

Judge Vincent A. Bifferato Trial Practices
Forum

Law & Technology
Ethics 2014

January 17, 2014

The ABA Commission on Ethics 20/20 (the “Commission”) was established to update the ABA’s Model Rules of Professional Responsibility.

Established: August 2009, by then-ABA President Carolyn B. Lamm.

Purpose: To study how technology is transforming the practice of law and how the regulation of lawyers should be upgraded in light of these developments.

Action by the ABA House of Delegates in August 2012

Adoption of Resolutions addressing confidentiality in a digital age, issues arising from new forms of advertising, issues relating to outsourcing, and other issues:

On August 28, 2012, the Delaware Supreme Court asked its Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct for its recommendation.

Subcommittees

- **Technology and Confidentiality**
- **Prospective Clients/Advertising**
- **Retaining
Lawyers/Outsourcing**
- **Practice Pending Admission
and Admission by Motion**
- **Conflicts/Disclosure**

On January 1, 2013, the Delaware Supreme Court accepted the recommendation of the Permanent Advisory Committee and amended the Delaware Lawyers' Rules of Professional Conduct as they relate to technology.

On July 1, 2013, the Delaware Supreme Court created a new Arm of Court, The Commission on Law & Technology to educate the Bench & Bar on matters related to technology and the amended rules.

Rules 1.1, 1.4, 1.6, 4.4
(Guidance on use of technology
and confidentiality)

Rule 1.1 Competence

While Rule 1.1 has not changed, one of the comments now specifically a lawyer to maintain the requisite knowledge and skill, including the benefits and risks associated with relevant technology.

Rule 1.4 Communication

This Rule previously focused on traditional written or telephone communications. The comments have been changed to clearly state that the lawyer should respond or acknowledge a client's communications.

Rule 1.6 Confidentiality of information

This Rule and the comments now include language that includes inadvertent or unauthorized disclosure or access to electronic information.

Rule 4.4 Respect for rights of third persons

Rule 4.4 and its comments relate to inadvertent production of electronically stored information and concepts like metadata

Rules 1.18, 5.5, 7.1, 7.2, 7.3
(Guidance regarding use of
technology and client development)

Rule 1.18 Duties to prospective client

This Rule and its comments relate to the potential issues that may arise when a lawyer's web site invites a prospective client to inform a lawyer about a matter for which the lawyer has not yet been retained; does the invitation to communicate create a conflict?

Rule 7.2 Advertising

Comment 3 of this Rule has been amended to specifically recognize the Internet and other forms of electronic communication are now among the most powerful media for getting information to the public.

Rules 1.1 and 5.3

(Guidance on retention of lawyers and non-lawyers
outside the firm to work on client matters –
outsourcing)

Rule 5.3 Responsibilities regarding non-lawyer assistance

This Rule and its comments now recognize the lawyer's responsibilities for the conduct of technology vendors.

Examples include:

- hiring a document management company,
- sending client documents to a third party for scanning,
- and using an Internet-based service to store client information.

The Vincent A. Bifferato Superior Court Trial Practice Forum

THE COMMISSION ON LAW AND
TECHNOLOGY
SPEAKS FROM THE BENCH

Presented by:

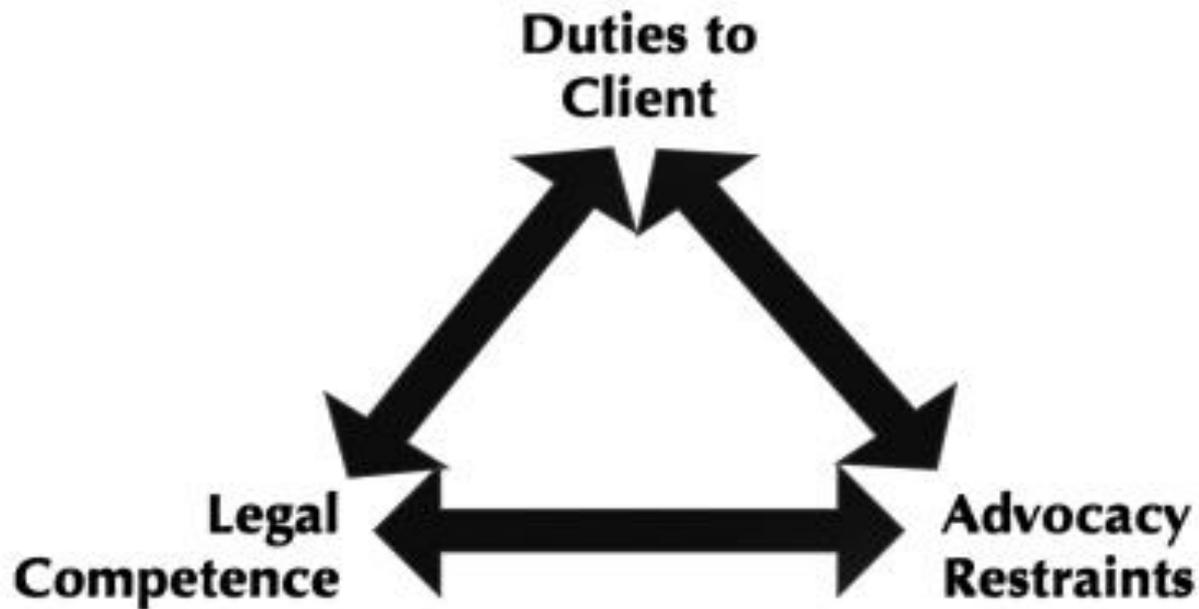
Kevin F. Brady

January 17, 2014

Why is This Important?

- Courts will generally look to the attorneys for those parties in evaluating whether there is compliance with the rules.
- Parties may be sanctioned for their lawyer's misconduct, so it is imperative that they communicate and closely coordinate activities related to discovery of electronic data.

Ethical Duties in e-Discovery Break Down Into Three Types



Duties of Counsel in the Era of Technology

- DUTIES OF COUNSEL – Critical Areas
 - Competence
 - Diligence
 - Candor

Limits of Advocacy

- Delaware Lawyers' Rules of Professional Conduct Preamble
- [1] “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”

Delaware Rule 1.1 Competence

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Model Rule 1.1: Competence

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

Comment 6: 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.

Model Rule 1.1: Competence

Comment [6] specifies that, to remain competent, lawyers need to “keep abreast of changes in the law and its practice.” The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need *to understand basic features of relevant technology* and that this aspect of competence should be expressed in the Comment.

For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use *email* or *create an electronic document*.

Duty of Competence

- Duty to identify and educate yourself and your clients about electronic discovery issues (legal and technological).
- Duty to understand benefits and risks associated with locating, preserving, collecting, reviewing and producing ESI in litigation (especially in the areas of confidentiality and privilege).
- A duty to understand e-mail, databases, network share data, cloud computing, social networking sites, BYOD, or other loose electronic files, counsel's ability to examine and produce electronic information is central to managing discovery in the modern age.

Model Rule 1.6: Confidentiality of Information

(c) 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.

Comment 16: “The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of paragraph (c) if the lawyer has made *reasonable efforts* to prevent the access or disclosure.

Model Rule 1.6: Confidentiality of Information

- Factors to be considered in determining the **reasonableness** of the lawyer's efforts include, but are not limited to, the **sensitivity of the information**, the **likelihood of disclosure** if additional safeguards are not employed, the **cost of employing additional safeguards**, the **difficulty of implementing the safeguards**, and the **extent to which the safeguards adversely affect the lawyer's ability to represent clients** (e.g., by making a device or important piece of software excessively difficult to use).
- A client may require the lawyer to **implement special security measures** not required by this Rule or may give informed consent to forego security measures that would otherwise be required by this Rule..."

Rule 3.3 – Candor Toward the Tribunal

Duty of Candor Toward the 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...”

Duty of Candor

Adverse Inference Instruction Leads to \$1.45 Billion Damage Award

- Despite an SEC regulation requiring e-mail retention for two years, Morgan Stanley overwrote e-mails, failed to timely process hundreds of backup tapes.
- Morgan Stanley certified completion of its discovery obligations, when as the Court noted Morgan Stanley personnel, including in-house counsel knew the certification was false when made.
- *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. CA 03-5045 AI (Fla. Cir. Ct. Mar. 23, 2005).



Sussex Chancery Court



Delaware Supreme Court



New Castle County Courthouse

“Leading Practices – View from the Bench”



Dover Superior Court



Sussex County Family Court



Sussex Chancery Court

Working Group

View from the Bench

Members:

Honorable Henry duPont Ridgely

Honorable Donald F. Parsons, Jr.

Honorable Eric M. Davis

Honorable Michael K. Newell

Honorable Kenneth S. Clark, Jr.

The Commission on Law and Technology

August 26, 2013 Amended Order

“The Commission on Law and Technology shall be charged with the responsibility of providing Delaware Lawyers with sufficient guidance and education in the aspects of technology and the practice of law so as to facilitate compliance with the Delaware Lawyers’ Rules of Professional Conduct.”

The intent of the working group is to address issues that may arise during litigation from the pre-litigation phase through appeal.

We also recognize that there are differences in the practice and use of technology among the various Courts

Upcoming articles will address:

PreTrial Issues and Obligations of Counsel

E Filing

E Discovery

ESI Evidentiary Issues

Trial Presentations

Appeal

Article No. 1: *Spoliation of Evidence*

Honorable Donald F. Parsons, Jr., Vice Chancellor, Court of Chancery

1. Common law duty to preserve evidence under a party's custody or control
 - * Electronically Stored Information ("ESI") – word processing documents, audio and text messages, email
 - * Different platforms (laptops, desktops, servers, USB devices, cell phones, tablets)

“As an initial matter, all Delaware attorneys should be familiar with the common law duty to preserve potentially relevant evidence under a party's custody or control.¹ Compliance with this duty is particularly important because of the increasing use of electronically stored information (“ESI”). ESI takes many forms (e.g., e-mail, word-processing documents, and audio and text messages) and can be stored on myriad platforms (e.g., laptop or desktop computers, commercial storage devices such as servers, portable storage devices such as USB drives, and cell phones and tablet devices). “

1. For a thorough description of the duty to preserve potentially relevant evidence, see *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009).

Article No. 1: *Spoliation of Evidence* (cont'd)

2. Duty arises when litigation is commenced or is reasonably anticipated

“Failing to take such steps to preserve relevant ESI once litigation is commenced or is reasonably anticipated can result in serious consequences for parties and attorneys.”

Article No. 1: *Spoliation of Evidence* (cont'd)

3. Use of adverse inference by the Court

* *Beard Research, Inc. v. Kates*, 981 A.2d 1175 (Del.Ch.2009)

“In *Beard Research, Inc. v. Kates*,² the Court of Chancery drew an adverse inference against the defendant because he recklessly destroyed and lost his laptop computer’s hard drive after he was on notice (and even instructed by counsel) that ESI on that hard drive could be relevant to the suit filed against him. In that case, the defendant repeatedly deleted documents, “emptied the recycle bin,” and reformatted the hard drive. In addition, he arranged for the hard drive to be replaced, and then he lost the old drive that contained the potentially relevant information. Because of the defendant’s actions, the Court not only drew an adverse inference against the defendant, but also awarded plaintiffs the attorneys’ fees and expenses they incurred in discovering defendant’s actions (including forensically analyzing relevant hardware) and in litigating the relevant motions.”

2. 981 A.2d 1175 (Del. Ch. 2009).

Article No. 1: *Spoliation of Evidence* (cont'd)

- *TR Investors, LLC v. Genger*, 2009 WL 4696062 (Del. Ch. Dec. 9, 2009)
 - Court of Chancery awarded monetary sanctions - \$750,000
 - Finding contempt
 - Found spoliation
 - Elevated “burden of persuasion”

“In *TR Investors, LLC v. Genger*,³ because the defendant arranged for a server to be “wiped” even though he knew it stored relevant ESI, the Court of Chancery granted plaintiffs’ motions for contempt and spoliation, awarded monetary sanctions (at least preliminarily in the amount of \$750,000), and elevated by one level the defendant’s burden of persuasion (*i.e.*, from a preponderance of the evidence burden to the clear and convincing standard).”

3. 2009 WL 4696062 (Del. Ch. Dec. 9, 2009).

Case Citations from Courts

Sears Roebuck & Co. v. Midcap, 893 A.2d 542 (Del. 2006).

Lesh v. ev3, Inc., 2013 WL 3155761 (Del. Super. Apr. 16, 2013).

TR Investors, LLC v. Genger, 2009 WL 4696062 (Del. Ch. Dec. 9, 2009), *aff'd in part, rev'd in part*, *Genger v. TR Investors, LLC*, 26 A.3d 180 (Del. 2011).

M.C. v. Dep't of Servs. for Children, Youth, & Their Families, 2011 WL 1707250 (Del. Fam. Mar. 24, 2011).

Cruz v. G-Town P'rs, L.P., 2010 WL 5297161 (Del. Super. Dec. 3, 2010).

Beard Research, Inc. v. Kates, 981 A.2d 1175 (Del. Ch. 2009).

Triton Constr. Co. v. E. Shore Elec. Servs., 2009 WL 1387115 (Del. Ch. May 18, 2009).

Secondary Sources

Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, App. B (eff. May 1, 2010)

http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2010-3.pdf

Guidelines to Help Lawyers Practicing in the Court of Chancery §§ II.7.a–7.b.

http://courts.delaware.gov/Chancery/docs/Complete_Guidelines.pdf

Court of Chancery Guidelines for the Collection and Review of Documents in Discovery

<http://courts.delaware.gov/Chancery/docs/CollectionReviewGuidelines.pdf>

Court of Chancery Guidelines for Preservation of Electronically Stored Information

<http://courts.delaware.gov/forms/download.aspx?id=50988>

The Sedona Guidelines: Best Practices & Commentary for Managing Electronic Information in the Electronic Age

<http://www.thesedonaconference.org/dltForm?did=Guidelines.pdf>

Future Topics

1. E filing
2. E Discovery
3. Evidentiary Issues
4. What technology is available to the Courtrooms of each Court
5. Technology and the self-represented litigant

1. We will try to reach all practitioners in the various disciplines of practice. We recognize that lawyers and Judges have varying degrees of experience (competence) with the use of technology.
2. Let us know if there are any topics you would like us to address.

Model Rule 5.3: Responsibilities Regarding Non-lawyer Assistance

Requires lawyers to make reasonable efforts to ensure that non-lawyers provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information. Lawyers must also give appropriate instructions to non-lawyers outside the firm when retaining or directing those non-lawyers.

A lawyer may use non-lawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information.