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Sanctions for e-discovery violations at 'historic' high

by Christina Pazzanese

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Sanction motions and awards for e-discovery violations across the country have climbed dramatically in recent years and have now hit "historic highs," according to a study published in the Duke Law Journal.

The study identified 401 cases filed in federal court before Jan. 1, 2010, with written opinions involving sanction motions or sanction awards. It found that not only have e-discovery sanction cases climbed annually since 1981, the increase in both sanction motions and awards since 2004 has been "significant."

In 2009, there were more sanction cases (97) and more sanction awards (46) than in any previous year.

Lawyers say the study, the most comprehensive effort they have seen attempt to quantify trends in what is a rapidly expanding and increasingly complicated area of litigation, confirms much of what they have witnessed in their own practices.

"E-discovery is a big issue, it's an enormous undertaking and it's incredibly expensive," said John A. Tarantino of Adler, Pollock & Sheehan in Providence, R.I. "Even if you proceed in good faith, you still can have problems."

Violations prompting the most sanctions were a failure to preserve evidence, which was cited in 131 of the 230 cases in which sanctions were handed out, followed by a failure to produce evidence, cited in 73 cases (see sidebar at bottom of page).

Sanctions included dismissal and default, as well as adverse jury instructions and monetary awards that ranged from $250 to $8.8 million.

Sanctions against counsel, however, remain rare, the study found.

Timothy J. Dacey III, a veteran business litigator at Goulston & Storrs in Boston, said e-discovery violations and sanctions have become an especially hot topic in the federal courts where high-stakes disputes involving parties that generate and retain more discoverable information — who also have the resources to pursue them from others — tend to play out.

The federal courts have also generated more "trailblazing" cases, such as the decision from 2003's *Zubulake v. UBS Warburg,* that have raised awareness among lawyers of the scope of their e-discovery obligations, as well as the pitfalls and potential for abuse, Dacey said.

And a December 2006 amendment to Rule 37(e) of the Federal Rules of Civil Procedure, designed to provide lawyers safe harbor against some sanctions, includes terms like "good faith" and "reasonable effort," which has led to some confusion and disagreement over what is required to comply with the rule, Dacey said.

Judge Robert B. Collings, a U.S. magistrate judge in Boston who lectures on e-discovery issues across the country, said unlike what is happening in other states, e-discovery violations and sanctions are still few and far between in Massachusetts.

"What I tell my colleagues in New York is the Boston lawyers get it. It's very important to be cooperative," he said. "They also have in their mind that if it's brought to the judge, they're going to require them to be reasonable."

Much of the e-discovery problems arise from courts taking a too hands-off approach and leaving attorneys to hash out what information they need, which leads to disputes about overly broad requests, he said.

"The real problem of e-discovery is, even if counsel is completely cooperative, it's still very expensive," Collings said. "That's the bottom line."

Judgment calls

Lawyers say a critical factor driving e-discovery disputes is the difficulty practitioners face with issuing appropriate litigation holds to clients because there is little guidance and essentially no appellate caselaw to follow.

Clients often balk at the high cost of an overly broad hold since it may encompass a vast amount of digital evidence stored in far-flung locations, while lawyers try not to exclude something in an overly narrow hold for fear of triggering a potential violation down the road.

Striking the appropriate balance of what should be retained and for how long is easier said than done, attorneys say.

"It's one of the harder judgment calls that lawyers and clients need to make early on," Nixon Peabody attorney Jonathan Sablone said.

"The problem is it's an unsupervised process," he said. "There's no judge telling you what you should be doing. Instead, you're trying to make a good-faith judgment at the time of what you need, and if you're wrong, you could be sanctioned."

Lawyers agree one key challenge is that the various federal and local rules governing such violations use a reasonableness standard rather than a bright line.

Rule 37(e) of the Federal Rules of Civil Procedure — which provides "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system" — was the most commonly cited rule in the cases studied.

Adler Pollock's Tarantino said the 2006 rule change has not turned out to be the safe harbor some thought, perhaps contributing to the spike in sanctions.

"A lot of folks may have misread or misunderstood the rule," he said. "It's a boat slip, not a harbor."

Counsel sanctions rare

Despite the overall uptick in sanctions, those specifically against counsel are still rare and prompted by repeated misconduct, according to the study.

Of the 401 cases studied, only 30 counsel sanctions were handed out and only 25 of those were issued specific awards; the other five were deferred. Sanctions against counsel were considered in seven additional cases, but were ultimately not handed out.

"I think sanctioning lawyers is often only the last resort of a court," said Stephen D. Riden of Beck, Reed, Riden in Boston. "Courts will typically give lawyers the benefit of the doubt, especially with a large volume of data that's hard to wrap your arms around."

Unless the conduct is egregious and opposing counsel offers a "slam-dunk argument," judges will look for other ways to punish violations, he said.

Judge Collings agreed.

"I don't think courts have been all that anxious to impose sanctions. I think they realize it's a difficult area" and only act on "really egregious stuff," he said.

Dacey said cases in which sanctions were issued as a result of negligent conduct suggests the possibility that lawyers may now be successfully engaging in "satellite litigation" around e-discovery as an end unto itself.

The courts defined "gross negligence" as the failure to advise the client to issue litigation holds or to otherwise take steps to preserve potentially relevant information; the failure to supervise a client search for responsive information by accepting the client's representations as to the

adequacy of the search; and the failure to produce a critical document in the possession of counsel for several years.

Dacey said given the inherent difficulty of gathering a variety of potentially relevant data stored in various mediums that may be subject to software that periodically deletes files or data, there is almost always a good chance that something potentially of interest to opposing counsel will get overlooked.

"It's real easy to be 'negligent' in the context of a lawsuit where the nature of the information you're collecting is changing rapidly," Dacey said.

Sidebar:

E-discovery study: what the numbers show

A study recently published in the Duke Law Journal analyzed cases filed in federal court prior to Jan. 1, 2010, in which sanction motions or awards were granted.

Of the 401 cases studied, sanctions were issued in 230 cases for one of several e-discovery violations. The sanctions imposed included dismissals, defaults, adverse jury instructions, hefty monetary awards and, though uncommon, even sanctions against counsel.

In a number of instances, sanctions were issued for multiple violations.

No. of cases and reason for sanction

131 – Failure to preserve

73 – Failure to produce

61 – Delay in production

34 – Failure to perform adequate searches

8 – Misrepresenting completeness of production

3 – Format of production

1 – Other

Source: "Sanctions for E-discovery Violations: By the Numbers" by Dan H. Willoughby Jr., Rose Hunter Jones and Gregory R. Antine

A total of 77 cases granted monetary awards including default judgments, monetary sanctions and award of attorneys' fees and costs. Awards ranged from $8.8 million to $250; five of the 77 awards were over $5 million and a total of nine were for awards of over $1 million.

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