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New Ethical Issues and Challenges in E-Discovery

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The rise of e-discovery and the globalization of electronic information has caused a drastic increase in the ethical issues and challenges attorneys face when compared to the paper world. Attorneys are facing emerging challenges both inside and outside their legal teams, regarding the supervision of vendors, contract attorneys, overseas labor, and in-house counsel; the need for cooperation and transparency with opposing counsel; and the discovery of electronic information stored outside the United States. Attorneys must use increasing care to avoid these ethical pitfalls.

WITHIN THE LEGAL TEAM

The vast increase in the amount of information involved in e-discovery has led to an increase in the number of players in the e-discovery process. As a result, attorneys need to be skilled not only in the practice of law, but the management of vendors, contract attorneys, legal support, and in-house counsel. A 2010 study showed that sanctions for e-discovery violations are increasingly common, and monetary sanctions are increasing. Dan H. Willoughby, Jr., Rose Hunter Jones, Gregory R. Antine, "Sanctions for E-Discovery Violations: By the Numbers," 60 Duke L.J. 789 (2010).

Sanctions for e-discovery violations vary by case, jurisdiction, and culpability of the parties and attorneys at issue. Recent sanctions have included adverse inference, monetary sanctions, attorney's fees, cost shifting, and imposition of additional discovery responsibilities. See *E.I. Du Pont De Nemours & Co. v. Kolon Indus. Inc.*, No. 3:09cv58, 2011 WL 2966862 (E.D. Va. July 21, 2011) (imposing adverse inference and monetary sanctions for intentional spoliation and bad faith); *Genger v. TR Investors, LLC*, No. 592, 2010, 2011 WL 2802832 (Del. July 18, 2011) (imposing monetary sanctions and payment of attorney's fees); *PIC Grp. Inc. v. LandCoast Insulation Inc.*, No. 1:09-CV-662-KS-MTP, 2011 WL 2669144 (S.D. Miss. July 7, 2011) (ordering additional discovery and payment of attorney's costs and fees, and ordering that payment be made by defendant, not insurance company).

There is a growing trend towards holding counsel liable for supervision of vendors, contract attorneys, legal support, and even in-house counsel. One of the most prominent cases regarding supervision, *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). Although there is some judicial debate regarding the standards for issuing sanctions for breaches of ethical duties, there is a general consensus that attorneys have a responsibility for ensuring the adequacy and accuracy of discovery. See *Rimkus Consulting Grp. Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010); see also *Orbit One Commc'ns Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010); *Surowiec v. Capital Title Agency Inc.*, CV-09-2153-PHX-DGC, 2011 WL 1671925 (D. Ariz. May 4, 2011).

A. Discovery Responsibilities -- The Duty to Make a "Reasonable Inquiry." The attorney of record has a responsibility to conduct a "reasonable inquiry" to ascertain whether discovery requests, responses, or objections are complete, correct, and not for any improper purposes. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356 (D. Md. 2008); see also *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 01-CV-01644-REB-CBS, 2010 WL 502721, at *10 (D. Colo. Feb. 8, 2010). In *Mancia*, Chief U.S. Magistrate Judge Paul W. Grimm of the District of Maryland sets out a legal framework for the "reasonable inquiry" necessary for attorneys signing discovery requests.

Grimm states that Rule 26(g) is "[o]ne of the most important, but apparently least understood or followed, of the discovery rules." Id. at 357. Rule 26(g) requires that all responses, requests, and objections be signed by counsel in order to be effective. The signature is a certification that, "to the best of the person's knowledge ... after a reasonable inquiry," the discovery is complete and correct, consistent with the rules, and not imposed for an improper purpose. Fed. R. Civ. P. 26(g). Grimm states that such a certification is not insignificant, and that the certification must be supported by a reasonable inquiry. Where a reasonably inquiry is not undertaken, Grimm argues that courts should routinely sanction counsel and parties.

B. Ethical Considerations Regarding Vendors, Outsourcing, and Legal Support Staff. The increased use of e-discovery vendors for all parts of the process -- preservation, collection, and review of documents -- raises additional ethical concerns, particularly as many of these vendors relocate overseas. On Aug. 5, 2008, the ABA issued an opinion meant to clarify the responsibilities of counsel when outsourcing e-discovery tasks. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008). In the opinion, the ABA supports outsourcing, stating that, "[t]he outsourcing trend is a salutary one for our globalized economy." Id. at 2. However, the ABA also explicitly states that the attorney of record is responsible for the results of the entire legal team, including any outside vendors. Id. The overarching theme of the opinion is that "[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.

Practicably, this means that the attorneys of record may be sanctioned for violations committed by vendors. While the case law on ABA Opinion 08-451 is rare, a number of states have issued ethics opinions consistent with the ABA Opinion.[FOOTNOTE 1] See New York City Bar, Comm. on Prof'l Responsibility, "Report on the Outsourcing of Legal Services Overseas," (2009); Ohio S. Ct. Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Colo. Bar Ass'n, Formal Op. 121 (2009); Prof'l Ethics of the Fla. Bar, Op. 07-02 (2008); N. Carolina State Bar, 2007 Formal Ethics Op. 12 (2008); Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004); Council of Bars and Law Soc'ys of Europe, "CCBE Guidelines on Legal Outsourcing," (2010), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf.

The ABA opinion also clarifies standards for the unauthorized practice of law. A nonlawyer may not offer legal services under the guise of being a lawyer. Similarly, a lawyer may not assist others to "practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." ABA Opinion 08-451 at 6. Therefore, if an attorney outsources legal services and helps the outsourced vendor or legal support staff to engage in the unauthorized practice of law, the attorney of record may be held responsible. Id.; see also Steven C. Bennett, "The Ethics of Legal Outsourcing," 36 N. Ky. L. Rev. 479-94 (2009).

In addition, inadequate supervision -- particularly of discovery vendors or contract attorney reviewers -- may open law firms up to malpractice suits. For example, on June 2, 2011, client J-M Manufacturing Co. Inc. filed a lawsuit in Los Angeles Superior Court against McDermott Will & Emery for damages resulting from inadequate supervision of contract attorneys. Complaint, *J-M Mfg. Co. Inc. v. McDermott Will & Emery*, No. BC462832, 2011 WL 2296468 (Cal. Sup. Ct. L.A. June 2, 2011). According to the first amended complaint, McDermott produced 3,900 privileged e-mails to the federal government, primarily because it did not review the work of its contract attorneys. Id. The contract attorneys in that case were hired through an external e-discovery vendor. Id. Although the case was only recently filed, the potential exposure for McDermott -- both in financial and reputation terms -- is extremely high.

C. Ethical Duties of In-House Counsel. Ethical duties and sanctions for failure to act appropriately are not limited to outside counsel. In-house counsel -- even those who have not appeared as an attorney of record or a party in a litigation -- have ethical duties regarding e-discovery. For example, in *Swofford v. Eslinger*, U.S. District Court Judge Mary S. Scriven sanctioned David Lane, in-house counsel for the Seminole County Sheriff's Office, after finding that he was "the sole lawyer responsible for responding to the preservation letters." 671 F. Supp. 2d 1274, 1283 (M.D. Fla. 2009). Despite receiving two preservation letters, a notice of intention to sue, and a public records request for particular information relating to the case, Lane failed to preserve electronically stored information. Id.

Lane testified in court that he had not "ever read the Federal Rules of Civil Procedure to ascertain on even a rudimentary level what his and his client's obligations were in this regard." Id. at 1281. Scriven concluded that "[n]othing other than bad faith can be inferred from the facts of this case," and imposed sanctions on the defendants and Lane. Id. at 1280-81. Outside counsel was not sanctioned, because according to Scriven, "there is no evidence to establish that any outside counsel contributed to or failed to prevent the spoliation." Id. at 1288 n.10. The sanctions included an adverse inference instruction plus attorney's fees and costs.

OUTSIDE THE LEGAL TEAM

Although many of today's e-discovery headlines focus on ethical problems within a legal team, there are still hurdles and challenges to overcome regarding interactions outside the team. For example, ethical duties of cooperation and transparency to opposing counsel have become increasingly relevant with the growth of e-discovery. In addition, e-discovery poses unique problems and challenges when it comes to complying with foreign privacy laws.

A. Ethical Obligations Regarding Cooperation and Transparency With the Opposition. Since 2008, cooperation has been the hot topic when it comes to interactions with opposing counsel. In 2008, the Sedona Conference published the Cooperation Proclamation, which was:

> a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a "just, speedy, and inexpensive determination of every action."

The Sedona Conference, The Sedona Conference Cooperation Proclamation 1 (2008) (Cooperation Proclamation), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

In the Cooperation Proclamation, the Sedona Conference stated that:

> [t]he costs associated with adversarial conduct in pretrial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information.

Id. The solution was cooperation between opposing parties, which would presumably lead to decreased costs and a more efficient system.

Although some practitioners have doubts about the feasibility of cooperation, judges have consistently signed on to the idea of cooperation. In *Mancia*, Grimm became the first federal judge to cite the Cooperation Proclamation. 253 F.R.D. 354 (D. Md. 2008). Since the *Mancia* decision, a number of other cases have cited the Cooperation Proclamation, and judges increasingly expect attorneys to cooperate when it comes to discovery. See *In re Facebook PPC Adver. Litig.*, No. C09-03043 JF (HRL), 2011 WL 1324516 (N.D. Cal. April 6, 2011) (ordering parties to enter into a joint e-discovery protocol); *Am. Fed'n of State County & Mun. Emps. v. Ortho-McNeil-Janssen Pharm. Inc.*, No. 08-CV-5904, 2010 WL 5186088 (E.D. Pa. Dec. 21, 2010) (ordering parties to "meet and confer in good faith to cooperatively and independently resolve these disputes to the extent possible"); *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 930 (N.D. Ill. 2010) (finding that, if parties had participated in "candid, meaningful discussion of ESI at the outset of the case," expensive discovery and motions practice could have been avoided); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts Inc.*, No. CV 2007-4027, 2009 WL 1750348 (E.D.N.Y. June 19, 2009) (ordering parties to enter into an agreed-upon e-discovery protocol).

B. Ethical and Legal Challenges of E-Discovery Stored Outside the United States. E-discovery in foreign countries can produce unique challenges. Many of these challenges arise when responsive material for U.S. litigation resides in the European Union. All privacy laws in the EU are derived from the European Commission Directive 95/46 EC, which provides an overarching framework for privacy and data protection, and provides minimum standards. However, the directive encourages each state within the EU to interpret and enact its own version of the directive. Id. The result is that, although every state has at least the minimum standards from the directive, some have more restrictive data protection laws.

France is often used as an example to illustrate the increased data protection laws that exist in the EU.[FOOTNOTE 2] France has enacted blocking statutes that criminalize the exportation of information requested in the course of foreign legal proceedings. Fr. Law No. 68-678 (July 26, 1968); amended by Fr. Law No. 80-538 (July 16, 1980). These statutes cause tension for litigants in the United States, because they either face the possibility of violating U.S. laws regarding discovery, or the French blocking statutes.

Traditionally, U.S. courts resolved the issue of whether relevant information must be produced where the production would violate another country's laws by looking at the likelihood of prosecution. See *In re Vivendi Universal S.A. Secs. Litig.*, No. 02 Civ. 5571, 2006 WL 3378115 at *3 (S.D.N.Y. 2006) (French blocking statute did not subject parties to a "realistic risk of prosecution"); *Minpeco S.A. v. Conticommodity Servs. Inc.*, 116 F.R.D. 517 at 528 (S.D.N.Y. Nov. 16, 1987) ("this is not a situation in which the party resisting discovery has relied on a sham law such as a blocking statute to refuse disclosure"). However, a 2007 case in France showed that the threat of sanctions in France for violating blocking statutes is very real. *In re Christopher X*, Cour de Cassation, Chambre Criminelle, Paris, Dec. 12, 2007, No. 07-83228 (Fr.). In that case, the court fined a French attorney €10,000 for violating the French blocking statute by seeking information from a French citizen relating to a lawsuit filed in the United States. Id.

It is unclear what the long-term results of the *Christopher X* decision will be. Courts addressing the decision have consistently held that the facts of the case at hand are sufficiently dissimilar to avoid any comparison. *MeadWestvaco Corp. v. Rexam PLC*, No.1:10CV511 (GBL/TRJ), 2010 WL 5574325, at *2, n.1 (E.D. Va. Dec. 14, 2010); aff'd sub nom. *MeadWestvaco Corp. v. Rexam PLC*, No.1:10CV511, 2011 WL 102675 (E.D. Va. Jan. 10, 2011) ("The court is not convinced that the circumstances surrounding *Christopher X* are comparable to those present in this case"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2010 WL 1189341, at *3 (E.D.N.Y. Mar. 29, 2010) (holding that *Christopher X* ... would be prosecuted for complying with a court order compelling disclosure of the documents at issue"); *In re Global Power Equip. Grp. Inc.*, 418 B.R. 833, 849-50 (Bankr. D. Del. 2009) (holding that *Christopher X* does not change the court's analysis because "it does not appear that the attorney who was sanctioned in that case was pursuing discovery in a manner that was ordered or approved by a United States court").

CONCLUSION

Attorneys constantly face new and changing ethical issues in e-discovery. The rise of e-discovery and the globalization of electronic information has caused a drastic increase in the ethical issues and challenges attorneys face when compared to the paper world. In order to avoid sanctions for failing to meet their ethical obligations, attorneys must be knowledgeable about the actions of all members of their legal team, and exercise increasing care.

::::FOOTNOTES::::

FN1 The only case currently citing the ABA Opinion refers to a section on reasonableness of fees. See *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009) aff'd, 355 F. App'x 523 (2d Cir. 2009).

FN2 Many other countries also have restrictive data privacy laws that may impede e-discovery in the United States, including Australia, Canada, China, South Africa, Switzerland, and the United Kingdom. See The Sedona Conference, "Framework for Analysis of Cross-Border Discovery Conflicts," 18-20 (2008), available at http://www.thesedonaconference.org/dltForm?did=WG6_Cross_Border.

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