InsideCounsel

Technology: Ethics meets e-discovery

Courts are underscoring counsel's duties in the areas of competence, confidentiality, candor and fairness

BY JOHN COWLING, DANIEL NELSON
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Recent developments in e-discovery put more burden on counsel and implicate the rules of ethics for lawyers. The explosion of electronic files in discovery has caused courts to become more active in affirming and enforcing the duties of counsel in four areas: competence, confidentiality, candor toward the tribunal and fairness.

Competence: The ABA Model Rule of Professional Conduct 1.1 requires that lawyers provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

Lawyers spent many years developing and perfecting techniques to handle paper discovery. The new world of electronic records requires new skills and knowledge. Collecting, searching and reviewing email, electronic documents, database records and other electronic data present new and often complicated issues for the lawyer. At a minimum, counsel needs to be able to acknowledge and understand their skills and understanding of the technical issues, inquire about clients' skills and limits and know when outside help is needed.

Some examples of what can happen when counsel are ill-informed include *Swofford v. Eslinger*, a 2009 Middle District of Florida case in which inside counsel failed to issue a litigation hold or other meaningful steps to preserve. In *Green v. McCLendon*, a 2009 case out of the Southern District of New York,

counsel discussed duty to preserve with the client but failed to discuss what types of information may be relevant or instruct the client to institute a litigation hold. The defendant thereafter reformatted his hard drive. The court awarded costs against client and against counsel. In *Bray & Gillespie v. Lexington Insurance*, a 2009 case out of the Middle District of Florida, the court sanctioned the law firm and two partners for misleading the court and the opposing party on the availability of electronic records in native format with metadata. Some of the plaintiff's claims were later dismissed as an additional sanction.

Confidentiality: ABA Model Rule 1.6 says that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. Counsel must act to safeguard client information from inadvertent or unauthorized disclosure, including privileged communications and work product.

Given the volume of electronic data, especially client email, it can be difficult to protect privileged information from disclosure. Counsel must understand and consider protective orders and new techniques such as clawback agreements or quick peek arrangements. Effective review tools, proper review procedures with quality controls and process documentation are often necessary.

Counsel also should consider Federal Rule of Evidence 502(b) (enacted in 2008), which states that inadvertent disclosure is not a waiver of the attorney-client or work-product privileges if the holder took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. Courts are also using rule 502(d) that provides that a federal court may find that disclosure is not a waiver in the matter, in which case it is not a waiver in any other state or federal proceeding. The rule is being used not only in cases of inadvertent disclosure, but also when a party intentionally discloses information to a government agency such as the Department of Justice.

Candor to the tribunal: ABA Rule 3.3 states that a lawyer shall not knowingly make a false statement of fact or law to a tribunal. This duty extends to discovery, including e-discovery. Consider *Magaña v. Hyundai Motor America*, a 2009 Washington Supreme Court case. The defendant—a "sophisticated multinational corporation experienced in litigation"—improperly limited its discovery search, made false, misleading and evasive responses and willfully violated discovery rules, warranting an $8 million default judgment sanction.

Fairness: ABA Rule 3.4 says that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. This requires the lawyer to work with the client to preserve evidence, including the duty to preserve evidence when litigation is anticipated. Courts also expect lawyers to make a coordinated effort to cooperate in the discovery process and work to efficiently conduct discovery.

Ethical canons also prohibit lawyers from knowingly defying court orders and discovery obligations. In the 2010 case *Aliki Foods, LLC v. Otter Valley Foods, Inc.*,the District of Connecticut court found that a party's "flagrant defiance" of court orders and discovery obligations resulted in "tremendous waste of resources—and largely for naught," leaving no "alternative to dismissal." Among other conduct the court found to be "willful and in bad faith," the party alleged that a critical hard drive "failed" (suspiciously coinciding with the court's order to produce it) and later signed over the hard drive to a nonparty after the court had ordered it to be forensically imaged, without ever attempting to comply.

About the Author

John Cowling

John F. Cowling *is an attorney in the St. Louis, Missouri office of Armstrong Teasdale. He practices primarily in the areas of commercial litigation, environmental litigation and information technology law. He has employed computers and litigation technology in his practice for many years. Additionally, he is the President of Lawgical Choice, an Armstrong Teasdale subsidiary, that provides legal technology services to law firms and legal departments.*

About the Author

Daniel Nelson

Daniel C. Nelson *is a partner in the St. Louis Missouri office of Armstrong Teasdale. He works primarily in the area of commercial litigation, with a particular emphasis on contract, real estate, sale of goods, securities and internal governance issues. He is the leader of the firm's Real Estate Litigation and Electronic Discovery practices.*