American Legal Ethics: Sanctions for Discovery Negligence?
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December 2002

Most of us think that judicial sanctions are only appropriate for grossly negligent or willful conduct.

This may not be so. Residential Funding Corp. v. DeGeorge Financial Corp., 306 F3d 99 (2d Cir 2002) was a multimillion dollar breach of contract action that resulted in a $96.4 million verdict for plaintiff and a dismissal of defendant's multimillion dollar counterclaim. On appeal, the only issue was whether the trial court had erred in refusing to give the jury an "adverse inference" instruction. This instruction would have informed the jury that in weighing the claims of the parties, it could consider the plaintiff's delays in producing electronically stored documents.

The trial court had declined to give such an instruction on the ground that it would only be appropriate to do so if the defendant could show that the plaintiff had been guilty of bad faith or gross negligence. The Second Circuit disagreed and held that mere negligence could be enough to justify an adverse inference instruction if the defendant could also show prejudice to its case by reason of the delayed production. The Second Circuit therefore reversed the decision below and remanded the case for the trial court to hold a hearing on the question of prejudice. If, of course, a sufficient showing of the likelihood of prejudice is made on remand, the case will have to be retried.

Three aspects of this case bear particular mention. First, plaintiff's counsel had retained the services of an accomplished third-party electronic discovery company to assist in the production of electronically stored documents. The Second Circuit manifestly did not think that the employment of such a company excused plaintiff and its counsel from a duty to continue to press for timely production.

Second, the Second Circuit asserted that in light of prior missed discovery deadlines and inconsistent representations as well as the upcoming trial date, the plaintiff was, as a matter of law, "under an obligation to be as cooperative as possible." (Emphasis in original.) In other words, the ordinary or reasonable care standard that more normally applies in discovery was superseded. On the other hand, it does not appear from the opinion that a great deal will necessarily be required in future cases to trigger the "as cooperative as possible" standard.

Third, the Second Circuit was clearly bothered by what the trial court had considered plaintiff's "somewhat purposeful[] sluggishness" in discovery. This suggests that the Second Circuit considered the case to be one involving more than mere negligence even if the conduct did not amount to gross negligence or bad faith. As the Second Circuit went on to say, "District courts should not countenance 'purposeful sluggishness' in discovery on the part of parties or attorneys and should be prepared to impose sanctions when they encounter it."

If nothing else, however, this case should lead counsel to be more vigilant than ever in discovery. How, after all, would any of us feel about having to explain to our client, or our insurance

carrier, the reversal of a $96.4 million judgment in the client's favor due to conduct over which we might have exercised additional control?

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If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

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