The Ethical Sand Traps of E-Discovery

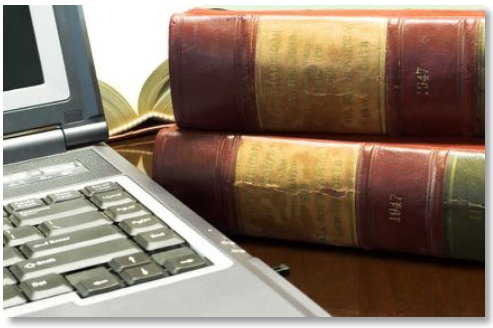
Brett Burney
Burney Consultants LLC
www.burneyconsultants.com

Introduction

Lawyers have two packages of often conflicting duties when it comes to electronic discovery: 1) duties to clients, and 2) duties to the adversarial system (opposing parties, courts, etc.).

When we discuss a lawyer's duties to a client, we're usually discussing the various ethics rules concerning confidentiality and competence. These rules govern the conduct of lawyers towards their clients and their clients' information. While the ABA Model Rules of Professional Conduct are frequently referenced, there are also common law duties that concern keeping a client informed.

A lawyer's duties to the adversarial system include adhering to the various ethics rules, as well as other laws and local court rules. These rules include a lawyer's candor towards the tribunal, and fairness to the opposing party and counsel.



Applicable Ethics Rules

The first ethical consideration that applies to e-discovery is the duty of competence. ABA Model Rule 1.1, Competence, provides:

> *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Competence requires that litigators and other attorneys who may face records preservation and e-discovery matters must understand at least the basic legal and technical issues, know their limitations, and know where to go for assistance with issues beyond their own level of competence.

In 2012, the ABA House of Delegates approved the expansion of the Duty of Competence to include the understanding of "the benefits and risks associated with relevant technology." This phrase was included in Comment 8 to Model Rule 1.1:

> *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.*

As of June 2017, 27 states have adopted the language from the Model Rules of Professional Conduct into their own analogous State Ethics Rules.

The duty of confidentiality is one of an attorney's most important ethical responsibilities. Rule 1.6 generally defines the duty of confidentiality. It begins as follows:

> *Rule 1.6: CONFIDENTIALITY OF INFORMATION*
>
> *(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). . . .*

Amendments to Rule 1.6. that were part of the Ethics 2000 revisions, added new Comment 15 (now Comment 16) to the rule. This comment requires reasonable precautions to safeguard and preserve confidential information:

> *Acting Competently to Preserve Confidentiality*
>
> *[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.*

Rules 1.1 and 1.6 and this comment make it clear that attorneys must act competently and reasonably to safeguard client information that is processed and stored in information systems. This includes data that is being processed and reviewed for e-discovery, as well as other data relating to clients.

Searching for Ethics

One area where lawyers have found it difficult to follow an ethical straight line in e-discovery is "search." This is not always an intentional disregard for the lawyer's ethical responsibilities, but because technology can be confusing and technical, many lawyers have found themselves lacking the skill and competence necessary to formulate effective and defensible search processes.

When we discuss "searching" in the context of e-discovery, we are commonly referring to the practice of applying search "keywords" and phrases to a set of documents in the hope of retrieving a select, focused group of those documents that are responsive to our search parameters. It sounds like an easy task, after all,

everyone can run a Google search. But defensible search has become more problematic in the context of search and retrieval of relevant document sets than anyone anticipated.

This frustration has been borne out in several opinions such as *United States v. O'Keefe,* 537 F. Supp.2d 14 (D. D.C.2008), where Judge Facciola famously stated:

> *"Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. ... Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread."*

In that same year (2008), *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D. D.C. 2008) opined in a similar fashion:

> *"[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence."*

Other opinions have expressed similar frustration with the lack of comfort and continuity among lawyers to devise effective and defensible approaches to "searching" a set of documents and data.

Preservation and Spoliation

The Rule of Professional Responsibility most directly affecting the issue of preservation of electronic data is Rule 3.4, entitled "Fairness to Opposing Party and Counsel." Rule 3.4(a) states: "[A lawyer shall not] unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

The comment to Rule 3.4 provides further important guidance regarding its purpose and scope:

> *"The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.*
>
> *Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedure right. The exercise of that right can be frustrated if the relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purposes of impairing its availability in a pending procedure or one whose commencement can be foreseen ... Paragraph (a) [of Rule 3.4] applies to evidentiary material generally, including computerized information."*

The annotation to Rule 3.4(a) points out that while a violation of the rule may expose a lawyer to professional discipline, "it is normally the judge hearing the matter who initially takes the corrective action through litigation sanctions, such as ... exclusion of evidence, and the payment of fines, costs, and attorneys' fees." While the ethics rule is a starting point, much of what is

important regarding the ethical issues related to the duty to preserve electronic data is found in the case law discussing spoliation of evidence, the duty to preserve evidence, the sanctions available under the discovery rules, as well as the inherent authority of the court.

The duty to preserve relevant information to be exchanged with an opposing party usually encircles the concept of a "litigation hold." Three concerns around the litigation hold include:

1. When the duty arises – the "trigger"
2. What must be preserved – the "scope"
3. How should it be preserved – the "process"

The "Trigger"

The duty to preserve evidence is triggered when litigation or an investigation begins, or when litigation or an investigation can be "reasonably anticipated." In *Byrnie v. Cromwell,* 243 F. 3d 93 (2d Cir. 2001), the obligation to retain arises when a "party has notice that evidence is relevant to litigation … but also on occasion in other circumstances, as for example, when the party should have known that the evidence may be relevant to future litigation."

The "Scope"

"Corporations are not obligation, upon recognizing the threat of litigation, to preserve every shred of paper, every e-mail or electronic document, and every backup tape. Indeed, such a rule would cripple large corporations." *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003)

Nevertheless, "[w]hile a litigant is under no duty to keep or retain every document in its possession, … it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request." *Wm. T. Thompson Co. v. General Nutrition Corp. Inc.,* 593 F.Supp. 1443, 1455 (C.D. Cal. 1984)

"[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary." *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003)

The "Process"

A party must take reasonable steps to identify and preserve relevant information as soon as practicable. Judges expect a good faith, reasonable process that is defensible and documented.

The "Zubulake" Duty was outlined in *Zubulake v. UBS Warburg, LLC,* 229 F.R.D. 422 (S.D.N.Y. 2004):

1. Issue a "litigation hold" at outset and periodically reissue"
2. Communicate directly with the "key players"
3. Instruct all employees to produce copies of relevant electronic files
4. Make sure that all … media which the party is required to retain is identified and stored in a safe place.

Protecting Privilege

There is an increased risk of waiver of privilege in e-discovery because of the volume of data involved, the multiple locations where data can be stored, and the confusion that accompanies the collection and preservation of electronically stored information.

Courts have taken three different approaches to the inadvertent disclosure of electronically stored information:

1. Strict waiver from inadvertent production;
2. An intermediate approach (weighing several factors);

3. And no waiver absent client agreement.

Model Rule 4.4(b) states that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Federal Rule of Civil Procedure 26(b)(5)(B) states: "after being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information ... and may promptly present the information to the court under seal for a determination of the claim."

In *Victory Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008), Judge Grimm ruled that there was a waiver of privilege through inadvertent production of electronic records because the defendants failed to establish that they took reasonable measure to prevent inadvertent disclosure. The defendants used an untested keyword search, failed to engage in sampling the verify its results, and were "regrettably vague" in their description of the keyword search.

In *Alcon Mfg., Ltd. v. Apotex, Inc.,* 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008), the court applied Federal Rule of Evidence 502 and found no waiver by inadvertent production:

> *"Perhaps the situation at hand could have been avoided had Plaintiffs' counsel meticulously double or triple-checked all disclosures against the privilege log prior to any disclosures. However, this type of expensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid."*

Agree to Disagree – Cooperation in E-Discovery

The concept of "cooperation" among litigating parties has become a clarion call from the bench as judges have grown increasingly frustrated with the delays and unnecessary hand-wringing surrounding the procedural fights around e-discovery.

In July 2008, the Sedona Conference issued the "Cooperation Proclamation" which sought the "open and forthright sharing of information by all parties." It stated:

> *"Cooperation does not conflict with the advancement of their clients' interests – it enhances it. Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict."*

In discussion the "Cooperation Proclamation," Ken Withers, the Director of Judicial Education and Content for the Sedona Conference, stated:

> *"If the goal of discovery is to uncover facts to be used during settlement conferences or at trial, why not cooperate in the discovery process, and utilize advocacy and persuasion skills to argue the interpretation of the facts and the application of the facts to the law?"*

In *Mancia v. Mayflower Textile Services Co.,* 253 F.R.D. 354 (2008), Judge Grimm cited the Sedona Conference Cooperation Proclamation and stated "there is nothing inherent in [the adversary system] that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery."