E-DISCOVERY AND RECORDS RETENTION PROGRAMS: What Healthcare Administrators Need to Know

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• The future ain't what it used to be."

Yogi Berra
Key Questions for Healthcare Administrators

• How many people are you responsible for?

• How are you going to protect the organization and yourself from what they might do?

• You need all of your staff to comply with all applicable laws, regulations & corporate polices, every day, no lapses or exceptions – how do you do that?

• You have little control over the thousands of emails, messages & documents sent, posted or saved each day – how do you gain control?
E-Mails That Should Never Have Been Sent

• “I’m not supposed to send you this financial information now as it is not final, so please don’t let anyone know I sent it to you.”

• “Let’s delete the worst emails and messages re this situation, I think there might be a OIG claim coming.”

• “I don’t care what the contract says, either do it my way or you are fired.”

• “You are still doing a terrible job and I’m going to make sure everyone knows it. You are such a jerk.”
The Answer: Compliance Programs Reduce Risk

• Records Management – key to both compliance and e-discovery readiness
• Government regulations compliance
• Personnel policies and codes of conduct
• Financial and contractual compliance
• Legal compliance
• Patient care and quality compliance
E-Documents – It’s not a paper world anymore

• 93% of all information is now generated in electronic form

• 70% of these documents are never reduced to hard copy

Everybody Knows This Game: "Where’s Waldo"
Here’s a Much More Difficult Game: Where’s Waldo’s ESI?
So, Where Is Waldo’s ESI?

ESI (“electronically stored information”), the term used in the new Electronic Discovery Amendments to the Federal Rules of Civil Procedure, is everywhere and can include:

• Email – Outlook & Other Programs
• Word, Excel, Access, PowerPoint similar programs
• Company proprietary or customized programs (e.g., Oracle database; SQL Server database; SAP & other custom business applications; specialized accounting programs, etc.)
• Mainframe systems
• Network servers for email, documents, databases, other materials
• Desktop & laptop computer hard drives
• Home computer hard drives – common when employees work from home on non-company computers; common for employees to forward files and email to home account (creates e-discovery, compliance & trade secret theft risks)
• Third-party email providers (GMail, Yahoo, Hotmail, etc.)
Where Else Is Waldo’s ESI?

• Backup tapes and other storage media
• Abandoned servers and drives
• Voicemail systems
• Instant messaging systems
• Copier memory
• Fax machine memory
• Blackberries or PDA’s
• Cell-phones – for call times, phone locations, text messages
• Portable devices (memory sticks, flash drives, CF, SD, Mini-SD, CRDW, DVD, etc.)
• iPods – and now iPhones too
• GPS devices
• Many other sources – even viruses can carry data
• RAM can be discoverable (recent California case involving movie file sharing with Bit Torrent software)
Are Waldo’s Electronic Files Discoverable?

• Yes. All of them.

• Waldo should not write anything he does not want to see on the front page of The Washington Post or Drudge Report.

• Smoking gun electronic documents are the key to unlock many government enforcement cases, especially false claims act/qui tam cases, fraud & abuse, employment litigation

• Every day brings new email disclosures, whistle blowing for health care entities has now become electronic.

• Illusion of privacy: smaller screen, more privacy

[computer, Blackberry, cell phone text message]

• Reality: none of it is private, everything is discoverable
"You Say You Want A Revolution?

• Discovery in litigation has undergone a truly revolutionary change from paper to electronic files.

• Change was gradual, accelerating over past 10 years to become part of most litigations.

• FRCP E-Discovery amendments – Federal Rules have recognized and caught up to changes and states will likely soon follow.

• Not another Y2K. Can’t ignore it, can’t live in a paper world anymore.

• Profound and permanent change in the way litigation discovery is conducted.
• The New Federal E-Discovery Rules
New E-Discovery Amendments to Federal Rules of Civil Procedure:

Effective date: December 1, 2006

- **Rule 26(a)**, adds “electronically stored information” (ESI) as own separate category of document subject to discovery

- **Rule 26(b)(2)**, sets up two tier discovery for *accessible* and *inaccessible* data; provides procedures for cost shifting on inaccessible data

- **Rule 26(f)**, requires parties/attorneys to meet 21 days before Court scheduling conference to discuss discovery plan, including any issues relating to disclosure or discovery of ESI, including the form or forms of production – ADVANCE PREPARATION REQUIRED!!
Focus on Rule 37 – “Safe Harbor”

**Rule 37** – Failure to Make Disclosure or Cooperate in Discovery = Sanctions

- **Limited protection** -- if inability to provide ESI results from routine, good-faith operation of an electronic information system

**Beware** – The so-called “safe harbor” is illusory and not much of a safe harbor at all; a watered down version of the original proposal

**But** – strong records management and compliance programs provide an edge in showing “good faith” if documents are destroyed accidentally
"If you don't know where you are going, you might wind up somewhere else."

Yogi Berra
MOTIVATION: A Cautionary Tale for Litigators and Their Clients

• Morgan Stanley Cases
  – $1.5 Billion judgment in Coleman Holdings, Inc. v. Morgan Stanley (March 2005)(backup tapes)
  – SEC Sanctions: $15 Million (May 2006)(e-mail)
  – NASD: False statements that e-mail lost in 9-11 attack (Feb. 2007)(sanctions pending in “more than 1,000 cases.”)
MOTIVATION: A Cautionary Tale for Litigators and Their Clients

• *In re NTL Inc. Securities Litigation:*
  - Monetary Sanctions **and** adverse inference for failing to preserve e-mails and other documents
  - Defendants “at least grossly negligent.”
  - On-going duty to preserve survives even corporate reorganization.
MOTIVATION: A Cautionary Tale for Litigators and Their Clients

• Duty to preserve applies to litigation and investigations and audits

• Government audits and investigations can be parallel civil and criminal

• Potential sanctions more than just money and adverse inferences

• Violations can lead to Obstruction of Justice and False Statements charges
MOTIVATION: A Cautionary Tale for Litigators and Their Clients

• Government Investigations:
  – Frequently begin with demand for production of records, including e-records
  – Include demand for preservation
  – Even inadvertent destruction viewed with suspicion
  – “Adverse Inferences” can lead to civil and criminal fraud cases
Connection

• A strong electronic data discovery program ...

• Requires a strong records management program

• New rules further emphasize the value of established records management practices

• Litigation Holds – always a part of comprehensive records management programs – now much more important due to sanctions for failure to preserve ESI.
What Is a Records Management Program?

• **Not** just a records retention schedule (list of how long to keep categories of records)

• **Not** an “IT” program to delete emails or other electronic records.

• **Not** just a policy drafted by lawyers and imposed on the business people
What Is a Records Management Program?

• It is a **comprehensive** program for the retention, retrieval and management of records needed by the company; **and**

• Destruction of records not needed or used by the company

• It involves the **design, implementation and enforcement** of records management policies and procedures
Why Do Organizations Need a Records Management Program?

• Focus on why there is a need for records
  – Business Reasons (contracts, patient care, financial records)
  – Regulatory Requirements (financial reporting, product evaluation, etc. by regulators)
  – Legal Holds (law suits, investigations and audits)
Why Do Organizations Need a Records Management Program?

• *Affirmative Benefits:*
  – Control over creation and volume of information
  – Facilitate preservation of required, important and useful business records
  – Provide better access to records
  – Increase quality and productivity
  – Reduce costs
  – Protect corporate history and memory
Why Do Organizations Need a Records Management Program?

• Defensive Reasons:
  – Reduce exposure to regulators and adverse litigants
  – Avoid penalties, including monetary sanctions and dismissal of claims or defenses
  – Protect against privacy law violations
  – Protect against Obstruction of Justice charges in the event of government audit or investigation
What Records Are Covered?

• Policy should **address** all information, but
• Not require **retention** of all information
• Keep:
  – Information needed to meet legal requirements;
  – Information needed or useful for business reasons
  – Information desired to be retained for historical, educational or other “soft” reasons
What Records Are Covered?

• Don’t Keep:
  – Information not required, needed, or useful

• Don’t Itemize Individual Records

• Do Classify and Manage by Groups or Categories
What Are the Elements of a Good Records Management Program

• Identify and group records (insurance policies, bylaws, amendments to bylaws)

• Place groups into larger “categories (General Administrative; Financial)

• Identify lifecycle, or retention period for each group (Beware of multiple state laws)

• Provide for preservation of permanent records and destruction of records at end of retention period
What Are the Elements of a Good Records Management Program?

• Provide procedures for implementing a “Litigation Hold” – suspension of destruction
Why Not Just Use an “Off-the-Shelf” Program?

• Effective programs are not “one-size-fits-all.”
• Must be tailored to specific circumstances, including size, of the organization
• Must fit with the culture of the organization
• Must be accepted by employees and management
Why Not Use an “Off-the-Shelf” Program?

• Must fit the business rules, traditional data forms and information flows

• Some retention periods are covered by “rule of reasonableness”

• Must fit the IT system and computers
How to Create an *Effective Records Management Program*

• Must be a collaborative effort

• Identify needs of the different departments and spokespeople within each ("Records Coordinators")

• Form committee of Records Coordinators

• Confirm kinds/categories of information to be covered and "forms" in which they exist
How to Create an Effective Records Management Program

- Create a Records Management Structure (centralized/decentralized/automated)
- Coordinate people, processes and technology
- Make it realistic, organized and accountable
- Don’t let IT dominate the process
How to Create an Effective Records Management Program

• Goal is “compliance, collaboration and using the company’s knowledge in a way that creates value” (Kraft Foods)
  – Understanding of legal requirements
  – Familiarity with technical capabilities
  – Understanding of how people think and work
  – Knowledge of the business
How to Create an Effective Records Management Program

• Bring Records Management under umbrella of comprehensive compliance and ethics program framework
  – Good Policy, without more, will not be effective
  – US Sentencing Commission Guidance on “effective” compliance and ethics programs
What Is an Effective Compliance Framework?

• Standards and Procedures
• Organizational Leadership and Culture
• Employment and Advancement Practices Consistent with Program
• Training and Communication
• Monitoring, Auditing and Evaluation of Program Effectiveness
What Is an Effective Compliance Framework?

• Performance Incentives and Disciplinary Actions
• Remedial Action
• Risk Assessment
Records Management Programs In Context

- Control creation, volume and location of information
- Preserve critical business records
- Efficient access to information
- Reduce potential exposure to regulators and adverse litigants
- Increase productivity
- Protect corporate history and memory
- Reduce storage costs
Document Lifecycle (simplified)

- Internally Created Document
- Externally Created Document

Document In Active Use

- Accessible (e.g., E-Archives; Storage Facility)
- Destruction
- Permanent Retention

Difficult Access: (e.g., Backup System)
Case Study: Capture at Creation

• Proctor & Gamble

• Approximately:
  – 190,000 laboratory notebooks
  – 17 research centers globally
  – over 6,000 researchers

• Existing records management application
  – available to only a few records management personnel
  – contained notebooks from a handful of research sites
Capture at Creation (cont)

- Critical records for the Health Care business unit:
  - managed with software that had reached capacity
  - relied heavily on the staff’s memory
- Solution: new records management system and program
  - (i) new business rules
  - (ii) technical changes
  - (iii) training
- Tracks notebooks
- Downloads metadata to assist in managing the information
- Reduces/avoids costs by $450,000
  - http://www.arma.org/conference/Awards/ProgramExcellenceOverall.cfm
Illustration Shows...

• It is critical to understand the organization’s existing:
  – Information infrastructure
  – Business rules and retention rules
  – Data flows
  – Physical “layout”

• How is this done?
Inventory

• Undertake or commission an inventory

• Three broad tasks:
  – (i) identify systems
  – (ii) associate records and record categories with systems
  – (iii) associate people with (a) record categories and (b) systems
Where Is the Information?

• Learn where the company’s records and files are located:
  – physically (what servers, what storage areas) and
  – Organizationally (which departments or provider groups)
• Encourage the company to simplify and standardize:
  – file structure
  – naming conventions
  – metadata specification
Active and Inactive

• The inventory must cover active records
• Equally as important, the inventory must cover:
  – Inactive, archived records
  – Backup systems
  – “Legacy” systems
Inventory Active Locations

- Internally Created Document
- Externally Created Document

Document In Active Use

- Accessible (e.g., E-Archives; Storage Facility)
- Difficult Access: (e.g., Backup System)
- Destruction
- Permanent Retention
Inventory Active Locations

- Home PC
- External hard drive
- Personal email folders
- Network (Word documents)
- Network (accounting documents)
- Jump drive
- PDA
- Email inbox
- Voice mail
- Text message
- Email attachments
Training

• Training program should instruct employees regarding document
  – creation,
  – Use,
  – storage,
  – maintenance,
  – retention and destruction

• The general goals of training are to explain
  – (i) the reasons for record management,
  – (ii) the benefits of compliance, and
  – (iii) the consequences and penalties for non-compliance.
Sanctions

• The provider should also consider sanctions for non-compliance
  – Describe its expectations to employees,
  – Conduct compliance reviews
  – Impose sanctions for failure to comply including, for example: under-retaining, over-retaining, and failing to adhere to legal hold requirements
Implementation - Illustration

• Example: Proctor & Gamble:
  – Employees instructed in records management as part of the orientation process
  – Take short on-line training modules
  – Records management included in departmental annual assessments and Internal Control Audits.
  – Departments, therefore, are incentivized to review records on an annual basis
Chain of Command and Litigation Holds

• Put in place structures to address litigation holds

• Identify "point" persons responsible for determining when the records management policy should be suspended

• “Point person” should:
  – Have strong knowledge of the policy
  – Coordinate the litigation hold
  – Be a good witness
Litigation Hold (cont)

• It is extremely important in the context of a litigation hold to ensure that "the right hand knows what the left hand is doing"

• Courts can be unforgiving where a party claims that a "simple communication breakdown" lead to destruction of relevant materials
Illustrations: Chain of Command and Communications

• Coleman Holdings Inc. v. Morgan Stanley & Co.:
  – Uncoordinated search for backup tapes
  – Defendant discovered more than 2,500 tapes late
  – Lead to partial default judgment, and later a $1.5 billion jury verdict
Illustrations: Chain of Command and Communications (cont)

• *Zubulake v. UBS Warburg LLC:*
  
  – Internal and counsel-related communication failures led to late productions and loss of data
  
  – Court gave an adverse-inference instruction, which leads to $29 million jury verdict
Illustrations: Chain of Command and Communications (cont)

• *GFTM, Inc. v. Wal Mart Stores, Inc.*:
  
  – Counsel did not consult with IT personnel
  
  – Provided incorrect information being provided to the court
  
  – Court orders the defendant to pay expenses and legal fees associated with additional discovery
Conclusion

• Core importance of records management program
• Proactive response to litigation and regulatory investigation
• Reduction in costs
• Numerous additional benefits
Conclusion

• “It is not the strongest of the species that survive, nor the most intelligent, but the ones most responsive to change.”

• Charles Darwin
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