

Ethical Issues In E-Discovery

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The growth of e-discovery has created a host of ethical problems for litigators, already over-burdened with examining and producing tens (or hundreds) of thousands of electronic documents. While no ABA or New York ethical opinion has discussed these problems comprehensively, the change in technology has not changed the basic principles in professional responsibility that apply. Older opinions of the Bar associations and the courts concerning ethical issues in paper discovery should be adapted to help lawyers navigate this difficult new area.

To discuss some of the typical ethical problems, we will use a simple hypothetical. Lawyer Jones is the litigation partner representing Client A, a multi-national corporation, in the case *A v. B*. B has just made a document production request that demands all the e-mails sent or received by 20 employees of A during a two-year period on subjects relevant to the litigation. Attempts to convince the court to require B to pare down the requests have failed. Jones, whose firm has only three other litigators and one paralegal, now has to organize the e-discovery response, and to do so in compliance with the ABA Model Rules and the new (April 1, 2009) New York Rules of Professional Conduct, the “new Rules.”

Temporary Lawyers

Jones knows he does not have enough lawyers and paralegals to review the tens of thousands of e-mails that will be revealed by even the most pared-down word search. He contacts a local agency, Giant Legal Temps, and contracts to hire ten temporary (“temp”) lawyers to work on reviewing the e-mails. He agrees to pay each lawyer \$100/hr., and to charge their time to A at \$225/hr. He also agrees to pay Giant 10% of any fees earned by the temp lawyers.

Twenty years ago, long before the advent of e-discovery, the ABA Standing Committee on Ethics and Professional Responsibility (the “ABA Committee”) wrote formal opinion 88-356 (1988) to set out the professional responsibility rules that lawyers must follow when hiring or serving as temp lawyers. That opinion focused on five areas: conflicts of interest, attorney-client confidentiality, supervision, disclosure to clients, and fee arrangements with placement agencies. All apply with equal force in the e-discovery context.

Conflicts of interest: Under Formal Opinion 88-356, each temp lawyer has to check for conflicts of interest with current clients (MR 1.7, new Rule 1.7-1.8, DR 5-105(A) and (B)) and with former clients (MR 1.9, new Rule 1.9, DR 5-108)) before undertaking to work for client A. If, for example, a temp lawyer is currently working on another matter adverse to client A, or once worked for client B on a matter substantially similar to *A v. B*, his conflict has to be identified, and the conflicted lawyer barred from taking the assignment. Thus, Jones has to require the temp lawyers to list any current or recent work, and must conduct a conflicts check.

The harder issue is whether a temp lawyer's conflicts on these other matters are imputed to other lawyers in Jones's firm under MR 1.10, new Rule 1.10 and DR 5-105(d). The ABA Committee in Opinion 88-356 noted that this turned on a "functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm. ..." Thus, if the temp lawyer works at the firm's offices on a regular basis, or "has access to information relating to the representation of firm clients other than the client" in question, then the vicarious disqualification rules apply. If, on the other hand, the firm, "through accurate records or otherwise, can demonstrate that the temp[] lawyer had access to information relating" only to a limited group of clients, or worked only on a single matter, those rules did not apply. To minimize any risk, "the firm should, to the extent practicable, screen each temp[] lawyer from all information relating to the clients for which the temp[] lawyer does no work," while keeping accurate records of the work the temp lawyer actually does.

Confidentiality: The ABA Committee made clear that all temp lawyers are obligated not to reveal "client information" under MR 1.6 – (*author's note:* or now, in New York, under new Rule 1.6) – regarding Client A, as well as "information relating to the representation of other firm clients [but] only to the extent that the temp[] lawyer in fact obtains the information as a result of working with the firm." Thus, it is again incumbent on Jones to limit the temp lawyer's exposure to information about other clients. "If such limited access cannot be demonstrated, the temporary lawyer in that situation must not disclose information relating to the representation of persons known to the lawyer to be firm clients regardless of the source of the information," even if in the public domain. ABA Formal Op. 88-356 (1988) (emphasis added).

Supervision: The ABA Committee reminded the Bar that supervising lawyers in the firm (in this case, Jones) "have an obligation [under MR 5.1(b) and (c), new Rule 5.1 (b), (c) and (d) and DR 4-101] to make reasonable efforts to ensure that the temporary lawyer conforms to the rules of professional conduct, including those governing the confidentiality of client information."

Disclosure to Client: There are two disclosure issues relating to temp lawyers. First, must Jones inform Client A that the firm is hiring temp lawyers to work on the case? Bar Committees have disagreed. The New York City Bar association Committee on Professional and Judicial Ethics (the "NYC Bar") made clear almost twenty years ago that "the law firm has an ethical obligation in all cases (i) to make full disclosure in advance to the client of the temp[] lawyer's participation in the law firm's rendering of services to the client, and (ii) to obtain the client's consent to that participation." N.Y. City formal op. 1989-2.

This position has found support in a number of Bar Association opinions across the country. See N.Y. City Formal Op. 2006-3, N. 10 (listing opinions). The ABA Committee took a different approach, stating that disclosure to the client was required only where "the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm;" otherwise, disclosure is not needed, since the temp lawyer, as any other lawyer at the firm, will be supervised by in-firm attorneys, and that is all the client has a right to know or expect. ABA Formal Op. 88-356, *supra*. The Committee on Professional Ethics of the New York State Bar Association (the "NYS Bar") adopted a similar distinction. See N.Y. State Op. 715 (1999), which advised that the need for client disclosure and consent depends on whether client confidences and secrets (as defined under DR 4-101) will be disclosed to the temp lawyer, whether the temp lawyer will be closely supervised in the matter, and/or whether the temp lawyer will do significant work in the matter.

In my judgment, the ABA and NYSBA approach is advisable, as a matter of both professional ethics and good business sense. The client has a right to know about and consent to the use of temp lawyers, who will show up as a significant disbursement on the next month's bill. Failing to reveal that temp lawyers are being used, and at what cost, opens the law firm up to objections either to the size of the bill or to the quality of the work performed.

The second disclosure issue relates to the fact that the temp lawyers are not full-time employees of Jones's firm, and the firm is marking-up their cost. Does the firm have to disclose the precise terms of the arrangement under MR 1.5, new Rule 1.5 and DR 2-107 – rules that generally require firms to disclose and obtain client consent to the division of fees between the firm and lawyers outside the firm? The ABA Committee said no, for two reasons: (1) temp lawyers act under the close supervision of lawyers at the firm, and thus are more closely akin to employees than to the in-dependent lawyers whom the rules were intended to control; and (2) the gross fee that a pays to the firm is not split with the temp lawyers; the firm pays them out of its overall proceeds, just as it pays its full-time employees.

Sharing Fees with Placement Agency. The ABA Committee concluded that an arrangement like the one between Jones and Giant is ethically appropriate. Rejecting concerns that the arrangement might constitute fee splitting with a non-lawyer in violation of MR 5.4, new Rule 5.5, and DR 3-102(B), the Committee noted the distinction between "the character of the compensation paid to the law firm [for legal services] and that paid to the placement agency [for placement services]," as well as the fact that paying a percentage to the placement agency did not threaten "the maintenance of the lawyer's professional independence."

Outsourcing

Now let's change the hypothetical slightly. Jones realizes that the cost of ten temp lawyers from New York will be more than the client can afford. He chooses instead to work with Madras legal Help Services, based in Mumbai. Madras advertises that it has highly trained Indian college graduates, supervised by Indian lawyers, who are willing to review documents for \$10/hour. What additional professional responsibility obligations does hiring Madras impose on Jones?

In recent years, the NYC Bar and the ABA Committee have both addressed the use of foreign outsourcing agencies. *See* ABA Formal Op. 08-451 (2008); NYC Bar Formal Op. 2006-03 (2006); *see also* NYS Bar Op. 762 (2003) (working with foreign attorneys within your firm). These opinions are quite consistent in their guidance.

Aiding the Unauthorized Practice of Law. Neither the Madras employees nor the Indian lawyers, are admitted to practice in New York, and are thus considered "non-lawyers" under the New York Code. As a result, Jones's agreement with Madras risks violating DR 3-101(a) (*see* new Rule 5.5(b)), which prohibits lawyers from "aid[ing] ... non-lawyer[s] in the unauthorized practice of law." NYC Bar Formal Op. 2006-03. New York ethics opinions recognize that non-lawyers may perform legal tasks – researching legal questions, reviewing documents, drafting legal papers, etc. – but only if they do so "under the supervision of an admitted lawyer." N.Y. State Opinion 721 (1999) (use of research firm staffed by non-lawyers). Thus, to ensure compliance with DR 3-101(a), (and the identical new Rule 5.5(b)), Jones has to vet Madras and supervise its personnel – including its Indian lawyers – with at least the same degree of

care as he would paralegals and other non-legal staff in the firm's employ. NYC Formal Op. 2006-03 ("the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality").

Supervision. Close supervision is required not just to avoid a DR 3-101(a) (new Rule 5.5(b)) violation, but also to ensure that Jones represents his client competently under DR 6-101(a) (new Rule 1.1.) The differences in foreign cultures and legal systems, as well as the difficulties created by the sheer geographical distance between the lawyer and the outsourcing agency, require "the New York lawyer [to] be both vigilant and creative in discharging the duty to supervise." NYC Formal Op. 2006-03. The supervisory obligations begin long before the work begins. The lawyer must: obtain background information about Madras's legal and non-legal staff; conduct reference checks; interview some of Madras's supervisory personnel, either on the telephone or, as the ABA Committee strongly recommends, in person; and inspect the Madras facility to check on security procedures. *See* ABA Formal Op. 08-451 (2008). The lawyer also has to ascertain whether the Madras lawyers are trained in, and understand, such basic ethical concepts as attorney-client confidentiality and conflicts of interest. *Id.*

Conflict Checking. As with temporary lawyers, the lawyer employing an outsourcing firm must check for conflicts, both current and potential. This can be difficult when dealing with foreign law firms and outsourcing companies, which may not maintain conflict-check systems like those required of New York lawyers. *See* DR 5-105(E) (new Rules 1.10(e), (f), (g) and (h)), (setting forth requirements for conflict check systems). Jones has to ask Madras specifically whether it "either is performing, or has performed, services for any parties adverse to the lawyer's client." NYC Formal Op. 2006-03.

Attorney-client privilege. DR 4-101(d) (*see* new Rule 1.6(c)) requires that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client. ... " Consequently, Jones and his firm must take steps to ensure that those in the firm who work with Madras "understand the sanctity of this provision. non-lawyers and lawyers licensed to practice in foreign countries whose confidentiality rules may differ need to be sensitized to" this fundamental obligation. N.Y. State Opinion 762 (2003). The lawyer must take steps to protect confidentiality by "restricting [the outsourcing agency's] access to confidences and secrets, [using] contractual provisions addressing confidentiality and [imposing] remedies in the event of breach, and [giving] periodic reminders regarding confidentiality." NYC Formal Op. 2006-03; ABA formal op. 08-451 ("written confidentiality agreements are ... strongly advisable in outsourcing relationships"). Indeed, it is precisely because of the risks that the use of foreign personnel pose to attorney-client confidentiality that "the lawyer should secure the client's informed consent" in advance of hiring the foreign firm. *Id.*

Disclosure. The requirement that lawyers disclose the use of foreign outsourcing companies to their clients is much more emphatic than for temp lawyers. This disclosure is particularly necessary when attorney-client confidences are involved, when an important task (e.g., production of a large or critical document) has been assigned, or when the client expects that only law firm personnel will work on the matter. NYC Formal Op. 2006-03.

Cost. Again, the rule here is different from that with temp lawyers, who can be billed like ordinary associates of the firm. outsourcing services are generally treated as disbursements, and thus those

“services should be billed at cost, plus a reason-able allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.” ABA Formal Op. 08-451.

In sum, Jones can use Madras, but has to conform to the heightened supervisory and disclosure requirements imposed by the relevant Bar opinions.

When Privileged Documents Are Produced Inadvertently – Impact of the New Rules

Jones now sends B a detailed document request requiring the production of thousands of e-mails. Later, as Jones reviews B’s production, he finds five e-mails between a key B manager and B’s general counsel, detailing B’s strategy in the case. Jones realizes, after reading the first paragraph of each, that the information in the e-mails was both confidential and quite valuable. What are his obligations?

This question has long bedeviled courts and Bar ethics committees, because it pits the lawyer’s obligation to preserve attorney-client confidentiality – even the confidences of the other side – against the lawyer’s obligation of zealous client representation. Moreover, the New York Code and (until a few years ago) the Model Rules did not contain any provisions that addressed this issue. Nevertheless, for many years the opinions of the ABA Committee, New York courts, and New York Bar ethics committees were remarkably consistent on the subject.

The first opinion on this subject was ABA Formal Opinion 92-368 (1992), withdrawn by Formal Op. 05-437 (2005). The ABA Committee ruled that:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them. (Emphasis added).

The ABA Committee based its conclusion on (1) “the importance the Model Rules give to maintaining client confidentiality” – a value as to which all other competing ethical obligations, including the duty of zealous advocacy, “pale in comparison;” (2) the general rule that the attorney-client privilege may be waived only by the client; (3) the general rule that mis-sent property must be returned to its rightful owner; and (4) “the similarity between circumstances here addressed and other conduct the profession universally condemns.”

Both the Ethics Committee of the New York County lawyers association (the “NYCLA Committee”), in Formal Op. 730 (2002), and the NYC Bar Committee, in Formal Opinion 2003-04 (2003), concurred with the conclusion in Formal Op. 92-368. Although both Committees noted the absence of any specific rule on the subject, the NYCLA Committee in particular made clear that “the Code expressly contemplates that a lawyer’s ethical obligations may flow from sources other than the black-letter of the Code, including ‘local customs of courtesy and practice’ of the organized bar.” NYCLA Formal Op. 730, citing EC 7-38. The NYC Bar Committee went further, finding that invading the opposing party’s attorney-client privilege violates DR 1-102(a)(5) (new Rule 8.4(d)), which prohibits lawyers from “engag[ing] in conduct prejudicial to the administration of justice,” and DR 9-102(C)(1) (new Rule 1.15(c)(1)), which requires a lawyer to notify a third party about the “receipt of ... properties in which the ... third party has an

interest.” Both opinions acknowledged that New York court opinions on the subject had generally condemned lawyers who had disregarded their adversaries’ instructions to return or cease reading inadvertently-sent privileged materials. *See, e.g., American Express v. Accu-Weather, Inc.*, 1996 WL 346388 (S.D.N.Y. June 25, 1996).

However, the ABA Committee has changed its original views on this subject. *See* ABA Formal Opinion 05-437 (2005). The Committee focused on the fact that Model Rule 4.4(b) had recently been amended to require the lawyer receiving a privileged document sent inadvertently, only to notify the sender – not to refrain from reading it, or even to follow the sender’s instruction. Because the Model Rules now provided explicit guidance on the subject, the ABA Committee reasoned, Formal Opinion 92-368 (2002) had to be withdrawn in favor of an opinion that conformed to the new, more restrictive rule.

This view of the recipient lawyer’s obligations was directly at odds with the view of the New York courts and of New York Bar opinions. However, the new Rules of Professional Conduct have adopted MR 4.4(b) in its entirety. Thus, until the New York courts render decisions interpreting new Rule 4.4, New York lawyers should carefully consider what steps they will take if they receive documents that were not meant for their eyes, especially when appearing before trial judges who often grow angry when lawyers try to play games with the attorney-client privilege.

In my view, New York lawyers are best advised to enter into a stipulation before e-discovery begins – either a separate document or part of a confidentiality agreement – that makes it clear that both parties will return inadvertently produced documents without reading them. Similar stipulations have been enforced in several cases. *E.g., U.S. Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, 2000 WL 744369 (S.D.N.Y. June 8, 2000); *Prescient Partners L.P. v. Fieldcrest Cannon, Inc.*, 1997 WL 736726 (S.D.N.Y. Nov. 26, 1997).

Finally, we would be remiss if we did not mention the new Fed. R. Evid. 502(b), which specifically addresses the inadvertent disclosure issue. This rule, which applies only to disclosures made in a federal proceeding or by a federal agency, states that a disclosure of attorney-client information is not considered a waiver of the privilege if: (a) the disclosure is inadvertent; (b) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (c) the holder promptly took reasonable steps to rectify the error. The rule explicitly states that “reasonable steps” include following Fed. R. Civ. P. 26(b)(5)(B), which involves notifying the opposing party (i.e., the party receiving production) that the documents produced contain privileged material. At that point, the recipient must either destroy or return the information or, if the recipient wishes to challenge the adversary’s claim of privilege, seek a court ruling by filing the information under seal and sequester the information until the court’s ruling is obtained.

Exploring Metadata

another area in which New York ethics opinions conflict with the ABA’s opinion involves the treatment of metadata, “which may be loosely defined as data hidden in documents that is generated during the course of creating and editing those documents.” N.Y. State Op. 782 (2004). New York Bar opinions have uniformly stated that lawyers have an obligation not to try to “get behind” computer-generated documents in order to find metadata, since doing so might reveal client “confidences” and “secrets” such as editorial changes made in the document (sometimes at the opposing client’s request) and the identity of the person(s) involved in the drafting. *Id.* (New York “lawyer-recipients ... have an obligation not to

exploit an inadvertent or unauthorized transmission of client confidences or secrets,” and thus may not search metadata); see also NYCLA Op. 738 (2008) (explicitly following New York State Op. 782); New York State Op. 749 (2001) (by mining for metadata, a lawyer would “violate the letter and spirit” of the disciplinary rules that promote “the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship”).

Again, the ABA Committee disagrees. noting that the Model Rules “do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents,” and reading the limited scope of new MR 4.4(b) “as evidence of the intention to set no other specific restrictions on the receiving lawyer’s conduct found in other rules,” the ABA Committee did not restrict the recipient lawyer’s use of metadata. Instead, it strongly counseled the sending lawyer to take steps to avoid creating metadata in the first place – steps the New York State Bar Committee had found in Op. 782 (2004), to be required by the lawyer’s obligation to protect the attorney-client privilege.

The ABA’s “buyer beware” approach to the ethics of e-discovery promises to make a difficult process even more difficult. Although New York Bar opinions and New York judges have take a more protective approach, we will have to wait to see how they deal with new Rule 4.4. Because MR 4.4 is the very Rule relied upon by the ABA and because the same Rule has now been adopted by New York’s appellate divisions, we can presume that the ABA view will ultimately prevail.

In sum, the basic principles of professional responsibility which have always governed the discovery of paper documents have now been carried over into e-discovery. There are no short-cuts or basic modifications. Some issues have still to be resolved, but familiarity with the rules concerning attorney supervision, unauthorized practice, fee splitting, and attorney-client privilege remain essential to navigating the new technological landscape. Because some of the new Rules of Professional Conduct relevant to this article adopt the ABA’s MRs and depart from the Code, it’s incumbent on New York lawyers to study the new Rules carefully when they confront issues of professional responsibility in e-discovery.

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