

eDISCOVERY BEST PRACTICES: AVOID COMMON ETHICAL PITFALLS IN eDISCOVERY

eDiscovery, like other aspects of legal practice, requires attorneys to be mindful of their obligations under ethical rules. Unlike traditional paper discovery, eDiscovery sometimes intersects with ethical requirements in new ways, especially as technology changes. With the constant changes involving electronically stored information and the advent of different devices, the complexity of addressing eDiscovery needs has broadened lawyers' ethical responsibilities when compared with traditional paper discovery.¹

While several ethics rules affect the way lawyers address eDiscovery matters,² rules related to competency, fairness, and candor are paramount.

PRESERVING ESI: RULES RELATED TO FAIRNESS

Generally, the duty to preserve electronically stored information (ESI) attaches when a party reasonably foresees that the information may be relevant to future litigation.³ Once the duty arises, attorneys must take affirmative steps to monitor compliance with preservation requirements so that all sources of discoverable information are identified and searched.⁴ Ethics rules address this eDiscovery obligation through ABA Model Rule 3.4, which imposes a duty of fairness to opposing parties and counsel.⁵



"The part of electronic discovery that presents some of the greatest ethical challenges is the preservation and collection of documents from clients," said Tyler Trew of Liskow & Lewis. "This really boils down to communicating with the client to gain a thorough understanding of their electronic infrastructure, as well as documentation of the steps that were taken during collection of the ESI."

Independent consultants can be enlisted as needed for as little as a few hours to vet the work.

Communicating obligations to clients and documenting steps taken will protect clients from spoliation claims, and fulfill an attorney's ethical obligations under Model Rule 3.4.⁶ Therefore, attorneys should take care to issue and monitor litigation hold notices to their clients, no matter the stage of litigation at which they are retained.

Proper preservation requires that the collection process include interviews with document custodians to ensure potentially relevant ESI is preserved.⁷ "After an initial litigation hold has been issued, custodian interviews should be undertaken to gain a better understanding of the location of all potentially relevant ESI," Trew said.



At a minimum, attorneys should make sure they're able to implement, or cause to be implemented, ESI preservation procedures; identify custodians of potentially relevant ESI; and produce responsive nonprivileged ESI in a recognized and appropriate manner.⁸ One way to do this is to take advantage of technical training offered by bar associations.

CANDOR REQUIREMENT EXTENDS TO eDISCOVERY

The challenges related to the collection, processing, review, and production of ESI also implicate the duties of candor to adversaries and the tribunal contained in Model Rule 3.3.⁹ At times, the duty to zealously represent a client can seem to conflict with an attorney's duty to be a candid officer of the court.¹⁰

"A key ethical issue is that attorneys cannot provide false or misleading representation," said Jonathan Bick, chair of the patent, intellectual property, and information technology practice at Brach Eichler, and professor of internet law at Pace Law School and Rutgers University Law School. "Likewise, attorneys must prevent clients from engaging in false and misleading behavior when it comes to electronic discovery."

Attorneys can appear to mislead parties by not having a proper understanding of key terms and processes related to the work. Engaging a consultant judiciously can assist in addressing this.

Attorneys must be able to make accurate representations to adversaries and the tribunal about their ability to produce ESI, the thoroughness of the searches and review performed, and the content of production sets to meet their obligations under Model Rule 3.4.

As such, attorneys should be able to engage in a competent and meaningful meet-and-confer with opposing counsel concerning an eDiscovery plan and collect responsive ESI in a manner that preserves the integrity of that ESI.¹¹



ETHICS RULES ADDRESS COMPETENCE

“The most basic ethical issue for lawyers when engaging in eDiscovery is the duty of competent representation,” said Kate G. Maynard, a litigator who serves as Robinson Bradshaw’s general counsel. The American Bar Association’s Model Rule 1.1 requires lawyers to provide competent representation to their clients.¹²

Included in competence is the

requirement that attorneys stay “abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”¹³ In 2012, Maynard said, Model Rule 1.1, Comment 8 was revised to include not only the general requirement that lawyers bring requisite knowledge and skill to matters they handle, but also an obligation to stay current on technology.¹⁴

In accordance with ABA Model Rules, most state bar associations are requiring technological competence from attorneys.¹⁵

With respect to eDiscovery specifically, technical competence requires that attorneys have a firm grasp on not only their client’s email systems, but also other sources for relevant electronic information.

Failing to understand a client’s ESI sources jeopardizes the ability to identify, preserve, and collect relevant information, and risks the possibility that adversaries will claim spoliation.¹⁶ This itself raises ethical issues with respect to an attorney’s duty.

“Competent representation requires the ability to locate evidence to support or defend your client’s position,” Maynard said. “Lawyers must know where to look and how to ask the right questions to locate ESI, and must know how to take the necessary steps to preserve the evidence for use or production in the case.”

Retaining experts in this area to confirm or challenge an understanding is a prudent and cost-effective way to address this. Relying on personal knowledge or internal knowledge alone can lead to misunderstandings and discovery challenges.

Attorneys must be able to do tasks such as assess eDiscovery needs, analyze and understand a client’s ESI systems and storage, and perform data searches.¹⁷

CONCLUSION

Complying with ethics obligations related to competence requires attorneys to be knowledgeable about technology, especially client ESI, to avoid the imposition of sanctions in a litigation in chief, as well as in potential ancillary bar actions alleging attorney misconduct. Ethics obligations also require that attorneys follow rules related to fairness and candor, while zealously representing their clients with respect to eDiscovery.

“I don’t think it is necessary for every lawyer to know every technology inside and out—that isn’t realistic,” Maynard said. But, “a lawyer does need to know how to ask the right questions to locate relevant ESI, when preservation is necessary and how to preserve ESI effectively, and when to ask for help.”

In fact, any attorney whose in-house team lacks the necessary expertise in any of these critical areas should consider seeking a vendor that does have the expertise.

Other steps that can help attorneys meet their obligations include:

- Understand the ethics obligations imposed by the authorities in your jurisdiction. Keep up with ethics rulings and opinions related to technology and discovery.¹⁸
- Understand the technologies and issues involved. Gain competency by taking classes offered by bar associations regarding technology and eDiscovery or work with knowledgeable co-counsel or other experts. Regularly incorporate consultants and vendors into in-house training sessions and associate training.
- Understand what your discovery obligations are, and when they arise, taking the appropriate steps such as issuing litigation holds, interviewing custodians, documenting actions, and monitoring the preservation work of non-lawyers, including clients.¹⁹ Articulate your discovery obligations as if you were explaining to a jury. Address the clarity and accuracy of your description in the process.
- To the extent necessary, explain technology and applicable practice and ethics rules to your client, so he or she understands the parameters of discovery obligations.



Taking those steps should go a long way to fulfilling ethics obligations when working with eDiscovery.

ABOUT CANON DISCOVERY SERVICES

Canon Discovery Services has a skilled, dedicated team of discovery professionals with a proven track record in solving complex discovery matters. Backed by over twenty years of experience, we help law firms and corporate legal departments develop practical, defensible eDiscovery response plans to support successful outcomes. Our services range from ESI processing, culling and analysis, document review, hosting and production to implementing information governance and readiness response programs. Canon Discovery Services is a part of Canon Business Process Services, a subsidiary of Canon U.S.A. Visit us at cbps.canon.com.

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- ¹ Tyler D. Trew, "Ethical Obligations in Electronic Discovery," Section of Litigation, American Bar Association, June 5, 2018, <https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2018/ethical-obligations-in-electronic-discovery.html>
 - ² Katherine G. Maynard, "Ethical Obligations Arising in Electronic Discovery," Litigation Article, Robinson, Bradshaw & Hinson, November 2007, p. 1, https://www.robinsonbradshaw.com/media/publication/514_article_kmaynard_ethical.pdf
 - ³ *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003)
 - ⁴ *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004)
 - ⁵ American Bar Association, Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html
 - ⁶ Email correspondence from Tyler Trew, Aug. 22, 2018
 - ⁷ Tyler D. Trew, "Ethical Obligations in Electronic Discovery"
 - ⁸ John A. Greenhall, Anthony L. Byler, and Kathleen M. Morley, "Attorney Ethical Duties in E-Discovery: It's Important to Stay Current," *The Legal Intelligencer*, Feb. 8, 2018, citing Cal. Ethics Opinion 2015-193, <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/02/05/attorney-ethical-duties-in-e-discovery-its-important-to-stay-current/>
 - ⁹ American Bar Association, Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html
 - ¹⁰ Interview with Jonathan Bick, Pace Law School and Rutgers University Law School, Aug. 20, 2018
 - ¹¹ John A. Greenhall, et al., "Attorney Ethical Duties in E-Discovery"
 - ¹² American Bar Association, Model Rules of Professional Conduct, ABA Rule of Professional Conduct 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html
 - ¹³ Tyler D. Trew, "Ethical Obligations in Electronic Discovery"; quoting ABA Model Rule 1.1, cmt. 8, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html
 - ¹⁴ Email correspondence with Katherine G. Maynard, Aug. 28, 2018
 - ¹⁵ Caroline Grossweiler, "'Technological Competence': The Role Bar Associations Will Play in Explaining a Lawyer's Duty of Competence with Technology," *Journal of Law and Technology*, University of Richmond, April 23, 2018, <https://jolt.richmond.edu/2018/04/23/technological-competence-the-role-bar-associations-will-play-in-explaining-a-lawyers-duty-of-competence-with-technology/>
 - ¹⁶ Tyler D. Trew, "Ethical Obligations in Electronic Discovery"
 - ¹⁷ John A. Greenhall, et al., "Attorney Ethical Duties in E-Discovery," citing Cal. Ethics Opinion 2015-193
 - ¹⁸ California Ethics Opinion 2015-193, fn. 3, [https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20\(06-30-15\)%20-%20FINAL.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf)
 - ¹⁹ Marie L. Mathews and Brigitte M. Gladis, "Ethical Considerations in E-Discovery: Avoiding Malpractice Claims," *New Jersey Law Journal*, April 11, 2018, citing *Industrial Quick Search v. Miller, Rosado & Algois*, 1:13-Civ-05589-ER (S.D.N.Y. Jan. 2, 2018) (holding that the law firm had an obligation to advise the client of its preservation obligation even though that obligation arose prior to the retention of the law firm) and *Brown v. Tellerate Holdings*, No. 2:11-cv-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014) (holding that the law firm had a duty to identify key personnel and to actively participate with the client in preservation, search, and production), <https://www.law.com/njlawjournal/2018/04/11/ethical-considerations-in-e-discovery-avoiding-malpractice-claims/>