................... 26-27
Education .......................................................................................................................................... 27
Compliance and Monitoring ........................................................................................................... 28

(CONTINUED)
## Table of Contents

(CONTINUED)

- Resource/Reference List ................................................................. 28-29
- Audience Questions ........................................................................... 30
- Thank You ......................................................................................... 30
- Audio Seminar Discussion and Audio Seminar Information Online .................. 31
- Upcoming Audio Seminars ............................................................... 32
- AHIMA Distance Education online courses ........................................ 32
- Thank You/Evaluation Form and CE Certificate (Web Address) .................. 33

Appendix .............................................................................................. 34

- Resource/Reference List ................................................................. 35-36
- CE Certificate Instructions
**Objectives**

- Understand the issues, risks and challenges of e-discovery
- Identify records involved in e-discovery and how they are produced
- Understand the vital role of the pre-trial conference
- Identify steps necessary for a legal record policy
- Learn how to create a data inventory

**Electronic Discovery Challenges**

- 29% follow retention schedules “not regularly” or “when time permits”
- 43% do not include electronic records in retention schedules
- 43% do not have formal system for records hold orders
- 49% do not have formal e-mail retention policy
- 53% reported electronic records not included in record holds
- 68% had “some, considerable, or great” difficulty finding and retrieving data from back-up media in response to court-ordered discovery.
Definitions

- **Discovery**
  - Stage in the litigation process during which both parties use strategies to discover information about a case, the primary focus of which is to determine strength of the opposing party's case.
  - Discovery may involve requests for information as evidence.

Definitions

- **What is a record?**
  - A record is information created, received, and maintained by an organization or person that is evidence of its activities or operations, and has value requiring its retention for a specific period of time.
  - It can be used in pursuance of legal and regulatory obligations.
Definitions

- **Legal Health Record**
  “generated at or for a healthcare organization as its business record and is the record that would be released upon request.”

- **Custodian of the EHR**
  “is the health information manager in collaboration with information technology.”

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**Legal EHR subset of the EHR**
**Definitions**

- **Four Levels of Custodians**
  - Level 1: Primary or Direct Custodian
  - Level 2: Data Owners or Stewards
  - Level 3: Business Associates and Third Parties
  - Official Record and System Custodians

**Polling Question #1**

Does your organization have a Legal Health Record Policy?

- a) Yes
- b) No
**Admissibility**

- **Conditions for hearsay exception**
  - Documented in the normal course of business
  - Kept in the regular course of business
  - Made at or near the time of the event
  - Made by a person with knowledge of act or event

**Admissibility of EHRs**

- Type of computer and its acceptance as a standard
- How the system operates
- Method and circumstance of how the system keeps records including:
  - Source(s) of information
  - How information is entered
  - How information is retrieved from the computer
  - Controls and checks
  - Reliability
  - Potential for alteration of data
Regulations

- **Federal Rules of Civil Procedure**
  - December 1, 2006

- **State Rules**
  - Uniform Rules Relating to the Discovery of Electronically Stored Information - August 2, 2007
  - Conference of Chief Justices
  - Individual State Actions - 41 states

Current State

- Legal health record defined
- Data retention strategy created
- Inventory of electronic systems complete
- Electronic discovery response plan developed
**E-Discovery Model**

1. Establish a well thought-out records retention policy considering any statutory or regulatory obligations;
2. Make sure someone is really in charge of records retention;
3. Establish records retention committee;
4. Disseminate record retention policy and provide education;
E-Discovery Readiness

5. Establish a response team for litigation that require document preservation;
6. Consult outside counsel on retention policy;
7. Retain an outside vendor to assist with litigation hold if necessary;
8. Encourage outside counsel to raise preservation costs at the earliest time;

E-Discovery Readiness

9. Ensure general counsel is educated and knowledgeable about organizational technology and storage strategy; and
10. Be very careful to avoid destruction of documents when there is a clear duty to preserve.
PRETRIAL CONFERENCE

Federal Rules of Civil Procedure - Pretrial Conference

- Pretrial conferences & early attention to electronic discovery issues - Rule 16(b), 26(f)
- What information is available & the format
- Preserving discoverable information & form of production
- Cost & delays of document production
- Assertion of privilege
- Stronger role for judges
Federal Rules of Civil Procedure - Pretrial Conference

- Duty to disclose & relevance of information - Rule 26(a), 26(b)(1)
- Legal obligation to maintain & disclose relevant records
- Prior to parties meeting - legal, HIM, & IT must meet
- Limit scope to information relevant to the claim or defense

Federal Rules of Civil Procedure

- Information not reasonably accessible; balancing cost & benefit - Rule 26(b), 26(b)(2)(C)
- Provides that a party need not provide electronically stored information that is inaccessible because of undue burden of cost
- Party must quantify the burden & show the court that sources are not reasonably accessible
- Court may still order discovery for good cause - judge to balance cost vs. benefit
Federal Rules of Civil Procedure

- Claims of privilege after inadvertent production – Rule 26(b)(5)
- A process to present to the court that information was inadvertently produced (information not requested or relevant to the request)
- Establish organizational policies outlining examples of privileged and protected work product

RECORD MANAGEMENT & DATA INVENTORY
Polling Question #2

Does your organization follow a destruction policy that includes electronic data?

a) Yes
b) No

Records Management

- Written records management policies should address both paper and electronic records
- Legal health record policy to define subset of data for release of information purposes
Records Management: Legal Issues

- E-Discovery Costs and Sanctions: a symptom, not the problem... and the cost of responding to even a single discovery request can be staggering.

Retention Strategy

1. Identify and document the method, location, and native file format of information created within the organization;

2. Recognize that the organization is not obligated to retain all information created or received, unless a business or legal obligation exists to maintain the information;
Data Inventory Example

<table>
<thead>
<tr>
<th>Application</th>
<th>Purpose</th>
<th>Clinical (C) Financial (F) HR (H) Operational (O) Email (E) No Data (N)</th>
<th>Data Format</th>
<th>Archive Yes or No</th>
<th>Automated Archive Function Yes or No</th>
<th>Data Destruction Yes or No</th>
<th>Automated Data Destruction Yes or No</th>
<th>Custodian</th>
<th>Retention Period</th>
</tr>
</thead>
</table>

Retention Strategy

3. **Specifically delineate the organization’s electronic records maintenance, storage, and destruction schedules;**

4. **Provide education on the retention schedule;**

5. **Determine how the organization would define “good faith operation” of its electronic information system if called upon to do so;**
Retention Strategy

6. Establish internal audits or controls to measure compliance with the organization’s storage, retention, and destruction policies; and

7. Recognize that the FRCP provide sanctions and safe harbors, while also balancing the availability of information.

LITIGATION RESPONSE
**Litigation Response Strategy**

- Team approach, identify in advance how records will be preserved
  - Info Sec professionals
  - IT/IS professionals
  - Clinical users
  - HIM professionals
  - Legal counsel
- Identify spokesperson

**Litigation Response Strategy**

- Spokesperson should be prepared
  - Recognize that the legal community may lack technical background or knowledge
  - Able to clarify complex technical issues and make them comprehensible to the court
Sample 30(b)(6) Deposition Questions

- What steps have been taken to ensure preservation of relevant electronic data?
- What is the company’s document retention policy regarding electronic information and how long has it been in effect? It is published and, if so, where?
- Are the company’s retention policies always complied with? If not, why? Were there former policies and, if so, what were they?

Litigation Response Strategy

- Gather information from disparate computer systems and application
- Identify, locate, retrieve, preserve and produce data for production and disclosure
**Litigation Response Strategy**

- **Determine the format of information production**
  - Electronic information should be produced in a form that preserves substantive data relevant to the case; the format chosen should allow the parties to verify authenticity and authentication for evidentiary purposes.

- **Determine what information must be produced**
  - Filtering ESI
    - Key words
    - File types
    - Dates
    - Custodians
**Litigation Response Strategy**

- Determine the format of information production - .TIF, .PDF, .JPG
  - Data that is not ordinarily viewable when normally printed need not be produced
  - This means paper printouts are okay

**LEGAL HOLD**
Legal Hold Definition

- A “legal hold” program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve has arisen.

Legal Hold Action Plan

1. Establish project team or responsible parties;
2. Educate yourselves using all available resources;
3. Identify what actions or events will trigger a legal hold;
4. Develop procedures to notify individuals or departments;
**Legal Hold Action Plan**

5. Determine additional technology or resource needs;
6. Finalize policies;
7. Provide education to all impacted parties
8. Implement and monitor; and
9. Update and revise policies and procedures as necessary.

**Special Considerations**

- MetaData
- E-Mail
- Portable Devices
- Back-up Tapes/ Media
**Metadata**

- Metadata Defined – “Data about Data”
  - Contextual, Processing, and Information About Use of a Record
  - Generated Through Variety of Sources
  - Significant Potential Benefits of Metadata

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**E-mail Management**

- E-Mail – “The Cache to the Cash”
  - Controversial – Don’t be caught off guard!
  - Sound Email Management Policies Will Yield Best Results
    1. Caselaw is Defining its Use
    2. Defined Policies for PHI
    3. Retention, Storage, Destruction
    4. Educate & Communicate Organizational Practices
    5. Routine Part of E-Discovery
E-mail Management

- Individual e-mail management
  - Automatic deletion 14 or 30 days
  - Employee moves or stores e-mail (paper or electronic folders .pst files)
  - Litigation hold requires individual searching

E-mail Management

- Pro-active on-line archiving
  - E-mails archived in a single on-line repository
  - Data maintained for a fixed period of time
  - Information is indexed by any criteria - employee, location, subject matter, date, etc.
Portable Devices

- Storage Capacity
- Communications
- Proliferation

- Perform needs assessment
- Develop protocols for devices:
  - Selection
  - Use policies
  - Maintenance/replacement
- Use wise risk-management evaluation
Back-up Function

- How are back-ups performed?
- How often are back-ups performed?
- Where is the back-up media retained?
- Does the back-up process perform a full system back-up, or is it incremental?

Back-up Function

- What is backed up?
  - Servers
  - Individual and network devices
  - Mobile devices
- Can you restore individual e-mails?
- How will a legal hold be applied to back-up media?
Destruction

- **Destruction Plan**
  - Instructions and guidelines for destruction
  - Instructions when destruction should be delayed or stopped
  - Include all types of information
  - Review of all laws and guidelines
  - Provide education
  - Safeguards for inappropriate destruction

E-mail

- Safeguards to ensure integrity
- Establish destruction guidelines and provide education
- Consider paper retention issues
**Destruction**

- Policies on method of destruction
- Variety of methods:
  - Physically destroy the media
  - Shredding of CD and DVD
  - Overwriting of hard drives using DoD software

**Education**

- Policies and Procedures
  - Retention
  - E-mail
  - Portable Devices
Compliance and Monitoring

- Establish a monitoring program.
- Perform periodic audits.
- Create written reports and communicate.
- Provide corrective action as needed.

Resource/Reference List

AHIMA Webinars

- 8/11/09 - Developing Your Records Retention Schedule
  https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC081109
- 11/17/09 - The Legal Health Record: Copy and Paste Guidelines
  https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC111709
- 4/22/08 - Defining and Maintaining the Legal Health Record
  https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC042208
- 5/20/08 - Enterprise Content Management
  https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC052008
- 6/10/08 - Fundamentals of eDiscovery
  https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC061008
- 8/12/08 - The Legal Health Record: The Legal Hold Process
  https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC081208
Resource/Reference List

AHIMA Practice Briefs

- 5/2/09 – Sanction Guidelines for Privacy and Security Breaches
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_043483.hcsp
- 2/2/09 – Redisclosure of Patient Health Information
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_042636.hcsp
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_040788.hcsp
- 10/2/08 – Enterprise Content and Record Management for Healthcare
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_040405.hcsp
- 7/2/08 – Mitigating Medical Identity Theft
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_039058.hcsp
- 4/2/08 – Defining and Disclosing the Designated Record Set and the Legal Health Record
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_037468.hcsp
- 2/2/08 – Litigation Response Planning and Policies for E-Discovery
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_036581.hcsp
- 10/2/07 – Developing a Legal Health Record Policy
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_035543.hcsp

AHIMA Journal Articles (member login required for some)

- 2/2/09 – Authenticating EHR Metadata
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_042635.hcsp
- 12/30/08 – AHIMA Leadership Model: Legal Health Record
- 10/2/08 – Applying Legal Holds to Electronic Health Records
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_040393.hcsp
- 7/2/08 – The Metadata You Need
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_039069.hcsp
- 2/2/08 – Metadata, Law and the Real World
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_036537.hcsp
- 2/2/08 – Litigation Response Planning and Policies for E-Discovery
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_036581.hcsp
- 2/2/08 – Enterprise Content and Records Management
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_036480.hcsp
- 11/2/07 – Calculating the Costs of E-Discovery
  http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_035924.hcsp
### Audience Questions

Thank you!
Audio Seminar Discussion

Following today’s live seminar
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Upcoming Webinars

- Auditing for Privacy and Security Compliance
  June 23, 2009
- ARRA Town Hall
  June 25, 2009
- MPI Clean Up: It’s a Must!
  July 21, 2009

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Certificates will be awarded for AHIMA CEUs.
Appendix

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CE Certificate Instructions
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5/20/08 – Enterprise Content Management  
https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC052008

6/10/08 – Fundamentals of eDiscovery  
https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC061008

8/12/08 – The Legal Health Record: The Legal Hold Process  
https://imis.ahima.org/orders/productDetail.cfm?pc=AUDMC081208

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12/30/08 – AHIMA Leadership Model: Legal Health Record  

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