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# Preparing for Healthcare Litigation and Investigations

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> With risk at every turn, collaboration, preparedness and search expertise can help healthcare companies gain the advantage in litigation and investigations. **Here's how.**

Healthcare litigation and investigations are inherently challenging. This is a domain where risks abound: practitioner or institution missteps could cause patient harm, fraudsters seek to deceive the unsuspecting, complicated billing systems are susceptible to fraud and abuse, and numerous laws and regulations — the Federal False Claims Act, Anti-Kickback Statutes, the Stark Law, just to name a few — risk violation. All the while, myriad enforcement agencies (and individuals) are motivated to look for bad behavior and could initiate actions that demand a costly and resource-intensive response.

What steps can a healthcare organization take to be able to respond quickly to a litigation or investigation and avoid the potential pitfalls that could make things worse?

Even in responding to possible litigation or investigations, companies face risks. Data preservation or collection issues, unintentional oversight of relevant information, or accidental exposure of personal data could result in further actions that go well beyond the original matter. On the other hand, a response handled well and quickly could cultivate good will with regulators or investigators and possibly mitigate further action.
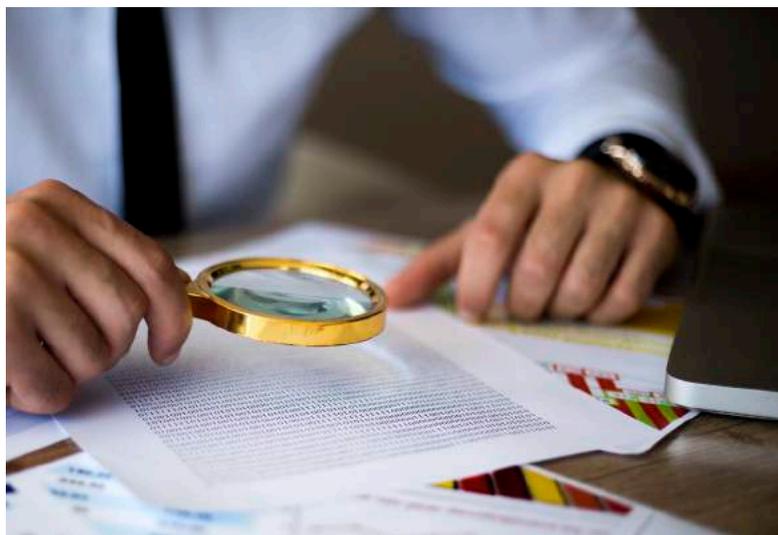
Above All, Be Prepared—and Then Some.

Advance preparation is the key, but it is also a challenge. It is a multi-faceted effort, to be sure, involving significant planning and a range of stakeholders, from business units to the the C-suite. And importantly, it must be ongoing to keep plans evergreen and stakeholders engaged and ready to act.

To avoid the dreaded fire drill, there are several steps your team can take that will help expedite a response that could stop a matter cold or at least provide the necessary intelligence to pursue it as effectively as possible.
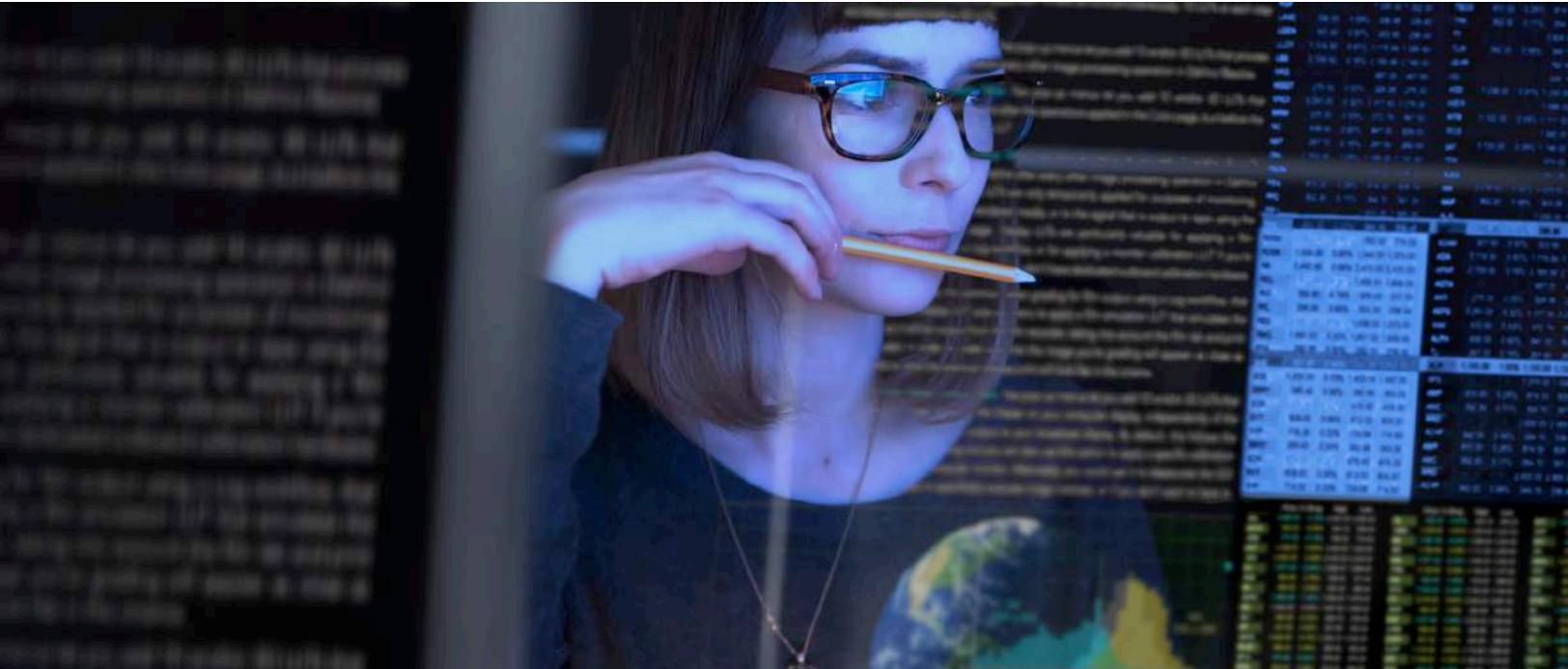
About Preparation...

Who should be included in readiness efforts?

- In-house counsel

- Outside counsel

- Service providers

- Compliance professionals

- IT

- Additional business stakeholders

- Appropriate C-suite members

Questions to consider:

- Is there a documented plan in place to get things moving quickly?

- Is the current data landscape known and documented to expedite data preservation and collection?

- Has the company identified and vetted the appropriate experts and service providers— preferably with experience in the healthcare domain?

- Is the requisite technology and expertise available and ready to be deployed?

What steps can a healthcare organization take to be able to respond quickly to a litigation or investigation and avoid the potential pitfalls that could make things worse?

Step 1:

Document your response plan.

If your company routinely faces potential litigation and investigations, create a readiness plan to get things moving quickly. The plan should include:

- An eDiscovery or incident response team with designated roles and clearly assigned responsibilities

- An up-to-date roadmap for preserving, collecting, reviewing and producing information, based on a documented data landscape *(see Step 2)*

- Custodian identification techniques

- Appropriate legal hold notification measures

- Outside expertise (that preferably includes industry experience) on tap and vetted for services the company may need.

Step 2:

Understand the company's data landscape.

One of the major challenges in healthcare matters concerns the electronic information that could be implicated, so the response plan should include careful consideration of potential data sources and the types of information each may contain. Creating a data map (and keeping it up-to-date) will help ensure that the right sources are tapped if a collection is required. Consider the following:

- What are the most likely sources of information for a litigation or investigation?

- Is the data from each source in a format that can easily be collected or extracted? *(If not, what is the plan?)*

- Are there data sources (e.g., databases) where alternative reporting or production options might be required?

- What types of employee communication systems are likely to be implicated?

- Are data extraction, encryption and data transport protocols in place to ensure data protection?

- Are there systems or data sources that may themselves be subject to examination (due to questionable data defaults or coding anomalies, for example)?

- Are employees and service providers trained and competent to handle personal information (i.e., PII/PHI)?

- Are plans in place for data disposition after the matter is closed?

To complicate matters, new technologies are being developed all the time that may not be eDiscovery friendly, such as certain mobile or patient-data collection applications. It is helpful to think about those beforehand, so that any difficulties can be communicated to investigators or the other side in a timely way.

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Step 3.
Leverage expertise to find key documents fast.

Data collection is one thing, finding what really matters is another. Buried within document collections is the evidence needed to formulate or help support case theories, provide insights into actions and behaviors, and create meaningful timelines.

In healthcare matters, important fact patterns may involve a variety of data sources and types—from medical records to MRA scores to pricing plans to marketing materials. This could make key information harder to find.

Usually, the method used to find key documents is keyword search followed by a manual review process, but this is among the slowest and most expensive options. Brainstorming keywords for complex data collections, even by the most plugged-in and tech-savvy case team, is unlikely to lead to the rapid development of a fact pattern that could provide valuable information right from the start.

Instead, consider hiring search experts who can apply sophisticated linguistic and analytic approaches using advanced tools. They are able to help find key documents and link them together in ways no case team's best efforts possibly could. This provides the following benefits:

- Identify key information faster and with higher accuracy
- Reduce or eliminate the overhead of manual review efforts
- Cost savings and reduced risk
- Avoid surprises that could hamstring counsel or delay response efforts.

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EXPERT TIP:
Use your key documents to assess the risk of your litigation or investigation. Leading firms and corporations leverage search experts and methods to get facts much faster than they could through a typical manual review.

With key facts in hand, you can incorporate these insights into your existing risk assessment processes to understand the merits of the matter, allocate your resources appropriately and build case strategy.

Step 4.
Be sure you can identify and protect PII/PHI.

Healthcare information is complex and a misstep in data-handling can have serious repercussions. It also likely contains sensitive personal information (PII/PHI), since patient claims or electronic health records are routinely involved. This information is subject to multiple privacy and security laws and regulations (e.g., HIPAA and HITECH) and a failure to understand the rules (not to mention how strenuously they are enforced via audit) could lead to devastating consequences for a company facing a litigation or investigation.

Locating personal data at risk is not as easy as it sounds. While there may be clear PII/PHI indicia in many structured data stores, unstructured data may harbor personal information that is not easy to discern.

EXPERT TIP:
Make sure your company or provider is using the most effective tools and methods for identifying personal information.

Newer methods and tools that include data classification techniques developed by linguists and engineers are the most successful at locating PII/PHI quickly and accurately.

Step 5:
Vet the security protocols of business associates and providers.

HITECH extends security obligations to outside entities, including lawyers, law firms and vendors, who may handle PII/PHI in the course of a litigation or investigation. Companies should vet such entities, especially eDiscovery vendors that routinely handle sensitive data. Confirm that all outside providers:

○ Understand and have the proper protocols in place to keep data secure, including encryption techniques, data segregation practices and PII/PHI identification methods

○ Can demonstrate that they have appropriate certifications and documentation of compliance for conducting the services you require

○ Conduct periodic risk assessments to expose any shortcomings in their processes for managing and processing personal information as threats change.

The Takeaways.

With the high risk potential in healthcare litigation and investigations, being prepared is critical. To avoid fire drills and enable a faster, smoother data collection and identification process:

○ Prepare for a litigation or investigation well in advance by implementing the steps above in ways that make sense for your organization.

○ Leverage search expertise and advanced tools to rapidly uncover the information you need to defend or pursue the matter

○ Ensure that data remains protected.

Taken all together, a well-developed plan executed by an informed and expert team will optimize the chances of a successful outcome.

About H5

H5 helps corporations and law firms find and manage the documents that matter in litigation and investigations by providing expert-driven, technological solutions to address the complex challenges created by electronic data. With expertise in eDiscovery, technology-assisted review and search, H5 is committed to helping clients find and manage the information they need to win cases, meet regulatory requirements and address risks by providing creative products and solutions that ensure fast, accurate, cost-effective results.

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info@h5.com or visit us at h5.com

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