

## Outside Counsel

# Ethical E-Discovery: Core Competencies for New York Lawyers

While technology may sometimes daunt even the most experienced and knowledgeable litigator, the impact of technology on the demands and realities of discovery cannot be ignored or minimized. Many jurisdictions and courts are now explicitly requiring lawyers to have sufficient learning and skill regarding electronic discovery (e-discovery) and electronically stored information (ESI) or, in the alternative, to associate with competent lawyers who do. This article highlights a recent California Bar opinion and focuses, looking forward, on the ethical duties implicated by e-discovery with respect to New York lawyers.

### Listing Skills

The California Bar recently released an opinion concerning the ethical obligations of attorneys with respect to e-discovery and ESI.<sup>1</sup> Pointing out that in today's world, every litigation matter potentially involves e-discovery, the opinion centered on the duty of competence, as well as confidentiality and the supervision of subordinate lawyers. Among the skills listed by the California Bar that an attorney handling e-discovery should be able to perform are:

- (i) initially assessing e-discovery needs and issues, if any;
- (ii) implementing or causing implementation of appropriate ESI preservation procedures, such as circulating litigation holds or suspending auto-delete programs;
- (iii) analyzing and understanding the client's ESI systems and storage;
- (iv) advising the client on available options for collection and preservation of ESI;
- (v) identifying custodians or potentially relevant ESI;
- (vi) engaging in "competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan";

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- (vii) performing data searches;
- (viii) collecting responsive ESI ("in a manner that preserves the integrity of the ESI"); and
- (ix) producing responsive non-privileged ESI "in a recognized and appropriate manner."

Most attorneys who have litigated a matter involving ESI will recognize this list as representing the standard tasks one should engage in and competently execute to properly collect and produce responsive ESI to the opposing party. The California Bar noted that: "Electronic document creation and/or storage, and electronic commu-

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nications, have become commonplace in modern life, and discovery of ESI is now a frequent part of almost any litigated matter. Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery."

### Framework for New York

While at the present time there is not a developed record of disciplinary decisions on these

topics in New York, there is an ample basis to discern a framework for ethical obligations, derived from ethics rules, court rules, and sanctions decisions in the e-discovery context. New York courts have been leaders in the advancement of e-discovery law, and sanctions have included additional discovery, monetary penalties (including six figure judgments), and adverse inference instructions, including judgments as to liability.<sup>2</sup> These issues also arise in the attorney malpractice context.<sup>3</sup> Ultimately, these sources provide a framework for New York lawyers when executing their ethical duties in the e-discovery context.

The key ethical rule at issue is competence, which requires that lawyers have the legal knowledge, skill, thoroughness, and preparation to conduct the representation, or associate with a lawyer who has such skills.<sup>4</sup> A recently added Comment to Rule 1.1 of the New York Rules of Professional Conduct indicates that lawyers should "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information[.]"<sup>5</sup> This comment change is similar to a recently added Comment to the ABA Model Rule, which holds that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."<sup>6</sup>

Lawyers should also supervise the work of others to ensure it is completed in a competent manner.<sup>7</sup> In addition, it is critical that lawyers refrain from revealing confidential or privileged client information in the course of e-discovery.<sup>8</sup> The New York State Bar Association has discussed the importance of competence and confidentiality when attorneys handle or store electronic information.<sup>9</sup> It is evident that in today's world, these obligations carry over into the realm of ESI preservation, collection, and production.

A starting point for establishing competence in the ESI context are the court and procedural rules. The New York Supreme Court and Commercial Division rules require that attorneys are sufficiently well versed in their clients' technological systems to competently discuss all

issues relating to e-discovery at the preliminary conference.<sup>10</sup> The Federal Rules of Civil Procedure require that the discovery plan considers the preservation of ESI and the forms in which it should be produced.<sup>11</sup> Accordingly, lawyers should be sufficiently well-versed in ESI and e-discovery to be aware of these issues and to discuss them with clients, opposing counsel, and the courts.

Well before the preliminary conference or the first meet and confer, the lawyer may be required—under her ethical duties of competence—to advise the client regarding (and help implement or cause to be implemented) appropriate litigation holds. Sanctions may be imposed when litigants fail to issue litigation hold notices when litigation is reasonably anticipated, and lawyers should work with clients to ensure that relevant ESI is not deleted and that automatic deletion measures are suspended.<sup>12</sup>

Lawyers should also work with clients to implement document retention and filing systems to enable reliable and expeditious e-discovery.<sup>13</sup> These guidelines are also important for in-house and transactional lawyers, as they are often the first to be apprised of a problem or anticipated litigation, and they often may also be involved with ESI preservation, collection, and continued e-discovery compliance.<sup>14</sup>

## Searching and Keywords

Another key area of a competent lawyer's involvement is the identification of custodians and keywords and the implementation of search mechanisms (either through key words or other technology assisted review (TAR) techniques and technologies) to isolate relevant data, for collection and review. In *William A. Gross Constr. v. American Mfrs. Mut. Ins.*, U.S. Magistrate Judge Andrew Peck of the Southern District of New York wrote: "[this decision] should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other [ESI]."<sup>15</sup> As the facts of that case demonstrate, it is often the originator of the documents who is in the best position to meaningfully understand what search terms would be optimal to effectively locate responsive documents, and the failure to do so can cause considerable delays.

Judge Peck has also been an advocate for use of TAR in the discovery process.<sup>16</sup> Because TAR requires a lawyer to understand how the analytic tools work and how to properly train or code the input or "seed sets," increasing use of TAR in the review and production phases of discovery may require further expansions of a lawyer's technological competencies.

Throughout this process, lawyers should take care not to produce privileged and confidential information and to create mechanisms to distinguish and segregate the two.<sup>17</sup> As noted in the California Bar ethics opinion, use of search terms, without some understanding of the ESI

they draw back and the implementation of measures to exclude privileged or proprietary data, can be a breach of a lawyer's ethical obligations.<sup>18</sup>

Ultimately, attorneys should make a thorough search for relevant documents and reasonable inquiries into all document requests, and once documents are available, they must be timely produced.<sup>19</sup> Attorneys also may not make false

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representations of completed searches.<sup>20</sup> In addition, attorneys should not overproduce to confuse or overburden opposing counsel, even if the data includes some responsive documents.<sup>21</sup>

Lawyers who lack their own competence in e-discovery may associate with other lawyers with the necessary expertise.<sup>22</sup> In addition, lawyers often retain non-lawyer e-discovery professionals to ensure they are professionally equipped to handle a given matter. E-discovery professionals may include lawyers (many firms now employ dedicated e-discovery counsel) and non-lawyers (such as litigation technology support departments or close partnership with outside e-discovery vendors). The room to associate with those who have the requisite skills implicates the lawyers' ethical duties of supervision.

As ESI review takes on an outsized role in litigations, responsible attorneys need to supervise the work accordingly.<sup>23</sup> Lawyers should ensure that there is no undocumented practice of law and cannot outsource their own duties to inexperienced non-professionals.<sup>24</sup> Lawyers also should ensure that privilege and confidentiality are maintained with outsourced staff and should not give outside vendors more information than necessary.<sup>25</sup>

## Conclusion

Under the controlling ethical rules and the ever increasing judicial guidance in the area of e-discovery, and with the added awareness prompted by the publication of out-of-state ethics opinions, it is evident that New York attorneys have minimum obligations to establish core ethical competencies with regard to e-discovery. At a minimum, lawyers should be familiar and capable with litigation holds and non-deletion instructions; establishing systems to maintain and organize documents; creating and exchanging search keywords; conducting comprehensive and prompt ESI searches and

productions that are not over or under inclusive; and distinguishing and maintaining confidential and privileged information with respect to ESI and search keywords.

In addition, attorneys should supervise all who do this work under their direction and ensure that information remains confidential in this regard. As the standards of professional conduct catch up with changing technologies, it is apparent that these duties and responsibilities will become a more central part of the ethics canons.

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1. See State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Op. No. 2015-193.

2. See *Metro. Opera Ass'n. v. Local 100, Hotel Emps. and Rest. Emps. Int'l Union*, 212 F.R.D. 178, 231 (S.D.N.Y. 2003); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 292 (S.D.N.Y. 2009); *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 421 (S.D.N.Y. 2010).

3. See *Distefano v. Law Offices of Barbara H. Katsos*, 2013 WL1339548, at \*1 (E.D.N.Y. March 29, 2013).

4. See New York Rules of Professional Conduct (N.Y. Rule) 1.1.

5. N.Y. Rule Comment 1.1[8].

6. ABA Model Rules Comment 1.1[8]; see Andrew Pearlman, "The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence," *The Professional Lawyer*, Vol. 22, No. 4, at 25-26 (2014).

7. N.Y. Rule 5.1(c).

8. N.Y. Rule 1.6.

9. New York State Bar Association, Ethics Opinion 1020.

10. 22 NYCRR 202.12(b); 22 NYCRR 202.70(g)(1)(b).

11. See Fed. R. Civ. P. 26(f)(3)(C).

12. See, e.g., *VOOM HD Holdings v. EchoStar Satellite*, 93 A.D.3d 33, 45-48 (1st Dept. 2012).

13. See *Metro. Opera Ass'n. v. Local 100, Hotel Emps. and Rest. Emps. Int'l Union*, 212 F.R.D. 178, 221-24 (S.D.N.Y. 2003).

14. See *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 416-419 (S.D.N.Y. 2010).

15. *William A. Gross Constr. v. American Mfrs. Mut. Ins.*, 256 F.R.D. 134, 134-36 (S.D.N.Y. 2009).

16. See *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 192-93 (S.D.N.Y. 2012), adopted sub nom. *Moore v. Publicis Groupe*, 2012 WL 1446534 (S.D.N.Y. April 26, 2012).

17. See N.Y. Rule 1.6; Steven Bennett, "Do Ask; Do Tell: Keyword Search Terms," 81-OCT N.Y. St. B.J. 44, 45-46 (2009).

18. Formal Op. No. 2015-193 at 4 (criticizing production where lawyer "did not fully understand the danger of overbreadth in the agreed upon search terms" and did not "pre-test the agreed upon search terms or otherwise review the data before the network search").

19. See *Metro. Opera Ass'n. v. Local 100, Hotel Emps. and Rest. Emps. Int'l Union*, 212 F.R.D. 178, 221-25 (S.D.N.Y. 2003) (imposing sanctions where union was given multiple opportunities to comply with discovery obligations but willfully failed to do so).

20. See *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 287-90 (S.D.N.Y. 2009) (false representations of completed search following data loss).

21. *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 417-19 (S.D.N.Y. 2010).

22. See New York Rule 1.1(b).

23. See N.Y. Rule 5.1(c); Steven Bennett, "The Ethics of Legal Outsourcing," 36 N. Ky. L. Rev. 479, 481-84 (2009).

24. See *Metro. Opera*, 212 F.R.D. at 222 (sanctions imposed where duties were outsourced to non-lawyer who did not have basic technological competence, such as understanding that documents include drafts and non-identical emails).

25. See N.Y. Rule 1.6; Bennett, *The Ethics of Legal Outsourcing*, at 486-87.