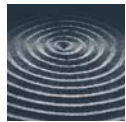


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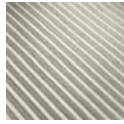


# Record Retention and Destruction / Spoilation for Litigation

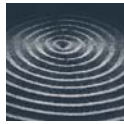
Rebecca Durcan

[rdurcan@millerthomson.com](mailto:rdurcan@millerthomson.com)

416.595.8554



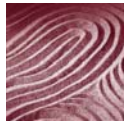
# Overview



- Policies



- Realities of Litigation

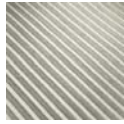


- Spoilation

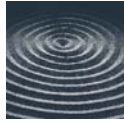
- Suggestions

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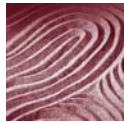
# Policies



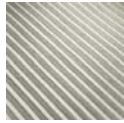
- Record Management System



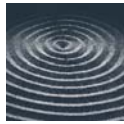
- Record Retention?



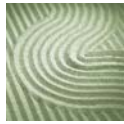
- Record Destruction?



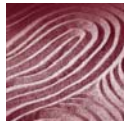
# Policies



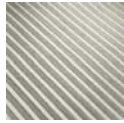
- REVIEW! REVIEW! REVIEW!



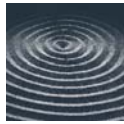
- Why?



- Standards change (*OHA 2007 Records Retention Toolkit*)
- Good opportunity to review litigation needs



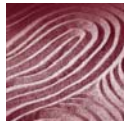
# Examples



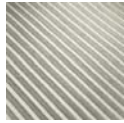
- Policies



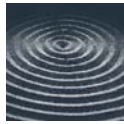
- No statutory retention period



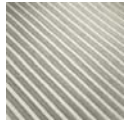
- We suggest archiving all amended policies



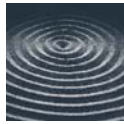
# Examples



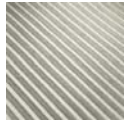
- Health record of adult which may develop into a lawsuit
  - PHA retention period is 10 years after date of discharge or death
  - *Limitations Act* ultimate retention period is 15 years after date of loss (but beware)
  - We suggest that the original record is maintained until litigation is complete (remember the appeal process)



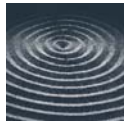
# Examples



- E-mails discussing adverse event
  - Rule 30.01(a) of the *Rules of Civil Procedure* defines document as a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form
  - This will include e-mails on server and on Blackberries, PDAs and other devices



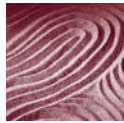
# Rationale?



- Original records will be key at trial

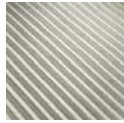


- Best Evidence Rule

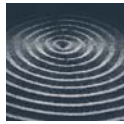


- Secondary evidence, such as a copy, will not be admissible if an original document is available

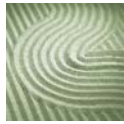




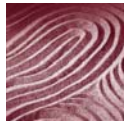
# Electronic Health Records



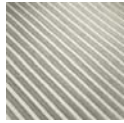
- Electronic health records?



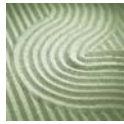
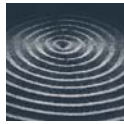
- Scanning paper records?



- PHA, Regulation 965, section 20 allows hospitals to photograph records for the purpose of retaining the contents in lieu of the originals where the photographing is carried out in accordance with procedures established by the board after considering the recommendations of the MAC



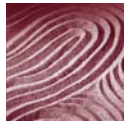
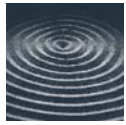
# Potential Problem



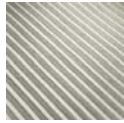
- If lawsuit arises, and if the original paper record has been “photographed”, in adherence to s. 20 of Regulation 965, it may not be admissible at trial.
- Could be seen to breach Best Evidence Rule
- Why?
  - Cannot see different colour ink
  - Cannot see portions of chart that may have been allegedly altered
  - Cannot see fax stamps which may have been cut off



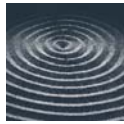
# Spoilation



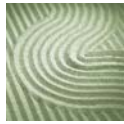
- The intentional or negligent destruction of relevant evidence
- In 2000, this became an independent tort in Ontario
  - *Spasic v. Imperial Tobacco Ltd.* (2000) 49 O.R. (3d) 699 (Ont. C.A.)



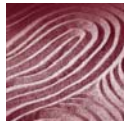
# Spoliation



- Can occur to:



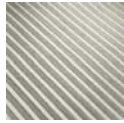
- Health records



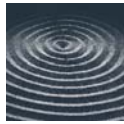
- Electronic documents (don't forget e-mails and Blackberries)

- Video Surveillance

- Call logs



# Suggestions



- Review policies



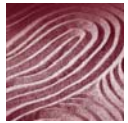
- Consult with all parties (MAC, HR personnel, legal counsel)



- Put in place litigation holds
- Documents scanned and destroyed?  
Consider affidavits to demonstrate process and rationale
- Key to defence? Consistent practice supported by policies that are enforced



# Thank you



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