

SANCTIONS FOR E-DISCOVERY VIOLATIONS: BY THE NUMBERS

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Introduction

As electronically stored information (“ESI”) plays an increasingly predominant role in pretrial discovery, parties and their counsel struggle to comply with ever expanding and more complex responsibilities. Litigants and their lawyers must immediately identify, promptly preserve, comprehensively collect, fairly filter, properly process, rigorously review, and produce ESI in appropriate format without sluggishness, purposeful or otherwise. This daunting series of tasks, whether performed personally or by overseeing others, involves technical issues relating to ESI that are often far beyond the ken of most laymen and lawyers. The liberal scope of discovery in federal courts, coupled with ESI’s defining characteristics -- high volume, broad dispersal, and a dynamic, changeable nature -- confound efforts by present day practitioners to discharge their discovery duties effectively *and* economically. ESI is not easy.

Grand efforts have been made to educate e-discoverers about best practices through seemingly daily continuing legal education courses, weekly webcasts, blog after blog, and Letterman-like top ten listings of the most important e-cases of the year. Governing federal,¹ state,² and local rules,³ drafted in the pre-e-discovery era, have been amended and supplemented

¹ See Report of the Advisory Committee on Civil Rules (E-Government And E-Discovery), (July 20, 2006).

² See, e.g., Arizona: Order Amending Rules 16(b), 16(c), 16.3, 26(b), 26.1, 26.2, 33(c), 34, 37(g), and 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 (closely tracking the December 1, 2006 Amendments to the Federal Rules of Civil Procedure); Indiana: 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> (closely tracking the December 1, 2006 Amendments to the Federal Rules of Civil Procedure); California: available at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab0001-0050/ab5bill20090629chaptered.pdf> (adopting some aspects of December 1, 2006 Amendments to the Federal Rules but also including several nonconforming provisions).

³ See, e.g., D. Md., Suggested Protocol for Discovery of Electronically Stored Information, available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>; D. Kan., Guidelines for Discovery of Electronically Stored Information, available at <http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf>.

with two tiers⁴, clawbacks⁵, and pilot programs⁶ to provide a procedural framework “to secure the just, speedy, and inexpensive determination”⁷ of matters in the modern age. Yet most agree that discovery in the post-amendment world is more expensive, more complicated, and more contentious than ever.⁸

Performing compound, complicated tasks under compressed deadlines certainly creates the opportunity for an incorrect or incomplete production, whether resulting from innocent inadvertence, intentional malfeasance, or something in between. When e-discovery efforts fall short, producers (or more accurately non-producers) may be penalized and prejudiced parties (both real and feigned) may be made whole through the dreaded sanctions process.⁹ Marquee e-disaster cases, the *Qualcomms*¹⁰ and *Metropolitan Operas*,¹¹ are towering reminders of the most severe sanctions -- dismissal with extreme prejudice, multimillion dollar awards, and bar association referrals -- that can be imposed for the most egregious of misconduct. Of greater concern to the average practitioner is the constant drumbeat of sanction decisions, most recently punctuated by *Pension Committee*,¹² with thirteen of thirteen plaintiffs sanctioned for e-discovery failings not rising to the level of intentional or willful conduct. In many cases, more

⁴ Fed. R. Civ. P. 26(b)(2)(B) (specifying different procedures and requirements for discovery of “reasonably accessible” and “not reasonably accessible” ESI).

⁵ Fed. R. Evid. 502 (addressing issues relating to attorney-client privilege and work product doctrine, including inadvertent disclosure and subject matter waiver).

⁶ See, e.g., Seventh Circuit Electronic Discovery Pilot Program’s Principles Relating to the Discovery of Electronically-Stored Information, (Oct.1, 2009).

⁷ Fed. R. Civ. P. 1.

⁸ See Task Force on Discovery, Am. Coll. of Trial Lawyers & The Inst. for the Advancement of the Am. Legal Sys., Interim Report & 2008 Litigation Survey of the Fellows of the Am. Coll. of Trial Lawyers (2008), p.3 (“Discovery costs far too much and has become an end to itself... ‘The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else.’ Electronic discovery in particular needs a serious overhaul.”)

⁹ See *Gamby v. First Nat’l Bank of Omaha*, No. 06-11020, 2009 U.S. Dist. LEXIS 7687, at *24 (E.D. Mich. Jan. 20, 2009) (dismissing action for discovery failures and noting, “Defendant’s performance can be explained only by monumental incompetence, inexcusable neglect, or purposeful evasion. None is sufficient to avoid responsibility or sanction. Enough is enough.”)

¹⁰ *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (“Qualcomm II”), vacated in part, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

¹¹ *Metropolitan Opera Ass’n, Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003).

¹² *Pension Comm. Of Univ. of Montreal Pension Plan v. Banc of America Secs.*, No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

attention is focused on e-discovery than on the merits, with a motion for sanctions an increasingly common filing.¹³

Three years after the effective date of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure, we undertook a review of written opinions prior to January 1, 2010 in federal courts involving motions for sanction for e-discovery violations. Over 400 cases¹⁴ were identified with sanctions being awarded in 231 cases. The written opinions in these cases, sometimes multiple opinions in a specific case, were analyzed for a variety of factors, including court, basis for sanction, sanctioned party, type of sanction, and sanctioning authority. Our analysis indicates that the overall number of e-discovery sanction cases is clearly increasing, that motions for sanction are being filed in all types of cases and all courts, and that in many cases the sanctions imposed against parties are severe, including dismissals, adverse jury instructions and significant monetary awards. Sanctions against counsel, although uncommon, are on the rise. The safe harbor provisions of Rule 37(e) provide little protection to parties or counsel for the conduct being sanctioned.

A. E-Discovery Sanctions Have Increased Over The Years.

ESI discovery, and disputes involving ESI discovery, began to appear as early as the 1970s.¹⁵ Sanctions for e-discovery violations began to appear in the early 1980s.¹⁶ The first case identified in which e-discovery sanctions were awarded was *William T. Thompson Co. v.*

¹³ See *Technical Sales Assocs., Inc. v. Ohio State Forge Co.*, Nos. 07-11745, 08-13365, 2009 WL 1212809, at *1 (E.D. Mich. May 1, 2009) (“Now an electronic discovery dispute has become the sideshow that eclipses the circus.”); *In re Atlantic Int’l Mortgage Co. v. Solomon Tropp Law Group*, 352 B.R. 503, 505 (Bankr. M. D. Fla. 2006). (“The matter before this court presents a deplorable scenario under which the ultimate issues raised by the pleadings are completely overcome by discovery disputes which have gained their own life”).

¹⁴ See 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.

¹⁵ See, e.g., *U.S. v. Int’l Bus. Mach. Corp.*, 58 F.R.D. 556 (S.D.N.Y. 1973) (during antitrust litigation, court denied United States’ motion to compel requesting that IBM pay for reconstruction of a destroyed database, but ordered IBM to deposit documents necessary for reconstruction of the database with the court).

¹⁶ *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981) (court declined to sanction defendant who improperly destroyed computer records because there was no evidence that of bad faith and the plaintiff could have developed the evidence from third parties); *William T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984) (court awarded plaintiff monetary sanctions and default judgment for GNC’s bad faith destruction of paper and computer records after filing of lawsuit).

*Gen. Nutrition Corp.*¹⁷ In *William T. Thompson Co.*, the plaintiff sued GNC for antitrust violations alleging that GNC falsely advertised the availability of 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 plaintiff's case.¹⁸ After the filing of the lawsuit and plaintiff's initial discovery requests, GNC destroyed its paper and computer inventory records. The 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.¹⁹ The court awarded plaintiff monetary sanctions, attorney fees and costs, and default judgment because GNC's bad faith destruction of documents caused prejudice to plaintiff.²⁰

Following *William T. Thompson* in 1984, cases involving motions for sanctions relating to e-discovery violations were sporadic for over a decade, with some years having only a single e-discovery sanction case and other years having none.²¹ After 1996, the number of cases slowly increased, but did not reach annual double digits until 2004. As shown by the charts below, the number of e-discovery sanction cases and the number of e-discovery sanction awards more than tripled in 2004, from six to twenty-nine sanction cases, and from six to twenty-one sanction awards. The numbers continue to rise. There were more e-discovery sanction cases (ninety-seven) and more e-discovery sanction awards (forty-six) in 2009 than in any prior year. There were more e-discovery sanction cases and more sanction awards in 2009 than in all years prior to 2005 combined.

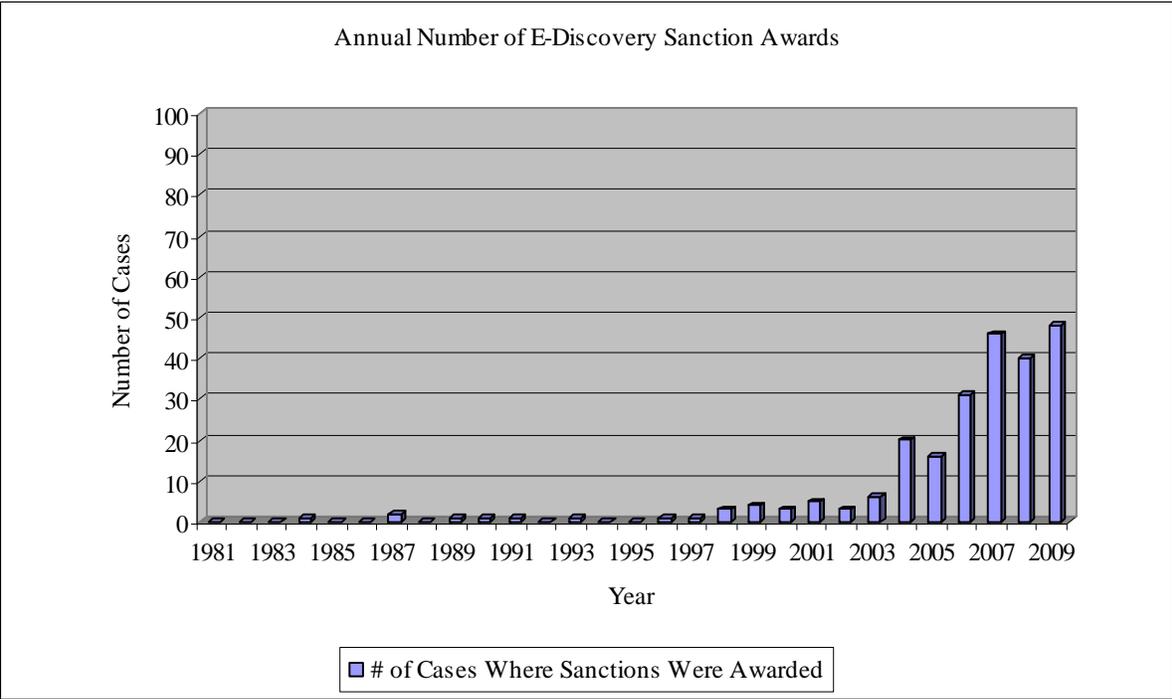
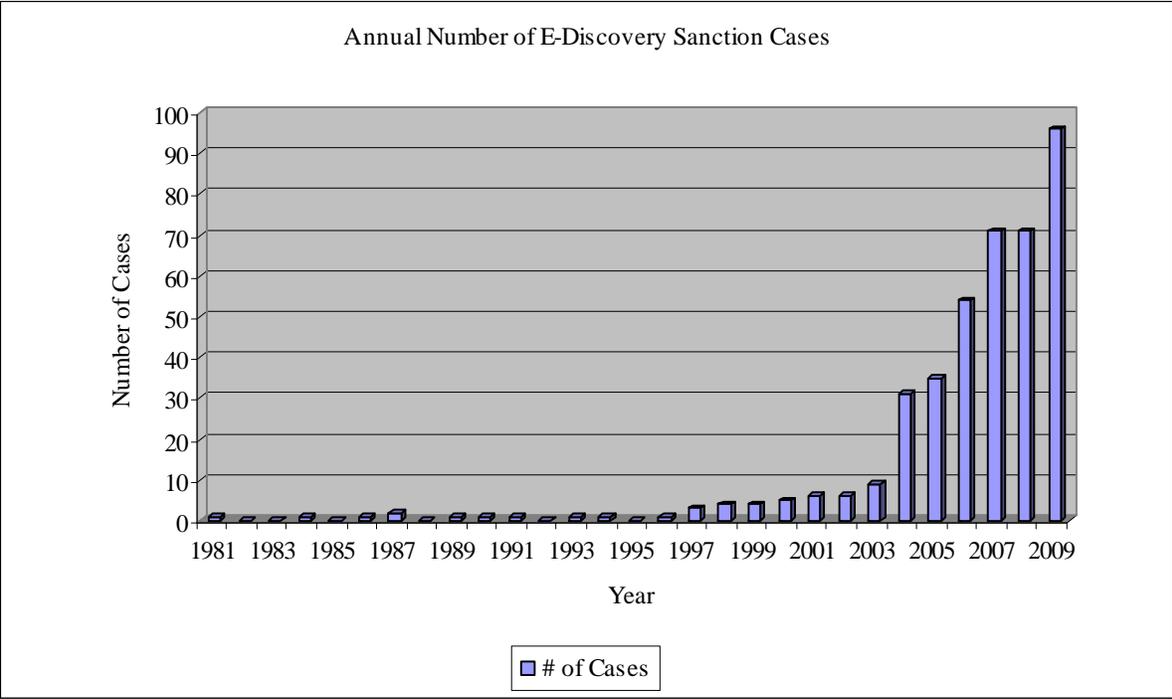
¹⁷ 593 F. Supp. 1443 (C.D. Cal. 1984).

¹⁸ *Id.* at 1445-46, 1449-50.

¹⁹ *Id.* at 1446-47.

²⁰ *Id.* at 1455-56.

²¹ See Appendix B for annual number of sanction cases and sanction awards.



B. E-Discovery Sanction Motions Are Before All Courts.

The issue of sanctions relating to e-discovery violations has reached courts everywhere. Our research indicates that 112 United States District Court Magistrate judges and 183 United

States District Court judges from seventy-five federal districts in forty-four states,²² as well as the Virgin Islands,²³ District of Columbia,²⁴ and Puerto Rico,²⁵ have issued written opinions regarding sanctions involving e-discovery. All eleven of the federal appellate circuit courts,²⁶ as well as the Federal²⁷ and D.C. circuits,²⁸ have issued opinions with issues regarding e-discovery sanctions. Additionally, nine bankruptcy court judges²⁹, two United States Court of Federal

²² 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.

²³ *Canton v. Kmart Corp.*, No. 1:05-CV-143, 2009 WL 2058908 (V.I. July 13, 2009); *Nieves v. Kmart Corp.*, No. 2005-CV-0024, 2009 WL 1605623 (V.I. June 8, 2009); *Dowling v. United States*, No. 2000-CV-0049, 2008 WL 4534174 (V.I. Oct. 6, 2008).

²⁴ *Covad Commc'n Co. v. Revonet, Inc.*, 260 F.R.D. 5 (D.D.C. 2009) (court deferred ruling on plaintiff's motion for sanctions concerning defendant's failure to produce documents in proper electronic format).

²⁵ *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176 (D. P.R. 1998) (court awarded sanction of default judgment for defendants destruction of laptop).

²⁶ *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 52 (1st Cir. 2005) (affirming denial of monetary sanctions for delay/failure to produce electronic files); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002) (reversing denial of adverse inference jury instruction for failure to produce e-mails in time for trial and holding that "discovery sanctions, including, an adverse inference instruction, may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence"); *Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, 110 Fed. Appx. 283, 288 (3rd Cir. 2004) (upholding findings of civil contempt for deletion of e-mails in violation of a discovery order and reversing award of legal fees that went beyond compensating plaintiff for the actual loss incurred from the violation); *Buckley v. Mukasey*, 538 F.3d 306, 321 (4th Cir. 2008) (remanding with instruction that a finding of "bad faith" is not essential for an adverse inference instruction for pre-litigation spoliation, rather a finding that conduct was "intentional," "willful," or "deliberate" is sufficient); *Ibarra v. Baker*, 338 Fed. Appx. 457, 466-467, 2009 WL 2244659 * (5th Cir. 2009) (reversing sanctions against attorney for client's deletion of e-mails because there was no finding of bad faith evidenced by intent to destroy adverse information); *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 568 (6th Cir. 2009) (reversing denial of adverse inference instruction sanction for spoliation of reports stored on a computer hard drive and remanding for consideration of whether appellees knew, or should have known that the destroyed information may be relevant to future litigation); *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 680 (7th Cir. July 17, 2008) (a showing of bad faith "is a prerequisite to imposing sanctions for the destruction of evidence...[that] a party has a duty to preserve"); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004) (affirming adverse inference jury instruction sanction for destruction of a radio tape where requisite element of bad faith was proven based on evidence indicating "an intent to destroy the evidence for the purpose of obstructing or suppressing the truth"); *Brookhaven Typesetting Servs., Inc. v. Adobe Sys., Inc.*, 332 F. App'x 387, 2009 WL 1515661 (9th Cir. 2009) (affirming denial of terminating sanctions for destruction of electronic source code); *Proctor & Gamble Co. v. Haugen*, 427 F.3d 727, 735-736 (10th Cir. 2005) (reversing order of dismissal for failure to preserve electronic data where the district court failed to provide a sufficient record of its reasoning and no evidence of willfulness, bad faith or culpability was shown); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (affirming the denial of an adverse inference jury instruction sanction for the unexplained loss of train speed recorder tape where no evidence of bad faith was shown).

²⁷ *Samsung Elecs. Co. v. Rambus, Inc.*, 523 F.3d 1374, 1377 (Fed. Cir. 2008) (plaintiff's request for monetary sanctions due to defendant's spoliation of evidence denied as moot because defendant offered to pay full amount of attorney's fees in dispute).

²⁸ *In Re Fannie Mae Securities Litigation*, 552 F.3d 814, 821 (D.C. Cir. 2009) (affirming sanction for delay in production of ESI where a non-party subpoena recipient failed to produce ESI pursuant to a stipulated discovery schedule).

²⁹ *(In re Elec. Mach. Enters., Inc.)*, 416 B.R. 801 (Bankr. M.D. Fla. 2009); *Riverside Healthcare, Inc. v. Sysco Food Services of San Antonio, LP (In re Riverside Healthcare, Inc.)*, 393 B.R. 422 (Bankr. M.D. La. 2008); *Hawaiian Airlines, Inc. v. Mesa Air Group, Inc. (In re Hawaiian Airlines, Inc.)*, Nos. 03-00817, 06-90026, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007); *In re Kmart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill. 2007); *U.S. v. Krause (In re Krause)*, 367 B.R. 740 (Bankr. D. Kan. 2007), *aff'd*, Nos. 08-1132 & 08-1136, 2009 WL 5064348 (D. Kan. Dec. 16, 2009); *Quintis Corp. v. Avaya, Inc. (In re Quintus Corp.)*, 353 B.R. 77 (Bankr. D. Del. 2006); *Atl. Int'l Mortgage Co. v. Solomon Tropp Law Group, P.A. (In re Atl. Int'l Mortgage Co.)*, 352 B.R. 503 (Bankr. M.D. Fla. 2006); *Fagnant v. Cohen Steel Supply, Inc. (In re Fagnant)*, Nos. 03-10496, 03-1348, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004); *In re LTV Steel Co.*, 307 B.R. 37 (Bankr. N.D. Ohio 2004).

Claims judges,³⁰ and one United States Court of International Trade judge³¹ have addressed issues relating to e-discovery sanctions.

The vast majority of the 487 written rulings are from the magistrate court and district court level, with 252 written district court rulings and 190 magistrate court rulings. Appellate review of e-discovery sanction cases has been limited, perhaps because many cases settle or are not appealed. Only thirty-two cases were identified at the appellate level.³²

ESI disputes giving rise to a motion for sanctions appear in all types of cases. The most common case types are employment (16.3%), intellectual property (15.3%) and contract (15.3%) cases. Sanctions for e-discovery violations were also discussed in tort cases (10.9%) and a variety of other cases including civil rights (7.7%) and bankruptcy (3.0%).

Courts have used a variety of different rules, statutes, and powers to sanction parties for e-discovery violations.³³ Their array of authority appears to provide ample and flexible bases for addressing the many e-discovery sanction scenarios that present themselves. No case was identified where a court inclined to impose a sanction was unable to do so because particular

³⁰ *Consol. Edison Co. of N.Y., Inc. & Subsidiaries v. United States*, No. 06-305T, 2009 WL 3418533 (Fed. Cl. Oct. 21, 2009); *Morse Diesel Int'l, Inc. v. U.S.*, 81 Fed. Cl. 220 (Fed. Cl. 2008).

³¹ *Daewoo Elecs. Co. v. U.S.*, 650 F. Supp. 1003 (Ct. Int'l Trade 1986).

³² *Koninklijke Philips Elecs., N.V. v. KXD Tech., Inc.*, 2009 WL 3059090 (9th Cir. Sept. 24, 2009); *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119 (3rd Cir. 2009); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009); *Ibarra v. Baker*, 338 Fed. Appx. 457, 2009 WL2244659 (5th Cir. 2009); *Wong v. Thomas*, 341 Fed. Appx. 765, 2009 WL 1566776 (3d Cir. 2009); *Brookhaven Typesetting Servs., Inc. v. Adobe Sys., Inc.*, 332 Fed. Appx. 387 (9th Cir. 2009); *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888 (8th Cir. 2009); *In re Fannie Mae Securities Litigation*, 552 F.3d 814 (D.C. Cir. 2009); *Tri-County Motors, Inc., v. Am. Suzuki Motor Corp.*, 301 Fed. Appx. 11 (2d Cir. 2008); *Buckley v. Mukasey*, 538 F.3d 306 (4th Cir. 2008); *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 523 F.3d 1374 (Fed. Cir. 2008); *Grange Mutual Casualty Co. v. Mack*, 270 F. App'x 372 (6th Cir. 2008); *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Americas, LLC*, 516 F.3d 623 (7th Cir. 2008); *Trask-Morton v. Motel 6 Operation L.P.*, 534 F.3d 672 (7th Cir. Jan. 17, 2008); *Drnek v. Variable Annuity Life Ins. Co.*, 261 F. App'x 50 (9th Cir. 2007); *Bakhtiari v. Lutz*, 507 F.3d 1132 (8th Cir. 2007); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032 (8th Cir. 2007); *Technology Recycling Corp. v. City of Taylor*, 186 Fed. Appx. 624 (6th Cir. 2006); *Serra Chevrolet, Inc. v. General Motors Corp.*, 446 F.3d 1137 (11th Cir. 2006); *Proctor & Gamble Co. v. Haugen*, 427 F.3d 727 (10th Cir. 2005); *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39 (1st Cir. 2005); *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 484 (4th Cir. 2005); *Rowe v. Albertsons, Inc.*, 161 Fed. Appx. 171, 2004 WL 2252064 (10th Cir. 2004); *Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, 110 Fed. Appx. 283 (3d Cir. 2004); *Morris v. Union Pacific Railroad*, 373 F.3d 896 (8th Cir. 2004); *Computer Task Group v. Brotby*, 364 F.3d 1112 (9th Cir. 2004); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739 (8th Cir. 2004); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *3M v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Crown Life Insurance Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993); *Allen Pen Company, v. Springfield Photo Mount Company, Inc.*, 653 F.2d 17 (1st Cir. 1981)

³³ See generally Symposium, *Sanctions in Electronic Discovery Cases: Views From the Judges*, 78 FORDHAM L. REV. 1, 5 (2009).

rules or statutory requirements were not met. The sanctioning authority includes Rule 26(g)³⁴ and Rules 37(b),³⁵ (c),³⁶ and (d).³⁷ 28 U.S.C. §1927, titled “Counsel’s Liability For Excessive Costs,” also provides authority for sanctioning any attorney “who so multiplies the proceedings in any case unreasonably and vexatiously.”³⁸ Importantly, even when the requirements of the rules or statute are not met, federal courts have still sanctioned parties for e-discovery violations, deriving their sanctioning authority from the “inherent authority of the court.” This inherent power arises from the court’s authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”³⁹

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 of the rule. Many times, rules and statutes are cited together. Noting these difficulties, our analysis indicated that the most prevalent bases for sanctioning 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

³⁴ A court must impose sanctions under Rule 26(g) against the party, its counsel, or both, when the party fails to meet its disclosure obligations under Rule 26. Fed. R. Civ. P. 26(g)(3). The completeness and accuracy of these disclosures must be certified by an attorney of record. Fed. R. Civ. P. 26(g)(1). This certification requirement includes an obligation to conduct a reasonable inquiry into the disclosures. *Id.* Sanctions may include the imposition of expenses and attorney’s fees incurred by the opposing party due to the violation. Fed. R. Civ. P. 26(g)(3).

³⁵ Rule 37(b) provides for sanctions against a party for violations of a discovery order. Fed. R. Civ. P. 37(b). It lists potential sanctions ranging from dismissal to evidentiary preclusion to a stay of proceedings until the order is stayed. Fed. R. Civ. P. 37(b)(2)(A). These sanctions include: (i) directing that matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (viii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. *Id.* Additionally, the court must require that the non-compliant party, its attorneys or both, “pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make the award unjust.” Fed. R. Civ. P. 37(b)(2)(C).

³⁶ The court may sanction the non-compliant party under Rule 37(c) if a party does not make the required disclosure under Rule 26(a) or properly supplement its disclosures. Fed. R. Civ. P. 37(c). Under Rule 37(c)(1), the court may prevent the use of the evidence or witnesses not provided. *Id.* The court may also choose to require the payment of reasonable expenses and attorney’s fees, may inform the jury of the party’s failure, and the court may choose to impose any of the other sanctions at their disposal under Rule 37. *Id.*

³⁷ Should a party fail to respond or object to a request under Rule 34, the court may choose to sanction the party, with any of the sanctions available under Rule 37(b). *See* Fed. R. Civ. P. 37(d)(3). The court may also require that the sanctioned party, its attorney, or both, to pay the reasonable expenses associated with the motion. *Id.*

³⁸ The court may only sanction attorneys under this provision. 28 U.S.C. § 1927. The court may impose a sanction of the payment of the excess costs and attorney fees which result from the offending attorney’s conduct. *Id.*

³⁹ *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43, II. S.Ct. 2123, 115 L. Ed. 27 (1991).

cases, and its subsections (b), (c), and (d) were cited as the sole bases in a total of twenty-four other cases. Rule 37 generally or Rules 37(b), (c), or (d) were cited in a total of 136 of the 231 cases awarding sanctions. The court's inherent authority was cited in thirty-six cases as the sole basis for sanctions and cited in another seventy-two cases as one of multiple bases for sanctioning. Rule 26 was cited as the sole basis for sanctions in four cases and in combination with another rule in twenty-seven cases. 28 U.S.C. § 1927 was cited in combination with another rule in two cases.

Defendants are sanctioned three times more often for e-discovery violations than plaintiffs. Defendants have been sanctioned 175 times; plaintiffs have been sanctioned 54 times; and third parties have been sanctioned twice. The 3:1 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 have greatly increased.⁴⁰

C. Failure to Preserve 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 more than one type of misconduct. In the 231 cases in which sanctions were awarded, the most common misconduct giving rise to a sanction was failure to preserve, which was the sole basis for sanctions in ninety-three cases. It was also cited as one of the types of misconduct in forty-five other cases involving multiple types of misconduct. Failure to produce was the sole basis for sanctions in forty cases and was mentioned in another sixty-eight cases involving multiple misconduct. Delay in production was the sole basis for sanctions in thirteen cases and mentioned in thirty-three other cases involving multiple types of misconduct. Failure

⁴⁰ See Appendix B for annual number of defendants and plaintiffs sanctioned.

to produce ESI in a proper format was the sole basis for sanctions in two cases and was cited in two other sanction cases with other misconduct.

D. 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. In cases of the most serious violations, courts have imposed the most draconian of sanctions, dismissal of all claims or defenses. Adverse jury instructions have also been imposed for serious e-discovery lapses. In cases of lesser violations, the courts have used a continuum of penalties to punish the misconduct and remedy the resulting prejudice, including evidence preclusion,⁴¹ witness preclusion,⁴² disallowance of certain defenses,⁴³ reduced burden of proof,⁴⁴ removal of jury challenges,⁴⁵ limiting closing statements,⁴⁶ supplemental discovery,⁴⁷ and additional access to computer systems.⁴⁸ In some instances, more creative courts have imposed non-traditional sanctions, such as payments to bar associations to fund educational programs,⁴⁹ participation in court-created ethics programs,⁵⁰ referrals to the

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- ⁴¹ *Shank v. Kitsap County*, No. C04-5843RJB, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005) (defendant prohibited from introducing digital audio recordings due to last minute discovery compliance); *Thompson v. U.S. Dept. of Housing & Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003) (defendant precluded from introducing 80,000 e-mail records produced after court imposed discovery deadlines).
- ⁴² *R & R Sails, Inc. v. Ins. Co. of Pa.*, 251 F.R.D. 520 (S.D. Cal. 2008) (defendant precluded from introducing expert witness' testimony which relied on ESI disclosed after discovery order); *Elion v. Jackson*, No. 05-0992 (PLF), 2006 WL 2583694 (D.D.C. Sept. 8, 2006) (defendant precluded from offering testimony of any witness regarding an email disclosed several days before the close of discovery).
- ⁴³ *JP Morgan Chase Bank v. Neovi, Inc.*, No. 2:06-CV-0095, 2007 WL 1514005 (S.D. Ohio May 22, 2007) (preclusion from maintaining defense of lack of personal jurisdiction due to failure to produce information concerning contacts with the state); *Kamatani v. BenQ Corp.*, No. Civ.A. 2:03-CV-437, 2005 WL 2455825 (E.D. Tex. Oct. 6, 2005) (court struck defendant's defenses relating to a specific license agreement due to bad faith representations made to the court and failure to produce requested email documents); *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp.2d. 27, 35 (D.D.C. 2004) (defendant's defense of lack of personal jurisdiction waived as a sanction for failure to comply with court's discovery orders).
- ⁴⁴ *Great Am. Ins. Co. of New York v. Lowry Dev. LLC*, Nos. 1:06CV097, 1:06CV412 LTS-RHW, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007) (in contract case concerning mutual mistake, burden of proof reduced to a preponderance of the evidence for destruction of computer data).
- ⁴⁵ *Juniper Networks, Inc. v. Toshiba Am., Inc.*, No. 2:05-CV-479, 2007 WL 2021776, at *4 (E.D. Tex. July 11, 2007) (two juror strikes removed from defendant for intentional failure to produce electronic source code).
- ⁴⁶ *Id.* (closing statements limited to one-third of the amount of time allotted to plaintiff due to intentional failure to produce electronic code).
- ⁴⁷ *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV, 2009 WL 982460 (S.D. Fla. Apr. 9, 2009) (further deposition permitted after emails were discovered one month before trial); *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, No. 03 Civ.7037 PKC MHD, 2005 WL 459267 (S.D.N.Y. Feb. 24, 2005) (discovery depositions reopened due to emails produced after the close of expert discovery).
- ⁴⁸ *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 10584(DJS), 2008 WL 9611216, at *10 (D. Conn. Apr. 9, 2008) (permission to inspect ESI granted due to defense attorney's "obstructive tactics" during discovery); *Hahn v. Minn. Beef Ind.*, No. 00-2282 RHKSRN, 2002 WL 32667146 (D. Minn. Mar. 8, 2002) (re-inspection of computer database ordered after inaccurate and incomplete information was provided).
- ⁴⁹ *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-cv-620, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009) (defendant ordered to pay \$2,500 to bar association to support a seminar program on litigation hold orders and preservation of electronic data).

state bar,⁵¹ payments to the clerk of court,⁵² and barring the sanctioned party from taking additional depositions prior to compliance with the court's discovery order.⁵³

1. Dismissals

We identified thirty-six cases where a dismissal or default judgment was entered against a party for e-discovery violations. Twenty-two of the thirty-six dismissed cases involved failure to preserve evidence;⁵⁴ nine involved failure to produce;⁵⁵ and five involved both failure to preserve and failure to produce.⁵⁶ In sixteen cases, the court noted that misrepresentations were made to the court by the client, counsel, or both.⁵⁷ In imposing the most severe sanction of

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- ⁵⁰ *Qualcomm II*, No. 05cv1958-B (BLM), 2008 WL 66932, at *18-19 (S.D. Cal. Jan. 7, 2008) (sanctioned attorneys ordered to attend court-created ethics program), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (vacating previous sanctions against counsel but upholding grant of monetary sanctions against defendant).
- ⁵¹ *Id.* at *17 (sanctioned attorneys ordered to appear before the state bar for further ethical investigations), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (vacating previous sanctions against counsel but upholding grant of monetary sanctions against defendant).
- ⁵² *Claredi v. Seebeyond Tech. Corp.*, No. 4:04CV1304, 2007 WL 735018, at *4 (E.D. Mo. Mar. 8, 2007) (defendant ordered to pay \$20,000 to the clerk of court as a sanction for unnecessarily prolonging and increasing the expense of litigation); *Wachtel v. Healthnet, Inc.*, 239 F.R.D. 81, 111 (D.N.J. 2006) (defendant ordered to pay a fine to the clerk of court for "unnecessarily draining the court's time and resources"); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 559 (N.D. Cal. 1987) (defendant ordered to pay \$15,000 to the clerk of court for consuming the court's time and resources).
- ⁵³ *Edelen v. Campbell Soup Co.*, No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117, at *3 (N.D. Ga. Dec. 8, 2009) (plaintiff barred from taking depositions until electronic discovery requests were narrowed).
- ⁵⁴ *See Ameriwood Ind., Inc. v. Liberman*, No. 4:06CV524DJS, 2007 WL 5110313 (E.D. Mo. July 3, 2007); *Arista Records LLC v. Tschirhart*, 241 F.R.D. 462 (W.D. Tex. 2006) ("Tschirhart"); *Atlantic Recording Corp., et al. v. Howell*, CV-06-02076-PHX-NVW, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008); *Cabinetware Inc., v. Sullivan*, No. 90-313, 1991 WL 327959, 22 U.S.P.Q.2d (BNA) 1686 (E.D. Cal. July 15, 1991); *Century ML-Cable*, 43 F. Supp. 2d 176; *Columbia Pictures v. Bunnell*, 2007 WL 4877701 (C.D. Cal. 2007); *Communications Center, Inc. v. Hewitt*, No. 03-1968, 2005 WL 3277983 (E. D. Cal. Apr. 5, 2005); *Computer Assoc. Int'l v. Am. Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990); *Gutman, et al. v. Klein, et al.*, No. 03CV1570, 2008 WL 4682208 (E.D. New York October 15, 2008); *In re Krause*, 367 B.R. 740 (Bank. D. Kan. 2007); *In re Quintus Corp.*, 353 B.R. 77 (Bankr. D. Del. 2006); *Koninklike Philips Elecs. N.V. v. KXD Tech., Inc.*, No. 2:05-CV1532, 2007 WL 3101248 (D. Nev. Oct. 16, 2007); *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006); *Kucala Enter., Ltd. v. Auto Wax Co.*, 56 Fed. R. Serv. (West) 3d 487, 2003 WL 21230605 (N.D. Ill. May 27, 2003); *Kvitka v. Puffin Co., LLC*, No. 1:06-CV-0858, 2009 WL 385582 (M.D. Penn. Feb. 13, 2009); *Leon v. IDX Sys. Corp.*, No. C03-1158, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), *affirmed*, 464 F.3d 951 (9th Cir. 2006); *Mecca Tech, Inc. v. Kiser, et al.*, No. 8:05CV570, 2008 WL 6010937 (D. Neb. April 2, 2008); *Peschel v. City of Missoula*, No. 1:04CV1158, 2009 WL 3364460 (D. Mont. Oct. 15, 2009); *Plasse v. Tyco Elecs. Corp.*, 448 F. Supp. 2d 302 (D. Mass. 2006); *PML North America, LLC v. Hartford Underwriters Insurance Company*, No. 05-CV-70404-DT, NC 2006 U.S. Dist. LEXIS 94456 (E.D. Mich. Dec. 20, 2006); *Wm T. Thompson Co.*, 593 F. Supp. 1443; *Pharmacy Records v. Nassar*, 248 F.R.D. 507 (E.D. Mich. Mar. 31, 2008) *dismissal affirmed* 572 F. Supp. 2d. 869 (E. D. Mich. Aug. 15, 2008).
- ⁵⁵ *See Crown-Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993); *Appraisal Mgmt. Co. III v. FNC, Inc.*, No. 1:04CV1158, 2005 WL 3088561 (N.D. Ohio Nov. 17, 2005); *Computer Task Group v. Brothby*, 364 F.3d 1112 (9th Cir. 2004); *Gamby*, 2009 U.S. Dist. LEXIS 7687; *1100 West, LLC v. Red Spot Paint & Varnish Co.*, No. 1:05CV1670, 2009 WL 1605118 (S.D. Ind. June, 5 2009); *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007); *Quantum Communications Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007); *S. New Eng. Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82 (D. Conn. 2008) (second amended ruling); *Tech. Recycling Corp. v. City of Taylor*, 186 F. App'x 624 (6th Cir. 2006) (unpublished).
- ⁵⁶ *See Grange Mut.* 270 Fed. Appx. 372; *Giant Screen*, 2007 WL 627607; *In re Telxon*, 2004 WL 3192729; *Metro. Opera*, 212 F.R.D. 178; *Ridge Chrysler*, 2006 WL 2808158.
- ⁵⁷ *See 1100 West*, 2009 WL 1605118; *Plasse*, 448 F. Supp. 2d 302; *In re Telxon*, 2004 WL 3192729; *Metro. Opera*, 212 F.R.D. 178; *Koninklike*, 2007 WL 3101248; *Perez-Farias*, 2007 WL 2327073; *Atlantic Recording*, 2008 WL 4080008; *Cabinetware*, 1991 WL 327959; *Columbia Pictures*, 2007 WL 4877701; *Communications Center*, 2005 WL 3277983; *Crown-Life*, 995 F.2d 1376; *Quantum*, 473 F. Supp. 2d

dismissal, twenty of thirty-six courts considered the prejudice to the opposing party in the loss or failure to produce evidence, with eight courts describing the resulting prejudice as “serious,”⁵⁸ “inalterable,”⁵⁹ “severe,”⁶⁰ “substantial,”⁶¹ “unfair,”⁶² or “significant.”⁶³

In nineteen of the thirty-six cases, the court emphasized a pattern of misconduct.⁶⁴ Often the failure to preserve ESI or produce ESI was considered in tandem with misrepresentations (or far-fetched explanations) to the court regarding how spoliation of data occurred.⁶⁵ In some cases, spoliation of ESI was a part of a pattern involving repeated violations of multiple court orders and misrepresentations concerning discovery proceedings, including issues related to non-ESI document production and other non-ESI discovery issues, such as disputes over depositions and deficient responses to written discovery requests.⁶⁶ When a court did impose a terminating sanction solely for the single act of failing to preserve or produce ESI, that information was typically the key evidence to prove the claims or defenses for the action.⁶⁷

1249; *Ridge Chrysler*, 2006 WL 2808158; *S. New Eng. Tel.*, 251 F.R.D. 82; *Tech. Recycling*, 186 F. App'x 624; *Pharmacy Records*, 248 F.R.D. 507.

⁵⁸ See *Computer Assoc.*, 133 F.R.D. at 170.

⁵⁹ See *Columbia Pictures*, 2007 WL 4877701, at *5.

⁶⁰ See *In re Krause*, 367 B.R. at 772; *Kucala*, 56 Fed. R. Serv. (West) 3d 487 at *8; *Kvitka*, 209 WL 385582, at *5.

⁶¹ See *Tschirharz*, 241 F.R.D. at 465.

⁶² See *Mecca Tech*, 2008 WL 6010937, at *9.

⁶³ See *Ameriwood*, 2007 WL 5110313, at *7.

⁶⁴ See *1100 West*, 2009 WL 1605118; *Century ML-Cable*, 43 F. Supp. 2d 176; *Computer Task Group*, 364 F.3d 1112; *Crown-Life*, 995 F.2d 1376; *Pharmacy Records*, 248 F.R.D. 507; *Gamby*, 2009 U.S. Dist. LEXIS 7687; *Grange Mutual*, 270 F. App'x 372; *Gutman*, 2008 WL 4682208; *In re Krause*, 367 B.R. 740; *In re Telxon*, 2004 WL 3192729; *Koninklike*, 2007 WL 3101248; *Kucala*, 56 Fed. R. Serv. (West) 3d 487; *Kvitka*, 2009 WL 385582; *Perez-Farias*, 2007 WL 2327073; *Plasse*, 448 F. Supp. 2d 302; *PML North America*, 2006 U.S. Dist. LEXIS 94456; *Qantum*, 473 F. Supp. 2d 1249; *Ridge Chrysler*, 2006 WL 2808158; *S. New Eng. Tel.*, 251 F.R.D. 82.

⁶⁵ See, e.g., *Leon*, 2004 WL 5571412; *Crown-Life*, 995 F.2d; *Kvitka*, 209 WL 385582; *Wm. T. Thompson*, 593 F. Supp. 1443; *Columbia Pictures*, 2007 WL 4877701.

⁶⁶ See, e.g., *Century ML-Cable*, 43 F. Supp. 2d 176 (“[Defendant] has engaged in contumacious bad faith scorched earth defense tactics in a blatant effort to prevent plaintiffs from proving their case against him.”); *Grange Mutual*, 270 F. App'x 372, 373 (Defendant’s judgment on liability was warranted by a defendant’s willful, prejudicial, and repeated obstruction of discovery and repeated disregard of court orders); *Koninklike*, 2007 WL 3101248, at *23 (“consistent pattern of discovery delay and obstruction by Defendants directed at preventing Plaintiff from obtaining relevant evidence to prove its claims”); *Perez-Farias*, 2007 WL 2327073 (failure to provide discovery in violation of court orders, failure to pay plaintiff’s costs of bringing discovery motions per the court orders, unpaid sanctions of \$500/day in violation, and repeatedly failing to follow court’s local rules for filing documents warranted terminating sanctions).

⁶⁷ See, e.g., *Computer Assoc.*, 133 F.R.D. 166, 170 (“Destroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party.”); *Tschirhart*, 241 F.R.D. 462, 465 (“By destroying the best evidence relating to the central issue in the case, defendant has inflicted the ultimate prejudice upon the plaintiffs.”); *Krumwiede*, 2006 WL 1308629, at *10 (lost data was “essential evidence” for allegations of misappropriation of trade secrets); *Cabinetware*, 1991 WL 327959, at *4 (source code considered “essential evidence” in copyright infringement action).

No cases resulted in dismissal where the court characterized the misconduct as mere negligence. In two of the thirty-six dismissal cases, the court characterized the conduct as gross negligence.⁶⁸ The remainder of the thirty-four cases involved some sort of willful conduct, with twenty-one involving bad faith.⁶⁹

The misconduct typically involved the modification or destruction of data through automated and manual file deletions or physical tampering with computer systems.⁷⁰ The courts typically held that these actions involved deliberate and knowing actions to destroy data and that the conduct was far beyond simple negligence and was willful and intentional. Several courts noted the sinister names of the software deletion program used by the sanctioned party, such as “Evidence Eliminator,” “Wipe & Delete,” “GhostSurf,” and “Evidence Elimination,” in demonstrating the egregious nature of the misconduct.⁷¹ As the court noted in *Metropolitan Opera*, the misconduct during discovery “was not merely negligent but was aggressively willful” and constituted “such gross negligence as to rise to intentional misconduct.”⁷²

Courts considered a variety of rules, statutes, and sources of authority in dismissing these cases, often using them in conjunction. Most prevalent was the use of Rule 37(b) in conjunction

⁶⁸ See *Gamby*, 2009 U.S. Dist. LEXIS 7687, at *8 (“grossly negligent, if not wilful”); *Kucala*, 56 Fed. R. Serv. (West) 3d 487, at *7 (“grossly negligent and in flagrant disregard of a court order”).

⁶⁹ See *1100 West*, 2009 WL 1605118; *Ameriwood*, 2007 WL 5110313; *Tschirhart*, 241 F.R.D. 462; *Atlantic Recording*, 2008 WL 4080008; *Communications Center*, 2005 WL 3277983; *Pharmacy Records*, 248 F.R.D. 507; *Grange Mutual*, 270 F. App’x 372; *Gutman*, 2008 WL 4682208; *In re Telxon*, 2004 WL 3192729; *Koninklike*, 2007 WL 3101248; *Krumwiede*, 2006 WL 1308629; *Kvitka*, 209 WL 385582; *Leon*, 2004 WL 5571412; *Mecca Tech*, 2008 WL 6010937; *Metro. Opera*, 212 F.R.D. 178; *Perez-Farias*, 2007 WL 2327073; *Peschel*, 2009 WL 3364460; *Quantum*, 473 F. Supp. 2d 1249; *S. New Eng. Tel.*, 251 F.R.D. 82; *Tech. Recycling*, 186 Fed. Appx. 624; *Wm. T. Thompson*, 593 F. Supp. 1443.

⁷⁰ See, e.g., *Cabinetware*, 1991 WL 327959; *Communications Center*, 2005 WL 3277983; *Kucala*, 56 Fed. R. Serv. (West) 3d 487; *Atlantic Recording*, 2008 4080008.

⁷¹ See, e.g., *Communications Center*, 2005 WL 3277983 (“Evidence Eliminator” program); *Kucala*, 56 Fed. R. Serv. (West) 3d 487 (“Evidence Elimination” program); *Atlantic Recording*, CV-06-02076-PHX-NVW WL 4080008 (“Wipe & Delete” program); *In re Krause*, 367 B.R. 740 (“GhostSurf” program).

⁷² *Metro. Opera*, 212 F.R.D. 178 at 222. See also, *In re Telxon*, 2004 WL 3192729, at *33 (“The only conclusion...is that [defendants] and/or its counsel engaged in deliberate fraud or was so recklessly indifferent to their responsibilities...that they failed to take the most basic steps to fulfill their responsibilities.”); *PML North America*, 2006 U.S. Dist. LEXIS 94456, at *15 (“there is a point beyond which bumbling and blindness to a party’s discovery obligations sufficiently resemble the sort of willful, intentional and malicious conduct”); *Pharmacy Records*, 248 F.R.D. 507, 531 (“the actions...in this case are so egregious that [the party has] forfeited their right to proceed in court.” “Considering [the actions] invariably leads to the conclusion that plaintiffs and their attorney have conducted a campaign of fraud.”)

with the court's inherent power (fourteen cases);⁷³ followed by Rule 37(b) by itself (thirteen cases).⁷⁴ In four other cases, the court relied only on the court's inherent power.⁷⁵ Courts have also combined Rule 37 and Rule 26 (one case also included inherent power) to dismiss two cases.⁷⁶ Rule 37 was coupled with Rule 41 twice.⁷⁷

Twenty-nine 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.⁷⁸ Twenty-seven cases involved violations of motions to compel or other discovery orders.⁷⁹ Two involved violations of temporary restraining orders or preliminary injunctions.⁸⁰

While courts have imposed sanctions of dismissal in 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 2009.⁸¹ Courts continue to withhold terminating sanctions for all but the most egregious of cases. In these terminated cases, the misconduct typically occurs after repeated warnings and after repeated willful failures that irreparably compromise the court's

⁷³ See *1100 West*, 2009 WL 1605118; *Ameriwood*, 2007 WL 5110313; *Tschirhart*, 241 F.R.D. 462; *Atlantic Recording*, 2008 WL 4080008; *Cabinetware*, 1991 WL 327959; *Century ML-Cable*, 43 F. Supp. 2d 176; *Columbia Pictures*, 2007 WL 4877701; *Computer Assoc.*, 133 F.R.D. 166; *Gutman*, 2008 WL 4682208; *In re Krause*, 367 B.R. 740 (citing 11 U.S.C. § 105 - the inherent power of a bankruptcy court); *In re Quintus Corp.*, 353 B.R. 77; *Koninklike*, 2007 WL 3101248; *Krumwiede*, 2006 WL 1308629; *S. New Eng. Tel.*, 251 F.R.D. 82; *Wm. T. Thompson*, 593 F. Supp. 1443.

⁷⁴ See *Communications Center*, 2005 WL 3277983; *Computer Task Group*, 364 F.3d 1112; *Crown-Life*, 995 F.2d 1376; *Gamby*, 2009 U.S. Dist. LEXIS 7687; *Giant Screen*, 2007 WL 627607; *Grange Mutual*, 270 F. App'x 372; *In re Telxon*, 2004 WL 3192729; *Kvitka*, 209 WL 385582; *Perez-Farias*, 2007 WL 2327073; *Peschel*, 2009 WL 3364460; *PML North America*, 2006 U.S. Dist. LEXIS 94456; *Tech. Recycling*, 186 Fed. Appx. 624.

⁷⁵ See *Pharmacy Records*, 248 F.R.D. 507; *Qantum*, 473 F. Supp. 2d 1249; *Plasse*, 448 F. Supp. 2d 302; *Leon*, 2004 WL 5571412.

⁷⁶ See *Kucala*, 56 Fed. R. Serv. (West) 3d 487; *Metro. Opera*, 212 F.R.D. 178 (citing 28 U.S.C. § 1927 to sanction counsel).

⁷⁷ See *Appraisal Mgmt.*, 2005 WL 3088561; *Ridge Chrysler*, 2006 WL 2808158.

⁷⁸ The court in *Pharmacy Records* noted that Rule 37(b)(2)(C) could not be a basis for a dismissal absent a violation of court order. 248 F.R.D. at 529.

⁷⁹ See *1100 West*, 2009 WL 1605118; *Ameriwood*, 2007 WL 5110313; *Appraisal Mgmt.*, 2005 WL 3088561; *Tschirhart*, 241 F.R.D. 462; *Atlantic Recording*, 2008; *Cabinetware*, 1991 WL 327959; *Communications Center*, 2005 WL 3277983; *Computer Task Group*, 364 F.3d 1112; *Crown-Life*, 995 F.2d 1376; *Gamby*, 2009 U.S. Dist. LEXIS 7687; *Gutman*, 2008 WL 4682208; *In re Krause*, 367 B.R. 740; *In re Quintus Corp.*, 353 B.R. 77; *In re Telxon*, 2004 WL 3192729; *Koninklike*, 2007 WL 3101248; *Krumwiede*, 2006 WL 1308629; *Kucala*, 56 Fed. R. Serv. (West) 3d 487; *Leon*, 2004 WL 5571412; *Mecca Tech*, 2008 WL 6010937; *Metro. Opera*, 212 F.R.D. 178; *Perez-Farias*, 2007 WL 2327073; *Plasse*, 448 F. Supp. 2d 302; *PML North America*, 2006 U.S. Dist. LEXIS 94456; *Qantum*, 473 F. Supp. 2d 1249; *Ridge Chrysler*, 2006 WL 2808158; *S. New Eng. Tel.*, 251 F.R.D. 82; *Tech. Recycling*, 186 F. App'x 624; *Wm. T. Thompson*, 593 F. Supp. 1443.

⁸⁰ See *Century ML-Cable*, 43 F. Supp. 2d 176; *Ridge Chrysler*, 2006 WL 2808158.

⁸¹ See Appendix B showing annual number of dismissals.

ability to adjudicate on the merits, leaving no alternative but dismissal. (“All the king’s horses...”).

2. Adverse Jury Instructions

Courts imposed sanctions of adverse jury instructions for e-discovery violations in fifty-two cases. In another ten cases, the court deferred judgment on the issue. Forty of the fifty-two cases awarding adverse jury instructions occurred from 2006 through 2009.

The basis for the adverse jury instruction sanction in these cases included thirty-nine cases involving failure to preserve, four cases involving failure to produce, and nine cases involving both failure to preserve and failure to produce. The defendant was sanctioned with an adverse jury instruction in forty-four cases, while the plaintiff was sanctioned in only eight cases.

The standard of conduct for the fifty-two cases varied. Four cases⁸² involved negligence, nine cases⁸³ involved gross negligence, three cases⁸⁴ involved reckless disregard, and thirty-four cases⁸⁵ involved intentional conduct and/or bad faith. One case did not provide information concerning the standard of conduct.⁸⁶

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- ⁸² *DaimlerChrysler Motors v. Bill Davis Racing, Inc.*, No. CIV.A.03-72265, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005); *Dowling*, 2008 WL 4534174; *Easton Sports, Inc. v. Warrior LaCrosse, Inc.*, No. 05-72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006); *Cyntegra, Inc. v. Idexx Labs., Inc.*, No. CV06-4170, 2007 WL 5193736 (C.D. Cal. Sept. 21, 2007); *see also Residential Funding Corp.*, 306 F.3d at 101.
- ⁸³ *Lewis v. Ryan*, No. 04-CV-2468-JLS (NLS), 2009 WL 3486702 (S.D. Cal. Oct. 23, 2009); *Fox v. Riverdeep, Inc.*, No. 07-CV-13622, 2008 WL 5244297 (E.D. Mich. Dec. 16, 2008); *Doe v. Norwalk Cmty. Coll. Bd. of Trs.*, 248 F.R.D. 372 (D. Conn. 2007); *Teague v. Target Corp.*, No. 3:06cv191, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007), *aff'd sub nom.*, *Gordon Partners v. Blumenthal*, No. 02CIV7377, 2007 WL 1518632 (S.D.N.Y. May 17, 2007); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006); *Hous. Rights Ctr. v. Sterling*, No. 03-859, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005); *Larson v. Bank One Corp.*, No. 00 C 2100, 2005 WL 4652509 (N.D. Ill. Aug. 18, 2005); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332 (D.N.J. 2004) (“Mosaid IV”); *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000).
- ⁸⁴ *Plunk v. Vill. of Elwood, Ill.*, No. 07 C 88, 2009 WL 1444436 (N.D. Ill. May 20, 2009); *Keithley v. Homestore.com, Inc.*, No. 03-04447, 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C06-3359, 2008 WL 4786671 (N.D. Cal. Oct. 29, 2008).
- ⁸⁵ *Stevenson*, 354 F.3d 739; *Swofford v. Eslinger*, No. 608cv00066-OR-35DAB, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009); *Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC*, No. Civ. A. 06CV02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009); *Kvitka*, 2009 WL 385582; *Arista Records, LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009) (“Usenet.com”); *Southeastern Mech. Servs., Inc. v. Brody*, 657 F. Supp. 2d 1293 (M.D. Fla. 2009); *KCH Servs., Inc. v. Vanaire, Inc.*, No. 05-777, 2009 WL 2216601 (W.D. Ky. July 22, 2009); *Goodman v. Praxair Servs., Inc.*, 632 F.Supp.2d 494 (D. Md. 2009); *Technical Sales Assocs.*, 2009 WL 728520; *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. 05-4896, 2008 U.S. Dist. LEXIS (D.N.J. Oct. 1, 2008); *Metrokane, Inc. v. Built NY, Inc.*, No. 06CIV14447 & 07CIV2084, 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008); *Kounelis v. Sherrer*, 529 F. Supp. 2d 503 (D.N.J. 2008); *Wells v. Berger, Newmark & Fenchel, P.C.*, No. 07 c 3061, 2008 U.S. Dist. LEXIS 21608 (N.D. Ill. Mar. 18, 2008); *Telequest Int'l. Corp. v. Dedicated Bus. Sys., Inc.*, No. 06-5359 (PGS), 2009 U.S. Dist. LEXIS 19546 (D.N.J. Mar. 11, 2009); *Am. Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2009 WL 982788 (N.D. Ill. Feb. 20, 2009); *Babaev v. Grossman*, No. 03-5076, 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008); *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559 (N.D. Cal. 2008); *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, No. Civ. A. 3: 06-cv-0271-B, 2008 WL 3261095 (N.D. Tex. Aug. 8, 2008); *Ogin v. Ahmed*, 563 F.Supp.2d 539 (M.D. Pa. 2008);

The courts used their inherent power and rules, both separately and in conjunction with each other, to impose the sanctions. The inherent power of the court was cited in fifteen cases as the sole basis for sanction and in seventeen other cases where multiple bases for sanctioning were cited. Rule 37 was cited in six cases by itself and in nineteen other cases with multiple citations to authority. Rule 26 was cited in two cases alone and three cases with other sanctioning authority.

3. Monetary Awards

We identified seventy-eight e-discovery sanction cases involving sanctions providing for specific monetary awards, including awards for default judgments, monetary sanctions, and attorneys fees and costs.⁸⁷ The amounts awarded range from \$8,830,983.69⁸⁸ to \$250.50.⁸⁹ There are five cases with monetary awards over \$5,000,000.00,⁹⁰ an additional five cases with monetary awards at or above \$1,000,000.00,⁹¹ and six additional cases with monetary awards

Johnson v. Wells Fargo Home Mortgage, Inc., No. 3:05-CV-0321, 2008 WL 2142219 (D. Nev. May 16, 2008); *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360 (N.D. Ga. 2008); *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008); *Great Am. Ins. Co. of N.Y.*, 2007 WL 4268776; *Paris Bus. Prods., Inc. v. Genesis Techs., LLC*, No. Civ. 07-0260JBS, 2007 WL 3125184 (D.N.J. Oct. 24, 2007); *Juniper Networks*, 2007 WL 2021776; *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007); *Optowave Co. v. Nikitin*, No. 6:05-CV-1083, 2006 WL 3231422 (M.D. Fla. Nov. 7, 2006); *3M Innovative Prods. Co. v. Tomar Elecs.*, No. 05-756, 2006 WL 2670038 (D. Minn. Sept. 18, 2006); *z4 Techs., Inc. v. Microsoft Corp.*, No. 6:06-cv-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006), *aff'd*, 507 F.3d 1340 (Fed. Cir. 2007); *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005); *Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A.*, No. 02 CIV. 0795, 2005 WL 1026461 (S.D.N.Y. May 2, 2005); *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392 (D.S.C. 2004); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V"); *Anderson v. Crossroads Capital Partners, LLC*, No. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004).

⁸⁶ *3M v. Pribyl*, 259 F.3d 587 (7th Cir. 2001).

⁸⁷ See Appendix C.

⁸⁸ *Grange Mut.*, 270 F. App'x 372 (\$3,430,983.69 plus attorney's fees and costs awarded to plaintiff Grange and \$5,400,000.00 awarded to plaintiff Allstate in connection with a default judgment).

⁸⁹ *Crown-Life*, 995 F.2d 1376 (\$250.50 awarded for attorney's fees).

⁹⁰ *Grange Mut.*, 270 F. App'x 372 (\$8,830,983.69); *Qualcomm II*, 2008 U.S. Dist. LEXIS 911, 2008 WL 66932 (\$8,568,633.24); *Pioneer Hi-Bred Int'l, Inc. v. Monsanto Co.*, 4: 97CV01609, 2001 WL 170410 (E.D. Mo. Jan. 2, 2001) (\$8,211,287.00) *amended by*, No. 4:97CV01609 2001WL34127923 (E.D. Mo. Feb. 20, 2001); *Wachtel*, 239 F.R.D. 81 (\$6,723,883.22); *S. New Eng. Tel. Co.*, 251 F.R.D. 82 (\$5,893,541.86).

⁹¹ *S. New Eng. Tel. Co.*, 251 F.R.D. 82 (\$5,893,541.86); *Hawaiian Airlines, Inc. (In re Hawaiian Airlines, Inc., Debtor)*, 49 Bankr. Ct. Dec. (LRP) 11 (Bankr. D. Haw. Oct. 30, 2007) (\$3,929,532.21); *United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004) (\$2,755,027.48); *z4 Techs.*, 2006 WL 2401099, *18 (\$2,300,000.00); *Kipperman*, 260 F.R.D. 682 (N.D. Ga. 2009) (\$1,022,700.00); *Koninklike*, 2007 WL 3101248 (\$1,000,000.00).

over \$250,000.00.⁹² In total, 28 cases were identified with monetary sanctions awards exceeding \$100,000.00.⁹³

E. 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.”⁹⁴ In 404 e-discovery sanction cases, we identified only thirty instances of counsel being sanctioned, with sanctions specifically awarded in twenty-five cases and indicated but deferred in five cases.⁹⁵ We also identified eight cases where sanctions were considered but not awarded. Consistent with the overall increase in sanction cases, counsel sanctions for e-discovery have steadily increased since 2004.

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

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. Only two opinions by a federal appellate

⁹² *CSI Inv. Partners, II, L.P. v. Cendant Corp.*, 507 F. Supp. 2d 384 (S.D.N.Y. 2007), *aff'd*, 328 F. App'x 56 (2d Cir. 2009) (\$720,000.00); *Mosaid IV*, 348 F. Supp. 2d 332 (\$566,839.97); *Kamatani*, 2005 WL 2455825 (\$500,000.00); *In re Sept. 11th Liability Insurance Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007) (\$500,000.00); *Gutman.*, 2008 WL 4682208 (\$287,729.72); *Keithley*, 2008 WL 3833384 (\$257,528.50).

⁹³ See Appendix C.

⁹⁴ Allman, Thomas, *Conducting E-Discovery After The Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 218 (Fall, 2009).

⁹⁵ It is important to note that cases today involve discovery of both ESI and paper documents and that 14 out of 30 cases involved counsel misconduct related to both paper documents as well as ESI.

court addressing potential counsel sanctions involving e-discovery were identified. In both instances, sanctions against counsel were vacated.⁹⁶

Courts have cited six general sources of authority for counsel e-discovery sanctions: Rules 26 and 37, 28 U.S.C. § 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 of their decisions, often discussing multiple sources of authority and federal rules generally rather than citing to specific subsections. Rule 37 is the most frequently cited authority for cases involving counsel sanctions for e-discovery violations, cited in twenty of the thirty cases.⁹⁷ The inherent power of the court was cited in ten of the thirty cases, and was cited as the sole source of authority in three cases.⁹⁸

Courts have only sanctioned in-house counsel for e-discovery violations three times, and in all three cases the client was also sanctioned.⁹⁹ Similarly, courts rarely sanction outside counsel for e-discovery violations without also sanctioning the client.¹⁰⁰ Moreover, in only four cases was outside counsel sanctioned as the result of a single instance of misconduct.¹⁰¹

⁹⁶ See *Ibarra*, 338 Fed. Appx. 457, 2009 WL 2244659 (sanctions against in-house counsel for County Attorney General's office vacated because no finding that counsel acted in bad faith, provided a false certification, or committed fraud); *Grider v. Keystone Health Plan Cent.*, 580 F.3d 119 (3d Cir. 2009) (sanctions against counsel under Rules 26 and 37 vacated because trial court did not undertake a substantial justification analysis and vacated under 28 USC §1927 for lack of factual specificity as to the conduct of each defendant).

⁹⁷ Several circuit courts have held that Rule 37(c) does not authorize counsel sanctions. See *Grider*, 580 F.3d at 141 ("We find the reasoning of the Second and Seventh Circuits persuasive and hold that Rule 37(c)(1) does not permit sanctions against counsel"); see also, *Apex Oil*, 855 F.2d at 1014; *Maynard*, 332 F.3d at 470.

⁹⁸ See *Brick v. HSBC Bank USA*, No. 04-CV-0129, 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004); *Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc.*, No. 06-15100, 2007 WL 3333016 (E.D. Mich. Nov. 9, 2007); *Swofford*, 2009 WL 3818593.

⁹⁹ See *Nat'l Assoc of Radiation Survivors*, 115 F.R.D. 543, *Swofford*, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009), *Qualcomm II*, 2008 WL 66932. But see *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 591 (M.D. Fla. 2009) and *Poole v. Textron, Inc.*, 192 F.R.D. 494 (D. Md. 2000) (where court held sanctions appropriate against in-house counsel but sanctions directed at outside counsel and client).

¹⁰⁰ See *Brick*, 2004 WL 1811430; *In re Fagnant*, 2004 WL 2944162, *Rousseau v. Echosphere Corp.*, No. Civ. A. 03-1230, 2005 WL 2176839 (W.D. Pa. Aug. 30, 2005); *Auto Inspection Servs.*, 2007 WL 3333016.

¹⁰¹ See *In re Fagnant*, Nos. 03-10496 & 03-1348, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004) (computer database printouts in possession of counsel not produced until the eve of trial); *R&R Sails*, 251 F.R.D. 520 (only 11 of 17 pages found on supplemental search and in possession of counsel produced prior to relevant deposition); *Ajaxo, Inc., v. Bank of Am. Tech. & Operations, Inc.*, No. 07-0945, 2008 U.S. LEXIS 97602, 72 Fed. R. Serv. 3d (West) 156 (E.D. Cal. Dec. 2, 2008) (non-compliance with court order requiring production of 5 CDs in searchable format); *Edelen*, 2009 WL 4798117 (failure to comply with a court order to narrow overly broad requests that sought complete contents of employee laptops).

The standards of conduct identified as the basis for counsel sanctions range from negligence to gross negligence to reckless disregard to intentional conduct or bad faith. Four cases involved negligence; seven cases involved gross negligence; nine cases involved reckless disregard, and ten cases involved intentional or bad faith conduct.

Negligence is a failure to conform to the standards of acceptable conduct “to participate meaningfully and fairly in the discovery phase.”¹⁰² All four cases where the court sanctioned counsel for negligent conduct involved situations where counsel was in possession of client materials, but failed to produce in a timely fashion.¹⁰³

Gross negligence is described as “a failure to exercise even that care which a careless person would use.”¹⁰⁴ Three different forms of sanctionable conduct by counsel have been deemed grossly negligent. First, failure of counsel to advise clients to issue litigation holds or otherwise advise clients to take steps to preserve potentially relevant information has been found to be gross negligence.¹⁰⁵ The court in *Richard Green* noted that “the failure to implement a litigation hold is, by itself, considered grossly negligent behavior.”¹⁰⁶ Second, failure to supervise a client search for responsive information by accepting client representations as to the adequacy of their search, in light of clear information to the contrary, has been held to constitute

¹⁰² *Pension Committee*, 2010 WL184312, at *3.

¹⁰³ See *In re Fagnant*, 2004 WL 2944162; *R&R Sails Inc.*, 251 F.R.D. 520; *Digene Corp. v. Third Wave Techs., Inc.*, No. 07-C-22-C, 2007 WL 4939048 (W.D. Wis. Oct. 24, 2007); *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56 (D.N.H. 2001), report and recommendation adopted in part, rejected in part, No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), aff'd in part, vacated in part, 428 F.3d 1 (1st Cir. 2005).

¹⁰⁴ *Pension Committee*, 2010 WL184312, at *3.

¹⁰⁵ See *Bd. of Regents of Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 U.S. Dist. LEXIS 82492, 2007 WL 3342423 (D. Neb. Nov. 5, 2007) (counsel sanctioned for not directing client to preserve potentially relevant ESI during computer system migration and not specifically directing client to search for electronic documents); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284 (S.D.N.Y. 2009); *Marketing Specialists, Inc. v. Bruni*, 129 F.R.D. 35 (W.D.N.Y. 1989).

¹⁰⁶ *Richard Green* 262 F.R.D. 284.

gross negligence.¹⁰⁷ Finally, failing to timely produce a critical document in the possession of counsel for several years has also been held to constitute grossly negligent conduct.¹⁰⁸

In six of the nine cases where the court found counsel's conduct to be in reckless disregard involved failures to comply with court-issued discovery orders without a reasonable justification.¹⁰⁹ In the other three cases, courts found repeated counsel misrepresentations about the adequacy of the client search and production, in light of overwhelming evidence to the contrary, to constitute recklessness.¹¹⁰

Sanctions for intentional or bad faith conduct are typically the result of multiple egregious failures to oversee client preservation, searching, and production, followed by subsequent court misrepresentations over an extended period of time.¹¹¹ Additionally, the discovery at issue is central to the litigation and, in many instances, the subject of specific court orders compelling production.¹¹²

¹⁰⁷ See *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006) (accepting client representations about the non-existence of computers to search); *Nat'l Assoc. of Radiation Survivors*, 115 F.R.D. 543 (in-house counsel sanctioned for failing to distribute discovery requests to all employees and agents potentially possessing responsive information or account for the collection and subsequent production); *Poole*, 192 F.R.D. 494 (sanction awarded where only one page produced to requests, 470 pages after motion to compel, but 2,900 pages and 20 videotapes after motion for sanctions filed).

¹⁰⁸ See *In re Sept 11th*, 243 F.R.D. 114 (failure to timely produce a highly relevant document for nearly two years despite being alerted to its possible existence by opposing counsel constituted a violation of discovery obligations).

¹⁰⁹ See *NSB U.S. Sales, Inc. v. Brill*, No. 04 CIV. 9240, 2007 WL 258181 (S.D.N.Y. Jan. 26, 2007) (failure to comply with three court orders compelling discovery); *In re Atlantic Int'l Mortgage*, 2006 WL 2848575 (filing meritless appeals of non-appealable discovery orders); *Sterle*, 2008 WL 961216 (improper obstructive conduct during a court ordered forensic inspection); *Ajaxo*, 2008 U.S. LEXIS 97602 (failure to produce documents in court ordered searchable format); *Edelen*, 2009 WL 4798117 (failure to comply with a court order to limit discovery); *Wachtel*, 239 F.R.D. 81 (failure to comply with a court order to supplement production).

¹¹⁰ See *Tantivy Commc'ns, Inc. v. Lucent Techs. Inc.*, No. Civ. A. 2:04cv79 (TJW), 2005 WL 2860976 (E.D. Tex. Nov. 1, 2005) (allowing relevant ESI to be destroyed through normal destruction practices, denying the existence of, and failing to produce until "the eleventh hour" highly relevant documents despite specific references to such documents by opposing counsel); see also, *Bray & Gillespie*, 2009 WL 546429; *Mancia v. Mayflower Textile Servs. Co.*, No. CCB-08-273, 2009 WL 2252151 (D. Md. July 28, 2009).

¹¹¹ See *Pharmacy Records*, 572 F. Supp. 2d 869 ("Although some of the events in this litigation might be excused as resulting from mere negligence when viewed in isolation, considering them in the aggregate invariably leads to the conclusion that the plaintiffs and their attorney have conducted a campaign of fraud."); *Metro. Opera*, 212 F.R.D. 178 (failure to issue litigation hold, failure to supervise search for responsive documents, misrepresentations as to production completion, and unilaterally failing to produce a category of responsive documents); *Brick*, 2004 WL 1811430 (failure to issue litigation hold, failure to supervise search by client employee, misrepresentations as to production completion, failure to notify court of document destruction, improperly withholding documents for privilege, and failing to produce client files in possession of counsel); *Qualcomm II*, 2008 U.S. Dist. LEXIS 911 (failing to instruct client on searches, failure to produce, and misrepresentations about the existence of 46,000 potentially responsive e-mails); *1100 West*, 2009 WL 1605118 (failure to supervise client search, failure to produce responsive documents, and misrepresentations about client information); *Swofford*, 2009 WL 3818593 (failure to issue a litigation hold despite receiving two notices requesting preservation).

¹¹² *Exact Software*, 479 F. Supp. 2d 702 ("[t]he information at issue is not ancillary to its case, most of it goes to the heart"); *Auto. Inspection Servs.*, 2007 WL 3333016 (counsel's "secret access to these computers may have irrevocably tainted key pieces of evidence"); see also, *Travel Sentry*, 2009 WL 3859272; *Rousseau*, 2005 WL 2176839.

Sanctions for counsel include sanctions based upon the counsel's personal execution of discovery tasks as well as sanctions based upon counsel's role in the coordination and oversight of client discovery.¹¹³ Rule 26(g) imposes on counsel an affirmative duty to engage in pretrial discovery responsibly.¹¹⁴ As noted in *Metropolitan Opera*, while "counsel need not supervise every step of the document production process and may rely on their clients in some respects, the rule expressly requires counsel's responses to be made upon reasonable inquiry."¹¹⁵

Counsel sanctions for failure to execute discovery obligations include situations where clients have met their underlying discovery obligations to collect and provide requested discovery materials to counsel, but counsel has failed to produce the requested discovery or communicate accurate information to the court and opposing counsel in a timely manner. In the thirty cases identified and analyzed, counsel's failure to competently execute its discovery obligations was the basis for sanctions in nine cases.¹¹⁶

Counsel sanctions related to lack of coordination and oversight involve client failures to preserve, search, or produce, and corresponding counsel failures to advise their clients to adequately preserve, search or produce. The number of cases where at least a portion of the basis for counsel sanctions was as a result of a failure to coordinate and oversee client conduct has increased from a total of four cases up until 2003, to a total of seventeen cases from 2004

¹¹³ See *Zubulake V* at 432 ("Counsel is responsible for coordinating her client's discovery efforts...to properly oversee...both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information...A party's discovery obligations do not end with the implementation of a "litigation hold" to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.")

¹¹⁴ Fed. R. Civ. P. 26(g).

¹¹⁵ *Metro. Opera*, 212 F.R.D. at 222.

¹¹⁶ See, e.g., *Sheppard*, 203 F.R.D. 56, report and recommendation adopted in part, rejected in part, 2004 WL 102493, *aff'd in part, vacated in part*, 428 F.3d 1; *In re Fagnant*, 2004 WL 2944126; *Rousseau*, 2005 WL 2176839; *Digene*, 2007 WL 4939048; *Auto. Inspection Servs.*, 2007 WL 3333016; *Sterle*, 2008 WL 961216; *Ajaxo*, 2008 U.S. LEXIS 97602, 72 Fed. R. Serv. 3d (West) 156; *Travel Sentry*, 2009 WL 3859272; *Edelen*, 2009 WL 4798117.

through 2009.¹¹⁷ An emerging issue in these types of counsel sanction cases is the nature and extent of counsel's reasonable reliance on client representations regarding discovery compliance.¹¹⁸

The predominant sanction against counsel was attorney's fees and costs, ranging from \$500.00 to \$250,000.00.¹¹⁹ In ten cases, the monetary sanction was allocated jointly and severally between counsel and client. Additionally, non-monetary sanctions imposing special discovery compliance requirements against counsel were awarded in four cases.¹²⁰

F. Rule 37(e)'s Safe Harbor Provides Limited Protection

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:

Failure to Provide Electronically Stored Information. 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.¹²¹

¹¹⁷ See, e.g., *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. 543; *Marketing Specialists*, 129 F.R.D. 35; *Poole*, 192 F.R.D. 494; *Metro. Opera*, 212 F.R.D. 178; *Brick*, 2004 WL 1811430; *Tantivy Commc'ns*, 2005 WL 2860976; *Phoenix Four*, 2006 WL 1409413; *In re Atl. Int'l Mortgage*, 352 B.R. 503; *Exact Software*, 479 F. Supp. 2d 702; *Wachtel*, 239 F.R.D. 81; *NSB U.S. Sales*, 2007 WL 258181; *In re Sept. 11th*, 243 F.R.D. 114; *Bd. of Regents*, 2007 WL 3342423; *Qualcomm II*, 2008 WL 66932, *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108; *R & R Sails*, 251 F.R.D. 520; *Pharmacy Records*, 572 F. Supp. 2d 869; *1100 West* 2009 WL 1605118; *Mancia*, 2009 WL 2252151; *Richard Green*, 262 F.R.D. 284; *Bray & Gillespie Mgmt.*, 259 F.R.D. 591; *Swofford*, 2009 WL 3818593.

¹¹⁸ See *1100 West*, 2009 WL 1605118, at 34 (sanctions awarded against counsel with court noting "[b]eing a zealous lawyer does not mean zealously believing your client in light of evidence to the contrary"); *Phoenix Four*, 2006 WL 1409413 at *6 (sanctions awarded against counsel after counsel "simply accepted [client's] representation" rather than being "diligent...as it should have" in ensuring the completeness of client's discovery efforts); *but see, Bray & Gillespie Mgmt.*, 2009 WL 5606058, at *13 (counsel reliance upon misrepresentation of client as to completeness of production "is not the sort of conduct for which sanctions against counsel may issue"); *Finley v. Hartford Life & Accident Ins. Co.*, 249 F.R.D. 329 (N.D. Cal. 2008) (court found that counsel negligently relied on client's defective search methods but failed to grant sanctions under Rule 26(g) as counsel did not act in bad faith); *Pinstripe*, 2009 WL 2252131 (court declined to grant sanctions where counsel made reasonable inquiry into completeness of production and relied upon false client representation concerning the implementation of a litigation hold); Allman, Thomas "Deterring E-Discovery Misconduct With Counsel Sanctions: The Unintended Consequences of *Qualcomm v. Broadcom*" 118 YALE L.J. Pocket Part 161 (March 4, 2009) ("Some courts, unfortunately, treat outside counsel as virtual guarantors of discovery diligence and see very little room for reliance on client resources").

¹¹⁹ See *Sheppard*, 203 F.R.D. 56 (\$500 for failure to timely produce floppy discs); *In re Sept. 11th*, 243 F.R.D. 114 (joint and several sanction of \$500,000, for failure to preserve and produce).

¹²⁰ See *Bd. of Regents*, 2007 WL 3342423 (counsel directed to submit an affidavit to court regarding discovery compliance); *Auto. Inspection Servs.*, 2007 WL 3333016 (counsel directed to submit an affidavit to court certifying that he has read rule 45 of the Federal Rules of Civil Procedure); *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. 543 (counsel directed to develop and submit a discovery plan to the court.); *Qualcomm II*, 2008 WL 66932, *vacated in part*, No. 05CV1958-RMB, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (counsel directed to participate in development of discovery protocols).

¹²¹ Fed. R. Civ. P. 37(e). When adopted, the safe harbor provision was contained in Rule 37(f). The 2007 edition of the Federal Rules moved the Safe Harbor rule from Rule 37(f) to Rule 37(e) with no changes to the rule's text.

The rule was intended by the drafters to provide only “limited protection against sanctions.”¹²² 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. 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 (*e.g.* failure to search, failure to produce on schedule, etc.).

Even in its limited scope, the proposed rule generated controversy concerning the appropriate standard of culpability that would support or preclude sanctions.¹²³ Debate included consideration of a standard of negligence, recklessness, or 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.”¹²⁴

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 did not relate to discovery of ESI in civil cases, as two involved paper documents¹²⁵ and

¹²² Report Of The Civil Rules Advisory Committee, May 27, 2005, p. 83. The Committee noted that the proposed new rule would afford “limited protection against sanctions” for the loss of information as a result of the routine operation of an electronic information system. The Committee recognized (1) that automated features in many electronic systems “automatically create, discard, or update information without specific direction from, or awareness of” system users; (2) that “such automatic features are essential to the operation of electronic information systems”; and (3) that “suspending or interrupting these features can be prohibitively expensive and burdensome.” *Id.* The Committee noted that electronic information systems present issues for businesses that are absent from traditional, paper-based systems, and that efforts to suspend automatic electronic processes risk disrupting business operations: “[i]t is unrealistic to expect parties to stop such routine operation of their computer systems as soon as they anticipate litigation.” *Id.*

¹²³ *See generally Id.* at p. 83-90. The first draft of the proposed Rule published by the Advisory Committee “barred sanctions only if the party who lost electronically stored information took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action.” *Id.* at p. 88. The Advisory Committee noted that this proposed version adopted a negligence standard, and also invited comment on whether the rule should instead set forth a standard of conduct which would bar sanctions unless the party “recklessly or intentionally failed to preserve the information.” *Id.*

¹²⁴ *Id.* at pp. 84-85.

¹²⁵ *United Medical Supply Company, Inc. v. United States*, 77 Fed. Cl. 257, 270 n. 24 (2007) (case involving spoliation of government contract files; Rule 37(e) cited in a footnote to illustrate availability of sanctions absent proof of bad faith); *Mohrmeyer v. Wal-Mart Stores East, L.P.*, 2009 WL 4166996, *3 (E.D. Ky. Nov. 20, 2009) (in case involving an accident in the defendant’s restroom, court refused to award sanctions against the defendant for discarding hard copy maintenance logs “as a result of its routine, good-faith records management practices long before [it] received any notice of the likelihood of litigation”; Rule 37(e) not applicable because the documents were not ESI, but court cited the Rule “by analogy”).

one was a criminal case.¹²⁶ Of the remaining twenty-seven cases, we identified, at most, seven and a half cases that invoked Rule 37(e) to protect a party against sanctions. In five of those cases, Rule 37(e) was invoked to deny requested sanctions.¹²⁷ In two cases, the rule was mentioned and sanctions were denied, but it is unclear whether the court relied on the rule in making its decision.¹²⁸ The half case comes from a decision in which a court held that Rule 37(e)'s safe harbor would protect a party from potential sanctions for some conduct prior to notice of litigation, but that it would not protect the party from potential sanctions for other conduct after notice.¹²⁹

Courts have not shown a propensity to give the safe harbor broad and ready application. One court cited the rule at the outset of a case, warning the parties to be cautious in relying on its protection.¹³⁰ In another case, the court cited the rule but deferred consideration of sanctions.¹³¹ In twelve decisions, the court denied the safe harbor, many finding that the post-notice destruction of evidence was not within the protection of Rule 37(e).¹³² Among these cases, three

¹²⁶ *United States v. O'Keefe*, 537 F. Supp.2d 14, 22 (D.D.C. 2008) (criminal case citing Rule 37(e) by analogy).

¹²⁷ *See Sue v. Milyard*, 2009 WL 2424435, *2 (D. Colo. Aug. 6, 2009) (video footage stored on hard drive was automatically recorded over within five to seven days due to normal operating process of the camera's computer system, before plaintiff made a request to preserve it); *Southeastern Mechanical Svcs., Inc. v. Brody*, 2009 WL 2242395, *3 (M.D. Fla. July 24, 2009) (no spoliation sanction warranted, because the overwriting of backup tapes involved no bad faith, and was part of company's routine document management policy); *Gippetti v. United Parcel Service*, 2008 WL 3264483, *4 (N.D. Cal. Aug. 6, 2008) (no spoliation sanctions warranted against company that discarded tachograph records showing vehicle's speed and length of time it was moving or stationary, where company's practice was to preserve the records for only 37 days due to large volume of data; and company had no notice that the specific records sought should have been preserved); *Escobar v. City of Houston*, 2007 WL 2900581, *18-19 (S.D. Tex. Sept. 29, 2007) (adverse-inference instruction sanction rejected where defendant destroyed documents deemed not responsive to the document requests; party seeking sanctions failed to show relevance of records sought or that destruction was in bad faith); *Columbia Pictures*, 2007 WL 2080419 (party's failure to retain website server log data, stored temporarily in RAM, not sanctionable, due to party's "good faith belief that preservation of data temporarily stored only in RAM was not legally required").

¹²⁸ *In re Riverside Healthcare, Inc.*, 393 B.R. 422, 429 (Bankr. M.D. La. 2008) (decision not to award sanctions seems predicated on lack of prejudice to the moving party); *In re Kessler*, 2009 WL 2603104, *3 (District Court, rejecting Magistrate Judge's Report and Recommendation, court appears to have applied Rule 37(e) *sub silentio* to reject an award of attorney's fees based on party's failure to preserve video footage which "self-destructed" approximately 27 hours after it was recorded, "in accordance with the routine operation of the . . . surveillance system").

¹²⁹ *Peskoff v. Faber*, 244 F.R.D. 54, 60-61 (D.D.C. 2007) (sanctions possible for failure to disable email auto-deletion function during period following notice of pending litigation, but not appropriate for failure to do so *prior* to notice of pending litigation).

¹³⁰ *Oklahoma v. Tyson Foods, Inc., et al.*, 2007 WL 1498973, *6 (N.D. Okla. May 17, 2007) (in case with voluminous ESI, court admonished parties to "be very cautious in relying upon any 'safe harbor' in new Rule 37(f)").

¹³¹ *U&I Corp. v. Advanced Medical Design, Inc.*, 2007 WL 4181900, *5 (M.D. Fla. Nov. 26, 2007) (court construed Rule 37(f) as "govern[ing] a parties' [sic] failure to cooperate during discovery" and deferred consideration of sanctions pending responding party's submission of an affidavit of a corporate representative explaining why certain emails were not available and the efforts it made to obtain them).

¹³² *KCH Svcs.*, 2009 WL 2216601, at *1 (defendant ordered employees to delete certain software and evinced an "unwillingness to place a meaningful litigation hold on relevant electronic information after being placed on notice"); *Stratienko v. Chattanooga-Hamilton County*

involved findings of intentional conduct;¹³³ one involved gross negligence;¹³⁴ one involved recklessness;¹³⁵ and two involved a failure by the responding party to show good-faith.¹³⁶

Several courts also held Rule 37(e) inapplicable to bar sanctions awarded under the court's inherent power, or inapplicable to bar sanctions where the conduct giving rise to the sanction was not governed by Rule 37.¹³⁷ Courts have also declined to apply the rule for other reasons, including that sanctions were not sought in the case.¹³⁸

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

Hospital Authority, et al., 2009 WL 2168717, *4 (E.D. Tenn. July 16, 2009) (hospital re-imaged hard drive of its chief of medical staff immediately after chief's retirement and long after hospital was on notice that electronic information on the hard drive could be relevant); *Ripley v. District of Columbia, et al.*, (D.D.C. July 2, 2009) <http://dc.findacase.com/research/wfrmDocViewer.aspx> (attorney's fees awarded as sanction after plaintiff repeatedly requested e-mails, defendant admitted that it had destroyed certain e-mails and asserted that no back-up tapes existed, and finally admitted that back-up tapes did exist; court found that rule 37(e) afforded no protection for such conduct: "Defendants . . . did not operate their e-mail system in a routine, good-faith manner"); *Phillip M. Adams & Associates, LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191-92 (D. Utah 2009) (safe harbor not available where party discarded computer source code and failed to show reasonableness or good-faith); *Technical Sales Assocs.*, 2009 WL 728520 (finding of intentional conduct where e-mails were deleted during the discovery period and "just days" before the completion of searches for responsive documents); *Usenet.com.*, 608 F. Supp.2d 409, 431 n. 31 (on-line bulletin board had obligation to preserve usage data, digital music files, and other material that was specifically requested; court noted that Rule 37(e) safe harbor was not cited by the parties in briefing, and concluded that the Rule "does not apply to the circumstances of this case"); *Pandora Jewelry, LLC v. Chamilia, LLC*, 2008 WL 4533902, *9 (D. Md. Sept. 30, 2008) (finding of gross negligence in party's failure to preserve evidence); *Keithley*, 2008 WL 3833384 ("Defendants did not satisfy their duty to preserve even after this lawsuit was filed and recklessly allowed the destruction of some relevant data as late as 2004."); *Mecca Tech*, 2008 WL 6010937, *9 (express finding that ESI was intentionally destroyed or withheld, and was not lost through good-faith operation of an electronic information system); *Norwalk Cmty Coll.*, 248 F.R.D. at 378 (court held that in order to take advantage of the good faith exception of the safe harbor rule, "a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business"); *In re Krause*, 367 B.R. at 767 (debtor in Chapter 7 liquidation proceeding "willfully and intentionally destroyed electronically stored evidence"); *Cache La Poudre Feeds LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007) (party's failure to implement and monitor an adequate records preservation program, including the wiping of hard drives and counsel's failure to properly monitor the discovery process, held not to have substantially prejudiced the moving party, but to have nevertheless interfered with the judicial process, warranting monetary sanction of \$5,000).

¹³³ *Technical Sales Assocs.*, 2009 WL 728520; *Mecca Tech* 2008 WL 6010937; and *In re Krause*, 367 B.R. 740.

¹³⁴ *Pandora Jewelry*, 2008 WL 4533902.

¹³⁵ *Keithley*, 2008 WL 3833384.

¹³⁶ *Ripley v. District of Columbia*, No. 06-1705 (D.D.C. July 2, 2009), <http://dc.findacase.com/research/wfrmDocViewer.aspx>; *Phillip M. Adams & Associates*, 621 F. Supp. 2d 1173.

¹³⁷ *Nucor*, 251 F.R.D. at 196 n. 3 (court held Rule 37(e) inapplicable to consideration of sanctions for party's intentional spoliation, because the sanctions were issued pursuant to court's inherent authority, not the Federal Rules); see also *Johnson*, 2008 WL 2142219, *3 n. 1 (plaintiff in Fair Credit Reporting Act case against bank erased data from hard drives after it was requested by defendant; court awarded sanction consisting of an adverse-inference instruction, and held Rule 37(e) safe harbor "inapplicable under these facts because the conduct giving rise to this action was not in violation of any discovery order governed by Rule 37").

¹³⁸ *Orrell v. Motorcarparts of America, Inc.*, 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007) (plaintiff in employment case who "wiped" her laptop and was found to have served deficient discovery responses, ordered to serve complete responses and to provide her home computer to defendants for forensic examination; court cited Rule 37(e), but sanctions were neither sought nor awarded); *Disability Rights Council of Greater Washington, et al. v. Washington Metropolitan Transit Authority, et al.*, 242 F.R.D. 139, 146 (D.D.C. 2007) (Rule 37(e) inapplicable because no sanctions were sought and because "indefensible" failure to disable "auto-delete" during course of litigation); *In re Intel Corp. Microprocessor Antitrust Litigation*, 258 F.R.D. 280, 283 n. 5 (D. Del. 2008) (decision concerns privilege and work product status of notes of defense counsel concerning counsel's investigation of document preservation; Rule 37(f) safe harbor cited by defendants in letter to court describing its e-mail system's auto-delete function but is not applied by court).

reach its refuge only in very limited situations. Approximately two cases a year have met its requirements since its adoption.

Conclusion

Motions for sanctions for e-discovery violations and sanction awards for e-discovery violations have been trending ever-upward for the last ten years and are at historic highs. At the same time, the frequency of sanctions against counsel for e-discovery violations, though small in number, is also increasing. While 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.

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The authors wish to thank the attorneys at the King & Spalding Discovery Center who assisted in the research and preparation of this article, particularly Jennifer Mencken, Edward Logan, Andrew Walcoff, Greg Antine, Stephanie Johnson and Arlisa Brown.

APPENDIX A

ALL CASES

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1	ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994)
2	Acorn v. County of Nassau, No. CV052301, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009)
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331	Serra Chevrolet, Inc. v. Gen. Motors Corp., No. 01-2682 (N.D. Ala. May 20, 2005), rev'd by 446 F.3d 1137 (11th Cir. 2006)
332	Service Employees Int'l Union v. Rosselli, 2009 WL 2581320 (N.D. Cal. Aug. 20, 2009)
333	Shank v. Kitsap County, No. C04-5843RJB, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005)
334	Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001), report and recommendation adopted in part, rejected in part, No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), aff'd in part, vacated in part, 428 F.3d 1 (1st Cir. 2005)
335	sit-up Ltd. v. IAC/Interactive Corp., 05 Civ. 9292, 2008 U.S. Dist. LEXIS 12017 (S.D.N.Y. Feb. 20, 2008)
336	Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC, No. Civ. A. 06CV02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009)
337	Sonii v. Gen. Elec. Corp., 2003 WL 21541039 (N.D. Ill. June 11, 2003)
338	SonoMedica, Inc. v. Mohler, No. 1:08-cv-230(GBL), 2009 WL 2371507 (E.D. Va. July 28, 2009)
339	Spooner v. Egan, No. Civ. 08-262-P-S, 2009 WL 2175063 (D. Me. July 21, 2009)
340	Square D Co. v. Scott Elec. Co., No. Civ. A. 06-459, 2008 WL 2779067 (W.D. Pa. July 15, 2008)
341	St. Tammany Parish Hosp. Serv. Dist. No. 1 v. Travelers Prop. Cas. Co. of Am., 250 F.R.D. 275 (E.D. La. 2008)
342	Sterle v. Elizabeth Arden, Inc., No. 3:06cv01584DJS, 2008 WL 961216 (D. Conn. Apr. 9, 2008)

No	Case
343	Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004)
344	Stratienko v. Chattanooga-Hamilton County Hosp. Auth., No. 1:07-cv-258, 2009 WL 2168717 (E.D. Tenn. July 16, 2009)
345	Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co., No 02 Civ. 8123PKCMHD, 2004 WL 2663564 (S.D.N.Y. Nov. 19, 2004)
346	Stroupe v. Wal-Mart Stores E., L.P., No., Civ. A. 3:07cv267, 2007 WL 3223224 (E.D. Va. Oct. 29, 2007)
347	Sue v. Milyard, No. Civ. A. 07cv01711-REBMJW, 2009 WL 2424435 (D. Colo. Aug. 6, 2009)
348	Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A., No. Civ. A. 3: 06-cv-0271-B, 2008 WL 3261095 (N.D. Tex. Aug. 8, 2008)
349	Superior Prod. P'ship v. Gordon Auto Body Parts Co, No. 2:06-cv-0916, 2009 WL 690603 (S.D. Ohio Mar. 12, 2009)
350	Swofford v. Eslinger, No. 608cv00066-OR-35DAB, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009)
351	Tango Transp., LLC v. Transp. Int'l Pool, Inc., No. 5:08-cv-0559, 2009 WL 3254882 (W.D. La. Oct. 8, 2009)
352	Tantivy Commc'ns, Inc. v. Lucent Techs. Inc., No. Civ. A. 2:04cv79 (TJW), 2005 WL 2860976 (E.D. Tex. Nov. 1, 2005)
353	Teague v. Target Corp., No. 3:06cv191, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007)
354	Tech. Recycling Corp. v. City of Taylor, 186 Fed. Appx. 624 (6th Cir. 2006)
355	Technical Sales Assocs., Inc. v. Ohio Star Forge Co., Nos. 07-11745, 08-13365, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009)
356	Telecom Int'l Am., Ltd. v. AT&T Corp., 189 F.R.D. 76 (S.D.N.Y. 1999)
357	Telequest Int'l. Corp. v. Dedicated Bus. Sys., Inc., No. 06-5359 (PGS), 2009 U.S. Dist. LEXIS 19546 (D.N.J. Mar. 11, 2009)
358	Thermodyne Corp. v. 3M Co., 593 F.Supp.2d 972 (N.D. Ohio 2008)
359	Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93 (D. Md. 2003)
360	Tilton v. McGraw-Hill Cos., No. C06-0098RSL, 2007 WL 777523 (W.D. Wash. Mar. 9, 2007)
361	Toth v. Calcasieu Parish, No. 06-998, 2009 U.S. Dist. LEXIS 16116 (W.D. La. Mar. 2, 2009)
362	Toussie v. County of Suffolk, No. CV 01-6716 JSARL, 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007)
363	Tracy v. Fin. Ins. Mgmt. Corp., No. 1:04-cv-00619-TABDFH, 2005 WL 2100261 (S.D. Ind. Aug. 22, 2005)
364	Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672 (7th Cir. July. 17, 2008)
365	Travel Sentry, Inc. v. Tropp, 2009 WL 3859272 (E.D.N.Y. Nov. 18, 2009)
366	Treppel v. Biovail Corp., 249 F.R.D. 111 (S.D.N.Y. 2008)
367	Tri-County Motors, Inc. v. Am. Suzuki Motor Corp., 494 F. Supp. 2d 161 (E.D.N.Y. 2007), aff'd, 301 Fed. Appx. 11 (2d Cir. 2008)
368	Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001)
369	Triple-I Corp. v. Hudson Assocs. Consulting, Inc., Nos. 06-2195-EFM, 06-2381-EFM, 2009 WL 1210882 (D. Kan. May 1, 2009), aff'd, No. 06-2195-EFM, 2009 WL 2162204 (D. Kan. July 17, 2009)
370	Tse v. UBS Fin. Servs., Inc., 568 F. Supp. 2d 274 (S.D.N.Y. 2008)
371	Turner v. Resort Condos. Int'l, LLC, No. 1:03cv2025 DFHWTL, 2006 WL 1990379 (S.D. Ind. July 13, 2006)
372	U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667 (M.D. Fla. 2008)
373	United States v. Koch Indus., Inc., 197 F.R.D. 463 (N.D. Okla. 1998)
374	United States v. Maxxam, Inc., No. C-06-07497CWJCS, 2009 WL 817264 (N.D. Cal. Mar. 27, 2009)
375	United States v. Murphy Oil USA, Inc. 155 F. Supp. 2d 1117 (W.D. Wis. 2001)
376	United States v. Philip Morris USA, Inc., 327 F.Supp.2d 21 (D.D.C. 2004)
377	Univ. of Pittsburgh v. Townsend, No. 304-cv-291, 2007 WL 1002317 (E.D. Tenn. Mar. 30, 2007)
378	Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376 (D.N.J. 2006)
379	Wachtel v. Health Net, Inc., 239 F.R.D. 81 (D.N.J. 2006)
380	Wash. Alder LLC v. Weyerhaeuser Co., No. CV 03-753-PA, 2004 WL 4076674 (D. Or. May 5, 2004)
381	Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n, No. 3:07-cv-449, 2009 WL 2243854 (S.D. Ohio July 24, 2009)

No	Case
382	Wells v. Berger, Newmark & Fenchel, P.C., No. 07 c 3061, 2008 U.S. Dist. LEXIS 21608 (N.D. Ill. Mar. 18, 2008)
383	Wells v. Orange County Sch. Bd., No. 6:05cv479ORL28DAB, 2006 WL 4824479 (M.D. Fla. Nov. 7, 2006)
384	White v. Lenox Hill Hosp., No. 02CIV5749 (WHP (FM)), 2005 WL 1081443 (S.D.N.Y. May 10, 2005)
385	Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003)
386	Willbros Eng'rs, Inc. v. Mastec N. Am., Inc., (N.D. Okla. Sept. 28, 2007)
387	William T. Thompson Co. v. Gen. Nutrition Corp., 593 F.Supp. 1443 (C.D. Cal. 1984)
388	Williams v. ACS Consultant Co., No. 06-cv-13603, 2007 WL 2822777 (E.D. Mich. Sept. 26, 2007)
389	Williams v. Saint-Gobain Corp., No. 00-CV-0502E, 2002 WL 1477618, 53 Fed. R. Serv. 3d (West) 360 (W.D.N.Y. June 28, 2002)
390	Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640 (D. Kan. 2005)
391	Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSWL SHX, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007)
392	Wixon v. Wyndham Resort Dev. Corp., No. C 07-02361 JSW, 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009)
393	Wong v. Thomas, No. Civ. 05-2588 (AET), 2008 WL 4224923 (D.N.J. Sept. 10, 2008), aff'd, No. 08-4571, 2009 WL 1566776 (3d Cir. June 5, 2009)
394	Wood Group Pressure Control, L.P. v. B & B Oilfield Servs., Inc., No. Civ. A. 06-3002, 2007 WL 1076702 (E.D. La. Apr. 9, 2007)
395	Wood v. Sempra Energy Trading Corp., No. 3:03-cv-986 (JCH), 2005 WL 3465845 (D. Conn. Dec. 9, 2005)
396	Woodburn Const. Co. v. Encon Pac., LLC, No. C05-5811FDB, 2007 WL 1287845 (W.D. Wash. Apr. 30, 2007)
397	World Courier v. Barone, No. C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007)
398	Yeisley v. PA State Police, No. 3:CV-05-1650, 2008 WL 906465 (M.D. Pa. Mar. 31, 2008)
399	z4 Techs., Inc. v. Microsoft Corp., No. 6:06-cv-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006), aff'd, 507 F.3d 1340 (Fed. Cir. 2007)
400	Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V")
401	1100 West, LLC v. Red Spot Paint & Varnish Co., No. 1:05CV1670, 2009 WL 1605118 (S.D. Ind. June, 5 2009)
402	3M Innovative Props. Co. v. Tomar Elecs., No. 05-756, 2006 WL 2670038 (D. Minn. Sept. 18, 2006)
403	3M v. Pribyl, 259 F.3d 587 (7th Cir. 2001)

APPENDIX B

OVERALL STATISTICS

Year	Total Written Rulings	Total Cases	Cases With Sanction Awards	Cases with Dismissal Sanctions	Cases with Adverse Jury Instruction Sanctions	Plaintiff Sanctions	Defendant Sanctions	Percentage of Plaintiffs Sanctions
2009	111	97	46	5	12	12	32	26.1%
2008	90	71	42	6	15	11	30	26.2%
2007	88	67	40	6	8	8	32	20.0%
2006	68	55	32	7	5	6	26	18.8%
2005	42	36	18	2	5	5	14	27.8%
2004	35	29	21	3	5	7	14	33.3%
2003	12	9	6	2	0	1	5	16.7%
2002	7	6	3	0	0	1	2	33.3%
2001	6	6	5	0	1	1	4	20.0%
2000	6	5	3	0	1	0	3	0.0%
1999	4	4	3	0	0	0	3	0.0%
1998	4	4	3	1	0	1	2	33.3%
1997	3	3	1	0	0	0	1	0.0%
1996	1	1	1	0	0	0	1	0.0%
1995	0	0	0	0	0	0	0	0.0%
1994	1	1	0	0	0	0	0	0.0%
1993	1	1	1	1	0	1	0	100.0%
1992	0	0	0	0	0	0	0	0.0%
1991	1	1	1	1	0	0	1	0.0%
1990	1	1	1	1	0	0	1	0.0%
1989	1	1	1	0	0	0	1	0.0%
1988	0	0	0	0	0	0	0	0.0%
1987	2	2	2	0	0	0	2	0.0%
1986	1	1	0	0	0	0	0	0.0%
1985	0	0	0	0	0	0	0	0.0%
1984	1	1	1	1	0	0	1	0.0%
1983	0	0	0	0	0	0	0	0.0%
1982	0	0	0	0	0	0	0	0.0%
1981	1	1	0	0	0	0	0	0.0%
	487	403	231	36	52	54	175	23.3%

APPENDIX C

MONETARY AWARDS

No	Case	Monetary Award
1	Grange Mut. Cas. Co. v. Mack, 270 F. App'x 372 (6th Cir. 2008)	\$8,830,983.69
2	Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) ("Qualcomm II"), vacated in part, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008)	\$8,568,633.24
3	Pioneer Hi-Bred Int'l, Inc. v. Monsanto Co., No. 4: 97CV01609, 2001 WL 170410 (E.D. Mo. Jan. 2, 2001), amended by No. 4: 97CV01609, 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001)	\$8,211,287.00
4	Wachtel v. Health Net, Inc., 239 F.R.D. 81 (D.N.J. 2006)	\$6,723,883.22
5	S. New Eng. Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82 (D. Conn. 2008).	\$5,893,541.86
6	Hawaiian Airlines, Inc. v. Mesa Air Group, Inc. (In re Hawaiian Airlines, Inc.), Nos. 03-00817 & 06-90026, 2007 Bankr. LEXIS 3679, 2007 WL 3172642, 49 Bankr. Ct. Dec. (LRP) 11 (Bankr. D. Haw. Oct. 30, 2007)	\$3,929,532.21
7	United States v. Philip Morris USA, Inc., 327 F.Supp.2d 21 (D.D.C. 2004).	\$2,755,027.48
8	z4 Techs., Inc. v. Microsoft Corp., No. 6:06-cv-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006), aff'd, 507 F.3d 1340 (Fed. Cir. 2007)	\$2,300,000.00
9	Kipperman v. Onex Corp., 260 F.R.D. 682 (N.D. Ga. 2009)	\$1,022,700.00
10	Koninklike Philips Elecs. N.V. v. KXD Tech., Inc., No. 2:05-CV1532, 2007 WL 3101248 (D. Nev. Oct. 16, 2007)	\$1,000,000.00
11	CSI Inv. Partners, II, L.P. v. Cendant Corp., 507 F. Supp. 2d 384 (S.D.N.Y. 2007), aff'd, 328 F. App'x 56 (2d Cir. 2009)	\$720,000.00
12	Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332 (D.N.J. 2004) ("Mosaid IV")	\$566,839.97
13	In re Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007)	\$500,000.00
14	Kamatani v. BenQ Corp., No. 2:03-CV-437, 2005 WL 2455825 (E.D. Tex. Oct. 4, 2005)	\$500,000.00
15	Gutman v. Klein, No. 03CV1570, 2008 WL 4682208 (E.D.N.Y. Oct. 15, 2008)	\$287,729.72
16	Keithley v. Homestore.com, Inc., No. 03-04447, 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008)	\$257,528.50
17	Tech. Recycling Corp. v. City of Taylor, 186 Fed. Appx. 624 (6th Cir. 2006)	\$223,805.00
18	Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001)	\$179,725.70
19	Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004), opinion withdrawn in part on reconsideration, No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio July 28, 2005)	\$168,175.00
20	Brick v. HSBC Bank USA, No. 04-CV-0129, 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004)	\$147,635.74
21	Communicationns Ctr., Inc. v. Hewitt, No. 03-1968, 2005 WL 3277983 (E. D. Cal. Apr. 5, 2005)	\$145,811.75
22	PML N. Am., LLC v. Hartford Underwriters Ins. Co., No. 05-cv-70404-DT, 2006 U.S. Dist. LEXIS 94456 (E.D. Mich. Dec. 20, 2006)	\$134,373.00
23	Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSWL SHX, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007)	\$125,000.00
24	Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987)	\$120,000.00
25	Krumwiede v. Brighton Assocs., L.L.C., No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006)	\$111,348.30
26	GTFM, Inc. v. Wal-Mart Stores, Inc., No. 98 CIV. 7724, 2000 WL 335558, 49 Fed. R. Serv. 3d (West) 219 (S.D.N.Y. Mar. 30, 2000)	\$109,753.81

No	Case	Monetary Award
27	SonoMedica, Inc. v. Mohler, No. 1:08-cv-230(GBL), 2009 WL 2371507 (E.D. Va. July 28, 2009)	\$108,212.15
28	Advante Int'l Corp. v. Mintel Learning Tech., No. 05-01022, 2008 WL 928332 (N.D. Cal. Apr. 4, 2008)	\$105,000.00
29	Plasse v. Tyco Elecs. Corp., 448 F.Supp.2d 302 (D. Mass. 2006)	\$99,996.39
30	APC Filtration, Inc. v. Becker, No. 07-CV-1462, 2007 U.S. Dist. LEXIS 76221 (N.D. Ill. Oct. 12, 2007)	\$99,462.40
31	Kucala Enters., Ltd. v. Auto Wax Co., No. 02 C 1403, 2003 WL 22433095, 57 Fed. R. Serv. 3d (West) 501 (N.D. Ill. Oct. 27, 2003)	\$93,125.74
32	Phoenix Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837 (HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006)	\$75,161.82
33	Claredi Corp. v. Seebeyond Tech. Corp., No. 4:04CV1304, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007)	\$73,943.75
34	McDowell v. Gov't of D.C., 233 F.R.D. 192 (D.D.C. 2006)	\$72,190.00
35	Leon v. IDX Sys. Corp., No. C03-1158, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), aff'd, 464 F.3d 951 (9th Cir. 2006)	\$65,000.00
36	NSB U.S. Sales, Inc. v. Brill, No. 04 CIV. 9240, 2007 WL 258181 (S.D.N.Y. Jan. 26, 2007)	\$56,667.00
37	Digene Corp. v. Third Wave Techs., Inc., No. 07-C-22-C, 2007 WL 4939048 (W.D. Wis. Oct. 24, 2007)	\$50,000.00
38	Perez-Farias v. Global Horizons, Inc., No. CV-05-3061 RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007)	\$45,500.00
39	Atl. Recording Corp. v. Howell, No. CV-06-02076, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008)	\$40,500.00
40	R & R Sails, Inc. v. Ins. Co. of the State of Pa., 251 F.R.D. 520 (S.D. Cal. 2008).	\$39,914.68
41	Poole v. Textron, Inc., 192 F.R.D. 494 (D. Md. 2000)	\$37,258.39
42	Recinos-Recinos v. Express Forestry, Inc., No. Civ. A. 05-1355, 2006 WL 2349459 (E.D. La. Aug. 11, 2006)	\$36,391.24
43	Chevron USA, Inc. v. M & M Petroleum Servs., Inc., No. 07-0818, 2009 WL 2431926 (C.D. Cal. Aug. 6, 2009)	\$25,000.00
44	AdvantaCare Health Partners, LP v. Access IV, Inc., No. 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004)	\$20,000.00
45	In re Rosenthal, No. H-04-186, 2008 WL 983702 (S.D. Tex. Mar. 28, 2008)	\$18,900.00
46	Technical Sales Assocs., Inc. v. Ohio Star Forge Co., Nos. 07-11745, 08-13365, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009)	\$17,786.25
47	Tse v. UBS Fin. Servs., Inc., 568 F. Supp. 2d 274 (S.D.N.Y. 2008)	\$16,666.75
48	Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506 (D. Md. 2005)	\$16,097.00
49	Google Inc. v. Am. Blind & Wallpaper Factory, Inc., No. 03-5340, 2007 U.S. Dist. LEXIS 48309 (N.D. Cal. June 27, 2007)	\$15,000.00
50	In re Cheyenne Software, Inc. Sec. Litig., No. 94-2771, 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997)	\$15,000.00
51	Hanni v. American Airlines, Inc., 2009 WL 1505286 (N.D. Cal. May 27, 2009)	\$13,117.00
52	Tango Transp., LLC v. Transp. Int'l Pool, Inc., No. 5:08-cv-0559, 2009 WL 3254882 (W.D. La. Oct. 8, 2009)	\$12,870.00
53	Creative Sci. Sys., Inc. v. Forex Capital Mkts., LLC, No. 04-03746, 2006 WL 870973 (N.D. Cal. Apr. 4, 2006)	\$12,175.00
54	Grantley Patent Holdings, Ltd. v. Clear Channel Commc'ns, Inc., No. 9:06CV259, slip op. (E.D. Tex. Aug. 14, 2007)	\$10,000.00

No	Case	Monetary Award
55	Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325, 53 Fed. R. Serv. 3d (West) 828 (N.D. Ill. 2000)	\$10,000.00
56	E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005)	\$10,000.00
57	Cimaglia v. Union Pacific R.R. Co., 2009 WL 87426 (C.D. Ill. Jan. 12, 2009)	\$10,000.00
58	Travel Sentry, Inc. v. Tropp, 2009 WL 3859272 (E.D.N.Y. Nov. 18, 2009)	\$10,000.00
59	Procter & Gamble Co. v. Haugen, 179 F.R.D. 622 (D. Utah 1998), rev'd on other grounds, 222 F.3d 1262 (10th Cir. 2000)	\$10,000.00
60	Finley v. Hartford Life & Accident Ins. Co., 249 F.R.D. 329 (N.D. Cal. 2008)	\$9,000.00
61	Attard v. City of N.Y., No. 05 CV 2129, 2008 WL 1991107 (E.D.N.Y. May 5, 2008)	\$5,000.00
62	Babaev v. Grossman, No. 03-5076, 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008)	\$5,000.00
63	Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007)	\$5,000.00
64	Ajaxo, Inc., v. Bank of Am. Tech. & Operations, Inc., No. 07-0945, 2008 U.S. LEXIS 97602, 72 Fed. R. Serv. 3d (West) 156 (E.D. Cal. Dec. 2, 2008)	\$4,170.00
65	Hewlett v. Davis, 1987 WL 12298 (E.D. Pa. June 3, 1987)	\$2,950.00
66	Pinstripe, Inc. v. Manpower, Inc., No. 07-cv-620, 2009 WL 2252131 (N.D. Okla. July 29, 2009)	\$2,500.00
67	In re Fagnant, Nos. 03-10496 & 03-1348, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004)	\$1,817.80
68	Omega Patents, LLC v. Fortin Auto Radio, Inc., No. 6:05CV1113, 2006 WL 2038534 (M.D. Fla. July 19, 2006)	\$1,500.00
69	Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 259 F.R.D. 591 (M.D. Fla. 2009)	\$1,205.65
70	Benton v. Dlorah, Inc., No. 06-CV-2488, 2007 U.S. Dist. LEXIS 80503, 2007 WL 3231431 (D. Kan. Oct. 30 2007)	\$1,000.00
71	Lessley v. City of Madison, Ind., No. 4:07CV136, 2008 WL 4977328 (S.D. Ind. Nov. 20, 2008)	\$1,000.00
72	SD Prot., Inc. v. Del Rio, 587 F.Supp.2d 429 (E.D.N.Y. 2008)	\$1,000.00
73	Stratienko v. Chattanooga-Hamilton County Hosp. Auth., No. 1:07-cv-258, 2009 WL 2168717 (E.D. Tenn. July 16, 2009)	\$1,000.00
74	Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2006 WL 1662615 (E.D. Mich. June 12, 2006)	\$750.00
75	Wells v. Orange County Sch. Bd., No. 6:05cv479ORL28DAB, 2006 WL 4824479 (M.D. Fla. Nov. 7, 2006)	\$750.00
76	Rousseau v. Echosphere Corp., No. Civ. A. 03-1230, 2005 WL 2176839 (W.D. Pa. Aug. 30, 2005)	\$696.74
77	Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001), report and recommendation adopted in part, rejected in part, No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), aff'd in part, vacated in part, 428 F.3d 1 (1st Cir. 2005)	\$500.00
78	Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993)	\$250.50