

ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month

**Ethical Duties for Lawyers Handling E-Discovery in California****Scenario**

A law firm has just been engaged to defend a large company in a California state court lawsuit involving contractual and unfair competition claims. The company heavily relies on email and other electronically stored information (ESI) to conduct its business. Discovery is about to begin and plaintiffs are expected to seek large volumes of data, including email related to the contractual negotiations. The law firm is interested in the State Bar's recent guidance on ESI and wants to understand how it affects its ethical duties on handling ESI.

State Bar of California Advisory Opinion on ESI

In a recent advisory opinion, the State Bar of California Committee on Professional Responsibility and Conduct (the State Bar) detailed the basic elements of an attorney's duty of competence and confidentiality with issues related to ESI in litigation. The State Bar concluded that, at a minimum, a competent attorney should have a basic understanding of e-discovery issues and, depending on the facts of a particular case, may need a higher level of technical understanding of ESI. To meet this competency requirement, an attorney may need to associate or consult with technical consultants in ESI (which could be other counsel or even the client).

The State Bar issued its advisory opinion based on a hypothetical scenario in which an attorney agreed to overbroad search requests proposed by an opposing party and then allowed the client's ESI to be gathered and produced by a third-party vendor with virtually no oversight and supervision. Later, the attorney produced that data to the opposing side with no prior review, and the production contained privileged and proprietary business information.

Under these hypothetical facts, the State Bar made several key observations (looking to the well-developed federal jurisprudence on e-discovery law), such as:

- The attorney had a general obligation to make an e-discovery evaluation early, prior to the initial case management conference. And the attorney had risked breaching the duty of competence by failing to perform a timely e-discovery evaluation at the outset.
- The attorney should have secured competent help by, for example, consulting with an e-discovery expert. Such an expert could have helped by structuring the search or drafting search terms less likely to turn over privileged and/or irrelevant but highly proprietary information.
- If associating with an outside vendor (or even the client) for ESI issues, the attorney is obligated to supervise the work, educate those involved about the legal issues and issue appropriate guidance, instructions and testing.

- The attorney may have breached the duty of confidentiality by failing to exercise reasonable care in protecting the client's privileged or confidential information.

Strategies and Best Practices

The advisory opinion, though a somewhat extreme hypothetical, reinforces some important points for attorneys dealing with ESI and e-discovery in all jurisdictions. These include:

- As early as possible, assess the ESI that might be at issue in the case (given today's widespread use of electronic information, ESI will be at issue in virtually every case). This evaluation should be done before the initial case management conference.
- Implement appropriate ESI preservation procedures (i.e., a litigation hold)
- Make a candid assessment of you or your firm's e-discovery capabilities and, if there is a lack of experience, consider consulting with an experienced e-discovery vendor and/or co-counsel that is competent in e-discovery. Even experienced counsel in e-discovery may benefit from using experienced and well-reputed e-discovery vendors for efficiency and quality control purposes.
- Closely supervise any outside vendors and provide necessary guidance on the legal issues involved.
- Analyze and understand your client's ESI systems and storage.
- Advise the client on the options for collection and preservation of ESI.
- Identify custodians of potentially relevant ESI.
- Engage in a meaningful meet-and-confer with opposing counsel concerning an e-discovery plan and attempt to narrow overbroad search terms.
- Collect responsive ESI in a manner that preserves the integrity of the ESI.
- Prior to producing ESI, conduct appropriate review and tests to prevent disclosure of privileged information.
- Produce responsive, non-privileged ESI in a recognized and appropriate manner.

In conclusion, e-discovery issues are often at the forefront of litigation and attorneys should be mindful of not only the governing e-discovery rules in federal and state court but also their ethical obligations of competence and confidentiality (which, if breached, could result in discipline by the State Bar).

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