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Take Steps to Prevent Spoliation When Using Electronic Records

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Q. I am the local manager of a national laboratory. We just received a subpoena from the U.S. Department of Health and Human Services Office of the Inspector General seeking requisition forms, billing policies, and chargemaster information from the lab. What do we do? What is spoliation, and how do we prevent a charge of spoliation from being lodged against our company or practice?

A. Spoliation is the destruction or alteration of evidence or failure to preserve property for another's use in litigation.[1] In the aftermath of Enron and the Arthur Andersen document destruction scandal, many judges view spoliation akin to contempt and will punish offenders accordingly. For example, Magistrate Judge Paul W. Grimm recently imposed damages and costs of over $1 million on the defendants in a case in the District of Maryland.[2] Judge Grimm even threatened to throw one of the defendants in jail for what he called a "truly extraordinary level of [spoliation]."

Electronic evidence and information provide new ways to misstep[3] — 90% of all business information is stored electronically. In order to comply with the subpoena, someone in your laboratory — you, perhaps — must identify and preserve all relevant data without interrupting normal business operations.

Companies facing discovery requests may engage the services of an outside counsel familiar with the preservation and production of electronic records; especially if the company has no inside technology experts. Computer specialists

can create search lists, pursue automated solutions and develop electronic discovery protocols to prevent spoliation.

When a lab manager knows, or should reasonably conclude, that certain records in his custody are relevant to a present or future lawsuit, he has a duty to preserve the records.[4] His company should have a document protection and retention policy in place prior to service of any request for records.

When an investigation (internal or conducted by outside counsel) commences, counsel should identify the universe of documents, evidence or data to be preserved. Counsel should then interview all relevant employees who are likely sources of documents and identify the material to be collected. Most importantly, counsel should send a letter, known as a "litigation hold" to employees explaining that no documents, including electronic data, may be destroyed without explicit approval of counsel. The litigation hold letter should be sent to employees or others with access to data. Automated and manual data destruction processes should be suspended until the discovery issue is resolved. Recreating lost documents can be enormously expensive.

A single company representative with knowledge of systems or databases should oversee production of the documents. Different individuals have different ideas about where electronic data resides. The designated representative, under advice of counsel, can coordinate responses to the discovery request from the different data repositories. External counsel can monitor compliance with the litigation hold through the representative.

Once relevant documents are obtained, they are logged into a format that allows tracking. Copies of back-up media should be preserved. Special care should be taken to identify and segregate documents containing patient health information and privileged information that are best handled in coordination with counsel. Counsel and the representative should work to ensure transparency and a document production protocol that will be satisfactory to a future court. In fact, Magistrate Judge Grimm has put together a sample protocol for discovery of electronic information.[5]

Engaging the other side in a discovery dialogue is helpful. The company should avoid over-production (inadvertently waiving attorney client privilege) and under-production (allegations of spoliation). The risks of both are sanctions; adverse instructions, default judgments, and monetary fines.[6]

What if a company inadvertently destroys material that should be protected and preserved? The worst case scenario is not inadvertent destruction, but obstructing or covering-up. Call the laboratory's attorney quickly and deal with inevitable disclosure of the failure to preserve.

References

[1] *West v. Goodyear Tire & Rubber Co.*, 167F. 3d 776, 779 (2d Cir 1999).
[2] *Victor Stanley, Inc. v. Creative Pipe, Inc.* MJG-o6-2662, Slop op. at 2 (D. Md. January 24, 2011).
[3] Fed. R. Civ. P. 26(b) and 34.
[4] *Silvestri v. General Motors Corp.*, 271 F. 3d 583, 591 (4th Cir. 2001).
[5] U.S. District Court for the District of Maryland, Suggested Protocol for Discovery of Electronically Stored Information. http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf. Accessed April 15, 2011.
[6] Fed. R. Civ. P 37(b).