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Ethics and Professionalism in e-Discovery

by Alan Blakley

Most attorneys, whether they litigate in federal court or not, are familiar with the revisions in the Federal Rules of Civil Procedure occasioned by the proliferation of electronic information and its importance in civil practice.

This explosion of electronic information has greater impact than simply affecting those practicing in federal court, however. First, the National Conference of Commissioners of Uniform State Laws is currently drafting and discussing uniform rules to propose to states concerning electronically stored information. Second, transactional attorneys handle more and more information electronically with clients or other counsel. Consequently, even those attorneys who do not believe they will need to think about ethical issues arising from electronic information will soon find it an essential element of their practice.

This article does not rehash all of the material that attorneys have available concerning electronic information in general, but rather, looks at ethical issues and professionalism as they relate to electronic information. Unlike other ethical issues, few opinions address issues that have begun to arise. Therefore, this article looks at the issues not only from what ethical norms apply but also from the more amorphous standards of professionalism. What are we required to do by the ethical rules—relying upon the American Bar Association (ABA) Model Rules, since New Jersey's rules mirror the ABA rules, and similar rules governing attorneys reading this article who practice in other jurisdictions? And, what do we as professionals expect of ourselves and other professionals?

This article focuses upon three areas: obligations to learn about electronic information; relationships with clients through electronic information; and relationships with other counsel through electronic information. The first topic is self-explanatory. The second topic, concerning clients, subsumes such issues as the pitfalls in communicating with clients through email, maintenance of client files electronically, and giving advice or disqualification through a prospective client.
Becoming competent in dealing with e-discovery or management of electronic information does not force counsel to learn another field of law, but requires the attorney to learn at least the fundamentals of advancing technology.

visiting a lawyer’s website. Finally, in working on the relationship with other counsel, the article reviews inadvertent disclosure of privileged or confidential information, mining electronic information received from others, scrubbing information from electronic files, and negotiating with unsophisticated counsel.

Obligations to Learn About Electronic Information

Legal ethics require lawyers to be diligent and competent. Generally, the lawyer may take on representation of a client in a field of law new to that lawyer and become competent by doing sufficient legal research, or by associating with an attorney with familiarity in that field. Electronic information is substantially different, however. Becoming competent in dealing with e-discovery or management of electronic information does not force counsel to learn another field of law, but requires the attorney to learn at least the fundamentals of advancing technology.

Increasingly, courts hold corporations to a standard that they know or should know the parameters of their electronic information. In Beattie v. CenturyTel, Inc. the court reiterated the reasoning from earlier cases that a business that creates massive amounts of information in an unusable system cannot hide behind that system to frustrate discovery. The court, based on this standard, refused to credit the company’s arguments that accessing its data would create an irreparable injury.

This past winter, Magistrate Judge David Keebler, during a continuing education seminar, fielded a question: How much longer will attorneys be able to get away with claiming ignorance of technological advances? His response, “not much longer,” mirrors courts’ attitudes with respect to corporations. Attorneys have been comfortable telling courts they are not technology experts, but soon will need to have enough facility with technology to communicate with judges and clients who are becoming more and more sophisticated.

The best place to start learning is the law firm’s own information technology (IT) department. A lawyer who spends 30 minutes with the firm’s IT specialists, asking questions about the systems in place, will develop a good, quick, basic understanding. From there, talk to the client’s information technology people. Attorneys desiring more knowledge can attend evening adult classes at community colleges, or talk to a consultant in the field, not to try to get him or her to do the attorney’s job, but to gain a better understanding.

Diligence and competence may interface with the duty to be candid with the tribunal. Technology changes so rapidly that information from two years ago is no longer accurate. For example, everyone has heard about the dreaded backup tapes and the expense of restoring them to look for information that may reside there. Only a few years ago, the standard in the industry was between $1,500 and $2,000 to restore a backup tape so it could be searched for responsive material. Now the cost is less than half of that.

A lawyer not keeping up with technology and the law, it arguing to the court that restoring 100 backup tapes will cost between $150,000 and $200,000 and thus is prohibitively expensive, may well be met with two questions: Why rely upon technological estimates from a few years ago; and, based on the line of cases concerning corporate obligations to manage data, why have so many backup tapes instead of a reasonable document management system? The worst question to hear from the judge is: Are you trying to mislead the court as to cost or are you just not up to date in your technology? No lawyer wants to face the Hobson’s choice of answering this question. Gain at least a minimum of knowledge concerning technology and stay current. Beyond ethical obligations, as professionals attorneys must remain current.

Relationships With Clients Through Electronic Information

May lawyers communicate with clients through email? May law firms...
keep client records electronically? Will a law firm be disqualified from representing a client because an adverse party visits a website and fills out a questionnaire? Fortunately, at least in this one aspect of ethics and electronic information, ethical opinions can guide counsel.

Communications With Clients

Ethically, counsel may communicate with clients through email, even unencrypted email. Of course, there are caveats arising from security concerns. The American Bar Association (ABA), in a 1999 opinion, begins by noting that counsel must abide by clients’ requests for method of communication. Counsel also should carefully review with the client special problems associated with email, such as waiver of privilege if a client forwards an attorney email to friends or others. After cataloging other methods of communication, specifically United States and private mail, landline telephones, cordless and cellular phones, and facsimile machines under ABA Model Rule 1.6(a) concerning revealing confidential information, the ABA turns to different types of email.

Following a lengthy review, the ABA and most bar associations conclude that counsel, after explaining to clients the potential problems, may communicate with clients by email, even unencrypted email. In spite of earlier opinions reflecting earlier technology, the ABA concluded that counsel can “have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted email sent on the Internet, despite some risk of interception and disclosure.” However, one caution: “when the lawyer reasonably believes that confidential information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client about whether another mode of transmission” is more appropriate. This is excellent advice no matter what the normal mode of transmission. When especially sensitive information is involved, counsel needs to take even greater care and abide by the client’s instructions, documenting their agreement.

Maintaining Client Files Electronically

New Jersey’s Advisory Committee on Professional Ethics has taken up the question of whether a law firm may maintain client files electronically. By definition, certain documents must be maintained in their original condition—wills and deeds, for instance, and other documents that are considered “property of the client.” The advisory committee turns to other material, not property of the client, that a law firm must maintain—correspondence, notes, research, for example. No ethical rules require keeping files in a particular format; in fact, “given advances in technology, a lawyer’s ability to...represent a client diligently and competently...may very well be enhanced by having client documents available in an electronic form.”

The advisory committee then turns to the same considerations that arise in questions of communicating through email—security. The same benefit to the lawyer—the ability to access client files remotely—raises the security issue. Realizing that no system can offer complete security and yet be connected through the Internet, the opinion imposes an obligation arising from New Jersey’s analog to ABA Model Rule 1.6 to exercise reasonable care against unauthorized access. This opinion is particularly well-thought-out and well-written, in that it does not find a one-size-fits-all solution that imposes unreasonable costs on small law firms, nor that is based on a static view of technology. Rather, the opinion defines “reasonable care” as either entrusting documents to an outsourcer with an enforceable obligation of security, or using available technology “to guard against reasonably foreseeable attempts to infiltrate the data.”

The advisory committee finishes with some advice that can help with the transmission of data between clients and counsel: password-protecting confidential documents within their application. For instance, word processing programs allow users to password-protect documents. Counsel and client could agree on a password and use it for all documents transmitted as attachments to email, requiring that no substantive material be included in the body of the email, but rather always as an attachment that is password-protected. If a copy of the email finds its way into the wrong hands, the information cannot be accessed.

Lawyer Websites

Visitors to law firm websites frequently see disclaimers such as “Nothing on this website should be considered legal advice.” Other websites contain forms for prospective clients to complete giving their contact information and “symptoms.”

While websites are excellent sources of information about law firms for prospective clients, they abound with ethical problems. First, if attorneys in the firm are only licensed in New Jersey, they cannot keep people from Nevada away from their site. Are they practicing law in Nevada without a license? Second, the firm will want to have material on the site to encourage visitors to use the firm. How can they walk the fine line between marketing material and giving legal advice? Finally, a firm’s website may solicit information from prospective clients through a “contact us” form. Since the question of whether a firm represents a client depends upon the belief of the client, what precautions must a firm take to avoid representing people based upon an Internet contact or potential disqualification?

The Washington State Bar Associa-
tion has considered these questions in detail. Recognizing the turmoil in the law, it attempts to set forth some guidelines for advertising on the Internet. The association considered a hypothetical in which an employee of an existing corporate client contacts the firm.

It sets forth seven practices to limit problems based upon current technology. They can be condensed to the following:

- identify conflicts of interest before undertaking representation;
- do not solicit information over the website that encourages provision of private or confidential information;
- accept only enough information to check for conflicts;
- use conspicuous disclaimers; and
- have non-lawyers receive and review inquiries first.

Following these guidelines should keep lawyers out of trouble.

'Arizona has simply held that attorneys owe no duty of confidentiality when they receive unsolicited emails from prospective clients.' Relying upon such a blanket rule may seem comforting, but generally counsel do not care to defend a malpractice lawsuit by pointing to a simplified rule in an ethical opinion. Better to follow Washington's measured and reasonable approach.

As technology changes, more and more bar associations are implementing rules governing website activity. Most of these revolve around attorney advertising. For instance, New York recently revised its disciplinary rules to include a specific provision in its advertising section to deal with the Internet. New Jersey's Committee on Attorney Advertising is concerned that advertising on the Internet, unlike advertising in the Yellow Pages, is not perceived as advertising by most people, and consequently greater scrutiny is necessary. Fortunately for attorneys, in this area bar associations give ample guidance to help avoid pitfalls. Counsel must avail themselves of the resources available, keeping in mind changes and advances in technology.

Relationship With Other Counsel

The murkiest area in dealing with electronic information is the relationship among counsel. The problem is not the lack of opinions from bar associations and courts concerning inadvertent disclosure of information and data mining, but the proliferation of competing and inconsistent opinions. On the other hand, few opinions help counsel understand the ramifications of scrubbing metadata—the information that computers automatically create about files—or using superior knowledge of technology.

Inadvertent Disclosure

Since the beginning of discovery, attorneys have battled with the problem of accidentally leaving a privileged or confidential document in a large stack of paper given to opposing counsel. The ABA Model Rule on diligence, along with the rule on confidential information, has always required an attorney to sift through paper to ensure that privilege is not waived. With the increase in volume of information saved electronically, the task of finding privileged information, creating a privilege log and segregating that information has become almost impossible. The ethical and professionalism obligations surrounding inadvertent disclosure impinge equally upon the party receiving the material as the party producing it.

Courts and bar associations have taken three different approaches: strict waiver of privilege by inadvertent disclosure, strict non-waiver, and the balancing approach. The only legitimate advice concerning ethical obligations is to know not only the jurisdiction, but also the individual court or judge. The ABA takes the approach that if an attorney receives information known to be privileged or confidential, which the attorney knows should not have been disclosed, receiving counsel should "avoid reviewing the materials, notify sending counsel if sending counsel remains ignorant of the problem and abide sending counsel's direction as to how to treat the disposition of the confidential materials." That ABA opinion is not only based upon ethical obligations, but also upon considerations of professionalism and personal conscience. The author holds that ethics, professionalism, good sense and the law of bailment all come together to compel this result. As the opinion notes, today's receipt by one attorney may be tomorrow's inadvertent production by that same attorney.

The credibility and professionalism inherent in doing the right thing can, in some significant ways, enhance the strength of one's case, one's standing with the other party and opposing counsel, and one's stature before the court.

Given the extensive amount of electronic information, everyone is likely to produce inadvertently some privileged document at some time or another.

Some courts have adopted the strict waiver approach, holding that privileged and confidential information is so precious that if it is not guarded appropriately, any privilege will be waived. As one court has stated:

The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent.'

The third approach, reasonableness, used by courts in light of electronic
information, depends largely upon the
court of the disclosing party, applying
a four-factor test: reasonableness of
precautions taken; volume of material
disclosed; timeliness of demand to
return material; and fairness.\textsuperscript{4}

The Restatement Third of the Law
Governing Lawyers\textsuperscript{13} cannot reconcile
the three approaches. However, the
restatement reporters favor the four-fac-
tor, reasonableness approach. Perhaps
from a strictly case law approach, the
four-factor test makes sense. But, given
the fact that all of us are going to make
a mistake in the electronic world, and
perhaps, due to the volume, not catch it
quickly, the best approach is the profes-
sionalism approach of the ABA opinions.

ABA Model Rule 4.4(b), not yet
adopted in most jurisdictions, has
added this professionalism requirement
to the rules. The clawback provision in
the revisions of the federal rules, Rule
26(b)(5)(B), and proposed Rule 9 of the
Uniform Rules Relating to the Discovery
of Electronically Stored Information,
militate toward this result. All allow the
producing party to request the return of
inadvertently disclosed information.
While no rule requires reasonable pre-
cautions on the part of the producing
party, ethical obligations, as well as
courts, obviously do.\textsuperscript{44} Counsel should
hope the "professionalism" rule applies,
but plan as though the Crown Jewels
rule applies, and be able to justify their
activities using the four factors in the
reasonableness approach.

\textbf{Data Mining}

Suppose an attorney representing a
buyer receives transactional documents
by email from the seller's counsel. May
the attorney look for embedded notes in
the document, including notes that
may have been added by the seller stat-
ing the "bottom line" sales price, which
is obviously somewhat higher than the
proposed price in the document?
Understandably, there are differing
opinions on the answer.

First, counsel owes a duty of loyalty to
the client. That duty includes getting the
best price in a transaction or getting the
best result in litigation. Furthermore,
courts have held that embedded com-
ments and other metadata are part of the
electronic document.\textsuperscript{45} Consequently,
when someone sends an electronic doc-
ument, like it or not, some hidden informa-
tion is always included, even if some
has been scrubbed (see explanation
below). The ABA, in a formal opinion in
Aug. 2006, recognized this fact, and
maintained that anyone wishing to be
absolutely certain not to transmit hid-
den information should send the docu-
ment in hard copy or as an image.\textsuperscript{26}

The first obligation falls on the send-
ing party to remove hidden informa-
tion. Under ABA Model Rule 1.6, the
sender must respect and protect a
client's private information.

The ABA opinion from Aug. 2006
finds no fault with the lawyer who
mines received information for embed-
ded data, metadata or other hidden
information. Others, however, hold dif-
f erently. New York holds that mining for
metadata in documents received from
others involves dishonesty and fraud,
and is "prejudicial to the administration
of justice."\textsuperscript{37}

The same principles of professional-
ism that apply to inadvertent disclosure
ought to apply here. While the ABA
opinion from Aug. 2006 specifically
withholds consideration of this question,
referring to ABA Model Rule 4.4(b), it
seems that if the information being
mined is helpful to the miner and detri-
mental to the producer, it can be nothing
other than inadvertently produced.
Therefore, professionalism, if not ethics,
requires counsel to notify producing
counsel and abide other counsel's wishes.

\textbf{Scrubbing}

To avoid producing metadata or
embedded comments to other counsel
(or derogatory comments to clients),
counsel may "scrub" that data from doc-
uments.\textsuperscript{28} Most word processing applica-
tions now include the ability to
eliminate such data, or have inexpen-
sive or free add-ons that do this. An arti-
cle in the \textit{ABA Law Practice Management}
for March 2007 discusses options.\textsuperscript{29}

Of course, it is part of a lawyer's obli-
gations to the client to protect confi-
dential information. But what about
removing hidden information from
client documents when the opponent
has not requested any metadata before
providing discovery? For instance, if the
opponent has asked for correspondence
and not specifically requested metadata,
may the producing party scrub meta-
data from the files before producing?

Few opinions directly address this
issue. The ABA Aug. 2006 opinion men-
tions in a footnote that "when respond-
ing to discovery, a lawyer must not alter
a document when it would be unlawful
or unethical to do so."\textsuperscript{30} This note,
though, is circular. The answer, how-
ever, should be quite simple. Since courts
now hold that the metadata is a part of
the document, altering the metadata
would violate ABA Model Rule 3.4(a).
Comment 2 to that rule specifically
applies the prohibition of altering evi-
cence to "computerized information."

\textbf{Superior Knowledge}

At first blush, it would seem that all
of the preceding would make it incum-
ment upon the attorney with advanced
technical knowledge to educate the less
sophisticated opponent. ABA Model
Rule 3.4, after all, concerns fairness to
opposing counsel. No opinions are on
point; however, the ABA, in a formal
opinion in Sept. 1994,\textsuperscript{40} considered the
obligations of counsel to inform other
counsel of adverse information. Until
the question arises, no one can say
whether similar reasoning applies in
this arena.

That opinion looked at several of the
model rules to answer the question: Must an attorney disclose to opposing counsel that the statute of limitations has run? That opinion concluded that the lawyer has no duty to inform the opponent that a claim is time-barred, and may, in fact, breach a duty to the client by making such a disclosure.

Analogously, if an unsophisticated attorney asks for documents "in electronic format," and the producing attorney knows that something unfavorable resides in the metadata, may the producing attorney convert documents into a flat format such as a PDF file—not scrubbing the metadata, just not producing it? Based on the opinion, the answer is "yes," and perhaps even that the lawyer owes it to the client to produce it that way.

This certainly violates principles of professionalism, and probably is distinguishable from the statute of limitations example. All attorneys know about statutes of limitations; all attorneys do not know about the properties of electronic information. Perhaps soon, as discussed earlier, counsel may not invoke ignorance, but at this time, disparate knowledge of technology should not allow one attorney to take unfair advantage of another.

Conclusion

The ethical and professionalism obligations of attorneys have not changed with the proliferation of electronic information and e-discovery. The focus has simply changed. Counsel have always been obligated to remain abreast of the law; now counsel must remain abreast of technology, at least enough to be conversant. Communications with clients have always raised concerns about confidentiality. However, unless a client tape-recorded a conversation, it could not be heard by an outsider. With email communications abounding, a client can forward it to friends, or the lawyer can inadvertently send it to the wrong people.

Lawyers have always thought twice about giving off-hand advice at cocktail parties or football games; now they need to beware that a statement on a firm's website can be seen as advice, and a response to an inquiry as beginning the attorney-client relationship for conflict of interest purposes. The vast amount of electronic information attorneys must review prior to releasing discovery responses raises the likelihood of inadvertently disclosing privileged or confidential information—always a problem, but now more so. Finally, the ease of forgetting to scrub documents that may be cleaned, and the ease of altering data that may not be altered, makes electronic data more troublesome than paper.

In the final analysis, the proliferation of electronic information, making practice easier, and making business run more quickly and smoothly, intensifies the need to make informed ethical and professional decisions. The benefits of electronic discovery—easier of reviewing massive amounts of data without sifting through dusty old boxes of paper in a nasty warehouse—do not come without cost. By becoming more aware and learning more about the technology, all lawyers can better represent their clients and avoid the pitfalls of the recent past. 20, 2006.

2. ABA Model Rules of Professional Conduct 1.1 and 1.3 (hereafter ABA Model Rule).
5. ABA Model Rule 3.3.
6. Briefly, for those readers unfamiliar with the problem: Backup media (usually magnetic tapes) are created by a disaster recovery department to restore a computer or system of computers in the event of a disaster. They will contain not only files such as word processing documents and spreadsheets, but also applications such as Word or WordPerfect. Therefore, they are not intended as repositories of information, like a filing cabinet. In the event information is not available elsewhere, though, it may still reside on the backup media from which it is not easily extracted.
9. Id.
11. Id.
12. Id.
17. The University of California at Berkeley has produced studies of volumes of electronic information being created. The latest study can be seen at http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/ (last visited March 19, 2007).

18. For instance, in Maine, the state courts follow the strict non-waiver approach, Corey v. Norman, Hanson & Detro, 742 A.2d 933 (Me. 1999) while the federal courts there follow strict waiver. EDIC v. Singh, 140 F.R.D. 252 (D. Maine 1992).

19. ABA Formal Op. 92-368 (Nov. 10, 1992), and see ABA Formal Op. 94-382 (July 5, 1994) (reiterating the same requirements).


21. In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989). This is the so-called Crown Jewels Rule because counsel is expected to treat privileged information as though it were the crown jewels.

22. See, e.g., United States v. Rigas, 281 F. Supp. 2d 733 (S.D.N.Y. 2003) (holding that part of the reasonableness was disclosing party's hiring a computer expert).

23. Rest. 3d Law Governing Lawyers § 79.

24. See e.g., ABA Model Rule 1.6 obligating an attorney to safeguard the confidences of the client and Resolution Trust Corp. v. First Bank of America, 868 F. Supp. 217 (W.D. Mich. 1994).


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