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Ostriches Beware: E-Discovery Ethics In Social Media

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"Electronic document creation and/or storage, and electronic communications, have become commonplace in modern life, and discovery of ESI is now a frequent part of almost any litigated matter. Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery."[1]

June is usually a month for blockbuster decisions from the U.S. Supreme Court, and this year was no exception. June 2015, however, also witnessed blockbuster opinions and guidelines from the state bar groups in three populous and commercially significant states — California, Florida, New York — all tying the ethical duty of competence to the need for attorneys to understand modern technologies.

While the California opinion was the latest in time, it perhaps is the most universally relevant of the state bar developments — because it applies to all litigation, and relies on federal case law and nationally recognized best practices guidance. Formal Opinion No. 2015-193, issued on June 30, 2015, by the State Bar of California Standing Committee on Professional Responsibility and Conduct.[2]

The first of the three state bar developments was the release on June 9, 2015, of updated Social Media Ethics Guidelines from the Commercial and Federal Litigation Section of the New York State Bar Association.[3] The New York group has added a new first guideline, which requires that an attorney, who chooses to use social media to communicate with prospective and current clients, contact or examine potential witnesses or prospective jurors, or hunt for electronic evidence, possess an understanding, at a minimum, of the most basic functions of how each system works, what information (particularly client confidences) may be exposed, to whom and how, and the ethical impact of the usage. See Kolcun & Weiner, The Ethical Limits of Attorney Social Media Investigations (Law 360, July 7, 2015).

Florida's Professional Ethics Committee followed on June 25, 2015, with the issuance of Proposal Advisory Opinion 14-1, which details specific duties lawyers have when advising clients on "cleaning up" social media pages before litigation.[4] This opinion, too, is based on the obligation of competence, as well as the duties to the court and adversaries not to obstruct access to evidence. The Florida opinion concludes that the lawyer can advise the client to change privacy settings, and even remove information

relevant to a reasonably foreseeable proceeding as long as the information is preserved. Other jurisdictions have reached similar conclusions.

More opinions in the same vein can be expected. Indeed, since the ABA adopted amendments to the Rules of Professional Conduct in 2012 — which include a Comment to Rule 1.1 on competence stating that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"[5] — no fewer than 14 states have made corresponding revisions to their rules of professional conduct.[6]

The California Formal Opinion, however, is different because it is based on a hypothetical set of facts, aspects of which occur daily in most parts of the country. Specifically, it describes the practitioner who (1) is unfamiliar with technology or its power or its limitations, but is persuaded by opposing counsel and a judge to adopt an electronic discovery protocol he does not comprehend, which is incorporated into an order. The attorney then (2) accepts without verifying a client's assurance that all relevant information has been produced in hard copy; (3) assumes how search terms will operate without testing them; (4) allows the opponent unsupervised access to the client's systems; (5) fails to understand the nuances of "clawback" agreements and "protected" or "protectable" information, as a result of which a chief competitor obtains his client's secrets; (6) is surprised when the opponent alleges spoliation, and (7) only belatedly obtains assistance from a technical expert, who confirms that information has been destroyed through the normal operation of the organization's systems after the duty to preserve attached. The opinion is unburdened by technical jargon, and should be mandatory reading for any litigator.

The California opinion acknowledges what some lawyers say when arguing they don't need to understand technology because their cases don't involve e-discovery, but cautions that, "in today's technological world, almost every litigation matter potentially does. The chances are significant that a party or a witness has used email or other electronic communication, stores information digitally, and/or has other forms of ESI related to the dispute." (Emphasis in original.) Indeed, electronic sensors generating information are becoming ubiquitous, and we are long past the day when email contains the most important electronic information. Today, the lawyer must think of devices that are used in the particular situation — from the automobile in the accident, to the student identification card that is swiped to enter dormitories, to the typed text messages sent after hours, to the photo on the smartphone that contains geo-location data and time stamps — and the applications that store the information (often databases, or cloud services). Accordingly, the California opinion finds:

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 the other side. (Emphasis added.)

If discovery of electronic information will likely be sought, the California opinion provides that the attorney should then assess his or her own skills and resources as part of the duty to provide the client with competent representation. The opinion also lists several specific tasks that attorneys handling e-discovery should be able to perform. This list[7], which should facilitate the self-assessments suggested, includes:

- Initially assessing e-discovery needs and issues, if any;
- Implementing/causing implementation of appropriate preservation[8];
- Analyzing and understanding a client's ESI systems and storage;
- Advising a client on available options for collection and preservation of ESI;

- Engaging in competent and meaningful meet and confer sessions with opposing counsel concerning an e-discovery plan (as required by federal rules and many state cognates);
- Performing data searches;
- Collecting ESI in a manner that preserves the integrity of the ESI (including such metadata as may be relevant or necessary); and
- Producing responsive and nonprivileged ESI in a recognized and appropriate manner (for example, including redaction or other special treatment of personal information).

The California opinion concludes that the attorney in the hypothetical at the least risked breaching his duty of competence when he failed at the outset of the case to perform a timely e-discovery evaluation, which risk grew considerably when opposing counsel insisted on the exchange of ESI. The opinion notes that a breach of the duty of competence does not necessarily give rise to a disciplinary violation, or run the risk of a malpractice claim. Such consequences may require intentional, repeated or reckless conduct. But other significant risks — including losing a case or a client — may attach far more readily.

Importantly, the opinion recognizes that while an attorney may have a generally acceptable degree of competence for an average case, assessing e-discovery competence must occur on a case-by-case basis, as "the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI."

If, after completing the assessment for each case, the attorney determines she lacks the requisite skills, the Formal Opinion (tracking the basic rule on competence) states that the attorney has three choices: (1) acquire sufficient learning and skill before performance is required; (2) associate with another ESI-competent attorney or consult a technical consultant; or (3) decline the client representation.

If the attorney handling the litigation concludes that he lacks sufficient expertise, and opts to associate another lawyer or technical expert, the opinion cautions that the attorney also has an obligation under California's Rule 3-110 to supervise the work of the expert, which is non-delegable. (Note: Similar rules are found in the ABA Model Rules at 5.1 and 5.3.) That duty belongs "to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court." Thus, the attorney must maintain overall responsibility for the work of the expert, even if the expert is employed by the client:

The attorney must do so by remaining regularly engaged in the expert's work, by 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.

In short, the attorney responsible for the litigation cannot simply lateral the e-discovery responsibility off to others. Like it or not, he will have to dig in and begin to learn the essentials (i.e., see the bulleted list above). As the opinion concludes: "Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery."

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[1] The State Bar of California Standing Committee on Professional Responsibility, Formal Opinion 2015-193, Available at http://ethics.calbar.ca.gov/Ethics/Opinions.aspx (superseding Formal Opinion Interim No. 11-0004).

[2] Available at http://ethics.calbar.ca.gov/Ethics/Opinions.aspx (superseding Formal Opinion Interim No. 11-0004). In 2009, California adopted electronic discovery legislation, but the opinion noted there is little California case law interpreting the act. The opinion also relies on the ABA Model Rules of Professional Conduct, even though California rules differ in some respect.

[3] Available at www.nysba.org/SocialMediaGuidelines. The original guidelines from this group were issued only last year. Both documents are comprehensive, but predicated upon the New York Rule of Professional Conduct.

[4] Affirmed as modified by the Professional Ethics Committee on June 25, 2015, and available at https://floridabar.org/TFB/TFBResources.nsf/Attachments/B806500C941083C785257E730071222B/$FILE/14-01%20PAO.pdf?OpenElement.

[5] See http://www.bna.com/ethics-2020-rule-n12884911245/ (emphasis added).

[6] See http://www.lawsitesblog.com/2015/03/mass-becomes-14th-state-to-adopt-duty-of-technology-competence.html (viewed July 7, 2015). In addition, 34 states have approved (or are considering) granting CLE credit to a course on Legal Ethics of Technology Competence. See http://www.nbi-sems.com/Details.aspx/Legal-Ethics-of-Technology-Competence/Video-Download/R-69593DVDM.

[7] The authors have added in parentheses some minor explanatory glosses to the list published by the California State Bar.

[8] In a footnote, the opinion counsels that this duty falls on both the party and outside counsel.
