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Association of Corporate Counsel
Central Ohio Chapter

**SIXTH ANNUAL
CO-ACC NIGHT WITH THE BLUE JACKETS**

Wednesday, February 9, 2011

Nationwide Arena

Agenda:

E-Discovery - Legal Tech & Case Law updates

**Developments and Trends Regarding Electronically Stored Information
& Evidence**

1:30 p.m. – 2:30 p.m.

Mason Evans, Partner, Porter Wright Morris & Arthur, LLP

Break: 2:30 p.m. – 2:45 p.m.

Creating and Implementing a New Standard for Recordkeeping

2:45 p.m. – 3:45 p.m.

Martin D. Susec, JD, MBA, CRM, Assistant General Counsel, Office of
the Chief Legal Officer, Discovery Management Unit, Nationwide

Break: 3:45 p.m. – 4:00 p.m.

**Clouding the Issue: An Overview of Current Issues with Cloud-based
Computing**

4:00 p.m. – 5:00 p.m.

Andrew Drake, Assistant General Counsel, Discovery Management,
Nationwide

Hors d'oeuvres 5:00 p.m. – 6:00 p.m.

Dinner 6:00 p.m. – 7:00 p.m. Dispatch Party Tower

Game time 7:00 p.m.

Whether it's cloud computing, reviewing records management procedures, or looking for the latest Legal Tech or law updates... you need a talented team to help you build a solid offense – or steady defense. We'll cover the latest issues in e-discovery, records management, and cloud computing to help you build a good strategy for your organization.

After the presentations, please be our guest for a cocktail reception and dinner, followed by the Columbus Blue Jackets game against the San Jose Sharks.



Mason Evans

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International Legal Technology
Association
ARMA International
AIIM
Association of Certified E-Discovery
Specialists

Education

George Washington University
School of Law, J.D., with highest
honors; Order of the Coif
Miami University, B.A.

Mr. Evans serves as Counsel to the Civil Rules Committee of the Ohio Supreme Court's Commission on the Rules of Practice and Procedure in Ohio Courts and was instrumental in preparing the 2008 electronic discovery amendments to the Ohio Rules of Civil Procedure. He is a member of the Sedona Conference® Working Group on Electronic Document Retention and Production. Mr. Evans handles and coordinates technology-related commercial litigation and frequently speaks about issues that arise at the intersection of technology and litigation.

Mr. Evans has represented the world's largest research-based pharmaceutical company in various matters. In this role, he filed and pursued a temporary restraining order and preliminary injunction in federal court and enjoined an attempt by ex-employees to penetrate Internet security and steal confidential information housed at a third-party site. Mr. Evans also provided counsel relating to pharmaceutical software licensing disputes, internal audits and internal investigations. Additionally, he advised the company regarding accusations of copyright infringement in new media contexts, as well as negotiated responses to third-party subpoenas in pharmaceutical and non-pharmaceutical litigation.

Mr. Evans has over 30 years of trial experience, and has prepared and tried major commercial, technology, and insurance matters as well as negotiated basic and complex settlement agreements.

Mr. Evans leverages his first-hand experience as the inaugural Chair of the firm's Technology Committee in advising clients on day-to-day technology issues. He regularly counsels clients, including the Firm, on questions related to records management and electronic discovery, technology and the Internet, infringement issues, and computer-related litigation.

Bar Admissions

- Supreme Court of the United States
- U.S. Court of Appeals for the Sixth Circuit
- U.S. District Court for the Southern District of Ohio
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Eastern District of Kentucky
- State of Ohio

Presentations/Publications/CLE

Mr. Evans is a frequent presenter for the Ohio State Bar Association. He has also presented for the Ohio Judicial College and regularly provides seminars and training for clients. Past presentations include the following:

- Presenter, Selected Rules of Civil Procedure, Ohio Judicial College
- Presenter, E-Discovery Boot Camp, Ohio State Bar Association
- Presenter, Social Media: How To Understand It and What To Do About It, Ohio State Bar Association
- Presenter, Spoliation: Avoiding the Fast Track to Liability, Columbus Bar Association
- Organizer and Presenter, LegalTech and Case Law Updates, Association of Corporate Counsel of America, Columbus Chapter
- Presenter, Advising Corporate Directors, Ohio State Bar Association
- Co-Author and Presenter: Slip-Ups And Safety Nets: The Procedural and Ethical Implications of Inadvertent Disclosure of Privileged or Protected Documents Under Ohio Law, Ohio Northern University Law Review, Vol XXXV No. 3
- Presenter, Electronic Discovery Boot Camp, Tuscarawas County Bar Association
- Presenter, *E-Discovery, What You Don't Know Can Hurt You*, 34th Annual Federal Law Seminar presented by the United States Attorney for the Southern District of Ohio
- Faculty, *E-Discovery: An A-Z Workshop*, West Legalworks, June 2008
- Presenter, *Ethics, E-Discovery and Inadvertent Disclosure: The Applicability of New Ethics Rules to the Representation of Corporations and In-House Counsel*, Ohio State Bar Association, Advising Corporate Counsel Institute
- Organizer & Presenter, *Dealing with Ethical Issues in E-Discovery and Document Retention/Production*, Association of Corporate Counsel America, Central Ohio Chapter, Columbus, Ohio
- Presenter, *Applicability of New Ethics Rules to Representation of Corporation and to In-House Counsel, including Professionalism Issues*, Ohio State Bar Association, Corporate Counsel Institute
- Organizer & Presenter, *Records Management and Electronic Discovery*, Association of Corporate Counsel America, Central Ohio Chapter, Columbus, Ohio
- Organizer & Presenter, *Litigation, Spoliation of Evidence, & E-Discovery*, Association of Corporate Counsel America, Central Ohio Chapter, Columbus, Ohio
- Speaker, Labor and Employment Relations Seminar, Columbus, Ohio, "Email, Electronic Discovery and You: Practical Implications for Today's Workplace"
- Presenter, Porter Wright Seminar to Major Pharmaceutical Client, New York, NY, "Copyright Law and Software Licensing"

Honors and Awards

- Recognized in *The Best Lawyers in America*® in the area of Commercial Litigation
- Recognized by the publishers of *Law & Politics* and *Cincinnati Magazine* as an Ohio Super Lawyer®

Biography of Andrew Drake



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Andrew Drake is an Assistant General Counsel with the Discovery Management Unit in the Office of the Chief Legal and Governance Officer at Nationwide. He is the primary attorney responsible for electronic discovery issues and also manages the corporate Service of Process team for the Nationwide family of companies.

Prior to joining Nationwide's legal department, Andrew had a 12-year career in the information technology field. During this time, he performed a variety of roles ranging from UNIX systems administrator to consulting IT project manager overseeing multi-million dollar domestic and international IT infrastructure projects.

Andrew holds undergraduate degrees from The Ohio State University and a J.D. from Capital University. He is admitted to the Ohio bar, the U.S. District Court for the Southern District of Ohio, and the U.S. Sixth Circuit Court of Appeals. He is an active member of the Sedona Conference and has spoken across the country on eDiscovery and litigation risk management issues.



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Biography of Martin D. Susec

Martin Susec works within the Discovery Management Unit (DMU) of the Litigation Practice Group (LPG) of Nationwide where he advises and supports fellow attorneys and business units, including the Records & Information Management Unit (RIM), on the proper management of information within the enterprise. In that capacity, he handles a variety of electronic discovery and information management matters and proactively assists in reducing corporate litigation costs and risks. Martin researches and consults on new and proposed laws, standards, or regulatory trends within the field of information management and also identifies risks presented by proposed actions of the business. Upon request, Martin also advises, drafts, and negotiates agreements between Nationwide and its vendors regarding information management.

Mr. Susec graduated from The Ohio State University College of Business with a Bachelors degree in Marketing and International Business in 1992 and the University of Akron School of Law in 1996. While attending law school, Martin earned a Masters of Business Administration in Finance at Akron's College of Business. After law school, Martin worked for ten years at the Ohio Attorney General's Office where he specialized in public records law.

Mr. Susec is a Certified Record Manager (CRM) and has given several presentations before national conferences within the information management industry. Martin is admitted to practice law in Ohio, the U.S. Fifth and Sixth Circuit Courts of Appeals, and the Northern and Southern U.S. District Courts of Ohio. Martin is also an active member of ARMA International.

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E-Discovery - Legal Tech & Case Law updates
Developments and Trends Regarding Electronically Stored Information & Evidence

Mason Evans
Porter Wright Morris & Arthur LLP

2010 Summary

- 39 percent of cases addressed sanctions
- 49 percent of sanctions involved preservation and spoliation issues
- 27 percent of sanctions involved production disputes
- 24 percent of sanctions involved withholding discovery and other abuses

- 18 percent of cases addressed various production considerations
- 17 percent of cases addressed various procedural issues (such as searching protocol and cooperation)
- 11 percent of cases addressed privilege considerations and waivers

- 8 percent of cases addressed computer forensics protocols and experts
- 2 percent of cases addressed cost considerations
- 2 percent of cases addressed preservation and spoliation issues (but not sanctions)
- 2 percent of cases addressed discoverability and admissibility issues

- Themes**
- Preservation
 - Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC (2010 WL 184312 (S.D.N.Y. Jan. 15, 2010))
 - Rimkus Consulting Group, Inc. v. Cammarata, 2010 WL 645253 (S.D.Tex. Feb. 19, 2010)
 - Victor Stanley, Inc. v. Creative Pipe, Inc., 2010 WL 3703696 (D. Md. Sept. 9, 2010)

- Themes**
- Privacy
 - City of Ontario, California v. Quon, 2010 WL 2400087 (U.S. June 17, 2010)
 - United States v. Warshak, 2010 WL 5071766 (6th Cir. Dec. 14, 2010)
 - Privilege
 - Mt. Hawley Ins. Co. v. Felman Prod., Inc., 2010 WL 1990555 (S.D.W.Va. May 18, 2010)

Themes

- **Willis v. Willis, 2010 WL 5186606 (N.Y. App. Div. Dec. 21, 2010)**
- Discoverability of additional mediums
 - Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (Sept. 21, 2010)

Cases

- Pharmacy Records v. Nassar, 2010 WL 2294538 (6th Cir. June 7, 2010)
- Hilton-Rorar v. State and Fed. Communications, Inc., 2010 WL 1486916 (N.D. Ohio Apr. 13, 2010)
- MVB Mortgage Corp. v. FDIC, 2010 WL 582641 (S.D. Ohio Feb. 11, 2010)

- N. Am. Rescue Prod., Inc. v. Bound Tree Medical, LLC, 2010 WL 187329 (S.D. Ohio May 10, 2010)
- O'Brien v. Ed Donnelly Enterprises, Inc., 2010 WL 3860522 (S.D. Ohio Sept. 27, 2010)
- R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d 262 (6th Cir. 2010)
- Ross v. Abercrombie & Fitch Co., 2010 WL 1957802 (S.D. Ohio May 14, 2010)
- United States v. Warshak, 2010 WL 5071766 (6th Cir. Dec. 14, 2010)

CASES

- Pharmacy Records v. Nassar, 2010 WL 2294538 (6th Cir. June 7, 2010)
“A party does not need formal notice to know that spoliation of evidence and misrepresentations may lead to dismissal.”
- Hilton-Rorar v. State and Fed. Communications, Inc., 2010 WL 1486916 (N.D. Ohio Apr. 13, 2010)
Emails among plaintiffs (both attorneys) and their counsel protected by either attorney-client privilege and/or work-product doctrine.
- MVB Mortgage Corp. v. FDIC, 2010 WL 582641 (S.D. Ohio Feb. 11, 2010)
Court declined to use concept of inadvertent production in area of expert testimony where counsel sent information to expert witness who used that information in report.
- N. Am. Rescue Prod., Inc. v. Bound Tree Medical, LLC, 2010 WL 187329 (S.D. Ohio May 10, 2010)
Attorney-client privilege waived through voluntary production of emails where party failed to take reasonable steps to prevent disclosure or rectify effort (FRE 502).
- O'Brien v. Ed Donnelly Enterprises, Inc., 2010 WL 3860522 (S.D. Ohio Sept. 27, 2010)
Sanctions denied where litigation by defendant's prior owner nor alteration of records put defendant on notice of future litigation.
- R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d 262 (6th Cir. 2010)
Appellate court affirmed district court's refusal to sanction party where third-party destroyed plaintiff's hard drives. Plaintiff had settled the independent action for spoliation under Ohio law against the third-party spoliator.

- Ross v. Abercrombie & Fitch Co., 2010 WL 1957802 (S.D. Ohio May 14, 2010)
Court ordered the parties to meet and confer to determine how to proceed with electronic discovery.
- United States v. Warshak, 2010 WL 5071766 (6th Cir. Dec. 14, 2010)
Court found Stored Communications Act unconstitutional to the extent it allows disclosure of emails without a search warrant.

SANCTIONS FOR E-DISCOVERY VIOLATIONS: BY THE NUMBERS

DAN H. WILLOUGHBY, JR.†

ROSE HUNTER JONES††

GREGORY R. ANTINE†††

ABSTRACT

This Article reviews our comprehensive survey of written opinions from cases in federal courts prior to January 1, 2010, involving motions for sanctions relating to the discovery of electronically stored information (ESI). We analyzed each case for various factors, including date, court, type of case, sanctioning authority, sanctioned party, sanctioned misconduct, sanction type, sanctions to counsel, if any, and the protections provided from sanctions by Federal Rule of Civil Procedure 37(e). The survey identified 401 sanction cases and 230 sanction awards and showed that sanction motions and awards have increased over time, particularly in the last five years. Sanctions against counsel are rare but are also increasing. Sanction motions have been filed in all types of cases and in courts across the country. Failure to produce ESI is the most common basis for sanctions. Courts have used a variety of different rules, statutes, and powers to sanction parties for e-discovery violations, including Rule 37 and the inherent power of the court, and courts impose many different sanction types on e-discovery violators, including the severe sanctions of dismissal, default judgment, adverse jury instructions, and sizeable monetary awards. Rule 37(e) has not provided broad protection from such sanctions.

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† Dan H. Willoughby, Jr. is a partner in the Atlanta office of King & Spalding and heads the firm's Discovery Center. 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, Stephanie Johnson, Arlisa Brown, Clifford Post, and John Tucker.

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INTRODUCTION

E-discovery sanctions are at an all-time high. We identified 230 sanction awards in 401 cases¹ involving motions for sanctions relating to the discovery of electronically stored information (ESI) in federal courts prior to January 1, 2010. We analyzed these cases for a variety of factors, including sanctioning court, sanctioning authority, sanctioned party, sanction type, and sanctioned misconduct. Our analysis indicates that although the annual number of e-discovery sanction cases is generally increasing, there has been a significant

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

increase in both motions and awards since 2004. Motions for sanctions have been filed in all types of cases and all types of courts. The sanctions imposed against parties in many cases are severe, including dismissals, adverse jury instructions, and significant monetary awards. Sanctions against counsel, although uncommon, are on the rise as well. All the while, the safe harbor provisions of Rule 37(e) of the Federal Rules of Civil Procedure² have provided little protection to parties or counsel.

Producing parties have struggled to comply with ever-expanding and increasingly complex responsibilities as ESI has played a predominant role in pretrial discovery. The liberal scope of discovery in federal courts, when coupled with ESI's defining characteristics—its high volume, broad dispersal, and dynamic nature—also confounds efforts to conduct discovery effectively and economically. Governing rules³ have been amended⁴ and supplemented⁵ to provide a procedural framework “to secure the just, speedy, and inexpensive

2. FED. R. CIV. P. 37(e).

3. For amendments and supplements of state rules regarding ESI, see, for example, Order Amending Rules 16(b), 16(c), 16.3, 26(b), 26.1, 26.2, 33(c), 34, 37(g), & 45, Ariz. Rules of Civil Procedure, No. R-06-0034 (Ariz. Sept. 5, 2007), *available at* http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf; and Order Amending Rules of Trial Procedure, No. 94S00 (Ind. Sept. 10, 2007), *available at* <http://www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf>, which both closely track the December 1, 2006, amendments to the Federal Rules of Civil Procedure. For a bill that adopts some aspects of the December 1, 2006, amendments to the Federal Rules but that also includes several nonconforming provisions, see Electronic Discovery Act, A.B. 5, 2009–2010 Leg., Reg. Sess. (Cal. 2009). For amendments and supplements that involve local rules regarding ESI, see, for example, Suggested Protocol for Discovery of Electronically Stored Information (D. Md. 2007), at 1, *available at* <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>, which states that its purpose “is to facilitate the just, speedy and inexpensive conduct of discovery involving ESI in civil cases,” and Guidelines for Discovery of Electronically Stored Information (D. Kan. Feb. 1, 2008), *available at* <http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf>, which states that “[t]hese guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 16, 26, 33, 34, 37, and 45, as amended December 1, 2006 and December 1, 2007, relating to the discovery of ESI.”

4. *See, e.g.*, FED. R. EVID. 502 (as amended Jan. 5, 2009) (addressing issues relating to the attorney-client privilege and the work-product doctrine, including inadvertent disclosure and subject-matter waiver). *Compare* FED. R. CIV. P. 26(b)(2)(B) (2006) (specifying different procedures and requirements for the discovery of “not reasonably accessible” ESI), *with* FED. R. CIV. P. 26(b)(2)(B) (2002) (containing no such provision for the discovery of ESI).

5. *See, e.g.*, SEVENTH CIRCUIT ELEC. DISCOVERY PILOT PROGRAM, PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 13 (2009), *available at* <http://www.ilcd.uscourts.gov/Statement-PhaseOne.pdf> (“The purpose of these Principles is . . . to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information . . .”).

determination”⁶ of discovery disputes involving ESI. Most notably, substantial amendments were made to the Federal Rules of Civil Procedure in 2006 to address the discovery of ESI in federal courts.⁷ Yet lawyers agree that discovery in the postamendment world is more expensive, more complicated, and more contentious than ever.⁸ The highest number of filed motions and awards relating to e-discovery sanctions in any single year prior to 2010 occurred in 2009,⁹ three years after the effective date of the 2006 amendments.

Performing complicated tasks on a deadline creates the opportunity for incorrect or incomplete production, whether resulting from innocent inadvertence or intentional malfeasance.¹⁰ When e-discovery efforts fall short, producing parties may be penalized, and prejudiced parties may be made whole through the award of sanctions. Marquee e-discovery-disaster cases, *Qualcomm Inc. v. Broadcom Corp.*¹¹ and *Metropolitan Opera Ass’n v. Local 100, Hotel Employees & Restaurant Employees International Union*,¹² are towering reminders of the most severe sanctions—dismissals, multimillion dollar awards, and bar association referrals—that can be imposed for the most egregious misconduct.¹³ Of greater concern to

6. FED. R. CIV. P. 1.

7. See generally ADVISORY COMM. ON FEDERAL RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2006.pdf> (recommending several changes to the Federal Rules of Civil Procedure).

8. See AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008), available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650 (“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.” (internal quotation marks omitted)).

9. See *infra* Figures 1 and 2.

10. See, e.g., *Gamby v. First Nat’l Bank*, No. 06-11020, 2009 WL 127782, at *5 (E.D. Mich. Jan. 20), *objection denied*, 2009 WL 963116 (E.D. Mich. Apr. 8, 2009) (dismissing the action for discovery failures); see also *id.* (“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.”).

11. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

12. *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003), *adhered to on reconsideration* by No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004).

13. See *Qualcomm*, 2008 WL 66932, at *17 (“Accordingly, for its monumental and

the average practitioner is the increasing frequency of sanction decisions, an issue most recently illustrated by *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*,¹⁴ in which all thirteen plaintiffs were sanctioned for e-discovery failings not rising to the level of intentional or willful conduct.¹⁵ In many cases, more attention is focused on e-discovery than on the merits,¹⁶ with a motion for sanctions an increasingly common filing.¹⁷ As a result, leading practitioners agree that more uniform standards and guidelines are needed to guide counsel through the complex tasks of discovery.¹⁸

I. E-DISCOVERY SANCTIONS HAVE INCREASED

Although discovery relating to ESI, and disputes involving it, appeared as early as the 1970s,¹⁹ only recently has the threat of sanctions relating to discovery of ESI been a prevalent concern of

intentional discovery violation, Qualcomm is ordered to pay \$8,568,633.24 to Broadcom”); *Metro. Opera*, 212 F.R.D. at 231 (“Plaintiff’s motion for judgment as to liability against defendants and for additional sanctions in the form of attorneys’ fees necessitated by the discovery abuse by defendants and their counsel . . . is granted . . .”).

14. *Pension Comm. v. Banc of Am. Sec. LLC*, 685 F. Supp. 2d 456, 496–97 (S.D.N.Y. 2010).

15. *Id.* at 478 (“I conclude that no plaintiff engaged in willful misconduct. However, . . . I find that [some plaintiffs] acted with gross negligence, and [other plaintiffs] acted in a negligent manner.”).

16. *See* *Technical Sales Assocs. v. Ohio Star Forge Co.*, No. 07-11745, 2009 WL 1212809, at *1 (E.D. Mich. May 1, 2009) (“Now, an electronic discovery dispute has become the sideshow which eclipses the circus.”); *Oscher v. Solomon Tropp Law Grp. (In re Atl. Int’l Mortg. Co.)*, 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.”).

17. *See infra* Part I.

18. *See, e.g.*, AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1, 14–17 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (expressing the need for “a framework for developing rules of reasonableness and proportionality”); Thomas Y. Allman, *Amending the Federal Rules (Again): Finding the Best Path to an Effective Duty to Preserve*, ENGAGE, Sept. 2010, at 92, 94, available at http://www.fed-soc.org/doclib/20100910_AllmanEngage11.2.pdf; Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 683 (2009) (arguing for a comprehensive adverse-inference-instruction standard).

19. *See, e.g.*, *United States v. IBM Corp.*, 58 F.R.D. 556, 559 (S.D.N.Y. 1973) (denying the plaintiff’s motion to compel the defendant to pay for the reconstruction of a destroyed database, but ordering the defendant to deposit the documents necessary for reconstructing the database with the court).

counsel. Sanctions for e-discovery violations began to appear in the early 1980s.²⁰ The first case identified in which e-discovery sanctions were awarded was *William T. Thompson Co. v. General Nutrition Corp.*²¹ In *William T. Thompson*, the plaintiff sued General Nutrition Corporation (GNC) for antitrust violations, alleging that GNC falsely advertised the availability of the plaintiff's products at GNC's stores. GNC's purchase, sale, and inventory records, kept in paper form and in computer files, were key to the plaintiff's case.²² After the plaintiff filed the lawsuit and initial discovery requests, GNC destroyed its paper and computer inventory records. The district court found that GNC could have maintained the computer records without undue burden and that it did not instruct its employees to preserve records, which resulted in the records' routine destruction.²³ The court awarded the plaintiff monetary sanctions, attorneys' fees and costs, and default judgment because GNC's bad faith destruction of documents prejudiced the plaintiff.²⁴

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

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

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

22. *Id.* at 1445–46, 1449–51.

23. *Id.* at 1446–47, 1450.

24. *Id.* at 1455–56.

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

Figure 1. Annual Number of E-Discovery Sanction Cases

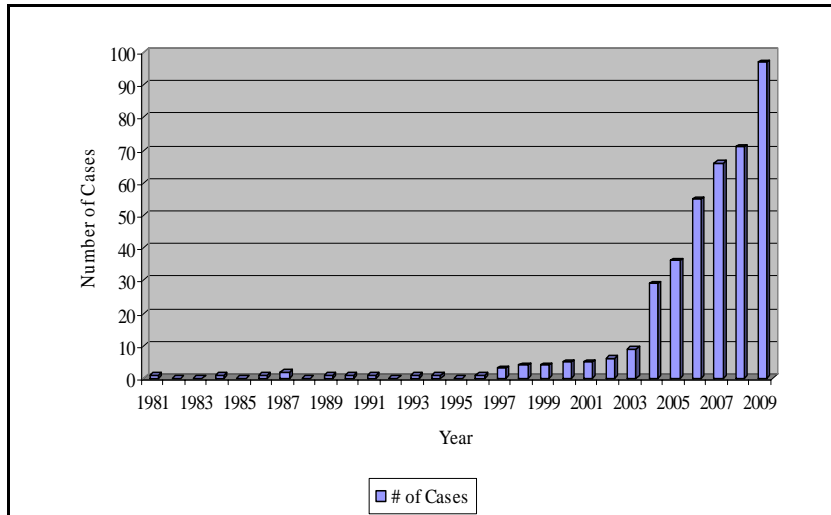
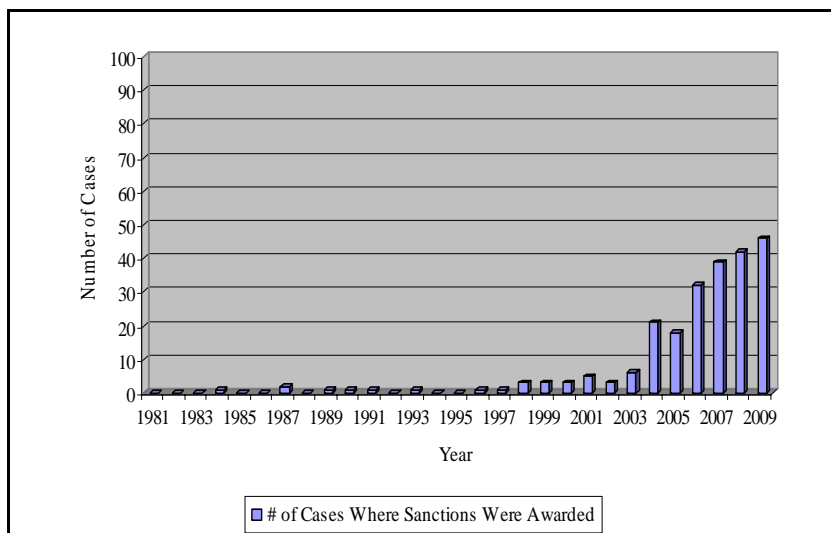


Figure 2. Annual Number of E-Discovery Sanction Awards



II. E-DISCOVERY SANCTION CASES ARE A DIVERSE DOCKET

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

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

Our research indicates that 183 district court judges and 111 magistrate judges from seventy-five federal districts in forty-four states,²⁶ as well as the Virgin Islands,²⁷ the District of Columbia,²⁸ and Puerto Rico,²⁹ have issued written opinions regarding sanctions involving e-discovery. All eleven of the federal appellate circuit courts,³⁰ as well as the Federal³¹ and D.C. Circuits,³² have issued

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

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

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

29. *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176, 185 (D.P.R. 1998) (sanctioning the defendant for destroying a laptop and awarding default judgment in favor of the plaintiffs).

30. *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 587–88 (6th Cir. 2009) (reversing the district court's denial of an adverse-inference-instruction sanction for the 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 have been relevant to future litigation); *Ibarra v. Baker*, 338 F. App'x 457, 470 (5th Cir. 2009) (reversing the district court's sanctions against the defendant's attorney for the client's deletion of emails because there was no finding of bad faith evidenced by an intent to destroy adverse information); *Brookhaven Typesetting Servs., Inc. v. Adobe Sys., Inc.*, 332 F. App'x 387, 389 (9th Cir. 2009) (affirming the district court's refusal to grant terminating sanctions for the destruction of electronic source code); *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 680 (7th Cir. 2008) (holding that a showing of bad faith is a prerequisite to imposing sanctions for the destruction of evidence); *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (instructing the district court that a finding of "bad faith" is not essential for an adverse-inference instruction for prelitigation spoliation and suggesting that "intentional," "willful," or "deliberate" conduct may be sufficient (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (internal quotation marks omitted))); *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 738–40 (10th Cir. 2005) (reversing the district court's order of dismissal for failure to preserve electronic data when the

opinions involving e-discovery sanctions. Additionally, nine bankruptcy court judges,³³ two United States Court of Federal Claims judges,³⁴ and one United States Court of International Trade judge³⁵ have addressed issues relating to e-discovery sanctions.

The vast majority of the 485 written rulings are from the district court level, with 251 written district court rulings and 189 magistrate rulings. Appellate review of e-discovery sanction cases has been

district court failed to provide a sufficient record of its reasoning and when no evidence of willfulness, bad faith, or culpability was presented); *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 53 (1st Cir. 2005) (affirming the district court's denial of monetary sanctions for discovery violations involving electronic files); *Inst. for Motivational Living v. Doulos Inst. for Strategic Consulting*, 110 F. App'x 283, 288–89 (3d Cir. 2004) (upholding the district court's findings of civil contempt for the deletion of emails in violation of a discovery order but reversing the award of legal fees that went beyond compensating the plaintiff for the actual loss it incurred from the violation); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 745–50 (8th Cir. 2004) (affirming an adverse-inference-jury-instruction sanction for the destruction of a radio tape when the 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”); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002) (reversing the district court's denial of an adverse-inference jury instruction for the appellee's failure to produce emails 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”); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (affirming the district court's denial of an adverse-inference-jury-instruction sanction for the unexplained loss of a train-speed-recorder tape when no evidence of bad faith was shown).

31. *Samsung Elecs. Co. v. Rambus, Inc.*, 523 F.3d 1374, 1380–81 (Fed. Cir. 2008) (denying as moot the plaintiff's request for monetary sanctions due to the defendant's spoliation of evidence because the defendant offered to pay the full amount of the attorneys' fees in dispute).

32. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 821 (D.C. Cir. 2009) (affirming a sanction for the delay in production of ESI when a nonparty subpoena recipient failed to produce ESI pursuant to a stipulated discovery schedule).

33. *Elec. Mach. Enters., Inc. v. Hunt Constr. Grp. (In re Elec. Mach. Enters., Inc.)*, 416 B.R. 801, 871–75 (Bankr. M.D. Fla. 2009); *Riverside Healthcare, Inc. v. Sysco Food Servs. of San Antonio, LP (In re Riverside Healthcare, Inc.)*, 393 B.R. 422, 428–30 (Bankr. M.D. La. 2008); *Hawaiian Airlines, Inc. v. Mesa Air Grp. (In re Hawaiian Airlines, Inc.)*, Bankr. No. 03-00817, Adv. No. 06-90026, 2007 WL 3172642, at *1 (Bankr. D. Haw. Oct. 30, 2007); *In re Kmart Corp.*, 371 B.R. 823, 843–854 (Bankr. N.D. Ill. 2007); *United States v. Krause (In re Krause)*, 367 B.R. 740, 758–59 (Bankr. D. Kan. 2007), *aff'd*, Nos. 08-1132, 08-1136, 2009 WL 5064348, at *8–9 (D. Kan. Dec. 16, 2009); *Quintus Corp. v. Avaya, Inc. (In re Quintus Corp.)*, 353 B.R. 77, 82–84 (Bankr. D. Del. 2006), *aff'd in part*, Nos. 01-501, 01-503, Adv. No. 04-53074, Civ. No. 06-769 SLR, 2007 WL 4233665 (D. Del. Nov. 29, 2007); *Oscher v. Solomon Tropp Law Grp. (In re Atl. Int'l Mortg. Co.)* 352 B.R. 503, 505 (Bankr. M.D. Fla. 2006); *Cohen Steel Supply, Inc. v. Fagnant (In re Fagnant)*, Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126, at *1–3 (Bankr. D.N.H. Dec. 13, 2004); *In re LTV Steel Co.*, 307 B.R. 37, 42–50 (Bankr. N.D. Ohio 2004).

34. *Consol. Edison Co. v. United States*, 90 Fed. Cl. 228, 252–63 (2009); *Morse Diesel Int'l, Inc. v. United States*, 81 Fed. Cl. 220, 221–22 (2008).

35. *Daewoo Elecs. Co. v. United States*, 650 F. Supp. 1003, 1004–07 (Ct. Int'l Trade 1986).

limited, perhaps because many cases settle or are otherwise not appealed. We identified only thirty-two cases at the appellate level.³⁶

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

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

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

Courts have used a variety of different rules, statutes, and powers to sanction parties for e-discovery violations.³⁷ Their array of authority appears to provide ample and flexible bases for addressing the various e-discovery sanction scenarios. We identified no case in which a court inclined to impose a sanction was unable to do so

36. *Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, 347 F. App'x 275 (9th Cir. 2009); *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119 (3d Cir. 2009); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567 (6th Cir. 2009); *Ibarra v. Baker*, 338 F. App'x 457 (5th Cir. 2009); *Wong v. Thomas*, 341 F. App'x 765 (3d Cir. 2009); *Brookhaven Typesetting Servs., Inc. v. Adobe Sys., Inc.*, 332 F. App'x 387 (9th Cir. 2009); *Sentis Grp. v. Shell Oil Co.*, 559 F.3d 888 (8th Cir. 2009); *In re Fannie Mae*, 552 F.3d 814; *Tri-Cnty. Motors, Inc., v. Am. Suzuki Motor Corp.*, 301 F. App'x 11 (2d Cir. 2008); *Buckley v. Mukasey*, 538 F.3d 306 (4th Cir. 2008); *Samsung Elecs.*, 523 F.3d 1374; *Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372 (6th Cir. 2008) (per curiam); *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672 (7th Cir. 2008); *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams., LLC*, 516 F.3d 623 (7th Cir. 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); *Tech. Recycling Corp. v. City of Taylor*, 186 F. App'x 624 (6th Cir. 2006); *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137 (11th Cir. 2006); *Procter & 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 485 (4th Cir. 2005); *Rowe v. Albertsons, Inc.*, 116 F. App'x 171 (10th Cir. 2004); *Inst. for Motivational Living v. Doulos Inst. for Strategic Consulting*, 110 F. App'x 283 (3d Cir. 2004); *Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004); *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981).

37. See generally Symposium, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 *FORDHAM L. REV.* 1, 4–5 (2009) (discussing the different sanction powers).

because particular rules or statutory requirements were not met. The sanctioning authorities include Rule 26(g)³⁸ and Rules 37(b),³⁹ 37(c),⁴⁰ and 37(d).⁴¹ Section 1927 of 28 U.S.C., titled “Counsel’s liability for excessive costs,” also provides authority to sanction any attorney “who so multiplies the proceedings in any case unreasonably and vexatiously.”⁴² Importantly, even when the requirements of the rules or statute are not met, federal courts still have sanctioned parties for e-discovery violations, deriving their sanctioning power from the court’s inherent authority. This inherent power arises from courts’ authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”⁴³

38. 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. *Id.* 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 attorneys’ fees incurred by the opposing party due to the violation. *Id.* 26(g)(3).

39. Rule 37(b) provides for sanctions against a party for violations of a discovery order. *Id.* 37(b). It lists potential sanctions ranging from dismissal to evidentiary preclusion to a stay of proceedings until the order is stayed. *Id.* 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 (vii) 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 noncompliant party, its attorneys, or both, “pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” *Id.* 37(b)(2)(C).

40. The court may sanction a noncompliant party under Rule 37(c) if the party does not make the required disclosure under Rule 26(a) or properly supplement its disclosures. *Id.* 37(c). Under Rule 37(c)(1), the court may prevent the use of the evidence or witnesses not provided. *Id.* 37(c)(1). The court may also require the payment of reasonable expenses and attorneys’ fees, inform the jury of the party’s failure, and impose any of the other sanctions at the court’s disposal under Rule 37. *Id.*

41. 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). *Id.* 37(d)(3). The court may also require that the sanctioned party, its attorney, or both pay the reasonable expenses associated with the motion. *Id.*

42. The court may sanction only attorneys under this provision. 28 U.S.C. § 1927 (2006). The court may impose as a sanction the payment of the excess costs and attorneys’ fees that result from the offending attorney’s conduct. *Id.*

43. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)).

Courts are not always precise in identifying the rule or statute upon which their sanction decisions are based. In some instances, no basis is identified. In other instances, there is a general citation to a rule without reference to a particular subsection. Many times, rules and statutes are cited together. Noting these difficulties, our analysis indicates that the most prevalent bases for sanctions were Rule 37 and the court's inherent authority. Rule 37, without reference to a particular subsection, was cited as a sole basis for sanctions in seventeen cases,⁴⁴ and one of its subsections (b), (c), or (d) was cited as the sole basis for sanctions in a total of twenty-four other cases.⁴⁵

44. *New Salida Ditch Co. v. United Fire & Cas. Ins. Co.*, No. 08-CV-00391-JLK-KLM, 2009 WL 2399933 (D. Colo. July 31, 2009); *Technical Sales Assocs. v. Ohio Star Forge Co.*, No. 07-11745, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009); *Armisted v. State Farm Mut. Auto. Ins. Co.*, No. 07-10259, 2009 WL 81103 (E.D. Mich. Jan. 9, 2009); *Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc.*, No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451 (E.D. Cal. Dec. 2, 2008); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007); *JPMorgan Chase Bank, N.A. v. Neovi, Inc.*, No. 2:06-CV-0095, 2007 WL 1514005 (S.D. Ohio May 16, 2007); *School-Link Techs., Inc. v. Applied Res., Inc.*, Civil Action No. 05-2088-JWL, 2007 WL 677647 (D. Kan. Feb. 28, 2007); *Rodgers v. Lowe's Home Ctrs., Inc.*, No. 05 C 0502, 2007 WL 257714 (N.D. Ill. Jan. 30, 2007); *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006); *Phx. Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006); *Adams v. Gateway, Inc.*, No. 2:02-CV-106, 2006 WL 2563418 (D. Utah Mar. 6, 2006) (ruling on de novo review of a magistrate judge's reports and recommendations and imposing sanctions); *McDowell v. District of Columbia*, 233 F.R.D. 192 (D.D.C. 2006); *Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506 (D. Md. 2005); *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392 (D.S.C. 2004); *Hahn v. Minn. Beef Indus., Inc.*, No. 00-2282 RHKSRN, 2002 WL 32667146 (D. Minn. Mar. 8, 2002); *Mktg. Specialists, Inc. v. Bruni*, 129 F.R.D. 35 (W.D.N.Y. 1989), *aff'd*, 923 F.2d 843 (2d Cir. 1990); *Oscher v. Solomon Tropp Law Grp. (In re Atl. Int'l Mortg. Co.)*, 352 B.R. 503, 505 (Bankr. M.D. Fla. 2006).

45. *Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372 (6th Cir. 2008) (per curiam); *Stratienko v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, No. 1:07-CV-258, 2009 WL 2168717 (E.D. Tenn. July 16, 2009); *Hanni v. Am. Airlines, Inc.*, No. C-08-00732 CW (EDL), 2009 WL 1505286 (N.D. Cal. May 27, 2009); *Grochocinski v. Schlossberg*, 402 B.R. 825 (N.D. Ill. 2009); *Gucci Am., Inc. v. Gucci*, No. 07 Civ. 6820(RMB)(JCF), 2009 WL 440463 (S.D.N.Y. Feb. 20, 2009); *Gamby v. First Nat'l Bank*, No. 06-11020, 2009 WL 127782 (E.D. Mich. Jan. 20), *objection denied*, 2009 WL 963116 (E.D. Mich. Apr. 8, 2009); *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, No. 3: 06-CV-0271-B, 2008 WL 3261095 (N.D. Tex. Aug. 8, 2008); *Aecon Bldgs., Inc. v. Zurich N. Am.*, 253 F.R.D. 655 (W.D. Wash. 2008); *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 01584(DJS), 2008 WL 961216 (D. Conn. Apr. 9, 2008); *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937 (D. Neb. Apr. 2, 2008); *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061-RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007); *Mother, LLC v. L.L. Bean, Inc.*, No. C06-5540 JKA, 2007 WL 2302974 (W.D. Wash. Aug. 7, 2007); *Giant Screen Sports LLC v. Sky High Entm't*, No. 05 C 7184, 2007 WL 627607 (N.D. Ill. Feb. 27, 2007); *NSB U.S. Sales, Inc. v. Brill*, No. 04 Civ. 9240(RCC), 2007 WL 258181 (S.D.N.Y. Jan. 26, 2007); *Louis Vuitton Malletier, S.A. v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 RMB MHD, 2006 WL 3476735 (S.D.N.Y. Nov. 30, 2006); *Elion v. Jackson*, Civil Action No. 05-0992 (PLF), 2006 WL 2583694 (D.D.C. Sept. 8, 2006); *Cardenas v. Dorel Juvenile Grp., Inc.*, No. 04-2478,

Rule 37—generally or one of its subsections—was cited in a total of 136 of the 230 cases awarding sanctions. The court’s inherent authority was cited in thirty-six cases as the sole basis for sanctions⁴⁶

2006 WL 1537394 (D. Kan. June 1, 2006); *Martin v. Nw. Mut. Life Ins. Co.*, No. 804CV02328T23MAP, 2006 WL 148991 (M.D. Fla. Jan. 19, 2006); *Shank v. Kitsap County*, No. C04-5843RJB, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005); *Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A.*, No. 02 Civ. 0795(CBM), 2005 WL 1026461 (S.D.N.Y. May 2, 2005); *In re Telxon Corp. Sec. Litig.*, Nos. 5:98CV2876, 1:01CV1078, 2004 WL 3192729 (N.D. Ohio July 16, 2004); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003); *Black & Veatch Int’l Co. v. Foster Wheeler Energy Corp.*, 211 F.R.D. 641 (D. Kan. 2002); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724 RPP, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000).

46. *United States v. Krause (In re Krause)*, Nos. 08-1132, 08-1136, 2009 WL 5064348 (D. Kan. Dec. 16, 2009); *Swofford v. Eslinger*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009); *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131 (N.D. Okla. July 29, 2009); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009); *Mullaney v. Hilton Hotels Corp.*, Civil No. 07-00313 ACK-LEK, 2009 WL 2006828 (D. Haw. June 30), *adopted as modified* by 2009 WL 2365561 (D. Haw. July 29, 2009); *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 264 F.R.D. 517 (N.D. Cal. 2009); *Kvitka v. Puffin Co.*, No. 1:06-CV-0858, 2009 WL 385582 (M.D. Pa. Feb. 13, 2009); *SD Prot., Inc. v. Del Rio*, 587 F. Supp. 2d 429 (E.D.N.Y. 2008); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C06-3359, 2008 WL 4786671 (N.D. Cal. Oct. 29, 2008); *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. 05-4896 (PGS), 2008 WL 4513696 (D.N.J. Oct. 1, 2008); *Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219 (D. Nev. May 16, 2008); *Wells v. Berger, Newmark & Fenchel, P.C.*, Civil Action No. 07 C 3061, 2008 WL 4365972 (N.D. Ill. Mar. 18, 2008); *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008); *Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc.*, No. 06-15100, 2007 WL 3333016 (E.D. Mich. Nov. 9, 2007); *Paris Bus. Prods., Inc. v. Genisis Techs., LLC*, Civil No. 07-0260 (JBS), 2007 WL 3125184 (D.N.J. Oct. 24, 2007); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF (RS), 2007 WL 1848665 (N.D. Cal. June 27, 2007); *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007); *Padgett v. City of Monte Sereno*, No. C 04-03946 JW, 2007 WL 878575 (N.D. Cal. Mar. 20, 2007); *Tilton v. McGraw-Hill Cos.*, No. C06-0098RSL, 2007 WL 777523 (W.D. Wash. Mar. 9, 2007); *Qantum Commc’ns Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007); *Optowave Co. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422 (M.D. Fla. Nov. 7, 2006); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006); *Easton Sports, Inc. v. Warrior LaCrosse, Inc.*, No. 05-72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006); *Creative Sci. Sys., Inc. v. Forex Capital Mkts., LLC*, No. C 04-03746 JF (RS), 2006 WL 870973 (N.D. Cal. Apr. 4, 2006); *DaimlerChrysler Motors v. Bill Davis Racing, Inc.*, No. CIV.A. 03-72265, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332 (D.N.J. 2004); *Leon v. IDX Sys. Corp.*, No. C03-1158P, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), *aff’d*, 464 F.3d 951 (9th Cir. 2006); *AdvantaCare Health Partners, LP v. Access IV*, No. 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004); *Brick v. HSBC Bank USA*, No. 04-CV-0129E(F), 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004); *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27 (D.D.C. 2004); *GE Harris Ry. Elecs., L.L.C. v. Westinghouse Air Brake Co.*, No. 99-070-GMS, 2004 WL 5702740 (D. Del. Mar. 29, 2004); *Invision Media Commc’ns, Inc. v. Fed. Ins. Co.*, No. 02Civ.5461(NRB)(KNF), 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001); *United States ex rel. Koch v. Koch Indus., Inc.*, 197 F.R.D. 463 (N.D. Okla. 1998); *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622 (D. Utah 1998), *aff’d in part and rev’d on other grounds*, 222 F.3d 1262 (10th Cir. 2000); *Hawaiian Airlines, Inc. v. Mesa Air Grp. (In re Hawaiian*

and cited in another seventy-two cases as one of multiple bases for sanctions. Rule 26 was cited as the sole basis for sanctions in four cases⁴⁷ and in combination with another rule in twenty-seven cases.⁴⁸ Section 1927 was cited in combination with another rule in two cases.⁴⁹

Airlines, Inc.), Bankr. No. 03-00817, Adv. No. 06-90026, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007).

47. Plunk v. Village of Elwood, No. 07 C 88, 2009 WL 1444436 (N.D. Ill. May 20, 2009); Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423 (D. Neb. Nov. 5, 2007); Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376 (D.N.J. 2006); E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005).

48. Travel Sentry, Inc. v. Tropp, 2009 WL 3859272 (E.D.N.Y. Nov. 18, 2009); Wixon v. Wyndham Resort Dev. Corp., No. C 07-02361 JSW, 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009); Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (*Bray & Gillespie II*), 259 F.R.D. 591 (M.D. Fla.), *rejected in part* by No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla., Nov. 11, 2009), and *adopted in part* by No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010); Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009); Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States, No. 04-CV-1798, 2009 WL 1617773 (E.D.N.Y. June 9, 2009); Kipperman v. Onex Corp., 260 F.R.D. 682 (N.D. Ga. 2009); Adele S.R.L. v. Filene's Basement, Inc., No. 06 Civ. 244, 2009 WL 855955 (S.D.N.Y. Mar. 24, 2009); Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC, No. 06-cv-02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009); Lessley v. City of Madison, No. 4:07-cv-136-DFH-WGH, 2008 WL 4977328 (S.D. Ind. Nov. 20, 2008); Canon U.S.A., Inc. v. S.A.M., Inc., No. 07-01201, 2008 WL 2522087 (E.D. La. June 20, 2008); R & R Sails, Inc. v. Ins. Co. of Pa., 251 F.R.D. 520 (S.D. Cal. 2008); *In re Rosenthal*, Civil Action No. H-04-186, 2008 WL 983702 (S.D. Tex. Mar. 28, 2008); Finley v. Hartford Life & Accident Ins. Co., 249 F.R.D. 329 (N.D. Cal. 2008); Fleming v. City of New York, No. 01 Civ. 8885, 2007 WL 4302501 (S.D.N.Y. Dec. 7, 2007); APC Filtration, Inc. v. Becker, No. 07 CV 1462, 2007 WL 3046233 (N.D. Ill. Oct. 12, 2007); Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSWL SHX, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007); *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007); Claredi Corp. v. Seebeyond Tech. Corp., No. 4:04CV1304 RWS, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007); Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007); May v. Pilot Travel Ctrs. LLC, No. 2:05-cv-918, 2006 WL 3827511 (S.D. Ohio Dec. 28, 2006); Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004), *withdrawn in part*, No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio July 28, 2005); Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004); Marcin Eng'g, LLC v. Founders at Grizzly Ranch, LLC, 219 F.R.D. 516 (D. Colo. 2003); Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003), *adhered to on reconsideration* by No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004); Poole *ex rel.* Elliot v. Textron, Inc., 192 F.R.D. 494 (D. Md. 2000); Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987); Fagnant v. Cohen Steel Supply, Inc. (*In re Fagnant*), Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004).

49. Inst. for Motivational Living v. Doulos Inst. for Strategic Consulting 110 F. App'x 283 (3d Cir. 2004); Pharmacy Records v. Nassar (*Pharmacy Records II*), 572 F. Supp. 2d 869 (E.D. Mich. 2008).

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

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

III. FAILURE TO PRESERVE ESI IS THE MOST PREVALENT
SANCTIONABLE CONDUCT

The misconduct underlying a particular sanction award is sometimes a single type of misconduct, such as failure to preserve ESI or failure to produce ESI. More often it is a combination of multiple types of misconduct. In the 230 cases⁵¹ in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in ninety cases. It was also cited as one of the types of misconduct in forty-six cases involving multiple misconduct. Failure to produce was the sole basis for sanctions in thirty-five cases and was mentioned in another sixty-seven cases involving multiple types of misconduct. Delay in production was the sole basis for sanctions in sixteen cases and mentioned in forty-five other cases involving multiple types of misconduct.

IV. COURTS HAVE USED A WIDE RANGE OF SANCTIONS FOR
E-DISCOVERY VIOLATIONS

Sanctions for e-discovery violations have varied greatly in type and severity depending on the circumstances of the case. For the most serious violations, courts have imposed the most draconian of sanctions: dismissal of all claims or defenses. Courts have also given adverse jury instructions and imposed monetary awards for serious e-discovery lapses. In cases of lesser violations, courts have used a continuum of penalties to punish the misconduct and remedy the resulting prejudice. Such penalties have included evidence

50. For the annual number of defendants and plaintiffs sanctioned, see *infra* Appendix B.

51. See *infra* Appendix C.

preclusion,⁵² witness preclusion,⁵³ disallowance of certain defenses,⁵⁴ reduced burden of proof,⁵⁵ removal of jury challenges,⁵⁶ limiting closing statements,⁵⁷ supplemental discovery,⁵⁸ and additional access to computer systems.⁵⁹ In some instances, more creative courts have imposed nontraditional sanctions, such as payments to bar

52. *See* *Shank v. Kitsap County*, No. C04-5843RJB, 2005 WL 2099793, at *4 (W.D. Wash. Aug. 30, 2005) (prohibiting the defendant from introducing digital audio recordings due to last-minute discovery compliance); *Thompson v. U.S. Dep't. of Hous. & Urban Dev.*, 219 F.R.D. 93, 104-05 (D. Md. 2003) (precluding the defendant from introducing eighty thousand email records produced after the court-imposed discovery deadlines).

53. *See* *R & R Sails, Inc. v. Ins. Co. of Pa.*, 251 F.R.D. 520, 528 (S.D. Cal. 2008) (precluding the defendant from introducing expert witness testimony that relied on ESI disclosed after the deadline imposed by the discovery order); *Elion v. Jackson*, Civil Action No. 05-0992 (PLF), 2006 WL 2583694, at *1-2 (D.D.C. Sept. 8, 2006) (precluding the defendant from offering any witness testimony regarding an email not disclosed in a timely fashion).

54. *See* *JPMorgan Chase Bank, N.A. v. Neovi, Inc.*, No. 2:06-CV-0095, 2007 WL 1514005, at *1 (S.D. Ohio May 16, 2007) (precluding the defense of lack of personal jurisdiction as a sanction for the defendant's failure to produce information concerning contacts with the state); *Kamatani v. BenQ Corp.*, Civil Action No. 2:03-CV-437, 2005 WL 2455825, at *15-16 (E.D. Tex. Oct. 4, 2005) (striking down defenses relating to a specific license agreement as a sanction for the defendant's bad faith representations to the court and its failure to produce the requested email documents); *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 35 (D.D.C. 2004) (waiving the defense of lack of personal jurisdiction as a sanction for the defendant's failure to comply with the court's discovery orders).

55. *See* *Great Am. Ins. Co. v. Lowry Dev., LLC*, Civil Action Nos. 1:06CV097 LTS-RHW, 1:06CV412 LTS-RHW, 2007 WL 4268776, at *4 (S.D. Miss. Nov. 30, 2007) (reducing the burden of proof to a preponderance of the evidence standard as a sanction for the destruction of computer data in a contract case concerning mutual mistake).

56. *See* *Juniper Networks, Inc. v. Toshiba Am., Inc.*, No. 2:05-CV-479, 2007 WL 2021776, at *4 (E.D. Tex. July 11, 2007) (taking away two juror strikes from the defendant as a sanction for the defendant's intentional failure to produce electronic source code). In addition, the court limited the defendant's time for voir dire and opening statements to one-half the time allotted to the plaintiff, prohibited the defendant from offering any expert testimony regarding noninfringement, instructed the jury on the court's finding of intentionally withholding documents, and awarded attorneys' fees and costs resulting from the defendant's withholding of documents. *Id.*

57. *See id.* (limiting closing statements to one-third of the time allotted to the plaintiff as a sanction for the defendant's intentional failure to produce electronic code).

58. *See* *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV, 2009 WL 982460, at *10 (S.D. Fla. Apr. 9, 2009) (permitting further depositions 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, at *14 (S.D.N.Y. Feb. 24, 2005) (reopening discovery depositions due to emails produced after the close of expert discovery).

59. *See* *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 01584(DJS), 2008 WL 961216, at *10, *14 (D. Conn. Apr. 9, 2008) (granting the plaintiff permission to inspect electronic records as a sanction for the defense attorney's "obstructive tactics" during discovery); *Hahn v. Minn. Beef Indus., Inc.*, No. 00-2282 RHKSRN, 2002 WL 32667146, at *4 (D. Minn. Mar. 8, 2002) (ordering the reinspection of a computer database after inaccurate and incomplete information was provided).

associations to fund educational programs,⁶⁰ participation in court-created ethics programs,⁶¹ referrals to the state bar,⁶² payments to the clerk of court,⁶³ and barring the sanctioned party from taking additional depositions prior to compliance with the court's discovery order.⁶⁴

A. *Dismissals*

We identified thirty-six cases in which a terminating sanction of dismissal or default judgment was entered against a party for e-discovery violations. Twenty of these thirty-six dismissed cases involved failure to preserve evidence,⁶⁵ seven involved failure to

60. See *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009) (ordering the defendant to pay \$2,500 to a bar association to support a seminar program on litigation hold orders and preserving electronic data).

61. See *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *18–19 (S.D. Cal. Jan. 7), (ordering the sanctioned attorneys to attend a court-created ethics program), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

62. See *id.* at *17 (ordering the sanctioned attorneys to appear before the state bar for further ethical investigations).

63. See *Claredi Corp. v. Seebeyond Tech. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at *4 (E.D. Mo. Mar. 8, 2007) (ordering the defendant to pay \$20,000 to the clerk of court as a sanction for unnecessarily prolonging and increasing the expense of litigation); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 111 (D.N.J. 2006) (ordering the defendant 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) (ordering the defendant to pay \$15,000 to the clerk of court for consuming the court’s time and resources).

64. See *Edelen v. Campbell Soup Co.*, Civil Action No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117, at *3 (N.D. Ga. Dec. 8, 2009) (barring the plaintiff from taking depositions until it narrowed its electronic discovery requests).

65. *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137 (D. Mont. 2009); *Kvitka v. Puffin Co.*, No. 1:06-CV-0858, 2009 WL 385582 (M.D. Pa. Feb. 13, 2009); *Gutman v. Klein*, No. 03 CV 1570(BMC)(RML), 2008 WL 4682208 (E.D.N.Y. Oct. 15), *adopted by* No. 03 Civ. 1570(BMC), 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008); *Atl. Recording Corp. v. Howell*, No. 06-CV-02076-PHX-NVW, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008); *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937 (D. Neb. Apr. 2, 2008), *adopted in part by* 2009 WL 1152267 (D. Neb. Apr. 23, 2009); *Pharmacy Records v. Nassar (Pharmacy Records I)*, 248 F.R.D. 507 (E.D. Mich. 2008), *aff’d*, 379 F. App’x 522 (6th Cir. 2010); *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093 FMC-JCx, 2007 WL 4877701 (C.D. Cal. Dec. 13, 2007); *Ameriwood Indus. v. Liberman*, No. 4:06CV524DJS, 2007 WL 5110313 (E.D. Mo. July 3, 2007); *Plasse v. Tyco Elecs. Corp.*, 448 F. Supp. 2d 302 (D. Mass. 2006); *Krumwiede v. Brighton Assocs.*, No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006); *Arista Records, L.L.C. v. Tschirhart*, 241 F.R.D. 462 (W.D. Tex. 2006); *Comm’n’s Ctr., Inc. v. Hewitt*, No. Civ.S-03-1968 WBS KJ, 2005 WL 3277983 (E.D. Cal. Apr. 5, 2005); *Leon v. IDX Sys. Corp.*, No. C03-1158P, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), *aff’d*, 464 F.3d 951 (9th Cir. 2006); *Kucala Enters., Ltd. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 21230605, (N.D. Ill. May 27), *adopted as modified by* 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003); *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176 (D.P.R. 1998); *Cabinetware Inc. v. Sullivan*, No. 90-313 CLKK, 1991 WL 327959 (E.D. Cal. July

produce,⁶⁶ and nine involved both failure to preserve and failure to produce.⁶⁷ In sixteen cases, the court noted that the client, counsel, or both made misrepresentations to the court.⁶⁸ In imposing the most severe sanction of dismissal, twenty of thirty-six courts considered the prejudice to the opposing party resulting from the loss or failure to produce evidence, with eight courts describing the resulting prejudice as “serious[],”⁶⁹ “inalterabl[e],”⁷⁰ “severe[],”⁷¹ “substantial,”⁷² “unfair[],”⁷³ or “significant[].”⁷⁴

15, 1991); *Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984); *United States 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); *Quintus Corp. v. Avaya, Inc. (In re Quintus Corp.)*, 353 B.R. 77 (Bankr. D. Del. 2006), *aff’d in part*, Nos. 01-501, 01-502, 01-503, Adv. No. 04-53074, Civ. No. 06-769 SLR, 2007 WL 4233665 (D. Del. Nov. 29, 2007).

66. *Tech. Recycling Corp. v. City of Taylor*, 186 F. App’x 624 (6th Cir. 2006); *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993); 1100 W., LLC v. Red Spot Paint & Varnish Co., No. 1:05-cv-01670-LJM-JMS, 2009 WL 1605118 (S.D. Ind. June 5, 2009); *Gamby v. First Nat’l Bank*, No. 06-11020, 2009 WL 127782 (E.D. Mich. Jan. 20), *objection denied*, 2009 WL 963116 (E.D. Mich. Apr. 8, 2009); *Quantum Commc’ns Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007); *Appraisal Mgmt. Co. III v. FNC, Inc.*, No. 1:04CV1158, 2005 WL 3088561 (N.D. Ohio Nov. 17, 2005).

67. *Grange Mut. Cas. Co. v. Mack*, 270 F. App’x 372 (6th Cir. 2008) (per curiam); *S. New Eng. Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82 (D. Conn. 2008), *aff’d*, No. 08-4518-cv, 2010 WL 3325962 (2d Cir. Aug. 25, 2010); *Koninklike Philips Elecs. N.V. v. KXD Tech., Inc.*, No. 2:05-cv-1532-RLH-GWF, 2007 WL 3101248 (D. Nev. Oct. 16, 2007), *appeal dismissed*, 539 F.3d 1039 (9th Cir. 2008); *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061-RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007); *Giant Screen Sports LLC v. Sky High Entm’t*, No. 05 C 7184, 2007 WL 627607 (N.D. Ill. Feb. 27, 2007); *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006); *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Servs. N. Am. LLC*, No. 03 C 760, 2006 WL 2808158 (N.D. Ill. Sept. 6, 2006), *aff’d sub nom. Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams. LLC*, 516 F.3d 623 (7th Cir. 2008); *In re Telxon Corp. Sec. Litig.*, Nos. 5:98CV2876, 01:01CV1078, 2004 WL 3192729 (N.D. Ohio July 16, 2004); *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003), *adhered to on reconsideration* by No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004).

68. *Tech. Recycling*, 186 F. App’x at 627; *Crown Life*, 995 F.2d at 1383; *Red Spot*, 2009 WL 1605118, at *10; *Ail. Recording*, 2008 WL 4080008, at *1; *S. New Eng. Tel.*, 251 F.R.D. at 93–94; *Pharmacy Records I*, 248 F.R.D. at 530; *Columbia Pictures*, 2007 WL 4877701, at *8; *Koninklike Philips*, 2007 WL 3101248, at *13; *Perez-Farias*, 2007 WL 2327073, at *5; *Quantum*, 473 F. Supp. 2d at 1272; *Plasse*, 448 F. Supp. 2d at 308; *DaimlerChrysler*, 2006 WL 2808158, at *5; *Commc’ns Ctr.*, 2005 WL 3277983, at *2; *Telxon*, 2004 WL 3192729, at *20; *Metro. Opera*, 212 F.R.D. at 186; *Cabinetware*, 1991 WL 327959, at *2.

69. *Computer Assocs.*, 133 F.R.D. at 170.

70. *Columbia Pictures*, 2007 WL 4877701, at *5.

71. *Kvitka v. Puffin Co.*, No. 1:06-CV-0858, 2009 WL 385582, at *5 (M.D. Pa. Feb. 13, 2009); *Kucala Enters., Ltd. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 21230605, at *8 (N.D. Ill. May 27), *adopted as modified* by 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003); *United States v. Krause (In re Krause)*, 367 B.R. 740, 770 (Bankr. D. Kan. 2007), *aff’d*, Nos. 08-1132, 08-1136,

In nineteen of the thirty-six cases, the court emphasized a pattern of misconduct.⁷⁵ The court often considered failure to preserve ESI or produce ESI in tandem with misrepresentations (or far-fetched explanations) to the court regarding how spoliation of data had occurred.⁷⁶ In some cases, spoliation of ESI was part of a pattern of 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.⁷⁷ When a

2009 WL 5064348 (D. Kan. Dec. 16, 2009).

72. *Arista Records, L.L.C. v. Tschirhart*, 241 F.R.D. 462, 465 (W.D. Tex. 2006).

73. *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *9 (D. Neb. Apr. 2, 2008).

74. *Ameriwood Indus. v. Liberman*, No. 4:06CV524-DJS, 2007 WL 5110313, at *7 (E.D. Mo. July 3, 2007).

75. *Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372 (6th Cir. 2008) (per curiam); *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004); *Crown-Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993); *1100 W., LLC v. Red Spot Paint & Varnish Co.*, No. 1:05-cv-01670-LJM-JML, 2009 WL 1605118 (S.D. Ind. June 5, 2009); *Gamby v. First Nat'l Bank*, No. 06-11020, 2009 WL 127782 (E.D. Mich. Jan. 20), *objection denied*, 2009 WL 963116 (E.D. Mich. Apr. 8, 2009); *Kvitka*, 2009 WL 385582, at *5; *Gutman v. Klein*, No. 03 CV 1570(BMC)(RML), 2008 WL 4682208 (E.D.N.Y. Oct. 15), *adopted by* No. 03 Civ. 1570(BMC), 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008); *S. New Eng. Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82 (D. Conn. 2008), *aff'd*, No. 08-4518-cv, 2010 WL 3325962 (2d Cir. Aug. 25, 2010); *Pharmacy Records v. Nassar (Pharmacy Records I)*, 248 F.R.D. 507 (E.D. Mich. 2008), *aff'd*, 379 F. App'x 522 (6th Cir. 2010); *Koninklike Philips Elecs. v. KXD Tech., Inc.*, No. 2:05-cv-1532-RLH-GWF, 2007 WL 3101248 (D. Nev. Oct. 16, 2007), *appeal dismissed*, 539 F.3d 1039 (9th Cir. 2008); *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061-RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007); *Quantum Commc'ns Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007); *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006); *Plasse v. Tyco Elecs. Corp.*, 448 F. Supp. 2d 302 (D. Mass. 2006); *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Servs. N. Am. LLC*, No. 03 C 760, 2006 WL 2808158 (N.D. Ill. Sept. 6, 2006), *aff'd sub nom. Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams. LLC*, 516 F.3d 623 (7th Cir. 2008); *In re Telxon Corp. Sec. Litig.*, Nos. 5:98CV2876, 1:01CV1078, 2004 WL 3192729 (N.D. Ohio July 16, 2004); *Kucala*, 2003 WL 21230605, at *8; *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176 (D.P.R. 1998); *In re Krause*, 367 B.R. at 763.

76. *See, e.g., Crown Life*, 995 F.2d at 1382–85; *Kvitka*, 2009 WL 385582, at *3; *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093 FMC-JCx, 2007 WL 4877701, at *5–6 (C.D. Cal. Dec. 13, 2007); *Leon v. IDX Sys. Corp.*, No. C03-1158P, 2004 WL 5571412, at *3 (W.D. Wash. Sept. 30, 2004), *aff'd*, 464 F.3d 951 (9th Cir. 2006); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1446 (C.D. Cal. 1984).

77. *See, e.g., Grange Mut.*, 270 F. App'x at 373 (finding a judgment of liability against the defendant was warranted by the defendant's willful, prejudicial, and repeated obstruction of discovery and disregard of court orders); *Koninklike Philips*, 2007 WL 3101248, at *23 (noting a "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, at *12 (finding terminating sanctions were warranted when the defendant failed to provide discovery in violation of court orders, failed to pay the plaintiff's costs of bringing discovery

court did impose a terminating sanction solely for failure to preserve or produce ESI, that missing information was typically the key evidence needed to prove the claims or defenses in the action.⁷⁸

No cases resulted in dismissal when the court characterized the misconduct as mere negligence. In two of the thirty-six dismissal cases, the court characterized the conduct as gross negligence.⁷⁹ The remainder of the thirty-four cases involved some sort of willful conduct, with twenty involving bad faith.⁸⁰

This willful misconduct typically involved the modification or destruction of data through automated and manual file deletions or physical tampering with computer systems.⁸¹ Courts typically held that these actions involved deliberate and knowing actions to destroy data, that the conduct was far beyond simple negligence, and that the conduct was willful and intentional. Several courts noted the sinister

motions per the court's orders, neglected to pay sanctions of \$500 per day, and repeatedly failed to follow the court's local rules for filing documents); *Century ML-Cable*, 43 F. Supp. 2d at 185 (“[Defendant] has engaged in contumacious bad faith scorched earth defense tactics in a blatant effort to prevent plaintiffs from proving their case against him.”).

78. See, e.g., *Arista Records, L.L.C. v. Tschirhart*, 241 F.R.D. 462, 465 (W.D. Tex. 2006) (“By destroying the best evidence relating to the central issue in the case, defendant has inflicted the ultimate prejudice upon the plaintiffs.”); *Krumwiede v. Brighton Assocs.*, No. 05 C 3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006) (finding the lost data were “evidence essential to” allegations of misappropriation of trade secrets); *Cabinetware Inc. v. Sullivan*, No. Civ. S. 90-313 CLKK, 1991 WL 327959, at *4 (E.D. Cal. July 15, 1991) (considering source code “essential evidence” in a copyright infringement action); *Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) (“Destroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party.”).

79. See *Gamby*, 2009 WL 127782, at *3 (“Defendant had been *grossly negligent, if not willful*, in failing to meet its discovery obligations . . .” (emphasis added)); *Kucala*, 2003 WL 21230605, at *7 (“Kucala was at fault by . . . acting with *gross negligence and in flagrant disregard of the court order . . .*” (emphasis added)).

80. *Grange Mut.*, 270 F. App’x at 376; *Tech. Recycling Corp. v. City of Taylor*, 186 F. App’x 624, 633 (6th Cir. 2006); *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137, 1146–47 (D. Mont. 2009); *Red Spot*, 2009 WL 1605118, at *27–28; *Kvitka*, 2009 WL 385582, at *6; *Gutman*, 2008 WL 4682208, at *8; *S. New Eng. Tel.*, 251 F.R.D. at 92; *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *9 (D. Neb. Apr. 2, 2008); *Pharmacy Records I*, 248 F.R.D. at 529; *Koninklike Philips*, 2007 WL 3101248, at *2–3; *Perez-Farias*, 2007 WL 2327073, at *9; *Ameriwood Indus. v. Liberman*, No. 4:06CV524-DJS, 2007 WL 5110313, at *6 (E.D. Mo. July 3, 2007); *Quantum*, 473 F. Supp. 2d at 1261; *Tschirhart*, 241 F.R.D. at 464; *Krumwiede*, 2006 WL 1308629, at *8; *Comm’ns Ctr., Inc. v. Hewitt*, No. Civ.S-03-1968 WBS KJ, 2005 WL 3277983, at *2 (E.D. Cal. Apr. 5, 2005); *Leon*, 2004 WL 5571412, at *4; *Telxon*, 2004 WL 3192729, at *26; *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003), *adhered to on reconsideration* by No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004); *Wm. T. Thompson Co.*, 593 F. Supp. at 1456.

81. See, e.g., *Atl. Recording Corp. v. Howell*, No. 06-CV-02076-PHX-NVW, 2008 WL 4080008, at *1 (D. Ariz. Aug. 29, 2008); *Comm’ns Ctr.*, 2005 WL 3277983, at *2–3; *Kucala*, 2003 WL 21230605, at *2; *Cabinetware*, 1991 WL 327959, at *2.

name of the software deletion program that the sanctioned party used, such as “Evidence Eliminator,”⁸² “Wipe & Delete,”⁸³ and “GhostSurf,”⁸⁴ in demonstrating the egregious nature of the misconduct. 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.”⁸⁵

In dismissing these cases, courts considered a variety of rules, statutes, and sources of authority, often in conjunction with each other. Most prevalent was the use of Rule 37(b) in conjunction with the court’s inherent power (fifteen cases),⁸⁶ followed by Rule 37(b) by itself (eleven cases).⁸⁷ In five other cases, the court relied only on its

82. *Commc’ns Ctr.*, 2005 WL 3277983, at *1; *Kucala*, 2003 WL 21230605, at *1.

83. *Atl. Recording*, 2008 WL 4080008, at *1.

84. *United States v. Krause (In re Krause)*, 367 B.R. 740, 748 (Bankr. D. Kan. 2007), *aff’d*, Nos. 08-1132, 08-1136, 2009 WL 5064348 (D. Kan. Dec. 16, 2009)

85. *Metro. Opera*, 212 F.R.D. at 222; *see also Pharmacy Records I*, 248 F.R.D. at 530 (“The actions of the plaintiffs and their attorney in this case are so egregious that they have forfeited their right to proceed in court.”); *id.* at 531 (“[C]onsidering [the actions] . . . invariably leads to the conclusion that the plaintiffs and their attorney have conducted a campaign of fraud.”); *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914, at *5 (E.D. Mich. Dec. 20, 2006) (“[T]here is a point beyond which bumbling and blindness to a party’s discovery obligations sufficiently resemble the sort of willful, intentional and malicious conduct that calls for the heavy sanction of judgment by default.”); *Telxon*, 2004 WL 3192729, at *33 (“The only conclusion . . . is that [the defendant] 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 those responsibilities.”).

86. *1100 W., LLC v. Red Spot Paint & Varnish Co.*, No. 1:05-cv-01670-LJM-JMS, 2009 WL 1605118, at *26 (S.D. Ind. June 5, 2009); *Gutman v. Klein*, No. 03 CV 1570(BMC)(RML), 2008 WL 4682208, at *11 (E.D.N.Y. Oct. 15), *adopted by* No. 03 Civ. 1570(BMC), 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008); *Atl. Recording*, 2008 WL 4080008, at *1; *S. New Eng. Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 90 (D. Conn. 2008), *aff’d*, No. 08-4518-cv, 2010 WL 3325962 (2d Cir. Aug. 25, 2010); *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093 FMC-JCx, 2007 WL 4877701, at *5 (C.D. Cal. Dec. 13, 2007); *Koninklike Philips Elecs. N.V. v. KXD Tech., Inc.*, No. 2:05-cv-1532-RLH-GWF, 2007 WL 3101248, at *12–13 (D. Nev. Oct. 16, 2007), *appeal dismissed*, 539 F.3d 1039 (9th Cir. 2008); *Ameriwood Indus. v. Liberman*, No. 4:06CV524-DJS, 2007 WL 5110313, at *4 (E.D. Mo. July 3, 2007); *Arista Records, L.L.C. v. Tschirhart*, 241 F.R.D. 462, 464 (W.D. Tex. 2006); *Krumwiede v. Brighton Assocs.*, No. 05 C 3003, 2006 WL 1308629, at *9 (N.D. Ill. May 8, 2006); *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176, 182–83 (D.P.R. 1998); *Cabinetware*, 1991 WL 327959, at *3; *Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 168 (D. Colo. 1990); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *In re Krause*, 367 B.R. at 746 (citing 11 U.S.C. § 105 on the inherent power of a bankruptcy court); *Quintus Corp. v. Avaya, Inc. (In re Quintus Corp.)*, 353 B.R. 77, 92 (Bankr. D. Del. 2006), *aff’d in part*, Nos. 01-501, 01-502, 01-503, Adv. 04-53074, Civ. 06-769 SLR, 2007 WL 4233665 (D. Del. Nov. 29, 2007).

87. *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137, 1141–42 (D. Mont. 2009); *Grange Mut. Cas. Co. v. Mack*, 270 F. App’x 372, 376 (6th Cir. 2008) (per curiam); *Tech. Recycling*

inherent power.⁸⁸ Courts have also combined Rule 37 and Rule 26 to dismiss two cases.⁸⁹ Rule 37 was coupled with Rule 41 twice.⁹⁰

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

Corp. v. City of Taylor, 186 F. App'x 624, 633, 631 (6th Cir. 2006); Computer Task Grp., Inc. v. Brothby, 364 F.3d 1112, 1115–17 (9th Cir. 2004); Crown-Life Ins. Co. v. Craig, 995 F.2d 1376, 1381–84 (7th Cir. 1993); Gamby v. First Nat'l Bank, No. 06-11020, 2009 WL 127782, at *2 (E.D. Mich. Jan. 20), *objection denied*, 2009 WL 963116 (E.D. Mich. Apr. 8, 2009); Perez-Farias v. Global Horizons, Inc., No. CV-05-3061-RHW, 2007 WL 2327073, at *9 (E.D. Wash. Aug. 10, 2007); Giant Screen Sports LLC v. Sky High Entm't, No. 05 C 7184, 2007 WL 627607, at *2-3 (N.D. Ill. Feb. 27, 2007); *PML*, 2006 WL 3759914, at *2-4; *Commc'ns Ctr.*, 2005 WL 3277983, at *1; *Telxon*, 2004 WL 3192729, at *19-21.

88. Kvitka v. Puffin Co., No. 1:06-CV-0858, 2009 WL 385582, at *3 (M.D. Pa. Feb. 13, 2009); *Pharmacy Records I*, 248 F.R.D. at 529; *Qantum Commc'ns Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1268 (S.D. Fla. 2007); *Plasse v. Tyco Elecs. Corp.*, 448 F. Supp. 2d 302, 308–11 (D. Mass. 2006); *Leon v. IDX Sys. Corp.*, No. C03-1158P, 2004 WL 5571412, at *3 (W.D. Wash. Sept. 30, 2004), *aff'd*, 464 F.3d 951 (9th Cir. 2006).

89. *Kucala Enters., Ltd. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 21230605, at *4 (N.D. Ill. May 27), *adopted as modified* by 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003); *Metro. Opera*, 212 F.R.D. at 219–20 (citing 28 U.S.C § 1927 to sanction counsel and also relying on the court's inherent power).

90. *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Servs. N. Am. LLC*, No. 03 C 760, 2006 WL 2808158, at *8 (N.D. Ill. Sept. 6, 2006), *aff'd sub nom.* *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams. LLC*, 516 F.3d 623 (7th Cir. 2008); *Appraisal Mgmt. Co. III v. FNC, Inc.*, No. 1:04CV1158, 2005 WL 3088561, at *7 (N.D. Ohio Nov. 17, 2005).

91. *Grange Mut.*, 270 F. App'x 372; *Tech. Recycling*, 186 F. App'x 624; *Crown Life*, 995 F.2d 1376; *Gamby*, 2009 WL 127782; *Gutman*, 2008 WL 4682208; *Atl. Recording*, 2008 WL 4080008; *S. New Eng. Tel.*, 251 F.R.D. 82; *Koninklike Philips*, 2007 WL 3101248; *Perez-Farias*, 2007 WL 2327073; *Ameriwood*, 2007 WL 5110313; *Giant Screen*, 2007 WL 627607; *PML*, 2006 WL 3759914; *Plasse*, 448 F. Supp. 2d 302; *Tschirhart*, 241 F.R.D. 462; *Krumwiede*, 2006 WL 1308629; *Appraisal Mgmt.*, 2005 WL 3088561; *Commc'ns Ctr.*, 2005 WL 3277983; *Kucala*, 2003 WL 21230605; *Telxon*, 2004 WL 3192729; *Metro. Opera*, 212 F.R.D. 178; *Century ML-Cable*, 43 F. Supp. 2d 176; *Wm. T. Thompson Co.*, 593 F. Supp. 1443; *In re Krause*, 367 B.R. 740. One court noted that Rule 37(b)(2)(C) could not be a basis for a dismissal absent a violation of a court order. *Pharmacy Records I*, 248 F.R.D. at 529.

92. *Tech. Recycling*, 186 F. App'x 624; *Computer Task Grp.*, 364 F.3d 1112; *Crown Life*, 995 F.2d 1376; 1100 W., LLC v. Red Spot Paint & Varnish Co., No. 1:05-cv-01670-LJM-JMS, 2009 WL 1605118 (S.D. Ind. June 5, 2009); *Gamby*, 2009 WL 963116; *Gutman*, 2008 WL 4682208; *Atl. Recording*, 2008 WL 4080008; *S. New Eng. Tel.*, 251 F.R.D. 82; *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937 (D. Neb. Apr. 2, 2008); *Koninklike Philips*, 2007 WL 3101248; *Perez-Farias*, 2007 WL 2327073; *Ameriwood*, 2007 WL 5110313; *Qantum*, 473 F. Supp. 2d 1249; *PML*, 2006 WL 3759914; *Plasse*, 448 F. Supp. 2d 302; *Tschirhart*, 241 F.R.D. 462; *Krumwiede*, 2006 WL 1308629; *Appraisal Mgmt.*, 2005 WL 3088561; *Commc'ns Ctr.*, 2005 WL 3277983; *Leon*, 2004 WL 5571412; *Kucala*, 2003 WL 21230605; *Telxon*, 2004 WL 3192729; *Metro. Opera*,

Although courts have imposed sanctions of dismissal in a total of thirty-six cases involving e-discovery violations, the number of dismissals per year since 2006 has slightly decreased, from seven in 2006 to five in 2009.⁹⁴ Courts continue to reserve terminating sanctions for only the most egregious of cases. In these terminated cases, the misconduct typically occurred after repeated warnings and after repeated willful failures that irreparably compromised the court's ability to adjudicate on the merits, leaving no alternative but dismissal.

B. Adverse Jury Instructions

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

The cases in which adverse jury instructions were issued included forty-three cases involving failure to preserve,⁹⁵ four cases involving

212 F.R.D. 178; *Cabinetware Inc. v. Sullivan*, No. 90-313 CLKK, 1991 WL 327959, (E.D. Cal. July 15, 1991); *Wm. T. Thompson Co.*, 593 F. Supp. 1443; *In re Krause*, 367 B.R. 740; *Quintus Corp. v. Avaya, Inc.* (*In re Quintus Corp.*), 353 B.R. 77 (Bankr. D. Del. 2006), *aff'd in part*, Nos. 01-501, 01-502, 01-503, Adv. No. 04-53074, Civ. No. 06-769 SLR, 2007 WL 4233665 (D. Del. Nov. 29, 2007).

93. *DaimlerChrysler*, 2006 WL 2808158; *Century ML-Cable*, 43 F. Supp. 2d 176.

94. For the annual number of dismissals, see *infra* Appendix B.

95. *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001); *Swofford v. Eslinger*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009); *Se. Mech. Servs., Inc. v. Brody (Brody II)*, 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.*, 632 F. Supp. 2d 494 (D. Md. 2009); *Arista Records, LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009); *Plunk v. Village of Elwood*, No. 07 C 88, 2009 WL 1444436 (N.D. Ill. May 20, 2009); *Technical Sales Assocs. v. Ohio Star Forge Co.*, No. 07-11745, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009); *TeleQuest Int'l Corp. v. Dedicated Bus. Sys. Inc.*, Civ. Action No. 06-5359 (PGS), 2009 WL 690996 (D.N.J. Mar. 11, 2009); *Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate LLC*, No. 06-cv-02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009); *Am. Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2009 WL 982788 (N.D. Ill. Feb. 20, 2009); *Kvitka v. Puffin Co.*, No. 1:06-CV-0858, 2009 WL 385582 (M.D. Pa. Feb. 13, 2009); *Fox v. Riverdeep, Inc.*, No. 07-CV-13622, 2008 WL 5244297 (E.D. Mich. Dec. 16, 2008); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C06-3359, 2008 WL 4786671 (N.D. Cal. Oct. 29, 2008); *Dowling v. United States*, No. 2000-CV-0049, 2008 WL 4534174 (D.V.I. Oct. 6, 2008); *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. 05-4896 (PGS), 2008 WL 4513696 (D.N.J. Oct. 1, 2008); *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559 (N.D. Cal. 2008); *Babaev v. Grossman*, No. CV03-5076, 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008); *Keithley v. Home Store.com, Inc.*, No. 03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008); *Ogin v. Ahmed*, 563 F. Supp. 2d 539 (M.D. Pa. 2008); *Johnson v. Wells Fargo Home Mortg.*,

failure to produce,⁹⁶ and five cases involving both.⁹⁷ The defendant was sanctioned with an adverse jury instruction in forty-four cases,⁹⁸ while the plaintiff was so sanctioned in only eight cases.⁹⁹

Inc., No. 3:05-CV-0321-RAM, 2008 WL 2142219 (D. Nev. May 16, 2008); *Wells v. Berger*, Newmark & Fenchel, P.C., Civil Action No. 07 C 3061, 2008 WL 4365972 (N.D. Ill. Mar. 18, 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); *Kounelis v. Sherrer*, 529 F. Supp. 2d 503 (D.N.J. 2008); *Great Am. Ins. Co. v. Lowry Dev., LLC*, Civil Action Nos. 106CV097, 1:06CV412, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007); *Paris Bus. Prods. v. Genisis Techs., LLC*, Civil No. 07-0260 (JBS), 2007 WL 3125184 (D.N.J. Oct. 24, 2007); *Cyntegra, Inc. v. Idexx Labs., Inc.*, No. CV 06-4170 PSG (CTx), 2007 WL 5193736 (C.D. Cal. Sept. 21, 2007), *aff'd*, 322 F. App'x 569 (9th Cir. 2009); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007); *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007); *Teague v. Target Corp.*, No. 3:06CV191, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007); *Optowave Co. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422 (M.D. Fla. Nov. 7, 2006); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006); *Easton Sports, Inc. v. Warrior LaCrosse, Inc.*, No. 05-72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006); *DaimlerChrysler Motors v. Bill Davis Racing, Inc.*, No. CIV.A. 03-72265, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005); *Larson v. Bank One Corp.*, No. 00 C 2100, 2005 WL 4652509 (N.D. Ill. Aug. 18, 2005); *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005); *Hous. Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332 (D.N.J. 2004); *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Anderson v. Crossroads Capital Partners, LLC*, No. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004); *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000).

96. *Juniper Networks Inc. v. Toshiba Am. Inc.*, No. 2:05-CV-479, 2007 WL 2021776 (E.D. Tex. July 11, 2007); *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); *Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A.*, No. 02 Civ. 0795(CBM), 2005 WL 1026461 (S.D.N.Y. May 2, 2005); *Network Computing Servs. Corp. v. Cisco Sys.*, 223 F.R.D. 392 (D.S.C. 2004).

97. *Lewis v. Ryan*, No. 04-CV-2468-JLS (NLS), 2009 WL 3486702 (S.D. Cal. Oct. 23, 2009); *Metrokane, Inc. v. Built NY, Inc.*, Nos. 06 Civ. 14447(LAK)(MHD), 07 Civ. 2084(LAK)(MHD), 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008); *Super Future Equities, Inc. v. Wells Fargo Bank*, No. 3: 06-CV-0271-B, 2008 WL 3261095 (N.D. Tex. Aug. 8, 2008); *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. 02 Civ. 7377(LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007); *3M Innovative Prods. Co. v. Tomar Elecs.*, Civ. No. 05-756(MJP/AJB), 2006 WL 2670038 (D. Minn. Sept. 18, 2006).

98. *Stevenson*, 354 F.3d 739; *Minn. Mining & Mfg. Co.*, 259 F.3d 587; *Lewis*, 2009 WL 3486702; *Swofford*, 671 F. Supp. 2d 1274; *Brody II*, 657 F. Supp. 2d 1293; *KCH Servs.*, 2009 WL 2216601; *Goodman*, 632 F. Supp. 2d 494; *Usenet.com*, 633 F. Supp. 2d 124; *Plunk*, 2009 WL 1444436; *Technical Sales Assocs.*, 2009 WL 728520; *TeleQuest Int'l*, 2009 WL 690996; *Smith*, 2009 WL 482603; *Am. Family Mut.*, 2009 WL 982788; *Fox*, 2008 WL 5244297; *Dong Ah Tire*, 2008 WL 4786671; *Dowling*, 2008 WL 4534174; *Arteria*, 2008 WL 4513696; *Nursing Home Pension Fund*, 254 F.R.D. 559; *Babaev*, 2008 WL 4185703; *Keithley*, 2008 WL 3833384; *Ogin*, 563 F. Supp. 2d 539; *Wells*, 2008 WL 4365972; *Connor*, 546 F. Supp. 2d 1360; *Nucor*, 251 F.R.D. 191; *Kounelis*, 529 F. Supp. 2d 503; *Great Am. Ins. Co.*, 2007 WL 4268776; *Paris Bus. Prods.*, 2007 WL 3125184; *Doe*, 248 F.R.D. 372; *Juniper Networks*, 2007 WL 2021776; *World Courier*, 2007 WL 1119196; *In re NTL*, 244 F.R.D. 179; *Optowave*, 2006 WL 3231422; *Napster*, 462 F. Supp. 2d 1060; *Easton Sports*, 2006 WL 2811261; *3M Innovative Prods.*, 2006 WL 2670038; *z4 Techs.*, 2006 WL 2401099; *DaimlerChrysler Motors*, 2005 WL 3502172; *Larson*, 2005 WL 4652509; *Lyondell-*

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

The courts used their inherent power and the Federal Rules of Civil Procedure, both separately and in conjunction with each other, to impose the sanctions. The inherent power of the court was cited in fourteen cases as the sole basis for sanction¹⁰⁵ and in twenty other cases in which multiple bases for sanctioning were cited.¹⁰⁶ Rule 37

Citgo, 2005 WL 1026461; *E*Trade*, 230 F.R.D. 582; *Hous. Rights Ctr.*, 2005 WL 3320739; *Mosaid Techs.*, 348 F. Supp. 2d 332; *Zubulake V*, 229 F.R.D. 422; *Danis*, 2000 WL 1694325.

99. *Kvitka*, 2009 WL 385582; *Metrokane*, 2008 WL 4185865; *Super Future Equities*, 2008 WL 3261095; *Johnson*, 2008 WL 2142219; *Cyntegra*, 2007 WL 5193736; *Teague*, 2007 WL 1041191; *Network Computing Servs.*, 223 F.R.D. 392; *Anderson*, 2004 WL 256512.

100. *Dowling*, 2008 WL 4534174; *Cyntegra*, 2007 WL 5193736; *Easton Sports*, 2006 WL 2811261; *DaimlerChrysler Motors*, 2005 WL 3502172.

101. *Lewis v. Ryan*, 261 F.R.D. 513 (S.D. Cal. 2009); *Fox*, 2008 WL 5244297; *Doe*, 248 F.R.D. 372; *Teague*, 2007 WL 1041191; *In re NTL*, 244 F.R.D. 179; *Napster*, 462 F. Supp. 2d 1060; *Larson*, 2005 WL 4652509; *Hous. Rights Ctr.*, 2005 WL 3320739; *Mosaid Techs.*, 348 F. Supp. 2d 332; *Danis*, 2000 WL 1694325.

102. *Plunk*, 2009 WL 1444436; *Dong Ah Tire*, 2008 WL 4786671; *Keithley*, 2008 WL 3833384.

103. *Stevenson*, 354 F.3d 739; *Swofford*, 671 F. Supp. 2d 1274; *Smith*, 2009 WL 482603; *Kvitka*, 2009 WL 385582; *Usenet.com*, 633 F. Supp. 2d 124; *Brody II*, 657 F. Supp. 2d at 1293; *KCH Servs.*, 2009 WL 2216601; *Goodman*, 632 F. Supp. 2d 494; *Technical Sales Assocs.*, 2009 WL 728520; *Arteria*, 2008 WL 4513696; *Metrokane*, 2008 WL 4185865; *Kounelis*, 529 F. Supp. 2d 503; *Wells*, 2008 WL 4365972; *TeleQuest Int'l*, 2009 WL 690996; *Am. Family Mut.*, 2009 WL 982788; *Babaev*, 2008 WL 4185703; *Nursing Home Pension Fund*, 254 F.R.D. 559; *Super Future Equities*, 2008 WL 3261095; *Ogin*, 563 F. Supp. 2d 539; *Johnson*, 2008 WL 2142219; *Connor*, 546 F. Supp. 2d 1360; *Nucor*, 251 F.R.D. 191; *Great Am. Ins. Co.*, 2007 WL 4268776; *Paris Bus. Prods.*, 2007 WL 3125184; *Juniper Networks*, 2007 WL 2021776; *World Courier*, 2007 WL 1119196; *Optowave*, 2006 WL 3231422; *3M Innovative Prods.*, 2006 WL 2670038; *z4 Techs.*, 2006 WL 2401099; *E*Trade*, 230 F.R.D. 582; *Lyondell-Citgo*, 2005 WL 1026461; *Network Computing Servs.*, 223 F.R.D. 392; *Zubulake V*, 229 F.R.D. 422; *Anderson*, 2004 WL 256512.

104. *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001).

105. *Swofford*, 671 F. Supp. 2d at 1280; *Goodman*, 632 F. Supp. 2d at 505; *Kvitka*, 2009 WL 385582; *Arteria*, 2008 WL 4513696, at *5; *Wells*, 2008 WL 4365972, at *6; *Johnson*, 2008 WL 2142219, at *6; *Nucor*, 251 F.R.D. at 194; *Paris Bus. Prods.*, 2007 WL 3125184, at *2; *World Courier*, 2007 WL 1119196, at *1; *Optowave*, 2006 WL 3231422, at *7; *Napster*, 462 F. Supp. 2d at 1066; *Easton Sports*, 2006 WL 2811261, at *4; *DaimlerChrysler Motors*, 2005 WL 3502172, at *1; *Mosaid Techs.*, 348 F. Supp. 2d at 335.

106. *Stevenson*, 354 F.3d at 745; *Lewis*, 261 F.R.D. at 518–19; *Brody II*, 657 F. Supp. 2d at 1302; *Usenet.com*, 633 F. Supp. 2d at 138; *Plunk*, 2009 WL 1444436, at *9; *TeleQuest Int'l*, 2009 WL 690996, at *2; *Smith*, 2009 WL 482603, at *3; *Am. Family Mut.*, 2009 WL 982788, at *4 n.6; *Dowling v. United States*, No. 2000-CV-0049, 2008 WL 4534174, at *1 (D.V.I. Oct. 6, 2008); *Metrokane*, 2008 WL 4185865, at *3; *Nursing Home Pension Fund*, 254 F.R.D. at 563; *Keithley*,

was cited in three cases by itself¹⁰⁷ and in fourteen other cases with multiple citations to authority.¹⁰⁸ Rule 26 was cited in four cases with other sanctioning authority.¹⁰⁹

C. Monetary Awards

We identified seventy-seven e-discovery sanction cases providing for specific monetary awards, including awards for default judgments, monetary sanctions, and attorneys' fees and costs.¹¹⁰ The awards ranged from \$250.00¹¹¹ to \$8,830,983.69.¹¹² There are five cases with monetary awards over \$5 million,¹¹³ an additional four cases with monetary awards at or above \$1 million,¹¹⁴ and six additional cases

2008 WL 3833384, at *2; *Cyntegra, Inc. v. Idexx Labs., Inc.*, No. CV 06-4170 PSG (CTx), 2007 WL 5193736, at *2 (C.D. Cal. Sept. 21, 2007), *aff'd*, 322 F. App'x 569 (9th Cir. 2009); *Juniper Networks*, 2007 WL 2021776, at *3; *In re NTL*, 244 F.R.D. at 191; *3M Innovative Props.*, 2006 WL 2670038, at *3; *Larson*, 2005 WL 4652509, at *8; *E*Trade*, 230 F.R.D. at 586; *Hous. Rights Ctr.*, 2005 WL 3320739, at *1; *Zubulake V*, 229 F.R.D. at 430.

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

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

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

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

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

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

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

114. *Kipperman v. Onex Corp.*, 260 F.R.D. 682, 700 (N.D. Ga. 2009) (\$1,022,700); *z4 Techs., Inc. v. Microsoft Corp.*, No. 6:06-CV-142, 2006 WL 2401099, at *25 (E.D. Tex. Aug. 18, 2006) (\$2.3 million); *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21, 26 (D.D.C. 2004) (\$2,755,027.48); *Hawaiian Airlines, Inc. v. Mesa Air Grp. (In re Hawaiian Airlines, Inc.)*, Bankr. No. 03-00817, Adv. No. 06-90026, 2008 WL 185649 (Bankr. D. Haw. Jan. 22, 2008) (\$3,929,532.21).

with monetary awards over \$250,000.¹¹⁵ In total, we identified twenty-seven cases with monetary awards exceeding \$100,000.¹¹⁶

V. COUNSEL SANCTIONS ARE INCREASING

Sanctioning counsel for e-discovery violations is an extraordinary remedy. “A mild presumption exists that clients are in the best position to control their counsel and, absent egregious counsel conduct, should bear the discovery sanctions.”¹¹⁷ Out of 401 e-discovery sanction cases,¹¹⁸ we identified only thirty instances of counsel being sanctioned, with sanctions specifically awarded in twenty-five cases¹¹⁹ and indicated but deferred in five cases.¹²⁰ We also

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

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

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

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

119. *Edelen v. Campbell Soup Co.*, Civil Action No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117, at *3 (N.D. Ga. Dec. 8, 2009); *Travel Sentry, Inc. v. Tropp*, 669 F. Supp. 2d 279, 286–87 (E.D.N.Y. 2009); *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1288–89 (M.D. Fla. 2009); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 291 (S.D.N.Y. 2009); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (Bray & Gillespie II)*, 259 F.R.D. 591, 617 (M.D. Fla.), *rejected in part by* No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla., Nov. 11, 2009), *and adopted in part by* No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010); *1100 W., LLC v. Red Spot Paint & Varnish Co.*, No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118, at *35 (S.D. Ind. June 5, 2009); *Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc.*, No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451, at *3 (E.D. Cal. Dec. 2, 2008); *R & R Sails Inc. v. Ins. Co. of Pa.*, 251 F.R.D. 520, 528 (S.D. Cal. 2008); *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 01584(DJS), 2008 WL 961216, at *14 (D. Conn. Apr. 9, 2008); *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *1 (S.D. Cal. Jan. 7), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); *Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc.*, No. 06-15100, 2007 WL 3333016, at *8 (E.D. Mich. Nov. 9, 2007); *Bd. of Regents v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *7 (D. Neb. Nov. 5, 2007); *Digene Corp. v. Third Wave Techs., Inc.*, No. 07-C-22-C, 2007 WL 4939048, at *3 (W.D. Wis. Oct. 24, 2007); *In re Sept. 11th Liab. Ins.*, 243 F.R.D. at 132; *NSB U.S. Sales, Inc. v. Brill*, No. 04 Civ. 9240(RCC), 2007 WL 258181, at *3 (S.D.N.Y. Jan. 26, 2007); *Phx. Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006); *Rousseau v. Echosphere Corp.*, No. Civ. A. 03-1230, 2005 WL 2176839, at *11 (W.D. Pa. Aug. 30, 2005); *Brick v. HSBC Bank USA*, No. 04-CV-0129E(F), 2004 WL 1811430, at *6 (W.D.N.Y. Aug. 11, 2004); *Metro. Opera*

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

Figure 3. Annual Number of Counsel E-Discovery Sanctions

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

Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178, 231 (S.D.N.Y. 2003), *adhered to on reconsideration* by No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004); Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56, 62 (D.N.H. 2001), *adopted in part and rejected in part* by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), *aff'd in part and vacated in part*, 428 F.3d 1 (1st Cir. 2005); Poole *ex rel.* Elliott v. Textron, Inc., 192 F.R.D. 494, 511 (D. Md. 2000); Mktg. Specialists, Inc. v. Bruni, 129 F.R.D. 35, 55 (W.D.N.Y. 1989), *aff'd*, 923 F.2d 843 (2d Cir. 1990); Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 (N.D. Cal. 1987); Oscher v. Solomon Tropp Law Grp. (*In re* Atl. Int'l Mortg. Co.), 352 B.R. 503, 510-11 (Bankr. M.D. Fla. 2006); Cohen Steel Supply, Inc. v. Fagnant (*In re* Fagnant), Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126, at *4 (Bankr. D.N.H. Dec. 13, 2004).

120. *Pharmacy*, 248 F.R.D. at 718-19; *Mancia v. Mayflower Textile Servs. Co.*, Civil Action No. CCB-08-273, 2009 WL 2252151, at *3-4 (D. Md. July 28, 2009); *Exact Software N. Am., Inc. v. Infocon, Inc.*, 479 F. Supp. 2d 702, 718-19 (N.D. Ohio 2006); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 113-15 (D.N.J. 2006); *Tantivy Commc'ns., Inc. v. Lucent Techs. Inc.*, No. Civ.A.2:04CV79 (TJW), 2005 WL 2860976, at *3-4 (E.D. Tex. Nov. 1, 2005).

121. *Grider*, 580 F.3d at 140, 144; *Ibarra*, 338 F. App'x at 470; *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2-3 (N.D. Okla. July 29, 2009); *In re Rosenthal*, Civil Action No. H-04-186, 2008 WL 983702, at *12 (S.D. Tex. Mar. 28, 2008); *Finley v. Hartford Life & Accident Ins. Co.*, 249 F.R.D. 329, 332 (N.D. Cal. 2008); *Quinby*, 2005 WL 3453908, at *9-10; *Cuomo*, 1998 WL 395320, at *2-3.

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

Courts have cited six general sources of authority for e-discovery sanctions against counsel: Rule 26, Rule 37, Section 1927, the inherent power of the court, local court rules, and state bar regulations governing attorney conduct. Some written rulings are less than precise regarding the specific basis for their decisions, often discussing multiple sources of authority and the Federal Rules of Civil Procedure generally rather than citing to specific subsections. Cited in twenty of the thirty cases, Rule 37 is the most frequently used authority for imposing sanctions on counsel for e-discovery violations.¹²³ The inherent power of the court was used in eleven¹²⁴ of the thirty cases and was relied upon as the sole source of authority in only two of those cases.¹²⁵

122. See *Grider*, 580 F.3d at 140, 144 (vacating sanctions against counsel under Rules 26 and 37 because the trial court did not undertake a substantial justification analysis, and under 28 USC § 1927 for lack of factual specificity as to the conduct of each defendant); *Ibarra*, 338 F. App'x at 470–71 (vacating sanctions against in-house counsel for a county attorney general's office because there was no finding that counsel acted in bad faith, provided a false certification, or committed fraud).

123. 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.”); *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003); *Apex Oil Co. v. Belcher Co.*, 855 F.2d 1009, 1014 (2d Cir. 1988). *But see Travel Sentry*, 669 F. Supp. 2d at 284; *Richard Green*, 262 F.R.D. at 288; *Bray & Gillespie II*, 259 F.R.D. at 608; *Red Spot*, 2009 WL 1605118, at *26–27; *Kipperman v. Onex Corp.*, 260 F.R.D. 682, 699 (N.D. Ga. 2009); *Ajaxo*, 2008 WL 5101451, at *2; *Pharmacy Records v. Nassar (Pharmacy Records I)*, 248 F.R.D. 507, 529 (E.D. Mich. 2008), *aff'd*, 379 F. App'x 522 (6th Cir. 2010); *R & R Sails*, 251 F.R.D. at 526; *Sterle*, 2008 WL 961216, at *7; *Qualcomm*, 2008 WL 66932, at *13 n.9; *Digene*, 2007 WL 4939048, at *1; *In re Sept. 11th Liab. Ins.*, 243 F.R.D. at 131–32; *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 110 (D.N.J. 2006); *NSB*, 2007 WL 258181, at *2; *Phx. Four*, 2006 WL 1409413, at *7; *Metro. Opera*, 212 F.R.D. at 224; *Poole*, 192 F.R.D. at 506; *Mktg. Specialists*, 129 F.R.D. at 53; *Atl. Int'l*, 352 B.R. at 510; *Fagnant*, 2004 WL 2944126, at *1.

124. *Travel Sentry*, 669 F. Supp. 2d at 284; *Swofford*, 671 F. Supp. 2d at 1287; *Richard Green*, 262 F.R.D. at 288; *Red Spot*, 2009 WL 1605118, at *27–28; *Pharmacy Records I*, 248 F.R.D. at 529; *Qualcomm*, 2008 WL 66932, at *13 n.9; *Auto. Inspection Servs.*, 2007 WL 3333016, at *3; *Wachtel*, 239 F.R.D. at 100; *Brick*, 2004 WL 1811430, at *3; *Metro. Opera*, 212 F.R.D. at 231; *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. at 554.

125. *Auto. Inspection Servs.*, 2007 WL 3333016, at *3; *Brick*, 2004 WL 1811430, at *3.

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

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

Negligence is a failure to conform to the standards of acceptable conduct “to participate meaningfully and fairly in the discovery phase.”¹²⁹ In all four cases in which the court sanctioned counsel for negligent conduct, counsel was in possession of client materials but failed to produce them in a timely fashion.¹³⁰

126. In only four of thirty cases were outside counsel sanctioned without the client also being sanctioned. *See Auto. Inspection Servs.*, 2007 WL 3333016, at *7 (“[T]he Court will not attribute [counsel’s] conduct to his client and deprive it a chance to present its case on the merits.”); *Rousseau v. Echosphere Corp.*, No. Civ.A.03-1230, 2005 WL 2176839, at *1 (W.D. Pa. Aug. 30, 2005) (sanctioning counsel alone because the client’s case had already been dismissed); *Brick*, 2004 WL 1811430, at *3 n.29 (sanctioning counsel alone because his “disregard of discovery obligations . . . could not have been performed on behalf of his client”); *Fagnant*, 2004 WL 2944126, at *2, *4 (sanctioning counsel alone for carelessly or negligently delaying document delivery, despite the client’s good faith efforts).

127. *Swofford*, 671 F. Supp. 2d at 1288–89; *Qualcomm*, 2008 WL 66932, at *1; *Nat’l Ass’n of Radiation Survivors*, 115 F.R.D. at 558; *see also Bray & Gillespie II*, 259 F.R.D. at 588, 590 (sanctioning the client and outside counsel, and reminding in-house counsel not to rely blindly on outside counsel); *Poole*, 192 F.R.D. at 611 (directing sanctions at the client and outside counsel, but also holding that sanctions are appropriate against in-house counsel).

128. *See Edelen v. Campbell Soup Co.*, Civil Action No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117, at *2–3 (N.D. Ga. Dec. 8, 2009) (sanctioning counsel for the failure to comply with a court order to narrow overly broad requests that sought the complete contents of employee laptops); *Ajaxo*, 2008 WL 5101451, at *1–2 (sanctioning counsel for noncompliance with a court order requiring production of documents in a searchable format); *R & R Sails*, 251 F.R.D. at 526 (sanctioning counsel for producing only eleven of the seventeen pages in its possession prior to the relevant deposition); *Fagnant*, 2004 WL 2944126, at *1–2 (sanctioning counsel for not producing computer database printouts in its possession until the eve of trial).

129. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010).

130. *See R & R Sails*, 251 F.R.D. at 526 (sanctioning counsel for not producing the entire electronic claim log until the next month); *Digene Corp. v. Third Wave Techs., Inc.*, No. 07-C-22-C, 2007 WL 4939048, at *1–2 (W.D. Wis. Oct. 24, 2007) (sanctioning counsel for delaying notebook production for months because counsel mistakenly believed the notebooks had already been sent electronically); *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56, 60 (D.N.H. 2001) (sanctioning counsel for the failure to timely comply with a discovery order),

Gross negligence is “a failure to exercise even that care which a careless person would use.”¹³¹ Three different forms of sanctionable conduct by counsel have been deemed grossly negligent. First, the failure to advise the client to issue litigation holds or to otherwise take steps to preserve potentially relevant information has been found to be gross negligence.¹³² The court in *Richard Green (Fine Paintings) v. McClendon*¹³³ noted that “the failure to implement a litigation hold is, by itself, considered grossly negligent behavior.”¹³⁴ Second, the failure to supervise a client search for responsive information by accepting client representations as to the adequacy of the client’s search, in light of clear information to the contrary, has been held to constitute gross negligence.¹³⁵ Finally, the failure to produce a critical document in the possession of counsel for several years has also been held to constitute grossly negligent conduct.¹³⁶

Six of the nine cases in which the court found counsel’s conduct constituted reckless disregard involved a failure to comply with court-issued discovery orders without reasonable justification.¹³⁷ In the

adopted in part and rejected in part by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), *aff’d in part and vacated in part*, 428 F.3d 1 (1st Cir. 2005); *Fagnant*, 2004 WL 2944126, at *1–2 (sanctioning counsel for not producing a computerized general ledger until the eve of trial, nearly eight months after his client gave it to him).

131. *Pension Comm.*, 685 F. Supp. 2d at 464.

132. *See* *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 290 (S.D.N.Y. 2009) (holding that the failure to institute a litigation hold is grossly negligent and sanctioning the client in part for this failure); *Bd. of Regents v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) (sanctioning counsel for not directing the client to preserve potentially relevant ESI during computer system migration and for not specifically directing the client to search for electronic documents); *Mktg. Specialists, Inc. v. Bruni*, 129 F.R.D. 35, 54 (W.D.N.Y. 1989), *aff’d*, 923 F.2d 843 (2d Cir. 1990) (sanctioning counsel for “wilfully fail[ing] to attend to the work necessary to ascertain the existence of other records of the parties’ relationship and to make a proper disclosure”).

133. *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284 (S.D.N.Y. 2009).

134. *Id.* at 290–91.

135. *See* *Phx. Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at *6 (S.D.N.Y. May 23, 2006) (finding counsel grossly negligent for “simply accept[ing]” the client’s representations about its lack of computers to search); *Poole ex rel. Elliott v. Textron*, 192 F.R.D. 494, 502 (D. Md. 2000) (sanctioning counsel for producing only one page in response to initial requests, 470 pages after receiving a motion to compel, but over 2,900 pages and 20 videotapes after a motion for sanctions was filed); *Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987) (sanctioning in-house counsel for failing to distribute discovery requests to all the employees and agents who potentially possessed responsive information or for failing to account for its collection and subsequent production).

136. *See In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 130 (S.D.N.Y. 2007) (finding counsel “negligen[t] or worse” for the failure to produce a highly relevant document for nearly two years despite being alerted to its possible existence by opposing counsel).

137. *See* *Edelen v. Campbell Soup Co.*, Civil Action No. 1:08-cv-C0299-JOF-LTW, 2009 WL

other three cases, courts found repeated counsel misrepresentations about the adequacy of the client's search and production, in light of overwhelming evidence to the contrary, to constitute recklessness.¹³⁸

In the cases we analyzed, 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.¹³⁹

4798117, at *3 (N.D. Ga. Dec. 8, 2009) (affirming sanctions against counsel for its failure to comply with a court order to limit discovery); *Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc.*, No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451, at *1-2 (E.D. Cal. Dec. 2, 2008) (sanctioning counsel for unjustified disregard of a court order in its failure to produce documents in the court-ordered searchable format); *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 01584(DJS), 2008 WL 961216, at *13 (D. Conn. Apr. 9, 2008) (sanctioning counsel for improper obstruction during a court-ordered forensic inspection); *Wachtel v. Health Net*, 239 F.R.D. 81, 101 (D.N.J. 2006) (sanctioning counsel for improper conduct and flagrant disregard of court orders in its failure to comply with a court order to supplement production); *NSB U.S. Sales, Inc. v. Brill*, No. 04 Civ. 9240(RCC), 2007 WL 258181, at *3 (S.D.N.Y. Jan. 26, 2007) (sanctioning counsel for its disregard of and failure to comply with three court orders compelling discovery); *Oscher v. Solomon Tropp Law Grp. (In re Atl. Int'l Mortg. Co.)*, 352 B.R. 503, 509 (Bankr. M.D. Fla. 2006) (sanctioning counsel for ignoring discovery requests and filing meritless appeals of nonappealable discovery orders).

138. See *Tantivy Commc'ns, Inc. v. Lucent Techs. Inc.*, No. Civ.A.2:04CV79 (TJW), 2005 WL 2860976, at *2 (E.D. Tex. Nov. 1, 2005) (finding sanctionable conduct when counsel allowed relevant ESI to be destroyed through normal destruction practices and denied the existence of, and failed to produce until "the eleventh hour," highly relevant documents despite specific references to such documents by opposing counsel); see also *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (Bray & Gillespie I)*, 259 F.R.D. 568, 587 (M.D. Fla.) ("Such deliberate or reckless disregard of the truth can never provide substantial justification under Rule 37."), *aff'd in part*, No. 6:07-cv-0222, 2009 WL 5606058 (M.D. Fla. Nov. 16, 2009); *Mancia v. Mayflower Textile Servs. Co.*, No. CCB-08-273, 2009 WL 2252151, at *4 (D. Md. July 28, 2009) (ordering a motion to compel, a sanctions consideration hearing, and an award of costs for apparent discovery violations and deficiencies).

139. See *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1285 (M.D. Fla. 2009) (sanctioning counsel for failure to issue a litigation hold despite receiving two notices requesting preservation); *1100 W., LLC v. Red Spot Paint & Varnish Co.*, No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118, at *28-35 (S.D. Ind. June 5, 2009) (sanctioning counsel for the failure to supervise the client's search, failure to produce responsive documents, and misrepresentations about client information); *Pharmacy Records v. Nassar (Pharmacy Records II)*, 572 F. Supp. 2d 869, 873 (E.D. Mich. 2008) ("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."); *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *12-20 (S.D. Cal. Jan. 7) (sanctioning counsel for the failure to instruct the client on searches, failure to produce, and misrepresentations about the existence of 46,000 potentially responsive emails), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); *Brick v. HSBC Bank USA*, No. 04-CV-0129E(F), 2004 WL 1811430, at *1-4 (W.D.N.Y. Aug. 11, 2004) (sanctioning counsel for the failure to issue a litigation hold, failure to supervise the search by the client's employee, misrepresentations as to production completion, failure to notify the court of document destruction, improperly withholding documents for privilege, and failure to

Additionally, the discovery at issue was usually central to the litigation and, in many instances, the subject of specific court orders compelling production.¹⁴⁰

Sanctions for counsel can be based on the counsel's personal execution of discovery tasks or on the counsel's role in coordinating and overseeing the client's discovery.¹⁴¹ Rule 26(g) imposes on counsel an affirmative duty to engage in pretrial discovery responsibly.¹⁴² As noted in *Metropolitan Opera*, although "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."¹⁴³

Counsel sanctions for failure to execute discovery obligations include situations in which the client has met its 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. Counsel's failure to competently execute

produce client files in possession of counsel); *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 212 F.R.D. 178, 184–214 (S.D.N.Y. 2003) (sanctioning counsel for the failure to issue a litigation hold, failure to supervise a search for responsive documents, misrepresentations as to production completion, and unilateral failure to produce a category of responsive documents), *adhered to on reconsideration by* No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004).

140. *Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc.*, No. 06-15100, 2007 WL 3333016, at *6 (E.D. Mich. Nov. 9, 2007) (finding that counsel's "secret access to these computers may have irrevocably tainted key pieces of evidence"); *Exact Software N. Am., Inc. v. Infocon, Inc.*, 479 F. Supp. 2d 702, 719 (N.D. Ohio 2006) ("The information at issue is not ancillary to its case; most of it goes to the heart . . ."); *see also* *Travel Sentry, Inc. v. Tropp*, 669 F. Supp. 2d 279, 285 (E.D.N.Y. 2009) (listing lower court orders that focus on discovery compliance); *Rousseau v. Echosphere Corp.*, No. Civ.A. 03-1230, 2005 WL 2176839, at *8 (W.D. Pa. Aug. 30, 2005) (holding that the belated production of material evidence ultimately led to the dismissal of the case).

141. *See* *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004) ("[C]ounsel is responsible for coordinating her client's discovery efforts . . . to properly oversee . . . its duty to locate relevant information and its duty to preserve and timely produce that information."); *see also id.* at 432 ("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.").

142. FED. R. CIV. P. 26(g).

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

discovery obligations was the basis for sanctions in nine of the thirty counsel sanction cases.¹⁴⁴

Counsel sanctions related to lack of coordination and oversight involve client failures to preserve, search, or produce, and corresponding failures by counsel to advise their clients to adequately preserve, search, or produce. The number of cases in which failure to coordinate and oversee client conduct was at least one basis for counsel sanctions has increased from a total of four cases through 2003¹⁴⁵ to a total of seventeen cases from 2004 through 2009.¹⁴⁶ An

144. See *Edelen v. Campbell Soup Co.*, Civil Action No. 1:08-cv-C0299-JOF-LTW, 2009 WL 4798117, at *3 (N.D. Ga. Dec. 8, 2009) (sanctioning counsel for failure to comply with a court order to limit discovery); *Travel Sentry*, 669 F. Supp. 2d at 286–87 (sanctioning counsel for its “conscious concealment of the facts and . . . documents”); *Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc.*, No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451, at *2 (E.D. Cal. Dec. 2, 2008) (sanctioning counsel for its unjustified disregard of a court order); *Sterle v. Elizabeth Arden, Inc.*, No. 3:06 CV 01584(DJS), 2008 WL 961216, at *13 (D. Conn. Apr. 9, 2008) (sanctioning counsel for its unreasonable conduct throughout discovery); *Auto. Inspection Servs.*, 2007 WL 3333016, at *8 (sanctioning counsel for violating Rule 45 during discovery); *Digene Corp. v. Third Wave Techs., Inc.*, No. 07-CC-2-C, 2007 WL 4939048, at *1–2 (W.D. Wis. Oct. 24, 2007) (sanctioning counsel for a discovery misunderstanding that resulted in a delay); *Rousseau*, 2005 WL 2176839, at *9 (sanctioning counsel for delaying discovery after finding a document that undermined his client’s case); *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56, 62 (D.N.H. 2001) (sanctioning counsel for obstructing discovery, misleading the other party, and concealing his conduct), *adopted in part and rejected in part* by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), *aff’d in part and vacated in part*, 428 F.3d 1 (1st Cir. 2005); *Cohen Steel Supply, Inc. v. Fagnant (In re Fagnant)*, Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126, at *2 (Bankr. D.N.H. Dec. 13, 2004) (sanctioning counsel for the failure to produce a document until the eve of trial).

145. *Metro. Opera*, 212 F.R.D. at 223–24; *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 503 (D. Md. 2000); *Nat’l Mktg. Specialists, Inc. v. Bruni*, 129 F.R.D. 35, 54 (W.D.N.Y. 1989), *aff’d*, 923 F.2d 843 (2d Cir. 1990); *Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987).

146. *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1281 (M.D. Fla. 2009); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 290 (S.D.N.Y. 2009); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (Bray & Gillespie II)*, 259 F.R.D. 591, 611 (M.D. Fla.), *rejected in part* by No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla., Nov. 11, 2009), *and adopted in part* by No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010); *Mancia v. Mayflower Textile Servs. Co.*, No. CCB-08-273, 2009 WL 2252151, at *3 (D. Md. July 28, 2009); *1100 W., LLC v. Red Spot Paint & Varnish Co.*, No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118, at *35 (S.D. Ind. June 5, 2009); *Pharmacy Records v. Nassar (Pharmacy Records II)*, 572 F. Supp. 2d 869, 881 (E.D. Mich. 2008); *R & R Sails Inc. v. Ins. Co. of Pa.*, 251 F.R.D. 520, 525 (S.D. Cal. 2008); *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *12–20 (S.D. Cal. Jan. 7), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); *Bd. of Regents v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 92–97 (D.N.J. 2006); *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 130 (S.D.N.Y. 2007); *NSB U.S. Sales, Inc. v. Brill*, No. 04 Civ. 9240(RCC), 2007 WL 258181, at *3 (S.D.N.Y. Jan. 26, 2007); *Exact Software N. Am., Inc. v. Infocon Inc.*, 479 F. Supp. 2d 702, 703 (N.D. Ohio 2006); *Phx. Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ.

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.¹⁴⁷

The predominant sanction against counsel was an award of attorneys' fees and costs, ranging from \$500 to \$500,000.¹⁴⁸ In seven cases, the monetary sanction was allocated jointly and severally between counsel and the client.¹⁴⁹ Additionally, four cases awarded nonmonetary sanctions against counsel, imposing special discovery compliance requirements.¹⁵⁰

4837(HB), 2006 WL 1409413, at *6 (S.D.N.Y. May 23, 2006); *Tantivy Commc'ns, Inc. v. Lucent Techs. Inc.*, No. Civ.A.2:04CV79 (TJW), 2005 WL 2860976, at *4 (E.D. Tex. Nov. 1, 2005); *Brick v. HSBC Bank USA*, No. 04-CV-0129E(F), 2004 WL 1811430, at *4 (W.D.N.Y. Aug. 11, 2004); *Oscher v. Solomon Tropp Law Grp. (In re Atl. Int'l Mortg. Co.)*, 352 B.R. 503, 507-08 (Bankr. M.D. Fla. 2006).

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

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

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

150. See *Qualcomm*, 2008 WL 66932, at *18-19 (directing counsel to participate in the development of a discovery protocol); *Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc.*, No. 06-15100, 2007 WL 3333016, at *8 (E.D. Mich. Nov. 9, 2007) (directing counsel to submit an affidavit to the court certifying that he had read Rule 45 of the Federal Rules of Civil Procedure); *Bd. of Regents*, 2007 WL 3342423, at *7 (directing counsel to submit an affidavit to the court regarding counsel's discovery compliance efforts); *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. at 559 (directing counsel to develop and submit a discovery plan to the court).

VI. 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: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."¹⁵¹

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

Despite its limited scope, the proposed rule generated controversy concerning the appropriate standard of culpability that would support or preclude sanctions.¹⁵⁴ Proposed standards included

151. 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 provision from Rule 37(f) to Rule 37(e) with no changes to the rule's text. *Compare id.*, with FED. R. CIV. P. 37(f) (2006).

152. ADVISORY COMM. ON THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 83 (May 27, 2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf>. 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.*

153. *Id.* at 83.

154. *See id.* at 83–90 (discussing the proposed rule and the public commentary surrounding it). 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 88. The Advisory Committee noted that this proposed version adopted a negligence standard, and the Committee 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.*

negligence, recklessness, and intentional conduct. The Advisory Committee ultimately adopted what it deemed to be an “intermediate” culpability standard, providing “protection from sanctions only for the ‘good faith’ routine operation of an electronic information system.”¹⁵⁵

From Rule 37(e)’s promulgation on December 1, 2006, until January 1, 2010, we identified only thirty federal court decisions citing the safe harbor provision. Three of these cases did not relate to discovery of ESI in civil cases, as two involved paper documents¹⁵⁶ and one was a criminal case.¹⁵⁷ Of the remaining twenty-seven cases, we identified, at most, seven and one-half cases that invoked Rule 37(e) to protect a party from sanctions. In five of those cases, the court invoked Rule 37(e) to deny requested sanctions.¹⁵⁸ In two cases, the court mentioned Rule 37(e) and denied sanctions, but it is unclear

155. *Id.* at 84–85.

156. *Mohrmeyer v. Wal-Mart Stores E., L.P.*, No. 09-69-WOB, 2009 WL 4166996, at *3 (E.D. Ky. Nov. 20, 2009) (refusing 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” and finding Rule 37(e) inapplicable because the documents were not ESI, but citing the Rule “[b]y analogy”); *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 270 n.24 (2007) (addressing the spoliation of paper government-contract files and citing Rule 37 in a footnote to illustrate the availability of sanctions absent proof of bad faith).

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

158. *Sue v. Milyard*, No. 07-cv-07711-REB-MJW, 2009 WL 2424435, at *2 (D. Colo. Aug. 6, 2009) (denying sanctions for the destruction of evidence when video footage stored on the defendant’s hard drive was automatically recorded over within five to seven days due to the normal operating process of the camera’s computer system, which erased the footage before the plaintiff made a request to preserve it); *Se. Mech. Servs., Inc. v. Brody (Brody I)*, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395, at *3 (M.D. Fla. July 24, 2009) (holding that no spoliation sanction was warranted because the overwriting of backup tapes involved no bad faith and was part of the company’s routine document-management policy); *Gipetti v. United Parcel Serv., Inc.*, No. CO7-00812 RMW (HRL), 2008 WL 3264483, at *1, *3–4 (N.D. Cal. Aug. 6, 2008) (rejecting a request for spoliation sanctions against a company that discarded tachograph records showing a vehicle’s speed and the length of time it was moving or stationary, because the company’s practice was to preserve the records for only thirty-seven days due to the large volume of data and the company had no notice that the specific records sought should have been preserved); *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at *18–19 (S.D. Tex. Sept. 29, 2007) (rejecting an adverse-inference instruction when the defendant destroyed documents deemed not responsive to the document requests and the party seeking sanctions failed to show the relevance of the records sought or that destruction was in bad faith); *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJXC, 2007 WL 2080419, at *14 (C.D. Cal. May 29, 2007) (holding that a party’s failure to retain website server log data, stored temporarily in RAM, was not sanctionable due to the party’s “good faith belief that preservation of data temporarily stored only in RAM was not legally required”).

whether the court relied on the rule in making its decision.¹⁵⁹ The half case is a decision in which the 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.¹⁶⁰

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.¹⁶¹ In another case, the court cited the rule but deferred consideration of sanctions.¹⁶² In twelve decisions, the court denied the safe harbor, with many courts finding that the post-notice destruction of evidence was not within the protection of Rule 37(e).¹⁶³ Among

159. *In re Kessler*, No. 05 CV 6056(SJF)(AKT), 2009 WL 2603104, at *3 (E.D.N.Y. Mar. 27, 2009) (appearing to apply Rule 37(e) *sub silentio* to reject an award of attorneys' fees based on the party's failure to preserve video footage which "self-destructed" approximately twenty-seven hours after it was recorded "in accordance with the routine operation of the . . . surveillance system"); *Riverside Healthcare, Inc. v. Sysco Food Servs. of San Antonio, LP* (*In re Riverside Healthcare, Inc.*), 393 B.R. 422, 429 (Bankr. M.D. La. 2008) (refusing to award sanctions when the absence of the requested email did not unfairly prejudice the opposing party and when the email was deleted routinely before the suit).

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

161. *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (admonishing the parties, in a case with voluminous ESI, to "be very cautious in relying upon any 'safe harbor' doctrine as described in new Rule 37(f)").

162. *U & I Corp. v. Advanced Med. Design, Inc.*, No. 8:06-CV-2041-T-17EAJ, 2007 WL 4181900, at *6 (M.D. Fla. Nov. 26, 2007) (construing Rule 37(f) as "govern[ing] a parties' [*sic*] failure to cooperate during discovery" and deferring consideration of sanctions pending the responding party's submission of an affidavit of a corporate representative explaining why certain emails were not available and detailing the efforts it made to obtain them).

163. *KCH Servs. Inc. v. Vanaire*, No. 05-777-C, 2009 WL 2216601, at *1 (W.D. Ky. July 22, 2009) (granting an adverse-inference jury instruction when the 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 Cnty. Hosp. Auth.*, No. 1:07CV258, 2009 WL 2168717, at *4, *7 (E.D. Tenn. July 16, 2009) (awarding attorneys' fees to the plaintiff as a sanction after the defendant hospital reimaged the chief of medical staff's hard drive immediately after the chief's retirement and long after the hospital was on notice that electronic information on the hard drive could be relevant to the lawsuit); *Ripley v. District of Columbia*, No. 06-1705, slip op. at 9 (D.D.C. July 2, 2009) (holding that Rule 37(e) afforded no protection to a defendant that destroyed emails and denied the existence of a back-up tape after the plaintiff requested the emails and awarding attorneys' fees as a sanction because "[d]efendants . . . did not operate their e-mail system in a routine, good-faith manner"); *Phillip M. Adams & Assocs. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191–92 (D. Utah 2009) (holding that the safe harbor was not available because the defendant discarded computer source code and failed to show reasonableness or good faith); *Technical*

these cases, three involved findings of intentional conduct,¹⁶⁴ one involved gross negligence,¹⁶⁵ one involved recklessness,¹⁶⁶ and two involved a failure by the responding party to show good faith.¹⁶⁷

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

Sales Assocs. v. Ohio Star Forge Co., No. 07-11745 2009 WL 728520, at *7-8 (E.D. Mich. Mar. 19, 2009) (holding that the safe harbor did not apply to a finding of intentional conduct when emails were deleted during the discovery period and "just days" before the completion of searches for responsive documents); *Arista Records, LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 431 n.31 (S.D.N.Y. 2009) (ruling that an online bulletin board had an obligation to preserve usage data, digital music files, and other material that was specifically requested, and noting that the Rule 37(e) safe harbor was not cited by the parties in briefing and "does not apply under the circumstances of this case"); *Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008) (concluding that while the moving party submitted no evidence that the defendant acted in bad faith, the defendant "appear[ed]" grossly negligent in failing to preserve documents after the duty to preserve attached); *Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 3833384, at *6 (N.D. Cal. Aug. 12, 2008) ("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."); *MeccaTech Inc., v. Kiser*, No. 8:05CV570, 2008 WL 6010937 at *9 (D. Neb. Apr. 2, 2008) (awarding a sanction based on an express finding that ESI was intentionally destroyed or withheld and was not lost through the good-faith operation of an electronic information system); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 378 (D. Conn. 2007) (holding that 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"); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 636-37 (D. Colo. 2007) (ruling that a party's failure to implement and monitor an adequate records preservation program, including the wiping of hard drives, and the counsel's failure to properly monitor the discovery process, did not substantially prejudice the moving party but nevertheless did interfere with the judicial process, warranting a monetary sanction of \$5,000); *United States v. Krause (In re Krause)*, 367 B.R. 740, 767, 770-72 (Bankr. D. Kan. 2007) (ordering sanctions against a debtor in a Chapter 7 liquidation proceeding because the debtor "willfully and intentionally destroyed electronically stored evidence"), *aff'd*, Nos. 08-1132, 08-1136, 2009 WL 5064348 (D. Kan. Dec. 16, 2009).

164. *Technical Sales Assocs.*, 2009 WL 728520, at *7-8; *MeccaTech*, 2008 WL 6010937, at *9; *In re Krause*, 367 B.R. at 767, 770.

165. *Pandora Jewelry*, 2008 WL 4533902, at *9.

166. *Keithley*, 2008 WL 3833384, at *6.

167. *Ripley*, slip op. at 9; *Phillip M. Adams & Assocs.*, 621 F. Supp. 2d at 1191-92.

168. *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (holding that Rule 37(e) was inapplicable to the consideration of sanctions for a party's intentional spoliation when the sanctions were issued pursuant to the court's inherent authority, not the Federal Rules); *see also Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219, at *3 n.1 (D. Nev. May 16, 2008) (awarding sanctions consisting of an adverse-inference instruction in a Fair Credit Reporting Act case when the plaintiff erased data from hard drives after the data

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

CONCLUSION

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

were requested by the defendant and holding that the Rule 37(e) safe harbor was "inapplicable under these facts because the conduct giving rise to this action was not in violation of any discovery order governed by Rule 37").

169. *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280, 282 n.5 (D. Del. 2008) (refusing to apply the Rule 37(f) safe harbor even though it was cited by the defendants in a letter to the court describing its email system's auto-delete function); *Orrell v. Motorcarparts of Am., Inc.*, No. 3:06CV418-R, 2007 WL 4287750, at *7 (W.D.N.C. Dec. 5, 2007) (ordering, in an employment case, that the plaintiff, who had "wiped" her laptop and was found to have served deficient discovery responses, serve complete responses and provide her home computer to defendants for forensic examination, and citing Rule 37(e), even though sanctions were neither sought nor awarded); *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007) (holding that Rule 37(e) was inapplicable because no sanctions were sought and because of the "indefensible" failure to disable "auto-delete" during the course of litigation).

APPENDIX A

ALL CASES

| No. | Case | Primary Case Type |
|-----|--|-----------------------|
| 1 | ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994) | Contract |
| 2 | Acorn v. County of Nassau, No. CV 05-2301, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009) | Civil Rights |
| 3 | Adams v. Gateway, Inc., No. 2:02-CV-106, 2006 WL 2563418 (D. Utah Mar. 6, 2006) | Intellectual Property |
| 4 | Adorno v. Port Auth., 258 F.R.D. 217 (S.D.N.Y. 2009) | Employment |
| 5 | AdvantaCare Health Partners, LP v. Access IV, No. 03-4496 JF, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) | Commercial |
| 6 | Advante Int'l Corp. v. Mintel Learning Tech., No. C 05-01022JW (RS), 2008 WL 928332 (N.D. Cal. Apr. 4, 2008) | Intellectual Property |
| 7 | Aecon Bldgs., Inc. v. Zurich N. Am., 253 F.R.D. 655 (W.D. Wash. 2008) | Insurance |
| 8 | Aero Prods. Int'l, Inc. v. Intex Recreation Corp., No. 02 C 2590, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004) | Intellectual Property |
| 9 | Ajaxo Inc., v. Bank of Am. Tech. & Operations, Inc., No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451 (E.D. Cal. Dec. 2, 2008) | Intellectual Property |
| 10 | Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17 (1st Cir. 1981) | Antitrust |
| 11 | Allianz Ins. Co. v. Otero, 353 F. Supp. 2d 415 (S.D.N.Y. 2004) | Insurance |
| 12 | Am. Family Mut. Ins. Co. v. Roth, No. 05 C 3839, 2009 WL 982788 (N.D. Ill. Feb. 20, 2009) | Commercial |
| 13 | Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States, No. 04-CV-1798, 2009 WL 1617773 (E.D.N.Y. June 9, 2009) | Tax Refund Action |
| 14 | Ameriwood Indus. v. Liberman, No. 4:06CV524-DJS, 2007 WL 5110313 (E.D. Mo. July 3, 2007) | Commercial |
| 15 | Anadarko Petrol. Corp. v. Davis, No. H-06-2849, 2006 U.S. Dist. LEXIS 93594 (S.D. Tex. Dec. 28, 2006) | Commercial |
| 16 | Anderson v. Am. Airlines, Inc., No. 05-04292, 2008 WL 4816620 (N.D. Cal. Nov. 5, 2008), <i>aff'd</i> , No. 08-16859, 2009 WL 3698566 (9th Cir. Nov. 6, 2009) | Employment |
| 17 | Anderson v. Crossroads Capital Partners, LLC, No. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004) | Employment |
| 18 | Angelotti v. Roth, No. 06-10068, 2006 WL 3666849 (S.D. Fla. Nov. 17, 2006) | Civil Rights |
| 19 | APC Filtration, Inc. v. Becker, No. 07 CV 1462, 2007 WL 3046233 (N.D. Ill. Oct. 12, 2007) | Commercial |
| 20 | Appraisal Mgmt. Co. III v. FNC, Inc., No. 1:04CV1158, 2005 WL 3088561 (N.D. Ohio Nov. 17, 2005) | Contract |
| 21 | Arista Records, Inc. v. Sakfield Holding Co., 314 F. Supp. 2d 27 (D.D.C. 2004) | Intellectual Property |

| No. | Case | Primary Case Type |
|------------|---|-----------------------------------|
| 22 | Arista Records, L.L.C. v. Tschirhart, 241 F.R.D. 462 (W.D. Tex. 2006) | Intellectual Property |
| 23 | Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009) | Intellectual Property |
| 24 | Armamburu v. Healthcare Fin. Servs., Inc., No. 2002-6535, 2007 WL 2020181 (E.D.N.Y. July 6, 2007) | Federal Statutory Cause of Action |
| 25 | Armisted v. State Farm Mut. Auto. Ins. Co., No. 07-10259, 2009 WL 81103 (E.D. Mich. Jan. 9, 2009) | Insurance |
| 26 | Armstrong v. Amstead Indus., No. 01 C 2963, 2004 WL 1497779 (N.D. Ill. July 2, 2004) | Employment |
| 27 | Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc., No. 05-4896 (PGS), 2008 WL 4513696 (D.N.J. Oct. 1, 2008) | Contract |
| 28 | Atl. Recording Corp. v. Howell, No. CV-06-02076-PHX-NVW, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008) | Intellectual Property |
| 29 | Attard v. City of New York, No. 05 CV 2129(JG)(RML), 2008 WL 1991107 (E.D.N.Y. May 5, 2008) | Employment |
| 30 | Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc., No. 06-15100, 2007 WL 3333016 (E.D. Mich. Nov. 9, 2007) | Contract |
| 31 | Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc., No. 05 C 5488, 2008 WL 783301 (N.D. Ill. Mar. 25, 2008) | Commercial |
| 32 | Babaev v. Grossman, No. CV03-5076(DLI)(WDW), 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008) | Commercial |
| 33 | Bakhtiari v. Lutz, 507 F.3d 1132 (8th Cir. 2007) | Civil Rights |
| 34 | Ball v. Versar, Inc., No. IP 01-0531-C, 2005 WL 4881102 (S.D. Ind. Sept. 23, 2005) | Contract |
| 35 | Barrett v. Ambient Pressure Diving, Ltd., No. 06-CV-240, 2008 WL 4280360 (D.N.H. Sept. 16, 2008) | Tort |
| 36 | Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997) | Tort |
| 37 | Bensel v. Allied Pilots Ass'n, 263 F.R.D. 150 (D.N.J. 2009) | Contract |
| 38 | Benton v. Dlorah, Inc., No. 06-CV-2488, 2007 WL 3231431 (D. Kan. Oct. 30, 2007) | Employment |
| 39 | Bishop v. Toys "R" Us-NY, LLC, No. 04-CV-9403, 2007 WL 2042913 (S.D.N.Y. July 13, 2007) | Tort |
| 40 | Black & Veatch Int'l Co. v. Foster Wheeler Energy Corp., 211 F.R.D. 641 (D. Kan. 2002) | Contract |
| 41 | Blangsted v. Snowmass-Wildcat Fire Prot. Dist., 642 F. Supp. 2d 1250 (D. Colo. 2009) | Civil Rights |
| 42 | Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423 (D. Neb. Nov. 5, 2007) | Contract |
| 43 | Bolger v. District of Columbia, 608 F. Supp. 2d 10 (D.D.C. 2009) | Civil Rights |
| 44 | Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (<i>Bray & Gillespie II</i>), 259 F.R.D. 591 (M.D. Fla.), <i>rejected in part</i> by No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla. Nov. 11, 2009), <i>and adopted in part</i> by No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010) | Insurance |

| No. | Case | Primary Case Type |
|------------|--|------------------------------------|
| 45 | Brick v. HSBC Bank USA, No. 04-CV-0129E(F), 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004) | Bankruptcy |
| 46 | Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506 (D. Md. 2005) | Employment |
| 47 | Brookhaven Typesetting Servs., Inc. v. Adobe Sys., Inc., 332 F. App'x 387 (9th Cir. 2009) | Intellectual Property |
| 48 | Bryant v. Gardner, 587 F. Supp. 2d 951 (N.D. Ill. 2008) | Civil Rights |
| 49 | Buckley v. Mukasey, 538 F.3d 306 (4th Cir. 2008) | Employment |
| 50 | Burkybile v. Mitsubishi Motors Corp., No. 04 C 4932, 2006 WL 3191541 (N.D. Ill. Oct. 17, 2006) | Contract |
| 51 | Burrell v. Anderson, 353 F. Supp. 2d 55 (D. Me. 2005) | Civil Rights |
| 52 | Buskey v. Bos. Mkt. Corp., No. 04 CV 2193, 2006 WL 2527826 (E.D.N.Y. Aug. 14, 2006) | Tort |
| 53 | Cabinetware Inc. v. Sullivan, No. Civ. S. 90-313CLKK, 1991 WL 327959 (E.D. Cal. July 15, 1991) | Intellectual Property |
| 54 | Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007) | Intellectual Property |
| 55 | Calixto v. Watson Bowman Acme Corp., No. 07-60077, 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009) | Contract |
| 56 | Canon U.S.A., Inc. v. S.A.M., Inc., No. 07-01201, 2008 WL 2522087 (E.D. La. June 20, 2008) | Contract |
| 57 | Canton v. Kmart Corp., No. 1:05-cv-143, 2009 WL 2058908 (D.V.I. July 13, 2009) | Tort |
| 58 | Cardenas v. Dorel Juvenile Grp., Inc., No. 04-2478, 2006 WL 1537394 (D. Kan. June 1, 2006) | Tort |
| 59 | Century ML-Cable Corp. v. Carrillo, 43 F. Supp. 2d 176 (D.P.R. 1998) | Commercial |
| 60 | Chevron U.S.A., Inc. v. M & M Petrol. Servs., Inc., No. SACV 07-0818 DOC (ANx), 2009 WL 2431926 (C.D. Cal. Aug. 6, 2009) | Federal Statutory Causes of Action |
| 61 | Chirido v. Minerals Techs., Inc., No. 06-5523, 2009 WL 2195135 (E.D. Pa. July 23, 2009) | Employment |
| 62 | Cimaglia v. Union Pac. R.R., No. 6-CV-3084, 2009 WL 87426 (C.D. Ill. Jan. 12, 2009) | Tort |
| 63 | Claredi Corp. v. Seebeyond Tech. Corp., No. 4:04CV1304 RWS, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007) | Contract |
| 64 | Clark Constr. Grp., Inc. v. City of Memphis, 229 F.R.D. 131 (W.D. Tenn. 2005) | Contract |
| 65 | Columbia Pictures, Inc. v. Bunnell, No. 2:06-cv-01093 FMC-JCx, 2007 WL 4877701 (C.D. Cal. Dec. 13, 2007) | Intellectual Property |
| 66 | Columbus McKinnon Corp. v. HealthNow N.Y., Inc., No. 03-CV-0831, 2006 WL 2827675 (W.D.N.Y. Sept. 29, 2006) | Insurance |
| 67 | Commc'ns Ctr., Inc. v. Hewitt, No. Civ.S-03-1968 WBS KJ, 2005 WL 3277983 (E.D. Cal. Apr. 5, 2005) | Commercial |
| 68 | Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166 (D. Colo. 1990) | Contract |
| 69 | Computer Task Grp., Inc. v. Brotby, 364 F.3d 1112 (9th Cir. 2004) | Contract |

| No. | Case | Primary Case Type |
|------------|--|--------------------------|
| 70 | Concord Boat Corp. v. Brunswick Corp., No. 95-781, 1997 WL 33352759 (E.D. Ark. Aug. 29, 1997) | Antitrust |
| 71 | Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360 (N.D. Ga. 2008) | Employment |
| 72 | Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (M.D. La. 2006) | Contract |
| 73 | Consol. Edison Co. of N.Y. v. United States, 90 Fed. Cl. 228 (2009) | Tax Refund Action |
| 74 | Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162 (S.D.N.Y. 2004), <i>clarified by</i> No. 00 Civ. 5141, 2005 WL 1514284 (S.D.N.Y. June 24, 2005) | Intellectual Property |
| 75 | Cornell Research Found., Inc. v. Hewlett-Packard Co., No. 5:01-CV-1974 (NAM/DEP), 2006 WL 5097357 (N.D.N.Y. Nov. 13, 2006), <i>clarified by</i> No. 5:01-CV-1974 (NAM/DEP), 2007 WL 4324094 (N.D.N.Y. May 16, 2007), <i>aff'd</i> , No. 01-CV-1974, 2007 WL 4302778 (N.D.N.Y. July 23, 2007) | Intellectual Property |
| 76 | Covad Commc'ns Co. v. Revonet, Inc., 260 F.R.D. 5 (D.D.C. 2009) | Contract |
| 77 | CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04CV2150, 2006 WL 1272615 (D. Conn. Feb. 6, 2006) | Contract |
| 78 | Crandall v. City & County of Denver, No. 05-CV-00242, 2006 WL 2683754 (D. Colo. Sept. 19, 2006) | Tort |
| 79 | Creative Sci. Sys., Inc. v. Forex Capital Mkts., LLC, No. C 04-03746 JE(RS), 2006 WL 870973 (N.D. Cal. Apr. 4, 2006) | Intellectual Property |
| 80 | Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993) | Contract |
| 81 | CSI Inv. Partners II, L.P. v. Cendant Corp., 507 F. Supp. 2d 384 (S.D.N.Y. 2007), <i>aff'd</i> , 328 F. App'x 56 (2d Cir. 2009) | Securities |
| 82 | Cumberland Truck Equip. Co. v. Detroit Diesel Corp., No. 05-CV-74594-DT, 2008 WL 5111894 (E.D. Mich. Dec. 2, 2008) | Antitrust |
| 83 | Cyntegra, Inc. v. Idexx Labs., Inc., No. CV 06-4170 PSG (CTx), 2007 WL 5193736 (C.D. Cal. Sept. 21, 2007), <i>aff'd</i> , 322 F. App'x 569 (9th Cir. 2009) | Antitrust |
| 84 | Daewoo Elecs. Co. v. United States, 650 F. Supp. 1003 (Ct. Int'l Trade 1986) | Commercial |
| 85 | DaimlerChrysler Motors v. Bill Davis Racing, Inc., No. CIV.A. 03-72265, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005) | Contract |
| 86 | Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000) | Securities |
| 87 | DE Techs., Inc. v. Dell, Inc., No. Civ.A. 7:04CV00628, 2007 WL 128966 (W.D. Va. Jan. 12, 2007) | Intellectual Property |
| 88 | DeLoach v. Philip Morris Cos., 206 F.R.D. 568 (M.D.N.C. 2002) | Antitrust |
| 89 | Diabetes Ctrs. of Am., Inc. v. Health Pia Am., Inc., No. H-06-3457, 2008 WL 336382 (S.D. Tex. Feb. 5, 2008) | Contract |
| 90 | Digene Corp. v. Third Wave Techs., Inc., No. 07-C-22-C, 2007 WL 4939048 (W.D. Wis. Oct. 24, 2007) | Intellectual Property |

| No. | Case | Primary Case Type |
|-----|---|-----------------------------------|
| 91 | Dilts v. Maxim Crane Works, L.P., No. CIV. A. 07-38, 2009 WL 3161362 (E.D. Ky. Sept. 28, 2009) | Tort |
| 92 | DirecTV, Inc. v. Borow, No. 03 C 2581, 2005 WL 43261 (N.D. Ill. Jan. 6, 2005) | Federal Statutory Cause of Action |
| 93 | Doctor John's, Inc. v. City of Sioux City, 486 F. Supp. 2d 953 (N.D. Iowa 2007) | Constitutional |
| 94 | Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372 (D. Conn. 2007) | Federal Statutory Cause of Action |
| 95 | Dong Ah Tire & Rubber Co. v. Glasforms, Inc., No. C 06-3359 JF (RS), 2008 WL 4786671 (N.D. Cal. Oct. 29, 2008) | Contract |
| 96 | D'Onofrio v. SFX Sports Grp., Inc., 247 F.R.D. 43 (D.D.C. 2008) | Employment |
| 97 | Dowling v. United States, No. 2000-CV-0049, 2008 WL 4534174 (D.V.I. Oct. 6, 2008) | Contract |
| 98 | Drnek v. Variable Annuity Life Ins. Co., No. CIV 01-242, 2004 WL 1098919 (D. Ariz. May 4, 2004), <i>aff'd</i> , 261 F. App'x 50 (9th Cir. 2007) | Securities |
| 99 | Durbin v. Kuryakyn Holdings, Inc., No. 06-C-0039-C, 2006 WL 6040466 (W.D. Wis. Nov. 7, 2006) | Intellectual Property |
| 100 | Durst v. FedEx Express, No. 03-5186, 2006 WL 1541027 (D.N.J. June 2, 2006) | Employment |
| 101 | Dziadkiewicz v. Blue Cross & Blue Shield of R.I., No. C.A.96-275S, 2004 WL 2418308 (D.R.I. Oct. 13, 2004, Oct. 21, 2004) | Insurance |
| 102 | E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005) | Securities |
| 103 | E. Coast Brokers & Packers, Inc. v. Seminis Vegetable Seeds, Inc., No. 8:07-CV-17126-T-26TBM, 2009 WL 361281 (M.D. Fla. Feb. 9, 2009) | Commercial |
| 104 | Easton Sports, Inc. v. Warrior LaCrosse, Inc., No. 05-72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006) | Commercial |
| 105 | Edelen v. Campbell Soup Co., Civil Action No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117 (N.D. Ga. Dec. 8, 2009) | Civil Rights |
| 106 | Elec. Mach. Enters. v. Hunt Constr. Grp., Inc. (<i>In re</i> Elec. Mach. Enters.), 416 B.R. 801 (Bankr. M.D. Fla. 2009) | Bankruptcy |
| 107 | Elion v. Jackson, Civil Action No. 05-0992 (PLF), 2006 WL 2583694 (D.D.C. Sept. 8, 2006) | Employment |
| 108 | Escobar v. City of Houston, No. 04-1945, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007) | Tort; Civil Rights |
| 109 | de Espana v. Am. Bureau of Shipping, No. 03 Civ. 3573(LTS)RLE, 2007 WL 1686327 (S.D.N.Y. June 6, 2007) | Environmental |
| 110 | Exact Software N. Am., Inc. v. Infocon, Inc., 479 F. Supp. 2d 702 (N.D. Ohio 2006) | Contract |
| 111 | Fendi Adele S.R.L. v. Filene's Basement, Inc., No. 06 Civ. 244, 2009 WL 855955 (S.D.N.Y. Mar. 24, 2009) | Intellectual Property |
| 112 | Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004), <i>withdrawn in part</i> , No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio July 28, 2005) | Employment |

| No. | Case | Primary Case Type |
|-----|---|-------------------------------------|
| 113 | Ferron v. Echostar Satellite, LLC, 658 F. Supp. 2d 859 (S.D. Ohio 2009) | Commercial |
| 114 | Pharmacy Records v. Nassar (<i>Pharmacy Records I</i>), 248 F.R.D. 507 (E.D. Mich. 2008), <i>aff'd</i> , 379 F. App'x 522 (6th Cir. 2010) | Intellectual Property |
| 115 | Finley v. Hartford Life & Accident Ins. Co., 249 F.R.D. 329 (N.D. Cal. 2008) | Insurance |
| 116 | Fleming v. City of New York, No. 01 Civ. 8885, 2007 WL 4302501 (S.D.N.Y. Dec. 7, 2007) | Civil Rights |
| 117 | Floeter v. City of Orlando, No. 605CV-400-ORL-22KRS, 2007 WL 486633 (M.D. Fla. Feb. 9, 2007) | Civil Rights |
| 118 | Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., No. 06-CV-13143, 2009 WL 998402 (E.D. Mich. Apr. 14, 2009) | Intellectual Property |
| 119 | Fortis Corporate Ins., SA v. Viken Ship Mgmt. AS, No. 3:04CV7048, 2007 WL 3287357 (N.D. Ohio Nov. 5, 2007) | Insurance |
| 120 | Fox v. Riverdeep, Inc., No. 07-CV-13622, 2008 WL 5244297 (E.D. Mich. Dec. 16, 2008) | Intellectual Property; Contract |
| 121 | Frey v. Gainey Transp. Servs., Inc., No. 1:05-CV-1493-JOF, 2006 WL 2443787 (N.D. Ga. Aug. 22, 2006) | Tort |
| 122 | G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc., 671 F. Supp. 2d 1203 (D. Nev. 2009) | Commercial |
| 123 | Gamby v. First Nat'l Bank of Omaha, No. 06-11020, 2009 WL 127782 (E.D. Mich. Jan. 20), <i>objection denied</i> , 2009 WL 963116 (E.D. Mich. Apr. 8, 2009) | Federal Statutory Cause of Action |
| 124 | Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90 (D. Colo. 1996) | Commercial |
| 125 | GE Harris Ry. Elecs., L.L.C. v. Westinghouse Air Brake Co., No. 99-070-GMS, 2004 WL 5702740 (D. Del. Mar. 29, 2004) | Intellectual Property |
| 126 | Gen. Med., PC v. Morning View Care Ctrs., No. 2:05-CV-439, 2006 WL 2045890 (S.D. Ohio July 20, 2006) | Contract |
| 127 | Getty Props. Corp. v. Raceway Petrol., Inc., No. 99-CV-4395DMC, 2005 WL 1412134 (D.N.J. June 14, 2005) | Contract |
| 128 | Giant Screen Sports LLC v. Sky High Entm't, No. 05 C 7184, 2007 WL 627607 (N.D. Ill. Feb. 27, 2007) | Contract |
| 129 | Gippetti v. United Parcel Serv., Inc., No. C07-00812 RMW (HRL), 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008) | Employment |
| 130 | Glass v. Beer, No. 1:04-CV-05466-OWW-SMS PC, 2007 WL 1456059 (E.D. Cal. May 17, 2007) | Civil Rights |
| 131 | Global Ampersand, LLC v. Crown Eng'g & Constr., Inc., 261 F.R.D. 495 (E.D. Cal. 2009) | Contract |
| 132 | Goldman v. Healthcare Mgmt. Sys., Inc., No. 1:05-CV-35, 2006 WL 3589065 (W.D. Mich. Dec. 8, 2006) | Intellectual Property; Antitrust |
| 133 | Goodbys Creek, LLC v. Arch Ins. Co., No. 3:07-CV-947-J-34HTS, 2008 WL 4279693 (M.D. Fla. Sept. 15, 2008) | Contract |
| 134 | Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494 (D. Md. 2009) | Contract |

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| 135 | Google Inc. v. Am. Blind & Wallpaper Factory, Inc., No. C 03-5340 JF (RS), 2007 WL 1848665 (N.D. Cal. June 27, 2007) | Intellectual Property |
| 136 | Grange Mut. Cas. Co. v. Mack, 270 F. App'x 372 (6th Cir. 2008) (per curiam) | Federal Statutory Cause of Action |
| 137 | Grantley Patent Holdings, Ltd. v. Clear Channel Comm'ns, Inc., Civil Action No. 9:06CV259, 2008 WL 7701186 (E.D. Tex. Apr. 4, 2008) | Intellectual Property |
| 138 | Great Am. Ins. Co. of N.Y. v. Lowry Dev., LLC, Civil Action Nos. 106CV097 LTS-RHW, 1:06CV412 LTS-RHW, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007) | Insurance |
| 139 | Greyhound Lines, Inc. v. Wade, 485 F.3d 1032 (8th Cir. 2007) | Tort |
| 140 | Grider v. Keystone Health Plan Cent., 580 F.3d 119 (3d Cir. 2009) | Insurance |
| 141 | Grochocinski v. Schlossberg, 402 B.R. 825 (N.D. Ill. 2009) | Bankruptcy |
| 142 | GSI Grp., Inc. v. Sukup Mfg. Co., No. 05-3011, 2008 WL 3849695 (C.D. Ill. Aug. 18, 2008) | Intellectual Property |
| 143 | GTFM, Inc. v. Wal-Mart Stores, Inc., No. 98 CIV. 7724 RPP, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000) | Intellectual Property |
| 144 | Gucci Am., Inc., v. Gucci, No. 07 Civ. 6820(RMB)(JCF), 2009 WL 440463 (S.D.N.Y. Feb. 20, 2009) | Intellectual Property |
| 145 | Gutman v. Klein, No. 03 CV 1570(BMC)(RML), 2008 WL 4682208 (E.D.N.Y. Oct. 15), <i>adopted by</i> No. 03 Civ. 1570(BMC), 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008) | Commercial |
| 146 | GW Equity LLC v. Xcentric Ventures LLC, No. 3:07-CV-976-O, 2009 WL 62168 (N.D. Tex. Jan. 9, 2009) | Tort |
| 147 | Hahn v. Minn. Beef Indus., Inc., No. 00-2282 RHKSRN, 2002 WL 32667146 (D. Minn. Mar. 8, 2002) | Employment |
| 148 | Hamilton v. Signature Flight Support Corp., No. 05-0490 CW (MEJ), 2005 WL 3481423 (N.D. Cal. Dec. 20, 2005) | Employment |
| 149 | Hanni v. Am. Airlines, Inc., No. C-08-00732 CW (EDL), 2009 WL 1505286 (N.D. Cal. May 27, 2009) | Tort |
| 150 | Hawaiian Airlines, Inc. v. Mesa Air Grp., Inc. (<i>In re</i> Hawaiian Airlines, Inc.), Bankr. No. 03-00817, Adv. No. 06-90026, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007) | Bankruptcy |
| 151 | Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627 (E.D. Pa. 2007) | Intellectual Property |
| 152 | Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 WL 1054279 (D. Kan. Apr. 9, 2007) | Antitrust |
| 153 | Hendricks v. Smartvideo Techs., Inc., 511 F. Supp. 2d 1219 (M.D. Fla. 2007) | Contract |
| 154 | Hewlett v. Davis, Civil Action No. 86-3708, 1987 WL 12298 (E.D. Pa. June 3, 1987), <i>aff'd in part and rev'd in part</i> , 844 F.2d 109 (3d Cir. 1988) | Civil Rights |

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| 155 | Holt v. Nw. Mut. Life Ins. Co., No. 1:04-CV-280, 2005 WL 3262420 (W.D. Mich. Nov. 30, 2005) | Insurance |
| 156 | Hous. Rights Ctr. v. Sterling, No. CV 03-859 DSF, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005) | Federal Statutory Cause of Action |
| 157 | Hynix Semiconductor Inc. v. Rambus, Inc., 591 F. Supp. 2d 1038 (N.D. Cal. 2006) | Intellectual Property |
| 158 | Ibarra v. Baker, 338 F. App'x 457 (5th Cir. 2009) | Civil Rights |
| 159 | Ill. Tool Works, Inc. v. Metro Mark Prods., Ltd., 43 F. Supp. 2d 951 (N.D. Ill. 1999) | Commercial |
| 160 | Oscher v. Solomon Tropp Law Grp., P.A. (<i>In re</i> Atl. Int'l Mortg. Co.), 352 B.R. 503 (Bankr. M.D. Fla. 2006) | Bankruptcy |
| 161 | <i>In re</i> Atl. Marine Prop. Holding Co., Civil Action No. 06-0100-CG-B, 2009 WL 1211399 (S.D. Ala. Apr. 29, 2009) | Tort |
| 162 | <i>In re</i> Cheyenne Software, Inc., Sec. Litig., No. CV-94-2771(NG), 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997) | Securities |
| 163 | <i>In re</i> Direct Sw., Inc., Fair Labor Standards Act (FLSA) Litig., No. 08-1984-MLCF-SS, 2009 WL 1160454 (E.D. La. Apr. 29, 2009) | Employment |
| 164 | Cohen Steel Supply, Inc. v. Fagnant (<i>In re</i> Fagnant), Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004) | Bankruptcy |
| 165 | <i>In re</i> Fannie Mae Sec. Litig., 552 F.3d 814 (D.C. Cir. 2009) | Securities |
| 166 | <i>In re</i> Kessler, No. 05 CV 6056(SJF)(AKT), 2009 WL 2603104 (E.D.N.Y. Mar. 27, 2009) | Insurance |
| 167 | <i>In re</i> Kmart Corp., 371 B.R. 823 (Bankr. N.D. Ill. 2007) | Bankruptcy |
| 168 | United States v. Krause (<i>In re</i> Krause), 367 B.R. 740 (Bankr. D. Kan. 2007), <i>aff'd</i> , Nos. 08-1132, 08-1136, 2009 WL 5064348 (D. Kan. Dec. 16, 2009) | Bankruptcy |
| 169 | <i>In re</i> LTV Steel Co., 307 B.R. 37 (Bankr. N.D. Ohio 2004) | Bankruptcy |
| 170 | <i>In re</i> Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060 (N.D. Cal. 2006) | Intellectual Property |
| 171 | <i>In re</i> Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig., No. 2:03-MD-1565, 2009 WL 87618 (S.D. Ohio Jan. 8, 2009) | Commercial |
| 172 | <i>In re</i> NTL, Inc. Sec. Litig., 244 F.R.D. 179 (S.D.N.Y. 2007), <i>aff'd sub nom.</i> Gordon Partners v. Blumenthal, No. 02 Civ. 7377(LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007) | Securities |
| 173 | <i>In re</i> Old Banc One S'holders Sec. Litig., No. 00 C 2100, 2005 WL 3372783 (N.D. Ill. Dec. 8, 2005) | Securities |
| 174 | <i>In re</i> Quintus Corp., 353 B.R. 77 (Bankr. D. Del. 2006), <i>aff'd in part</i> , Nos. 01-501, 01-502, 01-503, Adv. No. 04-53074, Civ. No. 06-769 SLR, 2007 WL 4233665 (D. Del. Nov. 29, 2007) | Bankruptcy |
| 175 | Riverside HealthCare, Inc. v. Sysco Food Servs. (<i>In re</i> Riverside Healthcare, Inc.), 393 B.R. 422 (Bankr. M.D. La. 2008) | Bankruptcy |

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| 176 | <i>In re</i> Rosenthal, Civil Action No. H-04-186, 2008 WL 983702 (S.D. Tex. Mar. 28, 2008) | Civil Rights |
| 177 | <i>In re</i> Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) | Insurance |
| 178 | <i>In re</i> Seroquel Prods. Liab. Litig., 244 F.R.D. 650 (M.D. Fla. 2007) | Tort |
| 179 | <i>In re</i> Telxon Corp. Sec. Litig., Nos. 5:98CV2876, 1:01CV1078, 2004 WL 3192729 (N.D. Ohio July 16, 2004) | Securities |
| 180 | Infinite Energy, Inc. v. Thai Heng Chang, No. 1:07CV23-SPM-AK, 2008 WL 4098329 (N.D. Fla. Aug. 29, 2008) | Contract |
| 181 | Innis Arden Golf Club v. Pitney Bowes, Inc., 257 F.R.D. 334 (D. Conn. 2009) | Environmental |
| 182 | Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc., 110 F. App'x 283 (3d Cir. 2004) | Intellectual Property |
| 183 | Inventory Locator Serv., LLC v. PartsBase, Inc., No. 02-2695-MaV, 2005 WL 6062855 (W.D. Tenn. Oct. 19, 2005) | Tort |
| 184 | Invision Media Commc'ns, Inc. v. Fed. Ins. Co., No. 02Civ.5461(NRB)(KNF), 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004) | Insurance |
| 185 | Itzenson <i>ex rel.</i> DePhillipo v. Hartford Life & Accident Ins. Co., No. CIV. A. 99-4475, 2000 WL 1507422 (E.D. Pa. Oct. 10, 2000) | Insurance |
| 186 | Jacobson v. Starbucks Coffee Co., No. 05-1338-JTM, 2006 WL 3146349 (D. Kan. Oct. 31, 2006) | Employment |
| 187 | Jinks-Umstead v. England, No. 99-2691, 2005 WL 3312947 (D.D.C. Dec. 7, 2005) | Employment |
| 188 | Johnson v. Wells Fargo Home Mortg., Inc., No. 3:05-CV-0321-RAM, 2008 WL 2142219 (D. Nev. May 16, 2008) | Federal Statutory Cause of Action |
| 189 | Jones v. Hawley, 255 F.R.D. 51 (D.D.C. 2009) | Employment |
| 190 | JPMorgan Chase Bank, N.A. v. Neovi, Inc., No. 2:06-CV-0095, 2007 WL 1514005 (S.D. Ohio May 16, 2007) | Commercial |
| 191 | Juniper Networks, Inc. v. Toshiba Am., Inc., No. 2:05-CV-479, 2007 WL 2021776 (E.D. Tex. July 11, 2007) | Intellectual Property |
| 192 | Kamatani v. BenQ Corp., Civil Action No. 2:03-CV-437, 2005 WL 2455825 (E.D. Tex. Oct. 6, 2005) | Intellectual Property |
| 193 | Katt v. Titan Acquisitions, Inc., 244 F. Supp. 2d 841 (M.D. Tenn. 2003) | Securities |
| 194 | Kayongo-Male v. S.D. State Univ., No. CIV 04-4172, 2008 WL 2627699 (D.S.D. July 3, 2008) | Employment |
| 195 | KCH Servs., Inc. v. Vanair, Inc., No. 05-777, 2009 WL 2216601 (W.D. Ky. July 22, 2009) | Commercial |
| 196 | Keir v. UnumProvident Corp., No. 02 Civ. 8781(DLC), 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) | Insurance |
| 197 | Keithley v. Home Store.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008) | Intellectual Property |

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| 198 | Kimbrough v. City of Cocoa, No. 6:05-CV-471-ORL-31KRS, 2006 WL 3500873 (M.D. Fla. Dec. 4, 2006) | Tort |
| 199 | Kinnally v. Rogers Corp., No. CV-06-2704-PHX-JAT, 2008 WL 4850116 (D. Ariz. Nov. 7, 2008) | Employment |
| 200 | Kipperman v. Onex Corp., 260 F.R.D. 682 (N.D. Ga. 2009) | Bankruptcy |
| 201 | Kleiner v. Burns, No. 00-2160-JWL, 2000 WL 1909470 (D. Kan. Dec. 22, 2000) | Intellectual Property |
| 202 | Koken v. Black & Veatch Constr., Inc., 426 F.3d 39 (1st Cir. 2005) | Tort; Contract |
| 203 | Koninklike Philips Elecs. N.V. v. KXD Tech., Inc., No. 2:05-cv-1532-RLH-GWF, 2007 WL 3101248 (D. Nev. Oct. 16, 2007), <i>appeal dismissed</i> , 539 F. 3d 1039 (9th Cir. 2008) | Intellectual Property |
| 204 | Kounelis v. Sherrer, 529 F. Supp. 2d 503 (D.N.J. 2008) | Civil Rights |
| 205 | Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006) | Employment |
| 206 | Kucala Enters., Ltd. v. Auto Wax Co., No. 02 C 1403, 2003 WL 21230605 (N.D. Ill. May 27), <i>adopted as modified</i> by 2003 WL 22433095, (N.D. Ill. Oct. 27, 2003) | Intellectual Property |
| 207 | Kvitka v. Puffin Co., No. 1:06-CV-0858, 2009 WL 385582 (M.D. Pa. Feb. 13, 2009) | Commercial |
| 208 | L.H. v. Schwarzenegger, No. CIV S-06-2042 LKK GGH, 2008 WL 2073958 (E.D. Cal. May 14, 2008) | Civil Rights |
| 209 | Laethem Equip. Co. v. Deere & Co., No. 05-10113, 2009 WL 3064663 (E.D. Mich. Sept. 21, 2009) | Contract |
| 210 | Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70 (D.D.C. 2003) | Freedom of Information Act |
| 211 | Larson v. Bank One Corp., No. 00 C 2100, 2005 WL 4652509 (N.D. Ill. Aug. 18, 2005) | Securities |
| 212 | Lava Trading, Inc. v. Hartford Fire Ins. Co., No. 03 Civ.7037 PKCMHD, 2005 WL 459267 (S.D.N.Y. Feb. 24, 2005) | Insurance |
| 213 | Law Offices of Ben C. Martin LLP v. Sweet, No. 3-06-CV-1440-B, 2008 WL 2045477 (N.D. Tex. Mar. 19), <i>adopted</i> by 2008 WL 2130574 (N.D. Tex. Apr. 23, 2008) | Contract |
| 214 | Legacy, Inc. v. Tekserve POS, LLC, No. 05 C 5431, 2007 WL 772958 (N.D. Ill. Mar. 12, 2007) | Commercial; Employment |
| 215 | Leon v. IDX Sys. Corp., No. C03-1158P, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), <i>aff'd</i> , 464 F.3d 951 (9th Cir. 2006) | Employment |
| 216 | Lessley v. City of Madison, No. 4:07-cv-136-DFH-WGH, 2008 WL 4977328 (S.D. Ind. Nov. 20, 2008) | Civil Rights; Tort |
| 217 | Lewis v. Ryan, 261 F.R.D. 513 (S.D. Cal. 2009) | Civil Rights |
| 218 | Lexis-Nexis v. Beer, 41 F. Supp. 2d 950 (D. Minn. 1999) | Commercial; Employment |
| 219 | Liafail, Inc. v. Learning 2000, Inc., No. C.A. 01-599, 2002 WL 31954396 (D. Del. Dec. 23, 2002) | Commercial |
| 220 | Liggett v. Rumsfeld, No. Civ. A.:04 1363(GBL), 2005 WL 2099782 (E.D. Va. Aug. 29, 2005) | Civil Rights |

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| 221 | Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2006 WL 1662615 (E.D. Mich. June 12, 2006) | Constitutional |
| 222 | Lockheed Martin Corp. v. L-3 Commc'ns Corp., No. 6:05-cv-1580-Orl-31KRS, 2007 WL 3171299 (M.D. Fla. Oct. 25, 2007) | Commercial |
| 223 | Louis Vuitton Malletier v. Dooney & Bourke, Inc., No. 04 Civ. 5316 RMB MHD, 2006 WL 3476735 (S.D.N.Y. Nov. 30, 2006) | Intellectual Property |
| 224 | Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A., No. 02 Civ. 0795(CBM), 2005 WL 1026461 (S.D.N.Y. May 2, 2005) | Contract |
| 225 | Magette v. BL Dev. Corp., No. 2:07CV181-M-A, 2009 WL 4346062 (N.D. Miss. Nov. 24, 2009) | Tort |
| 226 | Mancia v. Mayflower Textile Servs. Co., No. CCB-08-273, 2009 WL 2252151 (D. Md. July 28, 2009) | Employment |
| 227 | Marcin Eng'g, LLC v. Founders at Grizzly Ranch, LLC, 219 F.R.D. 516 (D. Colo. 2003) | Commercial |
| 228 | Marketfare Annunciation, LLC v. United Fire & Cas. Ins. Co., No. 06-07232, 2007 WL 3273440 (E.D. La. Nov. 5, 2007) | Insurance |
| 229 | Mktg. Specialists, Inc. v. Bruni, 129 F.R.D. 35 (W.D.N.Y. 1989), <i>aff'd</i> , 923 F.2d 843 (2d Cir. 1990) | Contract |
| 230 | Markham v. Nat'l States Ins. Co., No. Civ.02-1606-F, 2004 WL 3019308 (W.D. Okla. Jan. 8, 2004) | Insurance |
| 231 | Martin v. Nw. Mut. Life Ins. Co., No. 804CV2328T23MAP, 2006 WL 148991 (M.D. Fla. Jan. 19, 2006) | Insurance |
| 232 | Marwaha v. SBC Global Servs., Inc., No. 05-cv-2015, 2006 WL 2882854 (N.D. Ohio Oct. 6, 2006) | Employment |
| 233 | MasterCard Int'l, Inc. v. Moulton, No. 03Civ.3613 VMMHD, 2004 WL 1393992 (S.D.N.Y. June 22, 2004) | Intellectual Property |
| 234 | Maxpower Corp. v. Abraham, 557 F. Supp. 2d 955 (W.D. Wis. 2008) | Tort |
| 235 | May v. Pilot Travel Ctrs. LLC, No. 2:05-cv-918, 2006 WL 3827511 (S.D. Ohio Dec. 28, 2006) | Employment |
| 236 | Mazloun v. D.C. Metro. Police Dep't, 530 F. Supp. 2d 282 (D.D.C. 2008) | Civil Rights |
| 237 | McDowell v. District of Columbia, 233 F.R.D. 192 (D.D.C. 2006) | Civil Rights |
| 238 | McKenna v. Nestle Purina PetCare Co., No. 2:05-cv-0976, 2007 WL 433291 (S.D. Ohio Feb. 5, 2007) | Employment |
| 239 | MDS Am., Inc. v MDS Int'l, S.A.R.I., No. 04-72353-DT, 2005 WL 3107769 (E.D. Mich. Nov. 18, 2005) | Commercial |
| 240 | MeccaTech, Inc. v. Kiser, No. 8:05CV570, 2008 WL 6010937 (D. Neb. Apr. 2, 2008), <i>adopted in part by</i> 2009 WL 1152267 (D. Neb. Apr. 23, 2009) | Commercial |
| 241 | Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003), <i>adhered to on reconsideration by</i> No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004) | Tort; Employment |

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| 242 | Metrokane, Inc. v. Built NY, Inc., Nos. 06 Civ. 14447(LAK)(MHD), 07 Civ.2084(LAK)(MHD), 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008) | Intellectual Property |
| 243 | MGE UPS Sys., Inc. v. Fakouri Elec. Eng'g, Inc., 422 F. Supp. 2d 724 (N.D. Tex. 2006) | Intellectual Property; Commercial |
| 244 | Mich. First Credit Union v. CUMIS Ins. Soc'y, Inc., Civ. Case No. 05-74423, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007), <i>objections overruled</i> by 2008 WL 2915077 (E.D. Mich. July 22, 2008) | Insurance |
| 245 | Miller v. IBM, No. C 02-2118 MJJ (MEJ), 2006 WL 995160 (N.D. Cal. Apr. 14, 2006) | Contract |
| 246 | Minn. Mining & Mfg. Co. v. Pribyl, 259 F.3d 587 (7th Cir. 2001) | Commercial |
| 247 | Mintel Int'l Grp., Ltd. v. Neergheen, 636 F. Supp. 2d 677 (N.D. Ill. 2009) | Commercial |
| 248 | Moore v. Am. Family Mut. Ins. Co., No. CV 06-2408-PHX-MHM, 2009 WL 886848 (D. Ariz. Mar. 31, 2009) | Insurance; Contract |
| 249 | Morris v. Union Pac. R.R., 373 F.3d 896 (8th Cir. 2004) | Tort |
| 250 | Morse Diesel Int'l, Inc. v. United States, 81 Fed. Cl. 220 (2008) | Contract |
| 251 | Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332 (D.N.J. 2004) | Intellectual Property |
| 252 | Mother, LLC v. L.L. Bean, Inc., No. C06-5540 JKA, 2007 WL 2302974 (W.D. Wash. Aug. 7, 2007) | Commercial |
| 253 | MPCT Solutions Corp. v. Methe, No. 99 C 3736, 1999 WL 495115 (N.D. Ill. July 2, 1999) | Commercial |
| 254 | Mullaney v. Hilton Hotels Corp., Civil No. 07-00313 ACK-LEK, 2009 WL 2006828 (D. Haw. June 30), <i>adopted as modified</i> by 2009 WL 2365561 (D. Haw. July 29, 2009) | Tort |
| 255 | Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485 (4th Cir. 2005) | Insurance |
| 256 | N.Y. State Nat'l Org. for Women v. Cuomo, No. 93 Civ. 7146(RCL)JCF, 1998 WL 395320 (S.D.N.Y. July 14, 1998) | Civil Rights |
| 257 | N3 Oceanic, Inc. v. Shields, No. 06-1304, 2006 WL 2433731 (E.D. Pa. Aug. 21, 2006) | Commercial |
| 258 | Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987) | Tort; Constitutional |
| 259 | Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392 (D.S.C. 2004) | Commercial |
| 260 | New Salida Ditch Co. v. United Fire & Cas. Ins. Co., No. 08-cv-00391-JLK-KLM, 2009 WL 2399933 (D. Colo. July 31, 2009) | Insurance |
| 261 | Nieves v. Kmart Corp., No. 2005-CV-0024, 2009 WL 1605623 (D.V.I. June 8, 2009) | Tort |
| 262 | Novelty, Inc. v. Mountain View Mktg. Inc., No. 1:07-cv-01229-SEB-JMS, 2009 WL 3444591 (S.D. Ind. Oct. 21, 2009) | Intellectual Property |
| 263 | NSB U.S. Sales, Inc. v. Brill, No. 04 Civ. 9240(RCC), 2007 WL 258181 (S.D.N.Y. Jan. 26, 2007) | Contract |
| 264 | Nucor Corp. v. Bell, 251 F.R.D. 191 (D.S.C. 2008) | Tort; Intellectual Property |

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| 265 | Nursing Home Pension Fund v. Oracle Corp., 254 F.R.D. 559 (N.D. Cal. 2008) | Securities |
| 266 | O'Brien v. Ed Donnelly Enters., 575 F.3d 567 (6th Cir. 2009) | Employment |
| 267 | Ogin v. Ahmed, 563 F. Supp. 2d 539 (M.D. Pa. 2008) | Tort |
| 268 | Okoumou v. Safe Horizon, No. 03 Civ.1606 LAK HBP, 2005 WL 2431674 (S.D.N.Y. Sept. 30, 2005) | Employment |
| 269 | Oldenkamp v. United Am. Ins. Co., No. 07-CV-601-TCK-PJC, 2008 WL 4682226 (N.D. Okla. Oct. 21, 2008) | Insurance |
| 270 | Omega Patents, LLC v. Fortin Auto Radio, Inc., No. 6:05-cv-1113-Orl-22DAB, 2006 WL 2038534 (M.D. Fla. July 19, 2006) | Intellectual Property |
| 271 | Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422 (M.D. Fla. Nov. 7, 2006) | Contract |
| 272 | Orion Ethanol, Inc. v. Evans, No. 08-1180-JTM-DWB, 2009 WL 5205965 (D. Kan. Dec. 22, 2009) | Commercial |
| 273 | Outside the Box Innovations, LLC v. Travel Caddy, Inc., No. 1:05-CV-2482-ODE, 2007 WL 5155945 (N.D. Ga. Mar. 27, 2007) | Intellectual Property |
| 274 | Padgett v. City of Monte Sereno, No. C 04-03946 JW, 2007 WL 878575 (N.D. Cal. Mar. 20, 2007) | Civil Rights |
| 275 | Pandora Jewelry, LLC v. Chamilia, LLC, Civ. No. CCB-06-3041, 2008 WL 4533902 (D. Md. Sept. 30, 2008) | Commercial |
| 276 | Paramount Pictures Corp. v. Davis, 234 F.R.D. 102 (E.D. Pa. 2005) | Intellectual Property |
| 277 | Paris Bus. Prods., Inc. v. Genesis Techs., LLC, Civil No. 07-0260 (JBS), 2007 WL 3125184 (D.N.J. Oct. 24, 2007) | Commercial |
| 278 | Patmont Motor Werks, Inc. v. CSK Auto Inc., No. 3:04-CV- 0473-BES (VPC), 2006 WL 2591042 (D. Nev. Sept. 8, 2006) | Intellectual Property |
| 279 | Pennar Software Corp. v. Fortune 500 Sys. Ltd., No. 01-01734 EDL, 2001 WL 1319162 (N.D. Cal. Oct. 25, 2001) | Contract |
| 280 | Perez-Farias v. Global Horizons, Inc., No. CV-05-3061-RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007) | Employment |
| 281 | Perfect Barrier LLC v. Woodsmart Solutions Inc., No. 3:07-CV-103 JVB, 2008 WL 2230192 (N.D. Ind. May 27, 2008) | Contract |
| 282 | Performance Chevrolet, Inc. v. Mkt. Scan Info. Sys., Inc., No. CV-04-0244-BLW, 2006 WL 1042359 (D. Idaho Apr. 18, 2006) | Contract |
| 283 | Permasteelisa CS Corp. v. Airolite Co., No. 2:06-cv-569, 2008 WL 2491747 (S.D. Ohio June 18, 2008) | Commercial |
| 284 | Peschel v. City of Missoula, 664 F. Supp. 2d 1137 (D. Mont. 2009) | Civil Rights |
| 285 | Petcou v. C.H. Robinson Worldwide, Inc., No. 1:06-CV-2157-HTW-GGB, 2008 WL 542684 (N.D. Ga. Feb. 25, 2008) | Employment |

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| 286 | Peterson v. Tri-County Metro. Transp. Dist., No. CV-06-1828-ST, 2008 WL 723521 (D. Or. Mar. 14, 2008) | Employment |
| 287 | Peterson v. Union Pac. R.R., No. 06-3084, 2008 WL 1930453 (C.D. Ill. May 1, 2008) | Tort |
| 288 | Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173 (D. Utah 2009) | Intellectual Property |
| 289 | Phillips v. Netblue, Inc., No. C-05-4401 SC, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007) | Statutory Cause of Action |
| 290 | Phillips v. Potter, No. 7-8145, 2009 WL 1362049 (W.D. Pa. May 14, 2009) | Employment |
| 291 | Phx. Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006) | Commercial |
| 292 | Pinstripe, Inc. v. Manpower, Inc., No. 07-CV-620-GKF-PJC, 2009 WL 2252131 (N.D. Okla. July 29, 2009) | Commercial |
| 293 | Pioneer Hi-Bred Int'l, Inc. v. Monsanto Co., No. 4:97CV01609 ERW, 2001 WL 170410 (E.D. Mo. Jan. 2), <i>amended by</i> 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001) | Contract |
| 294 | Plasse v. Tyco Elecs. Corp., 448 F. Supp. 2d 302 (D. Mass. 2006) | Employment |
| 295 | Plunk v. Village of Elwood, No. 07 C 88, 2009 WL 1444436 (N.D. Ill. May 20, 2009) | Civil Rights |
| 296 | PML N. Am., LLC v. Hartford Underwriters Ins. Co., No. 05-CV-70404-DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006) | Insurance |
| 297 | Poole <i>ex rel.</i> Elliott v. Textron, Inc., 192 F.R.D. 494 (D. Md. 2000) | Tort |
| 298 | Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, 2009 WL 982460 (S.D. Fla. Apr. 9, 2009) | Contract |
| 299 | Procter & Gamble Co. v. Haugen, 179 F.R.D. 622 (D. Utah 1998), <i>aff'd in part and rev'd in part on other grounds</i> , 222 F.3d 1262 (10th Cir. 2000) | Commercial |
| 300 | Procter & Gamble Co. v. Haugen, 427 F.3d 727 (10th Cir. 2005) | Commercial |
| 301 | Purdee v. Pilot Travel Ctrs., LLC, No. CV 407-028, 2009 WL 430401 (S.D. Ga. Feb. 19, 2009) | Employment |
| 302 | Qantum Commc'ns Corp. v. Star Broad., Inc., 473 F. Supp. 2d 1249 (S.D. Fla. 2007) | Contract |
| 303 | Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7), <i>vacated in part</i> , 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) | Intellectual Property |
| 304 | Quinby v. WestLB AG, No. 04Civ.7406(WHP)(HBP), 2005 WL 3453908 (S.D.N.Y. Dec. 15, 2005) | Employment |
| 305 | R & R Sails, Inc. v. Ins. Co. of Pa., 251 F.R.D. 520 (S.D. Cal. 2008) | Insurance |
| 306 | R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 878 (N.D. Ohio 2009) | Commercial |
| 307 | Rafael Town Ctr. Investors, LLC v. Weitz Co., No. C 06-6633SI, 2007 WL 2261376 (N.D. Cal. Aug. 6, 2007) | Commercial |

| No. | Case | Primary Case Type |
|-----|---|-----------------------|
| 308 | Rahman v. Smith & Wollensky Rest. Grp., Inc., No. 06 CIV 6198LAKJCF, 2009 WL 773344 (S.D.N.Y. Mar. 18, 2009) | Employment |
| 309 | Realnetworks, Inc. v. DVD Copy Control Ass'n, 264 F.R.D. 517 (N.D. Cal. 2009) | Contract |
| 310 | Recinos-Recinos v. Express Forestry, Inc., Civil Action No. 05-1355, 2006 WL 2349459 (E.D. La. Aug. 11, 2006) | Employment |
| 311 | Rentfrow v. Epic Cos., No. 05-3736, 2009 WL 586279 (E.D. La. Mar. 5, 2009) | Employment |
| 312 | Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002) | Contract |
| 313 | Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284 (S.D.N.Y. 2009) | Contract |
| 314 | Ridge Chrysler Jeep, LLC v. DaimlerChrysler Servs. N. Am., LLC, No. 03 C 760, 2006 WL 2808158 (N.D. Ill. Sept. 6, 2006), <i>aff'd sub nom.</i> Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams. LLC, 516 F.3d 623 (7th Cir. 2008) | Commercial |
| 315 | Ring Plus, Inc. v. Cingular Wireless LLC, 637 F. Supp. 2d 423 (E.D. Tex. 2009) | Intellectual Property |
| 316 | Ripley v. District of Columbia, No. 06-1705 (EGS) (D.D.C. July 2, 2009) | Employment |
| 317 | Rodgers v. Lowe's Home Ctrs., Inc., No. 05 C 0502, 2007 WL 257714 (N.D. Ill. Jan. 30, 2007) | Employment |
| 318 | Rodriguez-Monguio v. Ohio State Univ., No. 2:08-cv-00139, 2009 WL 1575277 (S.D. Ohio June 3, 2009) | Employment |
| 319 | Rousseau v. Echosphere Corp., No. Civ.A. 03-1230, 2005 WL 2176839 (W.D. Pa. Aug. 30, 2005) | Employment |
| 320 | Rowe v. Albertsons, Inc., 116 F. App'x 171 (10th Cir. 2004) | Tort |
| 321 | Samsung Elecs. Co. v. Rambus, Inc., 439 F. Supp. 2d 524 (E.D. Va. 2006), <i>vacated</i> , 523 F.3d 1374 (Fed. Cir. 2008) | Intellectual Property |
| 322 | Scalera v. Electrograph Sys., Inc., 262 F.R.D. 162 (E.D.N.Y. 2009) | Employment |
| 323 | School-Link Techs., Inc. v. Applied Res., Inc., Civil Action No. 05-2088-JWL, 2007 WL 677647 (D. Kan. Feb. 28, 2007) | Contract |
| 324 | SD Prot., Inc. v. Del Rio, 587 F. Supp. 2d 429 (E.D.N.Y. 2008) | Contract |
| 325 | Select Med. Corp. v. Hardaway, No. Civ.A. 05-3341, 2006 WL 859741 (E.D. Pa. Mar. 24, 2006) | Contract |
| 326 | Sentis Grp., Inc. v. Shell Oil Co., 559 F.3d 888 (8th Cir. 2009) | Contract |
| 327 | Serra Chevrolet, Inc. v. Gen. Motors Corp., No. CV-01-VEH-2682-S (N.D. Ala. May 20, 2005), <i>aff'd in part and rev'd in part</i> , 446 F.3d 1137 (11th Cir. 2006) | Commercial |
| 328 | Serv. Emps. Int'l Union v. Rosselli, No. C 09-00404 WHA (MEJ), 2009 WL 2581320 (N.D. Cal. Aug. 20, 2009) | Employment |

| No. | Case | Primary Case Type |
|-----|---|-----------------------|
| 329 | Shank v. Kitsap County, No. C04-5843RJB, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005) | Civil Rights |
| 330 | Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001), <i>adopted in part and rejected in part</i> by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), <i>aff'd in part and vacated in part</i> , 428 F.3d 1 (1st Cir. 2005) | Employment |
| 331 | Sit-up Ltd. v. IAC/Interactive Corp., No. 05 Civ. 9292(DLC), 2008 WL 463884 (S.D.N.Y. Feb. 20, 2008) | Commercial |
| 332 | Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC, No. 06-CV-02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009) | Tort |
| 333 | Sonii v. Gen. Elec., No. 95 C 5370, 2003 WL 21541039 (N.D. Ill. June 11, 2003), <i>aff'd</i> , 146 F. App'x 852 (7th Cir. 2005) (per curiam) | Employment |
| 334 | SonoMedica, Inc. v. Mohler, No. 1:08-cv-230 (GBL), 2009 WL 2371507 (E.D. Va. July 28, 2009) | Commercial |
| 335 | Se. Mech. Servs., Inc. v. Brody (<i>Brody II</i>), 657 F. Supp. 2d 1293 (M.D. Fla. 2009) | Tort; Commercial |
| 336 | Se. Mech. Servs., Inc. v. Brody (<i>Brody I</i>), No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395 (M.D. Fla. July 24, 2009) | Tort; Commercial |
| 337 | S. Capitol Enters., Inc. v. Conseco Servs., L.L.C., No. 04-705-JJB-SCR, 2008 WL 4724427 (M.D. La. Oct. 24, 2008) | Commercial |
| 338 | S. New Eng. Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82 (D. Conn. 2008), <i>aff'd</i> , No. 08-4518-cv, 2010 WL 3325962 (2d Cir. Aug. 25, 2010) | Commercial |
| 339 | Spooner v. Egan, Civ. No. 08-262-P-S, 2009 WL 2175063 (D. Me. July 21), <i>adopted by</i> No. 08-262-P-S, 2009 WL 2591358 (D. Me. Aug. 19, 2009) | Intellectual Property |
| 340 | Square D Co. v. Scott Elec. Co., No. 06-00459, 2008 WL 2779067 (W.D. Pa. July 15, 2008) | Commercial |
| 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) | Insurance |
| 342 | Sterle v. Elizabeth Arden, Inc., No. 3:06 CV 01584(DJS), 2008 WL 961216 (D. Conn. Apr. 9, 2008) | Employment |
| 343 | Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004) | Tort |
| 344 | Stratienko v. Chattanooga-Hamilton Cnty. Hosp. Auth., No. 1:07-CV-258, 2009 WL 2168717 (E.D. Tenn. July 16, 2009) | Employment |
| 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) | Insurance |
| 346 | Stroupe v. Wal-Mart Stores E., LP, No. 3:07CV267, 2007 WL 3223224 (E.D. Va. Oct. 29, 2007) | Tort |
| 347 | Sue v. Milyard, No. 07-cv-01711-REB-MJW, 2009 WL 2424435 (D. Colo. Aug. 6, 2009) | Civil Rights |

| No. | Case | Primary Case Type |
|------------|--|--------------------------|
| 348 | Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A., No. 3: 06-CV-0271-B, 2008 WL 3261095 (N.D. Tex. Aug. 8, 2008) | Commercial |
| 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) | Antitrust |
| 350 | Swofford v. Eslinger, 671 F. Supp. 2d 1274 (M.D. Fla. 2009) | Constitutional |
| 351 | Tango Transp., LLC v. Transp. Int'l Pool, Inc., No. 5:08-CV-0559, 2009 WL 3254882 (W.D. La. Oct. 8, 2009) | Contract |
| 352 | Tantivy Commc'ns, Inc. v. Lucent Techs. Inc., No. Civ.A.2:04CV79 (TJW), 2005 WL 2860976 (E.D. Tex. Nov. 1, 2005) | Intellectual Property |
| 353 | Teague v. Target Corp., No. 3:06CV191, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007) | Employment |
| 354 | Tech. Recycling Corp. v. City of Taylor, 186 F. App'x 624 (6th Cir. 2006) | Civil Rights |
| 355 | Technical Sales Assocs., Inc. v. Ohio Star Forge Co., No. 07-11745, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009) | Contract |
| 356 | Telecom Int'l Am., Ltd. v. AT&T Corp., 189 F.R.D. 76 (S.D.N.Y. 1999) | Contract |
| 357 | TeleQuest Int'l Corp. v. Dedicated Bus. Sys., Inc., Civ. Action No. 06-5359 (PGS), 2009 WL 690996 (D.N.J. Mar. 11, 2009) | Contract |
| 358 | Thermodyn Corp. v. 3M Co., 593 F. Supp. 2d 972 (N.D. Ohio 2008) | Commercial |
| 359 | Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93 (D. Md. 2003) | Civil Rights |
| 360 | Tilton v. McGraw-Hill Cos., No. C06-0098RSL, 2007 WL 777523 (W.D. Wash. Mar. 9, 2007) | Tort |
| 361 | Toth v. Calcasieu Parish, No. 06-998, 2009 WL 528245 (W.D. La. Mar. 2, 2009) | Tort; Constitutional |
| 362 | Toussie v. County of Suffolk, No. CV 01- 6716(JS)(ARL), 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007) | Civil Rights |
| 363 | Tracy v. Fin. Ins. Mgmt. Corp., No. 1:04-CV-00619- TABDFH, 2005 WL 2100261 (S.D. Ind. Aug. 22, 2005) | Employment |
| 364 | Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672 (7th Cir. 2008) | Tort |
| 365 | Travel Sentry, Inc. v. Tropp, 669 F. Supp. 2d 279 (E.D.N.Y. 2009) | Intellectual Property |
| 366 | Treppel v. Biovail Corp., 249 F.R.D. 111 (S.D.N.Y. 2008) | Tort |
| 367 | Tri-Cnty. Motors, Inc. v. Am. Suzuki Motor Corp., 494 F. Supp. 2d 161 (E.D.N.Y. 2007), <i>aff'd</i> , 301 F. App'x 11 (2d Cir. 2008) | Contract |
| 368 | Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001) | Tax Refund Action |

| No. | Case | Primary Case Type |
|-----|--|-----------------------------------|
| 369 | Triple-I Corp. v. Hudson Assocs. Consulting, Inc., No. 06-2195-EFM, 2009 WL 1210882 (D. Kan. May 1), <i>aff'd</i> , No. 06-2195-EFM, 2009 WL 2162204 (D. Kan. July 17, 2009) | Intellectual Property |
| 370 | Tse v. UBS Fin. Servs., Inc., 568 F. Supp. 2d 274 (S.D.N.Y. 2008) | Employment |
| 371 | Turner v. Resort Condos. Int'l, LLC, No. 1:03-cv-2025-DFH-WTL, 2006 WL 1990379 (S.D. Ind. July 13, 2006) | Employment |
| 372 | U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667 (M.D. Fla. 2008) | Contract |
| 373 | United States <i>ex rel.</i> Koch v. Koch Indus., Inc., 197 F.R.D. 463 (N.D. Okla. 1998) | Federal Statutory Cause of Action |
| 374 | United States v. Maxxam, Inc., No. C-06-07497 CW (JCS), 2009 WL 817264 (N.D. Cal. Mar. 27, 2009) | Federal Statutory Cause of Action |
| 375 | United States v. Philip Morris USA Inc., 327 F. Supp. 2d 21 (D.D.C. 2004) | Tort |
| 376 | Univ. of Pittsburgh v. Townsend, No. 3:04-cv-291, 2007 WL 1002317 (E.D. Tenn. Mar. 30, 2007) | Intellectual Property |
| 377 | Van Asdale v. Int'l Game Tech., No. 3:04-CV-703, 2009 WL 4672727 (D. Nev. Dec. 8, 2009) | Intellectual Property |
| 378 | Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376 (D.N.J. 2006) | Employment |
| 379 | Wachtel v. Health Net, Inc., 239 F.R.D. 81 (D.N.J. 2006) | Employment |
| 380 | Wash. Alder LLC v. Weyerhaeuser Co., No. CV 03-753-PA, 2004 WL 4076674 (D. Or. May 5, 2004) | Antitrust |
| 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) | Commercial |
| 382 | Wells v. Berger, Newmark & Fenchel, P.C., Civil Action No. 07 C 3061, 2008 WL 4365972 (N.D. Ill. Mar. 18, 2008) | Civil Rights |
| 383 | Wells v. Orange Cnty. Sch. Bd., No. 6:05-cv-479-Orl-28DAB, 2006 WL 4824479 (M.D. Fla. Nov. 7, 2006) | Employment |
| 384 | White v. Lenox Hill Hosp., No. 02CIV5749(WHP)(FM), 2005 WL 1081443 (S.D.N.Y. May 10, 2005) | Tort |
| 385 | Wiginton v. CB Richard Ellis, No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003) | Employment |
| 386 | Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443 (C.D. Cal. 1984) | Antitrust |
| 387 | Williams v. ACS Consultant Co., No. 06-cv-13603, 2007 WL 2822777 (E.D. Mich. Sept. 26, 2007) | Civil Rights |
| 388 | Williams v. Saint-Gobain Corp., No. 00-CV-0502E(SC), 2002 WL 1477618 (W.D.N.Y. June 28, 2002) | Employment |
| 389 | Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640 (D. Kan. 2005) | Employment |
| 390 | Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSWL SHX, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007) | Commercial |

| No. | Case | Primary Case Type |
|------------|--|--------------------------|
| 391 | Wixon v. Wyndham Resort Dev. Corp., No. C 07-02361 JSW, 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009) | Contract |
| 392 | Wong v. Thomas, No. 05-2588 (AET), 2008 WL 4224923 (D.N.J. Sept. 10, 2008), <i>aff'd</i> , 341 F. App'x 765 (3d Cir. 2009) | Employment |
| 393 | Wood Grp. Pressure Control, L.P. v. B & B Oilfield Servs., Inc., Civ. Action No. 06-3002, 2007 WL 1076702 (E.D. La. Apr. 9, 2007) | Commercial |
| 394 | Wood v. Sempra Energy Trading Corp., No. 3:03-CV-986 (JCH), 2005 WL 3465845 (D. Conn. Dec. 9, 2005), <i>aff'd</i> , 225 F. App'x 38 (2d Cir. 2007) | Employment |
| 395 | Woodburn Constr. Co. v. Encon Pac., LLC, No. C05-5811FDB, 2007 WL 1287845 (W.D. Wash. Apr. 30, 2007) | Commercial |
| 396 | World Courier v. Barone, No. C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007) | Commercial |
| 397 | Yeisley v. Pa. State Police, No. 3:CV-05-1650, 2008 WL 906465 (M.D. Pa. Mar. 31, 2008) | Civil Rights |
| 398 | z4 Techs., Inc. v. Microsoft Corp., No. 6:06-CV-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006), <i>aff'd</i> , 507 F.3d 1340 (Fed. Cir. 2007) | Intellectual Property |
| 399 | Zubulake v. UBS Warburg LLC (<i>Zubulake V</i>), 229 F.R.D. 422 (S.D.N.Y. 2004) | Employment |
| 400 | 1100 W., LLC v. Red Spot Paint & Varnish Co., No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118 (S.D. Ind. June 5, 2009) | Environmental |
| 401 | 3M Innovative Proprs. Co. v. Tomar Elecs., No. 05-756(MJD/AJB), 2006 WL 2670038 (D. Minn. Sept. 18, 2006) | Intellectual Property |

APPENDIX B

OVERALL STATISTICS

| Year | Cases with Adverse Jury Instruction Plaintiff Defendant of Plaintiff | | | | | | | |
|------------|--|-------------|----------------------------|--------------------------------|----------------|---------------------|---------------------|-----------------------------------|
| | Total Written Rulings | Total Cases | Cases with Sanction Awards | Cases with Dismissal Sanctions | Jury Sanctions | Plaintiff Sanctions | Defendant Sanctions | Percentage of Plaintiff Sanctions |
| 2009 | 111 | 97 | 46 | 5 | 12 | 12 | 32 | 26.1% |
| 2008 | 90 | 71 | 42 | 6 | 15 | 11 | 30 | 26.2% |
| 2007 | 87 | 66 | 39 | 6 | 8 | 7 | 32 | 18.0% |
| 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 | 5 | 5 | 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% |
| 485 | 401 | 230 | 36 | 52 | 53 | 175 | 23.0% | |

APPENDIX C

CASES WHERE SANCTIONS WERE AWARDED

| No. | Case | Basis for Sanction |
|------------|--|---|
| 1 | Acorn v. County of Nassau, No. CV 05-2301, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009) | Failure to Preserve |
| 2 | Adams v. Gateway, Inc., No. 2:02-CV-106, 2006 WL 2563418 (D. Utah Mar. 6, 2006) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 3 | AdvantaCare Health Partners, LP v. Access IV, No. 03-04496, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) | Failure to Preserve |
| 4 | Advante Int'l Corp. v. Mintel Learning Tech., No. C 05-01022 JW (RS), 2008 WL 928332 (N.D. Cal. Apr. 4, 2008) | Failure to Preserve |
| 5 | Aecon Bldgs., Inc. v. Zurich N. Am., 253 F.R.D. 655 (W.D. Wash. 2008) | Failure to Produce |
| 6 | Ajaxo Inc., v. Bank of Am. Tech. & Operations, Inc., No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451 (E.D. Cal. Dec. 2, 2008) | Delay in Production; Format of Production |
| 7 | Am. Family Mut. Ins. Co. v. Roth, No. 05 C 3839, 2009 WL 982788 (N.D. Ill. Feb. 20, 2009) | Failure to Preserve |
| 8 | Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States, No. 04-CV-1798, 2009 WL 1617773 (E.D.N.Y. June 9, 2009) | Failure to Produce; Failure to Perform Adequate Searches |
| 9 | Ameriwood Indus. v. Liberman, No. 4:06CV524-DJS, 2007 WL 5110313 (E.D. Mo. July 3, 2007) | Failure to Preserve |
| 10 | Anderson v. Crossroads Capital Partners, LLC, No. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004) | Failure to Preserve |
| 11 | APC Filtration, Inc. v. Becker, No. 07 CV 1462, 2007 WL 3046233 (N.D. Ill. Oct. 12, 2007) | Failure to Preserve |
| 12 | Appraisal Mgmt. Co. III v. FNC, Inc., No. 1:04CV1158, 2005 WL 3088561 (N.D. Ohio Nov. 17, 2005) | Failure to Produce; Delay in Production |
| 13 | Arista Records, Inc. v. Sakfield Holding Co. S.L., 314 F. Supp. 2d 27 (D.D.C. 2004) | Failure to Preserve; Failure to Produce |
| 14 | Arista Records, L.L.C. v. Tschirhart, 241 F.R.D. 462 (W.D. Tex. 2006) | Failure to Preserve |
| 15 | Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009) | Failure to Preserve |
| 16 | Armisted v. State Farm Mut. Auto. Ins. Co., No. 07-10259, 2009 WL 81103 (E.D. Mich. Jan. 9, 2009) | Failure to Produce |
| 17 | Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc., No. 05-4896 (PGS), 2008 WL 4513696 (D.N.J. Oct. 1, 2008) | Failure to Preserve |
| 18 | Atl. Recording Corp. v. Howell, No. CV-06-02076-PHX-NVW, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008) | Failure to Preserve |

| No. | Case | Basis for Sanction |
|-----|---|---|
| 19 | Attard v. City of New York, No. 05 CV 2129(JG)(RML), 2008 WL 1991107 (E.D.N.Y. May 5, 2008) | Delay in Production |
| 20 | Auto. Inspection Servs., Inc. v. Flint Auto Auction, Inc., No. 06-15100, 2007 WL 3333016 (E.D. Mich. Nov. 9, 2007) | Other |
| 21 | Autotech Techs. Ltd. P'ship v. Automationsdirect.com, Inc., No. 05 C 5488, 2008 WL 783301 (N.D. Ill. Mar. 25, 2008) | Failure to Produce |
| 22 | Babaev v. Grossman, No. CV03-5076(DLI)(WDW), 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008) | Failure to Preserve |
| 23 | Benton v. Dlorah, Inc., No. 06-CV-2488, 2007 WL 3231431 (D. Kan. Oct. 30, 2007) | Delay in Production |
| 24 | Black & Veatch Int'l Co. v. Foster Wheeler Energy Corp., 211 F.R.D. 641 (D. Kan. 2002) | Failure to Produce |
| 25 | Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423 (D. Neb. Nov. 5, 2007) | Failure to Produce; Failure to Perform Adequate Searches |
| 26 | Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (<i>Bray & Gillespie II</i>), 259 F.R.D. 591 (M.D. Fla.), <i>rejected in part</i> by No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla. Nov. 11, 2009), <i>and adopted in part</i> by No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010) | Delay in Production; Failure to Perform Adequate Searches; Format of Production |
| 27 | Brick v. HSBC Bank USA, No. 04-CV-0129E(F), 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004) | Failure to Produce; Delay in Production |
| 28 | Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506 (D. Md. 2005) | Failure to Preserve |
| 29 | Bryant v. Gardner, 587 F. Supp. 2d 951 (N.D. Ill. 2008) | Failure to Preserve |
| 30 | Buskey v. Bos. Mkt. Corp., No. 04 CV 2193, 2006 WL 2527826 (E.D.N.Y. Aug. 14, 2006) | Failure to Preserve; Failure to Produce |
| 31 | Cabinetware Inc. v. Sullivan, No. Civ. S. 90-313CLKK, 1991 WL 327959 (E.D. Cal. July 15, 1991) | Failure to Preserve |
| 32 | Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007) | Failure to Preserve; Failure to Produce |
| 33 | Canon U.S.A., Inc. v. S.A.M., Inc., No. 07-01201, 2008 WL 2522087 (E.D. La. June 20, 2008) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 34 | Cardenas v. Dorel Juvenile Grp., Inc., No. 04-2478, 2006 WL 1537394 (D. Kan. June 1, 2006) | Failure to Perform Adequate Searches |
| 35 | Century ML-Cable Corp. v. Carrillo, 43 F. Supp. 2d 176 (D.P.R. 1998) | Failure to Preserve |
| 36 | Chevron U.S.A., Inc. v. M & M Petrol. Servs., Inc., No. SACV 07-0818 DOC (ANx), 2009 WL 2431926 (C.D. Cal. Aug. 6, 2009) | Failure to Preserve; Failure to Produce |
| 37 | Cimaglia v. Union Pac. R.R., No. 6-CV-3084, 2009 WL 87426 (C.D. Ill. Jan. 12, 2009) | Failure to Produce |
| 38 | Claredi Corp. v. Seebeyond Tech. Corp., No. 4:04CV1304 RWS, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007) | Failure to Produce; Delay in Production |

| No. | Case | Basis for Sanction |
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| 39 | Clark Constr. Grp., Inc. v. City of Memphis, 229 F.R.D. 131 (W.D. Tenn. 2005) | Failure to Preserve |
| 40 | Columbia Pictures, Inc. v. Bunnell, No. 2:06-cv-01093, 2007 WL 4877701 FMC-JCx (C.D. Cal. Dec. 13, 2007) | Failure to Preserve; Failure to Produce |
| 41 | Columbus McKinnon Corp. v. HealthNow N.Y., Inc., No. 03-CV-0831, 2006 WL 2827675 (W.D.N.Y. Sept. 29, 2006) | Failure to Produce |
| 42 | Commc'ns Ctr., Inc. v. Hewitt, No. Civ.S-03-1968 WBS KJ, 2005 WL 3277983 (E.D. Cal. Apr. 5, 2005) | Failure to Preserve; Failure to Produce |
| 43 | Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166 (D. Colo. 1990) | Failure to Preserve |
| 44 | Computer Task Grp., Inc. v. Brotby, 364 F.3d 1112 (9th Cir. 2004) | Failure to Produce |
| 45 | Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360 (N.D. Ga. 2008) | Failure to Preserve |
| 46 | Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (M.D. La. 2006) | Failure to Preserve |
| 47 | Creative Sci. Sys., Inc. v. Forex Capital Mkts., LLC, No. C 04-03746 JF (RS), 2006 WL 870973 (N.D. Cal. Apr. 4, 2006) | Failure to Preserve |
| 48 | Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993) | Failure to Produce |
| 49 | CSI Inv. Partners II, L.P. v. Cendant Corp., 507 F. Supp. 2d 384 (S.D.N.Y. 2007), <i>aff'd</i> , 328 F. App'x 56 (2d Cir. 2009) | Failure to Preserve; Delay in Production; Misrepresenting Completeness of Production |
| 50 | Cyntegra, Inc. v. Idexx Labs., Inc., No. CV 06-4170 PSG (CTx), 2007 WL 5193736 (C.D. Cal. Sept. 21, 2007), <i>aff'd</i> , 322 F. App'x 569 (9th Cir. 2009) | Failure to Preserve |
| 51 | DaimlerChrysler Motors v. Bill Davis Racing, Inc., No. CIV.A. 03-72265, 2005 WL 3502172 (E.D. Mich. Dec. 22, 2005) | Failure to Preserve |
| 52 | Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000) | Failure to Preserve |
| 53 | DeLoach v. Philip Morris Cos., 206 F.R.D. 568 (M.D.N.C. 2002) | Failure to Produce |
| 54 | Digene Corp. v. Third Wave Techs., Inc., No. 07-C-22-C, 2007 WL 4939048 (W.D. Wis. Oct. 24, 2007) | Failure to Produce |
| 55 | DirecTV, Inc. v. Borow, No. 03 C 2581, 2005 WL 43261 (N.D. Ill. Jan. 6, 2005) | Failure to Preserve |
| 56 | Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372 (D. Conn. 2007) | Failure to Preserve |
| 57 | Dong Ah Tire & Rubber Co. v. Glasforms, Inc., No. C 06-3359 JF (RS), 2008 WL 4786671 (N.D. Cal. Oct. 29, 2008) | Failure to Preserve |
| 58 | Dowling v. United States, No. 2000-CV-0049, 2008 WL 4534174 (D.V.I. Oct. 6, 2008) | Failure to Preserve |
| 59 | Durdin v. Kuryakyn Holdings, Inc., No. 06-C-0039-C, 2006 WL 6040466 (W.D. Wis. Nov. 7, 2006) | Failure to Preserve |
| 60 | Dziadkiewicz v. Blue Cross & Blue Shield of R.I., No. C.A.96-275S, 2004 WL 2418308 (D.R.I. Oct. 13, 2004, Oct. 21, 2004) | Delay in Production |

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| 61 | E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005) | Failure to Preserve; Failure to Perform Adequate Searches |
| 62 | Easton Sports, Inc. v. Warrior LaCrosse, Inc., No. 05-72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006) | Failure to Preserve |
| 63 | Edelen v. Campbell Soup Co., Civil Action No. 1:08-cv-00299-JOF-LTW, 2009 WL 4798117 (N.D. Ga. Dec. 8, 2009) | Failure to Perform Adequate Searches |
| 64 | Elion v. Jackson, No. 05-0992 (PLF), 2006 WL 2583694 (D.D.C. Sept. 8, 2006) | Failure to Produce |
| 65 | Fendi Adele S.R.L. v. Filene's Basement, Inc., No. 06 Civ. 244, 2009 WL 855955 (S.D.N.Y. Mar. 24, 2009) | Delay in Production |
| 66 | Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004), <i>withdrawn in part</i> , No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio July 28, 2005) | Failure to Produce; Failure to Perform Adequate Searches |
| 67 | Pharmacy Records v. Nassar (<i>Pharmacy Records I</i>), 248 F.R.D. 507 (E.D. Mich. 2008), <i>aff'd</i> , 379 F. App'x 522 (6th Cir. 2010) | Failure to Preserve |
| 68 | Finley v. Hartford Life & Accident Ins. Co., 249 F.R.D. 329 (N.D. Cal. 2008) | Failure to Produce |
| 69 | Fleming v. City of New York, No. 01 Civ. 8885, 2007 WL 4302501 (S.D.N.Y. Dec. 7, 2007) | Failure to Produce |
| 70 | Fox v. Riverdeep, Inc., No. 07-CV-13622, 2008 WL 5244297 (E.D. Mich. Dec. 16, 2008) | Failure to Preserve |
| 71 | Gamby v. First Nat'l Bank of Omaha, No. 06-11020, 2009 WL 127782 (E.D. Mich. Jan. 20), <i>objection denied</i> , 2009 WL 963116 (E.D. Mich. Apr. 8, 2009) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 72 | Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90 (D. Colo. 1996) | Failure to Preserve |
| 73 | GE Harris Ry. Elecs., L.L.C. v. Westinghouse Air Brake Co., No. 99-070-GMS, 2004 WL 5702740 (D. Del. Mar. 29, 2004) | Failure to Preserve |
| 74 | Giant Screen Sports LLC v. Sky High Entm't, No. 05 C 7184, 2007 WL 627607 (N.D. Ill. Feb. 27, 2007) | Failure to Preserve; Failure to Produce; Failure to Perform Adequate Searches |
| 75 | Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494 (D. Md. 2009) | Failure to Preserve |
| 76 | Google Inc. v. Am. Blind & Wallpaper Factory, Inc., No. C 03-5340 JF (RS), 2007 WL 1848665 (N.D. Cal. June 27, 2007) | Failure to Produce; Failure to Perform Adequate Searches |
| 77 | Grange Mut. Cas. Co. v. Mack, 270 F. App'x 372 (6th Cir. 2008) (<i>per curiam</i>) | Failure to Preserve; Failure to Produce |
| 78 | Grantley Patent Holdings, Ltd. v. Clear Channel Commc'ns, Inc., Civil Action No. 9:06CV259, slip op. (E.D. Tex. Aug. 14, 2007) | Failure to Produce |
| 79 | Great Am. Ins. Co. of N.Y. v. Lowry Dev., LLC, Civil Action Nos. 106CV097 LTS-RHW, 1:06CV412 LTS-RHW, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007) | Failure to Preserve |
| 80 | Grochocinski v. Schlossberg, 402 B.R. 825 (N.D. Ill. 2009) | Failure to Preserve |

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| 81 | GTFM, Inc. v. Wal-Mart Stores, Inc., No. 98 CIV. 7724 RPP, 2000 WL 335558, (S.D.N.Y. Mar. 30, 2000) | Failure to Produce; Delay in Production |
| 82 | Gucci Am., Inc., v. Gucci, No. 07 Civ. 6820(RMB)(JCF), 2009 WL 440463 (S.D.N.Y. Feb. 20, 2009) | Failure to Produce |
| 83 | Gutman v. Klein, No. 03 CV 1570(BMC)(RML), 2008 WL 4682208 (E.D.N.Y. Oct. 15), <i>adopted</i> by No. 03 Civ. 1570(BMC), 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008) | Failure to Preserve |
| 84 | Hahn v. Minn. Beef Indus., Inc., No. 00-2282 RHKSRN, 2002 WL 32667146 (D. Minn. Mar. 8, 2002) | Failure to Produce; Delay in Production |
| 85 | Hanni v. Am. Airlines, Inc., No. C-08-00732 CW (EDL), 2009 WL 1505286 (N.D. Cal. May 27, 2009) | Failure to Produce |
| 86 | Hewlett v. Davis, Civil Action No. 86-3708, 1987 WL 12298 (E.D. Pa. June 3, 1987), <i>aff'd in part and rev'd in part</i> , 844 F.2d 109 (3d Cir. 1988) | Failure to Preserve; Failure to Produce |
| 87 | Hous. Rights Ctr. v. Sterling, No. CV 03-859DSF, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005) | Failure to Preserve; Delay in Production; Failure to Perform Adequate Searches |
| 88 | Ill. Tool Works, Inc. v. Metro Mark Prods., Ltd., 43 F. Supp. 2d 951 (N.D. Ill. 1999) | Failure to Preserve; Delay in Production |
| 89 | Oscher v. Solomon Tropp Law Grp., P.A. (<i>In re</i> Atl. Int'l Mortgage Co.), 352 B.R. 503 (Bankr. M.D. Fla. 2006) | Failure to Produce; Delay in Production |
| 90 | <i>In re</i> Cheyenne Software, Inc. Sec. Litig., No. CV-94-2771(NG), 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997) | Failure to Produce |
| 91 | Cohen Steel Supply, Inc. v. Fagnant (<i>In re</i> Fagnant), Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004) | Delay in Production |
| 92 | <i>In re</i> Fannie Mae Sec. Litig., 552 F.3d 814 (D.C. Cir. 2009) | Failure to Produce; Delay in Production |
| 93 | Hawaiian Airlines, Inc. v. Mesa Air Grp., Inc. (<i>In re</i> Hawaiian Airlines, Inc.), Bankr. No. 03-00817, Adv. No. 06-90026, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007) | Failure to Preserve |
| 94 | <i>In re</i> Kmart Corp., 371 B.R. 823 (Bankr. N.D. Ill. 2007) | Failure to Preserve; Failure to Produce; Failure to Perform Adequate Searches |
| 95 | United States v. Krause (<i>In re</i> Krause), 367 B.R. 740 (Bankr. D. Kan. 2007), <i>aff'd</i> , Nos. 08-1132, 08-1136, 2009 WL 5064348 (D. Kan. Dec. 16, 2009) | Failure to Preserve |
| 96 | <i>In re</i> LTV Steel Co., 307 B.R. 37 (Bankr. N.D. Ohio 2004) | Failure to Produce; Delay in Production |
| 97 | <i>In re</i> Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060 (N.D. Cal. 2006) | Failure to Preserve |
| 98 | <i>In re</i> Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig., No. 2:03-MD-1565, 2009 WL 87618 (S.D. Ohio Jan. 8, 2009) | Failure to Produce; Delay in Production |

| No. | Case | Basis for Sanction |
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| 99 | <i>In re</i> NTL, Inc. Sec. Litig., 244 F.R.D. 179 (S.D.N.Y. 2007), <i>aff'd sub nom.</i> Gordon Partners v. Blumenthal, No. 02 Civ. 7377(LAK)(AJP), 2007 WL 1518632 (S.D.N.Y. May 17, 2007) | Failure to Preserve; Failure to Produce |
| 100 | <i>In re</i> Old Banc One S'holders Sec. Litig., No. 00 C 2100, 2005 WL 3372783 (N.D. Ill. Dec. 8, 2005) | Failure to Preserve |
| 101 | <i>In re</i> Quintus Corp., 353 B.R. 77 (Bankr. D. Del. 2006), <i>aff'd in part</i> , Nos. 01-501, 01-502, 01-503, Adv. No. 04-53074, Civ. No. 06-769 SLR, 2007 WL 4233665 (D. Del. Nov. 29, 2007) | Failure to Preserve |
| 102 | <i>In re</i> Rosenthal, Civil Action No. H-04-186, 2008 WL 983702 (S.D. Tex. Mar. 28, 2008) | Failure to Preserve |
| 103 | <i>In re</i> Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) | Failure to Produce; Delay in Production |
| 104 | <i>In re</i> Telxon Corp. Sec. Litig., Nos. 5:98CV2876, 1:01CV1078, 2004 WL 3192729 (N.D. Ohio July 16, 2004) | Failure to Preserve; Failure to Produce; Delay in Production; Failure to Perform Adequate Searches; Misrepresenting Completeness of Production |
| 105 | Innis Arden Golf Club v. Pitney Bowes, Inc., 257 F.R.D. 334 (D. Conn. 2009) | Failure to Preserve |
| 106 | Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc., 110 F. App'x 283 (3d Cir. 2004) | Failure to Preserve |
| 107 | Invision Media Commc'ns, Inc. v. Fed. Ins. Co., No. 02Civ.5461(NRB)(KNF), 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004) | Failure to Produce |
| 108 | Jacobson v. Starbucks Coffee Co., No. 05-1338-JTM, 2006 WL 3146349 (D. Kan. Oct. 31, 2006) | Failure to Produce; Failure to Perform Adequate Searches |
| 109 | Johnson v. Wells Fargo Home Mortg., Inc., No. 3:05-CV-0321-RAM, 2008 WL 2142219 (D. Nev. May 16, 2008) | Failure to Preserve |
| 110 | Jones v. Hawley, 255 F.R.D. 51 (D.D.C. 2009) | Failure to Preserve |
| 111 | JPMorgan Chase Bank, N.A. v. Neovi, Inc., No. 2:06-CV-0095, 2007 WL 1514005 (S.D. Ohio May 16, 2007) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 112 | Juniper Networks, Inc. v. Toshiba Am., Inc., No. 2:05-CV-479, 2007 WL 2021776 (E.D. Tex. July 11, 2007) | Failure to Produce; Misrepresenting Completeness of Production |
| 113 | Kamatani v. BenQ Corp., Civil Action No. 2:03-CV-437, 2005 WL 2455825 (E.D. Tex. Oct. 6, 2005) | Failure to Produce; Failure to Perform Adequate Searches |
| 114 | KCH Servs., Inc. v. Vanaire, Inc., No. 05-777, 2009 WL 2216601 (W.D. Ky. July 22, 2009) | Failure to Preserve |
| 115 | Keithley v. Home Store.com, Inc., No. C-03-04447SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008) | Failure to Preserve; Delay in Production; Failure to Perform Adequate Searches |
| 116 | Kipperman v. Onex Corp., 260 F.R.D. 682 (N.D. Ga. 2009) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |

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| 117 | Koninklike Philips Elecs. N.V. v. KXD Tech., Inc., No. 2:05-cv-1532-RLH-GWF, 2007 WL 3101248 (D. Nev. Oct. 16, 2007), <i>appeal dismissed</i> , 539 F.3d 1039 (9th Cir. 2008) | Failure to Preserve; Failure to Produce |
| 118 | Kounelis v. Sherrer, 529 F. Supp. 2d 503 (D.N.J. 2008) | Failure to Preserve |
| 119 | Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006) | Failure to Preserve |
| 120 | Kucala Enters., Ltd. v. Auto Wax Co., No. 02 C 1403, 2003 WL 21230605 (N.D. Ill. May 27), <i>adopted as modified by</i> 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003) | Failure to Preserve |
| 121 | Kvitka v. Puffin Co., No. 1:06-CV-0858, 2009 WL 385582 (M.D. Pa. Feb. 13, 2009) | Failure to Preserve |
| 122 | L.H. v. Schwarzenegger, No. CIV S-06-2042 LKK GGH, 2008 WL 2073958 (E.D. Cal. May 14, 2008) | Delay in Production; Format of Production |
| 123 | Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70 (D.D.C. 2003) | Failure to Preserve |
| 124 | Larson v. Bank One Corp., No. 00 C 2100, 2005 WL 4652509 (N.D. Ill. Aug. 18, 2005) | Failure to Preserve |
| 125 | Lava Trading, Inc. v. Hartford Fire Ins. Co., No. 03 Civ. 7037 PKC, 2005 WL 459267 (S.D.N.Y. Feb. 24, 2005) | Delay in Production |
| 126 | Legacy, Inc. v. Tekserve POS, LLC, No. 05 C 5431, 2007 WL 772958 (N.D. Ill. Mar. 12, 2007) | Failure to Preserve |
| 127 | Leon v. IDX Sys. Corp., No. C03-1158P, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), <i>aff'd in part and rev'd in part</i> , 464 F.3d 951 (9th Cir. 2006) | Failure to Preserve |
| 128 | Lessley v. City of Madison, No. 4:07-cv-136-DFH-WGH, 2008 WL 4977328 (S.D. Ind. Nov. 20, 2008) | Failure to Produce |
| 129 | Lewis v. Ryan, 261 F.R.D. 513 (S.D. Cal. 2009) | Failure to Preserve; Failure to Produce |
| 130 | Lexis-Nexis v. Beer, 41 F. Supp. 2d 950 (D. Minn. 1999) | Failure to Produce |
| 131 | Louis Vuitton Malletier v. Dooney & Bourke, Inc., No. 04 Civ. 5316 RMB MHD, 2006 WL 3476735 (S.D.N.Y. Nov. 30, 2006) | Failure to Produce; Failure to Perform Adequate Searches |
| 132 | Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A., No. 02 Civ. 0795 (CBM), 2005 WL 1026461 (S.D.N.Y. May 2, 2005) | Failure to Produce |
| 133 | Marcin Eng'g, LLC v. Founders at Grizzly Ranch, LLC, 219 F.R.D. 516 (D. Colo. 2003) | Failure to Produce |
| 134 | Mktg. Specialists, Inc. v. Bruni, 129 F.R.D. 35 (W.D.N.Y. 1989), <i>aff'd</i> , 923 F.2d 843 (2d Cir. 1990) | Failure to Produce |
| 135 | Martin v. Nw. Mut. Life Ins. Co., No. 8:04CV2328T23MAP, 2006 WL 148991 (M.D. Fla. Jan. 19, 2006) | Failure to Produce |
| 136 | MasterCard Int'l, Inc. v. Moulton, No. 03Civ.3613 VMMHD, 2004 WL 1393992 (S.D.N.Y. June 22, 2004) | Failure to Preserve |

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| 137 | May v. Pilot Travel Ctrs. LLC, No. 2:05-cv-918, 2006 WL 3827511 (S.D. Ohio Dec. 28, 2006) | Failure to Preserve; Failure to Produce; Delay in Production |
| 138 | Mazloum v. D.C. Metro. Police Dep't, 530 F. Supp. 2d 282 (D.D.C. 2008) | Failure to Preserve |
| 139 | McDowell v. District of Columbia, 233 F.R.D. 192 (D.D.C. 2006) | Failure to Produce; Delay in Production; Format of Production; Failure to Perform Adequate Searches |
| 140 | MeccaTech, Inc. v. Kiser, No. 8:05CV570, 2008 WL 6010937 (D. Neb. Apr. 2, 2008), <i>adopted in part</i> by 2009 WL 1152267 (D. Neb. Apr. 23, 2009) | Failure to Preserve |
| 141 | Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003), <i>adhered to on reconsideration</i> by No. 00 Civ. 3613(LAP), 2004 WL 1943099 (S.D.N.Y. Aug. 27, 2004) | Failure to Preserve; Failure to Produce; Failure to Perform Adequate Searches |
| 142 | Metrokane, Inc. v. Built NY, Inc., No. 06 Civ. 14447(LAK)(MHD), 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008) | Failure to Preserve; Failure to Produce |
| 143 | Minn. Mining & Mfg. Co. v. Pribyl, 259 F.3d 587 (7th Cir. 2001) | Failure to Preserve |
| 144 | Mosaïd Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332 (D.N.J. 2004) | Failure to Preserve |
| 145 | Mother, LLC. v. L.L. Bean, Inc., No. C06-5540 JKA, 2007 WL 2302974 (W.D. Wash. Aug. 7, 2007) | Failure to Produce |
| 146 | MPCT Solutions Corp. v. Methe, No. 99 C 3736, 1999 WL 495115 (N.D. Ill. July 2, 1999) | Failure to Preserve |
| 147 | Mullaney v. Hilton Hotels Corp., Civil No. 07-00313 ACK-LEK, 2009 WL 2006828 (D. Haw. June 30), <i>adopted as modified</i> by 2009 WL 2365561 (D. Haw. July 29, 2009) | Failure to Preserve |
| 148 | Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485 (4th Cir. 2005) | Failure to Produce |
| 149 | Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987) | Failure to Preserve; Failure to Produce; Failure to Perform Adequate Searches |
| 150 | Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392 (D.S.C. 2004) | Failure to Produce; Delay in Production; Misrepresenting Completeness of Production |
| 151 | New Salida Ditch Co. v. United Fire & Cas. Ins. Co., No. 08-cv-00391-JLK-KLM, 2009 WL 2399933 (D. Colo. July 31, 2009) | Delay in Production |
| 152 | Novelty, Inc. v. Mountain View Mktg. Inc., No. 1:07-cv-01229-SEB-JMS, 2009 WL 3444591 (S.D. Ind. Oct. 21, 2009) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 153 | NSB U.S. Sales, Inc. v. Brill, No. 04 Civ. 9240(RCC), 2007 WL 258181 (S.D.N.Y. Jan. 26, 2007) | Failure to Produce |
| 154 | Nucor Corp. v. Bell, 251 F.R.D. 191 (D.S.C. 2008) | Failure to Preserve |
| 155 | Nursing Home Pension Fund v. Oracle Corp., 254 F.R.D. 559 (N.D. Cal. 2008) | Failure to Preserve |

| No. | Case | Basis for Sanction |
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| 156 | Ogin v. Ahmed, 563 F. Supp. 2d 539 (M.D. Pa. 2008) | Failure to Preserve |
| 157 | Omega Patents, LLC v. Fortin Auto Radio, Inc., No. 6:05-cv-1113-Orl-22DAB, 2006 WL 2038534 (M.D. Fla. July 19, 2006) | Delay in Production |
| 158 | Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422 (M.D. Fla. Nov. 7, 2006) | Failure to Preserve |
| 159 | Padgett v. City of Monte Sereno, No. C 04-03946 JW, 2007 WL 878575 (N.D. Cal. Mar. 20, 2007) | Failure to Preserve |
| 160 | Pandora Jewelry, LLC v. Chamilia, LLC, Civ. No. CCB-06-3041, 2008 WL 4533902 (D. Md. Sept. 30, 2008) | Failure to Preserve; Failure to Produce |
| 161 | Paramount Pictures Corp. v. Davis, 234 F.R.D. 102 (E.D. Pa. 2005) | Failure to Preserve |
| 162 | Paris Bus. Prods., Inc. v. Genisis Techs., LLC, Civil No. 07-0260 (JBS), 2007 WL 3125184 (D.N.J. Oct. 24, 2007) | Failure to Preserve |
| 163 | Pennar Software Corp. v. Fortune 500 Sys. Ltd., No. 01-01734 EDL, 2001 WL 1319162 (N.D. Cal. Oct. 25, 2001) | Failure to Preserve; Failure to Produce |
| 164 | Perez-Farias v. Global Horizons, Inc., No. CV-05-3061 RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007) | Failure to Produce; Failure to Preserve; Delay in Production |
| 165 | Peschel v. City of Missoula, 664 F. Supp. 2d 1137 (D. Mont. 2009) | Failure to Preserve |
| 166 | Phx. Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837 (HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006) | Delay in Production |
| 167 | Pinstripe, Inc. v. Manpower, Inc., No. 07-CV-620-GKF-PJC, 2009 WL 2252131 (N.D. Okla. July 29, 2009) | Failure to Preserve |
| 168 | Pioneer Hi-Bred Int'l, Inc. v. Monsanto Co., No. 4:97CV01609 ERW, 2001 WL 170410 (E.D. Mo. Jan. 2), <i>amended by</i> 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001) | Failure to Produce; Delay in Production; Failure to Perform Adequate Searches; Misrepresenting Completeness of Production |
| 169 | Plasse v. Tyco Elecs. Corp., 448 F. Supp. 2d 302 (D. Mass. 2006) | Failure to Preserve |
| 170 | Plunk v. Village of Elwood, No. 07 C 88, 2009 WL 1444436 (N.D. Ill. May 20, 2009) | Failure to Preserve |
| 171 | PML N. Am., LLC v. Hartford Underwriters Ins. Co., No. 05-CV-70404-DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006) | Failure to Preserve; Failure to Produce |
| 172 | Poole <i>ex. rel.</i> Elliott v. Textron, Inc., 192 F.R.D. 494 (D. Md. 2000) | Failure to Produce; Failure to Perform Adequate Searches |
| 173 | Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, 2009 WL 982460 (S.D. Fla. Apr. 9, 2009) | Failure to Preserve; Delay in Production; Failure to Perform Adequate Searches |
| 174 | Procter & Gamble Co. v. Haugen, 179 F.R.D. 622 (D. Utah 1998), <i>aff'd in part, rev'd in part on other grounds</i> , 222 F.3d 1262 (10th Cir. 2000) | Failure to Preserve |
| 175 | Quantum Commc'ns Corp. v. Star Broad., Inc., 473 F. Supp. 2d 1249 (S.D. Fla. 2007) | Failure to Produce |

| No. | Case | Basis for Sanction |
|-----|--|--|
| 176 | Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7), <i>vacated in part</i> , 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) | Failure to Produce |
| 177 | R & R Sails Inc. v. Ins. Co. of Pa., 251 F.R.D. 520 (S.D. Cal. 2008) | Delay in Production |
| 178 | Rafael Town Ctr. Investors, LLC v. Weitz Co., No. C 06-6633SI, 2007 WL 2261376 (N.D. Cal. Aug. 6, 2007) | Failure to Produce |
| 179 | Realnetworks, Inc. v. DVD Copy Control Ass'n, 264 F.R.D. 517 (N.D. Cal. 2009) | Failure to Preserve |
| 180 | Recinos-Recinos v. Express Forestry, Inc., Civil Action No. 05-1355, 2006 WL 2349459 (E.D. La. Aug. 11, 2006) | Delay in Production; Failure to Produce |
| 181 | Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284 (S.D.N.Y. 2009) | Failure to Preserve |
| 182 | Ridge Chrysler Jeep, LLC v. DaimlerChrysler Servs. N. Am., LLC, No. 03 C 760, 2006 WL 2808158 (N.D. Ill. Sept. 6, 2006), <i>aff'd sub nom.</i> Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams. LLC, 516 F. 3d 623 (7th Cir. 2008) | Failure to Preserve; Failure to Produce; Delay in Production; Misrepresenting Completeness of Production |
| 183 | Ripley v. District of Columbia, No. 06-1705 (D.D.C. July 2, 2009) | Failure to Preserve; Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 184 | Rodgers v. Lowe's Home Ctrs., Inc., No. 05 C 0502, 2007 WL 257714 (N.D. Ill. Jan. 30, 2007) | Failure to Preserve |
| 185 | Rousseau v. Echosphere Corp., No. Civ.A. 03-1230, 2005 WL 2176839 (W.D. Pa. Aug. 30, 2005) | Delay in Production |
| 186 | School-Link Techs., Inc. v. Applied Res., Inc., Civil Action No. 05-2088-JWL, 2007 WL 677647 (D. Kan. Feb. 28, 2007) | Failure to Perform Adequate Searches |
| 187 | SD Prot., Inc. v. Del Rio, 587 F. Supp. 2d 429 (E.D.N.Y. 2008) | Failure to Produce |
| 188 | Shank v. Kitsap County, No. C04-5843RJB, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005) | Delay in Production |
| 189 | Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001), <i>adopted in part and rejected in part</i> by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), <i>aff'd in part, vacated in part</i> , 428 F.3d 1 (1st Cir. 2005) | Failure to Produce |
| 190 | Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC, No. 06-CV-02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009) | Failure to Preserve |
| 191 | Sonii v. Gen. Elec., No. 95 C 5370, 2003 WL 21541039 (N.D. Ill. June 11, 2003), <i>aff'd</i> , 146 F. App'x 852 (7th Cir. 2005) (per curiam) | Failure to Preserve; Failure to Produce |
| 192 | SonoMedica, Inc. v. Mohler, No. 1:08-cv-230 (GBL), 2009 WL 2371507 (E.D. Va. July 28, 2009) | Failure to Preserve; Failure to Produce |
| 193 | Se. Mech. Servs., Inc. v. Brody (<i>Brody II</i>), 657 F. Supp. 2d 1293 (M.D. Fla. 2009) | Failure to Preserve |

| No. | Case | Basis for Sanction |
|-----|--|--|
| 194 | S. Capitol Enters., Inc. v. Conesco Servs., L.L.C., No. 04-705-JJB-SCR, 2008 WL 4724427 (M.D. La. Oct. 24, 2008) | Delay in Production |
| 195 | S. New Eng. Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82 (D. Conn. 2008), <i>aff'd</i> , No. 08-4518-cv, 2010 WL 3325962 (2d Cir. Aug. 25, 2010) | Failure to Produce; Failure to Preserve |
| 196 | Spooner v. Egan, Civ. No. 08-262-P-S, 2009 WL 2175063 (D. Me. July 21), <i>adopted by</i> No. 08-262-P-S, 2009 WL 2591358 (D. Me. Aug. 19, 2009) | Failure to Produce; Delay in Production |
| 197 | Sterle v. Elizabeth Arden, Inc., No. 3:06 CV 01584(DJS), 2008 WL 961216 (D. Conn. Apr. 9, 2008) | Failure to Produce; Delay in Production |
| 198 | Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004) | Failure to Preserve |
| 199 | Stratienko v. Chattanooga-Hamilton Cnty. Hosp. Auth., No. 1:07-CV-258, 2009 WL 2168717 (E.D. Tenn. July 16, 2009) | Failure to Preserve; Failure to Produce; Delay in Production |
| 200 | Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co., No. 02 Civ. 8123PKCMHD, 2004 WL 2663564 (S.D.N.Y. Nov. 19, 2004) | Failure to Preserve |
| 201 | Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A., No. 3: 06-CV-0271-B, 2008 WL 3261095 (N.D. Tex. Aug. 8, 2008) | Failure to Preserve; Failure to Produce |
| 202 | Swofford v. Eslinger, 671 F. Supp. 2d 1274 (M.D. Fla. 2009) | Failure to Preserve |
| 203 | Tango Transp., LLC v. Transp. Int'l Pool, Inc., No. 5:08-CV-0559, 2009 WL 3254882 (W.D. La. Oct. 8, 2009) | Delay in Production |
| 204 | Teague v. Target Corp., No. 3:06CV191, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007) | Failure to Preserve |
| 205 | Tech. Recycling Corp. v. City of Taylor, 186 F. App'x 624 (6th Cir. 2006) | Failure to Produce |
| 206 | Technical Sales Assocs., Inc. v. Ohio Star Forge Co., No. 07-11745, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009) | Failure to Preserve |
| 207 | TeleQuest Int'l Corp. v. Dedicated Bus. Sys., Inc., Civ. Action No. 06-5359 (PGS), 2009 WL 690996 (D.N.J. Mar. 11, 2009) | Failure to Preserve |
| 208 | Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93 (D. Md. 2003) | Delay in Production; Failure to Preserve |
| 209 | Tilton v. McGraw-Hill Cos., No. C06-0098RSL, 2007 WL 777523 (W.D. Wash. Mar. 9, 2007) | Failure to Preserve |
| 210 | Toussie v. County of Suffolk, No. CV 01-6716(JS)(ARL), 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007) | Delay in Production |
| 211 | Tracy v. Fin. Ins. Mgmt. Corp., No. 1:04-CV-00619-TABDFH, 2005 WL 2100261 (S.D. Ind. Aug. 22, 2005) | Delay in Production |
| 212 | Travel Sentry, Inc. v. Tropp, 669 F. Supp. 2d 279 (E.D.N.Y. 2009) | Failure to Produce |
| 213 | Treppel v. Biovail Corp., 249 F.R.D. 111 (S.D.N.Y. 2008) | Failure to Preserve |
| 214 | Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001) | Failure to Preserve |

| No. | Case | Basis for Sanction |
|------------|---|--|
| 215 | Tse v. UBS Fin. Servs., Inc., 568 F. Supp. 2d 274 (S.D.N.Y. 2008) | Failure to Produce; Delay in Production |
| 216 | U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667 (M.D. Fla. 2008) | Failure to Produce; Delay in Production |
| 217 | United States <i>ex rel.</i> Koch v. Koch Indus., Inc., 197 F.R.D. 463 (N.D. Okla. 1998) | Failure to Preserve |
| 218 | United States v. Philip Morris USA Inc., 327 F. Supp. 2d 21 (D.D.C. 2004) | Failure to Preserve |
| 219 | Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376 (D.N.J. 2006) | Failure to Preserve; Failure to Perform Adequate Searches |
| 220 | Wachtel v. Health Net, Inc., 239 F.R.D. 81 (D.N.J. 2006) | Failure to Preserve; Failure to Produce; Failure to Perform Adequate Searches; Misrepresenting Completeness of Production; Delay in Production |
| 221 | Wells v. Berger, Newmark & Fenchel, P.C., Civil Action No. 07 C 3061, 2008 WL 4365972 (N.D. Ill. Mar. 18, 2008) | Failure to Preserve |
| 222 | Wells v. Orange County Sch. Bd., No. 6:05cv479ORL28DAB, 2006 WL 4824479 (M.D. Fla. Nov. 7, 2006) | Failure to Perform Adequate Searches; Delay in Production |
| 223 | Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443 (C.D. Cal. 1984) | Failure to Preserve |
| 224 | Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSWL SHX, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007) | Failure to Preserve; Failure to Produce; Delay in Production; Failure to Perform Adequate Searches |
| 225 | Wixon v. Wyndham Resort Dev. Corp., No. C 07-02361 JSW, 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009) | Failure to Produce |
| 226 | World Courier v. Barone, No. C 06-3072 TEH, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007) | Failure to Preserve |
| 227 | z4 Techs., Inc. v. Microsoft Corp., No. 6:06-CV-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006), <i>aff'd</i> , 507 F.3d 1340 (Fed. Cir. 2007) | Failure to Produce; Misrepresenting Completeness of Production; Delay in Production |
| 228 | Zubulake v. UBS Warburg LLC (<i>Zubulake V</i>), 229 F.R.D. 422 (S.D.N.Y. 2004) | Failure to Preserve; Delay in Production |
| 229 | 1100 W., LLC v. Red Spot Paint & Varnish Co., No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118 (S.D. Ind. June 5, 2009) | Failure to Produce; Failure to Perform Adequate Searches; Delay in Production |
| 230 | 3M Innovative Prods. Co. v. Tomar Elecs., Civ. No. 05-756(MJD/AJB), 2006 WL 2670038 (D. Minn. Sept. 18, 2006) | Failure to Preserve; Failure to Produce; Failure to Perform Adequate Searches |

APPENDIX D

MONETARY SANCTIONS¹⁷⁰

| No. | Case | Amount |
|-----|---|----------------|
| 1 | Grange Mut. Cas. Co. v. Mack, 270 F. App'x 372 (6th Cir. 2008) (per curiam) | \$8,830,983.69 |
| 2 | Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7), <i>vacated in part</i> , 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 ERW, 2001 WL 170410 (E.D. Mo. Jan. 2), <i>amended by</i> 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001) | \$8,211,287.50 |
| 4 | Wachtel v. Health Net, Inc., 239 F.R.D. 81 (D.N.J. 2006); Wachtel v. Health Net, Inc., Civ. Nos. 01-4183, 03-1801, 2007 WL 1791553 (D.N.J. June 19, 2007) | \$6,723,883.22 |
| 5 | S. New Eng. Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82 (D. Conn. 2008), <i>aff'd</i> , No. 08-4518-cv, 2010 WL 3325962 (2d Cir. Aug. 25, 2010) | \$5,893,541.86 |
| 6 | Hawaiian Airlines, Inc. v. Mesa Air Grp. (<i>In re</i> Hawaiian Airlines, Inc.), Bankr. No. 03-00817, Adv. No. 06-90026, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007); Hawaiian Airlines, Inc. v. Mesa Air Grp. (<i>In re</i> Hawaiian Airlines, Inc.), Bankr. No. 03-00817, Adv. No. 06-90026, 2008 WL 185649 (Bankr. D. Haw. Jan. 22, 2008) | \$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), <i>aff'd</i> , 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 | CSI Inv. Partners II, L.P. v. Cendant Corp., 507 F. Supp. 2d 384 (S.D.N.Y. 2007), <i>aff'd</i> , 328 F. App'x 56 (2d Cir. 2009) | \$720,000.00 |
| 11 | Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332 (D.N.J. 2004) | \$566,839.97 |
| 12 | <i>In re</i> Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) | \$500,000.00 |
| 13 | Kamatani v. BenQ Corp., Civil Action No. Civ.A. 2:03-CV-437, 2005 WL 2455825 (E.D. Tex. Oct. 4, 2005) | \$500,000.00 |
| 14 | Keithley v. Home Store.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008) | \$405,798.00 |
| 15 | Gutman v. Klein, No. 03 CV1570(BMC)(RML), 2008 WL 4682208 (E.D.N.Y. Oct. 15), <i>adopted by</i> No. 03 Civ. 1570(BMC), 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008) | \$287,729.72 |
| 16 | Tech. Recycling Corp. v. City of Taylor, 186 F. App'x 624 (6th Cir. 2006) | \$223,805.00 |
| 17 | Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001); Trigon Ins. Co. v. United States, 234 F. Supp. 2d 592 (E.D. Va. 2002) | \$179,725.70 |
| 18 | Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004), <i>withdrawn in part</i> , No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio July 28, 2005) | \$168,175.00 |

170. Where more than one case is cited, the court awarded the monetary sanction in the subsequent case.

| No. | Case | Amount |
|-----|---|--------------|
| 19 | Brick v. HSBC Bank USA, No. 04-CV-0129E(F), 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004) | \$147,635.74 |
| 20 | Commc'ns Ctr., Inc. v. Hewitt, No. Civ.S-03-1968 WBS KJ, 2005 WL 3277983 (E.D. Cal. Apr. 5, 2005) | \$145,811.75 |
| 21 | PML N. Am., LLC v. Hartford Underwriters Ins. Co., No. 05-CV-70404-DT, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006); PML N. Am., LLC v. Hartford Underwriters Ins. Co., No. 05-CV-70404-DT, 2007 WL 925627 (E.D. Mich. Mar. 28, 2007) | \$134,373.00 |
| 22 | 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 |
| 23 | Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987) | \$120,000.00 |
| 24 | Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006); Krumwiede v. Brighton Assocs., No. 05C3003, 2006 WL 2349985 (N.D. Ill. Aug. 9, 2006) | \$111,348.30 |
| 25 | GTFM, Inc. v. Wal-Mart Stores, Inc., No. 98 CIV. 7724 RPP, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000); GTFM, Inc. v. Wal-Mart Stores, Inc., No. 98CIV.7724(RPP), 2000 WL 1693615 (S.D.N.Y. Nov. 9, 2000) | \$109,753.81 |
| 26 | SonoMedica, Inc. v. Mohler, No. 1:08-cv-230 (GBL), 2009 WL 2371507 (E.D. Va. July 28, 2009) | \$108,212.15 |
| 27 | Advante Int'l Corp. v. Mintel Learning Tech., No. C 05-01022 JW (RS), 2008 WL 928332 (N.D. Cal. Apr. 4, 2008) | \$105,000.00 |
| 28 | APC Filtration, Inc. v. Becker, No. 07 C 1462, 2007 WL 3046233 (N.D. Ill. Oct. 12, 2007); APC Filtration, Inc. v. Becker, No. 07 C 1452, 2007 WL 4569721 (N.D. Ill. Dec. 21, 2007) | \$99,462.40 |
| 29 | Kucala Enters., Ltd. v. Auto Wax Co., No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003); Kucala Enters., Ltd. v. Auto Wax Co., No. 02 C 1403, 2004 WL 742252 (N.D. Ill. Apr. 6, 2004) | \$93,125.74 |
| 30 | Phx. Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006); Phx. Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 WL 2135798 (S.D.N.Y. Aug. 1, 2006) | \$75,161.82 |
| 31 | Claredi Corp. v. Seebeyond Tech. Corp., No. 4:04CV1304 RWS, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007) | \$73,943.75 |
| 32 | McDowell v. District of Columbia, 233 F.R.D. 192 (D.D.C. 2006); McDowell v. District of Columbia, Civ. Action No. 02-1110 (RWR/JMF), 2006 WL 1933809 (D.D.C. July 11, 2006) | \$72,910.12 |
| 33 | Leon v. IDX Sys. Corp., No. C03-1158P, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), <i>aff'd</i> , 464 F.3d 951 (9th Cir. 2006) | \$65,000.00 |
| 34 | NSB U.S. Sales, Inc. v. Brill, No. 04 Civ. 9240(RCC), 2007 WL 258181 (S.D.N.Y. Jan. 26, 2007) | \$56,667.00 |
| 35 | Plasse v. Tyco Elecs. Corp., 448 F. Supp. 2d 302 (D. Mass. 2006); Plasse v. Tyco Elecs. Corp., No. Civ.A.04 30056 MAP, 2006 WL 3445610 (D. Mass. Nov. 8, 2006) | \$55,472.32 |
| 36 | Digene Corp. v. Third Wave Techs., Inc., No. 07-C-22-C, 2007 WL 4939048 (W.D. Wis. Oct. 24, 2007) | \$50,000.00 |
| 37 | Perez-Farias v. Global Horizons, Inc., No. CV-05-3061-RHW, 2007 WL 2327073 (E.D. Wash. Aug. 10, 2007) | \$45,500.00 |
| 38 | Atl. Recording Corp. v. Howell, No. CV-06-02076-PHX-NVW, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008) | \$40,500.00 |
| 39 | R & R Sails, Inc. v. Ins. Co. of Pa., 251 F.R.D. 520 (S.D. Cal. 2008) | \$39,914.68 |
| 40 | Poole <i>ex rel.</i> Elliott v. Textron, Inc., 192 F.R.D. 494 (D. Md. 2000) | \$37,258.39 |


| No. | Case | Amount |
|-----|---|-------------|
| 41 | Recinos-Recinos v. Express Forestry, Inc., Civil Action No. 05-1355, 2006 WL 2349459 (E.D. La. Aug. 11, 2006) | \$36,391.24 |
| 42 | Chevron U.S.A., Inc. v. M & M Petrol. Servs., Inc., No. SACV 07-0818 DOC (ANx), 2009 WL 2431926 (C.D. Cal. Aug. 6, 2009) | \$25,000.00 |
| 43 | AdvantaCare Health Partners, LP v. Access IV, No. C 03-04496 JF, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) | \$20,000.00 |
| 44 | <i>In re</i> Rosenthal, Civil Action No. H-04-186, 2008 WL 983702 (S.D. Tex. Mar. 28, 2008) | \$18,900.00 |
| 45 | Technical Sales Assocs., Inc. v. Ohio Star Forge Co., No. 07-11745, 2009 WL 728520 (E.D. Mich. Mar. 19, 2009) | \$17,786.25 |
| 46 | Tse v. UBS Fin. Servs., Inc., 568 F. Supp. 2d 274 (S.D.N.Y. 2008) | \$16,666.75 |
| 47 | Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506 (D. Md. 2005) | \$16,097.00 |
| 48 | Google Inc. v. Am. Blind & Wallpaper Factory, Inc., No. C 03-5340 JF (RS), 2007 WL 1848665 (N.D. Cal. June 27, 2007) | \$15,000.00 |
| 49 | <i>In re</i> Cheyenne Software, Inc., Sec. Litig., No. CV-94-2771(NG), 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997) | \$15,000.00 |
| 50 | Hanni v. Am. Airlines, Inc., No. C-08-00732 CW (EDL), 2009 WL 1505286 (N.D. Cal. May 27, 2009) | \$13,117.00 |
| 51 | 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 |
| 52 | Creative Sci. Sys., Inc. v. Forex Capital Mkts., LLC, No. C 04-03746 JF (RS), 2006 WL 870973 (N.D. Cal. Apr. 4, 2006) | \$12,175.00 |
| 53 | Grantley Patent Holdings, Ltd. v. Clear Channel Commc'ns, Inc., Civil Action No. 9:06CV259 (E.D. Tex. Aug. 14, 2007) | \$10,000.00 |
| 54 | Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000) | \$10,000.00 |
| 55 | E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005) | \$10,000.00 |
| 56 | Cimaglia v. Union Pac. R.R. Co., No. 06-CV-3084, 2009 WL 87426 (C.D. Ill. Jan. 12, 2009) | \$10,000.00 |
| 57 | Travel Sentry, Inc. v. Tropp, 669 F. Supp. 2d 279 (E.D.N.Y. 2009) | \$10,000.00 |
| 58 | Procter & Gamble Co. v. Haugen, 179 F.R.D. 622 (D. Utah 1998), <i>aff'd in part and rev'd in part on other grounds</i> , 222 F.3d 1262 (10th Cir. 2000) | \$10,000.00 |
| 59 | Finley v. Hartford Life & Accident Ins. Co., 249 F.R.D. 329 (N.D. Cal. 2008) | \$9,000.00 |
| 60 | Attard v. City of New York, No. 05 CV 2129(JG)(RML), 2008 WL 1991107 (E.D.N.Y. May 5, 2008) | \$5,000.00 |
| 61 | Babaev v. Grossman, No. CV03-5076 (DLI)(WDW), 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008) | \$5,000.00 |
| 62 | Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007) | \$5,000.00 |
| 63 | Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc., No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451 (E.D. Cal. Dec. 2, 2008) | \$4,170.00 |
| 64 | Hewlett v. Davis, Civil Action No. 86-3708, 1987 WL 12298 (E.D. Pa. June 3, 1987), <i>aff'd in part and rev'd in part</i> , 844 F.2d 109 (3d Cir. 1988) | \$2,950.00 |
| 65 | Pinstripe, Inc. v. Manpower, Inc., No. 07-CV-620-GKF-PJC, 2009 WL 2252131 (N.D. Okla. July 29, 2009) | \$2,500.00 |
| 66 | Cohen Steel Supply, Inc. v. Fagnant (<i>In re</i> Fagnant), Nos. 03-10496-JMD, 03-1348-JMD, 2004 WL 2944126 (Bankr. D.N.H. Dec. 13, 2004) | \$1,817.80 |
| 67 | Omega Patents, LLC v. Fortin Auto Radio, Inc., No. 6:05-cv-1113-Orl-22DAB, 2006 WL 2038534 (M.D. Fla. July 19, 2006) | \$1,500.00 |

| No. | Case | Amount |
|-----|---|------------|
| 68 | Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (<i>Bray & Gillespie II</i>), 259 F.R.D. 591 (M.D. Fla.), <i>rejected in part</i> by No. 6:07-cv-0222-Orl-35KRS, 2009 WL 5606058 (M.D. Fla. Nov. 11, 2009), <i>and adopted in part</i> by No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595 (M.D. Fla. Jan. 5, 2010) | \$1,205.65 |
| 69 | Benton v. Dlorah, Inc., No. 06-CV-2488, 2007 WL 3231431 (D. Kan. Oct. 30, 2007) | \$1,000.00 |
| 70 | Lessley v. City of Madison, No. 4:07-cv-136-DFH-WGH, 2008 WL 4977328 (S.D. Ind. Nov. 20, 2008) | \$1,000.00 |
| 71 | SD Prot., Inc. v. Del Rio, 587 F. Supp. 2d 429 (E.D.N.Y. 2008) | \$1,000.00 |
| 72 | Stratienko v. Chattanooga-Hamilton Cnty. Hosp. Auth., No. 1:07-CV-258, 2009 WL 2168717 (E.D. Tenn. July 16, 2009) | \$1,000.00 |
| 73 | Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2006 WL 1662615 (E.D. Mich. June 12, 2006) | \$750.00 |
| 74 | Wells v. Orange Cnty. Sch. Bd., No. 6:05-cv-479-Orl-28DAB, 2006 WL 4824479 (M.D. Fla. Nov. 7, 2006) | \$750.00 |
| 75 | Rousseau v. Echosphere Corp., No. Civ.A. 03-1230, 2005 WL 2176839 (W.D. Pa. Aug. 30, 2005) | \$696.74 |
| 76 | Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001), <i>adopted in part and rejected in part</i> by No. Civ. 00-111-M, 2004 WL 102493 (D.N.H. Jan. 22, 2004), <i>aff'd in part and vacated in part</i> , 428 F.3d 1 (1st Cir. 2005) | \$500.00 |
| 77 | Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993) | \$250.00 |

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**GARP
Creating and Implementing a
New Standard for Recordkeeping**

**Martin D. Susec, JD, MBA, CRM
Assistant General Counsel,
Nationwide Insurance**




Introduction

Who am I? Martin D. Susec, Esq.

- ✓ Former chairman, GARP Education Committee
- ✓ Certified Records Manager
- ✓ 7 year career as public records attorney for Ohio
- ✓ Advisor to Nationwide regarding records and discovery management


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Presentation Objectives

- a. Introduce and summarize the GARP principles
- b. Educate you on the necessity of GARP
- c. Assist you in advising your corporate clients with regard to proper records & information management and GARP compliance


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What is GARP?

**G.A.R.P. is an Acronym for
Generally Accepted Recordkeeping
Principles**

ARMA International understands that records must be created, organized, secured, maintained, and used in a way that effectively supports the activity of that organization.







What is GARP?

**Generally Accepted
Recordkeeping Principles**

ARMA also recognizes that there currently is not a one well recognized standard for measuring an organization's compliance with professionally recognized record keeping practices.







What is GARP?

**Generally Accepted
Recordkeeping Principles**

Therefore, in order in order to achieve recognition at the regulator, business and associate level, ARMA International developed Generally Accepted Recordkeeping Principles (GARP) so as to allow organizations to adhere to and measure objective records and information management standards.







What is GARP?

There are 8 Principles that make up GARP:

- Accountability
- Transparency
- Integrity
- Protection
- Compliance
- Availability
- Retention
- Disposition






What is GARP?

How about a pneumonic for the principles?

"A TIP CARD"

- Accountability
- Transparency
- Integrity
- Protection
- Compliance
- Availability
- Retention
- Disposition





How will GARP be Used?

By Regulators...

To protect the public by assuring access about the operations, policies and procedures of regulated companies


By RIM Professionals...

To measure the records management programs of a companies in a consistent and systematic manner

By Businesses...


To document to regulators and the public that information will be available from these companies if ever needed






GARP Roadmap

- Introducing GARP to regulators
- Promoting GARP awareness
- Providing training sessions on GARP
- Measurements and testing organizations on GARP compliance
- Establishing GARP compliance as barometer of records management health







Principles Underlying GARP

Principle of Accountability

An organization shall assign a senior executive who will oversee a recordkeeping program and delegate program responsibility to appropriate individuals, adopt policies and procedures to guide personnel, and ensure program auditability.







Principles Underlying GARP

Principle of Transparency

The processes and activities of an organization's recordkeeping program shall be documented in an understandable manner and be available to all personnel and appropriate interested parties.







Principles Underlying GARP

Principle of Integrity

A recordkeeping program shall be constructed so the records and information generated or managed by or for the organization have a reasonable and suitable guarantee of authenticity and reliability.







Principles Underlying GARP

Principle of Protection

A recordkeeping program shall be constructed to ensure a reasonable level of protection to records and information that are private, confidential, privileged, secret, or essential to business continuity.







Principles Underlying GARP

Principle of Compliance

The recordkeeping program shall be constructed to comply with applicable laws and other binding authorities, as well as the organization's policies.







Principles Underlying GARP

Principle of Availability

An organization shall maintain records in a manner that ensures timely, efficient, and accurate retrieval of needed information.







Principles Underlying GARP

Principle of Retention

An organization shall maintain its records and information for an appropriate time, taking into account legal, regulatory, fiscal, operational, and historical requirements.







Principles Underlying GARP

Principle of Disposition

An organization shall provide secure and appropriate disposition for records that are no longer required to be maintained by applicable laws and the organization's policies.






GARP® Maturity Model

| GARP Maturity Level | Color Status |
|---------------------|--------------|
| 5 | GREEN |
| 4 | BLUE |
| 3 | AMBER |
| 2 | ORANGE |
| 1 | RED |

- Five levels
- Less than 5 may be acceptable because of:
 - Organization risk tolerance
 - As measured against peers or competitors

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Compliance on the Maturity Model: Level 1

Sub-Standard [REDACTED]

- There is no clear definition of the records the organization is obligated to keep.
- Records and other business documentation are not systematically managed according to records management principles. Various groups of the organization define this to the best of their ability based on their interpretation of rules and regulations.
- There is no central oversight and no consistently defensible position.
- There is no defined or understood process for imposing "holds."

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Compliance on the Maturity Model: Level 2

In Development [REDACTED]

- The organization has identified the rules and regulations that govern its business and introduced some compliance policies and recordkeeping practices around those policies. Policies are not complete and there is no apparent or well-defined accountability for compliance.
- There is a hold process, but it is not well-integrated with the organization's information management and discovery processes.

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Compliance on the Maturity Model: Level 3

Essential

- The organization has identified all relevant compliance laws and regulations.
- Record creation and capture are systematically carried out
- The organization has a strong code of business conduct
- Compliance and the records that demonstrate it are highly valued and measurable.
- The hold process is integrated into the organization's information management and discovery processes for the "most critical" systems.
- The organization has defined specific goals related to compliance.

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Compliance on the Maturity Model: Level 4

Proactive

- The organization has implemented systems to capture and protect records.
- Records are linked with the metadata used to demonstrate and measure compliance.
- Employees are trained appropriately and audits are conducted regularly.
- Records of the audits and training are available for review.
- Lack of compliance is remedied through implementation of defined corrective actions.
- The hold process is well-managed with defined roles and a repeatable process that is integrated into the organization's information management and discovery processes.

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Compliance on the Maturity Model: Level 5

Transformational

- The importance of compliance and the role of records and information in it are clearly recognized at the senior management and board levels.
- Auditing and continuous improvement processes are well-established and monitored by senior management.
- The roles and processes for information management and discovery are integrated.
- The organization's stated goals related to compliance have been met.
- The organization suffers few or no adverse consequences based on information governance and compliance failures.

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Next Steps for GARP

- Development of Educational Seminars
- Development of Measurement and Testing Process
- Lobbying Regulators
- Other Endeavors





Everyone's Future Role in GARP?

- As a Attorney/Consultant
- As an Organization
- As a Regulator
- As a RIM Vendor
- As an Educator





GARP: Creating and Implementing a New Standard for Recordkeeping

Question & Answer Session





**GARP: Creating and Implementing a New
Standard for Recordkeeping**

Thank you for attending!


Martin D. Susec, JD, MBA, CRM
Assistant General Counsel,
Nationwide Insurance



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2011 Association of Corporate Council

February 9, 2011
Porter Wright Morris & Arthur LLP



Clouding the Issue
An Overview and Digest of Issues with Cloud Computing

Andrew Drake, Esq. February 9th, 2011




Defining the Cloud
A conceptual overview

"Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This Cloud model promotes availability and is composed of three service models, four deployment models, and five essential characteristics."

- The NIST Definition of Cloud Computing by Peter Mell and Tim Grance, Version 15, 10-7-09

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Defining the Cloud

A conceptual overview in English

Cloud computing means many things to many people, but there are five basic characteristics of Cloud services:

- On demand "self service" provisioning
- Broad network access
- Measured service akin to a utility like telephone or electricity
- Pooled resources are shared across many users
- Service usage is not capped, it is delivered in a flexible or "elastic" way based on a rate plan or specified consumption model







Defining the Cloud

Offerings

"Cloud" offerings typically fall into three primary offerings:

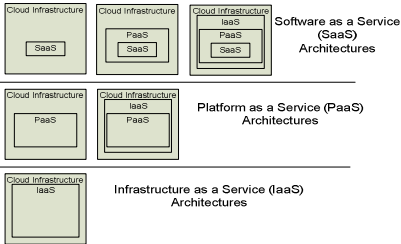
- Cloud Software as a Service (SaaS)
 - A standardized application offering with little or no customization.
- Cloud Platform as a Service (PaaS)
 - You've coded the application and now need a place to run it that matches your standards.
- Cloud Infrastructure as a Service (IaaS)
 - "Hired gun" approach where basic services are available for utility-style delivery: storage, CPU horsepower, cached web services, network capacity, etc.





Defining the Cloud

Service model overview




The diagram illustrates three service model architectures as stacks of layers within a 'Cloud Infrastructure' container:

- Software as a Service (SaaS) Architectures:** A stack with SaaS at the top, PaaS in the middle, and IaaS at the bottom.
- Platform as a Service (PaaS) Architectures:** A stack with PaaS at the top and IaaS at the bottom.
- Infrastructure as a Service (IaaS) Architectures:** A stack with IaaS at the bottom.

Source: Effectively and Securely Using the Cloud Computing Paradigm by Peter Mell and Tim Grance, NIST Information Technology Laboratory, 2009.






Defining the Cloud

Key question: Where is computing actually happening?

| Public Cloud | Private Cloud | Hybrid |
|--|---|--|
| <p>The most traditionally thought of Cloud computing model. Some characteristics:</p> <ul style="list-style-type: none"> • Third party provider sells services in the style of a utility. • Services range from metered raw computing power, hosting of web sites or applications of your design, or the use of a standardized one-size-fits-all application. • Examples: Amazon EC2, Microsoft Azure, Google applications, Salesforce.com, etc. • In many cases, your data is transparently stored with the provider. | <p>A model where the flexible services of Cloud computing are deployed and managed within the four walls of a company's datacenter. Some characteristics:</p> <ul style="list-style-type: none"> • Hardware and software vendors sell you the technical capability to build and manage pools of resources available to numerous applications, rather than assigning one application to one server as in the traditional model. • Data never leaves corporate custody. • Higher cost due to the necessity to build your own infrastructure and maintain it. | <p>A model that blends third party on-demand services with the existing infrastructure of corporate datacenter.</p> <ul style="list-style-type: none"> • Often a capacity issue; third parties are used for high-demand situations or instant disaster recovery. • Data may be with the third party, remain in a corporate datacenter, or both. • Companies often selectively choose to deploy certain applications with third parties in order to most efficiently meet the needs of users at a competitive price point. |

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Business Rationale

Why do they want this stuff, anyway?

Cloud computing offers a strong "value proposition" tremendously appealing to the average business or IT executive:

- It's cheap
- It's simple to connect and often more pervasive or easily delivered than legacy systems
- SaaS / PaaS-based applications are often "good enough" given the price
- Delivery model insures fast time to market
- Uptime and availability is often 99.999% or better
- Limited training required

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Legal Rationale:

Why Inhouse Counsel find the Cloud difficult to manage...

Inhouse counsel often find Cloud services revisit many of the same issues as business outsourcing arrangements popular over the last decade, including:

- Initial low cost is usually but one factor in total cost equation
- Users are depositing sensitive data in poorly thought out places (and in many cases, then abandoning it)
- "Free" service models often carry murky user licensing agreements detrimental to the corporate consumer
- Uptime and availability often requires geographically dispersed Cloud infrastructure which means jurisdictional issues
- Limited training required means limited opportunity to coach users on appropriate behavior or corporate policies

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Information Governance

Issues to consider with Cloud providers

As with any outsourcing arrangement, information governance remains challenging with Cloud providers:

- Worst case: individuals are already using the platform before an assessment can even take place
- Connection models matter (public, private, mixed)
- Can you even assess the depth of security with your Cloud provider?
- SAS70 Audits of Cloud providers
 - SAS70 auditors often are able to go where others (including you!) cannot
 - Critical question: What exactly is being audited? The application? The datacenter? Get the answer to this question.
 - SAS70 may not address controls around your data and key security requirements like segregation of duties between administrators.
- Thoughts around breach notification when sensitive information is at risk:
 - Is there a contractually-defined process for breach notification?
 - How is the extent of a breach determined, by whom, what is the notification process and SLA?
 - How are Federal and State requirements to develop an incident management plan fulfilled?
 - Note: no uniform standard exists
 - Common denominator is an evaluation of the likelihood of harm; how is this supposed to take place? Whose benchmark is used?







Information Governance

Records Management and Compliance Implications

Primary considerations for users with corporate records retention requirements:

- How does your Cloud provider align with your corporate records retention schedule?
- General rule: storage and classification of data in the Cloud should comport with existing corporate standards; hard to argue that "Cloud" is suddenly a new record class with a separate retention period than similar data which you are currently managing
- Does your internal RM platform have specific APIs that can be leveraged to provide trigger notifications for actions that should take place in the Cloud?
- Cloud providers may use data duplication as the primary way to guarantee data availability. Be sure to understand how data "sunsets" (usually does not go all at once in this scenario) and when it will be gone
- Data in Cloud providers is often co-mingled on backup tapes with other companies; someone else may issue a legal hold that suspends your natural data roll off process
- At the end of a contract period or in a time of non-renewal, is the Cloud vendor willing to return your data and sign a certificate of destruction?







Information Governance

Records Management and Compliance Implications

Additional considerations for users with corporate records retention requirements involving certain types of regulated users:

- "Commodity" Cloud services often do not provide the appropriate level of records retention to satisfy key users such as those regulated by the SEC or FINRA, or for that matter, those general users with targeted long term archival needs
 - SEC 17a-3 and 17a-4, NASD 3010 and 3110, NYSE 342, 440 & 442 and SEC RIA 204-2 and 206(4)-7.
 - Firms must capture electronic records and retain for 3 to 6 year retention period. (SEC 17a-4)
 - Messages must be stored in their original form on tamperproof, non-rewritable and non-erasable media and must be stored in duplicate in separate locations. (SEC 17a-4)
 - Archived messages must be time/date stamped and serialized. Messages must be indexed and searchable. (SEC Rule 17a-4)
 - Firms must have an auditing system in place and store audit records. (SEC 17a-4)
 - Firms must appoint an independent third party ("D3P") downloader to access the organization's electronic records, if the firm is unable or unwilling to do so. (SEC 17a-4)
 - Policy and procedures should be in place to supervise, review and sample registered representatives' electronic communication. Supervisors must have the ability to review outgoing email for noncompliant language. (NASD 3010)
 - Firms need to be able to show that supervisory procedures are being enforced with documented records. (NASD 3010)
- Plenty of vendors in the marketplace now willing to assist. Where are they putting your data?






eDiscovery and the Cloud

The scary reality

Notable cases:

- **Flagg v. Detroit**, 252 F.R.D. 346 (E.D. Mich. 2008)
 - Data in the hands of third parties is perfectly within scope of FRCP 26(b)(1); cannot really claim inaccessibility. This means litigants must apply the same duties of preservation, search, production of ESI at third parties as with internally stored information
- **Phillip M. Adams & Associates v. Dell, Inc.**, 2009 WL 910801 (D. Utah Mar. 30, 2009)
 - Custodial model really not adequate; cannot claim FRCP 37(e) "Safe Harbor" where virtually no steps were taken to preserve
 - ASUS violated their duty to preserve and that the loss of evidence could not be excused as a "routine, good faith operation of electronic information systems."
 - Challenge is that companies may not have direct control over what happens to their data at third parties, and using a "purely" custodial model increases the risk of data loss that should have been preserved
- **The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.**, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
 - Builds on the *Zubake* decisions
 - Creates three standards of Discovery Misconduct: Negligence, gross negligence, willfulness
 - Creates a four part sanctions analysis: level of culpability, interplay between preservation and spoliation, burden of proof evidence lost and value of that evidence, determination of an appropriate remedy
 - Currently the subject of much debate as the decision has been modified repeatedly
- **Victor Stanley, Inc., v. Creative Pipe**, 2010 WL 3530097 (D. Md. 2010)
 - A classic story of preservation and spoliation derived from a fairly straightforward patent and copyright infringement case
 - Heavy sanctions imposed on a defendant after finding intentional destruction of ESI in defiance of repeated orders not to do so. Defendant was held liable for civil contempt and prison time was ordered unless plaintiff's costs and fees associated with claims for spoliation of evidence were paid
- Et al.

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eDiscovery and the Cloud

The Impact of Subpoenas

A few thoughts on the impact of subpoenas:

- Caselaw such as *Flagg* says all repositories of data are in scope for subpoenas
- Regular service
 - You must make the same effort to do a thorough and reasonable search of Cloud-based repositories as you would those systems which are internally housed and presumed under your immediate control
 - Subpoenas may specify the format of production
- Service on third parties
 - Perfectly reasonable for your data at third party Cloud providers to be subpoenaed
 - Mixed track record of being able to intervene, particularly where Cloud providers subject themselves to a particular jurisdiction
 - Very challenging internationally
 - Hopefully, you have negotiated and implemented an effective and timely notification process between the Cloud provider and your legal team for the circumstance when subpoenas are served

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eDiscovery and the Cloud

Possession, Custody and Control Issues

It's 2:00AM. Do you know where "your" data is?

- ESI in the Cloud: physical custody is non-existent, but legal control is alive and well
 - The whole point of the Cloud is that by using the service, you cede custody (*effectively the care and feeding*) of the data
 - Legal control exists in form of a contract for services with specific provisions or possibly multiple Service Level Agreements between provider and user
 - "One Click" stock user: EULA's typically put the Cloud provider in the driver's seat for little or no liability or obligation to assist – sometimes not even to notify – during litigation or inquiry
 - Many users click right on through
- Technical constraints often create a difficult position where Cloud subscribers carry the legal liabilities of the data, but the Cloud provider makes it difficult to actually "mine" the data
 - Often very easy to put data into a Cloud platform, but somewhat ambiguous as to how to get it back out
 - This point is often obscured by the low cost aspect; can be quickly offset by the high cost to search and retrieve
- Contract should spell out precisely how get and who pays
 - Many vendors have "default" ESI request processes, but (politely) charge for the service
- Have you done your due diligence as to how the Cloud provider stores your data?

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Practical Approaches

Narrow the risk and understand “real costs”

Every technology matures: Cloud offerings will eventually offer functionality to suit legal and compliance requirements. In the mean time, consider a number of practical approaches:

- Think ahead
 - Know that it is extremely difficult to put the toothpaste back in the tube once data has left the building – copies are everywhere
 - Leverage your internal ITM data governance “gates” to do the due diligence necessary to really understand what is being offered and how it impacts your current compliance posture
 - Note: Your due diligence may be relevant in future litigation
 - Develop a strawman acquisition methodology. Can you benchmark this against known “real world” costs?
 - Understand broader issues of co-mingling or multi-tenancy: are you comfortable with the risks?
- Understand the data going to the Cloud
 - What model is being used (IaaS, PaaS or SaaS) and what types of data would be stored or processed in the Cloud?
 - Push for alternatives:
 - Private Cloud
 - Hybrid Cloud where data is stored in your four walls, but processed or presented via the Public Cloud
 - Limited amounts of data processed or stored in the Public Cloud
- Contract, Contract, Contract
 - Not surprisingly, many stock agreements do not address the concerns of Inhouse Counsel
 - Any decent contract should address:
 - Security
 - Intellectual Property
 - Breach Notification
 - Records Management
 - Discovery and Litigation
 - Is it necessary to include a prohibition against subcontracting?
 - Notification if your data is shifted to a different jurisdiction or overseas





Questions?