

## A Picture is worth a Thousand Words, but Sanctions are Priceless

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The Defendants in *Green v. McClendon*, 2009 U.S. Dist. LEXIS 71860 (S.D.N.Y. Aug. 13, 2009) attempted to purchase a \$4.2 million painting. As the Defendants' marriage ended in divorce, the Defendants (who never took physical ownership) did not complete their payments.

The Plaintiff sought sanctions against both the Defendant and her lawyer for failure to preserve electronically stored information.

### Mixing the Paint

The Defendants originally negotiated the purchase of the \$4.2 million painting with a \$500,000 down payment at an international art event in New York City. *Green*, 2. The Plaintiff kept the painting until the scheduled final payment. *Green*, 2.

The Defendants' marriage ended in divorce and the final payment never came.

### Painting a Picture for Spoliation

The Plaintiff sued for breach of contract and promissory estoppel in October 2008. Initial disclosures were filed in early December and written discovery requests right before Christmas Eve, which is never a fun stocking stuffer. *Green*, 4.

As discovery continued to be painted across computer screens, the Defendants represented to the Plaintiff they had thoroughly searched for responsive documents and produced accordingly. *Green*, 4.

The Plaintiff brought a motion to compel. The Defendants were ordered to produce all electronically stored information and certify the responses were complete. *Green*, 4.

### The Di Vinci Code of Excel Spreadsheets

The Defendant produced an Excel spreadsheet from her home computer on 37 artworks. *Green*, 5-6. The Plaintiff sought basic information on the Excel file, such as the date it was created, modified and authors. *Green*, 6. The Defendant in turn produced three more versions of the Excel file. *Green*, 6.

The Defendant claimed the spreadsheet was created by someone to organize the Defendant's art files, but nothing more on its origin. *Green*, 7.

The Plaintiffs brought a motion for a forensic examination of the Defendant's personal computer and sanctions. *Green*, 7.





However, any forensic examination in the words of the Plaintiff would have been a “useless exercise.” *Green*, 8. The Defendant had a “son of a friend” who was “familiar with computers” reinstall the operating system on her computer. *Green*, 8. All the data was copied to four CD’s. The Defendant’s attorney did not acquire the data until April 2009 and did not review them until June 2009. *Green*, 8.

The Plaintiff wanted to paint a spoliation masterpiece seeking the following sanctions:

- (1) Additional time to depose the Defendant regarding the Excel spreadsheet and ESI, at her expense. *Green*, 8-9.
- (2) An order directing the defendant to identify the person who created the spreadsheet; *Green*, 9.
- (3) Payment of costs incurred by the plaintiff in bringing this motion, including attorneys’ fees; and, *Green*, 9.
- (4) An adverse inference that the Defendants understood that they had in fact purchased the painting and added it to their personal collection. *Green*, 9.

### **The Duty to Preserve**



As easy it is for a layman to tell the difference between art by Pablo Picasso and Winslow Homer, the Defendant failed in their duty to preserve. *Green*, 13-14.

The duty to preserve began at the latest when the lawsuit was filed. *Green*, 14. Once there was a duty to preserve, the Defendants needed to enact a litigation hold. *Green*, 13. The Defendant should have known the Excel spreadsheet would have been relevant to the litigation, especially considering the fact there was a discovery request for any documents regarding the artwork. *Green*, 14.

The Court noted that the duty to preserve first attached to the attorney, who “has ‘a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.” *Green*, 15. Moreover, “Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.” *Green*, 16, citing *Qualcomm Inc. v. Broadcom Corp.*, 05 Civ. 1958-B, 2008 U.S. Dist. LEXIS 911, 2008 WL 66932, at \*9 (S.D. Cal. Jan. 7, 2008), vacated in part on other grounds, 2008 U.S. Dist. LEXIS 16897, 2008 WL 638108 (S.D. Cal. March 5, 2008).

### **A Failure of Discovery Obligations**

The Court held the Defendant attorney failed to meet their discovery obligations. *Green*, 16. The Court stated:

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. *Green*, 16-17.

### **Failure to Supplement under Federal Rule of Civil Procedure Rule 26(e)**

The Court further found there was no justifiable delay in producing the CD’s with the Defendant’s electronically stored information. *Green*, 17. A party must supplement discovery pursuant to Federal Rule of Civil Procedure Rule 26(e) and instead waited for the Plaintiff to request the material. *Green*, 17-18.

Federal Rule of Civil Procedure Rule 26(e) might be an angry giant in e-discovery cases. Three years ago, you rarely saw a court citing a party’s continuing obligation to supplement discovery. There were several cases this summer on this issue and I think courts are showing some backbone on failed discovery productions with both Rules 26(e) and 26(g).

### **A Culpable State of Mind**

The Court held the Defendants were at a minimum negligent by 1) Failing to enact a litigation hold; 2) Failing to search for responsive ESI; and 3) Failing to supplement discovery. *Green*, 18. Additionally, there is case law holding a failure to enact a litigation hold is gross negligence. *Green*, 18.

### **Adverse Inference**

As with many other adverse inference cases, the Plaintiff failed to show the Defendant created an “unfair evidentiary imbalance,” because all of the ESI was copied to CD’s. If there was evidence that relevant electronically stored information was destroyed, this might have had a different outcome. *Green*, 20-21.

### **Other Sanctions**

The Plaintiffs were entitled to an additional deposition of the Defendant and the identity of who created or modified the Excel spreadsheet. *Green*, 23. The Plaintiff was also entitled to costs to be proven with a fee application. *Green*, 23.

The Court did not close the door on additional sanctions. If discovery later showed the destruction of relevant ESI, the issue of an adverse inference instruction could be heard again.

### **Bow Tie Lessons**

Litigation holds and the failure to preserve electronically stored information appears regularly in case law. Attorneys are well served by discussing with their clients litigation holds and preservation to avoid sanctions for both themselves and their clients.