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Article

SANCTIONS FOR E-DISCOVERY VIOLATIONS: BY THE NUMBERS

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...d information (ESI). We analyzed each case for various factors, including date, court, type of case, sanctioning authority, sanctioned party, sanctioned misconduct, sanction type, sanctions to counsel, if any, and the protections provided from sanctions by Federal Rule of Civil Procedure 37(e). The survey identified 401 sanction cases and 230 sanction awards and showed that sanction motions and awards have increased over time, particularly in the last five years. Sanctions against counsel are rare but are also increasing. Sanction motions have been filed in all types of cases and in courts across the country. Failure to produce ESI is the most common basis for sanctions. Courts have used a variety of different rules, statutes, and powers to sanction parties for e-discovery violations, including Rule 37 and the inherent power of the court, and courts impose many different sanction types on e-discovery violators, including the severe sanctions of dismissal, default judgment, adverse jury instructions, and sizeable monetary awards. Rule 37(e) has not provided broad protection from such sanctions.

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Introduction

E-discovery sanctions are at an all-time high. We identified 230 sanction awards in 401 cases [1] involving motions for sanctions relating to the discovery of electronically stored information (ESI) in federal courts prior to January 1, 2010. We analyzed these cases for a variety of factors, including sanctioning court, sanctioning authority, sanctioned party, sanction type, and sanctioned misconduct. Our analysis indicates that although the annual number of e-discovery sanction cases is generally increasing, there has been a significant ***791** increase in both motions and awards since 2004. Motions for sanctions have been filed in all types of cases and all types of courts. The sanctions imposed against parties in many cases are severe, including dismissals, adverse jury instructions, and significant monetary awards. Sanctions against counsel, although uncommon, are on the rise as well. All the while, the safe harbor provisions of Rule 37(e) of the Federal Rules of Civil Procedure [2] have provided little protection to parties or counsel.

Producing parties have struggled to comply with ever-expanding and increasingly complex responsibilities as ESI has played a predominant role in pretrial discovery. The liberal scope of discovery in federal courts, when coupled with ESI's defining characteristics--its high volume, broad dispersal, and dynamic nature--also confounds efforts to conduct discovery effectively and economically. Governing rules [3] have been amended [4] and supplemented [5] to provide a procedural framework "to secure the just, speedy, and inexpensive ***792** determination" [6] of discovery disputes involving ESI. Most notably, substantial amendments were made to the Federal Rules of Civil Procedure in 2006 to address the discovery of ESI in federal courts. [7] Yet lawyers agree that discovery in the postamendment world is more expensive, more complicated, and more contentious than ever. [8] The highest number of filed motions and awards relating to e-discovery sanctions in any single year prior to 2010 occurred in 2009, [9] three years after the effective date of the 2006 amendments.

Performing complicated tasks on a deadline creates the opportunity for incorrect or incomplete production, whether resulting from innocent inadvertence or intentional malfeasance. [10] When e-discovery efforts fall short, producing parties may be penalized, and prejudiced parties may be made whole through the award of sanctions. Marquee e-discovery-disaster cases, Qualcomm Inc. v. Broadcom Corp. [11] and Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees International Union, [12] are towering reminders of the most severe sanctions--dismissals, multimillion dollar awards, and bar association referrals--that can be imposed for the most egregious misconduct. [13] Of greater concern to ***793** the average practitioner is the increasing frequency of sanction decisions, an issue most recently illustrated by Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC, [14] in which all thirteen plaintiffs were sanctioned for e-discovery failings not rising to the level of intentional or willful conduct. [15] In many cases, more attention is focused on e-discovery than on the merits, [16] with a motion for sanctions an increasingly common filing. [17] As a result, leading practitioners agree that more uniform standards and guidelines are needed to guide counsel through the complex tasks of discovery. [18]

I. E-Discovery Sanctions Have Increased

Although discovery relating to ESI, and disputes involving it, appeared as early as the 1970s, [19] only recently has the threat of sanctions relating to discovery of ESI been a prevalent concern of ***794** counsel. Sanctions for e-discovery violations began to appear in the early 1980s. [20] The first case identified in which e-discovery sanctions were awarded was

William T. Thompson Co. v. General Nutrition Corp.[21] In William T. Thompson, the plaintiff sued General Nutrition Corporation (GNC) for antitrust violations, alleging that GNC falsely advertised the availability of the plaintiff's products at GNC's stores. GNC's purchase, sale, and inventory records, kept in paper form and in computer files, were key to the plaintiff's case.[22] After the plaintiff filed the lawsuit and initial discovery requests, GNC destroyed its paper and computer inventory records. The district court found that GNC could have maintained the computer records without undue burden and that it did not instruct its employees to preserve records, which resulted in the records' routine destruction.[23] The court awarded the plaintiff monetary sanctions, attorneys' fees and costs, and default judgment because GNC's bad faith destruction of documents prejudiced the plaintiff.[24]

For over a decade following William T. Thompson, cases involving motions for sanctions relating to e-discovery violations were sporadic, with some years having only a single e-discovery sanction case and other years having none.[25] After 1996, the number of cases slowly increased but did not reach an annual total in the double digits until 2004. As shown in Figures 1 and 2, the number of e-discovery sanction cases and the number of e-discovery sanction awards more than tripled between 2003 and 2004, from nine to twenty-nine sanction cases, and from six to twenty-one sanction awards. The numbers continue to rise. Our analysis of pre-2010 cases indicates that there were more e-discovery sanction cases (ninety-seven) and more e-discovery sanction awards (forty-six) in 2009 than in any prior year. In fact, there were more e-discovery sanction cases in 2009 than in all years prior to 2005 combined.

***795** Figure 1. Annual Number of E-Discovery Sanction Cases

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Figure 2. Annual Number of E-Discovery Sanction Awards

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***796 II.** E-Discovery **Sanction Cases Are a Diverse Docket**

Sanctions relating to e-discovery violations have reached courts everywhere, have appeared in all types of cases, have been awarded based on varying authority, and have been granted to defendants and plaintiffs asymmetrically.

A. E-Discovery **Sanction Motions Are Before All Courts**

Our research indicates that 183 district court judges and 111 magistrate judges from seventy-five federal districts in forty-four states,[26] as well as the Virgin Islands,[27] the District of Columbia,[28] and Puerto Rico,[29] have issued written opinions regarding sanctions involving e-discovery. All eleven of the federal appellate circuit courts,[30] as well as the Federal[31] and D.C. Circuits,[32] have issued ***797** opinions involving e-discovery sanctions. Additionally, nine bankruptcy court judges,[33] two United States Court of Federal Claims judges,[34] and one United States Court of International Trade judge[35] have addressed issues relating to e-discovery sanctions.

The vast majority of the 485 written rulings are from the district court level, with 251 written district court rulings and 189 magistrate rulings. Appellate review of e-discovery sanction cases has been ***798** limited, perhaps because many cases settle or are otherwise not appealed. We identified only thirty-two cases at the appellate level.[36]

B. E-Discovery Sanction Motions Are in All Types of Cases

ESI discovery disputes and associated motions for sanctions appear in all types of cases. As Appendix A shows, the most common case types are employment (17 percent), contract (16 percent), and intellectual property (15.5 percent) cases. Sanctions for e-discovery violations were also discussed in tort cases (11 percent) and a variety of other types of cases, including civil rights (8.5 percent) and bankruptcy (3 percent).

C. E-Discovery Sanction Motions Are Granted through Varying Authority

Courts have used a variety of different rules, statutes, and powers to sanction parties for e-discovery violations. [37] Their array of authority appears to provide ample and flexible bases for addressing the various e-discovery sanction scenarios. We identified no case in which a court inclined to impose a sanction was unable to do so ***799** because particular rules or statutory requirements were not met. The sanctioning authorities include Rule 26(g) [38] and Rules 37(b), [39] 37(c), [40] and 37(d). [41] Section 1927 of 28 U.S.C., titled "Counsel's liability for excessive costs," also provides authority to sanction any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." [42] Importantly, even when the requirements of the rules or statute are not met, federal courts still have sanctioned parties for e-discovery violations, deriving their sanctioning power from the court's inherent authority. This inherent power arises from courts' authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." [43]

***800** Courts are not always precise in identifying the rule or statute upon which their sanction decisions are based. In some instances, no basis is identified. In other instances, there is a general citation to a rule without reference to a particular subsection. Many times, rules and statutes are cited together. Noting these difficulties, our analysis indicates that the most prevalent bases for sanctions were Rule 37 and the court's inherent authority. Rule 37, without reference to a particular subsection, was cited as a sole basis for sanctions in seventeen cases, [44] and one of its subsections (b), (c), or (d) was cited as the sole basis for sanctions in a total of twenty-four other cases. [45] ***801** Rule 37--generally or one of its subsections--was cited in a total of 136 of the 230 cases awarding sanctions. The court's inherent authority was cited in thirty-six cases as the sole basis for sanctions [46] ***802** and cited in another seventy-two cases as one of multiple bases for sanctions. Rule 26 was cited as the sole basis for sanctions in four cases [47] and in combination with another rule in twenty-seven cases. [48] Section 1927 was cited in combination with another rule in two cases. [49]

*803 D. E-Discovery Sanction Motions Are Awarded against Defendants More Often

Defendants are sanctioned for e-discovery violations nearly three times more often than plaintiffs. In our survey, defendants were sanctioned 175 times, plaintiffs were sanctioned fifty-three times, and third parties were sanctioned twice. The three-to-one ratio of defendant sanctions to plaintiff sanctions has generally held steady over the last ten years, even as the number of sanction cases and sanction awards has greatly increased. [50]

III. Failure to Preserve ESI Is the Most Prevalent Sanctionable Conduct

The misconduct underlying a particular sanction award is sometimes a single type of misconduct, such as failure to preserve ESI or failure to produce ESI. More often it is a combination of multiple types of misconduct. In the 230 cases [51] in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis

for sanctions in ninety cases. It was also cited as one of the types of misconduct in forty-six cases involving multiple misconduct. Failure to produce was the sole basis for sanctions in thirty-five cases and was mentioned in another sixty-seven cases involving multiple types of misconduct. Delay in production was the sole basis for sanctions in sixteen cases and mentioned in forty-five other cases involving multiple types of misconduct.

IV. Courts Have Used a Wide Range of Sanctions for E-Discovery Violations

Sanctions for e-discovery violations have varied greatly in type and severity depending on the circumstances of the case. For the most serious violations, courts have imposed the most draconian of sanctions: dismissal of all claims or defenses. Courts have also given adverse jury instructions and imposed monetary awards for serious e-discovery lapses. In cases of lesser violations, courts have used a continuum of penalties to punish the misconduct and remedy the resulting prejudice. Such penalties have included evidence ***804** preclusion,[52] witness preclusion,[53] disallowance of certain defenses,[54] reduced burden of proof,[55] removal of jury challenges,[56] limiting closing statements,[57] supplemental discovery,[58] and additional access to computer systems.[59] In some instances, more creative courts have imposed nontraditional sanctions, such as payments to bar ***805** associations to fund educational programs,[60] participation in court-created ethics programs,[61] referrals to the state bar,[62] payments to the clerk of court,[63] and barring the sanctioned party from taking additional depositions prior to compliance with the court's discovery order.[64]

A. Dismissals

We identified thirty-six cases in which a terminating sanction of dismissal or default judgment was entered against a party for e-discovery violations. Twenty of these thirty-six dismissed cases involved failure to preserve evidence,[65] seven involved failure to ***806** produce,[66] and nine involved both failure to preserve and failure to produce.[67] In sixteen cases, the court noted that the client, counsel, or both made misrepresentations to the court.[68] In imposing the most severe sanction of dismissal, twenty of thirty-six courts considered the prejudice to the opposing party resulting from the loss or failure to produce evidence, with eight courts describing the resulting prejudice as "serious[]," [69] "inalterabl[e]," [70] "severe[]," [71] "substantial," [72] "unfair[]," [73] or "significant[]." [74]

***807** In nineteen of the thirty-six cases, the court emphasized a pattern of misconduct.[75] The court often...

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...e 37(b) in conjunction with the court's inherent power (fifteen cases),[86] followed by Rule 37(b) by itself (eleven cases).[87] In five other cases, the court relied only on its ***810** inherent power.[88] Courts have also combined Rule 37 and Rule 26 to dismiss two cases.[89] Rule 37 was coupled with Rule 41 twice.[90]

Twenty-three of the thirty-six dismissed cases involved violations of discovery orders, most notably discovery orders granted to compel the production of the very ESI that was destroyed.[91] Twenty-seven cases involved violations of motions to compel or other discovery orders.[92] Two involved violations of temporary restraining orders or preliminary injunctions.[93]

***811** Although courts have imposed sanctions of dismissal in a total of thirty-six cases involving e-discovery violations, the number of dismissals per year since 2006 has slightly decreased, from seven in 2006 to five in 2009. [94] Courts continue to reserve terminating sanctions for only the most egregious of cases. In these terminated cases, the misconduct typically occurred after repeated warnings and after repeated willful failures that irreparably compromised the court's ability to adjudicate on the merits, leaving no alternative but dismissal.

B. Adverse Jury Instructions

In fifty-two cases, courts sanctioned parties for e-discovery violations by issuing adverse jury instructions. Courts deferred judgment on this issue in another ten cases. Forty of the fifty-two cases in which adverse jury instructions were awarded occurred between 2006 and 2009.

The cases in which adverse jury instructions were issued included forty-three cases involving failure to preserve, [95] four cases involving ***812** failure to produce, [96] and five cases involving both. [97] The defendant was sanctioned with an adverse jury instruction in forty-four cases, [98] while the plaintiff was so sanctioned in only eight cases. [99]

***813** The level of misconduct justifying the adverse jury instructions varied across the fifty-two cases. Four cases involved negligence; [100] ten cases involved gross negligence; [101] three cases involved reckless disregard; [102] and thirty-four cases involved intentional conduct, bad faith, or both. [103] One case did not provide information concerning the level of misconduct. [104]

The courts used their inherent power and the Federal Rules of Civil Procedure, both separately and in conjunction with each other, to impose the sanctions. The inherent power of the court was cited in fourteen cases as the sole basis for sanction [105] and in twenty other cases in which multiple bases for sanctioning were cited. [106] Rule 37 ***814** was cited in three cases by itself [107] and in fourteen other cases with multiple citations to authority. [108] Rule 26 was cited in four cases with other sanctioning authority. [109]

C. Monetary Awards

We identified seventy-seven e-discovery sanction cases providing for specific monetary awards, including awards for default judgments, monetary sanctions, and attorneys' fees and costs. [110] The awards ranged from $250.00 [111] to $8,830,983.69. [112] There are five cases with monetary awards over $5 million, [113] an additional four cases with monetary awards at or above $1 million, [114] and six additional cases ***815** with monetary awards over $250,000. [115] In total, we identified twenty-seven cases with monetary awards exceeding $100,000. [116]

V. Counsel Sanctions Are Increasing

Sanctioning counsel for e-discovery violations is an extraordinary remedy. "A mild presumption exists that clients are in the best position to control their counsel and, absent egregious counsel conduct, should bear the discovery sanctions." [117] Out of 401 e-discovery sanction cases, [118] we identified only thirty instances of counsel being sanctioned, with sanctions specifically awarded in twenty-five cases [119] and indicated but deferred in five cases. [120] We also ***816** identified seven

cases in which sanctions were considered but not awarded. [121] Consistent with the overall increase in sanction cases, Figure 3 demonstrates that counsel sanctions for e-discovery have steadily increased since 2004.

Figure 3. Annual Number of Counsel E-Discovery Sanctions

Year	Cases
1987	1
1989	1
2000	1
2001	1
2002	0
2003	1
2004	2
2005	2
2006	4
2007	5
2008	5
2009	7

***817** Like the case law involving e-discovery sanctions generally, case law involving counsel e-discovery sanctions is predominantly being developed at the trial court level by magistrate judges, bankruptcy judges, and district court judges. We identified only two opinions by a federal appellate court addressing potential e-discovery sanctions against counsel. In both instances, the court vacated sanctions against counsel. [122]

Courts have cited six general sources of authority for e-discovery sanctions against counsel: Rule 26, Rule 37, Section 1927, the inherent power of the court, local court rules, and state bar regulations governing attorney conduct. Some written rulings are less than precise regarding the specific basis for their decisions, often discussing multiple sources of authority and the Federal Rules of Civil Procedure generally rather than citing to specific subsections. Cited in twenty of the thirty cases, Rule 37 is the most frequently used authority for imposing sanctions on counsel for e-discovery violations. [123] The inherent power of the court was used in eleven [124] of the thirty cases and was relied upon as the sole source of authority in only two of those cases. [125]

***818** Courts rarely sanction counsel for e-discovery violations without also sanctioning the client. [126] In all three cases in which courts have sanctioned in-house counsel for e-discovery violations, the client was also sanctioned. [127] Additionally, counsel sanctions usually result from a pattern of misconduct, not an isolated incident. In only four of the thirty cases involving outside counsel sanctions were outside counsel sanctioned as the result of a single instance of misconduct. [128]

The cases identified various levels of misconduct as the basis for counsel sanctions. Four cases involved negligence, seven cases involved gross negligence, nine cases involved reckless disregard, and ten cases involved intentional conduct or bad faith.

Negligence is a failure to conform to the standards of acceptable conduct "to participate meaningfully and fairly in the discovery phase." [129] In all four cases in which the court sanctioned counsel for...

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Rule 37(e), adopted on December 1, 2006, contains a safe harbor for certain conduct relating to the preservation and production of ESI. The Rule provides: "Absent 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." [151]

The drafters intended the rule to provide only "limited protection against sanctions." [152] Its purpose was to protect against sanctions arising solely from the loss of ESI through the routine operation of electronic systems that automatically discard information. [153] The rule was never intended to provide protection for all manner of missteps in the broad range of e-discovery activities performed by parties and their counsel--such as failure to search and failure to produce on schedule.

Despite its limited scope, the proposed rule generated controversy concerning the appropriate standard of culpability that would support or preclude sanctions. [154] Proposed standards included ***825** negligence, recklessness, and intentional conduct. The Advisory Committee ultimately adopted what it deemed to be an "intermediate" culpability standard, providing "protection from sanctions only for the 'good faith' routine operation of an electronic information system." [155]

From Rule 37(e)'s promulgation on December 1, 2006, until January 1, 2010, we identified only thirty federal court decisions citing the safe harbor provision. Three of these cases...

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...o involved a failure by the responding party to show good faith. [167]

Several courts have also held Rule 37(e) inapplicable to bar sanctions awarded under the court's inherent power or in cases in which Rule 37 did not govern the conduct giving rise to the sanction. [168] Courts have also declined to apply the rule for other reasons, including that the opposing party had not sought sanctions. [169]

***828** In summary, the safe harbor was intended to provide limited protection, and it has. Parties or counsel seeking refuge from the increasing sanction-motion practice will be able to reach Rule 37(e)'s refuge only in very limited situations. Since the rule's adoption, approximately two cases per year have met its requirements.

Conclusion

Sanction motions and sanction awards for e-discovery violations have been trending ever-upward for the last ten years and have now reached historic highs. At the same time, the frequency of sanctions against counsel for e-discovery violations, though small in number, is also increasing. Although serious e-discovery misconduct by parties and counsel should continue to be the subject of sanctions, appropriate consideration should be given to the complexity of e-discovery in ruling upon the increasingly frequent e-discovery sanction motion.

*829 Appendix A

All Cases

No.	Case	Primary Case Type
1	ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994)	Contract
2	Acorn v. County of Nassau, No. CV 05-2301, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009)	Civil Rights
3	Adams v. Gateway, Inc., No. 2:02-CV-106, 2006 WL 2563418 (D. Utah Mar. 6, 2006)	Intellectual Property
4	Adorno v. Port Auth., 258 F.R.D. 217 (S.D.N.Y. 2009)	Employment
5	AdvantaCare Health Partners, LP v. Access IV, No. 03-4496 JF, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004)	Commercial
6	Advante Int'l Corp. v. Mintel Learning Tech., No. C 05-01022JW (RS), 2008 WL 928332 (N.D. Cal. Apr. 4, 2008)	Intellectual Property
7	Aecon Bldgs., Inc. v. Zurich N. Am., 253 F.R.D. 655 (W.D. Wash. 2008)	Insurance
8	Aero Prods. Int'l, Inc. v. Intex Recreation Corp., No. 02 C 2590, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004)	Intellectual Property
...		
76	Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001), adopted in part and rejected in part by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), aff'd in part and vacated in part, 428 F.3d 1 (1st Cir. 2005)	$500.00
77	Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993)	$250.00

Footnotes

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1 See infra Appendix A. Modern cases may involve not only ESI but also paper documents. Some of the cases involving e-discovery sanctions include discovery of both ESI and paper documents.

2 Fed. R. Civ. P. 37(e).

3 For amendments and supplements of state rules regarding ESI, see, for example, Order Amending Rules 16(b), 16(c), 16.3, 26(b), 26.1, 26.2, 33(c), 34, 37(g), & 45, Ariz. Rules of Civil Procedure, No. R-06-0034 (Ariz. Sept. 5, 2007), available at http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf; and Order Amending Rules of Trial Procedure, No. 94S00 (Ind. Sept. 10, 2007), available at http://www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf, which both closely track the December 1, 2006, amendments to the Federal Rules of Civil Procedure. For a bill that adopts some aspects of the December 1, 2006, amendments to the Federal Rules but that also includes several nonconforming provisions, see Electronic Discovery Act, A.B. 5, 2009-2010 Leg., Reg. Sess. (Cal. 2009). For amendments and supplements that involve local rules regarding ESI, see, for example, Suggested Protocol for Discovery of Electronically Stored Information

(D. Md. 2007), at 1, available at http:// www.mdd.uscourts.gov/news/news/ESIProtocol.pdf, which states that its purpose "is to facilitate the just, speedy and inexpensive conduct of discovery involving ESI in civil cases," and Guidelines for Discovery of Electronically Stored Information (D. Kan. Feb. 1, 2008), available at http:// www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf, which states that "[t]hese guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 16, 26, 33, 34, 37, and 45, as amended December 1, 2006 and December 1, 2007, relating to the discovery of ESI."

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20 See, e.g., Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 23-24 (1st Cir. 1981) (declining to sanction the defendant, who improperly destroyed computer records, because there was no evidence of bad faith and the plaintiff could have developed the evidence from third parties); Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455-56 (C.D. Cal. 1984) (awarding the plaintiff monetary sanctions and default judgment based on the defendant's bad faith destruction of paper and computer records after the lawsuit was filed).

21 Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443 (C.D. Cal. 1984).

22 Id. at 1445-46, 1449-51.

23 Id. at 1446-47, 1450.

24 Id. at 1455-56.

25 For the annual number of sanction cases and sanction awards, see infra Appendix B.

26 District courts in six states, Alaska, New Mexico, North Dakota, Vermont, West Virginia, and Wyoming, have not issued written opinions regarding sanctions for e-discovery violations.

27 See Canton v. Kmart Corp., No. 1:05-cv-143, 2009 WL 2058908, at *1-3 (D.V.I. July 13, 2009) (granting the plaintiff's motion for a spoliation-of-evidence jury instruction to sanction the defendant for the failure to preserve videotape and other evidence); Nieves v. Kmart Corp., No. 2005-CV-0024, 2009 WL 1605623, at *1-2 (D.V.I. June 8, 2009) (denying the plaintiff's motion for a spoliation-of-video-evidence instruction); Dowling v. United States, No. 2000-CV-0049, 2008 WL 4534174, at *2 (D.V.I. Oct. 6, 2008) (denying the plaintiff's motion for sanctions but granting a spoliation-of-evidence instruction due to the defendant's failure to preserve audiotape evidence).

28 Covad Commc'ns Co. v. Revonet, Inc., 260 F.R.D. 5, 9 (D.D.C. 2009) (staying the plaintiff's motion for sanctions concerning the defendant's failure to produce ESI documents in the proper electronic format).

...

107 Lyondell-Citgo, 2005 WL 1026461, at *3; Network Computing, 223 F.R.D. at 399-400; Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325, at *30 (N.D. Ill. Oct. 23, 2000).

108 Stevenson, 354 F.3d at 750; Lewis, 261 F.R.D. at 518-19; Usenet.com, 633 F. Supp. 2d at 138; Smith, 2009 WL 482603, at *10; Metrokane, 2008 WL 4185865, at *3; Nursing Home Pension Fund, 254 F.R.D. at 563; Keithley, 2008 WL 3833384, at *3; Cyntegra, 2007 WL 5193736, at *2; Juniper Networks, 2007 WL 2021776, at *2-3; In re NTL, 244 F.R.D. at 191; 3M Innovative, 2006 WL 2670038, at *11; Larson, 2005 WL 4652509, at *8; E*Trade, 230 F.R.D. at 586; Zubulake V, 229 F.R.D. at 430 n.60.

109 Smith, 2009 WL 482603, at *10; Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 432 (S.D.N.Y. 2009); E*Trade, 230 F.R.D. at 586; Zubulake V, 229 F.R.D. at 433.

110 For e-discovery sanction cases providing for specific monetary awards, see infra Appendix D.

111 Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1379 (7th Cir. 1993).

112 Grange Mut. Cas. Co. v. Mack, 270 F. App'x 372, 373 (6th Cir. 2008) (per curiam) (awarding $3,430,983.69 plus attorneys' fees and costs to plaintiff Grange on December 13, 2006, and $5,400,000.00 to plaintiff Allstate on February 14, 2007, in connection with a default judgment).

113 S. New Eng. Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82, 96-97 (N.D.N.Y. 2008) ($5,893,541.86); Grange Mut., 270 F. App'x at 373 ($8,830,983.69); Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932, at *20 (S.D. Cal. Jan. 7) ($8,568,633.24), vacated in part, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); Wachtel v. Health Net, Inc., Civ. No. 01-4183, 2007 WL 1791553, at *5 (D.N.J. June 19, 2007) ($6,723,883.22); Pioneer Hi-Bred Int'l, Inc. v. Monsanto Co., 4:97CV01609 ERW, 2001 WL 170410, at *22 (E.D. Mo. Jan. 2) ($8,211,287.50), amended by No. 4:97CV1609ERW, 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001).

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115 Gutman v. Klein, No. 03 Civ. 1570BMC, 2009 WL 3296072, at *9 (E.D.N.Y. Oct. 13, 2009) ($287,730.16); Keithley v. Home Store.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384, at *19 (N.D. Cal. Aug. 12, 2008) ($257,528.50); CSI Inv. Partners II, L.P. v. Cendant Corp., 507 F. Supp. 2d 384, 438 (S.D.N.Y. 2007) ($720,000), aff'd, 328 F. App'x 56 (2d Cir. 2009); In re Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 132 (S.D.N.Y. 2007) ($500,000); Kamatani v. BenQ Corp., Civil Action No. Civ.A. 2:03-CV-437, 2005 WL 2455825, at *15 (E.D. Tex. Oct. 6, 2005) ($500,000); Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd., 348 F. Supp. 2d 332, 334 (D.N.J. 2004) ($566,839.97).

116 For cases with monetary awards exceeding $100,000, see infra Appendix D.

117 Thomas Y. Allman, Conducting E-discovery After the Amendments: The Second Wave, 10 Sedona Conf. J. 215, 218 (2009).

118 It is important to note that cases today involve discovery of both ESI and paper documents and that fourteen of the thirty cases involving counsel misconduct related to paper documents as well as ESI.

119 Edelen v. Campbell Soup Co., Civil Action No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117, at *3 (N.D. Ga. Dec. 8, 2009); Travel Sentry, Inc. v. Tropp, 669 F. Supp. 2d 279, 286-87 (E.D.N.Y. 2009); Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1288-89 (M.D. Fla. 2009); Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 291 (S.D.N.Y. 2009); Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (Bray & Gillespie II), 259 F.R.D. 591, 617 (M.D. Fla.), rejected in part by No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla., Nov. 11, 2009), and adopted in part by No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010); 1100 W., LLC v. Red Spot Paint & Varnish Co., No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118, at *35 (S.D. Ind. June 5, 2009); Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc., No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451, at *3 (E.D. Cal. Dec. 2, 2008); R & R Sails Inc. v. Ins. Co. of Pa., 251 F.R.D. 520, 528 (S.D. Cal. 2008); Sterle v. Elizabeth Arden, Inc., No. 3:06 CV 01584(DJS), 2008 WL 961216, at *14 (D. Conn. Apr. 9, 2008); Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932, at *1 (S.D. Cal. Jan. 7), vacated in part, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc., No. 06-15100, 2007 WL 3333016, at *8 (E.D. Mich. Nov. 9, 2007); Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *7 (D. Neb. Nov. 5, 2007); Digene Corp. v. Third Wave Techs., Inc., No. 07-C-22-C, 2007 WL 4939048, at *3 (W.D. Wis. Oct. 24, 2007); In re Sept. 11th Liab. Ins., 243 F.R.D. at 132; NSB U.S. Sales, Inc. v. Brill, No. 04 Civ. 9240(RCC), 2007 WL 258181, at *3 (S.D.N.Y. Jan. 26, 2007); Phx. Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006); Rousseau v. Echosphere Corp., No. Civ. A. 03-1230, 2005 WL 2176839, at *11 (W.D. Pa. Aug. 30, 2005); Brick v. HSBC Bank USA, No. 04-CV-0129E(F), 2004 WL 1811430, at *6 (W.D.N.Y. Aug. 11, 2004); Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178, 231 (S.D.N.Y. 2003), adhered to on reconsideration by No. 00 Civ. 3613 (LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004); Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56, 62 (D.N.H. 2001), adopted in part and rejected in part by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), aff'd in part and vacated in part, 428 F.3d 1 (1st Cir. 2005); Poole ex rel. Elliott v. Textron, Inc., 192 F.R.D. 494, 511 (D. Md. 2000); Mktg. Specialists, Inc. v. Bruni, 129 F.R.D. 35, 55 (W.D.N.Y. 1989), aff'd, 923 F.2d 843 (2d Cir. 1990); Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 (N.D. Cal. 1987); Oscher v. Solomon Tropp Law Grp. (In re Atl. Int'l Mortg. Co.), 352 B.R. 503, 510-11 (Bankr. M.D. Fla. 2006); Cohen Steel Supply, Inc. v. Fagnant (In re Fagnant), Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126, at *4 (Bankr. D.N.H. Dec. 13, 2004).

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147 See Red Spot, 2009 WL 1605118, at *34 (ordering sanctions against counsel and noting that "[b]eing a zealous lawyer does not mean zealously believing your client in light of evidence to the contrary"); Phx. Four, 2006 WL 1409413, at *6 (ordering sanctions against counsel because it "simply accepted [the client's] representation" rather than being "diligent... as it should have" in ensuring the completeness of the client's discovery efforts); but see Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (Bray & Gillespie III), No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058, at *3 (M.D. Fla. Nov. 16, 2009) (holding that counsel's reliance on the misrepresentation of the client as to the completeness of production "is not the sort of conduct for which sanctions against counsel may issue"); Pinstripe Inc. v. Manpower, Inc., No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2-3 (declining to grant sanctions for counsel who made reasonable inquiry into the client's completeness of production and relied upon false client representation concerning the implementation of a litigation hold); Finley v. Hartford Life & Accident Ins. Co., 249 F.R.D. 329, 332 (N.D. Cal. 2008) (refusing to grant sanctions under Rule 26(g) despite counsel's negligent reliance on the client's defective search because counsel did not act in bad faith); Thomas Y. Allman, Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection with the Resolution of E-Discovery Misconduct, 15 Rich. J.L. & Tech. 9, P 22 (2009), http://jolt.richmond.edu/v15i3/article9.pdf ("Some courts, unfortunately, treat outside counsel as virtual guarantors of discovery diligence and see very little room for reliance on client resources.").

148 See In re Sept. 11th Liab. Ins., 243 F.R.D. at 131 (awarding joint and several sanction of $500,000 for the failure to preserve and produce the requested documents); Sheppard, 203 F.R.D. at 60 (awarding $500 for the failure to timely produce floppy discs).

149 Bray & Gillespie II, 259 F.R.D. at 617; Fharmacy Records II, 572 F. Supp. 2d at 881; R & R Sails, 251 F.R.D. at 528; Digene, 2007 WL 4939048, at *3; In re Sept. 11th Liab. Ins., 243 F.R.D. at 133; Poole, 192 F.R.D. at 510-11; Mktg. Specialists, 129 F.R.D. at 55.

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