



From Ethics To eDiscovery

## Considering the Ethical Challenges in Electronic Discovery

Presented By Tom O'Connor | Gulf Coast Legal Technology Center



# From Ethics to eDiscovery

## Considering the Ethical Challenges in Electronic Discovery

- General Ethical Duties  
*Understanding the General Ethical Expectations in the practice of Law.*
- Ethics and Technology  
*Understanding the General Ethical Expectations for the use of Technology.*
- Ethics and Obligations in eDiscovery  
*Understanding the Specific Ethics and Obligations for the use of ESI\* in Discovery.*
- Ethics, eDiscovery, and Judicial Standards  
*Understanding the Judicial Standards concerning the eDiscovery .*

\* Electronically Stored Information



# General Ethical Duties

## General Expectations

- What are the General Ethical Expectations in the practice of Law?

## The Lawyer's Code of Professional Responsibility

### Identification

The ethical duties of an attorney are set forth in a code of conduct known as the Rules of Professional Responsibility for Attorneys. Each state adopted its own version of a uniform code of conduct.

### Privacy

One of the fundamental ethical duties of a lawyer is to protect the privacy of a client. A lawyer cannot break the bond of confidentiality with a client.

### Zealous Advocacy

Another primary ethical obligation of a lawyer is to be a zealous advocate for the client. He/she must represent the client's interests to the full extent of the law.

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# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

Confidentiality | Loyalty | Competence

ABA Model Rules of Professional Conduct, Case Law, ABA Civil Discovery Standard



# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

## The Duty of Confidentiality

## Electronically Stored Information

Metadata Information  
Confidential Information  
Strategic Information  
Proprietary Information  
Trade Secrets  
Client Lists

The screenshot shows a software window with a 'Custom' tab selected. The 'Name' field contains a list of properties: 'Checked by', 'Client', 'Date completed', 'Department', 'Destination', and 'Disposition'. The 'Type' field is set to 'Text'. The 'Value' field is empty. A 'Link to content' checkbox is unchecked. Below these fields is a table with the following data:

Name	Value	Type
_AdHocReviewCy...	1429464961	Number
_EmailSubject	MP_Propos...	Text
_AuthorEmail	emersonw...	Text
_AuthorEmailDispl...	William Brown	Text

# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

## The Duty of Loyalty

### EC 7-4

The advocate may urge any permissible construction of the law favorable to the client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail. The lawyer's conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

## The Duty of Loyalty

### EC 7-5

A lawyer as adviser furthers the interest of the client by giving a professional opinion as to what he or she believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the practical effect of such decision. The lawyer may continue in the representation of the client even though the client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as the lawyer does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid the client to commit criminal acts or counsel the client on how to violate the law and avoid punishment therefor.



# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

## The Duty of Loyalty

### EC 7-6

Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when the client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist the client in developing evidence relevant to the state of mind of the client at a particular time. The lawyer may properly assist the client in the development and preservation of evidence of existing motive, intent, or desire; obviously, the lawyer may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of the client, and in those situations the lawyer should resolve reasonable doubts in favor of the client.

# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

## The Duty of Loyalty

### EC 7-7

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer or whether to waive the right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise the client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

# Ethics and Technology

## General Expectations

- What are the General Ethical Expectations for the use of Technology?

## The Duty of Competence

### “Old Duties” Include

Communication  
Meritorious Claims  
Reporting  
Misconduct

### “New Duties” Include

Old Duties  
Understanding of Technology

“...in all professional functions a lawyers should be **competent**, prompt, and diligent.”  
ABA Model Rules of Professional Conduct, Preamble, [4].



# Ethics and Technology

## The Duty Of Competence

- What are the Key Components of Competence in regard to Technology?

“...requires the legal knowledge, skill, thoroughness, and **preparation** necessary for representation.”

ABA Model Rules of Professional Conduct, Rule 1.1 Competence.



# Ethics and Technology

## The Component Of Preparation

- What are the Key Elements of Preparation in regard to Technology?

### An Understanding Of Technology Requirements

Creation | Connection | Communication | Collaboration | Conduct

### An Ability To Explain Applicable Technology Considerations

Legal Team | Client | Opposing Counsel | Jury | Judge



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# Ethics and Obligations in eDiscovery

## Specific Expectations

- What are the Specific Ethical Expectations for the use of ESI in Discovery?

## Competence

How can a lawyer who doesn't understand ESI represent a client in litigation when the predominant form of evidence is electronic?

*Ethics and E-Discovery Review, 28(1) ACC Docket 46 (2010).*



# Ethics and Obligations in eDiscovery

## Specific Expectations

- What are the Specific Ethical Expectations for the use of ESI in Discovery?

## Diligence

A threshold of diligence would be to make an effort to understand how the principle sources or discovery can be processed.

**Ethics and E-Discovery Review, 28(1) ACC Docket 46 (2010).**



# Ethics and Obligations in eDiscovery

## Specific Expectations

- What are the Specific Ethical Expectations for the use of ESI in Discovery?

## Fees

The obligation to refrain from double-billing implies a duty to take reasonable steps to identify duplicative work.

**Ethics and E-Discovery Review, 28(1) ACC Docket 46 (2010).**

# Ethics and Obligations in eDiscovery

## Specific Expectations

- What are the Specific Ethical Expectations for the use of ESI in Discovery?

## Expediting Litigation

The courts should not have to tolerate the delays caused by inefficient or unknowledgeable attorneys.

Ethics and E-Discovery Review, 28(1) ACC Docket 46 (2010).



# Ethics and Obligations in eDiscovery

## Specific Expectations

- What are the Specific Ethical Expectations for the use of ESI in Discovery?

## Candor Toward the Tribunal

Estimates of effort and time are required to process electronic records ought to be based on reasonably competent processing.

*Ethics and E-Discovery Review, 28(1) ACC Docket 46 (2010).*



# Ethics and Obligations in eDiscovery

## Specific Expectations

- What are the Specific Ethical Expectations for the use of ESI in Discovery?

## Truthfulness in Statements to Others

Estimates of effort and time are required to process electronic records ought to be based on reasonably competent processing.

**Ethics and E-Discovery Review, 28(1) ACC Docket 46 (2010).**



# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

Comply | Direct | Be Proactive | Preserve | Confer

ABA Model Rules of Professional Conduct, Case Law, ABA Civil Discovery Standard, Federal Rules of Civil Procedure



# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

## The Duty to Comply

“...shall not unlawfully obstruct another party’s access to evidence...”

“...(shall not) counsel or assist a client to do so.”

“...(shall not) fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

**ABA Model Rules of Professional Conduct, Rule 3.4.**



# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

## The Duty to Direct

Counsel must actively oversee and direct the discovery and preservation.

Counsel's duty to oversee extends to evidence preservation, location of responsive information, and timely production of responsive information.

Counsel required to supervise non-lawyer assistants.

**ABA Model Rules of Professional Conduct**



# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

## The Duty to Be Proactive

When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so.

**ABA Civil Discovery Standard (Section 10, 2004)**





# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

## The Duty to Preserve

“Once the subjects and information systems are identified, e-mail records and electronic ‘files’ of key individuals and departments will be the most obvious candidates for preservation.”

(Advisory Committee Notes to Amendments to Fed.R.Civ.P.37)

# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

## Preserving Reasonable Accessible Data

“[A] party need not provide discovery of information that the party identifies as not reasonably accessible;”

The producing party has the burden to show that requested electronic information is not accessible; and

A court may order the production of inaccessible electronic information for good cause, if the requesting party seeks a court order compelling its production.

**Federal Rules of Civil Procedure, Chapter 26.**



# Ethics and Obligations in eDiscovery

## Specific Obligations

- What are the Specific Obligations for the use of ESI in Discovery?

## The Duty To Confer (Early)

Prior to the initial case management conference, parties must:

“discuss any issues relating to preserving discoverable information”; and

to present to the court a discovery plan setting forth the parties’ views concerning “any issues relating to disclosure or discovery of electronically stored information, including the form in which it shall be produced.

**Federal Rules of Civil Procedure, Chapter 26.**



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# Ethics, eDiscovery, and Judicial Standards

## Judicial Standards

- Considering the Judicial Standards concerning the eDiscovery .

## The Duty of Confidentiality

### Client Communications

Qualcomm Inc. v. Broadcom Corp., 2008 - WL 66932 (S.D. Cal. Jan. 7, 2008)  
*Duty to Client vs. Duty to Court | Scope of Privileged Communications*



# Ethics, eDiscovery, and Judicial Standards

## Judicial Standards

- Considering the Judicial Standards concerning the eDiscovery .

## The Duty of Loyalty

### Conflicts with Clients

Coleman (Parent) Holding Inc. v. Morgan Stanley Inc., 2005 WL 674885 (Fla. Cir. Ct., 2005)  
Scope of Discovery Effort and Scope of Preservation



# Ethics, eDiscovery, and Judicial Standards

## Judicial Standards

- Considering the Judicial Standards concerning the eDiscovery .

## The Duty of Competence

- Pension Committee, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
- Adams v Winbond, 2010 WL 2979228 (D. Utah July 21, 2010)
- Victor Stanley, Inc. v. Creative Pipe, Inc., 2008 WL 2221841 (D. Md. May 29, 2008)
- United States v. O'Keefe, 537 F. Supp. 2d 14 (D.D.C. 2008) and Equity Analytics, LLC v. Lundin, 248 F.R.D. 331 (D.D.C. 2008)

# Ethics, eDiscovery, and Judicial Standards

## Judicial Standards

- Considering the Judicial Standards concerning the eDiscovery .

## The Duty to Be Proactive

- Zubulake v. UBS Warburg (S.D.N.Y. 2004)
- Phoenix Four, Inc. v. Strategic Resources Corp. (S.D.N.Y. 2006)
- Samsung Electronics Co., Ltd. v. Rambus, Inc. (E.D. Va. 2006)
- Pension Committee, 2010, WL 184312 (S.D.N.Y. Jan. 15, 2010)





# Ethics, eDiscovery, and Judicial Standards

## Judicial Standards

- Considering the Judicial Standards concerning the eDiscovery .

## The Duty to Preserve

“[T]he duty to preserve extends to those employees likely to have relevant information – the ‘key players’ in the case.”  
(Zubulake IV, 220 F.R.D. at 217-18).



# From Ethics to eDiscovery

## Tom O'Connor | Gulf Coast Legal Technology Center

Tom O'Connor is a nationally known consultant, speaker and writer in the area of computerized litigation support systems. He is a New England native who graduated from The Johns Hopkins University in 1972 with a BA in Political Science. After attending law school for one year at The University of Notre Dame, Tom returned to Baltimore and undertook a career as a paralegal specializing in complex litigation.

A frequent lecturer on the subject of legal technology, Tom has been on the faculty of numerous national CLE providers and currently teaches a course on legal technology in an ABA approved paralegal program at a local college. He is a member of the American Bar Foundation and the Governing Council of the Law Practice Management Section of the ABA. Tom has been on the faculty of numerous national CLE providers and is also a member of the advisory board of the national American Lawyer Media LegalTech conferences. A prolific writer on the subject, with articles in numerous legal publications as well as being the editor of several legal newsletters, Tom is also the author of *The Automated Law Firm*, a guide to computer systems and software published by Aspen Law & Business, now in its fourth edition and *The Lawyers Guide to Summation*, published by the ABA.





As a **general** rule,  
the most **successful** man in life  
is the man who has the **best** information.

*Benjamin Disraeli*

Good for you.  
Great for your clients.



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