**Today’s Ethics Rules and Technology – The Intersection Between the Two is Difficult under the Current System by Jeffrey Parkhurst**

It’s not news that we are living in a totally digitized world. What is not clear is whether the ethical standards that currently exist are complete enough to guide attorneys through the current climate. Lawyers have been bound by some fundamental ethical requirements since the beginning of the profession, but technology, and particularly the eDiscovery process, has resulted in the creation of an uncoordinated series of Federal and State rules, with additional ABA Model Rules of Professional Conduct and even individual State Ethics rules along with current opinions from a variety of Courts. It is difficult for lawyers to keep current given this wide disparity. How should lawyers be prepared to respond to best represent their clients and follow the ethical requirements of their profession? Is the root of the problem the technology or the law?

Document production challenges for litigators has increased dramatically as increasing amounts of information are stored exclusively in digital media, in various formats and locations. The rules that govern the information superhighway are constantly in flux, resulting in a lag in the passage of FRCP and Model Rules of Professional Conduct that dictate what lawyers are responsible for. How should lawyers be prepared to respond to best represent their clients and follow the ethical requirements of their profession?

Digital information is no longer an occasional player in the discovery process; it has become the controlling factor in what has become known as eDiscovery. The number one problem is the preservation, control and proper distribution of the digital evidence. At the root of all of this are the ethical obligations that lawyers must adhere to as they conduct business on behalf of their clients.

**Current Standards**

Technological advances occur at an ever increasing rate which results in a lag in the passage of Federal, State and Model Rules of Professional Conduct that dictate what lawyers are responsible for and how to perform their obligations. There has been a series of Rules and modifications to rules with the goal of providing clarity to attorneys’ actions and responsibilities which include:

* FRCP 16, 26, 33, 34, 37, 45, Form 35
* Planning for discovery
* Discoverable documents
* Individual State Ethics language
* ABA Model Rules of Professional Conduct
* 2006 Federal Rules of Civil Procedures and the new proposed 2014 amendments

Best practices are being developed for data collection, data culling (think Technology Assisted Review (TAR) and Predictive Coding) and Search alternatives that are based on new technology that can be difficult to understand and explain. Staying on top of eDiscovery obligations is both a legal and ethical requirement and lawyers need to have at least a working understanding of the processes they are considering using to properly represent their clients, stay within the ethical rules and avoid problems with an increasingly educated court. Even if your firm has a dedicated group that is focused on eDiscovery issues, mastering the intersection of law and technology must be part of everyone’s practice.

Foundation Cases in eDiscovery Knowledge

Some fundamental knowledge that everyone needs to be aware of is captured in the following key rulings by jurists in eDiscovery matters:

* Zubalake v UBS Warburg – Judge Shira Scheindlin. 5 key decisions regarding the obligations of parties to properly handle eDiscovery information including:
	+ The scope of a party’s duty to preserve digital data during the course of litigation
	+ A lawyer’s duty to monitor their clients compliance with data preservation and productions (litigation hold)
	+ Data sampling so that knowledge about costs and effectiveness are known in advance
	+ The ability for the disclosing party to shift costs
	+ The imposition of sanctions for the spoliation of digital evidence.
* Victor Stanley v Creative Pipe – Judge Paul Grimm. Issue of attorney-client privilege and how it can be waived by voluntary production based on:
	+ The reasonableness of the precautions taken to prevent inadvertent disclosure
	+ The number and extent of the inadvertent disclosure
	+ Any delay in measures taken to rectify the disclosure, and
	+ Overriding interests in justice
* US v O’Keefe – Judge John Facciola. Issue of the efficacy of search terms used in eDiscovery searches and the court’s refusal to participate in their selection said:
	+ Whether search terms or “keywords” will yield the information sought is a complicated questions involving the interplay of the science of computer technology, statistics and linguistics. (Bring your geek to court with you)
	+ This topic is beyond the layperson and requires that conclusions be based on evidence that meets Rule 702 of the FRE.
* Equity Analytics v Lundin – Judge John Facciola. Issue of illegal access to electronically stored information on a personal computer
	+ The challenges to or defenses of search methodology in producing eDiscovery require expert testimony to assist the court in its ruling.
* Mancia v Mayflower – Judge Paul Grimm. Issue regarding the requirement under rule 26(g) that every discovery disclosure, request, response or objection must be signed by the attorney of record or the client, if unrepresented.
	+ The rule is intended to impose an ‘affirmative duty’ on counsel to behave in a manner that is consistent with the “spirit and purposes” of the rules.  Such behavior, according to the court, would require counsel to identify and fulfill the legitimate needs of discovery while avoiding seeking discovery disproportionately costly or burdensome to what is at stake in the litigation.
	+ The rule is intended to curb abuse by requiring the imposition of sanctions for violations absent “substantial justification” and those sanctions are intended to both penalize the noncompliant lawyer or unrepresented client, and to deter others from noncompliance.
	+ The rule “aspires” to eliminate both discovery requests served without consideration of cost and objections proffered without factual basis
* Pension Committee v. Banc of America Securities – Judge Shira Scheindlin. Issue regarded litigation holds and the requirements under the rules.
	+ The failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information
	+ Parties need to participate and undertake document preservation carefully, if for no other reason than to avoid the detour of sanctions
	+ The duty to preserve means what it says and that failure to preserve records and properly search in the right places for those records will likely result in the spoliation of evidence

***Model Rules of Professional Conduct***

Over the last 5 years, there has been a concerted effort to align ethics rules with changing technology. In 2009 the ABA Commission on Ethics 20/20 was created to review the impact of technology and globalization on the ABA Model Rules of Professional Conduct, and to propose appropriate revisions in the rules. By 2013, the commission had developed a number of recommendations that were adopted by the association's policymaking House of Delegates on issues such as client confidentiality and the use of technology to attract new clients.

**The Model Rules and Reasonableness**

Many unanswered questions remain about how to apply the Model Rules to technology, and new ones arise with each new “advance” in technology. (The Model Rules are the basis for binding rules of professional conduct in every state, although California and New York have now issued rules with a different format and different specificity.)

The need for attorneys to stay abreast with the changing technology environment is set forth in [Model Rule 1.1](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html), which requires a lawyer to provide competent representation to a client. At the recommendation of the Ethics 20/20 Commission, the House of Delegates added language to the comments to Rule 1.1 stating that competence must encompass knowledge about "the benefits and risks associated with relevant technology."

However, they let the original language stand which states, “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In that context, the focus seems to be on the phrase “reasonably necessary”. With the new legal focus by the courts on reasonableness in addressing these issues, they are generally not looking for perfection in eDiscovery matters, but reasonable knowledge assumes an advanced level of understanding.

But if technology has changed how ethics rules apply to issues across the law practice spectrum, the changes are primarily a matter of degree rather than the actual substance of the rules. Confidentiality requirements were extended to include material stored electronically. The key language is in [Model Rule 1.6(c)](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html), which states: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Note the use of the word “reasonable” again. Comments to this paragraph emphasize that the unauthorized access to or inadvertent disclosure of information relating to the representation of a client "does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure." Furthermore, the comment states that the lawyer's duty "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."

**Lawyer Responsibilities when using TAR and Predictive Coding**

First of all, people need to understand that TAR is not really “new”. Lawyers have been using computers (technology) to assist in the discovery phase of litigation for over 35 years. Recently, TAR has gotten a lot more sophisticated and difficult to understand with the creation of algorithms and analytics which have increased the levels of knowledge required to understand how these decisions impact litigation. Not understanding the ethical challenges surrounding TAR may unknowingly damage a client’s case by releasing privileged information or not producing responsive information which, in the worst case, can result in sanctions for spoliation. With this in mind, here is a short list of issues to be aware of and why ethics and technology are inexorably intertwined.

1. Communication with Clients – ABA Rule 1 requires lawyers to communicate and consult with clients about any methods they plan to reach a litigation objective. They must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions. Lawyers must be able to fully explain (and understand) the risks, benefits and implementation issues of using TAR and keep clients in the loop throughout the discovery process.
2. Duty of Competence – ABA Model rule 1.1, comment 8 requires lawyers to “ keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”. This rule does not say that attorneys need to become testifying experts in the fields of technology such as statistics, math or computer science, but that they must understand enough about the technology to make sure that it is employed correctly and that they use experts when needed.
3. Confidentiality – ABA Rule 1.6 also describes the impact of technology on confidentiality and requires lawyers to make “reasonable efforts to prevent the inadvertent of unauthorized discloser of, or unauthorized access to, information relating to the representation of the client”.

This raises an extremely interesting issue of the role and disclosure of seed sets in Predictive Coding which are used to train the algorithm to located relevant and responsive documents. Given the strong movement towards cooperation under the FRCP, it would seem natural to produce this type of information. However, by definition, a series of seed set algorithms will contain non-response documents which need to be protected. To mitigate the risk of inadvertent disclosure, lawyers must make sure that clawback agreements, sensitivity logs, auto-redaction tools and extensive quality control procedures are part of the Agreement.

1. Expert/Vendor Supervision – Rule 5.3 makes it the clear responsibility of lawyers to make sure that vendors act ethically. That means that it is the responsibility of clients and their lawyers to oversee every phase of discovery, not third party vendors. Legal teams should be vetted to make sure that there is sufficient knowledge to create sound, defensible methodologies for the case. Ultimately, the lawyers are responsible for all activities undertaken by vendors and judges (and possibly clients) and you will be the ones left to defend your actions.

**Possible Solution**

The cases cited and the Model Rules quoted form the theoretical basis for understanding ethical obligations. But this is likely not enough. Problems that are highlighted by new technology will not be solved by technology. They can only be solved by the law since ethics are perceived as legal obligations. And they can only be understood and applied by all attorneys if there is truly a uniform and universal set of ethical standards that applies in all jurisdictions, in all situations. The likely solution to the intersection of law and technology will only occur when there is parity, when every member of the Bar, regardless of practice location, understands, is using and following the same Model Rules of Professional Conduct.

**Related Resources**

Federal Rules of Civil Procedure (most recent Amended version) - <http://www.law.cornell.edu/rules/frcp>

ABA Model Rules of Professional Conduct - <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>

The Sedona Principles: Best Practices, Recommendation and Principles for Addressing

Electronic Document Production, a project of the Sedona Conference Working Group on

Electronic Document Retention and Production ((2d ed. June 2007)

<http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf>