MELAND | BUDWICK

Why Your Firm Should Worry About Doc Destruction

https://mbdev.aplussdv.com/2015/08/18/why-your-firm-should-worry-about-doc-destruction/

Sindhu Sundar

Document destruction claims have dominated several high-profile cases in the past year, as highlighted by Takeda Pharmaceutical Co. Ltd.'s misadventures in the federal Actos litigation. Attorneys say the best way to fight such claims is to thoroughly catalog clients' data — and ensure it's preserved — at the first hint of litigation.

A jury hit Takeda with $6 billion in punitive damages last year over claims that it downplayed the alleged bladder cancer risks of its diabetes drug Actos. The explosive verdict followed a ruling by U.S. District Judge Rebecca Doherty that the company had destroyed Actos- related documents over the course of a decade despite a litigation hold.

Judge Doherty allowed the jury to hear evidence of the document destruction, which many observers said was more damaging to the drugmaker than if she had imposed monetary sanctions, as it likely inflamed the jury to return such a huge verdict against the company.

The judge later slashed that verdict to $27.7 million, finding that punitive damages should be roughly 25 times the amount of compensatory damages in order to be constitutional. However, she said she didn't think the jury had been motivated by "passion or prejudice."

Observers point to trials like Takeda's as a testament to the reputational damage and litigation challenges a company can face because of rulings related to failure to preserve documents.

"It can have a major impact on the outcome of a trial," Joshua Romero of Jackson Walker LLP said. "If the company against whom any sanctions are issued has a

reasonable basis for disagreeing, it would be worthwhile to seek to appeal of those sanctions because of the serious impact it can have on the outcome of the trial."

Findings of spoliation can have major consequences not only for clients but also for the attorneys representing them, raising the stakes for law firms in trying to anticipate and prepare for spoliation claims well before they hit, attorneys say.

Evidence spoliation issues have risen to the fore in the last decade since U.S. District Judge Shira Scheindlin's 2003 landmark decision in Zubulake v. UBS Warburg LLC, which established clearly that electronic documents should be discoverable.

Findings of spoliation can lead to consequences ranging from adverse jury instructions, where a jury is instructed to assume that the destroyed evidence would've been harmful to the company in the suit, to monetary sanctions or even default judgments against the company.

> "Judges are increasingly holding attorneys accountable for overseeing their clients' discovery efforts," Zachary James of Meland Budwick, P. A., said. "So you need to really understand your clients' record management program, and all of their structured document retention and destruction plans, before any of these discovery issues come up in the first place."

In November, the U.S. International Trade Commission hit a chemical manufacturer and its counsel, Finnegan Henderson Farabow Garrett & Dunner LLP, with nearly $2 million in attorneys' fees and costs to a sanction against evidence spoliation in a trade secrets dispute with Dow Chemical Co. Administrative Law Judge Thomas Pender awarded Dow a default judgment against Organik Kimya San. ve Tic. AS, which Dow had accused of misappropriating trade secrets, destroying evidence on one Organik employee's laptop and deleting more than 2,700 files off another.

To sanction Organik for its "bad faith spoliation of evidence," Judge Pender hit the company with a loss by default on Dow's allegations of trade secret misappropriation and imposed monetary sanctions against Organik and Finnegan.

"It's not just clients who are dealing with exposure ," James said. "If an attorney turns a blind eye or fails to properly oversee their client's preservation efforts, they can be

sanctioned even if they don't actively assist or know of ."

Courts have also often meted out sanctions based on the degree of the potential conduct — whether the destruction was negligent or in bad faith. A number of state and federal appeals courts have weighed in, including the Texas Supreme Court, which last June outlined a distinction between intentional destruction and mere negligence.

But the courts' push in recent years for attorneys to take more responsibility for their clients' preservation efforts means that attorneys can face huge reputational consequences too, experts say.

"Once you have that spoliation finding around your neck, it's a tough scarlet letter to get rid of," Tim O'Brien of Levin Papantonio Thomas Mitchell Rafferty & Proctor PA said. "It's a difficult stigma to ever shed in federal litigation because the federal rules of discovery are so much built on trust and candor."

To avoid sanctions, attorneys should work with clients to establish formal litigation readiness and document preservation plans ahead of lawsuits and devise a structured approach to preserving and deleting records, experts say.

They should keep detailed records of when documents are deleted as part of routine data purges. If any electronic information is destroyed as part of records retention programs before a lawsuit starts or can be anticipated, records that clearly show that timeline would make it harder for opponents to attack the clients' motivation for doing so in court.

Attorneys must clearly understand how their clients handle their employees' electronic data when they leave the company and where such information is located — smartphones, tablets or even home computers. They should know how their clients back up that information.

They should also make sure that their clients impose litigation holds as soon as they can reasonably anticipate lawsuits and then make sure that all sections of the company comply with the hold and suspend any relevant routine document destruction functions, experts say.

The company's document custodians and information technology staff should be

alerted immediately to any such litigation holds.

“As an attorney, you need to interview custodians, have them show you where they’re storing their data and basically ask them questions that opposing parties’ counsel would ask,” James said. “That means you’d ask them about every source of data, and every possible custodian of data that might be discoverable, so that you can make sure it’s preserved.”

