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Understanding and Avoiding Liability in E-Discovery

E-discovery has become a universal and unavoidable part of litigation. With fewer and fewer records on paper, the need for appropriate guidance, procedures, and guardrails is all the more important when navigating the virtual landscape. But even as e-discovery has predominated modern trial practice, attorneys must ensure that both physical documentation and files as well as electronically-stored information ("ESI") is adequately investigated, collected, preserved, and produced to ensure compliance with their ethical obligations. Failure to establish and abide by the prevailing guidance and guardrails that are in place risk significant liability for both attorneys and their clients.

Discovery disputes arise from the fundamental conflict at the heart of discovery: When opposing counsel asks for everything, how can I minimize the scope of my client's production? Even though requesting attorneys may seek broad requests that the answering party may find unfair or unreasonable, the responding attorney has an obligation to comply with discovery requests in good faith. When attorneys do not do so, the consequences can be severe. This piece identifies where an attorney is likely to be exposed to liability and explains the options federal courts may employ to sanction discovery misconduct.

Courts are equipped with a variety of tools to impose sanctions. Some are more generalized while others are issue-specific. All are worth discussing to consider why a court may choose (or not choose) to impose certain sanctions over others.

- **Inherent Authority/Civil Contempt.** Courts have inherent authority to impose sanctions or hold parties in contempt of court. But generally, where courts have a rule or statute by which to impose sanctions, those bases provide a stronger and more straightforward way of handling disputes. Where discovery disputes are directly contemplated by the Federal Rules of Civil Procedure, an enumerated basis likely forms a stronger grounds for sanctions. Thus, courts are unlikely to rely on their inherent contempt authority in a discovery dispute.
- **Federal Rule of Civil Procedure 56(h).**[1] Rule 56 sanctions arise when the judge relies on false affidavits or declarations in a summary judgment motion. Because Rule 56(h) sanctions require reliance, Rule 56(h) sanctions are context-specific. Regardless, there is a high burden of proof under Rule 56(h) and it is only actionable for egregious conduct – making it an unlikely candidate for attorney sanctions. Thus, while an attorney should always be sure that affidavits and declarations submitted to a court are accurate, this sanction tool is not commonly executed.
- **28 U.S.C. § 1927.** Section 1927 provides courts a statutory basis for sanctions when the underlying conduct is purposeful delay. It should go without saying that attorneys should not purposefully delay the production of discovery on specious grounds. Ultimately, attorneys should be mindful that deliberately delaying the production of documents without a proper purpose risks serious consequences.

1 Fed. R. Civ. P. 56.

- **Federal Rule of Civil Procedure 11.**[2] Discovery sanctions do not arise under Rule 11. Although attorneys have a duty to ensure no false representations are made to the Court, violations of Rules 26-37 are not actionable under Rule 11, which provides a separate remedy for discovery sanctions. Thus, an attorney facing discipline is unlikely to be sanctioned under Rule 11 procedures.

For many courts, discovery sanctions are most comfortably issued through the use of Rule 26(g) or various provisions of Rule 37 of the Federal Rules of Civil Procedure.

First – Rule 26(g).[3] Rule 26 imposes a duty to conduct a reasonable inquiry that the disclosure is complete and correct and that any objection is made in good faith and not for an improper purpose. This is no abstract duty. The Rule requires an attorney attestation that attaches mandatory sanctions where the violation was without "substantial justification." Because the standard is objective (like Rule 11), honest mistakes may nevertheless invite liability. In doing so, the Rule reminds attorneys to undertake a reasonable investigation into the facts, objections, and documents being transmitted to opposing counsel rather than simply taking their clients' word with respect to completeness. Although an attorney need not adopt a distrustful approach to client relations, they must not abdicate their responsibilities when considering the circumstances of disclosure. Thus, where a judge determines that a defendant is untrustworthy, greater skepticism with respect to client representations is all the more needed.

Second – Rule 37.[4] Rule 37 provides four grounds for discovery process sanctions and one provision specifically for e-discovery sanctions, all of which attorneys ought to be familiar with.

- **Rule 37(a):** Rule 37(a) sanctions arises where a party provides incomplete or evasive interrogatory responses or document productions. The question for sanctions turns on whether the violative party's was "substantially justified" or an award of expenses would be "unjust." These sanctions are compensatory, meaning they cover all the expenses that would not have been sustained had the sanctioned-attorney conducted themselves properly. These can be paid for by the attorney or the client. Here, attorneys should be mindful that written discovery is testimony and that providing complete and comprehensive answers early-on can make litigation more straightforward in the long-run.
- **Rule 37(b):** Rule 37(b) sanctions arise where an answering attorney has been ordered to provide or permit discovery, and fails to do so. For Rule 37(b), liability arises solely from the violation of a court order – not the intent of the violating attorney or client. Because of that, the question is what form the remedy should take, not whether sanctions should be awarded. While monetary sanctions are always a possibility, the Court may also prohibit a party from introducing certain evidence as a punishment for violation of the order. Or worse, a court may issue a more extreme remedy, striking pleadings, staying proceedings, dismissing an action, or rendering a default judgment. To avoid sanctions under Rule 37(b), attorneys should seek clarification where an order may be ambiguous or the parties dispute the scope of an order rather than waiting for the court to determine a party's non-compliance.
- **Rule 37(c):** Rule 37(c) sanctions prohibit the use of evidence or witness that should have been, but was not, disclosed pursuant to Rule 26(a). Rule 37(c) differs from normal sanctions in that it is self-executing. If Rule 37(c) is implicated, the responding party has the burden of showing that the failure to disclose the evidence or witness was substantially justified or harmless. This is somewhat intuitive: Using undisclosed evidence or witnesses gives a party an unfair advantage when the purpose of discovery is to ensure both sides can fairly and adequately review all the evidence. Like Rule 37(b), the consequences can be severe, including monetary costs, an adverse jury instruction or any case-ending sanctions. To avoid sanctions under Rule 37(c), attorneys should regularly audit disclosures for completeness and promptly supplement them when new information arises. Proactive compliance not only protects an attorney from evidentiary exclusion but also demonstrates good faith to the court.
- **Rule 37(d):** Rule 37(d) sanctions generally punish non-attendance or non-participation in the discovery process. Rule 37(d) is relatively straightforward, simply requiring *any* response to discovery. Rule 37(d) allows for the same remedies as Rule 37(b). To avoid sanctions under Rule 37(d), an attorney is simply required to be present and responsive in the litigation. To the extent that an attorney is unable to provide a response, they should keep their opposing counsel apprised of possible delays.

2 Fed. R. Civ. P. 11.
3 Fed. R. Civ. P. 26
4 Fed. R. Civ. P. 37.

The last grounds for sanctions under Rule 37 is for failure to take adequate steps to preserve electronically-stored information. Rule 37(e) is the sole remedy in the Federal Rules for issues or violations of electronic preservation standards. Before Rule 37(e) is triggered, there are five threshold elements that must be met: (1) the information must be ESI; (2) there must have been anticipated or actual litigation that triggers the duty to preserve ESI; (3) the relevant ESI should have been preserved at the time of the litigation was anticipated or ongoing; (4) the ESI must have been lost because a party failed to take reasonable steps to preserve it; and (5) the lost ESI cannot be restored or replaced through additional discovery.

Where a failure to disclose is intentional, a court may adopt an adverse inference regarding its evaluation of the unproduced contents, provide the jury an adverse-inference instruction, or dismiss the action or default the violative party. But where non-disclosure is unintentional, a court solely looks to the whether the producing – or in this case, nonproducing – party's failure to disclose resulted in prejudice. In these cases, sanctions are limited only to measures that are no greater than necessary to cure the prejudice caused.

Unlike the other discovery sanctions, Rule 37(e) does not expressly provide for attorneys' fees (although many courts have determined that attorneys' fees are a possible remedy). This makes sense because attorneys' fees do not "cure" the non-production. This gives a court significant discretion when evaluating and punishing e-discovery failures. Given that discretion, attorneys should be particularly wary when handling e-discovery and the concerns that arise with the failure to handle material evidence carefully.

A few final cautionary notes for attorneys. First, the use and issuance of discovery holds to clients can be an extremely helpful tool later, if the attorney needs to show that she provided proper direction and instructions to her client. Second, while policies differ, many Lawyers Professional Liability policies do not cover sanctions and will not pay for sanctions issued against counsel. Lastly, courts will not hesitate to issue sanctions even when the failure and/or improper disclosure was the result of support staff's actions, making it imperative that lawyers ensure their support staff are properly trained on e-discovery procedures.

The ubiquity of e-discovery creates a minefield of potential liability on top of run-of-the-mill discovery issues. Because of that, discovery misconduct can lead to severe consequences. Understanding the various mechanisms for discovery sanctions is the first step to ensure compliance with those rules. By conducting reasonable investigations, implementing timely litigation holds, and proactively and competently tackling complex evidentiary matters, an attorney can navigate these issues effectively. More than internal steps, healthy skepticism toward one's own client balanced with transparent communication with opposing counsel ensure that an attorney can fulfill their own ethical obligations while avoiding the serious sanctions that can result. As courts continue to develop standards for e-discovery conduct, maintaining vigilance throughout the discovery process remains an attorney's best defense against sanctions and liability.

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