

Essentials of E-Discovery

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10 Rulings You Need to Know

A company's failure to deal appropriately with e-discovery—innocently or not—can lead to significant sanctions and even adverse outcomes in a lawsuit. For example, courts have ordered offending companies to pay the other side's (sometimes sizable) legal fees in pursuing inappropriately withheld or destroyed electronically stored information ("ESI"). Courts have also instructed juries on "adverse inferences" that a company's destroyed or unavailable ESI was harmful to its legal position. These and similar kinds of court orders across the country are driving the development of prudent corporate policies for ESI. Specifically, the following are ten rulings around the country a company needs to know:

United States District Court, Southern District of New York

This unemployment discrimination case delivered well-known e-discovery rulings against the defendant, including an adverse inference jury instruction, and a \$29.2 million jury verdict for the plaintiff.

- Restoration of certain backup tapes revealed that employees were deleting emails, and other backup tapes were missing.
- Court gave an adverse inference jury instruction against defendant and ordered it to pay plaintiff's fees and costs.
- Court said that counsel must: (1) issue a litigation hold whenever litigation is reasonably anticipated, oversee compliance with the hold and periodically re-issue the hold to keep it "fresh in the minds of all employees"; (2) communicate directly with "key players" in the litigation to understand how they stored information; and (3) "instruct all employees to produce electronic copies of their relevant active files," and make sure that all backup media that a party is required to retain are identified and kept in a secure place.

United States District Court, Western District of Washington

Court ordered plaintiff and its counsel pay \$137,168.41 in sanctions for discovery violations.

- Plaintiff's violations included: (1) false certification that all relevant records were kept in paper format and there was no ESI; (2) delayed and inadequate production and failure to search for documents in a timely manner; and (3) counsel's failure to familiarize himself adequately with his client's document retention practices and to assist in document production.
- Plaintiff's corporate representative said in deposition that ESI existed and that the IT consultant could have searched and produced the ESI, but no one had "bothered to ask him."

United States District Court, Southern District of Mississippi

Court sanctioned defendant for its conduct in handling ESI and ordered the defendant not to seek indemnification or reimbursement from its insurance company for the sanctions paid.

- Court appointed a Special Master to investigate defendant's computers and premises.
- Special Master found a lack of "any corporate policy, procedure or concerted effort [to] preserve electronic evidence"; defendant failed to preserve, collect or examine potentially responsive ESI until long after it should have; and defendant's de facto general counsel—a disbarred attorney—erased the contents of his hard drive just before the Special Master arrived.
- Court ordered defendant to pay the Special Master's compensation and expenses plus the plaintiff's fees and costs.

United States District Court, Middle District of Pennsylvania

Court allowed an adverse inference jury instruction against the plaintiff for destruction of backup tapes.

- Plaintiff did not act in bad faith but had a policy to overwrite its backup tapes every twelve months, which did not cease when it should have reasonably anticipated litigation.

United States District Court, District of Minnesota

Court awarded sanctions against defendant for failing to respond adequately to discovery requests, by failing to seek information and documents from all key employees.

- Court said that all employees in the company need not be questioned, but emails and other electronic data of those individuals who are believed to have relevant information should be investigated and produced.

United States District Court, District of Maryland

Court imposed sanctions against defendant for failing to save data in a systems conversion following a consolidation of operations.

- Court found that defendant consolidated offices but failed to save computers used by two key employees and instructed them to transfer only “must have” documents and emails to the new system.
- Although defendant argued that the destroyed documents were irrelevant, the court stated that “the ultimate decision of what is relevant cannot be determined by a party’s ‘subjective assessment.’”
- Court found that F.R.C.P. 37 *mandated* an award of attorneys’ fees against the defendant.

United States District Court, Northern District of Illinois

Court ordered sanctions for the defendants' failure to save a personal computer that had "crashed."

- Court found that after a computer repairman verified that the motherboard and hard drive of the computer of the president of the company were "shot," the president disposed of the computer in a dumpster.
- Court imposed sanctions against defendants (the company and its president) because they should have retained the computer—even if broken—for production.
- The computer was used for business and personal matters.

United States District Court, Northern District of Texas

Court imposed sanctions on the plaintiff for failing to produce deleted files and metadata on computer hard drive.

- Court ordered that the plaintiff's hard drive be preserved.
- Court found that a DVD image of the plaintiff's hard drive showed only active files but not the "unallocated" space, which would have included deleted files that could have been reconstructed until overwritten.
- Metadata was lost, too, and metadata may not be contained in copies of archived data.
- Metadata is "data about data."

United States District Court, District of New Jersey

Court ordered defendant to produce its litigation hold letters to determine their adequacy.

- The litigation holds were not issued until after suit was filed, but the Court found they should have been issued as soon as the party reasonably anticipated litigation.
- Court held that litigation holds, which are usually privileged and not subject to discovery, can nevertheless become discoverable when a litigant fails to promptly draft and deliver the hold to necessary individuals and there is a preliminary showing of spoliation of evidence.
- Witnesses testified that they did not save any emails and did not even know what a litigation hold was.

United States District Court, Middle District of Pennsylvania

In a personal injury action arising out of an automobile accident, the Court ordered production of the relevant portions of plaintiff's Facebook profile.

- Court ordered the plaintiff to provide the Court with his log-in information and the Court conducted an *in camera* review.

Conclusion

Although this list is certainly not exhaustive, the cases collectively demonstrate the importance of preservation and retrieval of ESI and the potential adverse impact of e-discovery issues on a party's litigation position. In today's increasingly electronic world, a company can improve its odds in litigation by adopting effective policies to address ESI issues in advance, in particular the following:

- Prompt response when litigation is reasonably anticipated to preserve electronic data using an effective litigation hold.
 - If litigation occurs, full disclosure to counsel of potential sources of ESI so that the appropriate objections can be lodged.
 - Communication with business executives and key employees about the risks of sanctions and adverse inferences if electronic records are lost or destroyed.
 - Consideration of the potential impact of company information stored on laptops and personal computers, as well as employee communications using social media.
 - Preservation of old systems, backup media and old personal computers.
 - Appropriate attention to producing metadata.
 - Involve IT, or someone knowledgeable in IT terminology, at the outset of any litigation that may involve ESI.
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