



# E-Discovery Sanctions ("Scared Straight")

Thomas A. Clare, P.C.  
Kirkland & Ellis LLP  
Washington, D.C.

*Coleman (Parent) Holdings vs.  
Morgan Stanley & Co.*

- Commercial fraud case involved sale of Sunbeam stock to Coleman (Parent) Holdings
- Agreed order governing e-mail production
  - burden of restoring additional e-mail backup tapes supported by declaration from IT staff
  - compliance with agreed-upon order verified by a declaration from a separate IT staff member
- Additional e-mail backup tapes discovered and disclosed to court and opposing counsel
- Plaintiff requested (and court ordered) extensive discovery into the scope, timing, and quality of initial e-mail production

*Coleman (Parent) Holdings vs.  
Morgan Stanley & Co.*

- After an evidentiary hearing:
  - adverse inference instruction
  - reversed burden of proof on key elements of fraud
  - detailed statement to be read re: production problems
- As additional backup tapes were discovered:
  - deemed nearly all allegations in complaint established
  - precluded Morgan Stanley from introducing evidence or argument on nearly all key factual defenses
  - submitted to jury on issues of reliance and damages
  - revoked pro hac vice admission of out-of-state counsel
- Jury awarded \$1.6 billion in damages  
(later reversed on appeal)

## *Qualcomm v. Broadcom Corp.*

- Patent infringement case
- Alleged failure to produce 46,000 e-mail documents
- Indications that in-house and outside counsel were aware of production shortcomings
- Magistrate Judge:
  - found that failure to produce was intentional or reckless
  - imposed \$8.5 million in attorneys fees
  - referred six attorneys to California State Bar for investigation of possible ethical violations
  - ordered in-house attorneys to develop a comprehensive discovery compliance protocol

## Federal Rule of Civil Procedure 37

- Rule 37 authorizes a court to impose sanctions when a party fails to make disclosures or to cooperate in discovery
- In the e-discovery context:
  - failure to preserve electronically stored information (“ESI”)
  - failure to disclose ESI as required by Rule 26(a)
  - failure to cooperate with opposing counsel to create a workable framework for discovery of relevant ESI
  - failure to produce ESI
  - providing an evasive or incomplete disclosures, answers, or discovery responses regarding ESI

## Failure to Preserve ESI

Courts have statutory and inherent authority to sanction a party for failure to preserve ESI

- Rule 16(f)
- Rule 37
- 28 U.S.C. § 1927

Courts have significant (but not unlimited) discretion to fashion appropriate sanction for violations.

- “state of mind” of the producing party  
(negligence, gross negligence, willfulness)
- prejudice to the requesting party

## Sanctions Available For Failure To Preserve ESI

- Adverse Inference Instruction
- Evidentiary Sanctions
  - Preclusion
  - Shifting Burden Of Proof
- Monetary Sanctions
  - Attorneys' Fees / Costs
  - Expert Fees
  - Special Master / Discovery Plan
- Attorney Sanctions
- Dismissal / Default Judgment
- New Trial

## Rule 37(e) -- A Limited "Safe Harbor"

“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.”

# The "Routine Operation" Of An "Electronic Information System"

## Rule 37 Advisory Committee Notes:

- "the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs"
- "the alteration and overwriting of information, often without the operator's specific direction or awareness"

# The “Good Faith” Requirement

## Rule 37 Advisory Committee Notes:

- “The good faith requirement . . . means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”
- Good faith “may involve a party’s intervention to modify or suspend certain features . . . to prevent the loss of information that is subject to a preservation obligation.”

## Rule 37(e) -- A Limited "Safe Harbor"

“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.”

### Some additional limitations:

- “sanctions”
- “under these rules”
- “exceptional circumstances”

## Failure To Disclose or Produce ESI

### Fed. R. Civ. P. 26(a)(1) - Initial Disclosures.

“Except as exempted [by rule, stipulation, or court order], a party must, without awaiting a discovery request, provide to the other parties: ...

(ii) a copy -- or a description by category and location -- of all documents, ***electronically stored information***, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment”

Fed. R. Civ. P. 34 -- ESI (broadly defined) can be requested in connection with requests for production

## Failure to Cooperate Regarding ESI

Fed R. Civ. P. 26(f)(3) Discovery Plan.

“A discovery plan must state the parties’ views and proposals on: ...

(C) any issues about disclosure or discovery of ***electronically stored information***, including the form or forms in which it should be produced”

# The Duty To Cooperate Does Not End With The Discovery Plan

## *In re Seroquel Products Liability Litigation*

– 244 F.R.D. 650 (D. Fla. 2007)

Court set a hearing to determine whether sanctions should be imposed based on one party's "unilateral" approach to electronic discovery:

- failing to discuss / reach agreement with opposing party regarding electronic search terms and methods
- failing to provide information about steps taken to assure completeness and quality of searches for ESI
- refusing to allow contact between technical staffs regarding form and manner of production of ESI

# Attorney Sanctions

1. Referral to state bar
2. Revocation of admission
3. Monetary sanctions
4. Contempt

Sanctions exposure is not limited to outside counsel

## Common Pitfalls Observed In Sanctions Cases

- Failing to appropriately notify IT staff of need to preserve data / halt routine overwriting
- Entrusting preservation and collection of ESI to client IT staff not trained in legal requirements
- Making incomplete / incorrect copies of ESI
- Paying insufficient attention to legacy data and proprietary systems that produce ESI
- Failing to document each preservation, collection, and processing step

## Common Pitfalls Observed In Sanctions Cases

- Failing to re-issue preservation notices and collect ESI from newly identified custodians
- Failing to obtain a “meeting of the minds” with opposing counsel or court regarding:
  - Form of production
  - Production / preservation of metadata
  - De-duplication of ESI
  - Filtering / searching of ESI

## Tips For Avoiding Sanctions

- Know the Rules
- Demonstrate good faith
- Be proactive in preserving and producing ESI
  - Issue written litigation holds to custodians and IT staff
  - Ensure data destruction policies are legally defensible
  - Data collection is not an over-the-phone activity
- Document all steps in the process of preserving, collecting, and producing ESI
- Know and understand the information systems
- Educate clients regarding the legal requirements (and consequences) of electronic discovery
- If a problem arises, confront and deal with it early