Ethics of e-Discovery

Judge Mark J. Dinsmore
Honorable Magistrate Judge of the United States District Court for the Southern District of Indiana

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When we are talking about e-discovery, we are talking about the same familiar discovery concepts:

- Duty to Preserve
- Production
- Cooperation
- Privilege Issues
- Sanctions

Principle 1.02 (Cooperation)

- Failure of counsel to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Presentation Overview

I. Preservation and Spoliation
II. The Search for and Production of Documents
III. Preservation of Privilege and Confidential Client Information
IV. Duty to Supervise

I. Preservation and Spoliation

ABA Model Rule 3.4: Fairness To Opposing Party And Counsel

a) 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

b) (knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists

c) in pretrial procedure, make a frivolous discovery requestor fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party

Federal Rules of Civil Procedure

- FRCP 37 (e):
  - Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Seventh Circuit E-Discovery Pilot Program Principles

- Principle 2.03 (Preservation Requests and Orders)
- Principle 2.04 (Scope of Preservation)
  - (a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.

General Duty

- Preserve possibly relevant information:
  - in connection with a dispute in litigation or,
  - reasonably anticipated to lead to litigation

Specific Duties

- Scope of preservation obligation
- Client document and data retention policies
- Various forms of data

Preservation: Hold Notice

- In writing?
- Timeliness
- Amend hold notice
- Reissuing hold notice

Illustrative Cases

- *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004): counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched
- *Pension Committee v. Banc of America*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010): failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information

Illustrative Cases

- *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010): "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done–or not done–was proportional to that case and consistent with clearly established applicable standards."
- *Victor Stanley, Inc. v. Creative Pipe, Inc*., 269 F.R.D. 497 (D. Md. 2010): assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence

Illustrative Cases

- *Phillip M. Adams & Assoc., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173 (D. Utah 2009): The absence of a coherent document retention policy" is a pertinent factor to consider when evaluating sanctions.
- *Jones v. Bremen High School District*, 2010 U.S. Dist. LEXIS 51312 (N.D. Ill. 2010): It is unreasonable to allow a party's interested employees to make the decision about the relevance of documents

Illustrative Cases

- *Passlogix v. 2FA Technology*, 2010 U.S. Dist. LEXIS 43473 (S.D.N.Y. May 4, 2010): spoliation included emails, text-messages, and Skype messages
- *Orbit One Communications v. Numerex*, 271 F.R.D. 429 (S.D.N.Y. 2010): sanctions are not warranted unless there is proof that some information of significance has actually been lost.

Illustrative Cases

- *Green v. Blitz USA*, 2011 U.S. Dist. LEXIS 20353 (E.D. Tex. 2011): court considered parameters of electronic search terms when entering sanctions
- *Micron Tech., Inc. v. Rambus Inc*., 645 F.3d 1311 (Fed. Cir. 2011): "whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation"

Illustrative Cases

- *Alford v. Rents*, 2010 WL 4222922, 2010 U.S. Dist. LEXIS 112000 (S.D.Ill. 2010): Professional misconduct related to discovery led to sanctions in the form of individual fines for counsel
- *Grey v. Kirkland & Ellis*, 2010 WL 3526478, 2010 U.S. Dist. LEXIS 91726 (N.D.Ill. 2010) Court rejected plaintiffs' contention was that counsel was grossly and/or intentionally negligent with their discovery
- *Olson v. Sax* 2010 WL 2639853, 2010 U.S. Dist. LEXIS 76981 (E.D. Wis. 2010) Court denied motion for sanctions for spoliation despite party's failure to preserve data when aware of potential litigation as no evidence of "bad faith" destruction was found.

Sources of Information

- Seventh Circuit E-Discovery Pilot Program Website:
  - www.discoverypilot.com
- Sedona Conference
  - www.sedonaconference.org

Consequences

- Rule 37 sanctions
- Court sanctions
- Substantive regulations
- Civil liability (*e.g. Boyd v. Travelers*, 652 N.E.2d 267 (Ill. 1995))
- Criminal liability
- Malpractice liability
- Bar discipline

When is Duty to Preserve Triggered?

- Litigation reasonably anticipated
- Fact & Document/Data specific
- Plaintiff v. Defendant

Lawyers' E-Responsibilities

- Define scope of preservation & production
- Initiate litigation holds directly with key players
- Reissue hold, oversee compliance & audit
- Know document retention policies & practices
- Understand systems & retention architecture
- Detailed preservation & production records

What is Required?

- Notify custodians of preservation obligations
- Save relevant information
- Suspend deletion/overwriting of current and backup media
- Stop destruction of back-ups if *sole* source of information
- Stop recycling of computers, crashed hard drives
- Periodically monitor compliance with the hold

Illustrative Case

- *Treppel v. Biovail Corp*., 249 F.R.D. 111 (S.D.N.Y. 2008): Equates the duty to preserve upon reasonable anticipation of litigation with the same reasonable anticipation of litigation test required to claim work product protection. In other words, if you claim that a document is protected by then work product doctrine then you should be preserving ESI at the same time.

Principle 1.03 (Discovery Proportionality)

- The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable

Cloud Storage – where data is stored online on virtual servers, as opposed to dedicated servers, generally hosted by third parties.

II. The Search for and Production of Documents

Search & Production of Documents

- ABA Model Rule 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.”
- ABA Model Rule 1.3 - “A lawyer shall act with reasonable diligence and promptness in representing a client.”

Search & Production of Documents: ABA Model Rule 3.4

- A lawyer shall not:
  a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potentially evidentiary value. A lawyer shall not counsel or assist another person to do any such act….
  b) in pretrial procedure, . . .fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; . . ."

Fed. R. Civ. P. 26(b)(2)(B): *Specific Limitations on Electronically Stored Information*

- A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.
- On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.
- If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).

Considerations for Production

- Who?
  - Custodians, IT, employees, etc.
  - Necessity of vendor or IT assistance?
- What?
  - Scope of production
- Where?
  - Servers, databases, computers, discs, flash drives, backup tapes etc.
  - Accessible and Inaccessible Data?
- When?
  - Past, present, and ongoing

Illustrative Cases

- Counsel has an “affirmative” obligation to ensure relevant documents are discovered and produced. (*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004))
- Counsel is expected to take necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated and that such records are collected, reviewed and produced to the opposing side. (*Pension Committee v. B of A Securities, LLC,* 685 F. Supp. 2d 465, 477 (S.D.N.Y. 2010))

Illustrative Cases

- *Qualcomm Inc. v. Broadcom Corp*., 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. March 5, 2008):
  - court noted that the company failed to heed warning signs that its document searches and productions were inadequate
  - emphasizes the importance of communication in preservation

Illustrative Cases

- *Pension Committee v. B of A Securities, LLC,* 685 F. Supp. 2d 465, 477 (S.D.N.Y. 2010): failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information
- *Rimkus Consulting Grp. Inc. v. Cammarata,* 688 F. Supp. 2d 598 (S.D. Tex. 2010): preservation or discovery conduct depends on what is reasonable and proportional

Principle 2.02 (E-discovery liaisons)

- Technical disputes
- Communicate with all parties
- Communicate with the court

Predictive Coding

- For information on predictive coding see:
  - Andrew Peck, U.S. Magistrate Judge for the Southern District of New York, *Search, Forward,* LAW TECHNOLOGY NEWS, (Oct. 1, 2011).
  - Robert Alan Eisenberg, Anne S. Peterson & Daniel D'Angelo, *Predictive Coding Primer*, BNA Digital Discovery & e-Evidence, (Oct. 27, 2011).
  - Karl A. Schieneman, *The Top Ten Coding Mistakes and How to Avoid Them*, BNA Digital Discovery & e-Evidence, (Oct. 27, 2011).

Predictive Coding

- For information on predictive coding see:
  - Dave Walton, *Manage ESI Dangers With Targeted Collections*, LAW TECHNOLOGY NEWS, (Nov. 3, 2011).
  - Kathryn Walker, Anthony McFarland & Lucas Smith, *Technology is the problem. It's also the solution; Resistance to change is futile, but tools exist to help cope with the scale of discovery*, THE NATIONAL LAW JOURNAL, (Aug. 22, 2011).
  - Victor Li, *The Electronic Eye; Will Computers replace lawyers in document review?,* THE AMERICAN LAWYER, (Nov. 1, 2011).

III. Preservation of Confidential & Privileged Information

Attorney-client Privilege

- Applies
  - Where legal advice of any kind is sought
  - From a professional legal adviser in her capacity as such
  - The communications relating to that purpose
  - Made in confidence by the client
  - Are at his instance permanently protected
  - From disclosure by himself or by the legal adviser. *United States v. White,* 950 F.2d 426, 430 (7th Cir. 1991).

Attorney-client Privilege (cont'd)

- Must first establish an attorney-client relationship. *Matter of Walsh*, 623 F.2d 489, 493 (7th Cir. 1980).
- Not all communications are protected. *Id.*
  - Privilege does not apply to client seeking business advice. *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir. N.Y. 1984)

Work-Product Protection

- Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared **in anticipation** of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). FRCP 26(b)(3).
- If not made in anticipation of litigation, then not shielded by the work-product doctrine. *See Rockies Express Pipeline LLC v. 58.6 Acres,* 2009 U.S. Dist. LEXIS, 121618 2009 WL 5219025, at *6 (S.D. Ind. 2009) .

Duties to Clients

- **ABA Model Rules of Prof. Conduct**
  - **Model Rule 1.6(A):** "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.
- **Code of Prof. Responsibility**
  - **Canon 4:** "A lawyer should preserve the confidences and secrets of a client."
  - **Ethical Consideration 4.4:** "…ethical obligation of a lawyer to guard the confidence and secrets of his client.
  - **Disciplinary Rule 4 101(B):** "a lawyer shall not knowingly reveal a confidence or secret of his client."

Costs of Privilege Review

- Privilege review is often the single most expensive aspect of the discovery process. Anything that can be done to limit that expense can benefit both your client and the process itself.
  - FRCP 26(b)(5)(B)/FRE 502
  - Claw Back Agreements
  - Quick Peek Agreements
  - Use the Technology

Confidential Information

- Duty to Protect from Public Disclosure
  - Personal identifiers
  - Personal financial information
  - Medical information/HIPAA

FRCP Rule 26(b)(5)(B): Safe Harbor Rule

- The 2006 amendments to the Fed. R. Civ. P. added the so called “safe harbor”, Rule 26(b)(5)(B), in recognition that the privilege could more easily be waived when parties are dealing with large volumes of electronic information.

Process on Inadvertent Disclosure **Safe Harbor Rule**

- Federal Rules
  - The 2006 amendments to the Fed. R. Civ. P. added the so called “safe harbor”, Rule 26(b)(5)(B), in recognition that the privilege could more easily be waived when parties are dealing with large volumes of electronic information.
  - The rule provides that if a party produces privileged information or work product, the recipient must return or destroy the information, or “sequester” it and not use it or disclose it, on receipt of notice from the producing party. The receiving party can seek a court determination as to whether privilege has been waived. The receiving party can’t use potentially privileged or protected material after notice from the producing party until the issue is resolved.

FRE 502

- Problem Rule 502 tries to resolve
  - In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee Notes

FRE 502 (cont'd)

- Effective Date: proceedings commenced after September 19, 2008 and, insofar as is "just and practicable", in all proceedings pending on September 19, 2008.
- Rule 502 applies to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

Waiver Analysis Before FRE 502

- Strict: Always waived—*See Fed. Deposit Ins. Corp. v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992).
- Intent Based: Not waived unless *intentional—See Jones v. Eagle-North Hills Shopping Ctr., L.P.*, 239 F.R.D. 684, 685 (E.D. Okla. 2007).
- Majority Approach: not waived if disclosure inadvertent. *Alldread v. City of Grenada*, 988 F.2d 1425, 1433-34 (5th Cir. 1993).

FRE 502 (cont'd)

- Subject Matter Waiver
  - Pre Rule 502: Any waiver could lead to subject matter waiver. *See e.g.*, *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995).
  - Rule 502(a) & (b): "subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver." 502(a) Advisory Committee Note

FRE 502 (cont'd)

- 502(a) **Scope of a Waiver**: when the disclosure is made in a Federal proceeding and waives the privilege/protection, the waiver extends to an undisclosed communication or information in a Fed or State proceeding ONLY if:
  - The waiver is intentional:
  - The disclosed & undisclosed communications concern the same subject matter; and
  - Ought in fairness be considered together

FRE 502 (cont'd)

- 502(b) Inadvertent Disclosure—the disclosure does not operate as a waiver if
  - The disclosure is inadvertent
  - The holder of the privilege or protection took reasonable steps to prevent disclosure; AND
  - The holder promptly took reasonable steps to rectify the error

Illustrative Cases

- *Heriot v. Byrne*, 257 F.R.D. 645 (N.D. Ill. Mar. 20, 2009)
- *Containment Technologies Group, Inc. v. American Society of Health System Pharmacists*, 2008 WL 4545310, 2008 U.S. Dist. LEXIS 80688 (S.D.Ind. Oct. 10, 2008).
- *Alcon Mfg., Ltd. v. Apotex, Inc.*2008 WL 5070465, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008)

Review Considerations

- When manual review is outsourced:
  - In *Heroit*, the defendant was accused of copyright infringement. During discovery, the vendor that the Plaintiff used for document processing produced a significant number of privileged documents. Two months later, when Plaintiff discovered the mistake, it sought to get the information back. The judge, applying Fed.R.Evid. 502, found that there was no waiver because the release of information had been inadvertent and Plaintiff had sought the return of the information immediately on learning about the release. **Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. Mar. 20, 2009).**

Illustrative Cases

- ***Containment Technologies Group, Inc. v. American Society of Health System Pharmacists*, 2008 WL 4545310, 2008 U.S. Dist. LEXIS 80688 (S.D.Ind. 2008):** it's easier, more efficient and less expensive to "over designate" records than to "engage in a painstaking process of document by document (or even paragraph by paragraph) review…"

- ***Alcon Mfg., Ltd. v. Apotex, Inc.*, 2008 WL 5070465, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. 2008):** the Plaintiff did not waive its attorney□client privilege as it took "prompt remedial action" to identify the owners of handwritten notations and specifically assert privilege

FRE 502 Inadvertent Cases

- *Compare Silverstein v. Federal Bureau of Prisons*, 2009 WL 4949959, 2009 U.S. Dist. LEXIS 131357 (D. Colo. 2009).
  - finding "inadvertent" in 502(b) mandates a remedy for an unintended, rather than mistaken, disclosure)
  - No FRE 502 protection when disclosure and requested return were 1-year apart
- *With Amobi v. District of Columbia Dept. of Corrections*, 362 F.R.D. 45, 53 (D.D.C. 2009)
  - finding inadvertent included mistaken disclosures)

FRE 502 (e) & (d)

- 502(e) **Controlling effect of a party agreement:** An agreement on the effect of disclosures …is binding only on the parties to the agreement, unless it is incorporated into a court order.
- 502(d) **Controlling effect of a Court Order**: A court order that the privilege or protection is not waived by disclosure in the pending litigation also applies to any other Federal or State proceeding
  - Contemplates the use of claw-back arrangements "as a way to avoid the excessive costs of pre-production review for privilege and work product"

Clawback Agreements

- Assumes that there will be some review, but provides protection when something is inadvertently produced. Always a good idea, but it may not provide complete protection if a party is not careful and/or does not react in a timely manner when there is a concern that privileged information has been released.

Claw Back Agreements

- Source/Authority of Court
  - Under FRCP 26(c)(1), "The Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including …(B) specifying terms, including time and place, for the disclosure or discovery."
  - *See Rajala v. McGuire Woods LLP*, 2010 U.S. Dist. LEXIS 73564, 2010 WL 2949582, at *5 (D. Kan. 2010) (holding "that the entry of an order containing a clawback provision falls within the purview of Rule 26(c)(1)" and that the Court has authority to enter a clawback provision over a party's objection).

Claw Back Agreement

- Source/Authority of Court
  - Contemplated by 502(d) “Under [Rule 502], a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.” 502(d) Advisory Committee Note

Clawback Agreements

- FRE 502(b) - Inadvertent disclosure
- FRE 502(d) - Controlling Effect of a Court Order
- FRE 502(e) - Controlling effect of a party agreement
- FRCP 26(c)(1): grants authority to issue these orders

Claw Back Agreement

- Issue with Claw back agreements
  - Use of the word “inadvertent,” which is a term of art
  - Risk—Only “inadvertent” disclosures trigger the application of the agreement. Court applies a Rule 502 analysis to determine whether the disclosure was inadvertent. If not inadvertent, then claw-back agreement does not apply
  - *See Callan v. Christian Audigier, Inc*., 263 F.R.D. 564, 566 (C.D. Cal. 2009) Motion to compel compliance with a claw back agreement denied because court determined that the defendants failed to prove their production was inadvertent.
  - *See also Kandel v*. *Brother Intern. Corp.,* 683 F. Supp 2d 1076, 1086. Claw back agreement used the phrase “inadvertent production” and stated that it should not be construed to alter the legal definition of “inadvertent.” The Court essentially analyzed the disclosure under Rule 502.

Claw Back Agreement

- Example
  - "Privileges Not Waived By Production ("Claw-Back" Agreement). A party who produces material or information without intending to waive a claim of privilege does not waive that claim, and any privilege is preserved, if – within 30 days after the producing party actually discovers that such production was made – the producing party notifies in writing the persons to whom the documents were produced, identifying the material or information produced, and stating the privilege asserted. If the producing party thus asserts a privilege, the persons to whom the documents were produced must promptly return the specified material or information and any copies pending any ruling by the Court denying the privilege. This provision is intended to be construed broadly against waiver of a privilege, and applies whether or not the material produced is derived from ESI."

Claw Back Agreement

- Recommendation
  - Instead of using “inadvertent” use “unintentional” or even better, “expressly authorized by the individual or entity who controls the privilege.”

Quick Peek

- Concept: an agreement that allows the opposing party to review the producing party's documents for relevance before any privilege review has taken place. *See* The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act, 38 Loy. L.A. L. Rev. 1683, 1722 (Sum. 2005).
- Needs to be included in a Court Order for FRE 502 protection
- Hybrid Quick Peek

Quick Peek Agreements

- Requires client approval
- Must be in a court order under FRE 502(d)
- Unlike a claw-back agreement, need agreement from BOTH sides

Another Tool: Protective Orders

- Best way to protect information is to limit disclosure even among counsel

Use the Technology

- Use the available technology to limit the costs of privilege review.
  - Searches for potentially privileged WP documents
  - Requires cost/benefit discussion with client
  - No cookie-cutter approach

Lawyers' E-Responsibilities

- To review or not review?
- If no review is done prior to turning over documents, a party would usually rely on an agreement to preserve the privilege
- If documents are reviewed, that can be done electronically or manually, identifying privilege through key word searches or by manual attorney review.

What about Metadata?

- Another issue related to confidential information is whether metadata is considered confidential and, thus, subject to attorneys' ethical obligations that apply when they have reason to believe that they have received information that was turned over inadvertently.

- The ABA has issued an opinion that receiving counsel have no ethical issues if they review metadata. See ABA Formal Op. 06-442. Maryland follows this as well.

- Alabama, Washington, D.C., New York and Florida, however, have taken the opposite position, that metadata is confidential information and cannot be viewed if it is included in a production. The ABA and Maryland positions, however, do not relieve counsel of their obligation to protect clients' confidential information, meaning that care should be taken to avoid metadata, if confidential, from being produced.

- Some courts distinguish between types of metadata: (1) substantive, (2) embedded and (3) system generated, and then base what is considered confidential on the type of metadata. See Matter of Irwin, 72 A.D.3d 314, 321 (N.Y. App. Div. 2010).

Metadata: Information About Information

- Substantive: embedded in a document/data
  - Information in a Word document
- System: automatically generated
  - Example: name of author
- Embedded
  - Formula in an Excel document

- *Matter of Irwin,* 72 A.D.3d 314, 321 (N.Y. App. Div. 2010).

Document review handled by contract attorney's, staffing agencies or non-attorneys

IV. Duty to Supervise

Duty to Supervise

- Vetting the vendor
- Training & educating
  - Relevant documents
  - Privilege rules
  - Developing policy

Constant involvement by retained counsel

ABA's Proposed New Comment to Rule 1.1: Competence

- 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 technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rules Regarding Supervision

- Rules of Professional Responsibility Generally: attorneys are required to supervise those that they oversee
- FRCP 26(g): all responses, requests, and objections be signed by counsel in order to be effective

Illustrative Cases

- *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,* held that attorneys can be held liable for failing "to sufficiently supervise or monitor their employees' document collection." 685 F. Supp. 2d 465, 477 (S.D.N.Y. 2010).

Illustrative Cases

- Attorneys have a responsibility for ensuring the adequacy and accuracy of discovery.
- *Rimkus Consulting Grp. Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010)
- *Orbit One Commc'ns Inc. v. Numerex Corp*., 271 F.R.D. 429 (S.D.N.Y. 2010)
- *Surowiec v. Capital Title Agency Inc*., 2011 WL 1671925, 2011 U.S. Dist. LEXIS 48011 (D. Ariz. May 4, 2011).

Illustrative Cases

- ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) - attorney of record is responsible for the results of the entire legal team, including any outside vendors. *Id* at 2. “A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client." *Id.* at 1.

Illustrative Cases

- *J-M Manufacturing Co. Inc. v. McDermott Will & Emery* filed on June 2, 2011, in Los Angeles Superior Court (Case BC462832)
- The suit alleges that McDermott lawyers "negligently performed limited spot-checking of the contract attorneys' work," leading to the disclosure of about 3,900 privileged or irrelevant documents. Also includes allegations regarding significant markups of contract lawyers' fees.

Illustrative Cases

- *Lawson v. Sun Microsystems, Inc*. 2009 WL 5842136, 2009 U.S. Dist. LEXIS 124768 (S.D. Ind. 2009); 2010 WL 503054, 2010 U.S. Dist. LEXIS 10860 (S.D. Ind. 2010): found that attorneys' failure to supervise their client did not equate to "sanctionable," wanton conduct when their client sent them unlocked, password protected privileged documents received from Defendant.

Illustrative Cases

- *Promote Innovation LLC v. Roche Diagnostics Corp.* 2011 WL 3490005, 2011 U.S. Dist. LEXIS 87995 (S.D.Ind. 2011): Court payment of electronic discovery related costs to prevailing party based on prevailing party's efficient practices such as data culling and application of search terms.

Lessons Learned: Preservation

- Good advocacy matters
- Good faith required
- Need to learn the client's computer systems
- Need to communicate with key players
- Need to monitor clients → active supervision!

Lessons Learned: Processing & Production

- Reasonable inquiry required
- Counsel cannot turn a blind eye
- Familiarity with client's computer systems
- Understand the costs involved
- Form of production & metadata
- Early proportionality meet and confer