

THE JOY OF SANCTIONS

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Discovery sanctions are an essential element of the litigation process that is often neglected, avoided, and delayed to the detriment of parties and the Courts. The potential costs and consequences of e-discovery demonstrates the need to seek early and effective remedies before the case gets out of control. The decision in *Rowe Entertainment v. The William Morris Agency* (S.D.N.Y. 2002), 205 F.R.D. 421 and its progeny not only focused attention on the challenges of addressing electronic information but emphasized that discovery cannot be conducted in a mechanistic manner based on

cliche or slogan. We must revisit basic discovery concepts and practices, including sanctions, in order to properly apply them to electronic media and e-discovery issues.

Early discussion and attention to issues and effective judicial guidance play key roles in controlling costs and avoiding abuses in all discovery. With the large volume and dynamic nature of electronic information, the urgency and importance of such efforts is even greater with e-discovery. But rules and guidance are not always sufficient. Early imposition of discovery sanctions may play a critical and essential role in facilitating the process and reducing expenses. Lawyers and judges must understand, embrace and use them effectively for the discovery process to function properly. They cannot view sanctions as an afterthought or minor issue, an inconvenience or nuisance, or a personal attack or punishment. A lawyer that fails to pursue, obtain and enforce discovery sanctions may not be adequately representing its client. A court that fails to consider and apply sanctions adequately may not be performing its judicial function and responsibility.

In reading e-discovery cases, consider how early and adequate imposition of sanctions might have prevented subsequent problems and benefited all parties and the courts. Discovery problems do not improve with age or neglect. Early discussion by counsel and guidance from the court can solve many problems; if that does not work, resort must be made as soon as possible to appropriate sanctions. Although no one wants to waste time on motion practice, accepting inadequate discover responses may be counter productive and more expensive. Waiting until the discovery process collapses completely to seek a remedy complicates the issues and remedies and is often too little too late. In contrast, the early imposition of sanctions can set the tone for the litigation and avoid future abuses and motions.

Discovery is supposed to be self-executing; the requesting party is supposed to get it within a limited time unless there is a valid objection. If a party has to go to court to obtain discovery it is entitled to be compensated for that additional effort unless there is "substantial justification or other circumstances make the imposition of the sanction unjust." Federal Rules of Civil Procedure ("F.R.C.P.") Rule 37(a)(4). California Code of Civil Procedure ("C.C.P.") Sections 2031.310(d), 2023.010 (d), (e), (f), & (h). In California, the denial of sanctions should be supported by an express finding by the court that there was "substantial justification" for the failure to provide discovery. *Do v. Superior Court (Nguyen)* (2003), 109 Cal.App.4th 1210, 134 Cal.Rptr.2d 734 ["Because there was no finding that real party's failure to appear at the scheduled depositions was 'with substantial justification

or that other circumstances make the imposition of the sanction unjust' (§2025, subd. (j)(3)), petitioner is entitled to monetary sanctions."]. *California Shellfish v. United Shellfish* (1997), 56 Cal.App.4th 16 [express findings re "substantial justification" for conduct or "injustice" from awarding sanctions only required if sanctions denied]. If a lawyer fails to seek that compensation, the lawyer forces its client to absorb an unnecessary expense. If a court fails to compensate the requesting party fully for the additional effort required to obtain legitimate discovery, it punishes the innocent party and lawyer. Worse, it encourages frustration of the discovery process to the detriment of everyone.

Before rushing to court and seeking sanctions, the parties must attempt in good faith to resolve issues informally. F.R.C.P. Rule 37(a)(2)(B). In California, the failure of a party to do so is an abuse of discovery requiring the imposition of sanctions regardless of the outcome of the motion. C.C.P. §§ 2023.010(i), 2023.020. Such failure may not only result in the imposition of sanctions but may result in a denial of the motion. *Leko v. Connerstone Building Inspection Service* (2001), 86 Cal.App.4th 1109. Of course, Courts must be vigilant to discourage abuse of the meet and confer process itself to delay and frustrate the process.

The proper application of sanctions by courts requires some commitment and effort by both counsel and the court. Normally, sanctions are not awarded *sua sponte*. Lawyers must request them and make a showing to support them. C.C.P. §2023.040. A court is severely handicapped if counsel do not provide facts in support and opposition. Other than the simple case where one side fails to respond at all to discovery, lawyers must make an effort to provide adequate facts and analysis showing that the sanctions sought are an appropriate remedy for the dereliction and not excessive or punitive. If the jurisdiction permits punitive or exemplary sanctions, the lawyers must make the additional showing to justify them. If the lawyers do their jobs then the court can do its job. Unfortunately, the facts and appropriate remedies are not always simple and clear. The evaluation of a sanctions issue may require more time, effort and analysis than the underlying motion; but, that should not be a rationale for avoiding the issue because the imposition of sanctions may be more important than the issues at stake in the motion. The efforts should be fully compensated and the effect of an early and adequate imposition of sanctions should be to discourage abuses in the future and to reduce litigation costs.

Often, e-discovery motions are determined by the relative quality and factual detail of competing declarations --- sometimes because one side neglected to submit any meaningful

declaration. Facts and expert opinions, which trump argument and rhetoric, are provided by declarations of competent witnesses. With e-discovery motions, the declaration should educate the Court on the technical background and issues and make a convincing statement in support of the party's position. If an expert may be hindered by lack of information about the opponent's system, preliminary discovery must be conducted at the earliest opportunity in order to provide a meaningful declaration or opinion. Conclusions and generalities are not helpful. E-discovery cases suggest two propositions: judges lament the lack of information provided and expert testimony often determines the outcome.

The most common and initial sanction to be imposed is money. If the innocent party is not fully compensated, it is being punished and the abusive party is rewarded and encouraged. Merely warning litigants that such abuses will not be tolerated in the future are not following the law and are inviting more abuses. Warnings have their place with regard to more severe sanctions, such as termination, to be imposed in the future.

After money sanctions a continuum of available alternatives --- issue, evidence, adverse inferences, and termination --- requires more facts and analysis. In addition, the spoliation of evidence may be remedied with the same panoply of sanctions. However, more severe sanctions do not follow automatically and should be carefully crafted. Normally, the appropriate sanction is determined by the harm caused and the remedy required to compensate for that harm. Lawyers need to focus on the most effective presentation of facts and remedies to the court. Generalities alone are insufficient and do not enable a court to formulate a specific remedy. If the lawyer, supported by an expert's declaration, cannot articulate the harm and necessity for a specific remedy, the proposed sanction may not be justified or there may be no need for any sanctions. Clearly identify the missing discovery, its relevance and importance to specific issues or the case as a whole and the injury caused. Show how the requested sanction is required to adequately remedy the deprivation of expected discovery. Often, this can be done effectively in the form of a separate statement as to each item of missing discovery by setting forth the following: the request; the response; the deficiency; the relevance, importance, lack of alternatives, etc. of the missing discovery; the proposed remedy; explanation of how the proposal is the minimum or essential sanction or remedy. Requesting too much may result in a denial without any remedy. If there is a chance the court may not approve your request, consider suggesting, or be

prepared to suggest in court, an alternative, lesser sanction for the court to impose. Opponents of sanctions should provide alternative facts, expert opinions and analysis. They may want to concede that sanctions are appropriate but that the requested sanctions are excessive. If so, they should at least consider and be prepared to suggest specific lesser sanctions as an alternative and to show how the lesser alternative meets the needs of the case and any deficiency of discovery.

Assuming sanctions are appropriate, delay in their pursuit may be detrimental. In California, a failure to move within the time specified by statute is a waiver of the right to further responses. See e.g. C.C.P. §2031.310(c). That time limit and failure to act might also be used to support an argument that the party has waived its right to any remedy including an in limine motion. A trial court may conclude that the party should have pursued the remedy in a timely manner. If discovery abuses by your opponent are accepted they will probably get worse and discovery will be ineffective. Abuses often beget abuses and when the case is brought to the attention of the court, both sides look so bad that the court may be reluctant to get involved or will decide each side is equally at fault. A detailed litigation history is likely to present a complicated and unclear factual picture that is difficult to decipher. Most important, an early sanction motion will indicate, in a timely manner, for better or worse, how the court is going to enforce the rules and whether discovery abuses will be remedied or permitted.

Early awards of sanctions may help the losing party as well as the prevailing party. Often, sanctions cases involving the more severe sanctions reveal a long history of discovery abuses. Had the court imposed early, appropriate and lesser sanctions, the losing party might have corrected its conduct before it faced more severe sanctions. If conduct does not change, the argument for terminating sanctions will be more compelling when there is a history showing lesser sanctions have not worked.

While the importance of sanctions applies to all cases, with e-discovery issues the consequences and challenges are greater. The technical aspects require clear explanations to the court supported by facts, expert opinions and expert analysis.

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