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Friday May 6, 2005



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Legal Liability of the Records and Information Management Professional

A growing number of records and information managers have expressed concern related to their legal liabilities while engaged in their occupation. More and more non-lawyers research the legal requirements related to microfilm media and records retention, apply these requirements to their organization's information systems, and operate records and information systems which are subject to legal constraints. In other cases, these same individuals develop and operate systems which effect the rights and interests of others. To what degree, will these professionals be personally liable for their actions which violate the law or adversely effect another party?

Here are some of the frequently asked questions on this topic:

- If I am the organization's records manager and am responsible for developing and operating a records retention program, am I personally responsible for the consequences of failing to locate significant laws which impact on the retention period of records in my organization?
- When destroying records under a records retention program, am I responsible for mistakenly destroying the wrong records?
- When I am hired as a consultant to design a records management system, am I personally liable for improperly designing a system or failing to include system components which other consultant would commonly have considered?

The Concept of Malpractice

As the British Common Law evolved, the term "profession" only applied to the areas of law, medicine, and divinity.¹ These three groups were expected to exercise an advanced level of skill and knowledge in exercising their profession. This higher standard reflected the public's need for confidence and reliance. As a result, each required extensive training and certification beyond the level required for most other jobs.

Today, a member of any of these three professions is expected to exercise a skill level comparable to the typical skill level of those in the profession. For example, a surgeon is expected to perform surgery with the skill and expertise of other typical surgeons in the area. Most courts will compare surgeons working in rural areas with other surgeons in rural areas, recognizing that differences exist with surgeons in urban areas due to location and access to facilities. The standard to which these professions are held, however, is always higher than the skill level and knowledge attributed to the general population.

In recent years, court recognition as a "profession" has been expanded to the fields of accounting, engineering, architecture, and pharmacy. Individuals working in these professions are expected to perform at the same level of skill and expertise as the typical member of their profession.

Whenever a member of a profession fails to achieve the reasonable level of skill typically attributed to the profession, the individual may be subject to "malpractice". "Malpractice" may be defined as "any professional misconduct, unreasonable lack of skill or fidelity in professional fiduciary duties, evil practice, or illegal or immoral conduct."² An individual may only be subject to malpractice if the law has deemed the occupation to be a profession. If the occupation is a profession the individual is expected to exercise the reasonable care of the typical member of the profession. If the occupation is not a profession, the individual is only expected to exercise the reasonable care of an ordinary person, without any special skills.

Is Records and Information Management a Profession?

A profession has traditionally been legally recognized only after a series of court cases have defined the particular occupation as a profession or by specific laws which extend the definition. As of the time of this article, no cases exist nor laws implemented which define records and information management as a profession. But those circumstances could change over the next few years for the following reasons:

- The definition of a profession continues to expand over time. While law, medicine, and divinity were initially the only professions, now accounting, engineering, architecture, pharmacy and others have been added to the list.
- Records and information managers participate in professional organizations and certification programs. Several professional organizations, such as the Association of Records Managers and Administrators, provide continuing education and professional affiliation similar to the associations now in existence for the recognized professions. Certification programs now exist for records and information managers. For example, the Institute for Certified Records Managers supervises the examination and qualifications for the Certified Records Manager (CRM) designation. Other professional designations are available from other sources. The certification process ensures that candidates achieve a minimum standard of skill and expertise before receiving recognition, similar to the court-recognized professions.
- Records and information managers are expected to be knowledgeable in a great number of technical areas. Modern records and information managers must be familiar with information flow, technologies, cost analysis, legal requirements, and a variety of other technical areas in order to perform their tasks. This level of skill and experience typically exceeds the knowledge among the general public.
- Records and information managers are receiving higher compensation for their services. Years ago, records and information managers were treated like "glorified secretaries", and paid accordingly. An increasing number of organizations recognize the importance of these activities within these organizations. Many now provide salaries and benefit plans commensurate with the value placed on the occupation and the realities of attracting qualified individuals.

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These factors indicate that the field of records and information management has many of the characteristics of a profession. As each of these factors continues to grow and the field continues to receive increased acceptance, the field will continue to move closer to the ranks of a recognized profession. Formal recognition could occur within the next few years or perhaps never occur at all.

Are Records and Information Managers Subject to Malpractice?

Clearly, records and information managers cannot be subject to malpractice since their occupation is not yet considered a profession. Those participating in this occupation will be expected to exercise the level of care and knowledge of the ordinary individual without any special skills.

This does not mean, however, that a records and information manager does not have any responsibilities. For example, a records and information manager should review the various alternatives in developing and operating a records and information system since most ordinary people would view it as reckless to blindly develop a system without at least considering the alternatives.

Are Records and Information Managers Subject to Legal Liability?

The question of legal liability is different than the question of malpractice. Legal liability recognizes an obligation of an individual under the law and the failure of the individual to meet that obligation. Malpractice, as discussed above, specifies that the legal obligation of the individual is at a higher level than the normal population.

As a practical matter, records and information managers will not be liable for violating laws directed only at their organizations. Most records and information managers are employees within the typical employment context. Under well established principles of employment law, the employer will generally be responsible for the acts of the employees performed within the scope of employment. All work performed by the employees within the scope of employment will be considered the acts of the employer. Within the context of records and information management, all activities related to records creation, maintenance, and disposition performed within the scope of employment will be considered the acts of the employer. As such, the employer will generally be responsible for the failure of the records and information manager to comply with the law or to meet other legal responsibilities.

If the employer finds that the records and information manager deliberately caused the organization to fail to comply with these requirements or was grossly negligent in performing the job, a lawsuit against the individual would not be appropriate. Since the act of the employee will be attributed to the employer, it would be ridiculous for the employer to sue itself. On the other hand, the employer would sue the employee only if the employee clearly acted outside the scope of employment. In most cases, the employee would merely be dismissed rather than sued.

Records and information managers may, however, be subject to legal liability, to the same degree as any other private persons, for their own actions which violate a law directed at individuals. For example, when a subpoena is received covering certain records in litigation, those records should not be destroyed, even under an approved records retention program³ Clearly, the employer will be subject to the consequences of destroying records covered by a subpoena. In addition, the records and information manager will also be personally liable for violating the court order and subject to potential fines and penalties. (In order to prevent the improper destruction of records once a subpoena is received, therefore, legal counsel should immediately inform the records and information manager to stop destroying relevant records.⁴)

A records and information manager may also be legally responsible for harming an outside party under certain circumstances. For example, if a records and information manager mistakenly, even without evil intent, destroyed the wrong records under a records retention program, the company may be held responsible for this negligence. But, if an outside company is hurt in litigation because of the unavailability of those records, a private lawsuit against the records and information manager might be initiated to recover some of the losses. The claim could be made that the records and information manager acted outside the scope of employment by destroying records (even though inadvertent) which was not authorized by the company-approved records retention program. While no lawsuits of this nature have ever been filed to the knowledge of this author, it is conceivable that this type of litigation could be attempted in the future.

Summary

Records and information managers are not subject to malpractice and are therefore only responsible for performing their duties at the skill and experience level of an ordinary individual in the community. As a result, the records and information manager would only be legally responsible for exercising the level of care of an ordinary person in the three scenarios presented at the beginning of this article.

The records and information manager also would normally not be personally liable for the organization's failure to comply with published laws in areas such as recordkeeping, records retention, or microfilming.

On the other hand, the records and information manager may be liable for personally failing to comply with a court order (for example, for destroying records covered by a court order) or for acting outside the scope of employment (for example, harming an outside party by destroying records not covered by the records retention schedule). As of this date, however, the author is not familiar with any successful or even attempted lawsuits against records and information managers for breaching their legal responsibility or responsibility to outside parties.

In determining whether a records and information manager should obtain professional liability insurance, the factors discussed in this article should be considered. As a practical matter, this type of insurance may not be necessary at this time since no cases have ever been pursued against records and information managers.

With the low cost for professional liability insurance, however, some records and information managers may still opt to protect themselves from legal risks. As indicated at the beginning of this article, the definition of "profession" has been expanded during recent years. Since records and information managers are becoming more "professional" through professional associations, certification programs, increased knowledge, and increased salaries, the courts may attempt to expand the definition of profession to this new area. If that happens, records and information managers will be responsible for performing at the skill and experience level of the typical records and information manager in their area. As a profession, records and information managers could be subject to malpractice.

¹ See *Corpus Juris Secundum*, The American Law Book Company, Brooklyn, NY, 1983; 72 C.J.S. Page 1215 through 1220 for a discussion of the term "profession" and a listing of cases establishing the legal principles.

² See Black, Henry Campbell, *Black's Law Dictionary*, West Publishing Company, St. Paul, MN, for the definition of the term "malpractice".

³ See "Legal Issues for Records Retention and Disposition Programs." [Issues and Analysis 020-1030-00]

⁴ Ibid.

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