Discovery Sanctions Related to Technology Can Fell David or Goliath

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In an era of increased confusion over preservation and production of electronically stored information (ESI), court sanctions are increasingly common. Both monetary sanctions and adverse inference instructions are frequently levied as parties grapple with predictive coding, social media, and "plain old-fashioned" emails and edocs.

The decision by the 5th Circuit Court of Appeals last November in ***Steve Moore et al v Citgo Refining***[i] seems a positive step for both reducing the time and costs of eDiscovery battles (and reducing potentially frivolous claims) if both parties understand their obligations. In this matter, plaintiffs were sanctioned for willfully violating discovery orders. Not only did these plaintiffs delete emails "in direct contradiction" of a court order, they destroyed that evidence after their co-plaintiffs had been dismissed from the complaint for similar conduct. Although the district court reduced CITGO's award of taxable costs from approximately $53,000 to $5,000, based on defendant's "enormous wealth" and plaintiffs' "limited resources", the 5th Circuit Court of Appeals reversed and rendered the award of costs to CITGO while affirming the circuit court's summary judgment.

The majority opinion suggests that the relative wealth of the two parties should not factor into a decision regarding reimbursement of costs. The dissenting judge cited the "losing party's limited financial resources" and "the chilling effect" on potential future plaintiffs. However, this is not merely a case of the losing party in litigation paying costs; this is a sanctioned party paying costs. Losing in litigation is not a crime – one party must always lose in an adversarial situation. However, destroying discoverable evidence while under a court order to retain that same evidence is a violation of civil code, and adequate enforcement of the civil rules includes punishment. If this conduct doesn't warrant reimbursing defendants for their costs, what *would* be sufficient grounds?

Ignorance of technology is no excuse. Technology is included in ABA Ethics Rules 1.1, and courts are impatient with lawyers who have not taken the time to learn the basics.

Don't understand metadata or native files? Check out The Sedona Conference or the EDRM, or take advantage of free CLEs offered by technology companies and organizations. A knowledgeable vendor can often assist with both education and compliance. Need to supply the metadata for documents because establishing a timeline is critical, but don't want to turn over native files? Your technology vendor can create a load file with all the necessary information – a method of production approved by the DOJ and the SEC. As the Court noted in ***Jeffrey Ellis et al v Toshiba****, Lori Sklar Objector & Appellant*[ii], attorneys need to "get educated in the world of… electronic discovery".

In eDiscovery, size doesn't always matter. Large defendant or small plaintiff, all parties must comply with discovery orders, and in 2014 this clearly means eDiscovery. Standing before a judge and saying "oops" will not earn forgiveness; it will earn sanctions.

[i] Case: 12-41175, Fifth Circuit Court of Appeals, decision filed November 12, 2013; Original Case Number: 2:2011cv00022; Filed: February 1, 2011, SD TX.

[ii] In The Court Of Appeal Of The State Of California, Second Appellate District, Division One; *Jeffery L. Ellis et al. v. Toshiba America Information Systems, Inc.*; Lori J. Sklar, Objector and Appellant. 8/17/13. B220286, B227078; (Los Angeles County Superior Ct. No. BC328556); pg 5.