Ethical Considerations in E-Discovery: Avoiding Malpractice Claims
Electronic discovery, even more so than traditional paper-based discovery, can present treacherous ethical and malpractice pitfalls for all attorneys, even those who practice at the requisite level of technological competence.

By Marie L. Mathews and Brigitte M. Gladis – Chiesa, Shahinian & Giantomasi
April 11, 2018

Electronic discovery, even more so than traditional paper-based discovery, can present treacherous ethical and malpractice pitfalls for all attorneys, even those who practice at the requisite level of technological competence. The complex mix of evolving technologies, ever-expanding data sets, increased competition for a shrinking pool of work, corporate budget pressures and a continuing upward trend in professional liability claims creates unique challenges for lawyers in the area of e-discovery. In short, bad things can happen to the unwary attorney who fails to recognize the unique ethical considerations in e-discovery. Such traps are discussed below, along with practical guidance for complying with ethical rules implicated by common e-discovery issues.

The Preservation Obligation

The duty to preserve relevant materials, including electronically stored information, requires that parties take reasonable steps to identify and safeguard documents and other data that may be pertinent to anticipated litigation. That obligation is generally communicated to potential custodians through a "litigation hold" memo. Most lawyers are aware that both the party and the lawyer can be sanctioned for failing to preserve relevant evidence, particularly where a "litigation hold" was not issued, but lawyers also face the added risk of a malpractice claim for failing to properly advise a client on its preservation obligations. Recently, the influential U.S. District Court for the Southern District of New York held that an attorney's failure to institute a litigation hold and monitor the client's compliance could constitute negligence, even where the firm was retained long after the preservation obligation arose. *See Industrial Quick Search, Inc. v. Miller, Rosado & Algois, LLP*, 1:13-Civ-05589-ER (S.D.N.Y. Jan. 2, 2018). In that case, the client failed to preserve previous versions of its website that were relevant to a copyright claim brought against it. The court in the underlying matter issued a default judgment against the client as a sanction for spoliation. The client then filed a malpractice claim against its counsel seeking recovery of the judgment and return of fees, claiming that the firm failed to properly advise it of its obligation preservations, among other claims. On motions for summary judgment, Judge Ramos rejected the firm's argument that it had no duty to advise the client of its preservation obligations because such obligations arose prior to the firm being retained. To avoid being on the receiving end of such a claim, lawyers should take care to issue and monitor litigation hold notices to their clients, no matter the stage of litigation at which they are retained.

Not only must lawyers advise clients of their obligation to preserve evidence, they must also actively supervise the client's compliance with such obligations and verify the client's

representations concerning preservation, identification and production of e-discovery. In most instances, lawyers delegate the details of e-discovery preservation, collection and production to non-lawyers, such as paralegals, IT personnel and other employees of the client. The delegation of such work implicates New Jersey Rule of Professional Conduct (RPC) 5.3, Responsibilities Regarding Non-lawyer Assistance, which requires that a supervising lawyer ensure that the person to whom she delegates work complies with the RPCs, including the duty of competence required by RPC 1.1.

Thus, if the lawyer delegates tasks to non-lawyers, including the client's personnel, the lawyer must ensure that the non-lawyer is competent to effectively perform the task.
These ethical obligations sometimes butt up against clients' budget constraints and preference to handle preservation, collection and production independently. However, lawyers are ill-advised to turn e-discovery obligations over to a client and simply rely on the client's representations as to the existence or non-existence of relevant evidence and their compliance with preservation obligations. In other jurisdictions, severe sanctions have been entered against lawyers who failed to verify representations made by their own clients relating to e-discovery. For example, in *Brown v. Tellermate Holdings, LLC*, No. 2:11-cv-1122 (S.D. Ohio July 1, 2014), Magistrate Judge Kemp held that counsel had an obligation to do more than just advise the client as to its obligations.

"Rather, counsel had an affirmative obligation to speak to key players at [the client] so that counsel and client together could identify, preserve and search the sources of discoverable information." *Id*. at 35. "It is not sufficient to send the discovery requests to a client and passively accept whatever documents and information that client chooses to produce in response." *Id*. at 37. Judge Kemp was clear that counsel must conduct a reasonable inquiry into the facts as represented by the client, and cannot simply take a client's representations at face value." *Id*. at 32. It is the lawyer's obligation to push back against the client's preference to handle such matters independently, although in practice doing so can be difficult. In an extreme situation, the lawyer may be forced to withdraw as counsel in order to comply with her ethical obligations pursuant to RPC 1.16.

Balancing Transparency and Cooperation with the Duty to Preserve Confidences

Federal Rule of Civil Procedure 26(f) requires that parties cooperatively develop a proposed discovery plan, including for the disclosure of electronically stored information. The cooperation and transparency necessary to comply with those obligations in good faith at times appears to conflict with a lawyer's ethical obligation to zealously advocate a client's position and preserve confidential information. For example, meeting and conferring with the adversary in good faith might require the disclosure that certain data has not been preserved, that a certain category of discovery exists or an indication of how burdensome collection of certain information may be. To avoid a dispute with the client, the precise facts disclosed in a meet and confer with an adversary in connection with

efforts to develop a discovery plan should be discussed with the client in advance, and the client should provide its informed consent to disclosure of the information.

Safeguarding Confidential Information and Respecting the Privilege

One of the primary tenets of the profession requires that lawyers safeguard clients' confidential information and make reasonable efforts to prevent the inadvertent or unauthorized disclosure of privileged or confidential information. *See* RPC 1.6. The converse of the rule encompassed by RPC 1.6 requires that lawyers respect the rights of the opposing party that inadvertently discloses privileged information. RPC 4.4(b) obligates a lawyer that receives an inadvertently produced privileged document to not read it and return it to the sender. In the context of e-discovery, the disclosure of metadata can raise ethical traps for practitioners. Information included in metadata might include substantive information such as embedded commentary, attorney modifications and other privileged material. Lawyers handling the production of e-discovery must be sufficiently competent to ensure that they are not producing metadata unintentionally. Moreover, lawyers must be aware that they cannot review metadata inadvertently produced by another party. Importantly, the Official Comment to RPC 4.4(b) (adopted August 1, 2016) states that "metadata is presumed to be inadvertently sent when it reflects privileged or work product information." Therefore, lawyers receiving e-discovery must be wary of accessing or using metadata produced by an adversary, particularly where the metadata was not requested from or negotiated with the adversary, as production in such a case was likely inadvertent.

Outside the e-discovery context, metadata may still pose ethical traps for the unwary. For example, in *Estate of Kennedy v. Rosenblatt*, 447 N.J. Super. 444 (App. Div. 2016), the New Jersey Appellate Division addressed metadata as confidential information in the context of a disqualification motion. In that case, the plaintiff had been represented by an attorney from Law Firm A who subsequently moved to Law Firm B. The defendant had been represented by an attorney from Law Firm B, who then moved to Law Firm C. In connection with the move from Firm B to C, the lawyer took the client's paper file, but left the electronic file behind at Firm B, including a privileged memorandum outlining the defense. As Law Firm B was then representing the plaintiff, the defendant moved to disqualify Law Firm B. The trial court granted the motion to disqualify because the defendant's electronic file had been available to all attorneys at Law Firm B prior to the imposition of an ethical wall, and because at least one attorney had actually accessed the electronic file's metadata. On appeal, the Appellate Division vacated the disqualification order concluding that a question of fact existed as to whether the attorney who accessed the files accessed any confidential information or simply the metadata associated with the files to determine whether anyone else has accessed the files for the purpose of determining whether a conflict existed. *Id.* at 454.

The Appellate Division noted that disqualification would only be appropriate if the attorney had actually viewed the content of those files, drawing a distinction between that content

and the "metadata that merely discloses who has accessed an electronic file." Id. Thus, according to the New Jersey Appellate Division, such metadata does not result in an attorney having "information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter," and thus disqualification would not be appropriate under those circumstances. On remand, the Court required that the attorney who accessed the electronic file provide a sworn certification describing the information that was accessed, and addressing how the attorney avoided reviewing the content of protected information. *Id.* at 458. The decision presents a warning to the unwary that review of or access to metadata may violate the RPCs and lead to disqualification, even where the purpose of reviewing the metadata was to ensure compliance with ethical obligations.

Particularly in the context of e-discovery, lawyers need to be vigilant and proactive in their efforts to stay abreast of developments in technology, and also supervise, verify and monitor their client's discovery efforts. The failure to do so can present significant risks from an ethical and malpractice perspective.

Marie L. Mathews is a Member and Brigitte M. Gladis is an Associate in the professional malpractice group at Chiesa Shahinian & Giantomasi, where they advise professional services clients on legal malpractice claims, the RPCs and ethical issues. Mathews is also a member of the firm's Ethics-Conflicts Committee.