

TECHNOLOGY

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The ABA Model Rules of Professional Conduct, court rules of practice, and guidance from state bar associations have been updated to stress that technological skills may bear upon the ability of a lawyer to represent clients competently and ethically. This article will summarize some recent changes and illustrate the consequences of counsel's failure to come to grips with technology as it bears upon discovery, in particular.

The Ethics of Technology in E-Discovery – An Introduction

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

The Technology Committee keeps the IADC membership current on the use of technology in litigation, whether in the conduct of discovery or in the use of technology in the courtroom. It educates its members on the impact of technology in their practices – on the ways they communicate with each other, with courts and clients, on the systems they use to record and produce their work, and on technological developments in marketing for law firms. The committee provides information to its members on legal developments in the law governing the use and development of technology, in particular on Internet and computer law and related subjects. Through its members, it acts as a resource to the IADC staff and leadership on technology issues facing the organization. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Last year, the American Bar Association modified its model rules to inject explicitly into its directive regarding a lawyer's duty of competence the notion that competence requires a level of knowledge or facility with technology. Other bar associations around the country followed suit, issuing ethics opinions or adopting rules stressing the importance of technological skills to the ability of a lawyer to represent clients competently and ethically. In addition, federal and state courts have adopted rules of practice that require counsel, at various stages of litigation proceedings, to comprehend the issues of technology affecting the parties or their dispute and arrive at proposed solutions to address those issues.

This article will summarize these rules changes and illustrate the consequences of counsel's failure to come to grips with technology as it bears upon particular engagements. An article by these authors, to appear in the April 2015 Defense Counsel Journal, will address in greater depth the issue of lawyer competence as applied to the subject of search technologies applicable to the discovery of electronically-stored information in civil or criminal litigation and administrative proceedings.

[Rule 1.1](#) of the ABA Model Rules of Professional Conduct expresses in relatively few words the lawyer's duty to represent all clients competently:

Client-Lawyer Relationship
Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation.

In 2013, the ABA accepted a proposal of the ABA Commission on "Ethics 20/20", to modify one of the comments to Rule 1.1 in order to make clear that a lawyer must continuously maintain familiarity with technological change in order to comprehend the manner in which technology may affect a particular representation. The added language is underscored:

Maintaining Competence

[86] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Addressing the changes in Comment 8, the Ethics 20/20 Commission noted that the duty of maintaining competence already imposed upon lawyers the duty to keep abreast of technology affecting the practice of law, but asserted that an explicit reference to technology was necessary to remind lawyers that ignorance is not an option:

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase "including the benefits and risks associated with relevant technology," would offer greater clarity in this area and emphasize the importance of

technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent. [\[ABA Commission on Ethics 20/20 Report to the House of Delegates at 3 \(August 2012\)\]](#)

The ABA's modest wording change drew much attention in the legal press, some commenting that it represents a seismic change in the practice of law, and others suggesting that it was way overdue, given that the Internet entered the legal profession roughly twenty years ago. See R. Amborgi, [With New Ethics Rule There's No Hiding from Technology](#).

In February 2014, the State Bar of California took on the subject of lawyer incompetence in litigation e-discovery matters through the issuance for discussion of Proposed Formal Opinion Interim No. 11-0004. (Though the 90-day public comment period has passed, the Opinion has yet to be issued in final form.) The opinion posits a hypothetical involving a civil litigation between two business parties which are competitors. The lawyer whose conduct the opinion addresses comes to the first discovery conference in court after having refused to agree upon an e-discovery protocol in advance with his adversary. Pressured by the annoyed presiding judge, the two lawyers are directed to arrive at an agreement in two hours. The adverse counsel proposes having her vendor run searches on the system of the lawyer's client using search terms to be agreed upon, with a "clawback" provision. The subject counsel agrees, believing that the "clawback" would permit him to get back

irrelevant information retrieved by the search. When the result is delivered by the vendor, the lawyer does not bother to review it but rather puts the media containing the resulting data in his file. At the continued case management conference, the lawyer represents to the court that he has reviewed the discovery conducted to date, and the e-discovery is in compliance with the court's prior order. A few weeks later, the lawyer receives a letter from his adversary asserting that the client's document retention practices continued unabated despite the litigation, resulting in significant gaps in available information. Only then does the lawyer review the produced information and engage an e-discovery vendor. That belated effort reveals not only the client's failure to implement a litigation hold but also that documents shared with the adversary included privileged communications as well as information about the client's latest technological advances, even though not relevant to the subject of the lawsuit.

After positing this nightmare hypothetical, the Opinion asks a question in the style of a bar examination: "What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?" The missteps by the subject counsel are myriad, which the Opinion enumerates and discusses at length. Among the lawyer's failings, he: failed to possess, or associate with, sufficient expertise for the matter at hand, agreeing to proposals, court entry of protocols, and overbroad search terms created without guidance by appropriate experts; failed to require (or at least advise on) steps to protect the confidentiality of client business secrets and privileged information, which resulted in a finding that the production of this otherwise-protected information was not inadvertent, and hence not subject to clawback; and neglected to instruct his client on litigation-hold measures, especially relating to

electronically stored information, resulting an associated loss of data which implicated his ethical obligations to avoid suppression of evidence and to meet his duty of candor to the court.

Thus, the Opinion's conclusions are worthy of close reading:

Electronic document creation and/or storage and electronic communications have become standard practice in modern life. Attorneys who handle litigation may not simply ignore the potential impact of evidentiary information existing in electronic form. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under [California Rule] 3-110(C), even where the attorney may otherwise be highly experienced. It may also result in violations of the duty of confidentiality, the duty not to suppress evidence, and/or the duty of candor to the Court, notwithstanding a lack of bad faith conduct.

The fact pattern posited by Proposed Formal Opinion Interim No. 11-0004 might have been lifted from any number of legal malpractice cases past and presently pending. One which comes to mind is the case filed by J-M Manufacturing Company Inc. arising from the inadvertent production of masses of privileged documents to the federal investigators looking into allegations raised in a qui tam whistleblower case alleging that the company sold substandard PVC products to thousands of federal, state and local governments. The legal malpractice

[complaint](#) alleged that the law firm representing it in responding to federal subpoenas relied upon an outside vendor to retrieve documents based upon search terms and that the firm only realized that a "significant number" of privileged documents were included among the production when so advised by the government lawyers. The outside firm then brought in contract attorneys to further review the documents, yet privileged material was still produced -- some 3,900 privileged documents in the second production to the government. Thereafter, new counsel sought to retrieve the privilege under a "clawback" theory, but that demand was refused on the basis that the production was not "inadvertent" because the outside law firm twice conducted privilege reviews yet turned the privileged documents over to federal authorities.

Needless to say, such chilling facts serve as an admonishment that the production of ESI must be carefully planned and executed. More to the point, the case illustrates the importance of counsel's savvy in selection of its discovery team, as counsel will be held accountable for the expertise of the team (or lack thereof) and for mistakes that team makes. See ABA Model Rule of Professional Conduct 5.1 Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers and 5.3 Lawyer's Responsibility for Conduct of Nonlawyers. Blanket reliance upon the vendor as the expert will not excuse counsel if the end product contains significant errors. Part of the duty of competence requires informed selection by counsel of the right vendor, selection of the correct technological solution for the task at hand, and selection of a methodology to "QC" the quality of the end product.

In New York, a recently enacted rule of the Commercial Division of the Supreme Court of

New York mandates that counsel address e-discovery at the outset of the case and arrive at an agreed-upon protocol in the preliminary conference order. [Rule 202.12\(b\)](#) of the Uniform Civil Rules For The Supreme Court and The County Court first requires counsel to consider whether a resort to e-discovery is necessary in the case given the issues and economic value of the case:

Where a case is reasonably likely to include electronic discovery counsel shall, prior to the preliminary conference, confer with regard to any anticipated electronic discovery issues. Further, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.

(1) A non-exhaustive list of considerations for determining whether a case is reasonably likely to include electronic discovery is:

- (i) Does potentially relevant electronically stored information ("ESI") exist;
- (ii) Do any of the parties intend to seek or rely upon ESI;
- (iii) Are there less costly or less burdensome alternatives to secure the necessary information without recourse to discovery of ESI;
- (iv) Are the cost and burden of preserving and producing ESI proportionate to the amount in controversy; and

- (v) What is the likelihood that discovery of ESI will aid in the resolution of the dispute.

For cases that are deemed to include e-discovery, the Rule enumerates many specifics for counsel to address in pre-conference meetings so that the resolution may be reflected in the preconference order. Hence, counsel needs to appear at the conference with both the facts and capability to have an informed discussion of these issues:

(3) Where the court deems appropriate, it may establish the method and scope of any electronic discovery. In establishing the method and scope of electronic discovery, the court may consider the following non-exhaustive list, including but not limited to:

- (i) identification of potentially relevant types or categories of ESI and the relevant time frame;
- (ii) disclosure of the applications and manner in which the ESI is maintained;
- (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;
- (iv) implementation of a preservation plan for potentially relevant ESI;
- (v) identification of the individual(s) responsible for preservation of ESI;
- (vi) the scope, extent, order, and form of production;
- (vii) identification, redaction, labeling, and logging of privileged or confidential ESI;
- (viii) claw-back or other provisions for privileged or protected ESI;
- (ix) the scope or method for searching and reviewing ESI; and

(x) the anticipated cost and burden of data recovery and proposed initial allocation of such cost.

The foregoing illustrates the changing climate in which lawyers practice and the importance for litigators to understand their client's business and information systems and the technological and other solutions available to preserve, search, review, and make use of information stored by such systems. Basic legal ethics demands familiarity with technology; clients demand it; and rules of civil procedure require lawyers to engage knowledgably with adversaries and the court regarding such subjects. Of course, help is available from outside vendors but the lawyer must be able to evaluate vendor competencies, match competencies to need, partner effectively, and be sufficiently knowledgeable to supervise and evaluate the quality of that vendor's work.

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