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Report: E-discovery opinions show judges getting tougher

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"Continued growth of intolerance by the judiciary for discovery failures" and "the renewed call for cooperation amongst counsel" are among the dominant topics in judicial opinions on electronic discovery in 2010.

A third major topic is the struggle of companies and lawyers with proper preservation techniques, according to an annual report from Kroll Ontrack, a provider of information management and data recovery services.

The number of opinions related to discovery "continues to increase exponentially," according to Kroll's fourth annual analysis of electronic discovery opinions.

As a sign of the explosion of opinions, Regina Jytyla Hagen, managing staff attorney at Kroll Ontrack in Eden Prairie, Minn., said there were only a handful of cases each month when the firm began summarizing relevant cases in the early 2000s.

Now, Hagen said, "we see 75 to 100 cases a month."

The 7th U.S. Circuit Court of Appeals is now second only to the 2nd Circuit for the number of opinions it has issued on e-discovery, said Jennifer Freeman, a senior legal consultant for Kroll Ontrack in Chicago.

Kroll Ontrack's 2010 Year in Review Report offers summaries of 84 of the most significant e-discovery opinions of 2010 up through Oct. 31.

It can be found at: krollontrack.com/news-releases/?getPressRelease=61500.

In 39 percent of the 84 cases, or 33 cases, the court gave significant attention to the possibility of sanctions, Hagen said.

And in 23 of those 33 cases, the court awarded sanctions.

"I think we've moved into the space where everyone should know better," Freeman said.

"In some of the earlier cases where there were huge sanctions imposed, they centered around corporations and counsel that did not really understand, perhaps, the volume of data that they had to begin with," didn't manage it well, didn't disclose it in a timely fashion, and didn't sufficiently understand the technology, Freeman said.

Today, Freeman said, "sanctions have caused tension between outside counsel who prefer their clients over-preserve (data) and the client who bears the real burden of preservation."

Freeman said the tension is healthy, and a consultant or e-discovery expert can help with answers. "The goal of many companies is to purge data that they just don't need" for business continuity, or regulatory obligations, or need to hold for litigation, she said.

The Kroll Ontrack report cites "five notable discovery themes in 2010" in judges' opinions and lists cases for each theme.

The themes are:

Preservation, cooperation, privacy in the workplace, privileged documents and discoverability of information in social networking sites.

For example in the legal theme of "preservation," the report cites *Victor Stanley, Inc. v. Creative Pipe Inc.*, 2010 WL 3703696 (D. Md., Sept. 9, 2010), where the judge found that a defendant willfully violated court orders for preservation of evidence. The court held him in civil contempt of court and ordered him to be imprisoned for up to two years, or until he paid the attorney fees and costs that were awarded.

Regarding "privacy in the workplace," the Kroll Ontrack report cites *City of Ontario, Calif. v. Quon*, 2010 WL 2400087 (U.S., June 17, 2010). In that case, the U.S. Supreme Court found that a police officer who had a city-supplied text pager should have, according to this report, "anticipated that it might be necessary for the city to audit the pager messages" and that it was reasonable for the employer to audit them.

In the theme of "privilege," the report cites a West Virginia case, *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 2010 WL 1990555 (S.D.W. Va., May 18, 2010) where the plaintiff responded to discovery with 346 gigabytes of data, 30 percent of it irrelevant. This data included a key, plaintiff's e-mail that was on its privilege log for attorney-client privilege. Despite the plaintiff's attempts to get this e-mail and other privileged documents back, the court ruled that the plaintiff did not take reasonable steps to prevent disclosure and that confidentiality could not be restored to that e-mail.

In the theme of "discoverability," the report cites *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (Sept. 21, 2010). There the court, according to this report, "found public portions of the plaintiff's social networking sites contained content that was material and

necessary to the litigation and discerned a reasonable likelihood that the same would hold true to the private portions."

The court ordered the plaintiff to provide authorizations for access to private Facebook and MySpace accounts.

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