

What is a Litigation Hold?

Why S.A.V.E.D Can Save More Than Preserved Evidence

– by Robin Morra and Deborah Randall, RN, BSN, CPHRM

This issue of Insights into Risk Management focuses on an aspect of preserving information after a patient event. In the Summer 2013 issue of Insights, the importance of saving physical and electronic patient care evidence following an event was explained, along with the recommendation to utilize the acronym S.A.V.E.D. – **S**ettings, **A**ccessories, **V**aluable data and logs, **E**quipment, **D**isposables and packaging – as a prompt for evidence gathering and preservation. In this issue, the focus is on preserving written and electronic information through a process known as Litigation Hold. Knowing this information and understanding the implication of certain actions taken can assist in your understanding of the critical nature of evidence preservation and explain why you may receive a notice related to a litigation hold from Lifespan Risk Services, Lifespan’s Office of the General Counsel or the Corporate Compliance department. To underscore, it may make the difference in the ability to successfully defend a lawsuit or not.

Litigation Hold is the process used by Lifespan to ensure preservation of written or electronic information related to actual or reasonably anticipated litigation or regulatory proceedings. Key individuals receive a notice asking them to identify any written or electronic information they may have related to the event. Electronic information may include email, electronic documents, presentations, text messages, videos, photographs and so forth, wherever the information is stored. Recipients of a litigation hold are informed of the importance of not destroying that information and told how to provide it to the requesting department, usually Risk Management.

Why is it important to issue a litigation hold? Once a lawsuit commences, the involved parties begin a formal process of asking each other to produce information that may be relevant, called Discovery. As part of this process, attorneys often ask for emails, photographs and text messages in addition to policies and procedures, logs, training documents, guidelines and protocols. Therefore, once Lifespan is aware of an actual or potential legal action, we are required to ensure that relevant information is not altered or destroyed. Not all information will be produced to the opposing attorney, especially if it is considered peer review, but we need to be able to show that we made an attempt to preserve it. Otherwise, we may be accused of spoliation.

Spoliation is “the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. General Motors*. The judge may impose sanctions, which may be monetary, for a finding a spoliation. The court may also instruct a jury that they may presume that the missing information or evidence would have had a negative impact, and in many cases an inference is allowed that the information was purposely disposed of by the spoliating party. This could cause us to have to settle a claim that was otherwise defensible.

A notice describing the litigation hold and what to do is typically emailed to anyone likely to have any paper or electronic information concerning the event. At that point, the recipient is required to conduct a thorough search of all files and locations under their custody or control to identify pertinent information. When found, the information is forwarded to Risk Services. A copy of the hold is also forwarded to the Information Technology Department, who will ensure the security of the recipient’s Outlook Mailbox and all email messages.

Of note, any emails relevant to a litigation hold that contain the acronym, “PHI” in the subject line, *are not automatically protected from discovery in a lawsuit simply by the use of “PHI” in the subject line*. These emails are still subject to identification through discovery.

Recipients of litigation holds have understandably had many questions. The following FAQs are an attempt to address those questions.



What is a Litigation Hold? Frequently Asked Questions

Is Lifespan required to issue Litigation Hold notices? Yes.

- ◆ Lifespan Corporate Compliance system-wide policy, **CCPM-72, Litigation Hold Directive Standards**, describes standards we must adhere to and requires Litigation Hold notices be issued in applicable situations to meet our legal obligation requiring that *documents* relating to a potential legal claim or lawsuit are not destroyed and are available for the discovery process.
- ◆ A Litigation Hold enables Lifespan to avoid “spoliation” (the destruction, alteration, or mutilation of evidence).
- ◆ The United States Federal Rules of Civil Procedure (FRCP) also require organizations to hold all *electronic records* until each legal matter is formally settled, even if litigation is only reasonably anticipated.

What will happen if Lifespan or those receiving a Litigation Hold notice fail to comply?

- ◆ Failure to properly preserve documents and electronic records might cause a jury or judge to infer the missing materials contained information that was contrary to Lifespan’s position in a lawsuit, even if the materials did not contain damaging information; therefore, failure to comply could cause Lifespan to unnecessarily have a judgment entered against it, and ultimately pay penalties, which can include large monetary fines and/or reimbursement of the other party’s litigation costs.

Does Lifespan have a procedure it follows to issue a Litigation Hold? Yes.

- ◆ The Risk Management or Legal Department will send a detailed email notice to specified individuals that it has placed a Litigation Hold, the reason for the hold, and a summary of the items that should be preserved.

Who can receive a Litigation Hold notice?

- * When a lawsuit is anticipated or filed, an attempt is made to identify those persons who may have information related to the matter. If you receive a Litigation Hold notice, it is likely that you may have been involved in or witnessed a particular patient safety event, either during (as a caregiver/provider) or after (as a supervisor, etc.). Or, you may be identified as someone who *might* have relevant information related to a non-patient care matter.

Does receiving a Litigation Hold notice mean that I am being sued? No.

- ◆ Individuals named in a lawsuit will typically receive a separate notice regarding the suit. The Litigation Hold notice is issued to anyone who may have information about the case, regardless if the individual has been named personally in the lawsuit.

If I receive a notice, am I required to do anything? Yes, and No.

- ◆ Follow the instructions in the email notification and attachment. Whether you have relevant information or not, complete and return the attachment as described in the email.
- ◆ Do not stop your usual work out of fear that additional documents will be created, continue your normal work flow.

Does putting “PHI” in an email subject line or message protect the document from legal discovery and/or a Litigation Hold? No.

- ◆ Adding PHI leads to encryption of the information sent outside the -Lifespan system. It **does not protect** the email from discovery or a Litigation Hold.

What should I do if I provided documents and then I generate or receive new ones?

- ◆ Forward any new documents as described in the Litigation Hold notice you received.
- ◆ Follow the process until you receive an email notice from either the Risk Management or Legal Department that the hold has been discontinued.

Is there someone I can call for questions or assistance? Yes.

- ◆ Contact the department that issued the Litigation Hold:

Risk Management: Call the Litigation Support Specialist at (401) 255-0777 or (401) 444-0309, Monday – Friday, 9am to 5pm

Legal Department: Call the Paralegal at (401) 444- 3588, Monday – Friday 9am-5pm

The LRS Business Operations Program

OVERVIEW

Lifespan's insurance program encompasses both Lifespan's self-insurance program and purchased commercial insurance coverage program.

The Lifespan self-insurance program provides professional malpractice liability coverage to Lifespan, its entities and employees and to independent affiliated physicians. This coverage is also referred to as the "Lifespan Malpractice Plan (LMP)". The self-insurance program also provides general liability coverage to Lifespan, its entities and employees.

For many other risk exposures – Property, Cyber/ Privacy risk, Crime, Auto. - Lifespan prefers to transfer the risk to the commercial insurance market by purchasing insurance policies to cover these types of risk.

Meet The Business Operations Staff

From top, clockwise:

Deb Randall,
Loss Prevention and Underwriting
Deborah Maloney, Insurance/
Customer Service Coordinator
Steve Santos,
Sr. Underwriter
Rick Almeida,
Business Operations Director
Sharon Malloy, Claims Processor



Contact Information

Lifespan Risk Services:

Coro building, suite 170
167 Point Street
Providence, RI 02903
Phone: 401-444-8273
Fax: 401-444-8963

RISE

Coverage for Lifespan's self-insurance program is provided through R.I. Sound Enterprises Insurance Co., LTD (RISE), Lifespan's wholly owned captive insurance company, which was founded in 1991. Responding to a need for a flexible coverage vehicle for professional liability that was both responsive and cost effective, RISE was established to underwrite the malpractice risk of Lifespan and its independent affiliated physicians. What started with a relatively small number of physicians has today grown into a thriving company that indemnifies all Lifespan entities and their employees and the majority of independent physicians caring for patients at Lifespan hospitals.

LRS

Lifespan Risk Services (LRS) was created to provide administrative services for RISE. The primary function of LRS is to administrate the Lifespan Malpractice Plan (LMP) to Lifespan, its entities and employees and to independent affiliated physicians.

What are some of the services provided by LRS?

Many of our Insights readers may already be familiar with some of the services provided by LRS' Business Staff (see photo at left). These services include:

- ◆ Issue LMP Certificate of Coverage
- ◆ Provide LMP statement of claims history for credentialing/licensure
- ◆ Address LMP coverage questions; including, underwriting services related to new or additional clinical activities; including volunteer activities
- ◆ Obtain auto insurance cards for Lifespan vehicles, and provide for Fleet driver training and driver motor vehicle report background checks

For more details visit our website at: <http://www.lifespan.org/centers-and-services/lifespan-risk-services/>

FOCUS on Nursing - A Case Study

The purpose of this section is to share summaries of closed cases that have occurred in the New England area and represent real life issues that provide proactive risk management educational opportunities. The cases used may come from Lifespan affiliates, or other institutions or practices, or may be composites of several cases with very similar fact patterns. We present these cases because we believe they have some relevance to situations that you may encounter. By S. Duni, JD, RN, BSN

Spoilation of Evidence

ISSUE: Does a nurse have a duty to preserve and protect evidence that s/he knows or reasonably should know might be relevant to a possible claim of medical malpractice?

FACTS:

- ◆ Ms. P was a 36 year old woman who underwent back surgery at a New England Academic Medical Center in July, 1993. While surgery was in process, a question arose whether instruments in a sterile storage area were in fact sterile. As a result of this question, staff went to the OR to determine the status of the instruments being used in Ms. P's surgery. The instruments in question had already been used.
- ◆ Examination of the packaging on instruments used in Ms. P's surgery, specifically three sterility indicators, was inconclusive. The outer package indicator had changed color from yellow to brown. The second indicator, lying loose among the instruments changed to yellow, which was the expected change. The third indicator, found inside the peel pouch, had not changed color. Risk Management was notified, and the hospital's malpractice insurer was contacted the same day.
- ◆ A few days later, Ms. P suffered an infection at the surgical wound site that required re-hospitalization and produced various medical consequences. Suit was brought against the hospital alleging physical and financial damages.
- ◆ Efforts by the plaintiff patient to pursue the trail of the packaging and sterility indicators were futile, and the plaintiff sought a sanction for spoliation of evidence against the defendant hospital.

FINDINGS: The Plaintiff Prevails in her Claim of Medical Negligence

- ◆ Sanctions may be appropriate for the spoliation of evidence that occurs even before an action is brought, "if a litigant...knows or reasonably should know that the evidence might be relevant to the possible action." *Kippenham v. Chaulk Services, Inc.* 428Mass. 124, 127 (1998).
 - ◆ The O.R. staff nurse was aware of the critical significance of the sterility indicators to the resolution of a potential dispute, i.e. a lawsuit, in the event that the nonsterile instruments would cause infection or other medical complications, as evidenced by her immediate notification to Risk Management of the incident on the day of surgery.
 - ◆ Additionally, the hospital did not make necessary efforts to notify involved parties to retain discovery related to the incident, or to ensure the security of the sterility indicators while they were available.
 - ◆ The Judge sustained the claim of spoliation and held that the defendant hospital was prohibited from introducing all evidence upon which they wished to rely upon to suggest the instruments had been sterilized, specifically testimony related to the second indicator which showed appropriate sterilization.
 - ◆ In addition, it was to be taken as established that the instruments used during Ms. P's surgery were not sterile, and that the hospital and its employees were negligent in using them.
- Munsinger v. Baystate Med. Ctr., et al.* 9 Mass. L. Rptr. 486

SUMMARY:

- ◆ The existence of and adherence to the litigation hold process is a crucial step toward preserving evidence that can be used to successfully defend providers and hospitals in a medical malpractice lawsuit.