

## Avoid Legal Missteps with a Litigation Response Plan

Big changes are afoot in the legal world. HIM professionals should be in step on three key concepts and the ways they relate: legal EHR, enterprise content and records management, and e-discovery.

**1. Legal EHR**—Along with key uses for patient care and business, EHRs also are used as evidence in litigation, including malpractice, workers compensation, and employment. Litigators are increasingly requesting electronic data outside the traditionally defined legal business record. The healthcare industry is focusing more and more on shoring up electronic records management practices to ensure EHRs are credible evidence in legal proceedings.

**2. Enterprise content and records management**—Records management comprises all activities in the record lifecycle, from creation to destruction, to supporting the record so that it can be used for many purposes, including litigation. Good records management principles have always underpinned HIM practice. The new twist is that we are applying these concepts to electronic records, so new practices may evolve.

Another new facet is the concept of enterprise content management (ECM). Content is all the information included in the health record as well as relevant information that may not necessarily be included. Organizations must manage content, which includes things like voice files, machine tracings, e-mail messages, information being collected on Web sites, and policies and procedures to collect, create, and store electronic information. Litigators are asking for this type of information and using it to challenge the trustworthiness of records presented as evidence.

**3. E-discovery**—The electronic environment is changing the way litigation is handled and what evidence is requested. In 2006 the federal court system amended the **Federal Rules for Civil Procedure (FRCP)** that govern discovery of electronically stored information. Because litigators are aggressively pursuing electronic information, organizations must create a good litigation response plan. This type of plan can be the seed to develop an enterprise strategy for records and content management.

“FRCP introduced the term ‘electronically stored information’ (ESI) to the discovery process, which means that any electronic information, such as e-mails, spreadsheets, word processing files, and backup tapes, is potentially discoverable and admissible,” said **Kevin Joerling**, CRM, senior manager, standards and records management at **ARMA International**, based in Lenexa, KS. “With the drastic growth in ESI for most organizations today, these new requirements make it costly for organizations to retrieve ESI from servers, backup tapes, and archives.”

## New Standards Point the Way

Up until now, EHR development has emphasized the functionality needed to support clinical processes. Functions that support accurate, complete, and auditable records are not always built into EHR systems. Now the EHR is evolving to encompass good records management practices for a number of different business purposes, including legal. For the first time, new standards are being created to guide organizations in the development of these practices.

The standards development organization **Health Level Seven (HL7)** has completed the **EHR-S Records Management and Evidentiary Support (RM-ES) functional profile**. This standard, which has been championed by AHIMA, helps organizations identify functionality in their EHR systems to support day-to-day records management operations for business processes and medical legal purposes, including the new federal requirements for e-discovery. The HL7 project team has submitted the RM-ES informative standard to the **Certification Commission for Healthcare Information Technology (CCHIT)** for certification.

The RM-ES informative standard highlights key issues such as:

- Security functions that support the integrity and trustworthiness of the EHR.
- Health record and information management functions that help ensure the EHR system can support business and legal needs.
- Business rules and workflow management functions that may be called into question when an EHR is submitted as evidence.

Every EHR application should be evaluated for proper records management and evidentiary support functions. Organizations can use the RM-ES draft standard as a tool to assess risks and capabilities of current EHR applications and practices as well as when purchasing new EHR applications.

“Several functions must be in place to support a good legal EHR and business record,” said **Deborah Kohn**, MPH, RHIA, FACHE, CPHIMS, principal of Dak Systems Consulting in San Mateo, CA. “These include but are not limited to record security functions, such as identity management as well as authentication and authorization, record creation and completion functions, record archive and maintenance functions, record purge and destruction functions, and record correction, error, and amendment functions.”

These and other functions are addressed by the RM-ES draft standard. For example, section IN.2.5.3 focuses on managing health record information during the various stages of completion:

- 1. Pending state.** What happens to “pending” notes in your EHR? You’ll need a process to handle notes that are started but not finished. Clinicians may forget they started a note and then start a new one which may contradict other notes that have been finalized. Volumes of notes like these in a database are potentially legally discoverable.
- 2. Amended, corrected, and augmented state.** Even though it’s a basic concept from an HIM perspective, functions for handling amendments and corrections are missing in many EHR systems. Unfortunately, some organizations have systems that do not retain original entries, do not identify an entry that’s been flagged to correct it, or allow no visual way to know that an entry has been flagged or corrected. When changes are not transparent, the trustworthiness of the record can be called into question.
- 3. Document succession management and version control.** Once a version of a document has been used or accessed for patient care purposes it cannot be destroyed. If a clinical decision was based on an early version of a document that may have been changed later on, the system must provide access to that early version. A system administrator or other person with an administrative role should be able to access all versions if they were needed in litigation or some other type of business purpose.
- 4. Retracted state.** Errors do occur. For example, when wrong records get attached to the wrong patient, you should be able to remove them from view while still acknowledging that the record had at some point been available. Whenever clinical decisions are made based on a record, that record must be retained. When you destroy previous entries, the integrity of the record can be questioned.

## **HIM Plays Pivotal Role**

Start preparing now. First and foremost, open your mind because these new concepts are coming down the road fast and furious.

“HIM professionals have a responsibility to understand not just how the record is maintained, but also how information is used,” said **Kim Reich**, MBA, MJ, RHIA, CHC, CPHQ, an e-discovery and healthcare risk management/compliance professional from Lake Forest, IL. “Things like schematics, which describe how information flows in the organization, and well-documented records retention policies can be helpful to legal counsel.”

- 1. Learn the RM-ES draft standard.** See the article “How Legal Is Your EHR? Identifying Key Functions That Support a Legal Record” from the February 2008 issue of the *Journal of AHIMA*. You can find the standard in the Fore Library: Body of Knowledge at [www.ahima.org](http://www.ahima.org).
- 2. Develop a litigation response plan.** At the Legal EHR conference August 18–19 in Chicago, experts agreed that the time to prepare for e-discovery is not when you receive your first subpoena for electronically stored information. You’ll be way behind the eight ball if you don’t have a plan or approach.
- 3. Get your litigation response team together.** This group should consist of IT, legal, and HIM at a minimum. No more silos. We are no longer able to respond to a subpoena without input and support from others.
- 4. Create a data map.** Identify where all your data and records are kept. Classify your records so you can find them when a request comes in. “Maintain a complete inventory of all forms, formats, and locations of electronically stored data,” said Reich. And know the data owners, custodians, or stewards.
- 5. Study the e-discovery rules.** Your legal department can guide you, but give yourself a basic understanding. One of the biggest lessons to learn is that you don’t have to produce everything that is requested. If possible, attend the “Legal EHR Workshop: Navigating e-Discovery” on November 11 in Las Vegas.
- 6. Look for new practice brief.** “Enterprise Content and Records Management for Healthcare” appears in the October 2008 issue of the *Journal of AHIMA*.

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