

Legal Ethics

E-Discovery Sanctions Reach All-Time High for Litigants and Lawyers

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E-discovery sanctions have reached an all-time high after three decades of litigation over alleged discovery wrongdoing, and lawyers are increasingly being targeted.

A study of federal decisions by three King & Spalding lawyers identified 30 cases in which attorneys were sanctioned for e-discovery violations, seven of them in 2009, according to a summary on the [Catalyst E-Discovery Blog](#). Overall, 46 sanctions were awarded in 2009, the last year covered by the study.

Before 2009, the highest number of sanctions awarded against lawyers in a single year was five, in 2008 and 2007.

“Sanction motions and sanction awards for e-discovery violations have been trending ever-upward for the last 10 years and have now reached historic highs,” according to the King & Spalding study, published in the [Duke Law Journal](#) (PDF).

The King & Spalding lawyers analyzed 401 cases before 2010 in which sanctions were sought and found 230 sanctions awarded, including often severe sanctions of case dismissals, adverse jury instructions and significant money awards. Sanctions of more than \$5 million were ordered in five cases, and sanctions of \$1 million or more were awarded in four others.

Defendants were sanctioned for e-discovery violations nearly three times more often than plaintiffs. When sanctions were awarded, the most common misconduct was failure to preserve electronic evidence, followed by failure to produce and delay in production.

Courts rarely sanctioned lawyers for e-discovery violations without also sanctioning their clients. Usually the counsel sanctions were for a pattern of misconduct. Typically the sanction required the lawyers to pay attorney fees and costs, and the amount ranged from \$500 to \$500,000.

Four of the counsel cases involved negligence, seven involved gross negligence, nine involved reckless disregard, and 10 involved intentional conduct or bad faith.

All four of the negligence cases were based on the lawyers' failure to turn over materials in a timely manner. The gross negligence cases involved failure to advise clients to preserve evidence, failure to supervise a client search for responsive information, and failure to produce a critical document. Reckless disregard cases involved failure to comply with court-ordered discovery and lawyer misrepresentations. Lawyer sanctions for intentional or bad-faith conduct “typically resulted from multiple egregious failures to oversee the client’s preservation, search, and production efforts, followed by misrepresentations to the court over an extended period of time.”

The sanctions climate changed in 2010, according to [an analysis](#) of both state and federal decisions by Gibson Dunn. Calls for discovery reform increased, even as the number of opinions granting e-discovery sanctions declined from the prior year, the law firm says.

The percentage of sanctions granted also dropped. In 2010 state and federal courts granted sanctions in 55 percent of the cases where it was sought, compared to 70 percent in 2009.

Updated on Jan. 14 to include Gibson Dunn's study.

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