

**ACHIEVING AN APPROPRIATE BALANCE: THE USE OF  
COUNSEL SANCTIONS IN CONNECTION WITH THE  
RESOLUTION OF E-DISCOVERY MISCONDUCT**

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I. INTRODUCTION

[1] This article evaluates the increased use of counsel sanctions in connection with discovery misconduct in the federal courts.<sup>1</sup> Decisions such as *Qualcomm Inc. v. Broadcom Corp. (Qualcomm)*<sup>2</sup> have drawn attention to the affirmative responsibilities of counsel for discovery and the ample authority available to sanction them under appropriate circumstances. In particular, courts have revived Rule 26(g) of the

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<sup>1</sup> See Sheri Qualters, *25 Percent of Reported E-Discovery Opinions in 2008 Involved Sanctions Issues*, NAT'L L.J., Dec. 17, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202426805975&rss=newswire> (reporting that 25% of the opinions issued in the first 10 months of 2008 involved sanctions for the mishandling of electronic discovery).

<sup>2</sup> No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *partially vacated and remanded*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

Federal Rules of Civil Procedure for duty and blended ethical principles into the sanctions mix to motivate changes in counsel behavior.<sup>3</sup>

[2] When properly applied, counsel sanctions serve as a useful deterrent to misconduct. The threat of sanctions, however, also carries the potential for creating unproductive tension in client relationships, especially between in-house counsel who supervise litigation and outside counsel retained to provide trial court expertise and advice. This comes at a crucial time. Clients in a position to do so are dedicating qualified e-discovery personnel to team efforts involving outside counsel, internal resources and third party consultants. An increase in finger-pointing and defensive posturing that may result when the dynamics of that effort are not respected is not conducive to full development of this positive trend.

[3] The purpose of discovery sanctions is to compel compliance, remediate prejudice, and deter others from similar misconduct.<sup>4</sup> This article suggests that courts can best achieve that goal by maintaining a primary focus on client responsibility for misconduct, absent egregious counsel conduct, coupled with a mild presumption against costly detours involving a “Pandora’s Box”<sup>5</sup> of post-engagement battles between client and counsel.<sup>6</sup>

## II. TRIGGERING THE AUTHORITY TO SANCTION

[4] While there may once have been a general reticence on the part of Federal Courts to impose discovery sanctions on counsel,<sup>7</sup> that restraint is

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<sup>3</sup> See David Cross & Ty Carson, *Ethics and E-Discovery—“Reasonable Inquiry” in the Wake of Qualcomm v. Broadcom: Part I of II*, 8 DIGITAL DISCOVERY & E-EVIDENCE REPORT 375, 378 (Dec. 1, 2008) (“Thus, one could argue, a lawyer’s duty under Federal Rule 26(g) . . . is an ethical duty to make a reasonably diligent effort to comply with a proper discovery request.”).

<sup>4</sup> See *Poole v. Textron, Inc.*, 192 F.R.D. 494, 505-06 (D. Md. 2000).

<sup>5</sup> Tom Allman, *Pandora’s Box: Compliance Quagmires Can Alienate Legal Teams*, 15 L. TECH. NEWS 26 (2008) (“Opening up sensitive issues of relative fault among employed and retained counsel and their clients can be akin to opening Pandora’s Box.”).

<sup>6</sup> The party responsible for satisfying the duties created by a sanction is not always the one whose conduct triggered the authority to sanction. See *infra* Part III.

<sup>7</sup> Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 806 (1991) (“[I]n practice, judges are extremely reluctant either to expose discovery violations or to punish discovery

long past in this era of “managerial judging”<sup>8</sup> and electronically stored information. Cases like *Qualcomm*, with its sanctions on both counsel and client, have sent “ripples of fear through the litigation community and in-house counsel managing or supervising litigation.”<sup>9</sup>

[5] Nonetheless, the imposition of sanctions on counsel for discovery misconduct<sup>10</sup> remains a relatively isolated occurrence and properly so. Attorneys are professionals, whether employed by one client or serving as independent litigation counsel retained on an ad hoc basis to render services in specific cases. As such, they can be expected to honor ethical standards of professionalism and by-and-large must do so to maintain their own standing and reputation.<sup>11</sup>

[6] An emerging goal in counsel sanctions in the recent e-discovery cases, when they do occur, is to induce counsel to improve discovery behavior either in the case at hand or, by example, in future litigation.<sup>12</sup> As noted recently in the case of *In re September 11<sup>th</sup> Liability Insurance Coverage Cases*,<sup>13</sup> where client and counsel were sanctioned jointly, “[d]iscovery is

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violations once exposed, applying the rules instead in ways that minimize or avoid the problem.”).

<sup>8</sup>See Thomas D. Rowe, *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 199, 202 (2007) (summarizing the “extensive and proactive management authority” given judges today including the ability to “impose a broad range of sanctions in connection with discovery disputes and misconduct.”).

<sup>9</sup>Debra Bernard, *Qualcomm v. Broadcom: How Many Red Flags Does It Take?*, INTELL. PROP. TODAY, July 2008, at 30, available at [http://www.perkinscoie.com/files/upload/CHI\\_08\\_07\\_DebraBernardIPArticle.pdf](http://www.perkinscoie.com/files/upload/CHI_08_07_DebraBernardIPArticle.pdf).

<sup>10</sup>This article is focused only on substantive discovery misconduct in the civil context and not on the types of activity which generate comparatively *de minimis* sanctions. See *Petit-Phare v. City of New York*, No. CV20044046ARRMDG, 2005 WL 2548257, at \*2 (E.D.N.Y. Oct. 12, 2005) (imposing sanctions of \$100 against counsel and client under Rule 37(b)(2)).

<sup>11</sup>See generally MODEL RULES OF PROF’L CONDUCT pmb. & scope (2009) (discussing the responsibilities of lawyers).

<sup>12</sup>See Sybil Louise Dunlop, Note, *Are an Empty Head and a Pure Heart Enough? Mens Rea Standards for Judge-Imposed Rule 11 Sanctions and Their Effects on Attorney Action*, 61 VAND. L. REV. 615, 641 (2008) (arguing that the threat of negligence liability can induce organizations and individuals to adopt new methods to prevent future sanctions).

<sup>13</sup>243 F.R.D. 114 (S.D.N.Y. 2007).

run largely by attorneys, and the court and the judicial process depend upon [appropriate conduct] among attorneys.”<sup>14</sup>

[7] The primary focus is on counsel of record. Courts typically treat full time “corporate” counsel,<sup>15</sup> hereinafter referred to as “in-house counsel,” as aligned with the clients’ interests for purposes of analysis.<sup>16</sup> This self-imposed restraint avoids issues involving non-parties who neither appear in nor directly participate before the court.<sup>17</sup> Courts, however, do not hesitate to criticize in-house counsel where their conduct is at issue.<sup>18</sup>

#### A. RESPONSIBILITY FOR DISCOVERY COMPLIANCE

[8] Attorneys have an affirmative responsibility not only to carefully advise a client of its preservation and discovery obligations, but also to take reasonable and appropriate measures to assure that these obligations are met.<sup>19</sup> Failures by counsel to carry out these responsibilities can support the imposition of sanctions against the client or counsel or both, at the discretion of the trial court.<sup>20</sup>

[9] These obligations arise under a mixture of sources, including rule-based and statutory authority as well as the common law. For example, where orders compelling discovery or other discovery tools are involved,

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<sup>14</sup> *Id.* at 125.

<sup>15</sup> Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L. J. 479, 479 (1989) (“Inside counsel—lawyers who are employees of private business corporations—now are being called ‘corporate counsel.’”).

<sup>16</sup> *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 137 (S.D. Fla. 1987) (holding that corporation is responsible for actions of in-house counsel who destroyed information).

<sup>17</sup> *See McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 907-08 (5th Cir. 1995) (reversing sanctions levied on in-house counsel).

<sup>18</sup> *See Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 94-96 & nn.32-33, 103 (D.N.J. 2006) (stating that defendant, acting through its in-house counsel, “chose not to disclose” to outside counsel that its email system automatically removed email from active files).

<sup>19</sup> *See Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991) (holding that the “obligation [runs] first to counsel, who [has] a duty to advise [the] client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction,” with the “corporate managers” being “responsible for conveying this information to the relevant employees”).

<sup>20</sup> *See id.* at 72.

Rule 37 of the Federal Rules of Civil Procedure requires that counsel advising clients regarding discovery matters must undertake the necessary efforts needed to achieve adequate results.<sup>21</sup> Moreover, under Rule 26(g),<sup>22</sup> counsel must make a “reasonable inquiry” to ascertain that an appropriate effort has been made to comply with discovery requirements before they sign discovery filings of any type.<sup>23</sup>

[10] Counsel are also subject to an obligation not to vexatiously multiply litigation, including discovery.<sup>24</sup> Finally, and more generally, attorneys of record incur responsibility for discovery as an incident to their professional obligation, as “officers of the court,” to act in good faith in connection with proceedings before a tribunal.<sup>25</sup>

[11] In the seminal case of *Zubulake v. UBS Warburg LLC (Zubulake V)*,<sup>26</sup> for example, the court opined that “counsel<sup>27</sup> is responsible for co-

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<sup>21</sup> See *Devaney v. Cont’l Am. Ins. Co.*, 989 F.2d 1154, 1163 (11th Cir. 1993) (affirming sanction of counsel under Rule 37(a) for failures relating to professional disposition of that portion of a lawsuit); see also *Stuart I. Levin & Assocs., P.A. v. Rogers*, 156 F.3d 1135, 1141 (11th Cir. 1998) (upholding sanctions under Rule 37 on attorney of record who delegated portion of responsibility to associate).

<sup>22</sup> FED. R. CIV. P. 26(g) (providing that “[t]he signature of the attorney or party constitutes a certification that to the best of the signer’s knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made”). The certification also means that the “request, response, or objection” is “not interposed for any improper purpose” and is “not unreasonable or unduly burdensome or expensive” in the case. FED. R. CIV. P. 26(g)(2); see FED. R. CIV. P. 11(d) (analogous duties under Rule 11 as to pleadings and other court filings, does not apply to “disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37”).

<sup>23</sup> FED. R. CIV. P. 26 advisory committee’s note, subdiv. (g) (“Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.”).

<sup>24</sup> 28 U.S.C. § 1927 (2006).

<sup>25</sup> See Mark A. Willard, *The Duty to Preserve and Collect Electronic Evidence*, 6 LAW. J. 6 (2004) (“Counsel has a duty, as officers of the court, and under the Rules of Professional Conduct to ensure that evidence that one may reasonably anticipate may later become relevant is preserved.”).

<sup>26</sup> 229 F.R.D. 422 (S.D.N.Y. 2004). In a series of opinions written in 2003 and 2004, Judge Shira Sheindlin of the Southern District of New York famously dealt with e-mail-related preservation obligations in the context of a single plaintiff discrimination action against her former employer. See *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) (addressing both “counsel’s obligation to ensure that

coordinating her client's discovery efforts" and alluded to counsel's failure "to properly oversee [defendant] . . . both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information."<sup>28</sup>

[12] In *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*,<sup>29</sup> *R & R Sails Inc. v. Insurance Co. of Pennsylvania*,<sup>30</sup> and *Board of Regents of University of Nebraska v. BASF Corp.*,<sup>31</sup> counsel were found to have violated an affirmative duty arising under Rule 26(g) of the Federal Rules of Civil Procedure to make a "reasonable inquiry" of their client about discovery efforts before signing discovery filings based on those inadequate efforts.<sup>32</sup>

[13] Rule 26(g) also played a major role in *Qualcomm*,<sup>33</sup> which has caught the attention of the bar because of the severe sanctions imposed on outside counsel who failed to make adequate inquiries of their client.<sup>34</sup> The *Qualcomm* court acted because Qualcomm violated its discovery obligations by intentionally withholding production in an effort to win the

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relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions").

<sup>27</sup> See *id.* at 432-35 (defining counsel as "both in-house and outside").

<sup>28</sup> *Id.* at 435; Thomas Y. Allman, *Ruling Offers Lessons for Counsel On Electronic Discovery Abuse*, LEGAL BACKGROUNDER 1, 4 (2004), available at <http://www.wlf.org/upload/101504LBAAllman.pdf> ("Outside counsel should become more directly involved in the initial planning for preservation in specific cases and should be prepared to affirmatively offer to oversee the ongoing preservation efforts of inside counsel while candidly commenting on any noted deficiencies.").

<sup>29</sup> 244 F.R.D. 614, 630 (D. Colo. 2007) (counsel "failed in many respects to discharge [the duty] to coordinate and oversee discovery.").

<sup>30</sup> 251 F.R.D. 520, 525 (S.D. Cal. 2008) (counsel incorrectly certified completeness of discovery).

<sup>31</sup> No. 4:04CV3356, 2007 WL 3342423 (D. Neb. Nov. 5, 2007); *Id.* at \*5 ("[C]ounsel are required to direct the conduct of a thorough search . . . with due diligence and ensure all responsive documents . . . are produced.").

<sup>32</sup> *Cache La Poudre Feeds, LLC*, 244 F.R.D. at 630; *R & R Sails Inc.*, 251 F.R.D. at 525; *BASF Corp.*, 2007 WL 3342423, at \*5-6.

<sup>33</sup> No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *partially vacated and remanded*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

<sup>34</sup> *Qualcomm Inc.*, 2008 WL 66932, at \*17.

case and gain a strategic business advantage.<sup>35</sup> The court found it “unbelievable” that outside counsel did not “know or suspect” that its client had not conducted an adequate search given the numerous warning flags.<sup>36</sup> While in-house counsel and other members of the legal department were also mentioned, no explicit sanctions were levied on them.<sup>37</sup>

[14] According to Professor Marcus, the Special Reporter for the Civil Rules Advisory Committee effort leading to the 2006 Amendments, “e-discovery [citing to *Qualcomm*] may breathe new life into Rule 26(g)” given the “extensive responsibilities” of counsel to make representations “about what can be done and when it can be done.”<sup>38</sup>

#### B. “REASONABLE INQUIRY” BY COUNSEL

[15] The “reasonable inquiry” required by Rule 26(g) is “the discovery analog to [Rule 11 of the Federal Rules of Civil Procedure], mandating a reasonable inquiry before signing a disclosure, discovery request, or response.”<sup>39</sup> The Advisory Committee enacted Rule 26(g) to provide a “deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”<sup>40</sup> The reasonableness of counsel’s inquiry, prior to such

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<sup>35</sup> *Id.* at \*9. The *Qualcomm* case is said to be an example of a “patent ambush,” a controversial practice whereby a company fails to disclose relevant patents to standard-setters until after the standard has been adopted. *See Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1005, 1027 (Fed. Cir. 2008) (affirming in part and vacating in part underlying remedy ordered by District Court); *see also* Zusha Elinson, *Patent Ambush Costs Qualcomm*, THE RECORDER, Dec. 2, 2008, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202426407589> (quoting an expert to the effect that “even though the discovery debacle wasn’t central to the [appellate] ruling, it probably played an important role”).

<sup>36</sup> *Id.* at \*12.

<sup>37</sup> *See id.* at \*18 (requiring in-house lawyers to participate in certain post-trial remedial efforts designed to identify failures and craft alternatives).

<sup>38</sup> Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 346 (2008) (“There may be a new or enlarged role for Rule 26(g), [which may] become the ‘new Rule 11.’”).

<sup>39</sup> Michael D. Berman, *Give Peace a Chance: Lawyers Are Ethically Obligated to Cooperate in Discovery*, 34 A.B.A. SEC. LITIG. NEWS 25 (2009).

<sup>40</sup> FED. R. CIV. P. 26 amendments advisory committee’s note subdiv. (g).

certification, need not be exhaustive, but merely reasonable under “totality of the circumstances.”<sup>41</sup> It requires an assessment of the “thoroughness, accuracy and honesty (as far as counsel can reasonably tell) of the responses and the process through which they have been assembled.”<sup>42</sup>

[16] The test is whether a “reasonably competent” attorney<sup>43</sup> would have recognized that the client failed to undertake an adequate or diligent search.<sup>44</sup> A wide range of discovery inadequacies have been deemed to have been discoverable by counsel. This has included the careless failure to check with obvious custodians<sup>45</sup> or to clarify what is being sought,<sup>46</sup> as well as failures to use elementary keyword searches<sup>47</sup> or produce known test results<sup>48</sup> or highly relevant documents and electronic information.<sup>49</sup>

[17] The assessment is to be made on an objective basis<sup>50</sup> without unreasonable exercise of hindsight.<sup>51</sup> In *R & R Sails Inc. v. Insurance Co.*

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<sup>41</sup> FED. R. CIV. P. 26(g); *see* *Poole v. Textron, Inc.*, 192 F.R.D. 494, 503 & n.11 (D. Md. 2000).

<sup>42</sup> *Poole*, 192 F.R.D. at 503.

<sup>43</sup> *Cf. Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558-59 (9th Cir. 1987) (holding an attorney experienced in complex litigation to a higher standard).

<sup>44</sup> *Bd. of Regents of the Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at \*5 (D. Neb. Nov. 5, 2007) (“[C]ounsel are required to direct the conduct of a thorough search for responsive documents with due diligence.”).

<sup>45</sup> *Cardenas v. Dorel Juvenile Group, Inc.*, No. CV.A.04-2478 KHV-DJW, 2006 WL 1537394, at \*4 (D. Kan. June 1, 2006) (explaining that the paralegal overlooked an obvious custodian).

<sup>46</sup> *R & R Sails Inc. v. Ins. Co. of the State of Pa.*, 251 F.R.D. 520, 525 (S.D. Cal. 2008) (failing to recognize that an “electronic claim log” was sought as a “record/log”).

<sup>47</sup> *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, No. CV 05-1516-RSWL SHX, 2007 WL 2758571, at \*12 (C.D. Cal. Sept. 18, 2007) (failing to search through email servers for “Lord of the Rings” or other keywords); *see* *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at \*13 (S.D. Cal. Jan. 7, 2008) (“[A] reasonable inquiry should have included searches using fundamental terms . . . on the computers belonging to knowledgeable people.”).

<sup>48</sup> *Clearvalue, Inc. v. Pearl River Polymers, Inc.*, 242 F.R.D. 362, 378 (E.D. Tex. 2007) (discussing a willful concealment of product tests).

<sup>49</sup> *Qualcomm Inc.*, 2008 WL 66932, at \*13 (holding that intentionally hiding or ignoring relevant documents and warning signs that client document search was inadequate).

<sup>50</sup> *See* *Project 74 Allentown, Inc. v. Frost*, 143 F.R.D. 77, 84 (E.D. Pa. 1992) (“[Rule 26(g)] allows [a] court to impose sanctions on the signer of a discovery response when the signing of the responses . . . was objectively unreasonable under the circumstances.”).



of the State of Pennsylvania,<sup>52</sup> for example, the court concluded that a failure to make a reasonable inquiry must have existed since production was made late in the discovery process.<sup>53</sup> In *National Ass'n. of Radiation Survivors v. Turnage*,<sup>54</sup> “a reasonable inquiry would have led to [missing document’s] preservation and inclusion in defendant’s discovery responses.”<sup>55</sup> In *A. Farber and Partners, Inc. v. Garber*,<sup>56</sup> the fact that a “paltry number” of documents were produced was proof that a reasonable inquiry had not been made.<sup>57</sup> The danger in an overdependence on hindsight is particularly acute in the e-discovery context where the complexities defy easy explanation in retrospect.

[19] A “reasonable inquiry” often requires reliance on client representations about the adequacy of the search.<sup>58</sup> Attorneys are entitled to “rely on assertions by the client” only “as long as that reliance is appropriate under the circumstances.”<sup>59</sup> A client’s in-house counsel and other internal resources are particularly likely to be knowledgeable about the nature and location of potential sources of discoverable information.<sup>60</sup>

[20] The ABA Civil Discovery Standards (“Discovery Standards”)<sup>61</sup> posits that counsel should “take reasonable steps to ensure that the client

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<sup>51</sup> *Ideal Instruments v. Rivard Instruments*, 243 F.R.D. 322, 342 (N.D. Iowa 2007) (concluding that counsel “shirked their responsibilities to conduct a reasonable investigation of or inquiry” about certain test results since “[a]ny reasonable inquiry would have demonstrated [its] obvious flaws”).

<sup>52</sup> 251 F.R.D. 520 (S.D. Cal. 2008).

<sup>53</sup> *Id.* at 525.

<sup>54</sup> 115 F.R.D. 543 (N.D. Cal. 1987).

<sup>55</sup> *Id.* at 557 n.4.

<sup>56</sup> 234 F.R.D. 186 (C.D. Cal. 2006).

<sup>57</sup> *Id.* at 189.

<sup>58</sup> *Compare Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1012 (2d Cir. 1986) (finding, in Rule 11 context, the reliance on client for information “reasonable” where it could “hardly be known to an outsider”), *with BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1050 (11th Cir. 1994) (stating that outside counsel did not reasonably rely upon “its client and client’s in-house counsel’s representations”).

<sup>59</sup> FED. R. CIV. P. 26 amendments advisory committee’s note subdiv.(g).

<sup>60</sup> *See Bus. Guides, Inc. v. Chromatic Commc’n Enters., Inc.*, 498 U.S. 533, 550 (1991) (“Many corporate clients, for example, have in-house counsel who are fully competent to make the necessary inquiry.”).

<sup>61</sup> The ABA Civil Discovery Standards (2004) “are not a restatement of the law” but are intended to address “practical aspects” of the discovery process that may not be covered

understands (i) what documents are being requested [and] (ii) has adopted a reasonable plan to obtain [them].”<sup>62</sup>

[21] The ABA position seems reasonable. It clearly reflects the fact that the Rule 26(g) certification is not equivalent to “verification,” a well-established concept that appears elsewhere in the Federal Rules.<sup>63</sup> As the District Court noted in *State Farm Mutual Automobile Insurance Co. v. New Horizon, Inc.*,<sup>64</sup>

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client’s factual responses to a discovery request. Rather, the signature [only] certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.<sup>65</sup>

[22] Some courts, unfortunately, treat outside counsel as virtual guarantors of discovery diligence and see very little room for reliance on client resources. In *Phoenix Four, Inc. v. Strategic Resources Corp.*,<sup>66</sup> the United States District Court for the Southern District of New York sanctioned retained counsel for violation of “counsel’s duty to locate relevant electronic information.”<sup>67</sup>

### C. ETHICAL CONSIDERATIONS

[23] The ethical obligations of in-house and outside counsel and their subordinates are governed by disciplinary professional responsibility

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by rules. See A.B.A. CIVIL DISCOVERY STANDARDS 1, available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>.

<sup>62</sup> *Id.* at 21.

<sup>63</sup> See *id.* at 23.

<sup>64</sup> 250 F.R.D. 203 (E.D. Pa. 2008) (refusing to award sanctions).

<sup>65</sup> *Id.* at 220.

<sup>66</sup> No. 05 Civ. 4837(HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006).

<sup>67</sup> *Id.* at \*5.

codes based on the ABA Model Rules,<sup>68</sup> typically promulgated and administered on a state-by-state basis.<sup>69</sup>

[24] An attorney is obligated to represent the interests of her clients, within the bounds of the law, with an undivided loyalty and with the diligence and zeal appropriate under the circumstances.<sup>70</sup> Counsel must stay informed about legal developments,<sup>71</sup> must “make reasonable efforts to expedite litigation,”<sup>72</sup> and may not hinder or prevent the use of discoverable evidence nor assist another to do so.<sup>73</sup>

[25] Thus, in the area of discovery responsibilities, the “judicial vision of appropriate [attorney] behavior” embodied in the Federal Rules is essentially “identical to that of the bar.”<sup>74</sup> Some courts and

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<sup>68</sup> The “Model Rules” are in effect in 48 states and the District of Columbia, excepting only California and Maine. *See* Joel Stashenko, *New Lawyer Conduct Rules Adopted; Standards Aligned with ABA Model*, N.Y.L.J., Dec. 17, 2008, at 1. *See generally* MODEL RULES OF PROF’L CONDUCT (2009) (describing the ethical obligations of attorneys).

<sup>69</sup> District Courts (and appellate courts) often enact local rules incorporating the ethical codes of the jurisdictions in which they sit or—in some cases—simply refer to the Model Rules directly. *See* *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1117 (D. Mont. 1986) (“Attorneys practicing before this Court are obligated to comply with the standards of professional conduct announced by the American Bar Association.”); *see also* *Richards v. Jain*, 168 F. Supp. 2d 1195, 1200 (W.D. Wash. 2001) (“Federal courts have the authority to discipline attorneys appearing before them for conduct deemed inconsistent with ethical standards.”).

<sup>70</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2009). The Preamble also speaks of the duty to “zealously” assert a client’s position “under the rules of the adversary system.” *Id.* pmbl. ¶ 2.

<sup>71</sup> *Id.* R. 1.1 cmt. 6 (a lawyer must “keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject”).

<sup>72</sup> *Id.* R. 3.2.

<sup>73</sup> *See id.* R. 3.3 cmt. 12 (“Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as . . . unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.”); *id.* R. 3.4 (“A lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”).

<sup>74</sup> Fred C. Zacharias, *Are Evidence-Related Ethics Provisions “Law”?*, 76 FORDHAM L. REV. 1315, 1319 (2007) (describing limited category of instances where courts have “adopted common law evidence principles that are coextensive with those in the professional codes”); *see* Paul W. Grimm, *Ethical Issues Associated with Preserving*,

commentators,<sup>75</sup> however, see an inevitable tension between the duty of zealous advocacy and the ethical standards requiring principled behavior towards counsel and the court.<sup>76</sup> Clearly, counsel may “not knowingly . . . make a false statement of fact or law to a tribunal,”<sup>77</sup> and must “avoid conduct that undermines the integrity of the adjudicative process.”<sup>78</sup> The alleged tension is more theoretical than real, however, since the concept of loyalty to a client does not embrace knowing participation in discovery misconduct. Counsel must use care not to “cross the line” between zealous advocacy and sanctionable conduct.<sup>79</sup>

[26] Where counsel is made aware of activity that runs the risk of violating the law in a manner likely to result in substantial injury to the entity, she must take reasonably necessary steps, which may ultimately require withdrawal from representation if appeals to higher authority are insufficient.<sup>80</sup> Continued representation is not permissible if it will result in violation of the rules of professional conduct or other law.<sup>81</sup> A lawyer

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*Accessing, Discovering, and Using Electronically Stored Information*, 56 U.S. ATT’YS BULL. 1, 5-6 (May 2008), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5603.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5603.pdf).

<sup>75</sup> See Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 749 (1988) (the dual role of lawyers as client advocates and officers of the court may cause some team members to consciously or unconsciously screen out discoverable information and rationalize improper choices as in their clients interests).

<sup>76</sup> *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546-47 (11th Cir. 1993) (criticizing the Model Rules as “underscor[ing] the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law”). A number of states have abolished the concept to avoid the perception that zealous advocacy is “a pretext for bullying, rude and sometimes frightening behavior.” David D. Dodge, *When Lawyers Behave Badly: The “Z” Word, Civility & the Ethical Rules*, 44 ARIZ. ATT’Y 18, 19 & n.2 (2008) (stating that Arizona, “Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon and Washington have omitted all reference to zealousness”).

<sup>77</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(a) (2009).

<sup>78</sup> *Id.* R. 3.3 cmt. 2 (“A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. . . . [But a lawyer’s performance] is qualified by the advocate’s duty of candor to the tribunal. . . . [T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”).

<sup>79</sup> *Grider v. Keystone Health Plan*, No. Civ.A.2001-CV-05641, 2007 WL 2874408, at \*33 (E.D. Pa. Sept. 28, 2007).

<sup>80</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.13(b).

<sup>81</sup> *Id.* R. 1.16(a)(1) (stating that a lawyer shall withdraw if “the representation will result in violation of the rules of professional conduct or other law”). If the lawyer thinks a

may not assist a client to violate criminal law or to engage in fraudulent conduct.<sup>82</sup> Finally, counsel must not reveal information relating to the representation<sup>83</sup> of a current or past client nor represent such a client when a conflict of interest exists,<sup>84</sup> absent “informed consent” or other specified conditions.<sup>85</sup>

[27] On a practical level, the closest ethical analogy to the certification requirement of Rule 26(g) is the duty imposed on a partner or a supervisory lawyer under the Model Rules<sup>86</sup> to assure the ethical performance of lawyers and non-lawyers in a law firm.<sup>87</sup> In that context, supervisors involved in discovery matters need to pay attention to the adequacy of communications, quality assurance, and appropriate training and peer review.<sup>88</sup> Properly implemented, this approach should also help with compliance with Rule 26(g) obligations as well.

[28] While the supervisory lawyer analogy works well within law firms and legal departments, it can break down when applied to mixed discovery teams where outside counsel has limited direct responsibility.<sup>89</sup> Clients

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course of conduct is criminal or fraudulent or there is a “fundamental disagreement,” the lawyer “may withdraw,” subject to other conditions. *Id.* R. 1.16(b).

<sup>82</sup> See KC Goyer, Note, *Nancy Temple’s Duty: Professional Responsibility and the Arthur Anderson Verdict*, 18 GEO. J. LEGAL ETHICS 261, 271-73 (2004).

<sup>83</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2009).

<sup>84</sup> *Id.* R. 1.7(a); *id.* R. 1.9.

<sup>85</sup> See *id.* R. 1.6(a); *id.* R. 1.7(b)(4); *id.* R. 1.9(a)-(b); see also *id.* R. 1.6 cmt. 10 (regarding a lawyer’s ability to use confidential information in connection with her “right to defend”); *id.* R. 1.7, cmt. 18 & 22 (discussing the elements of “informed consent” as to current conflicts as well as the requirements for waiver of “future conflicts”); *id.* R. 1.9, cmt. 9 (discussing the applicability of informed consent to former clients).

<sup>86</sup> *Id.* R. 5.1; *id.* R. 5.3 (“[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer . . .”).

<sup>87</sup> As used in the Model Rules, a “firm” or “law firm” includes lawyers “employed [by] the legal department of a corporation or other organization.” *Id.* R. 1.0(c).

<sup>88</sup> The SEC also uses the “supervisory attorney” approach to ensure that subordinate attorneys conform to applicable reporting requirements. See Sara Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1028-29 (2007) (stating that the chief legal officer must make reasonable inquiry once receiving report of potential material violation).

<sup>89</sup> See Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorney’s Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 284-285 (1994) (it is “inappropriate”

are entitled to define the scope of representation by their counsel and a lawyer “shall abide by a client’s decisions” in that regard.<sup>90</sup> As noted in the Comment to Model Rule 1.2, “the terms upon which representation is undertaken may exclude specific means,” including “actions that the client thinks are too costly.”<sup>91</sup> Thus, while outside counsel may take the lead in some areas, resources not controlled by the law firm may be integrated into the team.<sup>92</sup>

[29] Where the client neither authorizes nor seeks to pay for the level of oversight sought by outside counsel, there is a potential for serious tension if Rule 26(g) is to be properly effected.<sup>93</sup> Counsel should not be expected to ignore the considered wishes of their clients on staffing decisions and the balance to be applied between inside and outside resources.<sup>94</sup> Obviously, a heightened sensitivity to client concerns and creative adjustments are required to make the relationship work under those conditions.<sup>95</sup>

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to expect a lawyer not in a position with management responsibility to be responsible for ethical conduct of another); Cindy Holland, Comment, *The Liabilities and Ethical Responsibilities of a Law Firm Associate*, 16 J. LEGAL PROF. 241, 249 (1991) (describing complexities of exercising authority as applied to an associate in a supervisory role).

<sup>90</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 (a) (2009).

<sup>91</sup> *Id.* R. 1.2 cmt. 6.

<sup>92</sup> According to experts, “[I]f you can control and take any significant portion of the process in-house, you have the opportunity to save a great deal of money. . . . [You can also] greatly reduce the amount of material that must be outsourced.” Interview by Editor of Metro. Corporate Counsel with Frank Wu, Managing Dir., Litigation, Restructuring and Investigative Services Solution Group, Protiviti Inc. (Jan. 2009), available at

<http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=9249>.

<sup>93</sup> See generally *Bratka v. Anheuser-Busch Co., Inc.*, 164 F.R.D. 448 (S.D. Ohio 1995) (sanctioning party which utilized in-house legal department to mitigate cost of discovery compliance without allowing outside counsel to supervise efforts).

<sup>94</sup> The most apt analogy is that of local counsel in the Federal Courts. See David A. Mazie & Ben-David Seligman, *Contractually Narrowing the Duties and Liability of a Mail Drop Local Counsel*, N.J. LAW., Feb. 2006, at 16, 17 (assessing the impact of local New Jersey rules and stressing the need for informed consent of client to any restrictions on role of outside counsel).

<sup>95</sup> See Jonathan Putnam, Note, *Catering to Our Clients: How In re Cater Exposes the Flaws in Model Rule 5.3—and How They Can Be Solved*, 19 GEO. J. LEGAL ETHICS 925, 926 & n.9 (2006) (arguing that Model Rule 5.1 creates a “duty to supervise that extends to all lawyers who oversee the work of another licensed attorney,” including “in-house

[30] Regardless of whether the professional serves as a supervisor or not, however, counsel is not entitled to ignore clearly applicable ethical requirements.<sup>96</sup> Ethical responsibilities are personal and cannot be delegated. In the case of *In re Estrada*,<sup>97</sup> it was noted that subordinate attorneys retain “an independent duty to the New Mexico judiciary to obey New Mexico’s ethical and discovery rules.”<sup>98</sup> The court emphasized that the duty was not to the client or law firm but to the administration of justice.<sup>99</sup>

[31] Courts sometimes utilize the provisions of the Model Rules when analyzing the need for discovery sanctions. In *Qualcomm*,<sup>100</sup> the court stated, for example, that an “[a]ttorneys’ ethical obligations do not permit them to participate in an inadequate document search and then provide misleading and incomplete information to their opponents and false arguments to the court.”<sup>101</sup> The magistrate judge also opined that had

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counsel and government attorneys, as well as independent attorneys who only associate for a specific period of time”).

<sup>96</sup> Model Rule 5.2 carves out an exception for subordinate attorneys who are acting pursuant to a supervisory attorney’s “reasonable resolution of an arguable question of professional duty.” MODEL RULES OF PROF’L CONDUCT R. 5.2(b) (2009). However, absent that exception, subordinate attorneys have independent ethical duties regardless of what they are told to do. See Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 206 (2007) (stating that “[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person”).

<sup>97</sup> 143 P.3d 731 (N.M. 2006) (suspending associate in law firm from practice for one year based on ABA Standards for Imposing Lawyer Sanctions (1992)).

<sup>98</sup> *Id.* at 741; see *Blue v. U.S. Dep’t of the Army*, 914 F.2d 525, 546 (4th Cir. 1990) (holding sanctions vacated against associate who was left to try the case after her supervisor left as “an unrealistic and unjust result”). The court also found a violation of the duty to not “unlawfully obstruct another party’s access to” documents or other materials, citing New Mexico rules and the ABA Model Rules 3.4. *In re Estrada*, 143 P.3d at 742.

<sup>99</sup> See *In re Estrada*, 143 P.3d at 741-42.

<sup>100</sup> No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008). The United States District Court for the Southern District of California referred certain attorneys to the State Bar of California for investigation and possible imposition of sanctions of Rules 5-200 and 5-220 of the California Rules of Professional Conduct. *Id.* at \*18. The order was subsequently vacated and remanded on other grounds without reference to the referral. See *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-RMB (BLM), 2008 WL 638108, at \*3 (S.D. Cal. Mar. 5, 2008).

<sup>101</sup> *Qualcomm Inc.*, 2008 WL 66932, at \*13 n.10.

counsel been unable to get their client to “conduct a competent and thorough document search, they should have withdrawn from the case or taken other action to ensure production of the evidence.”<sup>102</sup>

[32] Court challenges to attorney conduct in e-discovery disputes, however, are best resolved without reference to ethical principles.<sup>103</sup> State disciplinary authorities, utilizing “specific rules of professional conduct . . . [and] protections provided by the state grievance procedures” are better equipped to handle such serious matters than sanction hearings with their broad discretion and expedited focus.<sup>104</sup> It is not unusual for a court, in the heat of the moment, to find fault with counsel and form adverse conclusions which a more deliberative state bar disciplinary process may reject.<sup>105</sup>

[33] Not surprisingly, there is no clear consensus on when and to what extent federal courts should defer to the state disciplinary process. Some courts do not hesitate to resolve “both the disciplinary and remedial questions in a single action.”<sup>106</sup> The closest to a general principle that can be cited is the comment in *W.T. Grant Co. v. Haines*,<sup>107</sup> that “[t]he business of the [federal] court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it.”<sup>108</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986) (stating that enforcement of Rule 11 for “after-the-fact” review should not be based on assertions of unethical conduct, which are best left to “well-established bar and court ethical procedures”).

<sup>104</sup> William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept That Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897, 902-03 (1990) (criticizing sanctions as creating a separate and parallel system of attorney discipline that imposes a chilling effect on counsel by virtue of the vagueness of sanction rules and latitude of judicial discretion).

<sup>105</sup> See *McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 908 (5th Cir. 1995) (reversing *sua sponte* sanctions entered by district court after Texas State Bar refused to act against in-house counsel in response to referral).

<sup>106</sup> *Harlan v. Lewis*, 982 F.2d 1255, 1260-61 (8th Cir. 1993) (proceeding to enforce ethical obligations where conduct tainted the case and a referral “could not have repaired the damage”).

<sup>107</sup> 531 F.2d 671 (2d Cir. 1976).

<sup>108</sup> *Id.* at 677.



## D. SANCTIONING AUTHORITY

[34] The Second Circuit noted in *Oliveri v. Thompson*<sup>109</sup> that “[u]nfortunately [there is no] integrated ‘code’ of sanctions to supply coherent guidance” when a court considers counsel sanctions.<sup>110</sup> “[T]he sources of judges’ sanctioning power are diverse, and the standards invoked have not always been either clear or consistently applied.”<sup>111</sup> Even a cursory review of opinions relating to attorney sanctions confirms the accuracy of that statement.

[35] With the renewed emphasis on Rule 26(g) of the Federal Rules of Civil Procedure, at least two rule-based options exist<sup>112</sup> which may trigger the right to impose sanctions on counsel. First, Rule 26(g)(3) mandates that “appropriate” sanctions issue when counsel has signed discovery filings without making a “reasonable inquiry” into the accuracy of the contents or the purpose behind the filing.<sup>113</sup>

[36] Second, Rules 37(a)(5)(A), 37(b)(2)(C), and 37(d)(3) of the Federal Rules of Civil Procedure mandate that sanctions be issued when counsel has, without substantial justification, “advised” a disobedient party to oppose or fail to comply with discovery orders<sup>114</sup> or otherwise delayed or impeded the use of specified discovery mechanisms.<sup>115</sup>

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<sup>109</sup> 803 F.2d 1265 (2d Cir. 1986). The United States Court of Appeals for the Second Circuit emphasized the need for a predicate showing of “bad faith” conduct to issue sanctions against counsel under the inherent power or 28 U.S.C. § 1927. *Id.* at 1272-74.

<sup>110</sup> *Id.* at 1271.

<sup>111</sup> *Id.*

<sup>112</sup> Then District Judge Jose A. Cabrabes held in *J.M. Clemminshaw Co. v. City of Norwich*, that Rule 41(b) implicitly authorizes sanctions, including personal fines, against lawyers when “delays or disobedience have been the fault of counsel rather their clients.” 93 F.R.D. 338, 355 (D. Conn. 1981); *see* FED. R. CIV. P. 37(f) (authorizing sanctions against attorneys or parties who fail to participate in good faith in discovery planning process).

<sup>113</sup> FED. R. CIV. P. 26(g)(3). In *Qualcomm Inc. v. Broadcom Corp.*, the court held that under a “strict” reading of the rule, only the signing counsel would be liable for failure to make a reasonable inquiry, but opined that the “federal rules impose a duty of good faith and reasonable inquiry on all attorneys involved in litigation who rely on discovery responses executed by another attorney.” No. 05cv1958-B (BLM), 2008 WL 66932, at \*13 n.9 (S.D. Cal. Jan. 7, 2008)

<sup>114</sup> When a motion to compel disclosure or discovery is denied, Rule 37(a)(5)(B) requires the moving party, the attorney “filing” the motion, or both to pay the party or deponent

[37] Generally speaking, both Rule 26(g) and the various subsections of Rule 37 contemplate that sanctions may be imposed on the party, counsel, or both. Rule 37 also requires that the sanctions be both “appropriate” and “just,” a limitation not imposed by Rule 26(g).<sup>116</sup> Similarly, Rule 37 permits sanctions against law firms,<sup>117</sup> not just individual lawyers, as authorized under Rule 26(g).<sup>118</sup>

[38] In addition, courts can seek to impose sanctions under the authority of 28 U.S.C. § 1927, which applies when an attorney has multiplied proceedings “unreasonably and vexatiously.”<sup>119</sup> This authority, however, requires a showing of bad faith conduct or conduct amounting to bad faith, judged objectively,<sup>120</sup> or “recklessness” (but not mere “negligence”)<sup>121</sup> coupled with an improper purpose.<sup>122</sup> A finding of liability requires “a high degree of specificity” that the activity was in bad faith and taken “for reasons of harassment or delay for other improper purposes.”<sup>123</sup>

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who opposed the motion reasonable expenses incurred in opposing it. FED. R. CIV. P. 37(a)(5)(B).

<sup>115</sup> FED. R. CIV. P. 37(a)(5)(A), (b)(2)(C), (d)(3).

<sup>116</sup> FED. R. CIV. P. 37(a)(3)(A), (a)(4)(C).

<sup>117</sup> See *Kyoei Fire & Marine Ins. Co. v. M/V Mar. Antalya*, 248 F.R.D. 126, 158 (S.D.N.Y. 2007) (sanctioning law firm under Rule 37(d)); *In re Simonson*, Nos. 04-15846, 06-01235, 2008 WL 4830807, at \*11 (Bankr. W.D. Wash. Oct. 27, 2008) (sanctioning law firm for “the most serious allegation of discovery misconduct the Court has encountered”).

<sup>118</sup> FED. R. CIV. P. 26(g).

<sup>119</sup> 28 U.S.C. § 1927 (2006). In relevant part, the statute provides that:

Any attorney . . . admitted to conduct cases in any court of the United States . . . 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.

*Id.*

<sup>120</sup> *Sangui Biotech Int’l, Inc. v. Kappes*, 179 F. Supp. 2d 1240, 1245-46 (2002) (imposing sanctions on counsel under both Rule 11 and 28 U.S.C. § 1927 where counsel submitted misleading affidavit which showed “a reckless disregard for the duty owed by counsel to the court” with the result of multiplying the proceedings).

<sup>121</sup> *Jones v. Sweeney*, No. 1:04-CV-6214 AWI DLB, 2008 WL 5101471, at \*2 (E.D. Cal. Dec. 2, 2008).

<sup>122</sup> *Fink v. Gomez*, 239 F.2d 989, 993-94 (9th Cir. 2001).

<sup>123</sup> *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986).

[39] Finally, a court has inherent power to manage proceedings before it, which includes the power to sanction counsel for discovery abuse.<sup>124</sup> In *Chambers v. NASCO, Inc.*,<sup>125</sup> the Supreme Court cautioned that the inherent power to sanction should be used sparingly, and only when counsel has acted in bad faith or has taken actions tantamount to bad faith for an improper purpose.<sup>126</sup> As the Court explained, a sanctioning court “ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.”<sup>127</sup>

[40] Courts also have the inherent power to invoke civil contempt in order to maintain and preserve the sanctity of the court.<sup>128</sup> This power has been directed against counsel in discovery disputes.<sup>129</sup>

#### E. PROCESS ISSUES (INCLUDING APPEALS)

[41] In cases involving counsel sanctions, a district court must have personal jurisdiction and “the attorney . . . must be given both fair notice that his or her conduct is sanctionable, and a meaningful opportunity to be heard, either orally or in writing.”<sup>130</sup>

[42] Acquiring personal jurisdiction over in-house counsel presents difficult issues. In *McGuire v. Sigma Coatings, Inc.*,<sup>131</sup> sanctions imposed

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<sup>124</sup> See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991).

<sup>125</sup> 501 U.S. 32 (1991). The United States Supreme Court stated that “the inherent power extends to a full range of litigation abuses.” *Id.* at 46.

<sup>126</sup> *Id.* at 45-46, 46 & n.10; see *Fink*, 239 F.3d at 994 (including willful actions when combined with an additional factor such as frivolousness, harassment, or improper purpose).

<sup>127</sup> *Chambers*, 501 U.S. at 50.

<sup>128</sup> *In re Fannie Mae Sec. Litig.*, No. 08-5014, 2009 WL 21528, at \*9 (D.C. Cir. Jan. 6, 2009) (ordering production by party under contempt power “for the purpose of resolving whether [documents not logged] were in fact privileged” as sanction for failure to meet stipulated dates).

<sup>129</sup> See *In re Rosenthal*, No. H-04-186, 2008 WL 983702, at \*9 (S.D. Tex. Mar. 28, 2008).

<sup>130</sup> *Phillips v. Berlex Labs., Inc.*, No. 3:05CV81 (CFD)(TPS), 2006 WL 1359124, at \*2 (D. Conn. May 11, 2006) (postponing hearing on “the circumstances surrounding the withholding” of documents until “the conclusion of all proceedings”).

<sup>131</sup> 48 F.3d 902 (5th Cir. 1995) (reversing sanctions imposed on in-house counsel for lack of personal jurisdiction).

on an in-house counsel were reversed in the absence of prior notice that sanctions might lie against him.<sup>132</sup> In *E.F. Hutton & Co. v. Brown*,<sup>133</sup> however, jurisdiction was found to exist over an outside counsel who had not formally appeared in the action but was actively “advising . . . and consulting” with local counsel in regard to litigation before the court.<sup>134</sup>

[43] The issue of discovery misconduct is often assessed in the first instance by a U.S. magistrate judge, with any “non-dispositive” sanctions reviewed by the district court under a “clearly erroneous” or “contrary to law” standard.<sup>135</sup> Dispositive rulings, such as dismissal of the complaint or the entry of a default judgment, are made by district courts.

[44] A court need not conduct a mini-trial in order to impose sanctions.<sup>136</sup> The court can make findings “guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it, and by reference to the relevant criteria under the Federal Rules . . . .”<sup>137</sup> Where client and counsel are both potentially subject to sanctions it may be necessary for clients to seek the advice of independent counsel. Moreover, counsel may need to assert the “self-defense” exception to the attorney-client privilege when required to defend itself against client accusations.<sup>138</sup>

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<sup>132</sup> *Id.* at 908. The court also expressed “no opinion” as to whether jurisdiction over the in-house lawyer was possible under any procedure. *Id.*

<sup>133</sup> 305 F. Supp. 371 (S.D. Tex. 1969). The United States District Court for the Southern District of Texas disqualified New York counsel whose conduct was “intended to influence the court of litigation pending before [the court].” *Id.* at 378.

<sup>134</sup> *Id.*; see *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1128-30 (9th Cir. 1995) (ordering new trial under Rule 60(b) based on conduct of corporate counsel who served as de facto “officer of the court” within meaning of rule).

<sup>135</sup> *Reino de España v. Am. Bureau of Shipping, Inc.*, No. 03 Civ. 3573 (LTS) (RLE), 2008 WL 3851957, at \*4 (S.D.N.Y. Aug. 18, 2008) (stating that objections under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A) overruled because “it cannot be said” that the magistrate’s conclusions were clearly erroneous or contrary to law).

<sup>136</sup> *Devaney v. Cont’l Am. Ins. Co.*, 989 F.2d 1154, 1161-62 (11th Cir. 1993) (trial court has “broad discretion to apportion fault between them”).

<sup>137</sup> William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985). “[T]he sanctions decision [should be] based on the face of the record, not on extraneous matters such as state of mind or the equities.” *Id.* at 198.

<sup>138</sup> Model Rule 1.6 permits a lawyer to reveal information relating to representation without client waiver when necessary to establish a “claim or defense” on behalf of a lawyer in a controversy between the lawyer and client or to respond to allegations

[45] When appellate review is sought and accepted, the test applied is usually one of abuse of discretion, not review de novo.<sup>139</sup> U.S. Courts of Appeals are quite reluctant to second guess lower courts, given their “intimate familiarity with the details of the discovery dispute” and the risk of undermining their authority.<sup>140</sup> As the United States Court of Appeals for the Ninth Circuit has stated, however, the authority to sanction is not a “roving commission for the district court to bludgeon violators of local or federal rules.”<sup>141</sup>

[46] Not all adverse findings about counsel are appealable.<sup>142</sup> For example, in the absence of an “explicit reprimand or the issuance of some mandatory directive,” a court’s “criticism of an attorney is simply commentary made in the course of an action to which the attorney is,

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concerning representation. MODEL RULES OF PROF’L CONDUCT R 1.6(b)(5); *see* Qualcomm Inc. v. Broadcom Corp., 2007 WL 2900537, at \*1 (S.D. Cal. Sept. 28, 2007) (finding that because Qualcomm filed declarations critical of its counsel, “the self-defense exception to the attorney-client privilege” applies making communications and conduct relevant to the discovery “not privileged information”).

<sup>139</sup> *See generally* Robert B. Tannenbaum, Comment, *Misbehaving Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct*, 75 U. CHI. L. REV. 1857 (2008) (addressing the different approaches among the circuits).

<sup>140</sup> *In re Fannie Mae Sec. Litig.*, No. 08-5014, 2009 WL 21528, at \*8 (D.C. Cir. Jan. 6, 2009) (stating that an appellate court is “ill-positioned to second-guess” the “fact-bound conclusion” that the party dragged its feet and should be sanctioned).

<sup>141</sup> *Zambrano v. City of Tustin*, 885 F.2d 1473, 1480 (9th Cir. 1989). In *Blue v. United States Department of the Army*, the court noted that “the district court not only invoked every conceivable legal theory on which sanctions could be imposed, but also levied every conceivable sanction, including attorneys’ fees, court costs, court salaries (including that of its law clerk) and even a fine and reprimand of counsel for violation of state ethical rules.” 914 F.2d 525, 535 (4th Cir. 1990).

<sup>142</sup> *See* Carla R. Pasquale, Note, *Scolded: Can an Attorney Appeal a District Court’s Order Finding Professional Misconduct*, 77 FORDHAM L. REV. 219, 223-25 (2008) (contrasting rule-based sanctions with those using the power of the written word to impress upon an attorney the gravity of conduct).

legally speaking, a stranger.”<sup>143</sup> But aggrieved counsel may seek a writ of mandamus to have the offending actions or comment expunged.<sup>144</sup>

#### F. SELECTING AN APPROPRIATE SANCTION

[47] The “Civil Rules place virtually no limits on judicial creativity” in fashioning sanctions.<sup>145</sup> For example, while Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure lists some types of sanctions for violating an order to provide discovery, the listing “is neither exhaustive nor mutually exclusive, and ‘the court may impose [more than one of the enumerated sanctions] at the same time.’”<sup>146</sup> When acting “[u]nder [Rule] 37 (a)(5) and (b)(2)(C), the court is required to impose monetary sanctions unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”<sup>147</sup> A similar requirement exists under Rule 26(g)(3), where a certification that violates the rule without “substantial justification” must result in an “appropriate sanction.”<sup>148</sup>

[48] On the other hand, the decision as to what sanctions to impose—and on whom to impose them—is within the discretion of the trial court.<sup>149</sup> Ultimately, the sanction selected must “be proportionate to the offense and commensurate with the principles of restraint and dignity inherent in

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<sup>143</sup> *Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316, 1320 (Fed. Cir. 2007) (characterizing an attorney as facilitating inequitable conduct relating to patent prosecution is not an appealable sanction). *But cf.* *Dawson v. United States*, 68 F.3d 886, 893-94 (5th Cir. 1995) (holding that a reprimand coupled with an order to attend an ethics class is appealable).

<sup>144</sup> *See* *Clare v. Coleman (Parent) Holdings, Inc.*, 928 So. 2d 1246, 1249 (Fla. Dist. Ct. App. 2006) (finding that a revocation of *pro hac vice* admission, especially in light of absence of misconduct of counsel in its role as “the messenger” about e-discovery misconduct, was a violation of due process rights).

<sup>145</sup> *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990).

<sup>146</sup> *Moore v. Chertoff*, 255 F.R.D. 10, 31 (D.D.C. 2008) (alteration in original) (quoting *Mojarad v. Aguire*, No. Civ. A. 05-0038 CKK, 2006 WL 785415, at \*10 (D.D.C. Mar. 27, 2006)).

<sup>147</sup> *Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc.*, No. CIV-S-07-0945 GEB GGH, 2008 WL 5101451, at \*2 (E.D. Cal. 2008).

<sup>148</sup> FED. R. CIV. P. 26 (g)(3).

<sup>149</sup> *See* *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2008 WL 66932, at \*8 (S.D. Cal. Jan. 7, 2008), *partially vacated and remanded*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

judicial power.”<sup>150</sup> One approach is to apply a “balancing test” which considers the degree of fault, the degree of prejudice, and whether there is a lesser sanction that will avoid unfairness and yet deter the conduct by others in the future.<sup>151</sup>

[49] Although, “[w]hen the conduct [is] willful . . . the focus [is] no longer solely on [deterrence and] leveling the playing field.”<sup>152</sup> Courts act to punish “[w]hen the wrongdoer acted willfully or recklessly and the problem could not be corrected.”<sup>153</sup> Thus, when discovery abuse is particularly egregious, courts issue harsh sanctions. Examples involving e-discovery include *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*,<sup>154</sup> *Grider v. Keystone Health Plan Central, Inc.*,<sup>155</sup> *Wachtel v. Health Net, Inc.*,<sup>156</sup> *Qualcomm Inc. v. Broadcom Corp.*,<sup>157</sup> *Southern New England Telephone Co. v. Global NAPs, Inc.*,<sup>158</sup> *Micron Technology, Inc. v. Rambus Inc.*,<sup>159</sup> and *Bray & Gillespie Management LLC v. Lexington Insurance Co.*<sup>160</sup>

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<sup>150</sup> *Zambrano v. City of Tustin*, 885 F.2d 1473, 1480 (9th Cir. 1989); *see id.* at 1484 (vacating the sanctions and fee awards under local district rules because there was no bad faith or negligence on the part of the attorney).

<sup>151</sup> *See* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 95 (2004).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> No. CA 03-5045 AI, 2005 WL 674885, at \*9 (Fla. Cir. Ct. Mar. 23, 2005) (holding “[Morgan Stanley & Co.] has deliberately and contumaciously violated numerous discovery orders [and] chose[n] to hide information”).

<sup>155</sup> No. Civ.A.2001-CV-05641, 2007 WL 2874408, at \*27-28, \*33 (E.D. Pa. Sept. 28, 2007) (sanctioning lead counsel, associate counsel, law firms and client collectively for delaying prosecution in bad faith.).

<sup>156</sup> 239 F.R.D. 81, 84, 86-87 (D. N.J. 2006) (imposing severe sanctions where party, through its own in-house counsel and top executives, was responsible for egregious discovery misconduct).

<sup>157</sup> 548 F.3d 1004, 1027 (Fed. Cir. 2008) (affirming in part and vacating in part remedy ordered by the district court against party based in part on discovery misconduct).

<sup>158</sup> 251 F.R.D. 82, 96 (D. Conn. 2008) (entering default judgment to remedy impact of “morass of discovery disputes” caused by repeated violations of discovery orders).

<sup>159</sup> 255 F.R.D. 135, 150 (D. Del. 2007) (imposing dispositive sanction of unenforceability of patents for destruction of documents that party “knew or should have known” would become material).

<sup>160</sup> No. 6:07-cv-222-Orl-35KRS, 2009 WL 546429 (M.D. Fla. Mar. 4, 2009) (sanctioning counsel, law firm and client for bad faith failure to produce).

[50] Sanctions can be tailored to the perceived cause of the counsel misconduct. Where counsel is sanctioned for conduct that has ethical implications, a referral can be made to the appropriate state disciplinary authority. Non-monetary sanctions are often utilized. In *St. Paul Reinsurance Co. v. Commercial Financial Corp.*,<sup>161</sup> counsel [was] ordered to “write an article explaining why it [was] improper” to assert certain unfounded objections.<sup>162</sup> Other courts have published the names of counsel in opinions to create a “permanent record” available to legal researchers.<sup>163</sup> The magistrate judge in *Qualcomm Inc. v. Broadcom Corp.*<sup>164</sup> required retained and in-house counsel to meet under court auspices to “identify the failures in the case management and discovery protocol utilized by Qualcomm and its . . . attorneys [so as to] prevent such failures in the future . . . .”<sup>165</sup> This effort was intended to “establish a baseline for other cases. . . [and perhaps] establish a turning point in what the Court perceives as a decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena.”<sup>166</sup>

### III. ALLOCATING RESPONSIBILITY FOR SANCTIONS

[51] The primary responsibility for discovery under the Federal Rules – and for satisfying sanctions that result from noncompliance – properly resides with parties, given their superior ability to control the manner in which discovery obligations are met.<sup>167</sup> In the absence of egregious

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<sup>161</sup> 198 F.R.D. 508 (N.D. Iowa 2000).

<sup>162</sup> *Id.* at 518.

<sup>163</sup> *Flaherty v. Filardi*, No. 03 Civ. 2167 (LTS)(HBP), 2007 WL 2398762, at \*8 n.6 (S.D.N.Y. Aug. 15, 2007) (“I hope that the fact that this opinion will, no doubt, be reported by the computerized legal research services . . . will be sufficient to provide [a] deterrence.”).

<sup>164</sup> No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

<sup>165</sup> *Id.* at \*18 (ordering counsel to participate in the Case Review and Enforcement of Discovery Obligations (CREDO) project since they were “integral participants in hiding documents and making false statements to the court and jury”).

<sup>166</sup> *Id.* at \*20. The court entered a stipulation against the use of the CREDO process to the prejudice of the participants, implicitly acknowledging the serious potential due process issues involved. *See Stipulation and Order Concerning Credo Process at 1-2, Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B (BLM) (S.D. Cal. Feb. 4, 2008).

<sup>167</sup> *See Board of Regents of the Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at \*4, \*6 (D. Neb. Nov. 5, 2007) (applying sanctions to plaintiff when “counsel were far from diligent in complying with the court’s order directing the production of the subject documents); *see also Keithley v. Home Store.Com, Inc.*, No. C-



counsel conduct, most courts apply a mild de facto presumption against sanctioning counsel for discovery misconduct, even when the client is relatively blameless.<sup>168</sup> As Judge Schiendlin put it in *Zubulake V*, a party on notice of its obligations “acts at its own peril.”<sup>169</sup>

[52] The intellectual underpinning of this doctrine is the principle that clients are responsible for the acts or omissions of the counsel they select.<sup>170</sup> In *Link v. Wabash Railroad Co.*,<sup>171</sup> where the party suffered a dismissal because of counsel neglect, the Supreme Court refused to mitigate the sanctions and noted that “[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.”<sup>172</sup>

[53] Among the practical advantages to this approach is that it does not immediately create the type of adversity or finger-pointing between clients and counsel that triggers the need to retain independent counsel and

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03-04447 SI (EDL), 2008 WL 3833384, at \*6 (N.D. Cal. 2008) (holding a failure to diligently search well after the eleventh hour for discovery materials compounds the harm caused by the lack of a preservation policy).

<sup>168</sup> See, e.g., *Malloy v. WM Specialty Mortgage, LLC*, 512 F.3d 23, 27 (1st Cir. 2008) (affirming sanctions on client, despite fact that counsel could have been sanctioned, given that the circuit has consistently ignored claims that clients should not be held responsible for counsel’s mistakes).

<sup>169</sup> *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 436 (S.D. N.Y. 2004) (sanctioning party alone despite failures of in-house and outside counsel to ensure adherence to litigation hold by employees).

<sup>170</sup> *Alden v. Mid-Mesabi Assocs. Ltd P’ship*, No. 06-954 (JRT/RLE), 2008 WL 2828892, at \*18 (D. Minn. 2008) (“[I]t is far too facile to presume, in the absence of evidence to support a presumption, that simply because a client fails to responsibly allow discovery, her attorney should be blamed.”).

<sup>171</sup> 370 U.S. 626 (1962) (holding the client’s remedy is against the attorney in a suit for malpractice).

<sup>172</sup> *Id.* at 633-34; see *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 396 (1993) (stating clients must be held accountable for the acts and omissions of their attorneys); see also Harry F. Mooney, *Sanctions: Prosecuting, Defending and Avoiding Malpractice Liability*, 59 DEF. COUNS. J. 554, 560 (1992) (“Whether an attorney may be responsible to reimburse the client [will depend on] the level of the client’s participation in the conduct that gave rise to the sanctions penalty.”).

engage in defensive posturing.<sup>173</sup> Moreover, it provides an incentive for the client to discourage inappropriate lawyer conduct.<sup>174</sup>

[54] Sanctioning a party, however, does not preclude also imposing an appropriate sanction on counsel when they are primarily responsible for the misconduct or were acting without attention to their professional responsibilities.<sup>175</sup> Courts typically assess sanctions against both counsel and client if it is difficult or counterproductive to try to allocate culpability.<sup>176</sup> In *National Ass'n. of Radiation Survivors v. Turnage*,<sup>177</sup> for example, the court directed sanctions at both “the defendant and its counsel, since responsibility for the conduct of the litigation was shared and since culpability could not be accurately apportioned between the two.”<sup>178</sup>

[55] Some argue that assessing joint and several liability subverts the underlying purpose of provisions like Rule 26(g), since it encourages further litigation over culpability.<sup>179</sup> The costs and burdens of further satellite litigation are such that client and counsel may prefer to accept the joint sanctions; thereby saving the judicial system the necessity of proceeding with what can be a difficult undertaking in making a more precise allocation.

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<sup>173</sup> See *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 103 n.42 (D. N.J. 2006) (describing how inside and outside counsel “point[ed] fingers at each other” in regard to responsibility for discovery misconduct).

<sup>174</sup> See Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 395 (2007) (“Any special protection [for the client] is present in the form of the rules of ethics governing attorney conduct, principles of fiduciary duty, and attorney malpractice liability.”).

<sup>175</sup> *Orgler Homes, Inc. v. Chi. Reg’l Council of Carpenters*, No. 06 c 50097, 2008 WL 5082979 (N.D. Ill. Nov. 24, 2008) (assigning responsibility for sanctions only to counsel).

<sup>176</sup> See, e.g., *Poole v. Textron, Inc.*, 192 F.R.D. 494, 511 (D. Md. 2000) (“The Court will not attempt to determine how much fault lies with Textron and its inside counsel and how much fault lies with outside counsel.”).

<sup>177</sup> 115 F.R.D. 543 (N.D. Cal. 1987).

<sup>178</sup> *Id.* at 558.

<sup>179</sup> See Karen S. Beck, *Rule 11 and Its Effect on Attorney/Client Relations*, 65 S. CAL. L. REV. 875, 889-90 (1992) (noting how “the party more at fault may not be sufficiently deterred or punished”).

[56] Some courts perform a culpability allocation of joint responsibility only on request. In the case of *In re September 11th Liability Insurance Coverage Cases*,<sup>180</sup> a court imposed sanctions on the party and its counsel subject to a request by either for a “more exacting review and allocation.”<sup>181</sup>

[57] *Qualcomm* illustrates a fundamental problem that can arise whenever relative or comparative fault is sought to be established between client and counsel. In that case, the magistrate judge initially imposed sanctions on retained counsel without allowing them to defend their conduct by reliance on their communications with their client.<sup>182</sup> On appeal to the district judge, this ruling was reversed because Qualcomm had introduced “accusatory adversity” into the proceedings, thereby undermining the logic of the earlier ruling.<sup>183</sup> Accordingly, the attorneys had “a due process right to defend themselves under the totality of circumstances presented in this sanctions hearing.”<sup>184</sup>

[58] The matter of assigning culpability is made even more complex when the actions of in-house counsel are added to the mix. Typically courts simply avoid the issue and impute the conduct of in-house counsel to their employer and sanction the party. In *Bratka v. Anheuser-Busch Co.*,<sup>185</sup> a district judge entered a default judgment against a corporation based on the conduct of both in-house and outside counsel.<sup>186</sup> In *Poole v.*

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<sup>180</sup> 243 F.R.D. 114 (S.D.N.Y. 2007).

<sup>181</sup> *Id.* at 131.

<sup>182</sup> *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B(BLM), 2007 WL 2900537, at \*1 (S.D. Cal. Sept. 28, 2007) (denying use of correspondence with client since the “federal self-defense exception” does not apply where “the client [has not] initiated any complaints or allegations against its attorneys”).

<sup>183</sup> *Qualcomm Inc. v. Broadcom Corp.*, No 05CV1958-RMB (BLM), 2008 WL 638108, at \*3 (S.D. Cal. Mar. 5, 2008).

<sup>184</sup> *Id.* at \*3.

<sup>185</sup> 164 F.R.D. 448 (S.D. Ohio 1995).

<sup>186</sup> *Id.* at 463 (entering default judgment as authorized by Rule 37(b)(2)). The United States District Court for the Southern District of Ohio declared that retained counsel should have “exercise[d] some degree of oversight” over the internal effort “to ensure that their client’s employees are acting competently, diligently and ethically,” and that “[t]his was no doubt in accordance with defendant’s wishes. . . . [given] that corporate defendants with in-house legal departments often attempt to mitigate the cost of litigation, by using in-house counsel to assist trial counsel.” *Id.* at 460-61.

*Textron, Inc.*,<sup>187</sup> the United States District Court for the District of Maryland also sanctioned outside counsel because the “defense strategy [was] the product of the consensus of inside and outside counsel” and inside counsel had signed the responses and participated in hearings and in open court.<sup>188</sup>

[59] Given the *Link* doctrine, and for other good reasons, it would therefore seem appropriate to treat the issue of allocating responsibility for discovery misconduct between client and counsel with considerable restraint.

#### IV. OBSERVATIONS AND CONCLUSIONS

[60] From the point of view of both client and counsel, there is no substitute for making a good faith effort to meet Rule 26(g) discovery obligations.<sup>189</sup> Most suggestions for procedural fixes to avoid future conflict are either overly defensive or counterproductive. For example, some have argued that outside counsel should “insist” that in-house counsel sign discovery responses or that some form of “indemnification” from responsibility for discovery sanctions be sought in advance,<sup>190</sup> perhaps as a matter of “informed consent.”<sup>191</sup> Others suggest securing an advance waiver by the client of the use of privileged communications in the event of a dispute over discovery performance.<sup>192</sup>

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<sup>187</sup> 192 F.R.D. 494 (D. Md. 2000).

<sup>188</sup> *Id.* at 511.

<sup>189</sup> See Kristine L. Roberts, *Qualcomm Fined for “Monumental” E-Discovery Violations—Possible Sanctions Against Counsel Remain Pending*, LITIG. NEWS ONLINE, May 2008,

[http://www.abanet.org/litigation/litigationnews/2008/may/0508\\_article\\_qualcomm.html](http://www.abanet.org/litigation/litigationnews/2008/may/0508_article_qualcomm.html) (last visited Mar. 23, 2009).

<sup>190</sup> Gregory D. Shelton, *Qualcomm v. Broadcom: Lessons for Counsel and a Road Map to e-Discovery Preparedness*, TECH. & TRIAL TECHNIQUES & TACTICS (IADC, Chicago, Ill.), Feb. 2008, at 6, available at

<http://www.williamskastner.com/uploadedFiles/GSheltonQualcommv%20BroadcomIADC%20article.pdf>.

<sup>191</sup> Beck, *supra* note 179, at 906-07 (suggesting “[e]x ante sanction-shifting agreements” to curtail finger-pointing and to avoid need for attorneys to violate the attorney-client privilege to defend themselves).

<sup>192</sup> Posting of David McGowan to

<http://legalethicsforum.typepad.com/blog/2008/01/lessons-from-qu.html> (Jan. 9, 2008, 17:14 EST) (stating that “where outside counsel are not directly responsible for

[61] While these suggestions are logical, they risk distorting the attorney-client relationship and represent bad public policy. Clients should not be put in the position of having to agree in advance to open-ended commitments of that nature in order to secure or keep their counsel. Given the choice between losing counsel and agreeing, the pressures to sign may be insurmountable.<sup>193</sup> As pointed out by attorney and commentator Ralph Losey, “[e]thics and professionalism are not something that can be papered over with clever agreements.”<sup>194</sup>

[62] Responsible conduct in e-discovery matters has been positively reinforced by the ongoing paradigm shift towards early and cooperative discussion of contentious issues.<sup>195</sup> Given this new environment, the most realistic course for counsel involves engaging clients in early and, equally important, meaningful and ongoing dialogue within the framework of the representation established by the engagement.<sup>196</sup> Counsel should become as knowledgeable as possible under the circumstances about the potential custodians, databases, and sources of information and openly consult with

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discovery, they must take steps to protect themselves. . . . [and] demand an advance privilege waiver for communications relevant to any discovery disputes”).

<sup>193</sup> See *Celegene Corp. v. KV Pharm. Co.*, No. 07-4819 (SDW), 2008 WL 2937415, at \*8-10 (D. N.J. July 29, 2008) (disqualifying counsel despite advance waiver signed by in-house counsel). Compare MODEL RULES OF PROF’L CONDUCT R 1.7, cmt. 22 (authorizing advance waiver of conflicts), with MODEL RULES OF PROF’L CONDUCT R 1.6, cmt. 10 (limiting occasions that confidential information can be disclosed without mentioning advance waiver). But see Lauren Nicole Morgan, *Finding Their Niche: Advance Conflicts Waivers Facilitate Industry-Based Lawyering*, 21 GEO. J. LEGAL ETHICS 963, 982-84 (2008) (arguing that advance waivers by sophisticated clients should be enforced).

<sup>194</sup> e-Discovery Team, <http://ralphlosey.wordpress.com/2008/06/01/the-lessons-of-qualcomm-a-wake-up-call-for-the-whole-legal-profession/> (June 1, 2008 15:53 EST).

<sup>195</sup> See FED. R. CIV. P. 26(c) (requires avoiding discovery whose costs and burdens are disproportionately large); see also *SEC v. Collins & Aikman Corp.*, No. 07 Civ. 2419 (SAS), 2009 WL 94311, at \*9 & n.69 (S.D.N.Y. Jan. 13, 2009) (noting the Sedona Conference Cooperation Proclamation sees the discovery rules as a mandate for counsel to act cooperatively).

<sup>196</sup> See Robert B. Collings, *Qualcomm v. Broadcom—Some Lessons for E-Discovery Practitioners*, 52 BOSTON B.J. 20, 23 (2008) (stating that “outside counsel must be vigorous in questioning the client so they can assert that the client has searched for responsive documents”).

opposing counsel on the most appropriate means to preserve, collect, review, and produce e-discovery and other discoverable documents.<sup>197</sup>

[63] This approach has already had a direct and measurable impact on reducing discovery disputes.<sup>198</sup> Creative efforts such as the Sedona Conference® Cooperation Proclamation, based on limiting unnecessary disputes during discovery, holds out the promise of even more progress in the future.<sup>199</sup>

[64] The root cause of e-discovery disputes, however, is often a lack of dedicated client resources coupled with inadequate internal coordination in the face of overwhelming complexity.<sup>200</sup> Placing the primary responsibility for any resulting discovery sanctions on parties properly aligns the incentives with the entity most likely to effectuate change.<sup>201</sup> Where counsel conduct also requires an appropriate sanction, either jointly or independently, that task should be accomplished without undermining the fundamental principle of party responsibility.

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<sup>197</sup> See generally Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 13, ¶¶ 35-38 (2006).

<sup>198</sup> Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 886 (2008) (noting since the passage of the amendments, the percentage of orders granting sanctions has dropped from 65% to 50% of those sought).

<sup>199</sup> THE SEDONA CONFERENCE® COOPERATION PROCLAMATION 1 (2008), <http://www.thesedonaconference.org> (last visited Mar. 2, 2009) (“The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.”).

<sup>200</sup> See Gregory G. Wrobel et al., *Counsel Beware: Preventing Spoliation of Electronic Evidence in Antitrust Litigation*, 20 ANTITRUST 79, 80-81 (2006) (contrasting the broad discovery in an antitrust case with the relatively narrow focus of employment discrimination cases).

<sup>201</sup> See Giesel, *supra* note 174, at 349 (noting that clients in today’s legal services market are often sophisticated users of legal services and in control of “instrumental or ministerial decisions” and “should be held accountable for their agent’s actions”).