

MWELA Seminar – May 12, 2021

Winning Discovery Sanctions in Federal Court Litigation

Kristen Sinisi & Alan Kabat (Bernabei & Kabat, PLLC)

Lauren Khouri & Jonathan Puth (Correia & Puth, PLLC)

Sources of Sanctions Authority

- ▶ Rule 26(g), Fed. R. Civ. P.
- ▶ Discovery requests, responses, or objections must be:
 - (i) “consistent with these rules and warranted by existing law or by a nonfrivolous argument...;”
 - (ii) “not interposed for any improper purpose...” and
 - (iii) “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action”

Sources of Sanctions Authority

- ▶ Rule 37(a), Fed. R. Civ. P., “Motion for an Order Compelling Disclosure or Discovery”
 - Must have attempted “in good faith to obtain the disclosure or discovery without court action;”
 - Does not apply if “the opposing party’s nondisclosure, response, or objection was substantially justified.”
 - Remedy – ordering that discovery be had, and may order paying reasonable expenses incurred in making the motion.

Sources of sanctions authority

- ▶ Rule 37(b), Fed. R. Civ. P., “Failure to Comply with a Court Order”
 - Treated as contempt of court
 - Remedies:
 - Preclusion sanctions
 - Striking pleadings in whole or in part
 - Staying proceedings pending compliance with order
 - Dismissal or default judgment
 - Payment of expenses

Sources of Sanctions Authority

- ▶ Rule 37(c), Fed. R. Civ. P., “Failure to Disclose, to Supplement an Earlier Response, or to Admit”
- ▶ Remedies:
 - Preclusion sanctions
 - Payment of expenses and fees
 - Informing the jury of the party’s failure
 - Other sanctions, including 37(b)(2)(A) orders

Sources of Sanctions Authority

- ▶ Rule 37(e), Fed. R. Civ. P., “Failure to Preserve Electronically Stored Information”
- ▶ “If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
 - (1) upon finding prejudice to another party ... may order measures no greater than necessary to cure the prejudice; or [*next page*]

Sources of Sanctions Authority

- ▶ Rule 37(e), Fed. R. Civ. P., “Failure to Preserve Electronically Stored Information”
- ▶ “If ESI that should have been preserved in the anticipation or conduct of litigation is lost . . . the court: . . .
 - (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.”

Sources of Sanctions Authority

- ▶ Rule 11, Fed. R. Civ. P. – applies to discovery motions, oppositions, and reply briefs.
- ▶ 28 U.S.C. § 1927, “Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”
- ▶ Court’s “inherent authority” sanctions.

Attorneys' Fees – Matrixes

- ▶ U.S. District Court for the District of Maryland, Local Rules, “Appendix B” rates.
- ▶ *Laffey* rates, U.S. Attorney’s Office for the District of Columbia.
- ▶ Adjusted *Laffey* rates, or “*Salazar* rates,” *Salazar v. District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000).
- ▶ *Vienna Metro* matrix, 2011 WL 13369780 (E.D. Va. Aug. 24, 2011)

Attorneys' Fee Matrixes – Paralegals and Years 1–10

Years out of law school	Maryland App. B	Laffey	Laffey (Adjusted)	Vienna Metro (2011)
Paralegal	\$95 – \$150	\$180	\$206	\$130 – \$350
1	\$150 – \$225	\$333	\$378	\$250 – \$435
2	\$150 – \$225	\$369	\$378	\$250 – \$435
3	\$150 – \$225	\$369	\$378	\$250 – \$435
4	\$150 – \$225	\$380	\$465	\$350 – \$600
5	\$165 – \$300	\$380	\$465	\$350 – \$600
6	\$165 – \$300	\$388	\$465	\$350 – \$600
7	\$165 – \$300	\$388	\$465	\$350 – \$600
8	\$165 – \$300	\$452	\$672	\$465 – \$640
9	\$225 – \$350	\$452	\$672	\$465 – \$640
10	\$225 – \$350	\$452	\$672	\$465 – \$640

Attorneys' Fee Matrixes – Years 11–20

Years out of law school	Maryland App. B	Laffey	Laffey (Adjusted)	Vienna Metro (2011)
11	\$225 – \$350	\$532	\$759	\$520 – \$770
12	\$225 – \$350	\$532	\$759	\$520 – \$770
13	\$225 – \$350	\$532	\$759	\$520 – \$770
14	\$225 – \$350	\$532	\$759	\$520 – \$770
15	\$275 – \$425	\$532	\$759	\$520 – \$770
16	\$275 – \$425	\$591	\$759	\$520 – \$770
17	\$275 – \$425	\$591	\$759	\$520 – \$770
18	\$275 – \$425	\$591	\$759	\$520 – \$770
19	\$275 – \$425	\$591	\$759	\$520 – \$770
20	\$300 – \$475	\$591	\$914	\$505 – \$820

Attorneys' Fee Matrixes – Years 20–30+

Years out of law school	Maryland App. B	Laffey	Laffey (Adjusted)	Vienna Metro (2011)
21	\$300 – \$475	\$621	\$914	\$505 – \$820
22	\$300 – \$475	\$621	\$914	\$505 – \$820
23	\$300 – \$475	\$621	\$914	\$505 – \$820
24	\$300 – \$475	\$621	\$914	\$505 – \$820
25	\$300 – \$475	\$621	\$914	\$505 – \$820
26	\$300 – \$475	\$621	\$914	\$505 – \$820
27	\$300 – \$475	\$621	\$914	\$505 – \$820
28	\$300 – \$475	\$621	\$914	\$505 – \$820
29	\$300 – \$475	\$621	\$914	\$505 – \$820
30	\$300 – \$475	\$621	\$914	\$505 – \$820
31+	\$300 – \$475	\$665	\$914	\$505 – \$820