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Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds

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I. INTRODUCTION

Suppose you are a partner in the litigation department of a law firm. One of your corporate clients informs you that the company has been sued in a major breach of contract action. The company wants you and your firm to defend it in the action. What are your ethical obligations at this point? You should initiate a conflict-of-interest check to determine if the adverse party is either a current[1] or a former client.[2] You should promptly reach agreement with the client about charges for legal fees and expenses.[3] While not ethically required, a written engagement agreement reflecting the scope of your representation and the fees and

1. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).
2. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2009).
3. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2009).

expenses for which the client will be responsible is prudent.[4] If these are the only steps you take at this stage of the matter, however, you have exposed your client to substantial legal risks and subjected yourself to possible disciplinary action and legal liability.

You represent the plaintiff in a personal injury action. Shortly after you filed the case, an associate in your firm who is working on the case tells you that she has reviewed your client's Facebook page, and the site contains posts and pictures that would be very damaging to the client's case, particularly to her damage claims. What should you do ethically? (1) Nothing; (2) advise the client to remove herself from Facebook for the duration of the litigation if possible; or (3) counsel the client to capture her Facebook page as it currently exists and refrain from making any further posts?

II. WINNING IN LITIGATION THROUGH DISCOVERY ABUSE

Traditionally, a party attempted to win a lawsuit by gathering facts through investigation and discovery and by then trying to persuade the judge and the trier of fact of the merits of the party's case. In recent years a new way of winning has emerged: winning through discovery abuse. This route to victory *does not involve* illegally or improperly attempting to prevent the other side from obtaining evidence that it is entitled to receive.[5] This new approach to success in litigation involves obtaining significant sanctions against the opposing side for its discovery abuse.[6]

The range of sanctions for discovery abuse is broad and potentially devastating, including entry of default judgment, adverse inference instruction to jury, preclusion of witnesses from testifying, and monetary award.[7] Availability of discovery of electronically stored information (ESI) increases the possibility that a party will be guilty of discovery abuse, leading to claims for sanctions.[8] The quantities of information subject to electronic discovery are vast and are held throughout the organization, multiplying the possibilities of errors in preserving and producing such information.[9] An article in the Dec. 17, 2008, issue of

4. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 2 (2009).

5. *See* FED. R. CIV. P. 37 (authorizing sanctions for discovery abuse).

6. *See infra* notes 7-10

7. *See In re* Kmart Corp., 371 B.R. 823, 841 (N.D. Ill. 2007) (discussing various types of sanctions).

8. Sheri Qualters, *25% of Reported E-Discovery Opinions in 2008 Involved Sanctions Issues*, NAT. L.J., Dec. 16, 2008.

9. *See infra* note 39.

the *National Law Journal* reports that in the first ten months of 2008 there were 138 reported opinions dealing with electronic discovery, 25 percent of which involved sanctions issues.[10]

Both inside and outside counsel are directly involved in dealing with discovery of ESI. Increased client exposure for litigation sanctions also increases the exposure of lawyers for improper handling of ESI. The first point of exposure of counsel for improper handling of ESI begins with the litigation hold.

III. THE LITIGATION HOLD

A. Time When Duty Attaches

A litigation hold is a suspension of a party's normal document retention/destruction procedures in order to preserve evidence for litigation.[11] The duty to institute a litigation hold attaches when a party "reasonably anticipates" litigation.[12] Thus, an obligation to create a litigation hold can arise prior to the filing of a complaint. In *Zubulake IV*, an employment discrimination case, the plaintiff filed her EEOC charges on Aug. 16, 2001.[13] However, the court found that the duty to institute a litigation hold arose in April 2001 because at that time everyone associated with the matter recognized the possibility that she might sue.[14] *Phillip M. Adams & Assocs., LLC v. Dell, Inc.*[15] is an even more dramatic example showing that the duty to institute a litigation hold arises before litigation is filed. In that case, the plaintiff's counsel wrote to the defendant in 2005 asserting patent infringement claims.[16]

10. Qualters, *supra* note 8.

11. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y.2003) ("*Zubulake IV*").

12. *Id.* at 217. The Sedona Conference, a nonprofit organization devoted to the study of law and policy in antitrust, intellectual property, and complex litigation, has published an important study of litigation holds. *Commentary on Legal Holds: The Trigger and the Process* (2007), http://www.thesedonaconference.org/dltForm?did=Legal_holds.pdf (visited Oct. 11, 2009) ("Reasonable anticipation of litigation arises when an organization is on notice of a credible threat that it will become involved in litigation or anticipates action to initiate litigation.") (emphasis added); *see also* ABA CIVIL DISCOVERY STANDARDS, STANDARD 10 (Document Production) ("When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so.") (emphasis added).

13. 220 F.R.D. at 216.

14. *Id.* at 217.

15. 621 F. Supp. 2d 1173 (D. Utah 2009).

16. *Id.* at 1190.

However, the court found that the defendant had a duty to preserve evidence back to 1999-2000 because at that time class-action lawsuits had been filed against other computer manufacturers based on claims of computer defects that led to plaintiff developing its patented technology.[17] The court stated, "Throughout this entire time, computer and component manufacturers were sensitized to the issue . . . . In the 1999-2000 environment, [defendant] should have been preserving evidence related to floppy disk controller errors."[18]

B. Scope of Litigation Hold.

In *Zubulake IV*, Judge Scheindlin ruled that the duty to institute a hold did not apply to all possible information in a litigant's possession.[19] She decided that the duty is limited "to preserve what [a party] knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[20] The duty does not apply to data the access to which would be an undue burden, such as *inaccessible* backup tapes.[21] However, ordinary backups of files that are reasonably accessible would be subject to the duty to institute a litigation hold.[22] Ephemeral data such as is found in the caches of computers would be within the scope of a litigation hold.[23]

A number of questions can arise with regard to the scope of the litigation hold.[24] For example, does the litigation hold preclude a party from changing the form in which materials are stored? In particular, may a party preserve e-mails by converting them to pdf format? While a party may convert materials to pdf format, it appears that a party must also maintain the materials in native format.[25] The federal rules state

17. *Id.* at 1191.

18. *Id.*

19. 220 F.R.D. at 217.

20. *Id.*

21. *Id.* at 218.

22. *Id.*

23. *See* Arista Records LLC v. USENET.com, Inc., 608 F. Supp. 2d 409, 431-34 (S.D.N.Y. 2009) (holding that a party had a duty to preserve transitory data); Columbia Pictures Indus. v. Bunnell, 2007 WL 2080419, at *14 (C.D. Cal. 2007) (requiring preservation of server log data); *see generally*, Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349 (2008).

24. This article does not attempt a comprehensive analysis of the issues associated with litigation holds, but it does identify a few significant issues by way of illustration.

25. *See* FSP Stallion 1, LLC v. Luce, 2009 WL 2177107, at *5 (D. Nev. 2009) (requiring production of materials in native format).

that a party must produce materials in native form if requested by the other party: "*If a request does not specify a form for producing electronically stored information*, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[26]

Does a litigation hold apply to material that is not within the possession or control of a party? The duty to preserve evidence may apply even if the evidence is in a third party's possession, if a party has indirect control of the evidence.[27] Even if a party does not have direct or indirect control of evidence, a party has an obligation to notify the other party of the existence of the evidence so that the other party can take steps to prevent the destruction of such material by the possessor.[28]

C. Duties of Counsel with Regard to Litigation Holds.

In *Zubulake V*, Judge Scheindlin held that obligations regarding litigation holds apply to counsel as well as to parties: "Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents."[29] Judge Scheindlin identified three obligations of counsel:

First, as discussed above, counsel has an obligation to institute a litigation hold whenever litigation is reasonably anticipated.[30] Counsel must also periodically reissue the hold to bring it to the attention of new employees and to refresh the memories of existing employees.[31]

Second, counsel must communicate directly with "key players" in the litigation with regard to implementation and monitoring of the litigation hold.[32] Key players are those individuals likely to have discoverable information that a party would use in support of its claims.[33] These individuals should be periodically reminded of their preservation obligations.[34]

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26. FED. R. CIV. P. 34(b)(2)(E)(ii) (emphasis added).

27. *See* Cyntegra, Inc. v. Idexx Labs., Inc., 2007 WL 5193736, at *5 (C.D. Cal. 2007) (discussing preservation obligations when party had indirect control of evidence in possession of a third party). For a detailed discussion of the meaning of "control," see *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 514-17 (D. Md. 2009).

28. *See* Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001).

29. Zubulake v.UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*).

30. *Id.* at 433.

31. *Id.*

32. *Id.* at 434.

33. *Id.*

34. *Zubulake V*, 229 F.R.D. at 434.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files.[35] Counsel must also make sure that all backup data that a party is required to retain is kept safe.[36] In some instances counsel may have an obligation to take possession of such backup material.[37]

A number of issues can arise with regard to implementation of counsel's obligations. Suppose a party or potential litigant has both in-house and outside counsel. Who is responsible for initiation of the litigation hold? In one sense the answer is both. Both represent the company and competent representation would require both to inform the client of the need to institute a litigation hold. However, litigation counsel has the primary obligation because the court will look to counsel of record to implement the litigation hold and can sanction litigation counsel for failure to do so.[38] A similar problem of responsibility can arise if co-counsel are involved in the case or if the case involves out-of-state and local counsel. Each counsel of record would have responsibility to make sure that a litigation hold was implemented. However, counsel could by agreement assign responsibilities among themselves for various aspects of the litigation hold. Counsel should not be subject to sanctions if the counsel reasonably relied on other counsel of record with regard to the implementation of a litigation hold. If such reliance would be unreasonable—for example, if co-counsel learned that lead counsel was failing to take steps to implement the litigation hold—counsel would be required to take affirmative action.

What does communication with key players entail? The answer will, of course, be fact specific, but in general, communication should require the following: (1) identification of key individuals with regard to the substance of the matter; (2) identification of key IT personnel who control or who have knowledge about access to the relevant ESI; (3) identification of primary types of ESI that may contain relevant materials, such as word processing documents, webpages, or voicemails; (4) identification of devices on which relevant ESI may be stored, such as hard drives, thumb drives, DVDs, etc.;[39] (5) determination of the relevant period for which materials should be preserved; (6)

35. *Id.*

36. *Id.*

37. *Id.*

38. *See infra* Part III.

39. For an excellent listing of types of ESI and storage devices, see BEST PRACTICES GUIDE FOR ESI PRETRIAL DISCOVERY – STRATEGY AND TACTICS § 3.4 (Michael Arkfield ed. 2008-2009), *available at* http://www.elawexchange.com/index.php?option=com_content&view=article&id=95&Itemid=484.

determination of the method of preservation of the materials; (7) drafting of notice of the litigation hold directed to both key substantive and IT people; and (8) monitoring compliance with the litigation hold.[40]

IV. ETHICAL AND LEGAL LIABILITY OF COUNSEL FOR FAILURE TO INSTITUTE OR MONITOR A LITIGATION HOLD

What are the ethical and legal liabilities that counsel may face for violation of their obligations to institute or monitor litigations holds?

A. Ethical Violation.

ABA Model Rule 3.4(a) states that a lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;[41]

Comment 2 elaborates on this obligation and specifically refers to law prohibiting destruction of evidence:

> Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. *Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen*.[42]

Rule 3.4 clearly applies if a lawyer destroys or conceals evidence, but does the rule apply when a lawyer does not act by failing to institute a litigation hold or by failing to monitor the hold? If a lawyer knows that a litigation hold should be instituted in a case, but fails to do so, with the result that ESI is lost, the harm is the same as if the lawyer had actively destroyed the evidence.[43] Moreover, the rule applies not just to the lawyer's direct conduct, but also to the lawyer's assistance of another

40. *See* Litigation Hold Document Preservation Team Meeting Agenda, North Dakota State Government, http://www.nd.gov/risk/files/forms/Litigation_Hold-Team_Meeting_Agenda.pdf (last visited Mar. 23, 2010) (providing issues to discuss in preparing the litigation hold).

41. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a).

42. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) cmt. 2 (emphasis added).

43. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) cmt. 2.

person's conduct.[44] If a lawyer issues a litigation hold, the lawyer makes it more difficult for the client to destroy ESI. Conversely, if the lawyer fails to issue the hold, it becomes easier for the client to destroy ESI either intentionally or negligently because the client can claim that it acted in good faith and was never told of the need to preserve evidence. Thus, a lawyer's failure to institute or monitor a litigation hold can assist the client in such conduct.

Does the rule only apply if the lawyer is acting criminally? There is language in the rule that might support the contention that the rule is limited to criminal conduct.[45] The text of the rule refers to "unlawful" conduct and the comments refer to the "offense" of destroying evidence, both of which could be interpreted to refer to criminal conduct.[46] However, the rule should not be limited to criminal conduct, but should apply to conduct that violates preservation obligations whether those obligations arise from tort law, the rules of procedure, or principles developed in sanctions cases. First, the word "unlawful" is not equivalent to "criminal" and there is no reason of policy that would justify adopting a narrow interpretation of Rule 3.4(a). Second, Rule 8.4(b) already prohibits lawyers from engaging in criminal conduct,[47] so an interpretation of Rule 3.4(a) that limited it to a violation of the criminal law would be redundant.

A lawyer who fails to issue or monitor a litigation hold could be in violation of other ethical rules in addition to Rule 3.4. Rule 1.1 requires lawyers to be competent.[48] If a lawyer is not aware of the need to institute a litigation hold or to monitor the hold, the lawyer is almost certainly guilty of incompetence. While harm is not an element of an ethical violation of Rule 1.1,[49] harm could flow either to the client or to the opposing party—or both. Moreover, in order for a litigation hold to be effective, a lawyer must communicate with the key individuals in the company.[50] Effective communication requires a lawyer to gather substantial information about a client's ESI. Failure to gather this information could also subject a lawyer to a claim of incompetence. As one commentator has said:

44. MODEL RULES OF PROF'L CONDUCT R. 3.4(a).
45. *See id.*
46. *Id.*
47. MODEL RULES OF PROF'L CONDUCT R. 8.4(b).
48. MODEL RULES OF PROF'L CONDUCT R. 1.1.
49. *Id.*
50. *Zubulake V*, 229 F.R.D. at 434.

> [L]awyers will not only need extensive knowledge of their clients' electronic records, but will also have to be actively involved in the maintenance of records and the preservation of evidence that could be discoverable at litigation.[51]

Finally, Rule 8.4 establishes various grounds of misconduct, including conduct that is "prejudicial to the administration of justice."[52] Several court decisions have indicated in dictum that lawyers could be subject to discipline if they engaged in spoliation of evidence. In *Downen v. Redd*,[53] the court refused to recognize a cause of action for third-party spoliation of evidence.[54] In its opinion, however, the court noted that attorneys who engage in spoliation may be subject to disciplinary action under Rule 8.4.[55] Similarly, in *Roach v. Lee*,[56] the court noted that California does not recognize the tort of spoliation, but attorneys are subject to discipline for such conduct.[57]

B. Liability to Client for Malpractice.

Lawyers have a duty to counsel their clients about the need to institute and monitor litigation holds. ABA Civil Discovery Standards state:

> When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so . . . . This Standard is . . . an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues.[58]

Beginning with *Zubulake V*, many court decisions have held that lawyers have a duty to institute and to monitor litigation holds. For example, in *Green v. McClendon*,[59] the court stated:

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51. Zachary Wang, *Ethics and Electronic Discovery: New Medium, Same Problems*, 75 DEF. COUNSEL J. 328, 330 (2008).
52. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).
53. 367 Ark. 551 (2006).
54. *Id.* at 557.
55. *Id.* at 556.
56. 369 F. Supp. 2d 1194 (C.D. Cal. 2005).
57. *Id.* at 1200, 1202.
58. ABA CIVIL DISCOVERY STANDARDS, STANDARD 10 (Document Production).
59. 2009 WL 2496275 (S.D.N.Y. 2009).

> There is no question that Mrs. McClendon's counsel failed to meet these discovery obligations. Unless Mrs. McClendon brazenly ignored her attorney's instructions, *counsel apparently neglected to explain to her what types of information would be relevant and failed to institute a litigation hold to protect relevant information from destruction*. Moreover, despite numerous representations to the contrary, *it is highly unlikely that counsel actually conducted a thorough search for relevant documents in Mrs. McClendon's possession* in connection with their initial disclosure duties or in response to the plaintiff's first document request. If that had been done, counsel certainly would have found the spreadsheet from Mrs. McClendon's personal computer files."[60]

Federal Rule of Civil Procedure 37(e) protects a party against sanctions for failing to provide ESI in some circumstances, but the rule requires the party to act in good faith.[61] The Advisory Committee notes to the rule indicate that an element of good faith is whether the party complied with a preservation obligation.[62] Thus, a lawyer's failure to advise a client about a preservation obligation or the lawyer's failure to act competently to implement a preservation obligation could subject the client to sanctions. Clients could then seek to recover from their counsel for any sanctions that have been imposed on the client because of the lawyer's negligence. In an extreme case, in which a court entered a default judgment because of the client's failure, caused by its own counsel, to preserve evidence, the client could seek to recover the entire amount of the judgment in a malpractice action against its attorneys.[63]

C. Liability to the Opposing Party for Spoliation.

Spoliation occurs when evidence is altered, destroyed, or lost by a person who has a duty to preserve the evidence.[64] First-party spoliation occurs when a party to litigation engages in spoliation of evidence harming the other party.[65] Third-party spoliation involves spoliation of evidence by a person who is not a party to litigation but which harms a litigant.[66] Courts are divided on whether to recognize a tort of spoliation. In *Downen*, the court refused to recognize a cause of action

60. *Id.* at *5 (emphasis added).
61. FED. R. CIV. P. 37.
62. *Id. at* Advisory Committee's notes to 2006 amendment.
63. *See* Galanek v. Wismar, 68 Cal. App. 4th 1417, 1424-25 (1999).
64. *See* Goodman v. Praxair Services, Inc., 632 F. Supp. 2d 494, 505 (D. Md. 2009).
65. *See* Hannah v. Heeter, 213 W. Va. 704, 711 (2003).
66. *See id.* at 712.

for either first- or third-party spoliation because of the availability of other remedies for spoliation.[67] However, in *Hannah*, the West Virginia Supreme Court recognized the tort of negligent spoliation by a third party and intentional spoliation by a first party.[68]

Even if a lawyer is not directly liable for spoliation, a lawyer could be liable as an aider or abettor to either a first party or third party in jurisdictions that recognize these torts. The Restatement of Torts provides that a person is responsible for harm caused to a third party by another's conduct if the person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."[69] If a lawyer properly institutes and monitors a litigation hold, the lawyer reduces the likelihood that relevant evidence will be lost. If the lawyer fails to institute or monitor a litigation hold, with the result that evidence is lost, the lawyer's failure to act has substantially contributed to the spoliation of evidence. In fact, failure to institute or monitor a litigation hold is more likely to result in the loss of significant evidence than if the lawyer encourages the client to destroy evidence. The lawyer's failure to act affects everyone in the organization who has relevant evidence and induces destruction of evidence by clients who, if properly notified, would have complied with their legal obligation.

D. Sanctions

Courts have power to award sanctions for discovery abuse under Rule 37 of the Federal Rules or pursuant to their inherent power to manage their own affairs.[70] Sanctions can be awarded against both parties and their counsel.[71] Counsel who fail to institute or to monitor litigation holds can be subject to sanctions for such misconduct.[72] In the case of discovery abuse by a client, courts have the power to award a wide range of sanctions, such as dismissal, adverse inference instruction, denial of cross-examination of the other party's witnesses, or other relief

67. *Downen*, 367 Ark. at 554-56; *see also* Ortega v. City of New York, 876 N.E.2d 1189, 1197 (N.Y. 2007) (rejecting cause of action for third party spoliation).

68. 213 W. Va. at 715.

69. RESTATEMENT (SECOND) OF TORTS §876(b).

70. See Plunk v. Village of Ellwood, 2009 WL 1444436, at *9 (N.D. Ill. 2009).

71. *See, e.g.*, Phoenix Four, Inc. v. Strategic Resources, Corp., 2006 WL 1409413, at *9 (S.D.N.Y. 2006) (imposing monetary sanction equally on party and its counsel).

72. Bray & Gillespie Management LLC v. Lexington Ins. Co., 259 F.R.D. 568, 590 (M.D. Fla. 2009) (imposing monetary sanctions on plaintiff's counsel for discovery abuse in connection with production of ESI).

that would be appropriate based on the client's conduct.[73] Such case-specific sanctions could not be imposed on a lawyer who is not a party to the litigation. If a court chooses to sanction a lawyer for failure to initiate or monitor a litigation hold, the typical sanction would be monetary.[74]

V. CONCLUSION

The ethical and legal basis for subjecting counsel to discipline or liability for failing to initiate or implement litigation holds in connection with ESI exists. Recent important cases, while not imposing discipline or liability on counsel, have continued to lay the ground work for such liability. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, Judge Scheindlin, the author of the *Zubulake* opinions, held that the obligations of parties and their counsel with regard to ESI discovery had become so well-established that failure to comply with these obligations amounted to gross negligence warranting an adverse-inference instruction.[75]

In *Qualcomm, Inc. v. Broadcom, Corp.*, a California federal magistrate judge initially sanctioned six lawyers of Qualcomm for assisting their client in withholding thousands of relevant documents that had been requested in discovery.[76] The judge ordered the attorneys to participate in an educational program to identify discovery failures in the case and to develop a protocol that would serve as a model for the future.[77] The judge also referred the conduct of the attorneys to the State Bar of California for investigation.[78] The attorneys filed objections and the order was vacated by the trial judge.[79] In subsequent proceedings, the magistrate judge found that the attorneys had committed serious discovery errors, but they had made significant efforts to comply with their discovery obligations and had acted in good faith.[80] Accordingly, the judge declined to sanction the attorneys.[81] In future cases, however, judges may not be so lenient with counsel. Cases in which counsel are held liable for damages to their clients or subject to discipline for failing

73. *See supra* note 7 and accompanying text.
74. *See supra* notes 71-72.
75. 2010 WL 184312, at *18 (S.D. N.Y. 2010).
76. Qualcomm, Inc. v. Broadcom, Corp., 2010 WL 1336937, at *1 (S.D. Cal. 2010).
77. Qualcomm, Inc. v. Broadcom, Corp., 2008 WL 66932, at *18 (S.D. Cal. 2008).
78. *Id.* at *18
79. *Qualcomm, Inc.*, 2010 WL 1336937, at *1.
80. *Id.* at *7.
81. *Id*. at *2.

to comply with well established ESI discovery obligations will not be long in coming as the new approach to winning litigation through discovery continues to develop.