

The Litigator

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The Chair's Comments



Nichols

Dear Litigation Section Members: Spring is shaping up to be busy and exciting for the Litigation Section! Please read below and mark your calendars for our Annual Meeting and to volunteer for the National High School Mock Trial Championships in Raleigh.

The National High School Mock Trial Championship will take place in downtown Raleigh on May 15 and 16. As a section, our pro bono efforts have been directed toward volunteering for NCBA's middle school mock trial competition. North Carolina and NCBA are fortunate to sponsor the National High School Mock Trial Championship ... in our own backyard! We need volunteers to judge the high school mock trial participants. One round of trials is a time commitment of only 3 hours of your time. Please consider taking a day or half a day to be a part of this exciting pro bono opportunity. If you can't make it, ask your staff to volunteer. We need 400 lawyer judges and 200 site volunteers (can be a non-lawyer). For more information or to register go to: www.mocktrialvolunteer.com.

Please mark May 15 on your calendar as the Litigation Section Annual Meeting. The meeting will take place at the State Bar from 5:30 – 6:00 p.m. We invite you to join other Litigation Section members for a meeting and networking reception to congratulate the 2015 Advocate Award Winner! The cost of the Annual Meeting/Networking reception is \$10. However, *if you volunteer to judge at the National Mock Trials that day, you can sign up for free!* Immediately after the Annual Meeting, please join us at the National High School Mock Trial Championship reception at the State Bar. Attorneys and judges throughout the state will be in attendance, including members of the N.C. Court of Appeals and the N.C. Supreme Court. Any Litigation Section member (or your staff) who volunteers will have their names placed in a drawing for a special prize to be announced at the annual meeting.

Continued on page 2

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919.677.0561
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Ethics in eDiscovery: A Practical Approach

By Francisco J. Benzoni

Introduction

This article analyzes several critical ethical duties of an attorney – competence, maintaining client confidences, and fairness to the other party – in the context of electronic discovery, and offers practical guidance on meeting these obligations through data maps, non-waiver agreements, and an ESI protocol.

Competence – NCRPC 1.1

One of an attorney's foundational ethical obligations is the duty of competence. This duty is crucial in electronic discovery with its dependence on rapidly changing technology and evolving best practices. The American Bar Association's 20/20 Commission explained that "[l]awyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve." Comment 8 to North Carolina Rule of Professional Conduct 1.1 on the duty of competence, was recently amended to reflect this concern:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Continued on page 3

Inside this Issue...

- 6 | **Let it Go: Terminating a Litigation Hold**
- 7 | **Readers Like Suspense—Just Not in the Introduction to Your Brief**
- 8 | **Letters to the Editor**
- 9 | **Appellate Rules Followers Beware: Another Party's Post-Trial Motions May Not Toll Your Deadline for Filing a Notice of Appeal**

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The Chair's Comments, continued from the front page

The Litigation Section CLE committee is excited to announce three one-hour webcasts on Social Media coming in the next few months. Look for more information on the upcoming webcasts soon. In addition, Please mark your calendar now for the 2016 Litigation Section Annual Meeting on Friday, February 12, 2016. This full-day Litigation CLE will be informative and provide at least six hours of CLE, including one hour of ethics! Also, if you are interested in being on a committee of the Section, please contact Julianne Dambro: jdambro@ncbar.org. She can send you more information about joining Litigation Section Committees such as: CLE, Newsletter, Pro Bono, Membership and Ethics.

The Section has also engaged in financial support of several deserving programs. In keeping with the Section's pro bono tradition we are monetarily supporting the NCBA Law-Related Education middle-school Mock Trial program. The Section will be donating money to cover the cost of the medallions that the middle school winners receive. Likewise, the Section will be donating money towards the National High School Mock Trial Championship this year. Finally, the Section would like to donate needed items to your local courthouse. For example, many court houses do not have DVD players or extension cords for litigators. If you know of a courthouse that is need of equipment, please contact Julianne Dambro at jdambro@ncbar.org no later than June 1 with the name of the courthouse and what you think would help them.

As you can see we have a lot going on this year and I want to thank you for your membership to the NCBA Litigation Section. As the largest section of the NCBA, we take great pride in providing for the attorneys and citizens of North Carolina.

Chris Nichols | NCBA Litigation Section Chair

LITIGATION SECTION ANNUAL MEETING AND NETWORKING RECEPTION

When: Friday, May 15, 2015, 5:30-6 p.m.

Where: N.C. State Bar Center
217 East Edenton Street, Raleigh, NC

Cost: \$10 (unless you volunteer to judge at the National High School Mock Trial competition on May 15 or 16, in which case the reception would be free).

Immediately after the annual meeting, we will join the National High School Mock Trial Championship Judges' Reception, which will include more than 200 lawyers and judges from around the state, including judges from the North Carolina Supreme Court and Court of Appeals.

Reserve your spot now!
<http://tinyurl.com/kll076b>

NCRPC, Rule 1.1., Cmt 8 (emphasis added).

A recent proposed interim ethics opinion in California puts the matter this way: “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.” CA Formal Opinion Interim No. 11-0004. An attorney can gain competence through necessary study or, alternatively, can associate with an attorney of with established competence in the area. NCRPC 1.1, Competence.

Data mapping

An effective tool in helping an attorney meet both his ethical obligation of competence and his discovery obligations is the development of a data map, such as the sample depicted in **Diagram A** (see page 5). A data map provides a detailed overview of the flow and storage of electronic information in an organization, and includes such information as a description of the electronic data that an organization maintains; the locations where information is stored; the way in which information flows in the organization – including archive backup systems and disaster recovery systems; a description of applicable data retention policies and automated deletions; and each custodian’s interface with the organization’s computing system as well as his or her use of personal or home devices for business purposes.

A well-developed data map can aid an attorney on multiple fronts. In preparing a data map, an attorney must interview IT personnel as well as relevant custodians in some detail about both the organization’s electronic system as well as individuals’ use of electronic devices for business. Through the process of developing a data map, an attorney can determine early in the process likely areas where preservation might pose special hurdles as well as what personal devices might need to have information preserved. For instance, in a recent case, an organization had recently changed its backup system because the old one was no longer supported and had a queue of hundreds of thousands of emails waiting to be backed up. Unfortunately, to that point, the new system had only backed up 40% of the data. Through discussion, the attorney and client were able to determine that they could access and independently back up the necessary data directly from the company’s email server (which had a 90 day delay on deletions) without going through the back-up systems. Without the early development of a data map, they may not have learned this information in time to avoid preservation problems. Such a data map can also aid an attorney in understanding how most effectively to request information from his or her client or to advise the client on preservation and collection issues. As illustrated in **Diagram A**, data maps, and the preparatory work they prompt, fulfill multiple additional functions, such as helping to ensure that data hosted by third parties is properly preserved and collected; outlining the capabilities and limits of an organization’s IT department; and discovering any discrepancies between policies and practice. They are an effective tool

in creating an efficient and defensible eDiscovery process.

Client confidentiality – NCRPC 1.6

An attorney is ethically obligated to protect his client’s confidences. North Carolina Rule of Professional Conduct 1.6(c) provides that “[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.” NCRPC 1.6(c). Rule 1.6(c) was added through amendment approved on October 2, 2014.¹ The attorney-client privilege, which is based in the common law, is closely related to an attorney’s ethical obligation to maintain client confidences. The privilege “rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously—benefits out-weighing the risks of truth-finding posed by barring full disclosure in court.” *In re Miller*, 357 N.C. 316, 329, 584 S.E.2d 772, 782 (2003) (citation omitted).

Because of the substantial volume of electronic information, even an attorney who performs a diligent review may inadvertently produce attorney-client privileged information. Such disclosure can result in waiver of the attorney-client privilege. In federal court, in the absence of a non-waiver agreement between the parties, Federal Rule of Evidence 502 provides the standard for whether inadvertent disclosure constitutes waiver. Rule 502(b) provides that disclosure of privileged material does not constitute waiver 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 . . .” Fed. R. Evid. 502(b).

While there is no controlling authority in North Carolina, the business court case *Blythe v. Bell*, 2012 NCBC 42, provides guidance. In *Blythe*, the Court followed federal guidance in listing the factors a court should weigh to determine whether inadvertent disclosure has resulted in waiver: “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosures; and (5) the overriding interests of justice.” *Blythe*, 2012 NCBC 42 ¶ 52 (citation omitted). In *Blythe*, Court concluded that the attorney had not undertaken reasonable review, and that privilege had been waived as to the documents produced.

Non-waiver agreement:

While N.C. R. Civ. P. Rule 26(b)(5)(b) provides that a party can “clawback” material claimed to be privileged, *such a clawback does not itself preserve privilege*. Parties can, however, negotiate a non-waiver agreement, which can be made be made part of a court order (e.g., a Case Management Order or Discovery Scheduling Order). Such an agreement can mitigate risks and lower review costs. However, care must still be taken to comply with Rule 1.6 of the North Carolina Rules of Professional Conduct, and it may be prudent to keep the client apprised of any non-waiver agreement and get informed consent when appropriate. A non-waiver agreement can largely track the language of Rule 26(b)(5)(B) – with the

¹ A similar provision has long been included in the Comments for Rule 1.6.

addition of a provision on non-waiver. For instance, the parties may agree to a provision such as the following:

If information inadvertently produced in discovery is subject to a claim of privilege or work-product protection, the producing party shall notify the receiving party of the claim and the basis for it. Similarly, if the receiving party has a basis to believe documents it has received in discovery may be subject to the attorney-client privilege or work product protection, that party shall promptly notify the producing party. Once a claim of privilege or work product protection has been asserted, the receiving party must promptly return or destroy the specified information and any copies it has. The receiving party shall not make use of the specified information in any way. **The parties agree that such inadvertent disclosure shall not constitute waiver of attorney-client privilege or work product protection.**

It is this final, bolded sentence that constitutes the non-waiver agreement. The remainder of the provision is primarily a modification of the clawback provided for in N.C. R. Civ. P. 25(b)(5)(b), and eliminates the option to sequester the information. Such a non-waiver agreement does not alleviate an attorney's ethical duty to protect client confidences. Nevertheless, where an attorney has taken reasonable steps to protect such client confidences and has promptly asserted privilege or work product protection upon discovery of inadvertent disclosure, this agreement ends the inquiry – mitigating risks and reducing costs.

Fairness to the other party – NCRPC 3.4

While the duty to preserve potentially relevant information is based in large measure on the common law, North Carolina RPC 3.4 also grounds this duty, as well as additional obligations to the opposing party and opposing counsel. Rule 3.4 provides that an attorney shall not

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material

having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . . (d) in pretrial procedure, (1) make a frivolous discovery request, (2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or (3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions.

NCRPC 3.4(a) & (d). Arguably, this rule, together with the Rules of Civil Procedure 34, provides a basis for the requirement that a party produce documents in a reasonably usable format.

Electronically stored information (ESI) protocol

An ESI protocol can be an effective tool to help ensure compliance with RPC 3.4 as well as to improve the efficiency of the discovery process. Through such a protocol, the parties can negotiate important preservation, collection, privilege, and production issues before they lead to discovery disputes. For instance, on preservation, the parties might agree that certain data (such as voice-mail or unallocated space) need not be preserved. On collection, the parties might to search methodologies and even search terms to be used. On privilege, the parties might agree that privilege logs can be streamlined in various ways (e.g., listing documents by category rather than document-by-document, or not listing documents withheld exclusively on the basis of work product). On production, the parties can (and should) specify their preferred production format.

Conclusion

In the process of electronic discovery, developing and utilizing a data map, negotiating a non-waiver agreement and coming to an agreement on an ESI protocol are practical steps an attorney can take to help meet both ethical duties and discovery obligations.

Francisco J. Benzoni focuses his practice on commercial litigation at Smith Anderson in Raleigh. He serves as Smith Anderson's e-Discovery Coordinator.

SAVE THE DATE!
2016 Litigation Section Annual Meeting
February 12, 2016 | N.C. Bar Center, Cary