

# Pretrial Practice & Discovery

American Bar Association Litigation Section

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## Discovery Misconduct May Cost Millions in Sanctions

Numerous allegations of misconduct support a request for over \$2 million in sanctions in an ongoing discovery dispute.

By Jessica Barnes

There is a line between zealous advocacy and bad-faith avoidance of discovery obligations. Attorneys in *In re: Facebook Inc. Consumer Privacy User Profile Litigation*, Case No. 18-md-02843-VC (N.D. Ca. 2022) may have crossed that line.

This matter began in March 2018 and involves the discovery that a third-party app developer harvested personal data from roughly 87 million Facebook users and sold it to Cambridge Analytica, a political consulting firm.

In September 2022, the Facebook-user plaintiffs explained to a California district judge why discovery sanctions were appropriate in this case. Specifically, the judge found “abominable” deposition misconduct and was outraged by Facebook’s years-long refusal to turn over certain user data and non-privileged internal communications.

The so-called “deposition misconduct” included Facebook’s witness refusing to answer basic questions and the defense attorney repeatedly telling the witness that she did not have to respond to the question.

With respect to the allegations of refusing to turn over certain information, Facebook attorneys argued that the orders of the judge who presided over discovery disputes were ambiguous. The current district judge did not buy that argument, accusing Facebook attorneys of pouncing on any “little ambiguity” and using it to obstruct and delay the production of obviously responsive materials.

In November 2022, the Facebook-user plaintiffs submitted their total monetary request for sanctions related to fees and costs as a result of discovery misconduct—which totaled over \$2 million.

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The Facebook-user plaintiffs explained in their briefing, “Plaintiffs believe that the general approach that Facebook . . . took to this litigation greatly delayed progress and increased fees and costs well beyond what is sought in this submission. The fees and costs sought here, however, are only limited to what would not have been incurred absent two categories of sanctionable misconduct that the Court identified in its order.”

No sanction award has been made yet, but it's obvious that the district judge is entertaining the sanctions request. Furthermore, there is a crystal-clear takeaway from this case for litigation attorneys: Always take discovery obligations seriously.

It cannot be good for one's case to have the judge describe the attorney's conduct as “a good example of bad-faith dilatory conduct.” It also, may just cost millions of dollars.

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