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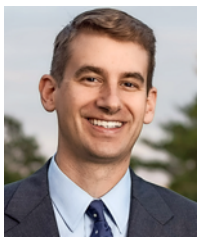
Legal Malpractice and eDiscovery: Understanding the Unique Challenges and Managing the Increasing Risks





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The maxim ''success is in the eye of the beholder'' holds true in complex litigation. Even when an attorney feels that she achieved a very good result, she can still suffer the wrath of a client whose expectations are not met. When an unhappy client scrutinizes the steps taken in the litigation, attorneys can end up in the crosshairs of allegations regarding professional misconduct (ethics), professional liability (malpractice), or both. As the technological complexity of litigation grows, especially in the area of eDiscovery, the risk of claims for attorney incompetence and attorney malpractice rise.

Many lawyers approach a case with confidence that they can learn the law involved and competently handle the matter for their client. These same lawyers typically apply their standard discovery plan for every type of case. Through a combination of the ''learn-on-the-job'' mentality and the ''paper-based,'' routine nature of discovery, many lawyers assume that the risks associated with digital information are no different from those that have always existed with paper. However, more astute lawyers understand that the legal and technical issues associated with managing eDiscovery involve unique—and greater—challenges. Costs and risks have continued to mount as emerging technologies significantly increase the volume and complexity of data, which in turn requires constantly evolving solutions. These challenges pose numerous ethical and legal (and even malpractice) traps for the unwary lawyer who follows an ''I can do it all by myself'' or ''learn-as-you-go'' approach.

Legal Malpractice and eDiscovery

The specter of attorney malpractice publicly collided with the field of eDiscovery in 2011 with *J-M Manufacturing Co. v. McDermott Will & Emery*.[1] Many commentators dubbed this California matter the first malpractice case involving eDiscovery and warned about the potential risk for attorneys who practice in the area without adequate knowledge. After five years, the risk (as well as the case against McDermott Will) has not gone away.[2] While there is a dearth of reported decisions regarding malpractice actions related to the handling of eDiscovery, this may be due to the arbitration provisions found in many engagement letters. As arbitrations are generally more private than lawsuits, there may be many unreported malpractice cases involving eDiscovery.

In *J-M Manufacturing*, a *qui tam* case, the plaintiff accused McDermott, Will, & Emery of legal malpractice and breach of fiduciary duty. J-M complained that the

[1] Case No. BC 462 832 (Cal. Super. Ct. L.A. Cty., First Amended Complaint, Jul. 28, 2011).

[2] While this case is still pending, according to the docket in this matter in the Superior Court for Los Angeles County, a Notice of [Order to Show Cause] Re Dismissal or Payment of Attorneys' Fees in Connection with Plaintiff's June 2, 2016 Non-Appearance was filed by counsel for defendant on June 3, 2016. A hearing has been scheduled for February 8, 2017 on the Order to Show Cause as to why the case should not be dismissed and/or as to why plaintiff should not pay attorneys' fees to the defendants for plaintiff's failure to appear at the court-ordered status conference.

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law firm, which had held itself out as knowledgeable in the area of eDiscovery,[3] breached its ''duty to render legal services competently'' and breached its fiduciary duty by, among other things, producing privileged documents to adverse parties, failing to supervise attorneys, and failing to supervise the vendors that the law firm hired to perform the review and production of J-M's documents. According to the first amended complaint in the case, the law firm originally worked with J-M to identify likely custodians in the company, collect information and transfer that information to the eDiscovery vendor to run search term filters and keywords that were negotiated with the federal government. The vendor also was supposed to run a privilege filter on the collected documents, so that the law firm thereafter could produce the non-privileged documents to the federal government. Unfortunately for the law firm, things did not go as planned.[4]

The first set of documents produced by the law firm to the government on behalf of J-M included J-M's privileged documents. The government subsequently asked the company to complete another privilege review and re-submit a new production to the government.[5] After hiring contract attorneys to assist with the second privilege review, the company again produced privileged documents. Out of nearly 250,000 documents produced by J-M, approximately 3,900 were privileged.[6] After obtaining this second production set, the government refused to return the privileged documents, claiming that J-M had waived privilege.[7]

This scenario highlights one area of significant risk for attorneys whose practice involves eDiscovery—the ''failure to supervise'' eDiscovery vendors and contract attorney reviewers. In *J-M Manufacturing*, the filtering process established by the vendors and the review work completed by the contract attorneys both allegedly resulted in the production of a significant number of privileged documents. Given that counsel is ultimately responsible for the content of a production, it is the attorneys who are charged with understanding the benefits and risks of the various technologies and thus must work closely with vendors to ensure that proper searches and checks are completed. The *J-M Manufacturing* plaintiffs alleged that its attorneys were not able to adequately audit the production of approximately 250,000 documents.[8] Such a risk would be magnified in cases involving the exchange of millions of documents.

Unique Emerging Challenges Regarding Potential eDiscovery Malpractice

When examining the standards for compliance with the rules of professional conduct versus the standard for satisfaction of an attorney's professional liability, the distinction can be unclear at times. Rules of professional conduct are aspirational and designed to guide lawyers as to what behavior is expected of them in terms of their professional conduct. A violation of the rules of professional conduct does not: (i) give rise to a private cause of action; (ii) result in civil liability; or (iii) create a presumption that a legal duty was breached. Malpractice claims, on the other hand, usually arise when a client claims that its lawyer acted negligently in handling the client's case and may result in civil liability on the part of the attorney

The concept of legal malpractice (or professional liability) has evolved under state common law to encompass a number of issues, including breach of contract, negligence, negligent representation, fraud, and breach of fiduciary duty.[9] Many claims of attorney malpractice are premised on a theory of negligence: the client contends that the attorney failed to exercise due care in his representation of the client. The elements of the claim generally include: (i) a duty to the client; (ii) a breach of that duty; (iii) the conduct of the defendant which was a legal or proximate cause of the injury to the client; and (iv) actual loss or damage incurred by the client.[10] Thus, attorney conduct that does not result in ''damages'' on the part of the client will not result in civil liability but may still be a violation of the rules of professional conduct. Further, clients who bring legal malpractice claims may have difficulty prevailing at trial, for example, if they cannot prove that the actions (or lack thereof) of the attorneys were indeed the legal or proximate cause of the loss incurred in litigation.[11] But despite the difficulties in establishing a claim and the potential availability of defenses, attorneys are still exposed to significant risks in terms of reputational damage, as well as the time and cost associated with defending such an actions.

As J-M noted in its complaint, McDermott Will & Emery ''held itself out as knowledgeable in the area of e-Discovery.''[12] It is not uncommon for law firms to have eDiscovery practice areas and for lawyers to hold themselves out as ''eDiscovery experts.'' Unfortunately, there is no standard by which to measure the competence of such eDiscovery attorneys. Many jurisdictions are just now starting to explore standards by which lawyers will be measured when they engage in eDiscovery.

The thrust of this movement started in August 2012, when the American Bar Association's House of Delegates voted to amend the Comment to Rule 1.1 of the Model Rules of Professional Conduct to advise lawyers that their duty to be competent extends to competence in technology.[13] The revised Comment to Rule 1.1 notes that lawyers ''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 sub-

[3] First Amended Complaint, *J-M Mfg. Co.*, at ¶ 9.
[4] *Id.* at ¶¶ 10–13.
[5] *Id.* at ¶ 11.
[6] *Id.* at ¶ 13.
[7] *Id.*
[8] *Id.*

[9] Professional Liability in Business and Commercial Litigation in the Federal Courts § 75.17 (West 2011).
[10] *See id.* at § 75:19.
[11] In addition, the potential availability of the legal theories of contributory negligence and comparative fault of the client may limit or bar the ability of a client to recover damages. *See, e.g.*, *Reliance Nat. Indem. Co. v. Jennings*, 189 F.3d 689 (8th Cir. 1999) (applying comparative fault under Arkansas law); *see also* Professional Liability in Business and Commercial Litigation in the Federal Courts § 75:33. Attorneys may also use the defenses of lack of justifiable reliance or statute of limitations under state law to escape liability. *See id.* at § 75:34-35.
[12] First Amended Complaint, *J-M Mfg. Co.*, at ¶ 9.
[13] American Bar Association (ABA), August 2012 Amendments to ABA Model Rules of Professional Conduct.

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ject.''[14] So far, at least 21 states have followed the lead of the ABA and have amended their rules of professional conduct to address technology.[15]

The directive is straightforwardly worded, yet complicated to implement. As a result, confusion abounds. How should competence in technology versus competence in law be measured? How should a lawyer approach the issue of competence in eDiscovery? How does a lawyer educate herself on the benefits and risks of the relevant technology in eDiscovery? Once a lawyer has reached the minimum level of technical competence in eDiscovery, how does she stay competent on such emerging issues such as cloud computing, technology assisted review, social media, and wearable technology? The challenge lies not in understanding the law, but in understanding the complex technologies involved in eDiscovery. This challenge begets the more general question: What level of understanding constitutes minimal competence to satisfy an attorney's ethical obligations in today's ever-changing digital information world?

The State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2015-193 on June 30, 2015 (the ''California opinion''), which addresses a number of issues regarding an attorney's ethical duties in the handling of discovery of digital information.[16] The digest of the opinion states:

> An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including 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 matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI.[17]

This opinion, like much of the current guidance regarding competence in eDiscovery, instructs members of the California bar that they have ethical obligations to understand, at a minimum, the legal issues regarding electronic discovery. While the California opinion is helpful in raising awareness of the numerous ''legal rules and procedures'' regarding eDiscovery, it fails to provide any guidance on the specifics of the technology involved or on how attorneys should acquire the minimum level of competence required to understand the ''benefits and risks'' associated with that technology.

The California opinion notes that an attorney handling eDiscovery matters, either alone or in association with competent co-counsel or expert consultants, should be able to:

- initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client's ESI systems and storage;
- advise the client as to available options for collection and preservation of ESI;
- identify custodians of relevant ESI;
- engage in a competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner.[18]

For lawyers skilled in the nuances of eDiscovery, the above list, while challenging, is not problematic. For the overwhelming majority of attorneys who are not experienced in the legal and technical aspects of eDiscovery, the challenge is daunting.

Performing data searches may seem simple, but small details can have large implications on search results. For example, what exactly is being searched (metadata fields, full text index, etc.)? You don't want to find out after the fact that the searches were only run against file names and not the full text of documents. Also, how will data be searched (Boolean operators, proximity searches, concept analytics, etc.)? Has the court issued any guidelines, or imposed requirements, about the format of production? Does the production meet whatever the parties agreed to in their ESI Protocol? Designing and proposing search terms without first understanding the available search capabilities can be inefficient, embarrassing, or worse.

To advise a client on the options for collecting and preserving ESI, as well as to protect client confidences and privileges, lawyers need to understand the ESI systems at issue and the tools available for each system. They also need to understand how tool selection will impact the ability to produce responsive ESI in the appropriate manner.

Evolving and Emerging Technologies

It has been five years since the complaint was filed in the *J-M Manufacturing* decision, and in that time period the volume of digital information has significantly increased. This growth is driven in large part by social media, mobile phone apps and the network of physical objects embedded with technology that enables these objects to communicate with each other—the so-called

[14] ABA Model Rule 1.1, cmt.

[15] Robert Ambrogi, *21 States Have Adopted Ethical Duty of Technology Competence*, www.lawsitesblog.com (Mar. 16, 2015); Robert Ambrogi, *Another State Adopts the Duty of Technology Competence for Lawyers*, www.lawsitesblog.com (June 17, 2016).

[16] California Formal Ethics Op. No. 2015-193, at 1, *available at* http://src.bna.com/g8b. The opinion is advisory in nature and not binding on any court in California or any member of the California Bar.

[17] *Id.* at 3.

[18] *Id.*

''internet of things.'' These devices collect, create, and emit a significant amount of data. It is estimated that by 2020, the number of devices connected to the internet of things will grow from the current estimate of 6 billion devices to over 20 billion.[19] Many of these devices will function at speeds that will outpace human intervention and thus will require artificial intelligence to operate them.

This break-neck pace of technical evolution directly clashes with the risk-averse legal profession, which often lags years behind the business world in embracing, much less understanding, new technologies. At the same time, attorneys face expanding and evolving obligations to understand both how their clients create and manage digital information and how best to preserve, collect, and produce ESI during litigation.

The overall concepts of eDiscovery may cause problems for even the seasoned attorney, and the associated challenges and risks in this area are magnified by a constant and rapid pace of technological evolution. Here are several examples of evolving challenges and the tough questions that may need to be answered:

- *Apps.* New methods for creating and storing information become available every day. There were approximately 400 million internet users in 2000; there are over 3 billion today. In 2009, there were approximately 100,000 apps available in the iTunes App Store; today there are over 1.7 million. Every new source of information could store information that is relevant to anticipated or ongoing litigation. What applications did your client use to create relevant information? In what format is that information stored? Who else can access this information and what are the limitations on the search and retrieval of that information?

- *The Cloud.* More than just buzz-words, ''cloud computing'' and ''mobile device management'' can have real implications for discovery. Services like Microsoft Office 365 and Google Apps for Work allow businesses to store email, spreadsheets, word processing documents, and instant messaging data in the cloud instead of in company-owned data centers. Mobile devices allow individuals to access the same information from multiple devices simultaneously, and save copies of the same information in multiple locations. As a result, a key question becomes, where is your client's data? What control does your client have over that data, and what capacities exist to preserve and collect copies of that data? How has this changed over the last year and how will this change in the next year? These relatively simple questions pose significant difficulties in the context of fast-paced litigation and deadlines imposed by courts that may not understand the challenges and workflows required for successful eDiscovery navigation.

- *Social Media.* The last several years have seen social media grow from college campuses to a nearly ubiquitous medium for communicating and sharing information. There are over 2 billion active social media users, whose ranks grow by 10 percent per year.[20] Facebook touts 1.6 billion monthly active users, while Instagram has 400 million and Twitter 320 million.[21] Attorneys should be aware of their client's social media presence and account for client information stored on non-traditional platforms. Is your client sending work-related messages via social media? How are those messages being preserved? Is your client alleging personal injury and at the same time sharing statements and pictures that tell a different story? Can your client defensibly delete or remove social media posts during litigation, or change privacy settings?

- *eDiscovery Providers.* Legal service providers claim to have simplified the eDiscovery process with innovation and technology, including through ''solutions'' like technology assisted review, predictive analytics, artificial intelligence, email conversation threading, near-duplicate identification, data visualization, and concept clustering. At the same time, the legal service provider marketplace can seem as complex and fluid as the information landscape it attempts to address. Who selects the eDiscovery provider? Is the provider adding value to the process at a reasonable rate? Is your client's data securely stored by the eDiscovery provider? Do you have concerns about privacy or cross-border discovery? Are the processes and procedures used for interacting with service providers being documented? Who will testify if something goes wrong?

- *Cybersecurity.* Cybersecurity risks complicate and magnify all of these challenges in a high-profile way. In this age of heightened concerns about data privacy and security, lawyers and their firms are targets for hackers looking to profit from client information. This puts lawyers and their law firms at risk for malpractice claims for failing to maintain adequate data security practices that effectively safeguard sensitive client data. Cisco's 2015 Security Report ranked the legal sector as the seventh riskiest sector for malware and hackers. Even if attorneys can guide their clients through the challenging process of identifying, preserving, and collecting relevant information from a seemingly endless list of sources, they face mounting challenges to keep the information secure. Are you going to ingest and store the client's documents? If so, how are you keeping that information secure? If you are recommending a vendor, have you properly vetted the vendor's security protocols?

These technological challenges, along with extraordinary cost, compressed timelines, and the specter of damaging sanctions and adverse judgments create a petri dish for potential malpractice claims and lawsuits. Further, eDiscovery can present a particularly troublesome malpractice scenario—the often high costs and

[19] See Newsroom Press Release, Gartner Inc. (Nov. 10, 2015), *available at* http://www.gartner.com/newsroom/id/3165317.

[20] Dave Chaffey, *Smart Insights Global Social Media research Summary 2016*, www.smartinsights.com (Apr. 21, 2016).

[21] *Leading social networks worldwide as of April 2016, ranked by number of active users (in millions)*, www.statista.com (2016).

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negative outcomes in motion practice can bolster a claim for damages and serve as proximate causation in a malpractice action. Discovery missteps can have implications for the overall case if they result in adverse inference or other case-altering sanctions.

Addressing Ethical Obligations

The digest to the California opinion provides guidance for an attorney wishing to understand her ethical obligations in noting, ''An attorney lacking the required competence for e-discovery issues 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.''[22] It can be extremely challenging for an attorney to attempt to ''acquire sufficient learning and skill'' regarding the various technologies associated with eDiscovery at the outset of a matter, and achieve the requisite competence to handle eDiscovery problems by the time they arise. Adding to this challenge are the complex analyses and decisions the attorney must make about preservation at the outset of the litigation, if not before. Thus, Option 1 is rarely a viable approach because of timing. Obviously, Option 3 is generally undesirable. That leaves Option 2, which on its face, appears to provide an easy solution to the problem. Unfortunately, it is not so simple.

Whom should a lawyer consult and how would that attorney know if the person is competent? What questions should you ask? Attorneys should not assume that the most senior litigators are best-positioned to understand the challenges inherent in eDiscovery and provide advice and representation on eDiscovery issues.

Thankfully, there is a growing list of resources on the basics of eDiscovery. For example, the Sedona Conference Jumpstart Outline sets forth a series of topics and questions for attorneys to consider asking their clients and adversaries, with respect to discovery obligations involving electronically stored information.[23] The United States Court of Appeals for the Seventh Circuit established an Electronic Discovery Pilot Program to educate the bar and bench on common issues related to electronic discovery.[24] The Delaware Supreme Court established a Commission on Law & Technology, which consists of lawyers from law firms of various sizes, as well as in-house and government lawyers, judges and information technology officers whose charge is to develop and publish guidelines and leading practices for lawyers exclusively on technology and the practice of law.[25] Finally, organizations like the Electronic Discovery Institute[26] and the Association of Certified E-Discovery Specialists (ACEDS)[27] has also been working to help lawyers, law students and legal professionals improve their eDiscovery knowledge and skill.

While good sources of information, these resources can't ensure that an attorney will select the right eDiscovery lawyer or vendor. An attorney not skilled in the relevant technology will find it difficult to evaluate whether another attorney, consultant or vendor is ''competent'' in the technology and the law. Fortunately, a ranking of eDiscovery counsel can give attorneys an objective evaluation of the eDiscovery counsel they are considering. Since 2008, Chambers & Partners has evaluated and ranked lawyers and law firms on the basis of their legal knowledge and experience as well as their ability, effectiveness and client-service in the area of eDiscovery.[28]

'Failure to Supervise'

Once an attorney selects another attorney, consultant, vendor or expert to conduct eDiscovery, the rules of professional conduct do not permit the hiring attorney to just turn over the assignment and walk away. Attorneys have an ethical obligation under Model Rule 5.1 and Rule 5.3 to understand what actions the retained counsel or consultant is taking, because the hiring lawyer must supervise and take reasonable steps to ensure that the retained counsel or other specialist's conduct is ''compatible with the professional obligations of the lawyer.''[29] For example, as the *J-M Manufacturing* case highlights, hiring counsel should ensure that the counsel or other specialist being retained takes steps to maintain the confidences of the client and to prevent the inadvertent or unauthorized disclosure of confidential information that might result in a waiver of privilege.

This obligation of counsel to supervise or oversee the work of subordinate lawyers—as well as that of nonattorney technical staff, which would include outside vendors, contractors or experts hired to perform eDiscovery tasks—is not only of paramount importance in the area of eDiscovery, it is non-delegable. In a 2015 decision in *HM Electronics v. R.F. Technologies*, the court found that sanctions were appropriate because the defendants' attorneys failed, among other things, to perform quality control checks or supervise the work of the ESI vendor which resulted in over 375,000 pages of ESI that should have been produced by defendants during discovery, not being produced until after the close of discovery.[30] In discussing the ethical obligations of counsel to supervise the work of subordinate lawyers and outside vendors, the court highlighted a pertinent section in the California opinion:

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[22] *Id.*

[23] Ariana J. Tadler, et al., *The Sedona Conference ''Jumpstart Outline'': Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production* (Mar. 2016), *available at* http://src.bna.com/g8d.

[24] Seventh Circuit Electronic Discovery Pilot Program, *Statement of Purpose and Preparation of Principles*, http://www.discoverypilot.com/.

[25] Delaware Supreme Court Commission on Law & Technology, Delaware State Courts, http://courts.delaware.gov/declt/.

[26] http://www.ediscoveryinstitute.org/.

[27] Association of Certified E-Discovery Specialists (ACEDS), *Mission and Vision*, www.aceds.org.

[28] Chambers & Partners, *Litigation: E-Discovery – Nationwide*, www.chambersandpartners.com.

[29] ABA Model Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer), *available at* http://src.bna.com/g8f; ABA Model Rule 5.1 (Responsibilities Regarding Nonlawyer Assistant), *available at* http://src.bna.com/g8l.

[30] See *HM Elecs., Inc. v. R.F. Techs. Inc.*, No. 12-cv-2884-BAS-MDD, 2015 BL 254876 (S.D. Cal. Aug. 7, 2015). The parties subsequently settled the action and upon a motion by defendants, the court vacated, as moot, the imposition of sanctions. See *HM Elecs., Inc. v. R.F. Techs. Inc.*, No. 12-cv-2884-BAS-MDD (S.D. Cal. Mar. 15, 2016).

> This consultation or association, however, does not absolve an attorney's obligation to supervise the work of the expert . . . which is a non-delegable duty belonging to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court. *An attorney must maintain overall responsibility for the work of the expert he or she chooses, even if that expert is the client or someone employed by the client. The attorney must do so by remaining regularly engaged in the expert's work, by educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by the law or by the court, and of any relevant risks associated with the e-discovery tasks at hand.* The attorney should issue appropriate instructions and guidance and, ultimately, conduct appropriate tests until satisfied that the attorney is meeting his ethical obligations prior to releasing ESI.[31]

Risk Reduction and Management

Law firms of all types and sizes should appreciate the significant risks associated with technology, and should develop a plan to reduce and manage those risks. Attorneys must ensure that their clients are well-advised and well-informed on the ramifications of all eDiscovery decisions. Attorneys have an ethical obligation to understand the benefits and risks associated with relevant technology. Counsel cannot simply default to the most conservative approach, such as demanding that a client ''save everything'' (not only is this almost always impracticable, costly and disruptive to the client's business, it also creates a record of advice the client cannot follow). Nor can an attorney enter into an agreement with opposing counsel to avoid having to deal with ESI issues because the attorney is uncomfortable or unfamiliar with the technology.

Technology is not an area for lawyers to ''wing it.'' If you are unsure about the technology involved in the litigation, you should associate with other law firms who have demonstrated knowledge and experience in the area. The key to a successful collaboration with retained counsel or other specialists is to ensure that they are knowledgeable in the law and the technology, have a significant amount of practical experience, and have demonstrated a level of competence through thought-leadership. The level of competence may be evidenced through their active involvement in the development and implementation of best practices, or through speaking, teaching, writing, or engagements as an expert in the field.

Critically, attorneys must exercise oversight to comply with their ethical obligations. Attorneys must understand that there are limits to the roles that non-legal experts can have in the area of eDiscovery. ''Trust but verify'' are watchwords for eDiscovery.

Finally, if you find yourself in the unenviable position of being accused of legal malpractice regarding eDiscovery, do not scoff at the claim or downplay the potential risk. Look at your malpractice policy notification provisions and follow them carefully. In this regard, consider whether the policy requires notification even if the current or former client has not yet asserted the claim. And if a claim matures into a ripe controversy, make sure you have adequate representation and expertise, both on the malpractice claim and on the ''case within the case'' involving the eDiscovery issues.

Conclusion

To safeguard against the ''wrath of the client,'' lawyers need to be proactive in understanding and using technology in discovery. A lawyer should keep the client informed and monitor the client's expectations as conditions change. It is not acceptable for an attorney to rely solely on another counsel or consultant to manage the digital information and handle any technological issues. It is best to approach technology in a collaborative way, so that all constituencies—including experienced eDiscovery counsel—have a seat at the table. That way, if an unhappy client starts to scrutinize what happened in the litigation, its (former) attorneys can better defend themselves against both ethical challenges and malpractice claims by demonstrating that the discovery process was designed and implemented in a collaborative, informed, and reasonable manner.

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[31] California Formal Ethics Op. No. 2015-193, at 5 (emphasis added). See *HM Elecs., Inc.*, 2015 BL 254876, at *26 (S.D. Cal. Aug. 7, 2015).

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