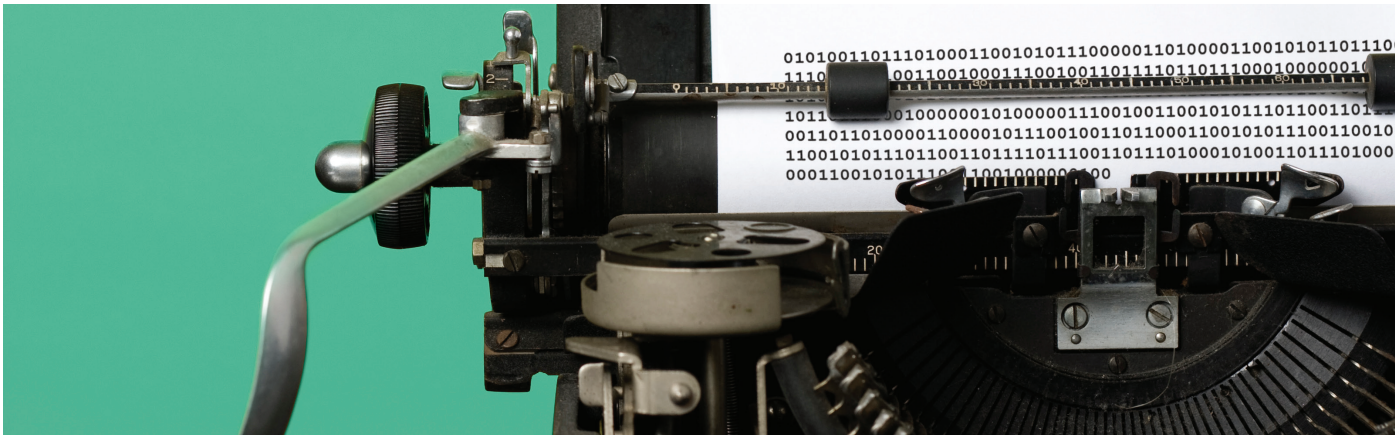

Litigation, Technology & Ethics: Changing Expectations

Prevailing thought leadership is increasingly embracing the concept that a lawyer's duty of competence includes technological proficiency. To meet this growing obligation, counsel must obtain knowledge and maintain skill in the technology arena, or associate with colleagues and professionals who already possess this expertise.

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Most lawyers understand that their ethical obligation of competence requires a level of knowledge, skill and preparation to handle any particular matter, whatever the complexities of that matter. For the past decade or longer, however, many lawyers have struggled with this long-established ethical principle in the face of rapid technological change. Some lawyers may be ignorant of evolving technologies and their impact on litigation practice or fear them as unduly complex. Indeed, for many litigators, e-discovery has remained terrain "where angels fear to tread" (*United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (Facciola, Mag. J.)*).

Yet it is hard to imagine a litigation of any size or complexity where technology, specifically electronically stored information (ESI), does not come into play to some degree. As technology has become more entrenched in every aspect of litigation, recent guidance and emerging best practices have made it clear that lawyers cannot thoughtlessly remain Luddites and still comport with their ethical duties.

RECENT RULES AND GUIDANCE

While it would be an overstatement to assert that clear and final direction has developed, several bar associations, state bars and courts have issued guidance on what a lawyer's duty of competence means in the e-discovery context. Most notable among these are:

- The American Bar Association's (ABA's) revision to Comment 8 of Rule 1.1 of the Model Rules of Professional Conduct.
- A recent ethical opinion from the State Bar of California.
- The Electronic Discovery Pilot Program introduced by the US Court of Appeals for the Seventh Circuit.

ABA MODEL RULE 1.1

Model Rule 1.1 requires a lawyer to provide competent representation to a client. This requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" (*Model Rules of Prof'l Conduct R. 1.1*). Comment 8 to this rule clarifies that a lawyer must keep abreast of changes in the law and its practice as part of this duty.

In August 2012, the ABA went further in underscoring the importance of technology in modern law practice by specifying that a lawyer's ethical obligation requires a reasonable understanding of "the benefits and risks associated with relevant technology" (*Model Rules of Prof'l Conduct R. 1.1, cmt. 8*). The ABA's Committee Report accompanying amended Comment 8 stressed that:

> "The proposed amendment ... 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 the lawyer's general ethical duty to remain competent."

(*ABA Comm'n on Ethics 20/20, Resolution & Report on Tech. & Confidentiality, at 3 (May 7, 2012)*, available at *americanbar.org*.)

Although the amended comment does not explicitly define the parameters of what competence in technology entails (which, absent judicially-set standards, may be an impossible task), it makes clear that lawyers cannot abdicate their responsibility to understand technology or delegate that responsibility entirely to IT departments, outside vendors, paralegals or secretaries.

Search The Hazards of Over-delegating E-Discovery Obligations for more on the risks companies may face by relying solely on a vendor to fulfill discovery obligations.

STATE BAR GUIDANCE

State bar organizations are also beginning to weigh in on a lawyer's duty of technological competence, and some appear poised to follow the ABA's approach (see, for example, *Del. Supreme Court, Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2 & 7.3 of the Del. Lawyers' Rules of Prof'l Conduct, R. 1.1, cmt. 8 (Jan. 15, 2013)* (adopting Comment 8 verbatim); *Mass. Rules Advisory Comm., Proposed Revisions to Mass. Rules of Prof'l Conduct, R. 1.1, cmt. 8 (July 1, 2013)* (proposing to adopt Comment 8 verbatim)).

Others have provided more specific guidance defining competence with technology. For example, earlier this year, the State Bar of California issued an interim formal opinion holding that a lawyer is not competent to handle complex cases involving ESI absent sufficient understanding of the technical skills, knowledge and aptitude required to conduct e-discovery (see *Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Proposed Formal Op. Interim No. 11-0004 (Mar. 28, 2014)*).

The opinion stated that a lawyer undertaking complex litigation involving e-discovery should be able to perform at least nine specific tasks, including the ability to:

- Initially assess e-discovery needs and issues, if any.
- Implement appropriate preservation procedures.
- Analyze and understand a client's ESI systems and storage.
- Identify custodians of relevant ESI.
- Perform appropriate searches.
- Collect responsive ESI while preserving its integrity.
- Advise a client on available options for collecting and preserving ESI.
- Competently and meaningfully meet and confer with opposing counsel concerning an e-discovery plan.
- Produce responsive ESI in a recognized and appropriate manner.

(*Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Proposed Formal Op. Interim No. 11-0004, at 3 (Mar. 28, 2014), citing Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 462-65 (S.D.N.Y. 2010)*.)

The opinion directs that lawyers "who handle litigation may not simply ignore the potential impact of evidentiary information existing in electronic form." Instead, a lawyer who does not possess sufficient competency in these areas must elect one of three options:

- Acquire sufficient learning before undertaking the matter.
- Associate or consult with technical consultants and competent counsel.
- Decline the representation.

Lack of competency in e-discovery matters can, in certain circumstances, result in ethical violations. (*Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Proposed Formal Op. Interim No. 11-0004, at 2, 8 (Mar. 28, 2014), citing R. 3-110(C)* ("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 ... even where the attorney may otherwise be highly experienced").)

SEVENTH CIRCUIT PILOT PROGRAM

Some courts have sought to help lawyers gain the necessary experience and knowledge to comply with their developing obligation to be technologically proficient. For example, the Seventh Circuit introduced its Electronic Discovery Pilot Program in 2010 with the intention of improving pretrial procedures concerning the discovery of ESI, in part, by promoting lawyers' understanding of "the feasibility, reasonableness, costs and benefits of various aspects" of e-discovery (*7th Cir. Elec. Discovery Comm., Principles Related to the Discovery of Electronically Stored Info., Principles 1.01 (Purpose), 3.01 (Judicial Expectations of Counsel)* ("it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI")).

The Pilot Program provides lawyers practicing in the Seventh Circuit with a framework on common e-discovery issues, including, among other things:

- The suggested content and scope of preservation requests and orders.
- Designating a knowledgeable e-discovery liaison to attend court conferences.
- Identifying types of data that are usually not discoverable.
- The appropriate process for raising and resolving discovery disputes.

Moreover, the Pilot Program enumerates specific expectations and standards of performance for lawyers, which was a fairly novel idea at the time the program was introduced. The Pilot Program presumes that all counsel, before filing an appearance in any litigation, will have educated themselves on:

- The e-discovery provisions of the Federal Rules of Civil Procedure (FRCP) and any applicable state procedural rules.
- The Advisory Committee Report on the 2006 Amendments to the FRCP.
- The principles embodied in the Pilot Program.
- Case law, statutes and other materials on the discovery of ESI, including relevant publications by The Sedona Conference.

(*7th Cir. Elec. Discovery Comm., Principles Related to the Discovery of Electronically Stored Info., Principles 3.01 (Judicial Expectations of Counsel), 3.02 (Duty of Continuing Education).*)

The committee responsible for the Pilot Program also developed and launched a website, *discoverypilot.com*, which contains written resources and webinars designed to further the program's educational mission.

While the Pilot Program will continue to be evaluated over the course of the next year, the reports on its progress have been promising. Participating judges have reported increased cooperation and greater knowledge by counsel on e-discovery matters (see *7th Cir. Elec. Discovery Pilot Program, Interim Report on Phase Three, at 3-4 (2013)*, available at *discoverypilot.com*).

BEST PRACTICES

Consensus and momentum are building in efforts to crystallize lawyers' e-discovery responsibilities, and litigators are now at a crossroads in the evolution of law and technology. Counsel must face the challenge of changing circumstances while at the same time adopting tangible best practices to ensure compliance with their ethical obligations.

Aside from considerations of potentially neglecting their ethical duties, clients will increasingly hold responsible lawyers who fail in matters requiring technological competence (see, for example, *Compl., J-M Mfg. Co. v. McDermott Will & Emery, No. BC462832, 2011 WL 2296468 (Cal. Super. June 2, 2011)* (malpractice complaint based on, in part, alleged negligence in e-discovery)). Additionally, "discovery on discovery" disputes are on the rise. These disputes examine a party's collection, retrieval and production efforts, and are costly, in terms of time, money and reputation for lawyers and clients.

Search Discovery on Discovery for information on the key considerations for counsel seeking or resisting discovery about a party's efforts to preserve data and comply with discovery requests.

Moreover, recent cases demonstrate that courts are willing to impose severe sanctions for deficiencies in this area (see, for example, *S. New England Tel. Co. v. Global NAPS Inc., 624 F.3d 123 (2d Cir. 2010)* (affirming grant of default judgment against the defendant for its repeated discovery failures including spoliation of ESI); *TR Investors, LLC v. Genger, No. 3994, 2009 WL 4696062 (Del. Ch. Dec. 9, 2009)* (elevating the defendant's burden of persuasion and proof on his affirmative defenses and counterclaims and awarding $750,000 in attorneys' fees to the plaintiffs for the defendant's spoliation of ESI)).

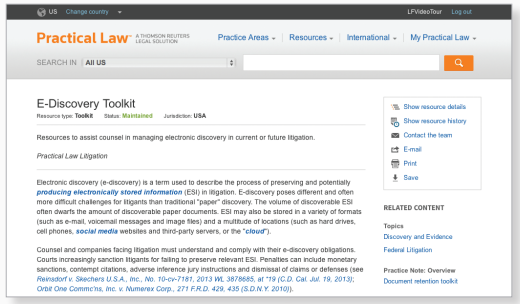
Search Spoliation Sanctions by US Circuit Chart for information on which sanctions, and what standard, a court may impose when relevant evidence was destroyed or lost.

Although the trend may be moving toward the promulgation of specific guidance to define what competence means in the technological sphere (like the nine subject matters enumerated by the State Bar of California), definitive guidance remains far-off. It is certain, however, that mere knowledge of computers, e-mail and mobile devices, and even a basic understanding of information data storage, will be insufficient to meet the ethical obligation suggested by Comment 8.

E-DISCOVERY TOOLKIT

The E-Discovery Toolkit available on practicallaw.com offers a collection of resources designed to assist counsel in managing electronic discovery in current or future litigation. It features a range of continuously maintained resources, including:

- E-Discovery in the US: Overview
- Practical Tips for Handling E-Discovery
- Data Collection: Locating and Collecting Relevant Data
- Fed. R. Evid. 502(d) Order
- Document Discovery Planning Tree
- Rule 26(f) Conference Checklist
- Considerations When Selecting an E-Discovery Vendor Checklist
- Document Retention Policies and Litigation Holds: Benchmarking Your Process



Therefore, any lawyer involved in litigation must step back and critically ask herself whether she has the skill, knowledge and ability to:

- Adequately interview a client's IT representatives to understand the client's fundamental IT issues, including the operation of any retention policies and the IT infrastructure.
- Identify the legal issues involved with the generation, receipt, transfer, storage, preservation and destruction of ESI.
- Ascertain the impact of technology decisions, implementations and changes on a client's legal rights and obligations.
- Ensure that the rights of a client and any non-parties (such as trade secrets, privilege or privacy rights) are adequately protected in addressing the preservation, collection and production of ESI.

Moving into the realm of any given case, at the very least, counsel should observe the following four directives for best ethical practices in litigation involving ESI:

- **Determine whether the matter will implicate e-discovery as soon in the course of litigation as possible.** This includes considering not only any issues regarding a client's ESI, but also the scope of any e-discovery efforts and the need to obtain ESI from an opposing party or a non-party.
- **Engage opposing counsel early in the process.** Doing so permits counsel to:
  - reach agreements about ESI issues to abate discovery disputes (for more information, search Learning to Cooperate on our website);
  - avoid possible sanctions or future challenges to the efforts made in the preservation, collection and production of ESI; and
  - ensure appropriate protection of the rights and property interests of parties and non-parties.
- **Assess whether to associate with more experienced and qualified counsel.** Counsel should consider whether they have sufficient knowledge and experience to meet e-discovery challenges. There are a number of law firms and lawyers who have specialized knowledge in the technology arena with whom less experienced counsel can associate. Taking this step comports with ethical requirements (see *Model Rules of Prof'l Conduct R. 1.1, cmt. 2* ("[c]ompetent representation can also be provided through the association of a lawyer of established competence in the field in question"); see also *Model Rules of Prof'l Conduct R. 1.1, cmt. 6* ("the reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers")).
- **Appreciate the complexities and nuances of the processes surrounding the preservation, collection and production of ESI.** This includes understanding how to implement preservation protocols, undertake defensible searches, and make productions effectively and in acceptable formats. Inexperienced lawyers can:
  - seek guidance and advice from experienced IT professionals within their practice and firm;
  - build on their experience through continuing legal education courses, which are increasingly available to every practitioner nationwide; and
  - take advantage of the many free opportunities for education from e-discovery vendors about specific systems, collection techniques, predictive coding and myriad other specific issues.