RECORDS RETENTION FOR HEALTH CARE COMPANIES

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Andy Walkup is the Assistant General Counsel for SSM Health Care, which operates in four states and includes eighteen hospitals, outpatient clinics, physician offices, nursing homes, a pharmacy benefit management company, an insurance company, home care, hospice, and a technology company. Andy’s responsibilities at SSM include managing litigation in Missouri and Illinois, managing select system-wide matters, and providing legal advice on a wide-range of topics to the SSM hospitals and entities operating in Missouri and Illinois.

Prior to joining SSM, Andy practiced in the Litigation and Health Care practice groups at Greensfelder, Hemker & Gale, P.C. where he represented and advised clients on a variety of issues, including data breaches, document retention, health care pricing and payment disputes, business torts, commercial litigation, products liability litigation, physician credentialing and medical staff privilege disputes, risk management issues, e-discovery, IP issues, health law, and media and communications law.

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David Barton is Associate General Counsel at St. Luke’s Health System in Boise, Idaho. He advises St. Luke’s on matters including physician contracting, relations with suppliers, and litigation.

David was previously Counsel at Crowell & Moring in San Francisco and an associate at Folger Levin & Kahn in San Francisco. He maintained a varied practice in complex litigation, including representation of clients in the health care industry and policy-holders in insurance litigation. Prior to his legal career, David taught philosophy at the University of Oregon, the University of California, Davis, and Swarthmore College.

David has served as a board member of the AIDS Legal Referral Panel, a San Francisco based organization providing free and reduced cost legal services to individuals with HIV/AIDS.

David graduated from Stanford University in 1988. He received a Ph.D. in Philosophy from the University of California, Berkeley in 1994 and a J.D. from the University of California, Berkeley, in 2002.
Kevin Hormuth is a Partner in the Litigation Practice Group of Greensfelder, Hemker & Gale in St. Louis, Missouri. His practice focuses on business torts, healthcare/pharmaceutical pricing and billing disputes, franchise and distribution litigation, and general commercial litigation.

He has tried cases in the Circuit Courts of the City of St. Louis, St. Louis County and Cole County, as well as the U.S. District Court, Eastern District of Missouri and the U.S. District Court, Southern District, Texas. Kevin also has argued before the U.S. Court of Appeals, Eighth Circuit, and the Missouri Court of Appeals, Eastern and Western Districts.

Kevin has been featured in Best Lawyers in America and Missouri & Kansas Super Lawyers. In 2009, Kevin was recognized as an “Up and Coming Lawyer” by Missouri Lawyers Weekly.

Kevin is Co-Chair of the Business Torts Subcommittee of the American Bar Association - Business Law Section and he is a member of the Missouri Organization of Defense Lawyers. He is a co-author of Missouri Trial Objections, published by Thompson-West, now in its fourth edition.

Kevin received his J.D. from Creighton University and his B.A. magna cum laude from Saint Louis University.
Types of Hospital Records

• Care Based Records
  – Medical Records
  – Medical Staff Files & Credentialing Documents
  – Peer Review Records
  – Pharmacy Records
  – Risk Management Investigations & Databases

• Administrative Hospital Records
  – Accreditation / Licensure Records
  – Insurance Policies
  – Medical Staff Bylaws, Meeting Minutes
  – Committee Meeting Minutes

• Corporate Records
  – Annual Reports
  – Contracts
  – Corporate Bylaws, Resolutions, & Meeting Minutes
  – Organization Charts

• Financial Records
• Personnel / HR Records
The Floor: Record Retention Laws

• Federal and State Statutes & Regulations
  – Hospital Licensing Regulations
  – HR Specific Regulations
  – Accounting Specific Regulations
  – Statute of Limitations
  – Medicare and Medicaid Conditions of Participation

• Administrative Agency Guidelines and Guidance
  – Department of Pharmacy
  – State Secretary of State Records Board Manual
  – Joint Commission

• Acceptable Business Practices & Guidelines
  – GAAP
  – American Health Information Management Association (AHIMA) Guidelines
Example Analysis: Medical Records

• **Hospital Licensing Statute (Missouri)**
  – 10 years or until the twenty-third (23rd) birthday of a minor patient, whichever is later.
  – 10 years begins from the last date of the patient’s treatment.

• **Medicare Conditions of Participation**
  – At least five (5) years.
  – 42 C.F.R. § 484.24

• **Statute of Limitations**
  – 5 year statute of limitations for malpractice (Missouri).
  – Tolled for mentally incapacitated individuals until retain capacity
    • Retain forever
  – Tolled for minors (under 18) until 20th birthday

• **Joint Commission**
  – Length of time dependent on the need for continuing patient care and for legal, research, operational, or education purposes and is based on law or regulation. IM.6.10

• **Specialized Regulations**
  – Mammography – 21 C.F.R. § 900.12
  – Medical Devices – 21 C.F.R. 803.18 & 821.60
  – See Handout
Example Analysis: Corporate Records

• Permanently Retained Records
  – Types of Records:
    • Annual Reports
    • Audit Reports
    • Bond Records
    • Corporate Bylaws, Resolutions & Minutes
    • Corporate Policies
    • Fixed Asset and Appraisal Records
    • Organizational Charts
  – Definition:
    • Period of existence of the legal entity which generated the record plus at least 10 years
  – Source:
    • No legal requirement
    • Documents should be retained permanently because they may affect or clarify the legal rights and/or obligations of the entity in future claims or issues.

• Contracts & General Correspondence:
  – Suggested Retention: 10 Years
  – Source: Statute of Limitations (Missouri)
    • Five (5) years: Torts and Contract Claims
    • Ten (10) years: Contracts in writing for payment of money or property
Other Records

• See handout for sources of information on records retention lengths for other types of records.

What Now?
THE LITIGATION PERSPECTIVE
ABA Model Rule 1.1 Comment Eight

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
In-House Counsel and Legal Hold Obligations

• Company has an obligation to preserve relevant documents/data when litigation is reasonably foreseeable

• In-house counsel is often tasked with deciding when a legal hold is required and ensuring that relevant documents/data are in fact preserved
WHAT IS A DOCUMENT?

• Question should be: What isn’t a document?
Document Defined

- **REQUEST FOR PRODUCTION EXAMPLE:**
- As used herein, “document” means any kind of recorded information, in the broadest sense permitted under the Rules of Civil Procedure, whether written, graphic, electronic or recorded by any other means, and whether an original or draft. This includes, but is not limited to, any correspondence, drawings, changes to such drawings, sketches, books, records, logs, reports, memoranda, abstracts, advertisements, agreements, appointment records, audio recordings, whether transcribed or not, balance sheets, bills, bills of lading, blanks, books of account, cablegrams, certificates, charters, communications, charts, checks, compilations from which information can be obtained or translated through detection devices, papers, transcriptions or summaries of conversations, delivery records, diaries, drafts, drafts of documents, electronic or mechanical recordation in whatever medium, discs, plans and specifications, graphs, tapes, slides, cards, wires, computer programs, computer print-outs, entries, estimates, expense records, field notes, films, financial analyses, financial statements, form, handbooks, telegrams, income statements, indices, instruments, intra-office and inter-office communications, invoices, itemizations, journals, letters, licenses, manuals, maps, meeting reports, minutes, notes order forms, orders, opinions, payroll records, permits, photocopies, photographs, planographs, press releases, prospectuses, publications, receipts, recordings, records, records of account, reports, requisitions, resolutions, statements, statistical records, studies, summaries, system analyses, time records, training manuals, evaluations, warehouse receipts, and any other electronic or mechanical recordings or transcripts or any other device or instrument from which information can be perceived, or which is used to memorialize human thought, speech or action in the possession, custody or control of Plaintiff, wherever located, including all premises and residences of Plaintiff and all the residences and premises of any of its attorneys, agents or representatives.
What is a Communication?

• **Request for Production Example:**
  
  As used herein, *“communication”* means and includes any transmission or exchange of information between two or more persons whether orally or in writing, including, without limitation, any conversation or discussion, face-to-face, or by means of letter, note, memorandum, telephone, telegraph, telex, cable, e-mail, voice-mail, text, instant messaging, recording, or some other medium, whether electronic or otherwise, whether formal or informal.
Sources of Electronic Information

- Home Computers
- Work Computers
- Laptops
- E-mail Servers
- Home Directory
- File and Print Servers
- Fax Server
- PDA
- Archived CDs
- Floppy Disks
- Cell Phones

- Blackberry
- Internet Repository
- Application Service Provider (ASP)
- Voice Mail Database
- Instant Message Logs
- Network System Logs
- Security Systems
- Backup Tapes
- Zip Drives

10/13/2014
Litigation Hold Memorandum

• Purpose: Preserve Relevant Documents/Data
• Timing: When Litigation Is Reasonably Forseeable
• Recipients
  – Records Custodians
  – Employees
  – IT Department
  – Vendors/Third Parties (Possession, custody or control? Right to control?)
Issuing and Managing the Hold

• Written legal hold should include the following:
  – Name of case/matter
  – Short description of case/matter
  – Contact person for questions
  – Date of notice
  – Relevant date range for materials
  – Categories of materials to be preserved
  – Return card/reply requirement to track individuals with potentially relevant materials
  – Description of employee’s obligations as well as consequences for non-compliance
  – Trumps all other preservation/retention policies and electronic settings

• Trust but verify compliance
  – Written surveys
  – Custodian interviews

• Documentation of legal hold process

• Reminders and changes in scope

• Add additional witnesses/custodians as identified

• Release at the close of a matter (The “Actos” conundrum)
What is a Preservation Policy?

• A policy that describes what data a company has, how that data is stored, and when that data is deleted.

• The goal of a preservation policy is to reduce costs by controlling the amount of data maintained and/or available for discovery.

• A further goal is to protect a company from sanctions for spoliation, adverse jury instructions and other litigation consequences.
Preservation/Retention Policies

• Create them
• Know them
• Distribute them
• Enforce them
  – IT Department
  – Monitor employee compliance
  – Forbid storage of company electronic documents/communications on unauthorized drives and devices
Preservation/Retention Policies

• They will save your company money in the long run if a lawsuit is filed
  – Upfront costs
  – Third party vendors
  – Attorney review time
  – Avoid discovery about discovery (Ruiz Bueno v. Scott; S.D. Ohio).
Proposed Changes to the Federal Rules of Civil Procedure

- Standing Committee approved, will go to Judicial Conference in September
- If approved by Supreme Court before May 1, 2015, effective December 1, 2015
- Substantial changes to Rule 26(b), Rule 37(e), and Rule 34
- Amendments focus on early case management, proportionality of discovery, and preservation.
Proposed Rule 26(b)

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and [1] proportional to the needs of the case, [2] considering the importance of the issues at stake in the action, [3] the amount in controversy, [4] the parties’ relative access to relevant information, [5] the parties’ resources, [6] the importance of the discovery in resolving the issues, and [7] whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
Current vs. Proposed Rule 26(b)(1)

- **Current** “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

- **Proposed** “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense…. Information within this scope of discovery need not be admissible in evidence to be discoverable.”
Current Rule 37(e)

• “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.”
Comment to Current Rule 37(e)

• “[A] party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”

Advisory Committee Note
Original Proposed Rule 37(e)

Replaces Current Rule 37(e) In Its Entirety

Allows For Curative Measures and Sanctions If A Party Failed To Preserve Discoverable Information

Court may “permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney’s fees, caused by the failure.”

Court may impose sanctions listed in Rule 37(b)(2)(A) or give an adverse jury instruction, “but only if the court finds that the parties actions caused substantial prejudice in the litigation and were willful or in bad faith” or “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.”
Original Proposed Rule 37(e) Factors

• “[T]he extent to which the party was on notice that the litigation was likely and that the information would be discoverable.”

• “[T]he reasonableness of the party’s efforts to preserve the information.”

• “[W]hether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation.”

• “[T]he proportionality of the preservation efforts to any anticipated or ongoing litigation.”

• “[W]hether the party timely sought the court’s guidance on any unresolved disputes about preserving discoverable information.”
Current Proposed Rule 37(e)

Rule 37 (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

(1) upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation:
   (A) presume that the lost information was unfavorable to the party;
   (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
   (C) dismiss the action or enter a default judgment.
Proposed Rule 34

• Can serve Rule 34 Requests for Production before the Rule 26(f) conference, but will not be deemed served until the Rule 26(f) conference

• Must state objections with specificity

• Must state whether anything is being withheld on the basis of the objection
Behaving Badly with E-mail and Social Media

• Do not destroy social media evidence
  – Is it “evidence” before litigation starts?
  – Should you take screenshots when pages are modified?
  – *Allied Concrete v. Lester*, 736 S.E.2d 699 (Va. 2013)
    • Removing Facebook photo with widower wearing “I ♥ Hot Moms” t-shirt was spoliation, leading to $722,000 sanction
Special Problems in Electronic Documents: E-mail Gone Wrong

• In space shuttle records: “Any more activity today on the tile damage or are people just relegated to crossing their fingers and hoping for the best?”

• Bill Gates: “How much do I need to pay you to screw Netscape?”
Special Problems in Electronic Documents: E-mail Gone Wrong

In suit against brokerage company:

• “[Excite@Home] is such a piece of crap!” after customers had been told to buy it.

• “I don’t mean to be a pain on this one, but this stock is a powder keg.”
Special Problems in Electronic Documents: E-mail Gone Wrong

• Diet Drugs: “Am I going to spend the rest of my career here writing big checks to fat people who were too stupid to lose weight on their own?”
Behaving Badly with E-mail and Social Media

• Do not send mixed email messages
  – Avoid putting personal and business communications in same email
  – Avoid multi-subject business emails when feasible
Additional Resources

- Proposed Federal Rules of Civil Procedure and Advisory Committee Notes (Handout)
- “What you wish you knew: litigation hold notice,” by Peter J. Comodeca; Association of Corporate Counsel, April 2, 2014 (Handout)
- “Litigation holds matter”, by James Beck, Association of Corporate Counsel, April 3, 2014 (Handout)
- “Implementing an Effective and Defensible Legal Hold Workflow,” by Dean Gonsowski, Vol. 29 No. 7 ACC Docket, Sept. 2011, at 108.
Data Retention and Production: Finding the Balance

Achieving compliance while avoiding unreasonable cost
Legal Background and Climate

Despite an explosion in the amount, variety, and sources of data, the trend in litigation over the last decade has been to expect more from organizations in terms of data retention and retrieval.

1. Influential SDNY cases

Judge Shira Scheindlin of the SDNY issued a series of litigation sanctions orders in Zubulake v. UBS Warburg LLC and in Pension Committee v. Banc of America Securities that have set a de facto standard of care regarding preservation of electronic data. In Pension Committee, the court:

- found that a duty to preserve potentially relevant material attached 10 months prior to the time litigation actually commenced
- found that each of the following constituted “negligence” justifying monetary sanctions:
  - failure to provide “meaningful supervision” to individuals performing data searches
  - failure to conduct electronic searches thorough enough to find emails produced by other parties
  - failure to search backup tapes where there was reason to think they contained pertinent information not yet produced
  - failure to search a palm pilot
  - delayed production of some documents
1. **Influential SDNY cases (cont’d)**
   - Found that each of the following constituted “gross negligence” justifying litigation sanctions:
     - Failure to produce certain emails sent between 1999 and 2003, well prior to the commencement of litigation
     - Delegation of document collection responsibilities to an employee lacking prior experience
     - Failure to collect documents in a timely fashion from key players
     - Failure to suspend routine overwriting of backup electronic data
   - Imposed monetary sanctions on 13 parties and additional litigation sanctions on 6 of those 13, including an instruction allowing the jury to presume that the grossly negligent parties had lost relevant and unfavorable evidence

2. **Anticipated changes to FRCP 26 and 37.** Proposed changes begin to recognize burdens of e-discovery:
   - Changes would limit scope of discovery to relevant material “proportional to the needs of the case”
   - Court’s power to allocate expenses of discovery would be made explicit
   - Committee considered but rejected proposal to limit the number of requests for production
   - Change to Rule 37(e) would allow certain sanctions for the loss of information only upon a finding that a party acted intentionally to deprive another party of the information
Costs of Electronic Discovery

Biggest costs are in extraction and review, not retention. Some rough cost data (costs vary substantially depending on a variety of factors we will discuss):

- Storage: ~$.20 per day per gigabyte
- Extracting data from easily accessible files and formatting for review: ~$600 per gigabyte
- External review of data by counsel: ~$18,000 per gigabyte

Per these numbers, the costs for extraction and review of easily accessible data can be expected to exceed $1,000,000 in litigation or investigations involving the extraction and review of just 54 GB of data. To put this in perspective, note that a single iPhone 5S has up to 64 GB of storage capacity.
Finding the Balance

• The SDNY cases show the need for robust retention, review, and production procedures

• But the retention, collection, and review of electronic data is staggeringly expensive

• Goal of counsel is to find a balance that meets obligations while avoiding costs associated with data the organization has no legal duty to retain
Strategies: Consider Discovery Tools

- Consider using eDiscovery software tools that bring substantial portions of the discovery process in-house.
- Even if you do not use internal eDiscovery tools, know what software your external counsel is using (poor or slow tools mean more billable attorney hours).
- Quality, purposes, and features of these tools vary substantially, and performance will vary depending on the network and servers on which they are deployed. Properly deployed, they can save money by speeding and targeting extraction and review.
- Hands on tests are a necessity.
- Gartner publishes “Magic Quadrant for E-Discovery Software,” a useful analysis of 22 leading tools, available online.
Strategies: Review retention policies

• Remember that maintaining data may be cheap, but extraction and review is not
• Consider reviewing policies to ensure your organization is not requiring the retention of data it has no legal or practical reason to keep
• Courts will not impose sanctions for following routine document retention/destruction policies, so long as destruction policies are suspended once the duty to preserve attaches
Strategies: Actively Manage Outside Counsel

• Encourage your outside counsel to work cooperatively with opposing counsel on eDiscovery.

• Counsel for all parties should agree on a limited set of custodians, well-designed search terms, and limitations on file types and data sources. Such limitations can save millions of dollars while still ensuring that parties get the discovery they need.

• Negotiate with your counsel on eDiscovery charges