

Competence in E-Discovery

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In the world of legal ethics, 2015 was a big year, with 20 states adopting the ABA's revised rules (Model Rule 1.1 and 1.6) regarding the need to be familiar with the risks and benefits of technology, including how to use technology to secure confidential data. CLEs about competence and technology began to multiply faster than rabbits as lawyers scrambled to see what their new ethical duties were.

Lost in that shuffle, for the most part, were discussions of an ethical requirement to be competent in e-discovery. News channels flared briefly when the California Bar released an ethics opinion (Formal Opinion 2015 – 193, published on June 30, 2015) which detailed the skills that attorneys must have when dealing with electronically stored information (ESI) and e-discovery. But the publicity died down and we saw only a handful of CLEs which touched on this issue even slightly, so the topic seemed ripe for an article.

The nine core skills that the California State Bar says an attorney working with ESI should have are:

1. initially assessing e-discovery needs and issues, if any;
2. implementing or causing implementation of appropriate ESI preservation procedures, such as circulating litigation holds or suspending the usage of auto-delete programs;
3. analyzing and understanding a client's ESI systems and storage;
4. advising the client on available options for collection and preservation of ESI;
5. identifying custodians of potentially relevant ESI;

6. engaging in “competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan”;
7. performing data searches;
8. collecting responsive ESI in a manner that preserves the integrity of that ESI; and
9. producing responsive non-privileged ESI in a recognized and appropriate manner.

What if you don’t have the requisite skills? According to the opinion, you have three choices. Acquire the needed skills. Find skilled lawyer or expert assistance. If you can’t do either of those, you have to decline the representation. That’s pretty blunt.

There really is no body of disciplinary decisions anywhere to guide us on how this ethical requirement will play out. However, we do have some court decisions (requiring additional discovery, a change in production format, monetary sanctions and the dreaded adverse inference instruction).

The California opinion strikes as a good first step, essentially defining what the new model rules may mean when it comes to e-discovery. We would add that under the current rules (Rule 5.1), lawyers must ensure that the work of others in the e-discovery realm must be supervised and completed in a competent manner.

Protecting data under Rule 1.6 (the old or new version) is obviously extended to protecting such data in e-discovery. However, in a world of dark data (data you don’t know your client has) and shadow IT (think “Hillary’s e-mail server”), the duty is sometime more complex than it first appears.

The California opinion is akin to a skeleton, with flesh on the bones given by some previous case law and more flesh sure to come as the entire subject of ethics in e-discovery matures. And this will not be a static subject – though ethical rules try to be technology-agnostic, the rapid changes in technology will inevitably impact the specifics of ethics in e-discovery.

In our own lectures, we have urged attorneys to become familiar with the publications of The Sedona Conference, to attend CLEs on the core skills identified by California, to be familiar with the Federal Rules of Civil Procedure which touch on e-discovery and to know some of the leading cases that have given attorneys ethical guidance.

A few such cases include:

First Coast Energy L.L.P. v. Mid-Continent Cas. Co. (M.D. Fla. 2015) which said that attorneys need to make a complete search for relevant documents, respond reasonably to document requests and produce relevant documents in a timely manner. In this case, Judge Timothy J. Corrigan rejected Mid-Continent's arguments and determined that the default judgment on the bad faith claim by the magistrate judge was appropriate given the number of Mid-Continent's supplemental responses after the deadline – certainly some evidence of bad faith.

"Frankly, Mid-Continent's contention that the repeated supplements were Mid-Continent's effort to stagger production to 'give First Coast time to digest' is ridiculous. The Court is not aware of any order or agreement allowing for the 'staggered' production of documents that should have been produced years earlier. Instead, based on a review of the supplemental responses, the repeated supplementation is an indication of an inadequate initial investigation followed by a disjointed effort to search for responsive documents only after the Court stepped in to address the deficiencies," the judge said.

Keithley v. Homestore.com, Inc. (N.D. California, 2008) upheld monetary sanctions for failure to preserve ESI and the failure to have a litigation hold in place. That seemed like a no-brainer, but it was big news in 2008.

In one of the most infamous e-discovery sanctions cases, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* (Fla. Cir. Ct. 2005) CPH sued financial giant Morgan Stanley for fraud in connection with CPH's sale of stock, and sought access to Morgan Stanley's internal e-mails. After learning that many relevant e-mails were lost because Morgan Stanley had continued its policy of overwriting e-mails (despite an SEC regulation requiring their retention), the court ordered Morgan Stanley to go to its backup tapes for relevant emails.

Morgan Stanley partially complied, but its team in charge of the project knowingly failed to search many hundreds of backup tapes and falsely certified the production as complete. There were too many missteps to cite here. A bizarre mix of incompetence and unethical behavior.

This earned Morgan Stanley the dreaded adverse inference instruction, in which the judge explained that (1) the spoliator had a duty to preserve the evidence, (2) the spoliator had a "culpable state of mind," and (3) the destroyed evidence was relevant to the opponent's claims or defenses.

In *James v. National Financial LLC* (Del. Ch. 2014), the opinion focused on discovery issues and failure to comply with discovery orders resulting in the grant of a motion for sanctions.

The opinion contained an exhaustive description of the multiple failures to comply with prior orders of the court granting motions to compel, as well as inconsistent answers to the same questions and conflicting explanations for failure to comply.

The court referred to the recent amendment to Rule 1.1 of the Delaware Rules of Professional Conduct, and Comment 8 thereto, which address the requirement that attorneys maintain familiarity with technological developments in order to maintain technological competence in connection with the practice of law. The court confirmed that: "Technological incompetence is not an excuse for discovery misconduct."

There are a plethora of cases in which parties make pathetic bleating excuses for why they did not do what they clearly should have done. It seems to us that courts have heard enough of the Sad Sack excuses and are drawing a line in the sand. It is downright dangerous today to say that discovery misconduct was a result of ignorance. While there might have been some merit in this argument when the federal rules were first amended to incorporate e-discovery rules in 2006, we are a decade out now – and there is no shortage of CLEs, articles and books explaining e-discovery in detail. Increasingly, lawyers who fail to get educated (and therefore competent to handle e-discovery) are being taken to the judicial woodshed.

We have seen judges enforcing competency in their own unique ways. One judge told us that he was sick and tired of hearing about meet and confers in which one attorney proclaimed that he was “entirely reasonable but opposing counsel was a jerk.” He made a rule that, in such cases, both counsel would have to have a phone call with him. He has never gotten a call.

Another judge with a similar approach tells both sides to videotape the meet and confer and give him the video if one side is being truly unreasonable. He has yet to receive a video.

A real ethical no-no is playing hide the ball – which we see all the time. A federal judge from the Eastern District of Virginia once lectured at a CLE: “If you play hide the ball with the electronic evidence in my court, you can rest assured that I will always remember who you are.” That sounded quite ominous to us.

Keywords are a particular source of incompetence. For all one hears about technology-assisted review, in smaller cases, keywords are still king. In general, lawyers have not taken the time to educate themselves about keywords. We nearly fell on the floor laughing when one attorney wanted, as a keyword, the domain name of the other party. That’s a great way to discover EVERY e-mail message whether relevant or not. As for Boolean connectors, fuzzy searches (to catch misspellings, typos) etc., they are largely clueless. California’s new opinion certainly wouldn’t tolerate this level of incompetence – no state should at this point in time.

In *Victor Stanley v. Creative Pipe* (D. Md. 2010), Magistrate Paul Grimm noted: “While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge.”

Amen. But attorneys are prone to devise the terms themselves, blissfully ignorant of their lack of skill – and what that lack of skill is going to cost their clients in unnecessary e-discovery costs. Failure to engage an e-discovery expert (which could be an attorney within the firm or an outside attorney or consultant) is pure incompetence – and clients are beginning to catch on to that fact and scrutinizing the competence of their counsel.

Lawyers tend to react to vanishing clients, so we hope that clients will more rigorously examine the e-discovery skills of their counsel. What competence means in e-discovery is no longer shrouded in fog. Standards have begun to emerge and California did a pretty good job of encapsulating those standards. California may have been the first state to articulate what competence means in e-discovery, but we doubt it will be the last.

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