2016 CLM Annual Conference
April 6-8, 2016
Orlando, FL

REDUCE COST AND RISK DURING DISCOVERY

DEFENSE COUNSEL'S ETHICAL DUTY TO MASTER eDISCOVERY

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I. CALIFORNIA AND THE ABA MODEL RULES RECOGNIZE eDISCOVERY HAS EMERGED AS A COMPETENCY LITIGATORS MUST MASTER

A. Introduction

Competent representation can be provided only by those lawyers who keep abreast of technological advancements that will benefit their clients. Eighteen states have adopted explicit guidance for attorneys in the form of a formal ethics opinion or adoption of some variation of the American Bar Association's amended Model Rule 1.1 with commentary including Comment Nos. 1 and 8. A lack of knowledge about ESI and the technologies associated with eDiscovery impacts not only professional competence, but also ethical conduct. A practitioner who is not conversant with these issues faces malpractice and disciplinary exposure because of his or her ignorance. This paper will address a recent formal ethics opinion released by California's Committee on Professional Responsibility and Conduct, which presents a hypothetical series of misadventures committed by an attorney not conversant with ESI or eDiscovery and the recently amended ABA Model Rules, which already explicitly govern the conduct of attorneys in 18 states.

The duty to understand ESI and how to conduct eDiscovery is not only for cases where they are a significant part of the litigation, but also for cases potentially involving them, which is almost every case. That's how ESI and eDiscovery can sneak up on the unwary practitioner. For example, a civil litigator knows immediately If a potential client calls asks me for help with a patent, or child custody case, he or she knows immediately the subject matter is outside his or her area of expertise. But, attorneys who deal with any type of litigation can find themselves in a situation where they are no longer competent to represent a client because eDiscovery issues have popped up.

B. California Formal Opinion No. 2015-193

After more than a year of consideration and an extended comment period, the State Bar of California Standing Committee on Professional Responsibility and Conduct

recently issued Formal Opinion No. 2015-193 ("Opinion No. 2015-193") about some of the ethical obligations implicated when attorneys deal with ESI and eDiscovery. Recognizing that "discovery of ESI is now a frequent part of almost any litigated matter" (Opinion No. 2015-193, at p. 7), the Committee notes that "[a]ttorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to eDiscovery including the discovery of [ESI]." (*Id.*, at p. 1.) The Committee concludes improper handling of eDiscovery issues directly impacts the attorneys' ethical duties of competence and confidentiality, and potentially others, even in the absence of bad faith on the attorney's part. (*Id.*, at pp. 1 and 7.) So, "[a]ttorneys who handle litigation may not ignore the requirements and obligations of electronic discovery. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced." (*Id.*, at 7.)

The opinion suggests on attorneys have responsibility to evaluate the need for eDiscovery in every case. If eDiscovery is needed or conducted by either side in an action, lawyers on both sides must understand how the information is stored, mined, retained, searched and deleted. If the technology or process eludes them, the attorney must seek help from another source. The Committee's Digest of its opinion concludes:

> "An attorney lacking the required competence for eDiscovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in eDiscovery issues also may lead to an ethical violation of an attorney's duty of confidentiality."

These stark choices are lifted directly from the Comment on Rule 3-110; so, the only thing new about these options is their application specifically to ESI and eDiscovery. Ethics violations by legal professionals are no small matter and can easily lead to disciplinary actions as well as malpractice lawsuits.

To meet their ethical obligations regarding ESI and eDiscovery, the Committee says attorneys must ensure competent completion of the following tasks:

1. Evaluate the likely ESI issues implicated by the matter, if any;

2. Advise the client on its options for preservation, collection, processing, review and production of ESI;

3. Identify the key players and likely custodians of ESI;

4. Develop a thorough understanding of the client's electronic storage systems and information architecture;

5. Implement a proper preservation strategy;

6. Competently conduct searches to identify potentially relevant information;

7. Collect the ESI "in a matter that preserves the integrity" of the data, including metadata;

8. Competently engage in meet and confer sessions with opposing counsel; and

9. Produce responsive ESI in an appropriate format. (*Id.*, at pp. 3-4.)

A discussion of these tasks identified by the Committee appears below in the in depth discussion of the opinion and the ABA Model Rules. These discussions include reference to eDiscovery case law bearing on the obligations identified in the opinion and Model Rules.

The practitioner should take note these nine tasks are not exhaustive. Indeed, they involve only one half of the eDiscovery equation, *i.e.*, identification, preservation, collection, processing, review and production of the client's ESI, in other words responding to eDiscovery propounded by another litigant. As the Committee notes in footnote 7, these nine topics focus "on an attorney's ethical obligations relating to his own client's ESI... This opinion does not address the scope of an attorney's duty of competence relating to obtaining an opposing party's ESI." (Opinion No. 2015-193, at p. 4.) What counsel must do to conduct competent eDiscovery of ESI in possession of opposing and third parties is a separate subject raising additional duties and challenges. It presents a formidable challenge because there is no readily available model for propounding eDiscovery and evaluating the responses comparable to the Electronic Document Reference Model ("EDRM"), for responding to eDiscovery requests, which has been with us since 2006.

Although the Commission's new, formal opinion addresses only one side of the eDiscovery coin, it has caused quite a stir because it explicitly advises California attorneys they have professional and ethical duties to develop at least a basic understanding of ESI and eDiscovery. In short, "But, Your Honor, I don't understand eDiscovery," will change from a plea for another chance to make things right in a discovery dispute to a confession of sanctionable incompetence in all California courts – state or federal.

Before jumping to the conclusion that the California Committee has drifted into fantasy land, consider the 2012 amendments to the American Bar Association Model Rules of Ethics. Rule 1.1 and commentary, which impose comparable duties. Every state except California uses the ABA Model Rules as the source of their ethical codes and 17 states have already adopted the amendments mandating technological competence with respect to eDiscovery.

Authority for the Committee's formal opinion derives from Rule of Professional Conduct 3-110, which prohibits a lawyer from "intentionally, recklessly, or repeatedly fail[ing] to perform legal services with competence." (California Rules of Professional Conduct ("Cal. R. of Prof'l Conduct") Rule 3-110(A).) The rule states that "'competence' in any legal service shall mean to apply the: (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability *reasonably necessary for the performance of such service.*" (Cal. R. of Prof'l Conduct R. 3-110(B) (emphasis added).) The

Committee also relies on Rule 3-100, Business & Professions Code § 6068(e) and Evidence Code §§ 952, 954 and 955.

Although merely failing to meet community standards in a particular case may subject an attorney to malpractice exposure, a disciplinary action under Rule 3-110 becomes a real possibility if the failure is intentional, reckless or repeated. (See *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr 138, 149; see also, *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr 41; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416.) Later in the Committee's analysis of the untutored attorney's conduct, it suggests the severity of the numerous failures on the Luddite's part might warrant disciplinary action citing *In re Matter of Copren* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 861, 864; *In re Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377-78; *In re Matter of Respondent G.* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179. (Opinion No 2015-193, at p. 5.)

New Hampshire is another state which issued an advisory ethics opinion comparable to California's formal opinion. The New Hampshire Bar Association issued Advisory Opinion No. 2012-13/4 about cloud computing, which states, "Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes."

As shown in the discussion below, knowing how to respond to eDiscovery and understanding ESI are not part of a passing fad; rather they are an integral part of every litigator and trial lawyers' tool kit.

B. ABA Model Rule 1.1 Imposes Obligations Similar to Those Described in California's Formal Opinion 2015-193

Already 17 states, including New Hampshire, have adopted amended ABA Model Rule 1.1, or some variation of it, which mandates technological competence because of the rapid growth of ESI as a principle source of evidence and the concomitant expansion of eDiscovery. The states which have adopted amended Rule 1.1 since March 1, 2013, appear below:

- Arizona, effective January 1, 2015;
- Arkansas, effective June 26, 2014;
- Connecticut, effective January 1, 2014;
- Delaware, effective March 1, 2013;
- Idaho, effective July 1, 2014;
- Illinois, effective Jan. 1, 2016;
- Kansas, effective March 1, 2014;
- Massachusetts, effective July 1, 2015;
- Minnesota, approved February 24, 2015;
- New Hampshire, effective January 1, 2016;
- New Mexico, effective December 31, 2013;

- New York, adopted on March 28, 2015, by the New York State Bar Association;
- North Carolina, approved July 25, 2014 (the phrase adopted varies slightly from the Model Rule: "… including the benefits and risks associated with the technology relevant to the lawyer's practice.");
- Ohio, effective April 1, 2015;
- Pennsylvania, effective November 21, 2013;
- West Virginia, effective January 1, 2015; and
- Wyoming, effective October 6, 2014.

Because 32 other states rely on the ABA Model Rules as the foundation for their Codes of Professional Conduct, it is only a matter of time before all 50 states explicitly require technological competence of attorneys engaged on matters involving ESI. In the interim, the analyses contained in amended Rule 1.1 and the Comments are likely to apply in states that have yet to adopt the amended Rule 1.1, particularly if the state has already amended its rules of civil procedure to acknowledge the lasting presence of eDiscovery.

Lawyers who practice in states now or soon to be governed by amended Rule 1.1 are well advised to be aware of Opinion 2015-193 because it puts considerable flesh on the bones of the Rule and comments, which mirror the content of California Rule 3-110 and comments thereto.

And, lawyers in California will need to pay attention to Model Rule 1.1, associated Comments and resulting jurisprudence because although California will not adopt Rule 1.1 or the ABA Model Rules given the independent course it has charted for many years, the Model Rules nonetheless "may serve as guidelines absent on-point California authority or a conflicting state public policy." (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839, 852.)

C. The California Commission and the ABA Address an Attorney's Duties when Dealing with ESI Because It Is Everywhere and Constitutes the Overwhelming Bulk of Data Subject to Discovery in Most Cases

Given the ubiquity of ESI, It is easy to understand why ethicists, like those on the California Committee, found it necessary to state forcefully attorneys must understand at least the basics about ESI and eDiscovery in order to represent their clients effectively, *i.e.*, to meet their professional obligation to a particular client and to avoid incompetent representation, which amounts to a repeated failure to meet professional standards.

Currently, more than 99 percent of all interpersonal communications are created and stored electronically. Less than five percent is ever printed out. Relying on printouts of data could mean ignoring 95 percent or more of what may be relevant to your client's case. And, ESI exists in many forms. Focusing on email could mean missing more than 75 percent of what may be critical evidence in your case. This is a function of the rapidity with which people change the means by which they communicate.

In 2006, for example, social media was just beginning to emerge. By 2009, the volume of text and social media communications exceeded that occurring by email.

Video was just beginning to be widely used. By 2015 more than half of interpersonal communication was occurring through digital images or video. So, a discovery request propounded in 2016 limited to email correspondence could fail to capture the vast majority of interpersonal communication relevant to a dispute. Keeping up with how people involved in a pending matter actually communicate is critical to conducting eDiscovery properly.

Counsel must also be sensitive to the unique challenges ESI can create for the joint responsibility of client and counsel to preserve potentially relevant documents. These include: (1) documents can disappear; (2) computers and servers can disappear, particularly when virtual devices are involved; (3) files, documents, and computers can be corrupted or hacked; (4) documents can and will be changed by routine operations, including accessing them through the operating system and use of utilities to maintain the network or hard drive; (5) privileged documents may be shared more widely, which creates a real risk of waiver by excessive disclosure; (6) large amounts of data can be lost inadvertently through the routine operation of automated document retention and deletion protocols; (7) multiple copies of documents are likely to exist creating a risk of inconsistent treatment of data in large cases, particularly when multiple persons are making determinations of relevance and privilege; and (8) metadata must be preserved in most cases, not because it is relevant to the merits, but because it facilitates use of analytic software to speed the review process and an increasing number of courts are adopting anti degradation standing orders, which are violated if metadata is not collected or altered during collection.

Any lawyer who ignores or fails to appreciate fully how ESI differs from documents created on a typewriter or by hand places his or her client is at a disadvantage even if opposing counsel is similarly ill-equipped to deal with modern technologies. The reason is simple. Counsel cannot secure the benefits available from using information uniquely available in ESI. These include using metadata to authenticate or provide a foundation for documents whose authors or recipients are not available or using processing, deduplication and analytic software to reduce the cost of document review by as much as 90 percent or more. eDiscovery done correctly allows counsel and clients to find needles in haystacks, ignore that which is irrelevant and greatly reduce the cost of document review, the most costly part of discovery. In short, understanding ESI allows counsel to deliver a better result at a greatly reduced cost.

A RAND study showed that when conventional human review is employed in cases involving ESI, over 70 percent of the total cost of eDiscovery is attributable to review. Research shows that about 50 percent of litigation spend involves documents and eDiscovery. Other studies show that even after deduplication and other basic culling and filtering of data sets, less than 10 percent of what reviewers look at is relevant to the case, which means even if legal services on other matters are completely efficient, about 30 percent of every dollar spent in litigation does not advance the client's case. Using technologies, like predictive coding, concept searching, document clustering and near dupe analysis to do review more effectively will greatly reduce this inefficiency because it will dramatically increase the number of relevant documents at the front end of the review queue. When the queue is front end loaded with relevant documents and they are ranked according to probable relevancy, it is much easier to make a cost benefits analysis and stop the review at an appropriate inflection point.

To put a finer point on the canard that eDiscovery is more expensive than doing things "the old way," compare "the old way," which would involve printing out a small data set consisting of 5,000 pages and reviewing it linearly using the old Gold Standard of eyes on every document, with the cost of using basic eDiscovery technologies including processing that data, deduplicating it and reviewing the remainder using a review tool. Using available technologies, with which every lawyer should be familiar, reduces the cost by 75%. Can a competent attorney deny his or her client cost savings of that magnitude because he or she isn't comfortable with "new fangled technologies"? The chart below demonstrates the point.

Traditional Linear Review of Documents				eDiscovery with Deduplication and Analytics			
Photocopy	5,000 pgs.	$0.10/pg.	$500	Processing	$55/GB	0.2 GBs	$11
				Hosting	$21/GB	0.2 GBs	$4
				License Fee	$65		$65
Attorney Review	2,000 pgs./day	$225/hr.	$4,500	Analytics Assisted Review	8,000 pgs./day	$225/hr.	$1,125
Total			$5,000				$1,205

II. AN IN DEPTH LOOK AT OPINION NO. 2015-193

A. Introduction to a Luddite Attorney Who Failed to Appreciate the Professional and Ethical Challenges Associated with eDiscovery

The California Committee's formal opinion, much like a law school exam, is based on a hypothetical in which an ill-informed defense lawyer, the Luddite, stonewalls efforts by his opposing counsel to meet and confer with her about ESI and eDiscovery before a case management conference. An exasperated judge orders counsel to meet and confer in the courthouse for two hours and come up with an eDiscovery plan.

Before considering the hypothetical in depth, think about how you would respond to the issues the Luddite confronted.

Are you capable of coming up with an eDiscovery plan in 2 hours?

Do you understand how clawback agreements work?

Do you understand time frames for production?

Do you understand litigation hold letters?

What are your clients' auto delete policies?

During the meet and confer, the Luddite accepted opposing counsel's keyword terms for a search of his client's ESI and allowed opposing counsel to send her vendor to do the collection. Note, the Commission did not even address the question of whether

search methodologies other than keywords might be better suited for the particular project. The Luddite instructed his client to allow the opposing counsel and her vendor to search the client's ESI, wrongly assuming the clawback agreement they entered, which he had not carefully reviewed, would allow for recovery of anything inadvertently produced. In fact, the scope of the clawback was limited to attorney-client communications and work product.

The Luddite failed his client on two counts. First, the clawback did not protect the client's highly confidential proprietary products. Second, instead of agreeing to a clawback, like that authorized under Federal Rule of Evidence 502(d), which allows a party to obtain the return of any inadvertently produced data simply by asking for it, the agreement, consistent with FRE Rule 502(b) and most common law, allowed for recovery of inadvertently produced information only if the disclosing party could prove it took reasonable steps to secure the confidentiality of the data in question. Unfortunately, the common law in most jurisdictions holds the party seeking to recover data inadvertently disclosed to a high standard. Often, disclosure of multiple documents is sufficient to allow courts to declare waiver has occurred. Because the number of documents in a typical ESI production is much larger than historic paper productions, the likelihood some inadvertent disclosure will occur is quite high compared to historic experience.

B. The Committee's Assessment of the Luddite's Conduct and Suggested Alternatives to Secure a Better Outcome

The Committee expressly recognizes the limited protections afforded a California practitioner with respect to inadvertent disclosure and notes they are narrower than those afforded litigants in federal court. In footnote 11, the Commission states:

> "Although statute, rules, and/or case law provide some limited authority for the legal claw back of certain inadvertently produced materials, even in the absence of an express agreement, those provisions may not work to mitigate the damage caused by the production in this hypothetical. These 'default' claw back provisions typically only apply to privilege and work product information, and require both that the disclosure at issue has been truly inadvertent, and that the holder of the privilege has taken reasonable steps to prevent disclosure in the first instance. [Citations omitted.] As noted above, whether the disclosures at issue in our hypothetical truly were 'inadvertent' under either the parties' agreement or the relevant law is an open question. Indeed, Attorney will find even less assistance from California's discovery clawback statute than he will from the federal equivalent, as the California statute merely addresses the procedures for litigating a dispute on a claim of inadvertent production, and not the legal issue of waiver at all. (See Code Civ. Proc., § 2031.285.)" (Opinion No. 2015-193, at p. 7.)

This new reality and the failure of the California Legislature to adopt a curative evidentiary rule as was done in the Federal system after the 2006 amendments were adopted and the gap about dealing with inadvertent disclosures was recognized calls for different practices. These should include insisting a clawback order be entered in every

case involving ESI, either by case management or protective order, and expanding the scope beyond that in FRE Rule 502(d) to include any confidential or proprietary information. The order is essential to give universal effect to the terms of the clawback, which cannot be assured if it is limited to an agreement among the parties. This type of order can protect against the loss of trade secrets and mitigate unintended disclosure of protected health information ("PHI") or personally identifiable information ("PII") that might otherwise trigger an obligation to notify the affected parties. Imagine the complications that might arise if a healthcare provider sued for malpractice had to inform the plaintiff it allowed PHI and PII unrelated to the subject matter of the pending litigation to be disclosed in discovery responses that were not subject to appropriate quality control.

The Luddite, in the Commission's hypothetical, compounded his negligence by failing to examine the ESI collected by opposing counsel's vendor using search terms jointly developed but never tested using sampling or other techniques. Had a consultant been engaged, the over breadth of the requests could have been identified before the collection, processing and production occurred. That would have resulted in a better outcome because the client's trade secrets would not have been swept up in the collection process. (Opinion No. 2015-193, at pp. 2 and 6.) As a bonus, the smaller data footprint would have reduced collection, processing and production costs.

Defense counsel relied on his client's representation all relevant data had already been produced to him in hard copy. As a result, the Luddite missed the last clear chance to avoid delivering confidential information to opposing counsel. Counsel even missed an opportunity to correct his oversights by using the limited clawback relief he did secure when he chose not to review a copy of the ESI opposing counsel collected because he believed it would merely duplicate the printouts he had already examined. This undue delay is discovering the inadvertent production further reduced the prospect for clawing back the data.

After opposing counsel reviewed the ESI production, the Luddite learned from opposing counsel the data he never reviewed included irrelevant but extremely valuable proprietary information about his client's revolutionary new product, which he allowed to be delivered to his client's chief competitor, and evidence his client deleted some potentially relevant documents as part of a regular document retention policy. To make matters worse, he became aware of these problems in a meet and confer letter from opposing counsel accusing his client of destroying evidence and/or spoliation. She threatened his client with motions for monetary and evidentiary sanctions.

Then, belatedly the Luddite consulted an eDiscovery expert who advised had counsel employed such a person earlier, the problems of overbreadth of production and release of proprietary secrets could have been avoided. (Opinion No. 2015-193, at p. 2.) The consultant also could have helped the attorney meet his obligation to supervise the collection of ESI performed by his adversary's vendor.

Although many lawyers eschewed subjects like mathematics, science and statistics during their formal educations, there is nothing odd about an ethics committee insisting attorneys understand technologies needed to examine the evidence they must present on behalf of their clients. The Committee explains why lawyers must stay

informed about changes in legal rules and procedures brought about by new technologies, the tools available to apply the technologies and the costs likely to be incurred and savings available when the technologies are used appropriately. The Committee says, “While eDiscovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant.” (Opinion No. 2015-193, at p. 2.) It continues stating, “Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes keeping 'abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...'“ (*Id.*, at p. 3.) All this means technophobes practicing law will have to learn enough to know when to bring those with expertise in mathematics, linguistics, statistics and other sciences to assist them when dealing with ESI and eDiscovery.

Additionally, the Luddite’s ignorance prevented him from assisting the client in setting up and monitoring a litigation hold on potentially relevant ESI. Such a hold is essential to provide the client with the benefit of the safe harbor afforded by the Federal Rules of Civil Procedure (“FRCP”) and the California Discovery Act (“CDA”). In addition to this compounding lack of competence creating further malpractice exposure, it also created an additional ethical exposure because failing to oversee implementation of a litigation hold meant the lawyer breached his ethical duty not to suppress evidence.

The Committee admonishes in the Digest of its opinion:

> “Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, *i.e.*, the discovery of electronically stored information (“ESI”)… Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI.”

Litigators and trial attorneys can no longer ignore potential evidence existing as ESI. If a case involves ESI, and virtually every one does, a lack of technological knowledge about how to conduct cost effective and efficient eDiscovery will very often render an attorney ethically incompetent to handle the case, absent curative assistance under the California Rules of Professional Conduct Rule 3-110(C), even where the attorney may otherwise be highly experienced.

This edict is expansive. It applies not only to those specializing in large cases such as a “mass torts litigator,” a “complex commercial litigator” or “every lawyer who handles eDiscovery on a regular basis.” The Committee says, “Attorneys who handle litigation” and cases “related to litigation.” This means every attorney who litigates or is involved in cases related to litigation. The Committee goes on to explain this follows because more and more basic litigation cases involve eDiscovery. A simple vehicle collision with personal injuries will likely involve a “black box,” onboard computer systems, emergency response communications, dash cams and body cams on the vehicles and person of first responders, GPS data on vehicle and personal devices, data on personal or onboard devices which may point to the driver being distracted at the

time of the collision, video from security surveillance cameras, digital photographs and video taken by witnesses to the collision and its aftermath, social media, texting and email generated by witnesses, not to mention electronic health records. If the event is severe enough to be newsworthy, there will be video and audio records created by news organizations, some of which may be posted on the internet.

Understanding technology and how it relates to ESI involves more than knowing what and where the data is. It also requires counsel to know how to utilize the electronic formats to reduce client costs when preparing standard parts of discovery responses, like privilege logs. Expenses associated with generating privilege logs can be reduced dramatically by taking advantage of electronic information embedded in ESI such as metadata, or data about data.

An example proves the point. Recently, counsel was preparing for an arbitration. Opposing counsel obtained an order directing a comprehensive privilege log be created over the July 4th weekend or an expert's testimony would be barred. The log needed to describe about 12,500 emails, which counsel had printed out into 3 ring binders. Before consulting an eDiscovery expert, counsel was preparing to deliver the bad news that 30 paralegals would have to suspend their holiday plans and sit with binders and a dictation machine to populate the log. Assuming the paralegals each made about 100 entries into the log a day, and billed at a rate of $100 per hour, the cost of the project would have been about $100,000.00. When the consultant looked at the data, which had been received electronically, he ascertained it could be processed and the metadata and extracted text could be used to populate a spreadsheet using the fielded information in the emails, including sender, recipients, date of creation and subject matter based on the content of the Re: line. Because the emails all involved communications between clients, consulting experts and counsel, and the names of each were known, it was a simple process to bulk code the documents for the appropriate privilege(s). The processing was almost instantaneous because of the small volume involved, about 2 GBs, and cost less than $500.00. The attorney and 3 paralegals were able to do a quality control review of the spreadsheet generated by the review platform, which was about 90% complete, in two and a half days. The combined cost of the technology and paralegal time to create a compliant privilege log using the metadata and extracted text was $6,500.00, or 93.5% less than doing things the "old fashioned way."

To be sure, not every litigated case ultimately involves eDiscovery; but, in today's technological world, almost every case *potentially* does. Because electronic document creation and/or storage and electronic communications have become standard practice in modern life, the chances are overwhelming a party or a witness used email or other electronic communications, stored information digitally, and/or has other forms of ESI related to the dispute.

The Luddite not only breached his duty of competence, exposing himself to malpractice and disciplinary liabilities, but also breached additional ethical and professional duties, including the duties to maintain client confidences, to protect privileged information, to supervise those involved in the process of collecting, processing, reviewing and producing ESI in response to discovery requests and to

preserve potentially relevant evidence against routine deletion. (Opinion No. 2015-193, at p. 2.)

C. Evaluating the Likely ESI Issues Implicated by Claims Involved in the Action

The Committee describes the initial assessments attorneys must make by observing:

> "We start with the premise that 'competent' handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate or consult with someone with the expertise to assist. Rule 3-110(C)." (*Id.*, at p. 3.)

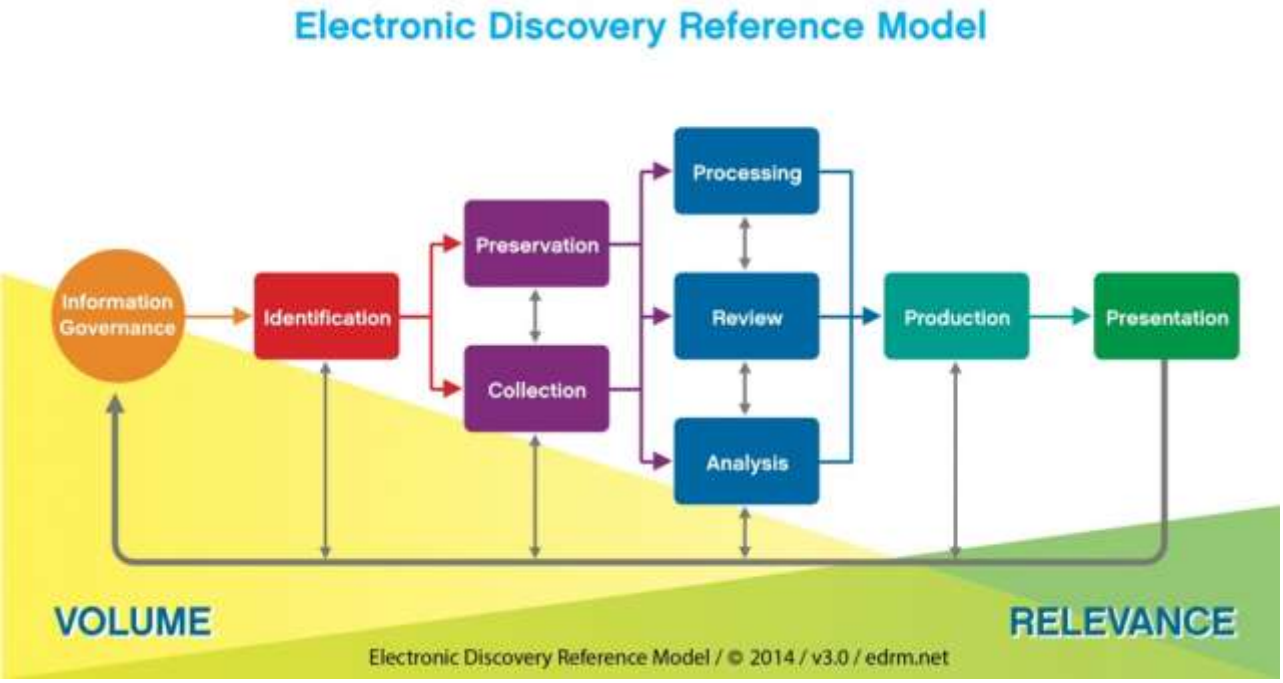
What an attorney must do to conduct him or herself competently with respect to eDiscovery evolves over the life of the case. The Commission notes the Luddite risked breaching his duty at the outset of the case when he failed "to perform a timely e-discovery evaluation." (*Id.*, at p. 4.) He compounded his error when after learning opposing counsel was insisting "on the exchange of e-discovery [and] it became certain that e-discovery would be implicated," he did nothing despite the fact "the risk of a breach of the duty of competence grew considerably…" (*Id.*) Her demand for eDiscovery "should have prompted [the Luddite] to take additional steps to obtain competence, as contemplated under rule 3-110(C), [by] consulting an e-discovery expert." (*Id.*)

A key consideration not addressed in the Commission's Opinion is proportionality. This concept is addressed in depth by the amendments to the FRCP which will go into effect on December 1, 2015. Because th Commission relies heavily on the FRCP for guidance when California precedent is lacking, practitioners would be well advised to understand the concept as it applies to eDiscovery.

D. Counsel Must Be Prepared to Advise Clients about Options for Preservation, Collection, Processing, Review and Production of ESI

The EDRM provides an excellent guide for dealing with the many tasks associated with evaluating a client's ESI and preparing it for production in response to eDiscovery requests from opposing counsel. In provides a common nomenclature and processes, which are often referenced in opinions and commentaries about eDiscovery.

The basic model appears below and extensive commentary can be found at www.edrm.net.



The Luddite's failure to address the litigation hold was one of many failures identified by the Committee. (Opinion No. 2015-193, at p. 3, fn. 6.) In a laundry list, it sets forth the many failures to provide advice and unwarranted assumptions committed by defense counsel. The Committee states:

> "[R]elying on his familiarity with Client's IT department, [1] Attorney assumed the department understood network searches better than he did. [2] He gave them no further instructions other than to allow [Opposing Counsel's] Vender access on the date of the network search. [3] He provided them with no information regarding how discovery works in litigation, [4] differences between a party affiliated vendor and a neutral vendor, [5] what could constitute waiver under the law, [6[what case-specific issues were involved, or [7] applicable search terms." (*Id.*, at pp. 5-6.)

These sins of commission and omission resulted in the client putting its Crown Jewels into the hands of its principle competitor. According to the Committee, the Luddite's unknowing dereliction of duties resulted in a wholly unnecessary compromise of the client's intellectual property because, as a result of counsel's inaction:

> "Client allowed [opposing counsel's eDiscovery] Vendor direct access to its entire network, without the presence of any Client representative to observe or monitor Vendor's actions. Vendor retrieved proprietary trade secret and privileged information, a result Expert advised Attorney could

> have been prevented had a trained IT individual been involved from the outset. In addition, Attorney failed to warn Client of the potential significant legal effect of not suspending its routine document deletion protocol under its document retention program." (*Id.*, at p. 6.)

In the hypothetical, the Luddite failed to recognize granting opposing counsel access to his client's data sources is not the norm. The Committee cites to the Advisory Committee Notes to the 2006 Amendments to the Rule 34 of the FRCP to underscore the unusual nature of this accommodation. In footnote 8, the Committee quotes the Notes and analysis provided by The Sedona Conference, as follows:

> "'Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) … is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.' See also The Sedona Principles Addressing Electronic Document Production (2nd Ed. 2007), Comment 10(b) ('Special issues may arise with any request to secure direct access to electronically stored information or to computer devices or systems on which it resides. Protective orders should be in place to guard against any release of proprietary, confidential, or personal electronically stored information accessible to the adversary or its expert.')." (Opinion No. 2015-193, at p. 5.)

Obviously, abdication of control over the collection process to opposing counsel and her vendor did not comport with the existing standards referenced by the Commission.

Regardless of the protocols for ESI production to which the parties agree, it is essential that counsel keep records about the ESI collection process and make sure information is collected to answer the following questions, among others:

- What custodians were involved?
- Have all places where potentially relevant documents may reside been identified?
- Does the index of identified documents include documents located:
  - On servers;
  - On local hard drives;
  - On mobile devices;
  - On USB or thumb-drives;

        - On other removable storage devices;
        - On back-up media, which may have to be restored if that is the only source for certain documents or information; or
        - In the cloud?
    - What was collected?
    - Who created the documents?
    - When they were created?
    - Is there any other relevant information?
    - Has metadata been preserved?

While preservation of all potentially responsive ESI is generally required until an agreement or case management order is entered limiting the scope of the preservation obligation, collection should not be so broad as to be coincident with the preserved data. Collection should be limited to unique documents, including metadata, from each material custodian and in location where the custodian stored data, unless excused from doing so by an agreement or court order.

Some additional questions to think about include: (1) Have you interviewed custodians so you know how to locate their files containing potentially relevant information? (Far too often counsel learn after the fact custodians store data in idiosyncratic ways that differ markedly from official practices described by the IT Department.) (2) Have you ensured all identified documents are exempt from the automatic document retention and destruction procedures? (This should be part of the litigation hold process.) (3) If not, have you obtained copies in a defensible manner so that if data is deleted the risk of spoliation is minimized? ("Defensible" does not necessarily mean forensic. You should determine whether a logical or targeted collection gathering content rather than making a byte by byte image of the information on a storage device is sufficient. The cost differential can be significant in a large case.)

The identification, preservation and collection processes, which appear on the left side of the EDRM model, are joint responsibilities of attorneys and clients. Counsel fall short if they are not actively involved in these processes. They cannot simply take client representations about these processes at face value. Case law establishes attorneys must live by the admonition of the Great Communicator, "Trust, but Verify." We selected older, seminal cases to illustrate the point these duties are not new. As a result, courts have become less forgiving when dealing with alleged breaches of eDiscovery obligations.

in *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y.2006), the court addresses the duty of counsel to identify and preserve the ESI

of a defunct corporation. Suit was filed in May 2005 and counsel requested the client to produce electronic and hard copy documents. The client did not find electronic documents hidden behind the partition and advised counsel that none existed. A year later on the eve of trial, the ESI behind the partition was discovered; the client immediately notified counsel who notified opposing counsel. Despite taking appropriate curative steps, the court found counsel's "deficiencies here to constitute gross negligence" and awarded monetary sanctions against counsel and client. It observed counsel's obligation is not confined to a request for documents; the duty is to search for *sources* of information.

Counsel never undertook the more methodical survey of the client's sources of information such as is outlined in *Zubulake V.* Rather, counsel simply accepted the clients' representations because the company was no longer in operation, there were no computers or electronic collections to search. Had counsel been diligent, they might have asked - as they should have - what had happened to the computers? Further, counsel's obligation under *Zubulake V* extends to an inquiry as to whether information was stored on that server and, had the client been unable to answer the question, directing a technician examine the server. In the case of a defunct organization, this forensic effort would be no more than the equivalent of questioning the IT personnel of a live enterprise about how information is stored on the computer system.

Turning to the preservation obligation, courts find counsel must do more than provide bromides about not deleting data. In *Samsung Electronics Co., Ltd. v. Rambus, Inc*. 2006 WL 2038417 (E.D. Va. 2006), the Court finds general admonitions by counsel to preserve relevant documents are insufficient. Instead, counsel must instruct on the subject matter and kinds of documents to preserve. The court discussed the duty of counsel to assure retention of documents relevant to litigation, criticized counsel about advice given in 1998 regarding document preservation, and noted "...in order to have an effective suspension of the document destruction plan during litigation, employees must be specifically instructed respecting what documents are relevant to the litigation (and thus cannot be destroyed) and what documents are not relevant (and thus can be destroyed)."

Counsel should not be glib or vague when providing advice about preservation of ESI. When issues of spoliation arise, discovery about discovery often ensures. It focuses on what, if anything, was said and done when the prospect of litigation became reasonably foreseeable. The inquiry can reach the content of attorney instructions and the vehicle to provide the courts and opposing counsel access to these discussions is often the crime-fraud exception to the attorney-client and work product privileges.

Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376 (D.N.J.2006) is one of several cases to apply the crime-fraud exception to attorney-client privilege and work product privileges to get to the root of issues relating to spoliation of e-mail. The court finds:

> "Defendants may have used their counsel to delay discovery. Throughout discovery, Plaintiffs expressed concerns... Defendants were not taking all appropriate steps to preserve and produce relevant documents. In response ... Health Net's counsel...stated...'we are familiar with our

> obligations' and that the company 'has complied with its obligations to preserve evidence.' Despite these assurances, there has been a *prima facie* showing that Health Net did not have effective procedures in place to ensure the preservation of employees' electronic mail."

Even legitimate advice can be second guessed if it appears the intended result was to obstruct access to potentially relevant information. In *Hynix Semiconductor Inc. v. Rambus, Inc.* Slip Copy, 2006 WL 565893 (N.D. Cal. 2006), the trial court ultimately rejected claims of spoliation and a request for a dismissal based upon unclean hands, despite the loss of data. The challenge arose because Rambus adopted a document retention policy, which aggressively eliminated data, while it was formulating a strategy for licensing and litigating patent claims. The propriety of the retention policy itself--- which reduced the life cycle of backup tapes, eliminated drafts, encouraged elimination of unnecessary email--- was not disputed. "The primary question before the court is whether Rambus adopted and implemented its document retention policy in advance of reasonably foreseeable litigation for the purpose of destroying relevant information." To get to the bottom of the issue, the court reviewed in detail the advice and testimony of counsel regarding the development and implementation of document retention policy.

Similarly, *In re Grand Jury Investigation*, 445 F.3d 266 (3d Cir. 2006), the court affirmed application of the crime-fraud exception to attorney-client and work product privileged communications in grand jury proceedings where counsel advised the executive of receipt of a subpoena and email was subsequently deleted. Such advice was used in "furtherance" of the crime.

The Commission summarizes its assessment of the Luddite's deficient handling of his client's ESI stating:

> "Here, Attorney took only minimal steps to protect Client's ESI, or to instruct/supervise Client in the gathering and production of that ESI, and instead released everything without prior review, inappropriately relying on a clawback agreement. Client's secrets are now in Chief Competitor's hands, and further, Chief Competitor may claim that Client has waived the attorney-client privilege. Client has been exposed to that potential dispute as the direct result of Attorney's actions. Attorney may have breached his duty of confidentiality to Client." (Opinion No. 2015-193, at p. 7.)

E. Identifying Key Players and Likely Custodians of ESI

The Committee had nothing to say about this key part of the eDiscovery process, likely recognizing this is not a subject matter requiring technological sophistication. This involves old fashioned investigation and interviews, which are skills the Luddite in the hypothetical had undoubtedly honed through his many years of experience. Although properly conducted eDiscovery requires development of new skills, those developed over years and decades by experienced trial attorneys and litigators remain essential parts of a competent lawyer's tool kit.

F. Developing a Thorough Understanding of the Client's Electronic Storage Systems and Information Architecture

eDiscovery competence includes understanding the client's Information Technology (IT) architecture and practices, so potentially relevant documents can be identified. The same investigative and interviewing skills used to identify likely custodians need to be applied to understand the client's ESI and hardware housing it. The questions, however, are different. It is useful to think in terms of checklists and systematic lists of questions, which should include:

- Where can custodians save documents?
- In practice, where do custodians save documents? (on computer hard-drives, on thumb-drives, on company servers, as e-mail attachments, on personal devices, etc.)
- How are emails stored and archived?
- What are the potential risks to document retention for server migrations, software updates, or e-mail conversions?
- What happens to the hard drives of the computers of personnel who leave the company?
- Can documents or files be "locked" so only specific individuals have access?
- How are mobile devices integrated into the client's network?
- How are passwords and encryption used by the client?
- Does the client have a bring your own device ("BYOD") policy or practice?
- Are there automated deletion processes in operation, *e.g.*, emails more than 60 days old are deleted?
- What are the client's data retention and deletion protocols?
- Are the data protocols followed?
- How does the back-up and disaster recovery solution work?
- How long are back-up media retained?
- Where are the servers located?
- Who has access to the servers?

- Is any of the information stored in the cloud?

- If so, who is the service provider and are there any limitations on the client's right of access to the data in the cloud?

G. Implementing a Proper Preservation Strategy (Avoiding Spoliation)

Although the Commission addresses a large number of issues relating to ESI, eDiscovery, competence and other ethical obligations like supervision and preservation of client confidences in the seven page opinion, it expressly recognizes a number of very important issues are not addressed directly. Among those issues barely touched by the Commission are "ethical obligations relating to legal holds." (Opinion No. 2015-193, at p. 3, fn. 6.) A litigation hold, which is essential to suspend the routine destruction of data pursuant to a document retention and destruction plan, serves as the backbone of any preservation effort overseen by counsel and for which he or she is jointly responsible with the client. The limited discussion appearing in footnote 6 provides:

> "A litigation hold is a directive issued to, by, or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such documents, pending further direction. See generally Redgrave, *Sedona Conference® Commentary on Legal Holds: The Trigger and The Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260-270, 277-279. Prompt issuance of a litigation hold may prevent spoliation of evidence, and the duty to do so falls on both the party and outside counsel working on the matter. See *Zubulake v. UBS Warburg LLC* (S.D.N.Y 2003) 220 F.R.D. 212, 218 and *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2004) 229 F.R.D. 422, 432. Spoliation of evidence can result in significant sanctions, including monetary and/or evidentiary sanctions, which may impact a client's case significantly." (*Id.*, at pp. 3-4, fn. 6.)

Counsel must be aware of when the duty to preserve potentially relevant ESI may attach and ensure that the client implements necessary protections. Failing to do so may constitute spoliation which is "the destruction or significant alteration of evidence or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." (*United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263 (2007).) Spoliation can result in sanctions being imposed against the client, against counsel directly or indirectly when the client seeks indemnification for sanctions awarded against it.

Counsel have a duty to monitor and direct retention efforts. Once litigation is anticipated counsel must: (1) advise the client to suspend routine document retention/destruction policies for all accessible information; (2) ensure litigation holds are issued and direct employees to preserve both paper and electronic records; (3) communicate the preservation duty to persons with relevant information; (4) speak

directly to the key players in the litigation; (5) oversee compliance with the litigation hold; and (6) monitor the client's efforts to retain and produce relevant documents. (*See The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 685 F.Supp.2d 456 (S.D.N.Y. 2010); *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y, 2004).)

H. Competently Conducting Searches to Identify Potentially Relevant Information and Exclude from Production Privileged or Confidential Materials

Counsel must communicate with his or her client to ensure that all sources of relevant information are identified. This involves more than simply asking the client for responsive ESI. It involves searching for the sources of information. Counsel may not simply accept a client's representation that there is nothing to search. If the client cannot answer technical questions, counsel must coordinate the retention of technical expertise to help determine if relevant documents exist. (*See Phoenix Four, Inc. v. Strategic Resources Corporation*, *supra*.)

Counsel must: (1) make a reasonable inquiry into the basis of discovery responses; (2) make an adequate inquiry to ensure that the client has provided all the relevant information and documents available; (3) keep records of the retention and production process to support discovery responses and to show compliance; (4) assist in implementing a systematic procedure for document production or for the retention of documents, including electronic documents; (5) must provide adequate supervision to junior attorneys, laypersons, and vendors involved in the production and retention process. (*See Metropolitan Opera Association, Inc., v. Local 100, Hotel Employees and Restaurant Employees International Union*, 212 F.R.D. 178 (S.D.N.Y. 2003); *See also* DC Bar Opinion 21-12.)

Any searches to identify potentially relevant documents may need to be updated once a discovery request is issued.

Decisions regarding any search parameters (search terms, date limitations, custodians, etc.) should be well documented and available for disclosure, if required. Cooperation with the opposing party and its counsel may be important for this process. When the search protocols are inadequate, the consequences can be severe. In *Qualcomm Inc. v. Broadcom*, 2008 WL 66932 (S.D. Cal. 2008) *vacated in part*, 2008 WL 638108 (S.D. Cal. 2008), individual attorneys were sanctioned and referred to the State Bar of California for failure to disclose emails the existence of which became known during trial. The Magistrate Judge found, "the Sanctioned Attorneys violated their discovery obligations and also may have violated their ethical duties."

In *Metropolitan Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emp. Int'l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003), the court imposed monetary sanctions on defendant and its counsel because they failed to conduct adequate efforts to locate responsive ESI thereby unreasonably obstructing and delaying discovery.

I. Collecting the ESI "In a Manner that Preserves the Integrity" of the Data, Including Metadata or Data about Data

Metadata provides information about electronic documents, such as how, when and by whom an electronic document was collected, created, accessed, and modified. As early as 2009 the Magistrate Judges in the Middle District of Florida recognized stripping metadata as a discovery tactic was sanctionable in *Bray & Gillespie Management LLC v. Lexington Insurance Co.*, 259 F.R.D. 568 (M.D. Fla. 2009). Electronic data with metadata intact is much more useful than "dumb" images. It can be sorted in various ways and authenticated, even when no human is available to lay a foundation. "Dumb" images must be reviewed linearly at great, unnecessary expenditures of time and money. The Court characterized the dumbing down of data by stripping out metadata as imposing a litigation tax on adversaries.

There are many types of metadata about which counsel conducting eDiscovery should be aware. Issues about these different types of metadata need to be considered during initial conferences with opposing counsel. Properly handled, these discussions can result in significant cost savings over the life of a case. An example is the preparation of cost effective privilege logs, as described above. Commonly discussed types of metadata include:

Application metadata: information required to create the file, such as fonts, styles, and spacing;

Document metadata: information about the properties of the file, such as document author, creation, and revision dates and times;

File System metadata: stored externally from the document and generated by the system to track information, such as the name, size, and location of an electronic document;

Email metadata: information within the email program, such as blind carbon copy, received date, and sent date;

Embedded metadata: information that is generally hidden but a part of the file, such as spreadsheet formulas, hidden columns, track changes, comments, and notes.

Ethical issues involving metadata:

(1) generally focus on confidentiality and privilege associated with embedded data and preservation of evidence, but can also involve competency and adequate supervision.

(2) vary based on whether the production of documents is in a discovery or non-discovery context.

(3) vary significantly by state.

Not all metadata will be relevant or helpful.

J. Competently Engaging in Meet and Confer Sessions with Opposing Counsel and Complying with Duties to Third Parties and the Court

1. Introduction

The Luddite's problems began when he declined invitations to meet and confer in advance of the initial case management conference and were compounded when he met and conferred without adequate knowledge about his client's ESI and the eDiscovery process to protect his client's interests. He entered into disadvantageous agreements because of his ignorance.

2. Duties to Third Parties

A Lawyer shall not advise violation of law, rule or ruling (Calif. R. of Prof'l Con. Rule 3-210) or "unlawfully obstruct another party's access to evidence…" (ABA Model Rule 3.4 (a)) counsel or assist a client to do so (ABA Model Rule 3.4 (a)) fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party (ABA Model Rule 3.4 (d)) or suppress any evidence that the … client has a legal obligation to … produce. (Calif. R. of Prof'l Con. Rule 5-220)

In *Qualcomm Inc. v. Broadcom Corp.*, *supra*, the court addresses California Rules 3-210 and 5-220, among others stating:

> "...the Court finds that these attorneys did not conduct a reasonable inquiry into the adequacy of Qualcomm's document search and production and, accordingly, they are responsible, along with Qualcomm, for the monumental discovery violation." (*Id.*, 2008 WL 66932, at *55-56.)

In Footnote 10 the court states counsel must withdraw from the representation of a client if the client will not provide data responsive to a discovery request. The attorneys including Leung, Mammen and Batchelder were subject to sanctions by the Magistrate Judge and ordered to report themselves to the State Bar Association for potential discipline because of what the court perceived as potential ethical violations:

> "Leung's attorney represented during the OSC hearing that Leung requested a more thorough document search but that Qualcomm refused to do so. October 12, 2007 Hearing Transcript at 14-15. If Leung was unable to get Qualcomm to conduct the type of search he deemed necessary to verify the adequacy of the document search and production, then he should have obtained the assistance of supervising or senior attorneys. If Mammen and Batchelder were unable to get Qualcomm to conduct a competent and thorough document search, they should have

withdrawn from the case or taken other action to ensure production of the evidence. See The State Bar of California, Rules of Professional Conduct, Rule 5-220 (a lawyer shall not suppress evidence that the lawyer or the lawyer's client has a legal obligation to reveal); Rule 3-700 (a lawyer shall withdraw from employment if the lawyer knows or should know that continued employment will result in a violation of these rules or the client insists that the lawyer pursue a course of conduct prohibited under these rules). Attorneys' ethical obligations do not permit them to participate in an inadequate document search and then provide misleading and incomplete information to their opponents and false arguments to the court. *Id.*; Rule 5-200 (a lawyer shall not seek to mislead the judge or jury by a false statement of fact or law); see also, *In re Marriage of Gong and Kwong*, 157 Cal. App. 4th 939, 951 (1st Dist. 2007) ("[a]n attorney in a civil case is not a hired gun required to carry out every direction given by the client;" he must act like the professional he is)." (*Id.*, 2008 WL 66932, at *49-50.)

Under the ABA Model Rules, similarly, a lawyer cannot improperly withhold documents from a requesting party, regardless of whether the client is a litigant or third party responding to a subpoena. Model Rule 3.4 addresses fairness to the requesting party and counsel. It bars a lawyer from unlawfully obstructing a party's access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value. Comment 2 to Rule 3.4 recognizes the right of a litigant to obtain evidence through discovery or subpoena is an important procedural right.

3. Candor Towards the Tribunal

Model Rule 3.3 prohibits a lawyer form knowingly: (1) making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or (2) offering evidence the lawyer knows to be false. Certain cases address spoliation and provide significant guidance regarding counsel's duties for retention, preservation, and production of ESI. (*The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 685 F.Supp.2d 456 (S.D.N.Y. 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 269 F.R.D. 497 (D. Md. 2010); Q*ualcomm Inc. v. Broadcom, supra* ; *Phoenix Four, Inc., v. Strategic Resources Corporation*, *supra*; *Zubulake V,* supra; *Metropolitan Opera Association, Inc., v. Local 100, Hotel Employees and Restaurant Employees International Union*, *supra*.)

K. Producing Responsive ESI in an Appropriate Format

The Committee does not address the nuts and bolts issues involved with production of ESI in response to a discovery request. These are addressed in some detail by the FRCP and CDA. The requesting party can specify how production should be made to suit its convenience. The responding party can accept the production criteria or provide alternative formats. In the absence of any specification by the parties or by court order, data should be produced in the manner in which it is ordinarily maintained,

provided that format is one that is readily accessible. If a proprietary format is involved, the producing party may have to make available the program used to host the data or convert it into a readily accessible format. These are all issues appropriately addressed during initial meet and confer discussions. Because non-standard production issues are comparatively rare, they were probably beyond the scope of what the Committee sought to address during its first foray into the eDiscovery maze.

L. Duty to Supervise

The Committee notes the duty to supervise included in Rule 3-110:

> "[I]ncludes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents. See Discussion to rule 3-110. This duty to supervise can extend to outside vendors or contractors, and even to the client itself. See California State Bar Formal Opn. No. 2004-165 (duty to supervise outside contract lawyers); San Diego County Bar Association Formal Opn. No 2012-1 (duty to supervise clients relating to ESI, citing *Cardenas v. Dorel Juvenile Group, Inc*. (D. Kan. 2006) 2006 WL 1537394)." (Opinion No. 2015-193, at p. 5.)

The Committee also notes that while an attorney can satisfy his or her obligation to act competently by associating with an expert, who may be another attorney or a vendor, that attorney remains personally responsible for the conduct of the case. The attorney can discharge this non-delegable duty only by remaining closely involved with the case. (*Id*., at p. 5.) This includes:

> "[R]emaining regularly engaged in the expert's work, … educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by the law or by the court, and of any relevant risks associated with the e-discovery tasks at hand. The attorney should issue appropriate tests until satisfied that the attorney is meeting his ethical obligations prior to releasing ESI." (*Id*., at p. 5.)

The Committee was highly critical of the Luddite's "hands off" approach to data collection, which allowed an unsupervised party affiliated vendor to have access to the client's network. (*Id*., at pp. 5-6.)

The Comment to Rule 3-110 observes, "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. [Numerous citations.]" (See also, *Samsung Electronics Co., Ltd. v. Rambus, Inc*. 2006 WL 2038417 (E.D.Va.) [duty to instruct with specificity]; *Cardenas v. Dorel Juvenile Group, Inc*., 2006 WL 1537394 (D. Kan. 2006) While granting monetary sanctions, the trial court reiterated counsel's duty in conducting discovery relying upon *Bratka v. Anheuser-Busch Co., Inc*., 164 F.R.D. 448, 461(S.D.Ohio,1995), observing:

> "Trial counsel have a duty to exercise some degree of oversight over their clients' employees to ensure that they are acting competently, diligently, and ethically in order to fulfill their responsibility to the Court and opposing parties. Accordingly, trial counsel have the obligation to communicate with in-house counsel to identify the persons having responsibility for the matters that are the subject of the document requests and to identify all employees likely to have been authors, recipients or custodians of documents falling within the request. Trial counsel also have an obligation to review all documents received from the client to see whether they indicate the existence of other documents not previously retrieved or produced. The Court does not find that these duties were met here...."

III. A CLOSER LOOK AT ABA MODEL RULE 1.1

ABA Model Rule 1.1 establishes competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Maintaining competence includes knowledge of the benefits and risks of relevant technology. Comments 1 and 8 to Rule 1.1 are particularly instructive on the issues of technological competence, ESI and eDiscovery. They provide:

> "Rule 1.1 Competence - Comment
>
> "Legal Knowledge and Skill
>
> "[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. …
>
> "Maintaining Competence
>
> "[8] 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."

There is nothing new about Rule 1.1 – only its application in a contemporary world where changing technology has impacted the practice of law in major ways regardless of the desires of practitioners. (R.D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, Hofstra L. Rev.,Vl.42:175,176(2013); J. Podgers, *You Don't Need Perfect Tech Knowhow for Ethics' Sake–But a Reasonable Grasp Is Essential*, ABA J. - Annual Meeting(8/9/4).)

This manifestation may include new challenges associated with the practice of law, including awareness of "social media sites," the "growing use of the cloud," the "risks associated with using mobile devices," and "basic issues of data security";(J. Browning, *Legal Ethics and Social Media: It's Complicated*, Dallas Bar Association (December 2013); J. Kessler, *Are You in Compliance with ABA Rule 1.1?* AbacusLaw (April 30, 2014)) the use of technology to "help enforce document retention policies"; (M. Nelson, *New Changes to Model Rules a Wake-up Call for Technologically Challenged Lawyers*, Inside Counsel Magazine(3/28/13) basic use of modern "legal research services"; (D. Jackson, *Can Lawyers Be Luddites? Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology*, Oklahoma Bar J. V. 84(12/2013)) and "recurrent issues like metadata within documents." (R.D. Rotunda, *supra.*) And lawyers may not recognize those instances—in which "mere association or consultation" with other lawyers may not be sufficient, (M. Nelson, *supra*) as "simply making another, seemingly more 'tech-savvy' lawyer or staff member the point person for all things technological" presents its own set of ethical and practical challenges. (A. M. Vogel, *Should California Lawyers Have a Duty of "Compu-tence"?* Los Angeles County Bar Association – County Bar Update (October 2013).)

Despite what lawyers do or do not recognize, they are still required to maintain a level of core competence, which changes with time and technologies. Fortunately, this level of competence is not perfection, but rather a one of reasonableness. (Podgers, *supra.*) However, changing technologies and their burgeoning complexity have resulted in a number of judicial decisions which find, far too often, lawyers fail to recognize competency mandated by ABA Model Rule 1.1 or California Rule 3-110 is elastic and expands, as appropriate, to keep pace with the digital age—and that the skills they must master to deliver competent representation have expanded as well.

IV. PREDICTIVE CODING OR ONE WAY KEEPING ABREAST OF TECHNOLOGY CHANGES MAY HELP KEEP LITIGATION AFFORDABLE

With respect to the state of eDiscovery in the digital age, keeping "abreast of changes in the law" undoubtedly includes becoming familiar with the benefits and risks associated with predictive coding. It is an alternative to the drudgery of a page-by-page manual document review. Some practitioners anticipate an associated ethical obligation to use cost saving technologies in the near future, (D.C. Weiss, *Lawyer for E-Discovery Company Predicts Predictive Coding Will Become an Ethical Obligation*, ABA Journal Law News Now (Dec. 6, 2012)) while others believe the change will be prompted by clients' cost sensitivities. (J. Calloway, *Will Predictive Coding in E-Discovery Become an Ethical Requirement?* Jim Calloway's Law Practice Tips Blog (Dec. 19, 2012).)

Attorneys have eschewed using predictive coding despite the fact the underlying technology has existed for decades, because the profession is notoriously slow to change. (D. DeWitte, *Tech of Law: Fast-Changing Technology Meets Slow-Changing Profession*, The Iowa Gazette (May 15, 2011).) For example, one of the widely used predictive coding programs uses Latent Semantic Indexing, a technology well recognized by linguists and statisticians by the mid to late 1980s. Although thoroughly vetted and able to withstand any *Daubert* challenge, counsel were reluctant to use the

technology until Judge Andrew Peck issued his *DaSilva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D. N.Y. 2012) decision in February 2012. No one wanted to be the guinea pig or poster child in a reported case mandating a production be redone because a judge was uncomfortable with the science. Even after Judge Peck's watershed opinion, there have been relatively few judicial opinions directly addressing predictive coding and most of these were issued after the ABA's amendments to Rule 1.1. None of these opinions contains the dreaded castigation of counsel for using predictive coding. Perhaps the judiciary is less close minded than the lawyers who appear before them.

These technologies allow for cost effective eDiscovery because they dramatically reduce the number of documents that have to be examined by human reviewers. In one case we used predictive coding several years before Judge Peck opined it was appropriate to use when conducting an eDiscovery review. It was employed because it was the only way the client could have afforded to defend the case. Given the volume of data that was potentially responsive and the absence of persons familiar with its content because of a change in management, the estimated cost of a traditional linear review would have exceeded the available insurance proceeds, leaving nothing for other defense activities or settlement. The insured demanded the case be resolved within policy limits and threatened bad faith litigation if it was not. The insured's lenders threatened to withhold needed funding unless the proceeds would not be subject to a judgment adverse to the insured. The insurer asked if anything could be done to reduce the cost of eDiscovery. The answer was technology in the form of predictive coding. Counsel prepared a seed set of relevant documents and the software sorted the entire data set. It pushed the most relevant documents to the front of the review queue and this allowed counsel to identify relevant documents, produce those responsive to discovery requests and present supporting documents at a mediation which resolved the matter within policy limits. When the richness of the remaining data reached a point it was not cost effective to review further, *i.e.*, fewer than 1 in 100 documents was even remotely relevant, the review process stopped. Opposing counsel was provided with the statistical analysis of the remaining data and samples to review. They were offered the opportunity to review the lean data set, but declined after reviewing the analysis and samples, also concluding doing so would not be cost effective.

This solution, which allowed the insured to remain in business and avoided a bad faith suit, was only possible because counsel and the clients opted to take advantage of proven technologies other lawyers were not comfortable using.

Even with successes like that described above, the full benefit of predictive coding is not yet achievable. The conservative protocols for use of the technology developed by attorneys and approved by courts at their request have stifled the application of the technologies. Demands for transparency, which were unheard of during the days of linear reviews of paper documents, give rise to unnecessary intrusions into the culling and review processes. Requiring disclosure of documents deemed not relevant is particularly problematic because it may contribute to filing additional actions against manufacturing and pharmaceutical clients, among others. This presents another ethical issue for counsel. They must balance cost savings against a potential exposure to the client to additional claims. Failing to consider these

possibilities will leave counsel in the same position as the Luddite in the Commission's hypothetical, *i.e.*, damaging the client by failing to understand the pros and cons of technological changes to the discovery process.

Aside from predictive coding, keyword searches to identify and collect electronic evidence are also part of what Rule 1.1 contemplates as a form of technology of which lawyers must keep abreast. Keyword searching, although simpler than predictive coding, is not done competently by simply generating a blind list. This is exemplified by cases such as *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.,* 256 F.R.D. 134, 136 (S.D.N.Y. 2009), which frown on the use of the technology in the absence of a true understanding or strategy behind the method. In *Gross,* the court finds:

> "Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this."

Whether the technology involves predictive coding, keyword searching, retaining service providers, or even enlisting contract attorney assistance (among other things), the commentary to the amendments to Rule 1.1 demonstrates that attorneys must understand the benefits and risks of new technologies that have so rapidly usurped the old way of practicing law. Rule 1.1 is elastic for good reason: because technology is too.

V. CONCLUSION

There is only one solution to the data explosion that has occurred in the 21st Century. The same technologies responsible for creating the incredible volumes of data must be harnessed to sort through it so a trial lawyer can present his or her client's case to a trier of fact. To do successfully, counsel must either master the technologies or associate with consultants or other attorneys who have. The first step is becoming aware of the issues and systematically documenting what is done with ESI in every case.