

Ethical Obligations Arising in Electronic Discovery



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The recent amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information (“ESI”) are not the only source of a lawyer’s electronic discovery obligations to adversaries, the courts and clients. The governing rules of legal ethics and professional conduct also require counsel to become skillful participants in the discovery of ESI. For practitioners who are slow to come around to the practice of electronic discovery, a handshake agreement simply to ignore ESI in a given case, or the lack of expressed rules governing ESI discovery in state court, will not exempt a lawyer from the ethical obligations to his or her client and adversary to engage in electronic discovery. Once electronic discovery is underway, counsel should be mindful of the ethical issues that may arise.

What are a lawyer’s responsibilities?

The following provisions of the Model Rules of Professional Conduct have implications on a lawyer’s responsibilities regarding electronic discovery:

Rule 1.1 Competence

Rule 1.6 Confidentiality

Rule 3.3 Candor to Tribunal

Rule 3.4 Fairness to Opposing Party and Counsel

Rule 4.4 Respect for Rights of Third Parties

Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

Rule 5.3 Responsibilities Regarding Nonlawyer Misconduct

How does electronic discovery implicate each of these rules?

A lawyer’s ethical obligations arise in electronic discovery in a number of ways, including the following:

Knowledge of the Rules and Participation in Electronic Discovery: Rule 1.1

Lawyers must represent their clients competently, diligently, and zealously. In order to be a competent advocate, a lawyer must know the rules of the court before which he or she practices. Rule 1.1, Ann. ABA Model Rules of Professional Conduct, 6th Ed. (citing *In re Dempsey*, 632 F. Supp. 908 (N.D. Cal. 1986) (lawyer not familiar with federal trial practice failed to notice motions in accordance with local rules, attempted to subpoena witnesses improperly, and consistently made improper or unintelligible objections to questions and testimony); *In re Kellogg*, 4 P.3d 594 (Kan. 2000) (lawyer failed to initiate proper out-of-state service of process in divorce proceeding); *In re Krause*, 737 A.2d 874 (R.I. 1999) (lawyer's failure to effectuate timely service of process demonstrated incompetence); *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (lawyer failed to serve defendant within thirty days of filing lawsuit, thereby risking dismissal of case); *In re Belser*, 287 S.E.2d 139 (S.C. 1982) (lawyer filed improper exceptions to hearing and failed to serve them on opposing counsel, claiming ignorance of rule requiring service)); see also Restatement of Law Governing Lawyers (3d Ed.) § 105 ("In representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings."). In particular, a lawyer's failure to have a working knowledge of the federal and local rules regarding discovery can be a violation of the lawyer's ethical obligation to represent a client competently. Specifically, courts have held that failure to respond to discovery or failure to understand what is required by the discovery rules demonstrates incompetence. Shelton, Gregory D., *Providing Competent Representation in the Digital Age*, 74 Def. Couns. J. 261 (July 2007) (citing *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (failure to reply to discovery requests violated South Carolina's Rule 1.1); *In re Estrada*, 143 P.3d 731 (N.M. 2006) ("Respondent's failure to verify the authenticity of the forged prescription demonstrates incompetence because it shows a lack of thoroughness in preparing for trial that resulted in a mistrial in this case.")). Moreover, although the Federal Rules contain their own provisions for discipline and sanctions, rule violations may constitute ethical violations as well. Rule 1.1, Ann. ABA Model Rules (citing *Smith v. Town of Eaton*, 910 F.2d 1469 (7th Cir. 1990) (fining lawyer for filing a lengthy, rambling, and almost incomprehensible brief in violation of Rule 28(a)(4) of Federal Rules of Appellate Procedure and admonishing that repetition may lead to suspension); *Mendez v. Draham*, 182 F. Supp. 2d 430 (D.N.J. 2002) (referring lawyer to district chief judge for discipline after repeated admonitions under Rule 11 of Federal Rules of Civil Procedure cast doubt on lawyer's continuing compliance with Rule 1.1); *In re Alexander*, 513 A.2d 781 (D.C. 1986) (disciplining lawyer under Code competence rules for drafting "seriously defective" complaint that violated Rule 8(a)(2) of Federal Rules of Civil Procedure and also considering lawyer's earlier Rule 11 violations); *In re McCord*, 722 N.E.2d 820 (Ind. 2000) (sixty-day suspension warranted for lawyer who represented client before U.S. Court of Appeals without being admitted to practice before that court, misapplied rules governing federal appellate practice, and repeatedly failed to comply with procedural requirements, resulting in dismissal of client's action)).

The rules regarding electronic discovery are no different. Of course, when practicing in federal court, a lawyer must have knowledge and understanding of the Federal Rules of Civil Procedure. Since the December 1, 2006 effective date of the electronic discovery amendments to those Rules, over thirty of the federal district courts have adopted local rules regarding electronic discovery. See <http://www.ediscoverylaw.com>, Updated List: Local Rules of United States District Courts Addressing E-Discovery Issues, last visited October 29, 2007. Other individual judges have implemented standing orders governing electronic discovery in their cases. See, e.g., *In re Standing Order on Protocol for Discovery of*

Electronically Stored Information in Civil Cases before the Honorable Frank D. Whitney (W.D.N.C. May 14, 2007) (available on the court's website). These local rules, and similar standing orders of individual judges, cannot be overlooked. Although there are not yet any ethics opinions specifically addressing conduct involving electronic discovery, a number of federal courts have issued harsh rebukes of counsel both before and since the amendment of the Federal Rules for failing to adequately fulfill discovery obligations. See, e.g., *Qualcomm, Inc. v. Broadcom Corp.*, 2007 WL 2296441 (S.D. Cal. Aug. 6, 2007) (finding counsel's failure to produce documents and misleading statements about existence of documents to be "gross litigation misconduct" and later issuing order for counsel to appear and show cause why sanctions should not be entered); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005) (court grants adverse instruction after Morgan Stanley "thwarts" discovery of emails resulting in a \$1.5 billion verdict against Morgan Stanley); *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (court sanctions party for destroying emails).

When practicing in a state court without specific rules mandating electronic discovery, a lawyer should consider whether the responsibility of competent representation—which mandates "legal knowledge, skill, thoroughness and preparation" – requires him to engage in the discovery of ESI¹. It is hard to imagine that in this age of technology – where the average person processes about 100 emails per day and more than ninety percent of the information in the world is being generated in electronic format – a lawyer could adequately represent her client in litigation on most subject matters without requesting or producing some form of electronically stored information. See *The Sedona Principles: Second Edition, Best Practices for Recommendations & Principles for Addressing Electronic Document Production* (June 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf; *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy* (April 7, 2007), available at http://www.thesedonaconference.org/content/miscFiles/Commentary_on_Email_Management___revised_cover.pdf. Even when adversaries silently (or openly) agree not to engage in any electronic discovery, thought should be given as to whether each lawyer is fulfilling his or her responsibilities owed to their respective clients.

Preservation of Information: Rules 1.1, 3.3, 3.4

The obligation to preserve documents and information relevant to litigation is one of common law that is essential to the adversary system. See *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). The Rules of Professional Conduct likewise recognize the importance of document preservation to the litigation process. Model Rule 3.4 states that a "lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." The comments to the Model Rule recognize, "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, . . . obstructive tactics in discovery procedures, and the like." Comment 1, Ann. ABA Mod. Rules Prof. Cond. Rule 3.4. The amended Federal Rules of Civil Procedure also emphasize the importance of preserving ESI and require parties to address related preservation issues early in litigation. See F.R.C.P. 26(f). Likewise, some state courts are implementing rules related to ESI preservation. See, e.g., North

Carolina Business Court Amended Local Rule 17.1 (instructing parties to discuss at the case management conference “[t]he need for retention of potentially relevant documents, including but not limited to documents stored electronically and the need to suspend all automatic deletions of electronic documents or overwriting of backup tapes which may contain potentially relevant information.”). A lawyer’s ability to effectively implement and monitor a litigation hold to preserve ESI is demanded by Rule 3.4’s responsibilities to opposing counsel. Likewise, because the Federal Rules of Civil Procedure require the parties to report to the court efforts that have been taken for the preservation of relevant ESI, Rule 3.3, which demands a lawyer’s candor toward the tribunal, requires a lawyer, who has represented to the court that ESI has been preserved, to be able to implement an effective hold.

Moreover, a lawyer’s ability to implement and monitor a litigation hold to preserve ESI implicates Rule 1.1, which demands a lawyer’s competent representation of clients. To provide competent representation, a lawyer must have knowledge of the legal principles governing preservation and the skill required to (i) identify all of a client’s sources of potentially relevant ESI that may be subject to the preservation obligation and (ii) implement and monitor a litigation hold that satisfies the client’s legal obligations to preserve ESI under governing case law. Court opinions addressing counsel’s shortcomings in this area are numerous and provide guidance as to the requisite level of skill practitioners must have in this area. See *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (“[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched”); *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y. 2006) (concluding counsel acted with gross negligence for failing to conduct thorough search for ESI sources).

Negotiation of Scope of Discovery: Rules 1.1, 3.3, 3.4, 4.4

The amended Federal Rules of Civil Procedure contemplate that litigants will address the scope of electronic discovery early in each case, and Rule 26(f) and the related Advisory Committee Notes outline a number of topics that should be discussed at the meet and confer sessions. Many local rules are providing even more specificity around how counsel must prepare for the Rule 26(f) conference and the items that parties must discuss at the earliest stages of litigation. For example, the United States District Court for the District of Delaware’s “*Default Standard for the Discovery of Electronic Documents*” states that at the Rule 26(f) conference, the parties “shall exchange. . . [a] list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system.” Ad Hoc Committee for Electronic Discovery of the U.S. District Court for the District of Delaware, *Default Standards for Discovery of Electronic Documents*, available at <http://www.ded.uscourts.gov/OrdersMain.htm>. Similarly, Judge Whitney of the Western District of North Carolina has issued a standing order providing protocols for the discovery of ESI wherein he notes that, prior to the Rule 26(f) conference, counsel should determine where relevant ESI is maintained and investigate the format, location, structure, and accessibility of active storage, backup, and archives; servers; computer systems including legacy systems; remote and third-party locations; network and shared drives; desktop computers; portable media and laptops; home computers; and other sources of data. *In re Standing Order on Protocol for Discovery of Electronically Stored Information in Civil Cases before the Honorable Frank D. Whitney* (W.D.N.C. May 14, 2007). These rules are aimed at the goal of having counsel reach early agreements on a number of topics regarding the scope and process of electronic discovery.

These contemplated discussions, negotiations, and agreements regarding ESI implicate a number of the ethical rules. To represent a client competently in a Rule 26(f) conference, a lawyer must have the ability to discuss and negotiate in necessary detail a number of ESI-related topics, including: the client's sources of relevant ESI, the accessibility of those ESI sources, the volume of relevant data, the burdens associated with collection and production of various forms of ESI, search terms and other search methodologies, production format, and agreements to protect inadvertently produced privileged information. In addition to having a working knowledge of basic issues related to electronic discovery, a lawyer must also have conducted a thorough investigation of his or her client's ESI prior to the Rule 26(f) conference, as required by the rules and developing case law. These obligations under the Federal Rules of Civil Procedure implicate not only the obligation of competent representation under Rule 1.1 but also the obligations of candor to opposing counsel under Rule 3.4 and to the tribunal under Rule 3.3. When electronic discovery is targeted at nonparties through subpoena, the obligations toward third parties under Rule 4.4 are also put into focus and should be considered when negotiating the scope of nonparty discovery.

One specific issue related to the Rule 26(f) conference that presents unique ethical issues is the negotiation of search terms. The Sedona Conference, the leading legal think tank that has addressed electronic discovery issues, recommends the use of agreed search terms to narrow the scope of ESI that must be collected, reviewed, and produced. See *The Sedona Principles: Second Edition, Best Practices for Recommendations & Principles for Addressing Electronic Document Production* (June 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf. A number of local court orders instruct parties to discuss search terms, see, e.g., *In re Electronically Stored Information (Suggested Protocol for Discovery of Electronically Stored Information)* (D. Md.), available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>, and some courts have imposed search terms when the parties have been unable to reach agreement, *Williams v. Taser Int'l, Inc.*, 2007 WL 1630875 (N.D. Ga. June 4, 2007). At this point, no guidance has been offered regarding the ethical considerations involved in the negotiation of search terms and other search methodologies. However, the parties will most likely have unequal knowledge about what potential search terms are likely to locate relevant data in their own ESI and that of the adversary. Counsel should carefully consider the ethical obligations to clients and opposing counsel that control in these circumstances, such as when opposing counsel proposes a search term list that does not include key terms that are likely to identify responsive material or when privileged communications have revealed an otherwise unknown term that will locate relevant information.

Production of ESI: Rules 1.1, 1.6, 3.3, 3.4, 5.3

Because the mechanics involved in the discovery of ESI present challenges unknown in traditional paper discovery, lawyers must be sure they have the ability to perform these tasks competently. When dealing with ESI, lawyers must oversee the electronic collection, processing, attorney review, and production of the data. Often a vendor is employed to collect and/or process the data prior to attorney review of the materials. Also, as the volume of ESI for attorney review increases exponentially, many lawyers are turning to contract lawyers to assist in that review. When either vendors or contract lawyers are employed, lawyers should keep in mind their supervisory obligations under Rule 5.3 (Responsibilities

regarding Nonlawyer Misconduct) and Rule 5.1 (Responsibilities of Partners, Managers and Supervisory Lawyers). See also NYC Eth. Op. 2006-3, 2006 WL 2389364 (addressing outsourcing of legal support services, such as document review, overseas).

The challenges related to the collection, processing, review, and production of ESI also implicate the duties of candor to adversaries and the tribunal. Counsel must be able to make accurate representations to adversaries and the tribunal about their ability to produce ESI in a certain format at a certain time, the thoroughness of the searches and review performed, and the content of production sets.

Finally, as is also the case with traditional paper discovery, the production of responsive materials requires a lawyer to guard carefully his or her duty of confidentiality under Rule 1.6. As the Advisory Committee Notes to Rule 26(f) recognize, electronic discovery creates unique challenges to the preproduction privilege review process. Electronic discovery increases greatly the volume of information that must be reviewed for privilege. Native review or production of ESI also creates the issue of possible privileged information appearing as metadata or embedded data. Counsel must take reasonable precautions to protect privileged communications in light of these challenges. For these reasons, the Federal Rules of Civil Procedure require the parties to discuss how the inadvertent production of privileged information will be handled. F.R.C.P. 26(f) and 16(b). The Advisory Committee Notes to the rule suggest the parties consider a “clawback” or “quick peek” agreement; however, counsel must be cautioned that any agreement with opposing counsel (or even a court order incorporating the agreement) may not protect against arguments of waiver of the privilege from third parties or in other actions.²

In conclusion, the advent of electronic discovery has brought changes to the traditional obligations of lawyers in civil discovery. These obligations come not only from the applicable court rules but also arise from the Rules of Professional Conduct that govern lawyers in their representation of clients, interaction with adversaries and the courts, and supervision of others.

1. A number of state courts have begun implementing rules regarding electronic discovery. See State Court Local Rules and Statutes at <http://www.krillontrack.com/legalresources/localrules.aspx>. Additionally, this summer, the National Conference of Commissioners for Uniform State Laws proposed the Uniform Rules Relating to the Discovery of Electronic Stored Information Uniform Law, available at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007am_final.pdf. Another source for state court guidance on electronic discovery is the Conference of Chief Justices’ Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information, available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>, cited by *Analog Devices Inc. v. Michalski*, 2006 NCBC 14, 2006 WL 3287382 (N.C. Super. Nov. 1, 2006), available at <http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2014.htm>.

2. On September 27, 2007, the Judicial Conference of the United States submitted to Congress a proposed amended Federal Rule of Evidence 502 that would address and resolve this waiver concern. Text of the proposed rule is available at http://www.klgates.com/files/upload/eDAT_ER_502.pdf.