

# The Legal Health Record & e-Discovery

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# Pre-test

1. Who is the custodian of health records in IHS?
2. e-Signatures are acceptable if allowed by state, federal and reimbursement regulations. True or False?
3. What is ESI?
  - a) evidence of system integrity
  - b) electronically stored information
  - c) electronic security integrity
4. Give an example of ESI?

# Agenda

- Legal Health Record (LHR) Defined
- HIPAA and the LHR
- Legal Hybrid Health Record
- Personal Health Record
- Post-Test

# What is the LHR?

- American Health Information Management Association (AHIMA) defines the legal health record as **“generated at or for a healthcare organization as its business record and is the record that would be released upon request.”**

# What is the LHR?

- The LHR is the documentation of healthcare services provided to an individual in any type of healthcare organization (I/T/U).
- It is consumer – or patient-centric.
- The LHR contains individually identifiable data, stored on any medium, and collected and directly used in documenting healthcare.

# Who is the Custodian?

- HIM is responsible for the care, custody, and control of the health record whether stored in paper or electronic format.
- HIM professionals oversee the operational functions related to collecting, protecting, and archiving the LHR.
- The custodian should be authorized to certify records and supervise all inspections and copying records.
- The custodian of the health record may be called to testify to the admissibility of the record (Federal Rules of Evidence (803(6)).

# Certification

- Certification verifies that “this is the true copy of the original.”
- A statement or Affidavit and signature of the record custodian are sufficient; some states may require a witness or notary signature.

# The LHR...

- Must meet accepted standards as defined by CMS Conditions of Participation, federal regulations, **applicable state laws**, and accrediting agencies such as CMS and Joint Commission, and **IHS policies**.
- Is the record of care used by healthcare professionals while providing patient care service, used for administrative purposes such as cost reports and planning, or for payment purposes.
- May exist in paper, electronic, or both (hybrid).



# CMS Conditions of Participation

- Maintain a medical record for each patient.
- Properly filed and retained to ensure prompt retrieval.
- The medical record must be accessible.
- The medical record system must ensure that medical record entries are not lost, stolen, destroyed, altered, or reproduced in an unauthorized manner.
- Locations where medical records are stored or maintained must ensure the integrity, security and protection of the records.
- All entries in the medical record must be timed, dated, and authenticated, and a method established to identify the author.

# Authentication

- Authentication is an attestation that something, such as a medical record, is genuine.
- The purpose is to show authorship and assign responsibility for an act, event, condition, opinion, or diagnosis.
- Every entry in the health record should be authenticated and traceable to the author of the entry (Provider File).
- e-signatures are acceptable if allowed by state, federal and reimbursement regulations.

# HIPAA & the LHR

- HIPAA Privacy rule (Section 164.501) requires that organizations identify their **designated record set**, which is defined as “a group of records maintained by or for a covered entity.”
- The designated record set for IHS is the Privacy Act System of Records “Health, Medical and Billing Records” Notice No. 09-17-0001.

# Legal Hybrid Health Record

- When the LHR consists of information created as paper documents and information created in electronic media, it is considered to be in a **hybrid** environment.
- Document the information that is considered the LHR and identify the source (paper or electronic) of that information. A matrix should be used for this purpose.

See AHIMA's matrix at: <http://www.ahima.org>

# LHR Matrix Example

Report/ Document Types	LHR Media (P)aper (E)lectronic*	Source System Application (nonpaper)	Electronic Storage Start Date	Stop Printing Start Date
H&P EKG Orders Consents* * Includes Scanned Images	P/E P E E	RPMS-EHR Version 1.2  RPMS EHR Version 1.2 RPMS EHR Version 1.2	1/2/2005  1/2/2005  TBD	1/2/2006  6/1/2005

# Documents Not Included in the LHR

- Administrative Data & Documents are patient-identifiable data used for administrative, regulatory, healthcare operations, and payment (financial) purposes.
  - Authorization Forms/valid written requests for ROI
  - Financial and insurance forms
  - Incident or patient safety reports
  - Indices (disease, operation, death)
  - Institutional Review Board lists
  - Logs
  - Acknowledgment of Receipt of the Notice of Privacy Practices
  - Patient identifiable claims
  - Patient identifiable data reviewed for quality assurance or UR
  - Registries

# Procedure: Cut and Paste Functionality

- Risks
  - Copying to wrong patient or wrong encounter
  - Inadequate identification of original author and date
  - May be illegal or unethical in some circumstances, e.g. clinical trials, pay for performance, quality assurance data

# Policies and Procedures

- The process in the EHR will change policy and procedure/process when documenting in the electronic health record.
- The IHS HIM have developed several EHR Policies & Procedures:
  1. Template Use & Design
  2. Locking Visits
  3. Copying and Pasting PHI Documentation
  4. EHR Documentation
  5. Employee Health Records
  6. Students Accessing and Using RPMS EHR



# Policies and Procedures cont'd

7. Monitoring RPMS EHR Reports
8. Monitoring and Auditing of Clinical Data
9. Logging of Activity in the RPMS EHR
10. Processing PHI Received in an Electronic Format
11. Scanning Outside Clinical Documents

# Personal Health Record

- Organizational policy should address how personal health information will or will not be incorporated into the patient's health record.
- Copies of PHR that are created, owned, and managed by the patient and are provided to a healthcare organization should be considered part of the LHR.

# Legal Health Record

Questions?

# eDiscovery

- Discovery Defined
- Federal Rules of Civil Procedure
- Retention & Destruction
- Resources

# Discovery Defined

- Discovery is a normal part of the legal system (it is not new).
- There has always been a cost associated with discovery
- Pertains to pre-trial access to witnesses or documents:
  - Oral depositions
  - Interrogatories
  - Paper documents/records
  - Electronically stored information (ESI)

# Federal Rules of Civil Procedure

- The Federal Rules of Civil Procedure govern procedure for all civil suits in U.S. District Court. (1938 original, 10 revisions)
- They were established by the U.S. Supreme Court and approved by Congress.

# Federal Rules of Civil Procedure

- Amendments were made to the Federal Rules of Civil Procedure (FRCP) which were effective December 1, 2006. (e-discovery)
- Almost half of the states have adopted the amendments. (AZ adopted the new rule, January 2008)
- The new rule ensures that all sources of relevant electronic information is preserved in anticipation of litigation.

# Case Law: Zubulake

- Sued her former employer UBS for sex discrimination, including disparate treatment, wrongful termination, and retaliation. The court found that relevant e-mails were deleted **after** litigation was anticipated.
- The court issued an “adverse inference” instructing the jury that they were **allowed** to make inferences that the evidence on the deleted e-mails would have been adverse to UBS.
- The jury awarded Zubulake \$9.1 million in compensatory damages and \$20.2 million in punitive damages.



# Legal Hold (Preservation Order)

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

# ESI – Legal Hold

- Duty to preserve could include:
  - Emails
  - Voice Messages
  - ITAS (IHS Time/Attendance System)
  - GovTrip
  - PDA (Blackberrys) i-phones, cell phones
  - iPODs - really
  - Thumb Drives, Laptops
  - RPMS
  - FMCRA data

# Spoliation

- Intentional destruction, mutilation, alteration or concealment of evidence.
  - Records in any form must be reasonable protected
  - Burden rests on organizations to show information lost was a result of a good faith operation/effort of the system
  - Policies and procedures are abided by

# Retention & Destruction

- Organizations must know where all of their information is housed.
- HIM must work with IT and other departments to identify where relevant information is stored such as back-up tapes AND MEDiDATA.
- IHS Records Disposition Schedule, Schedule 3, Professional Services, **Section 3-Medical Records**.
- Tobacco Litigation Freeze on destruction of records. Memo dated November 27, 2006.

# eDiscovery

- The new rule provides an opportunity for HIM, IT, Office of General Counsel, and Records Management to collaborate and develop policy for responding to eDiscovery requests – and reduce risk.

# Resources

- AHIMA e-HIM practice brief, “The Legal Process and Electronic Health Records.” Journal of AHIMA, 76, no. 9 (2005)
- AHIMA e-HIM practice brief, “Update: Maintaining a Legally Sound Health Record-Paper and Electronic.” Journal of AHIMA 76, no. 10 (2005).
- AHIMA HIM Body of Knowledge, “The New Electronic Discovery Civil Rule.”
- IHS Records Disposition Schedule:  
<http://www.ihs.gov/FacilitiesServices/AreaOffices/Albuquerque/ResourceManagement/rmintro.cfm>
- <http://www.thesedonaconference.org/>
- <http://www.archives.gov/records-mgmt/>

# Post Test

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# eDiscovery

- Questions?
- Please fill out the evaluation and sign-in sheet.

**Thank you!**