THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 11-0004

ISSUES: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

DIGEST: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law. Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI. An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

AUTHORITIES INTERPRETED: Rules 3-100, 3-110, 3-210, 5-200, and 5-220 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068.

STATEMENT OF FACTS

Attorney defends Client in litigation brought by Client's Chief Competitor ("Plaintiff") in a judicial district that addresses e-discovery[2/] in its formal case management. Opposing Counsel wants e-discovery. Attorney refuses. They are unable to reach an agreement by the time of the initial case management conference. At that conference, an annoyed Judge informs both attorneys that they must reach a compromise and orders them to return in 2 hours with a joint proposal.

Opposing Counsel offers to do a joint search of Client's network, using her chosen vendor, but based upon a jointly agreed search term list. She further offers a clawback agreement that would permit Client to claw back any inadvertently produced ESI that was otherwise "protected by law" ("protected ESI").

Attorney mistakenly thinks that the clawback agreement is broader than it is, and will allow him to pull back *anything*, not just protected ESI, so long as he asserts it was "inadvertently" produced. Attorney then erroneously concludes there is *no* risk to Client in Opposing Counsel's proposal, and after so advising Client, Attorney agrees to the proposal. The Judge thereafter approves the attorneys' agreement, and incorporates it into a Case Management

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[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

[2/] Electronic Stored Information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. See, e.g., Code of Civil Procedure section 2016.020, subdivisions (d) & (e).) Electronic Discovery, also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

Order, including the provision for the clawback of inadvertently produced protected ESI. The Court sets a deadline three months later for the network search to occur, and a case management conference a month after that, to monitor the status of discovery and the case.

Back in his office, Attorney prepares a list of keywords he thinks would be relevant to the case and then emails those notes to Opposing Counsel as Client's agreed upon search terms. Attorney then reviews Opposing Counsel's additional facially neutral proposed search terms and agrees to include them as well. A joint search term list is created, and upon Attorney's instructions to Client to provide access, the court ordered network search proceeds on Client's network, with the vendor running the search using the joint search term list. Other than instructing Client to provide the vendor access to Client's network, Attorney does not take any other action. Attorney mistakenly reasons that he will simply claw back anything he does not like, asserting "inadvertent" production under the clawback agreement.

Subsequently, Attorney receives a copy of the data retrieved by the vendor search and puts it in the file without review. The parties return to Court for the continued Case Management Conference, during which, in response to the Judge's questions, Attorney assures the Judge that he has reviewed everything and the e-discovery is in full compliance with the Court Order, and Client's discovery obligations. Two weeks after that hearing, Attorney receives a letter from Opposing Counsel accusing Client of destroying evidence/spoliation. Opposing Counsel threatens motions for monetary and evidentiary sanctions. Only after Attorney receives this letter does he, for the first time, attempt to open his copy of the data retrieved by the vendor search, but finds he can make no sense of it. Attorney finally hires an e-discovery expert ("Expert"), who accesses the data, conducts a forensic search, and tells Attorney it appears that potentially responsive ESI has been routinely deleted off of company computers as part of Client's normal document retention policy, resulting in gaps in the document production. Expert also advises Attorney that due to the breadth of the jointly agreed search terms, it appears both privileged information, as well as highly proprietary information about Client's upcoming revolutionary product, was provided to Plaintiff in the data retrieval, even though such proprietary information was not relevant to the issues in the lawsuit.[3/] What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?

DISCUSSION

Attorney Duties Concerning Electronically Stored Information ("ESI")

1. Duty of Competence

While the requirements and standards of e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under subdivision (B) of that rule, "competence" includes the learning and skill necessary for performing legal services.

Legal rules and procedures, when placed in conjunction with ever changing technology, produce professional challenges that attorneys must meet in order to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." (ABA Model Rule 1.1, Comment [8].)[4/] Rule 3-110(C) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Another permissible choice would be to decline the representation. In

[3/] This opinion is not intended to discuss what disclosure obligations Attorney may owe to Client as a result of the release of proprietary information and the allegations of spoliation.

[4/] In the absence of on-point California authority and conflicting state public policy, the ABA Model Rules may provide guidance. *City & County of San Francisco v. Cobra Solutions, Inc*. (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

an e-discovery setting, association or consultation may be with a non-lawyer technical expert, if appropriate under the circumstances. Cal. State Bar Formal Opn. No. 2010-179.

Not every litigated case ultimately involves e-discovery; however, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness in the matter has used email or other electronic communications, stores information digitally, and/or has other forms of ESI related to the dispute. Under this backdrop, the law governing e-discovery is still evolving. In 2009, the California Legislature passed California's Electronic Discovery Act adding or amending several California discovery statutes to make specific provisions for electronic discovery and ESI. See, e.g., Code of Civil Procedure section 2031.010, subdivision (a) (now expressly providing for "copying, testing, or sampling" of "electronically stored information in the possession, custody, or control of any other party to the action").[5/] However, there remains little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena. Thus, to analyze a California attorney's current ethical obligations relating to e-discovery, we look to federal jurisprudence for guidance, as well as applicable Model Rules, and apply those principals based upon the California ethical rules[6/] and California's existing discovery law outside the e-discovery setting.

We start with the premise that "competent" handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues, if any, might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If it is likely that e-discovery will be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must take steps to acquire sufficient learning and skill, or associate or consult with someone with appropriate expertise to assist. Rule 3-110(C). Taken together generally, and under current technological standards, attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. initially assess e-discovery needs and issues, if any;
2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
3. analyze and understand a client's ESI systems and storage;
4. identify custodians of relevant ESI;
5. perform appropriate searches;
6. collect responsive ESI in a manner that preserves the integrity of that ESI;
7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
9. produce responsive ESI in a recognized and appropriate manner.

See, e.g., *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462-465.

In our hypothetical, Attorney had a general obligation to make an e-discovery evaluation early in his handling of the case, and certainly prior to the initial case management conference. The fact that it was the standard practice of the judicial district in which the case was pending to address e-discovery issues in formal case management only

[5/] In 2006, revisions were made to the Federal Rules of Civil Procedure, Rules 16, 26, 33, 34, 37 and 45, to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly parallel provisions in the 2006 federal rules amendments. See Evans, *Analysis of the Assembly Committee on Judiciary regarding AB 5* (March 3, 2009).

[6/] Federal decisions are compelling where the California law is based upon a federal statute or the federal rules. *Toshiba America Electronic Components, Inc. v. Superior Court (Lexar Media, Inc.)* (2004) 124 Cal.App.4th 762, 770 [21 Cal.Rptr.3d 532].

highlighted Attorney's obligation to conduct an early initial e-discovery evaluation. At the very least, Attorney's obligation to make an e-discovery evaluation should have been obvious even to him when he became aware that Opposing Counsel intended to pursue e-discovery in this particular case.

Notwithstanding the above, Attorney made *no* assessment of the case's e-discovery needs or of his own capabilities. Attorney exacerbated the situation when he took no steps to consult with an e-discovery expert prior to the initial case management conference. He agreed to Opposing Counsel's proposed e-discovery plan under a mistaken belief as to its scope, and thereafter allowed that proposal to be transformed into a Court Order, again without any expert consultation, and in the face of his lack of expertise in the area. Attorney participated in preparing joint e-discovery search terms without expert consultation, and was so inexperienced in ESI that he did not recognize the danger of overbreadth in the agreed upon search terms.

After the Court ordered a search of his Client's network, Attorney took no action other than to instruct Client to allow vendor to have access to Client's network. Attorney allowed the network search to move forward on Client's network without taking any steps to review it, relying on the parties' clawback agreement, the scope of which he misunderstood. After the search, Attorney took no action to review the gathered data until after Plaintiff's attorney asserted spoliation and threatened sanctions. Attorney then attempted to review the search results, only to discover he could make no sense of it. It was only then, at the end of this long line of events, that Attorney finally consulted an e-discovery expert and learned of the e-discovery problems facing Client. By this point, the potential prejudice facing Client was significant, and much of the damage was already done.

Once Opposing Counsel insisted on e-discovery, it became certain that e-discovery would be implicated in the case, and the previously *potential* risk of a breach of the duty of competence became an *actual* risk, which should have resulted in Attorney taking immediate steps to comply with rule 3-110(C), such as consulting an e-discovery expert. Had the expert been consulted at the beginning of the case, or at the latest once Attorney realized e-discovery would absolutely occur in the case, the expert could have helped to structure the search differently, and could have controlled the agreed upon search terms to be less overbroad and less likely to turn over privileged and/or irrelevant but highly proprietary material.

Rule 3-110(A) addresses intentional, reckless, or repeated failures to perform legal services with competence. In our hypothetical, while not intentional, Attorney's failures in this instance were arguably reckless and/or at the very least repeated. Attorney has breached his duty of competence.[7/]

2. <u>The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege</u>

A fundamental duty of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Business and Professions Code section 6068, subdivision (e)(1). "Secrets" includes "information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Cal. State Bar Formal Opn. No. 1988-96. Both "secrets" and "confidences" are protected communications. Cal. State Bar Formal Opn. No. 1981-58. "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Rule 3-100(A).

Similarly, an attorney has a duty to assert the attorney-client privilege to protect confidential communications between the attorney and client which are sought in discovery. Evidence Code sections 952, 954, 955. In a civil discovery setting, while the holder of the privilege is not required to take strenuous or "Herculean efforts" to resist disclosure in order to preserve the privilege, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure *only if* the attorney and client act reasonably to protect that privilege in the first instance. *Regents of University of California v. Superior Court (Aquila Merchant Services, Inc.)* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186]. This approach also echoes federal law. See Federal Rules of

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[7/] This Opinion does not intend to set or to define a standard of care of lawyers with respect to any of the issues discussed herein, as standards of care can be highly dependent on the factual scenario in any given situation.

Evidence, rule 502(b).[8/] A lack of reasonable care to protect against the disclosure of privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. See *Kilopass Technology Inc. v. Sidense Corp.* (N.D. Cal. 2012) 2012 WL 1534065 at *2-3 (attorney-client privilege deemed waived as to privileged documents released through e-discovery because screening procedures employed were unreasonable); see also *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D. Md. 2008) 250 F.R.D. 251, 259-260, 262.

Accordingly, the reasonableness of an attorney's actions to ensure *both* that secrets and confidences, *as well as* privileged information, of a client remain confidential and that the attorney's handling of a client's information does not result in a waiver of any confidence, privilege, or protection, is a fundamental part of an attorney's duty of competence. Cal. State Bar Formal Opn. No. 2010-179.

In our hypothetical, as a result of the actions taken by Attorney prior to consulting with any e-discovery expert, Client's privileged information has been disclosed, and such disclosure may be found not to have been "inadvertent" and thus, may constitute a waiver. Further, non-privileged but highly confidential proprietary information about Client's upcoming revolutionary new product has been released into the hands of Client's chief competitor, all as a result of search terms Attorney participated in creating. All of this happened completely unbeknownst to Attorney, and only came to light after Plaintiff accused Client of evidence spoliation. In the absence of Plaintiff's accusation, it is not clear when the "inadvertent" disclosure would have come to Attorney's attention, if ever.

The clawback agreement, heavily relied upon by Attorney under a mistaken understanding of its breadth, may or may not work to retrieve the information. By its terms, the clawback agreement was limited to inadvertently produced, protected ESI. Both privileged information and non-privileged confidential and proprietary information have been released to Plaintiff.

Under these facts, Client may have to litigate the issue of whether Client (through Attorney) acted diligently enough to protect its attorney-client privilege. Attorney took no acts whatsoever to review Client's network prior to allowing the network search, Attorney participated in drafting the overbroad search terms, and Attorney waited until after Client was accused of evidence spoliation to even look at the data – all of which would permit Opposing Counsel to viably argue either that (a) Client failed to exercise due care to protect the privilege in the first instance, such that the disclosure at issue was not inadvertent, and/or (b) at the very least, the Parties' clawback agreement does not apply to protect the proprietary, but non-privileged, produced information.[9/] Client may further have to litigate its rights to return of non-privileged but confidential proprietary information.

Whether a waiver has occurred under these circumstances, and what Client's rights are to return of the non-privileged/confidential proprietary information, are legal questions beyond the scope of this opinion. The salient point is that Attorney did not take reasonable steps to minimize the risks and was directly responsible for the release of

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[8/] "(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B)."

[9/] While statutes, rules, and/or case law provide some limited authority for the legal clawback of certain inadvertently produce materials, those provisions may not work to mitigate the damage caused by the production in this hypothetical. Such "default" clawback provisions typically only apply to privilege and work product information, and require both that the disclosure at issue was truly inadvertent, and that the holder of the privilege took reasonable steps to prevent disclosure in the first instance. See, Federal Rules of Evidence, rule 502; see also, generally, *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 [82 Cal.Rptr.2d 799]; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818 [68 Cal.Rptr.3d 758]. As noted above, the effect of Attorney's acts on the question of "inadvertence" are at issue in our hypothetical.

Similarly, Attorney finds even less assistance from California's discovery clawback statute, which deals merely with the procedure for litigating a dispute on a claim of inadvertent production, and not with the legal issue of waiver at all. See, Code of Civil Procedure section 2031.285.

Client's confidential and privileged information to Plaintiff. Even if Client is able to retrieve all such information, Client may never be able to un-ring the bell.

While the law does not require perfection by attorneys in acting to protect privileged or confidential information, it does require the exercise of some level of reasonable care. Cal. State Bar Formal Opn. No. 2010-179. Here, Attorney took minimal, if any, reasonable steps to protect Client's ESI, and instead chose to release everything without prior review, relying on a clawback agreement the scope of which he mistakenly interpreted. Client's secrets are now in Plaintiff's hands and a waiver of Client's attorney-client privilege may be claimed by Plaintiff. Client has been exposed to a potential dispute as the direct result of Attorney's actions. Attorney has breached his duty of confidentiality to Client.

3. The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege

A. Duty Not to Suppress Evidence

In addition to protecting their clients' interests, attorneys, as members of the profession, have a general duty "to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Kirsch et al. v. Duryea* (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218].

Rule 5-220 states, "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."

Thus, while the legal ramifications for failure to preserve evidence are consequences imposed by law, the duty not to suppress evidence is an ethical one imposed by the rules of professional conduct. The close relationship between the duty not to suppress evidence and the duty of candor (discussed below) mandates that an attorney pay particular attention to how these ethical duties manifest themselves in e-discovery:

> . . . [T]he risk that a client's act of spoliation may suggest that the lawyer was also somehow involved encourages lawyers to take steps to protect against the spoliation of evidence. Lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence. (Bus. & Prof. Code, § 6106 ["The commission of any act involving moral turpitude, dishonesty or corruption ... constitutes a cause for disbarment or suspension."]; *id*., § 6077 [attorneys subject to discipline for breach of Rules of Professional Conduct]; Rules Prof. Conduct, rule 5–220 ["A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."].) The purposeful destruction of evidence by a client while represented by a lawyer may raise suspicions that the lawyer participated as well. Even if these suspicions are incorrect, a prudent lawyer will wish to avoid them and the burden of disciplinary proceedings to which they may give rise and will take affirmative steps to preserve and safeguard relevant evidence.

Cedars-Sinai Medical Center v. Superior Court (Bowyer) (1998) 18 Cal.4th 1, 13 [74 Cal.Rptr.2d 248].

None of these duties are new. However, where ESI is concerned, the interface between legal and ethical duties manifests in a unique way, and strongly urges that an attorney assist the client in implementing a "litigation hold" at the outset. A litigation hold is a directive issued by or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such ESI, pending further direction.[10/] See generally The Sedona Conference® WG1, *Sedona Conference® Commentary on Legal Holds: the Trigger and the Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260-270, 277-279.

The developing federal case law governing litigation holds finds that it is the client's obligation to issue an immediate and appropriate litigation hold whenever litigation becomes reasonably foreseeable. See *Hynix Semiconductor, Inc. v.*

[10/] Of course, whether or not ESI exists or is relevant, clients and attorneys should consider issuing litigation holds to avoid destruction of relevant paper files.

Rambus, Inc. (C.A. Fed. Cir. 2011) 645 F.3d 1336, 1344-1345. Cases also have held that the obligation to ensure litigation holds or similar directions are timely issued falls on both the party and on outside counsel working on the matter.[11/] This Committee notes that litigation holds are legal duties, and not ethical ones. Nevertheless, the distinction between a legal duty to preserve evidence and an ethical duty not to suppress evidence can be very narrow when the failure to request immediate preservation of electronic information can result in a significant potential for its loss or mutation, as electronic data can easily be deleted or altered, either inadvertently through routine document retention policies, or even intentionally. Counsel would be prudent to consider the proper use and monitoring of litigation holds to assist him or her in complying with the duty not to suppress evidence.

In our hypothetical, Attorney did not discuss a litigation hold with Client. Attorney further failed to advise Client about the potentially significant harm to Client and Client's case that could result from the improper deletion of relevant ESI after the obligation to preserve evidence had commenced. Client's actions in deleting ESI after the litigation hold obligation was triggered could provide the basis for sanctions, either monetary, evidentiary, or terminating. Due to Attorney's inaction, Client may not have been aware of the need to preserve its ESI, and may not have knowingly caused the subsequent deletion of responsive ESI. The significant consequences Client now faces may have been avoided altogether had Client been timely advised of its ESI risks and obligations. Here, the ethical issue is not the lack of a litigation hold instruction itself. Rather, the ethical issue is the duty not to suppress evidence. Here, Attorney's failures in counseling his client relating to e-discovery has resulted in potential suppression of evidence.

B. The Duty of Candor

Business and Professions Code section 6068 also addresses a number of ethical duties an attorney owes the court, in addition to the duties owed to the client. Significant to the facts of this opinion, an attorney owes a tribunal a duty of candor, and must "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Business and Professions Code section 6068, subdivision (d); *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 219-220.

The Rules of Professional Conduct establish similar requirements. "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with the truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice of false statement of facts or law; . . . and (D) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness." Rule 5-200(A), (B), and (D).

These provisions "unqualifiedly require an attorney to refrain from acts which mislead or deceive the court." *Sullins v. State Bar* (1975) 15 Cal.3d 609, 620-621 [125 Cal.Rptr. 471]. "The presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of" Business and Professions Code section 6068, subdivision (d). *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175, citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144. It also is "settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163 [162 Cal.Rptr. 458], citing *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [46 Cal.Rptr. 513]; *Sullins v. State Bar*, 15 Cal.3d 609, 622; and *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574 [131 Cal.Rptr. 379].

In our hypothetical, in response to the Judge's questions, Attorney assured the Judge that he reviewed the ESI and that it was in full compliance with the Court Order and Client's discovery obligations. He made such assurances even though he had not reviewed the data retrieved by the search, and had no reasonable basis to make such assurances. Attorney turned out to be wrong, a fact he learned after the hearing. In the subsequent sanctions

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[11/] See, e.g., *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.") and *Zubulake v. UBS Warburg LLC.* (S.D.N.Y. 2003) 229 F.R.D. 422, 432 ("Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.").

motions threatened by Plaintiff, Attorney likely will be faced with the uncomfortable situation in which he will have to explain to the Judge why his earlier misrepresentation was not a willful violation of the duty of candor.

CONCLUSION

Electronic document creation and/or storage and electronic communications have become standard practice in modern life. Attorneys who handle litigation may not simply ignore the potential impact of evidentiary information existing in electronic form. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It may also result in violations of the duty of confidentiality, the duty not to suppress evidence, and/or the duty of candor to the Court, notwithstanding a lack of bad faith conduct.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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RULE 1.1.

Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2.

Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3.

Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4.

Communication

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5.

Fees and Division of Fees

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

RULE 3.1.

Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2.

Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3.

Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

RULE 3.4.

Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) *(1)* suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5.

Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

RULE 4.1.

Truthfulness In Statements To Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2.

Communication With Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3.

Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 5.1.

Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) *(1)* A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.2.

Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RULE 5.3.

Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a

lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.4.

Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4.

Misconduct

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified

copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5.

Disciplinary Authority and Choice of Law

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice,