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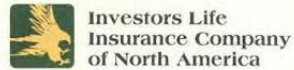
Records Management: Boring when done correctly, costly when done ineptly

November 20, 2024



CEFLI Joint
Educational
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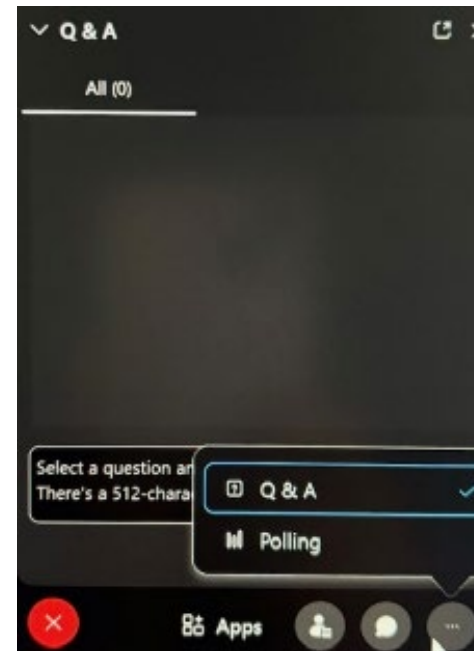


We Will Provide

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Questions are Welcomed!

- Please use the **Q&A Function** (not the Chat function).



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Presenters



Ted Holt
Shareholder
Maynard Nexsen



Anna Regnier
Associate
Maynard Nexsen



Brandon Robinson
Shareholder
Maynard Nexsen



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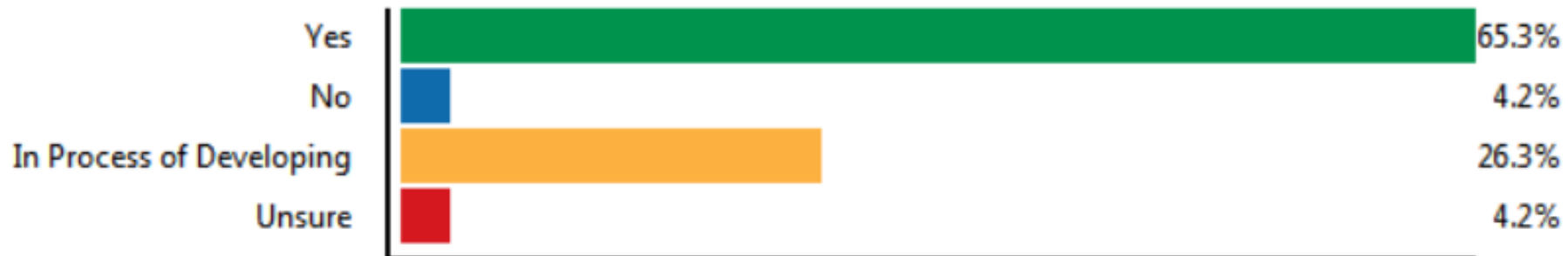
Agenda

- Introduction
- Overview of Relevant Rules
- The Goldilocks Principle: the risks of destroying records too soon vs. keeping them too long
- Best Practices

Then and Now: 2014 CEFLI Webinar Series

Do you have a formal Records Management Program?

Do you have a formal Records Management Program?





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Primary Sources of Records Management for Insurers

Regulatory Compliance

- **NAIC Model Regulation**: Market Conduct Record Retention and Production
 - Records should be maintained so that during an examination the commissioner can readily ascertain insurer's compliance with applicable insurance laws, rules, and standards outlined in the NAIC Market Conduct Examiners Handbook.

Regulatory Compliance Continued

- **Policy Record Files:**

- For the duration of the current policy term plus 3 years; or
- For life insurance policies and annuity contracts, for the time the policy or contract is in force and 3 years thereafter.
- If a policy is terminated, maintain documentation supporting the termination and account records indicating a return of premiums, if any.

- **Claim Files:**

- For the calendar year in which the claim is closed plus 3 years.
- Include: claim forms, notice of claim, proofs of loss, medical records, correspondence, claim investigation documentation, etc.

[NAIC Model Regulation – Record Retention]

Regulatory Compliance Continued

- **Licensing Records:**

- For the current year plus 3 years.
- Include records of each producer associated with insurer and reasons for termination, as applicable.

- **Complaint Records:**

- In addition to actual compliant, include a complaint log/register that shows:
 - the total number of complaints for the current year plus the immediately preceding 3 years;
 - The classification of each complaint by line of insurance and by complainant;
 - The nature of each complaint;
 - The insurer's disposition of each complaint; and
 - The complaint number assigned by the Department of Insurance, if applicable.

[NAIC Model Regulation – Record Retention]

Regulatory Compliance Continued

- **Format:**

- One that can be duplicated to a legible hard copy.
- Maintained according to insurer's written procedures, which should be made available to the commissioner.

- **Location:**

- All records must be kept in a location that will allow the records to be produced for examination within the time period required.
- Note: States often require department approval to maintain books and records outside state. (See e.g., TX, NY)

[NAIC Model Regulation – Record Retention]

Regulatory Compliance Continued

- **Producers/Agents:**

- NAIC model regulation recommends producers retain records for the current year plus 3 years (*but see Conn: 7 yrs. after completion of transaction*).

- **MGAs:**

- State-specific record retention requirements.
 - Texas: MGAs must keep records for 5 years or until the completion of a financial examination by the insurance department.

- **TPAs**

- For duration of agreement and 5 years thereafter, maintain at its principal office adequate books and records of all transactions between TPA, self-insured plans, trusts and covered individuals.
- Written agreement between TPA & insurer should be retained for duration of the agreement and 5 years thereafter. [NAIC Model Regulation – Third Party Administrators]
- (*But see, e.g., Maine: 7 yrs.*)

Regulatory Compliance Continued

- **SEC and FINRA**

- Some life insurance policies, including variable life and variable universal life insurance, and annuities are considered securities and must be registered with the SEC.
- FINRA's default rule for record retention is 6 years.

The Goldilocks Principle



Balancing the Risks of Record Retention vs. Destruction

- **Too long**: increases cyber attack surface, potential privacy burdens
- **Not long enough or disorganized**: increases legal/regulatory exposure, compromises customer service, inefficient use of company resources.



Example of cyber/privacy risk of keeping too long or deleting too early

- **Cyber vulnerability (2024):** In February 2024, a large health insurer faced a ransomware attack that compromised patient information, exposing vulnerabilities in their records management and cybersecurity protocols.
- **Privacy Class Action (2023):** In July 2023, a large group of mutual insurance companies faced a class-action lawsuit in Illinois alleging violations of privacy laws by improperly sharing individuals' health information with a risk database company, highlighting deficiencies in records management and data protection practices.
- **Medicaid overpayment litigation (2022):** A managed care intermediary for government and privately insured health care programs settled with multiple states, paying almost \$200 million to resolve allegations of Medicaid overpayments due to inadequate record-keeping and transparency in their pharmacy benefit management operations.
- **Civil Fraud Suit (Medicaid overpayments) (2020):** In March 2020, the DOJ sued a health insurance provider for allegedly submitting inaccurate diagnostic data to obtain increased Medicare reimbursements, indicating failures in accurate records management.

Regulatory Risks of Record Retention Noncompliance

- **State Insurance Departments**

- During exam, insurer must provide documents within specified time period.
- Disciplinary actions for violations may include: cancellation, revocation, or suspension of authority; payment of administrative penalties; restitution to policyholders; compliance plan; and/or cease and desist.

- **SEC & FINRA**

- Noncompliance with SEC/FINRA can result in high dollar fines, suspensions, or expulsions from securities exchange.
- Aug. 2024: SEC fined 26 broker-dealers and investment dealers (and dual registered) more than \$390M combined for violating recordkeeping requirements.

Litigation Holds: Key Components

- Trigger[s] for the Hold
- The Litigation Hold Notice
- Identification of Relevant Data
- Communication to potential custodians
- Suspension of Normal Data Destruction
- Data Preservation
- Acknowledgment of Litigation Hold
- Ongoing Monitoring and Compliance
- Modifications or Updates to the Hold
- Lifting the Litigation Hold
- Documentation and Audit Trail
- Training and Awareness

Spoliation: The most frightening word in litigation

- 2012 – Individual invests as a limited partner in a private placement partnership marketed by broker dealer (owned by major insurer). Underlying investment was the development of gas wells in Colorado;
- 2014 – Investor writes general counsel of managing general partner (*i.e.*, the company drilling and operating the wells) accusing it of fraud and requesting refund of his investment;
- 2016 – Investor sues broker dealer (and life insurer) and gas company drilling/operating the wells for fraud;
- Jan. 2018 -Deposition of Corporate Representative: Revealed defendant had used software to analyze production results in black-acre to predict production in white-acre (which was the subject of the litigation);

Spoliation Continued

- Feb. 2018 -Request for Production of Documents followed the deposition: Produce all data upon which Defendants' projections for [XYZ investment program in white-acre] were based.
- March 2018 -Response to RFP: Requested documents were destroyed in the ordinary course of business [in 2015] as part of Defendant's document destruction schedule.
- April 2018 – Motion for Sanctions based on Spoliation of Evidence. Declaration from CTO in support of Defendant's opposition to motion: Explains document destruction policy, including back up tapes being written over after 30 days;
- May 2018 – Spoliation Motion denied (and request for jury instruction re: spoliation denied);
- August 2019 – Back-up tapes discovered.



Best Practices

Data/privacy best practices

- **Implement Robust Access Controls:** Limit access to sensitive records to authorized personnel only, using multi-factor authentication and role-based permissions to reduce the risk of unauthorized access.
- **Encrypt Data at Rest and in Transit:** Use strong encryption protocols to protect data, ensuring that both stored records and those transmitted across networks are secure against breaches and unauthorized interception.
- **Adopt Regular Audits and Monitoring:** Conduct frequent audits of record management systems to identify vulnerabilities, ensure compliance with regulatory requirements, and detect any unauthorized activities promptly.
- **Establish Clear Retention and Disposal Policies:** Define specific retention periods based on legal and business requirements, and securely dispose of records that are no longer needed to minimize risks associated with over-retention.
- **Provide Comprehensive Employee Training:** Regularly educate employees on privacy laws, cybersecurity risks, and proper records management practices, fostering a culture of accountability and vigilance.
- **Rinse and Repeat:** Periodically (ideally, annually or whenever material changes are warranted), review records management policies and procedures for updates, whether due to change in legal /regulatory landscape, or changes in information practices. Whenever updated, communicate/socialize the updates and engage training and awareness efforts among employees and custodians of data.

Regulatory best practices

- **Retention Period Compliance:** Ensure records are maintained for the longest required period based on state laws and, as applicable, SEC and FINRA.
- **Third Party Agreement Compliance:** Ensure agreements with third parties include clear requirements for record retention, maintenance and destruction.
- **Written Procedures:** Establish clear written procedures on record retention/maintenance and what records can be destroyed and when.
 - Educate employees on proper procedures for record retention and destruction.
 - Take precautions to make sure no one can access outdated records.
 - Ensure all departments follow same procedures for record retention and destruction.

Litigation Best Practices

- “Do your job” – Bill Belichick;
- Avoid being Brandy Melville;
- “Success depends upon previous preparation, and without such preparation, there is sure to be failure.” - Confucius
- “If you see something, say something.”

Thank you!

Questions?



Thank you
Ted, Anna &
Brandon!



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2. The **presentation deck, link to the recorded event and a Certificate of Attendance** will be emailed to those who attended the live session (within 24-48 hours).
3. CEFLI's materials are not filed for CLE or CE with any State Bar or other organizations. In the event you plan to self submit for CE or CLE with the organizations you are involved with, the following slides may be helpful.

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- Participants are required to register to join CEFLI's events.
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- Short bios for today's Webinar speakers appear on the following slide, along with a link to their full bio on the Maynard Nexsen site.
- We do not have a way of knowing how many attorneys attend a CEFLI event.
- While CEFLI webinar events do not have a timed agenda a high-level agenda appears on slide 7.
- Participants may ask questions of the speakers during webinar event by clicking on the Q&A feature in the Webex.
- CEFLI is not a marketing organization. It is a compliance and ethics organization whose mission is to support professionals by providing educational opportunities that address current compliance matters.

Speaker Bios



Ted Holt

Ted Holt is a Shareholder at Maynard Nexsen and Chair for the firm's Insurance Practice Group, which includes 60 attorneys across the US, who represent insurers and other financial services companies in all manner of litigation, regulatory, and transactional matters.

Ted received his J.D. cum laude from the University of Alabama School of Law, and he holds an M.B.A. from the University of Alabama at Birmingham and a B.A. from Rollins College.

Ted's personal practice involves litigating on behalf of insurance and financial services clients in a variety of disputes including sales practices, breach of contract and fiduciary duty, and bad faith claims handling in both individual and class actions.

[Link to Full Bio](#)



Anna Regnier

Anna Regnier is an Associate Attorney with Maynard Nexsen's Insurance Regulatory Group.

She received her undergraduate degree from Cornell University and her JD, summa cum laude, from the University of Arkansas School of Law.

Anna advises clients on insurance and regulatory matters, including licensing, contract review, regulatory filings, company formations and admissions, as well as, mergers and acquisitions, and reorganizations of regulated entities.

[Link to Full Bio](#)



Brandon Robinson

Brandon Robinson is a Shareholder at Maynard Nexsen in the firm's Private Markets practice group.

Brandon completed his undergraduate degree at Duke University and he received his J.D. from Duke University, with honors.

Brandon's practice focuses primarily on three areas: cybersecurity and data privacy, emerging technologies, and energy. He counsels clients in multiple industries to proactively manage data privacy- and cybersecurity-related risks and compliance while maintaining innovative customer service.

[Link to Full Bio](#)



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