TRIAL ADVOCATE QUARTERLY

Volume 32 • Number 3 SUMMER 2013

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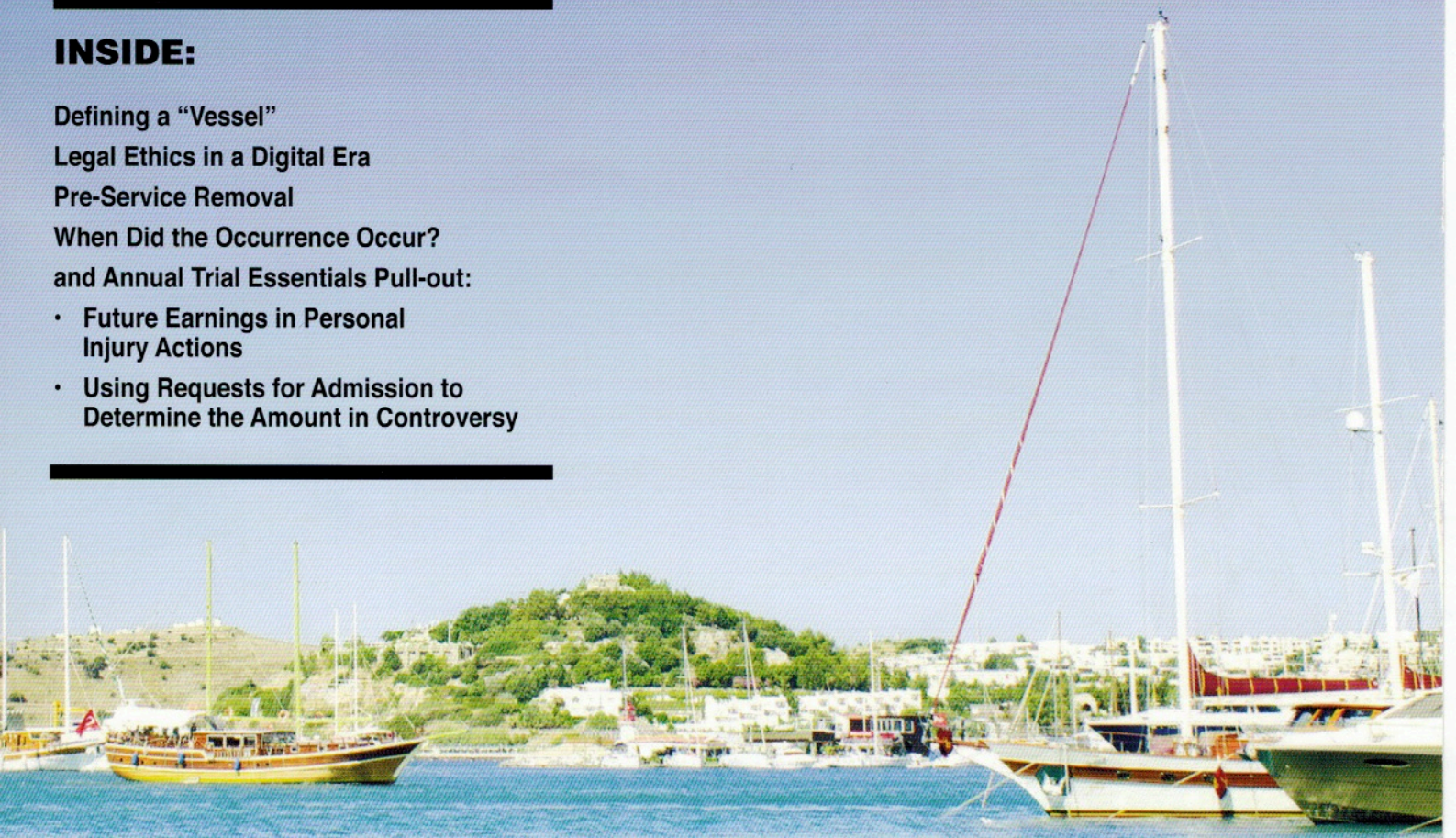

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A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

Staying Out of Trouble: Legal Ethics in a Digital Era

By Thomas Newcomb Hyde

Two millenia ago, Heraclitus observed that change is the only constant. Technology is constantly changing legal practice, for better or worse. As Thomas Hyde explains in the following article, among the changes are new ethical, as well as practical, responsibilities.

Shelley Podolny, in "The Digital Pileup,"[1] writes that electronic information is tangible. He claims that we underestimate the resources necessary to keep it. In fact, three percent of our power supply is used to keep it and cool it. But it is not Google or Amazon or the Wall Street investment bankers that are using all of this energy. It is us. Podolny argues that 70% of the digital universe is generated by us as we email each other back and forth or pass it on others. It is estimated that all electronic information now exceeds 1.2 zettabytes. That's the one with the 21 zeros. Worse than that, over 75% is duplicative. Podolny laments that we have finally reached the state of TMI.

Not only is electronic information tangible, but corporate data never goes away. Jim McGann, in "Lesson from the News of The World Scandal,"[2] explains that corporate data is forever: deleting an email, shredding a hard drive, or even decommissioning an entire email server does not purge corporate data. For as quickly as data is created, corporate technology teams are making copies in disaster recovery systems.

The ethical challenges of litigation management in today's digital world demand technological competence, especially in managing electronically stored information (ESI) and e-discovery. Client and counsel alike must protect confidential electronic information and work cooperatively to preserve and produce ESI.

Competence

Under the Florida Rules of Professional Conduct, Rule 4-1.1 (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.

In an age of electronic discovery, lawyers must be competent in electronically stored information (ESI). An attorney cannot adequately represent a client without some knowledge of how a client is managing its ESI. Thus, lawyers cannot be competent in the digital era if they do not know: how to find it, where it is stored, how it is preserved, and how to make sure it is protected and preserved.

Let us look at some cases involving incompetence: a lawyer who claimed to be computer illiterate, another found to have inhibited ability and novice skills, and finally, lawyers who designed keyword searches in the dark, by the seat of the pants.

"Computer Illiterate"[3]

Peter Martin, a lawyer from Sarasota, Florida, was seeking benefits from Northwestern Mutual for being "disabled." Despite numerous requests for information about Martin's income while he was disabled, the information was not provided. The defendant's lawyer suspected the plaintiff had not produced all of the documents available; he subpoenaed not only Martin's bookkeeper, but also his fiancée. They produced what turned out to be more than three boxes of documents the plaintiff had certified did not exist. When challenged on this, Martin, a former trial lawyer with federal experience, conceded that he had failed to produce the requested documents, but claimed that he is computer illiterate and, therefore, incapable of retrieving any

ABOUT THE AUTHOR...

THOMAS NEWCOMB HYDE received a B.A. from the Seminary of St. Vincent De Paul in Boynton Beach, Florida; a Master of Education from South Carolina State University in Orangeburg, South Carolina; and a J.D. from the University of Miami. He is licensed to practice in Florida and before the United States District Courts for the Middle and Southern Districts of Florida, the Eleventh Circuit Court of Appeals, and the Supreme Court of the United States. He joined Liberty Mutual Insurance Company as a trial attorney and has been a managing attorney, division general attorney and the National Director of Legal Training. He served on Liberty Mutual's Ethics Committee for ten years.

electronically stored documents. The court found such claim was "frankly ludicrous" and imposed sanctions of expenses and attorney's fees.

"Inhibited Ability & Novice Skills"[4]

Plaintiffs sued for employment discrimination against the Kings County, Washington Department of Transportation. The suit was dismissed, but the plaintiffs won a jury verdict on the claim for retaliation; their lawyer sought attorney's fees. The court found that she had contributed to a discovery dispute by failing to offer search terms for the delivery of relevant electronically stored information (ESI), which resulted in the delivery of 50,000 pages of paper documents. The court concluded the lawyer's "inhibited ability to participate meaningfully in electronic discovery tells the Court that she has novice skills" and penalized her by reducing her fees.

"In the Dark, By the Seat of the Pants"[5]

In a multi-million dollar dispute over defects and delays in the Bronx Criminal Court Complex, the parties requested the use of "thousands" of search terms for electronically stored information (ESI) from a non-party, Hill International. Magistrate Judge Andrew Peck wrote: "This case is just the latest example of lawyers designing key word searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the e-mails." Judge Peck explained that counsel must be able to understand how to carefully craft appropriate keywords, with input from the ESI custodians, to assure accuracy in retrieval and elimination of false positives. He added, "It is time that the Bar — even those lawyers who did not come of age in the computer era — understand this."

To remain competent in a digital era lawyers and their corporate clients should commit to learning about information technology and e-discovery and understand that this is an evolving area of both the law and the technology. Fortunately, Comment [2] to Rule 4-1.1 also advises lawyers that "Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

Spoliation

Claims for spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns. Spoliation of evidence is "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[6]

Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about reservation based more on fear of potential future sanctions than on a reasonable need for information. Much of the recent case law on sanctions for spoliation has focused on failures by litigants and their lawyers to take adequate steps to preserve and collect information in discovery.[7]

Under Rule 4-3.4 (a) (Fairness to Opposing Party and Counsel) a "lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act." The Comment provides additional guidance, "Subdivision (a) applies to evidentiary material generally, including *computerized information*."[8] Furthermore, "a lawyer shall not fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[9]

The case of *Pension Committee of the University of Montreal v. Banc of America Securities*[10] involved nearly one hundred investors of a failed hedge fund with alleged losses of over 500 million dollars. Although the court noted that it did not expect any party to meet "a standard of perfection", it added: "Nonetheless, courts have a right to expect litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party." The court also stated that the duty to preserve means what it says; the failure to preserve records (paper or electronic), or to search in the right places for these records, will inevitably result in the spoliation of evidence. "Failure to conform to this standard is negligence even if it results from a pure heart and an empty head."[11]

The *Pension Committee* court also held that "[t]he failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."[12] However, the notion that a failure to institute a "litigation hold" constitutes gross negligence per se was later rejected by the Second Circuit in *Chin v. Port Authority of New York & New Jersey*.[13] The Second Circuit explained that "the better approach is to consider the failure to adopt good preservation practices as one factor in the determination of whether discovery sanctions should issue."

In *Green v. Blitz U.S.A., Inc.*,[14] Rene Green filed a wrongful death case alleging that a gas can manufactured by Blitz caused the death of Brody Green, asserting that the gas can did not include a flame arrester. The plaintiff lost at trial but settled in a high-low agreement. A year later the court found that Blitz had failed to produce documents related to the flame arrester. Blitz failed to institute a litigation hold, do any electronic word searches, or talk with the IT department on how to search for electronic documents. In fact, the company failed to search for emails that were titled "flame arrester" and appointed someone to coordinate discovery who was admittedly as "computer literate—illiterate as they get." The court noted that this was not the only case in which Blitz was accused of discovery abuse. It required the company to pay $250,000 for civil contempt, plus an additional $500,000 fine that would be extinguished if the company filed the civil contempt order in all suits against it for the most recent two years, and for the following five years.

Cooperation

Advocacy is balanced with the duty to cooperate with opposing counsel and expedite litigation. Identifying electronically stored information (ESI) and working out methods for e-discovery is a cooperative undertaking.

The Comment to Rule 4-1.3 (Diligence) requires a lawyer to "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer." But it also adds, "A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued."

Rule 4-3.2 (Expediting Litigation) states that a "lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client," adding in the Comment, "Dilatory practices bring the administration of justice into disrepute."

The courts seem to have gone further in requiring cooperation. In *In re Seroquel Products Liability Litigation*,[15] the court found that "Identifying relevant records and working out technical methods for their production is a *cooperative* undertaking, not part of the adversarial give and take." The court added, "It is not appropriate to seek an advantage in the litigation by failing to *cooperate* in the identification of basic evidence."[16]

And in the Bronx courthouse case mentioned above, the court wrote, "This opinion should serve as a wake-up call to the Bar about the need for careful thought, quality control, testing and *cooperation* with opposing counsel in designing search terms of 'keywords' to be used to produce emails or other ESI."[17]

One source of guidance for conducting cooperative discovery is The Sedona Conference, an organization where trial lawyers, in-house counsel, judges, and academics come together to develop an awareness of the need for cooperation and to help lawyers and judges in the practical techniques of cooperation in discovery. The Sedona Cooperation Proclamation reads: "A national drive to promote open and forthright information sharing, dialogue (internal and external), training and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."[18]

The Sedona Conference offers a three-part process for electronic document retention and production: Awareness, Commitment and Tools. First, by promoting an awareness of the need and advantages of cooperation; next, by a commitment to develop an understanding of the issues and changes needed to obtain cooperative fact-finding; and finally, by developing and distributing practical tools to train and support lawyers, judges, and others in techniques of discovery cooperation, collaboration, and transparency.

Members of the Sedona Conference have developed fourteen principles guiding the discovery of electronically stored information. These principles are the basis for the 2006 amendments to the Federal Rules of Civil Procedure with respect to discovery of electronically stored information in civil litigation in federal courts.[19]

Here is a brief summary of the Sedona Principles:

1. Electronic data are potentially discoverable. Organizations must preserve electronic data.
2. In balancing the cost, burden, and need for electronic data, parties should apply proportionality from Federal and State Rules.
3. Parties should confer early in discovery.
4. Discovery requests should be clear and responses should disclose the scope and limits.
5. The obligation to preserve electronic data requires reasonable and good faith efforts.
6. Responding parties are best situated to evaluate the procedures appropriate for producing their own electronic data.
7. The requesting party has to show that the responding party's steps were inadequate.
8. The primary source of electronic data and documents for production should be active data.
9. Absent a showing of special need, there is no duty to produce deleted, fragmented, or residual ESI.
10. The responding party should follow reasonable procedures to protect privileges and objections to production of ESI.
11. The responding party may use data sampling, searching, or selection criteria, to identify data.
12. There is usually no duty to produce metadata.
13. Usually the cost of retrieving electronic information should be borne by the responding party. If the data sought is not reasonably available, then the costs should be shifted to the requesting party.
14. Sanctions, including spoliation, may be considered if, an intentional or reckless failure and a reasonable probability that the loss has materially prejudiced the adverse party.

Not all states follow the Sedona Principles in regard to the cost of electronic discovery. In Florida, at least one state court case directs that the cost of retrieving electronic data should be borne by the requesting party.[20]

Confidentiality

Under Rule 4-1.6 (Confidentiality), "a lawyer shall not reveal information relating to the representation of a client." This is a fundamental principle in the client-lawyer relationship which contributes to the trust that is the hallmark of the client-lawyer relationship. The Comment to Rule 4-1.6 further provides "the confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

In a digital era, lawyers and their clients have an ethical duty to act competently to preserve confidentiality. This means they must protect confidential information from inadvertent disclosure and unintended recipients by developing technical competence in protecting confidential information. According to the Florida Bar Ethics Committee,[21] it is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communication sent by electronic means and to protect all confidential information, including information contained in metadata.

Of course, lawyers who receive confidential information that was sent inadvertently also have ethical responsibilities. Under Rule 4-4.4 (b) (Respect for Rights of Third Persons), a lawyer who receives a document with confidential information relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. This is explained more thoroughly in the Comment. "Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." This also applies to e-mail or other electronic modes of transmission.

Metadata is data about other data of any sort in any media. It has been defined as "information describing the history, tracking, or management of an electronic document."[22]

If lawyers in a digital era must meet the ethical challenges of competence, cooperation and confidentiality, then managers and supervising lawyers must see to it that all of the lawyers and non-lawyers in their firm also meet those same requirements.

Thus, metadata can contain information about the author, and can show the changes made to the document during its drafting, including what was added or deleted, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged information which the sender does not wish to be revealed.[23]

In the digital era, there are ethical responsibilities as to whether lawyers may search or "mine" for metadata from electronic documents. An ABA analysis[24] shows that metadata mining is prohibited in Arizona, Alabama, Florida, Maine, New Hampshire, New York, North Carolina and Wisconsin. It is permitted in Colorado, Maryland, Oregon, Vermont, Washington, Washington, D. C., and West Virginia under varying circumstances.

Supervision

Rule 4-5.1(a) requires a partner in a law firm, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, to make reasonable efforts to ensure that the firm has measures providing reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct.

In addition, under Rule 4-5.1(b), any lawyer with direct supervisory authority over another lawyer is required to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

There is a further duty to instruct and supervise non-lawyer assistants. Under Rule 4-5.3, managers and supervisory lawyers must meet the same requirements for supervising non-lawyer assistants, such as secretaries, investigators, law student interns and paralegals. The Comment adds that lawyers must give non-lawyer assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding confidentiality.

So if lawyers in a digital era must meet the ethical challenges of competence, cooperation and confidentiality, then managers and supervising lawyers must see to it that all of the lawyers and non-lawyers in their firm also meet those same requirements as to competence, cooperation, and especially, confidentiality. In fact, the failure to supervise may itself be unethical.[25]

The duty of supervision is not limited to supervising lawyers and non-lawyer assistants, but extends to outside vendors as well.[26]

This was re-affirmed in *PSEG Power New York v. Alberici Construction*,[27] where the court ruled that a glitch in the software used by one of the e-vendors caused numerous emails produced by the plaintiff to be "divorced" from their attachments. Even though the e-mail attachment fiasco would not have occurred "but for" the vendor's mistake, it was ultimately the plaintiff, not the plaintiff's vendor, who had to pay.

Conclusion

A digital world requires technological competence, especially in e-discovery and the duty to preserve and produce potential evidence. Cooperation is necessary in identifying electronically stored information (ESI) and following the Sedona Principles. Lawyers and their non-lawyer assistants must protect

the confidentiality of electronic information from disclosure. Lawyers and non-lawyers alike must receive supervision and training in the use of technology and the evolving law as to competence, cooperation and confidentiality.

1 *New York Times*, March 12, 2011. <http://www.nytimes.com/2011/03/13/opinion/13podolny.html?_r=0>
2 *Forbes*, August 3, 2011. <http://www.forbes.com/sites/ciocentral/2011/08/03/lesson-from-the-news-of-the-world-scandal-data-is-forever/>
3 *Martin v. Northwestern Mut. Life Ins. Co.*, 2006 WL 146991 (M.D. Fla. Jan. 19, 2006).
4 *Chen v. Dougherty*, 2009 WL 1938961 (W.D. Wash. July 7, 2009).
5 *William A. Gross Constr. Assoc. v. Amer. Mfrs. Mut.*, 256 F.R.D. 134 (S.D.N.Y. 2009).
6 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 569 F.R.D. 497, 516 (D. Md. 2010).
7 *See, e.g., Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 598, 607 (S.D. Tex. 2010).
8 Emphasis supplied.
9 *See* Rule 4-3.4 (d).
10 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
11 *Id.* at 464.
12 *Id.* at 465.
13 685 F.3d 135 (2d Cir. 2012).
14 2011 WL 806011(E.D. Tex. Mar. 1, 2011).
15 244 F.R.D. 650 (M.D. Fla. 2007).
16 *Id.* at 660 (emphasis supplied).
17 *William A. Gross Constr. Assoc. v. Amer. Mfrs. Mut.*, 256 F.R.D. 134, 134 (S.D.N.Y. 2009). (emphasis supplied). In "Hard to Predict", *Corporate Counsel*, November 2011, page 57, Judge Peck also notes that studies generally show computer-assisted coding technology works at least as well as, if not better than keywords or manual review.
18 https://thesedonaconference.org/cooperation-proclamation.
19 For more information, visit www.thesedonaconference.org.
20 *SPM Resorts, Inc. v. Diamond Resorts Mgmt., Inc.*, 65 So. 3d 146, 147 (Fla. 5th DCA 2011). Interestingly, the most recent of the cases cited in the court's reasoning was decided in 1983.
21 Florida Bar Ethics Opinion 06-2, September 15, 2006.
22 Florida Bar Ethics Opinion 06-2, citing the Sedona Conference Working Group Series, Sept. 2005 Series. The Law Practice Management Section of the American Bar Association in "Metadata Ethics Opinions around the U. S." similarly describes metadata as "data about data." "More specifically, the term refers to the embedded stratum of data in electronic files that may include such information as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document."
23 Florida Bar Ethics Opinion 06-26.
24 *See* www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html.
25 *See* Comment to Rule 4-5.1.
26 "Ultimate responsibility for ensuring the preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the nonparty consultant or vendor." *Sedona Principles (Second Edition)* June 2007, at 40 cmt. 6.d.
27 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007).

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