Raising the Bar on E-Discovery

The Recorder (California) (Online)

August 26, 2015 Wednesday

THE RECORDER

Length: 1039 words

Byline: Jim Carden, Benjamin Rose and Lisa Sherman

Body

E-Discovery

California is leading the way in requiring ***e-discovery*** "competence" on the part of lawyers, even when they retain third-party experts. The State ***Bar*** of California recently issued Formal Opinion No. 2015-193, which addresses attorneys' ethical duties in the handling of ***discovery*** of electronically stored information, or ESI.

In December 2014, the state ***bar***'s Commission for the Revision of the Rules of Professional Conduct issued a proposed ethics opinion (Proposed Formal Opinion Interim No. 11-0004), which required attorneys who represent clients in litigation to be competent in the area of ***e-discovery*** or associate with others who have sufficient knowledge. The commission studied the current Rules of Professional Conduct and proposed comprehensive amendments for the state ***bar***'s board of trustees to consider.

The Ethical Duty of Competence in ***E-Discovery***

Proposed Formal Opinion Interim No. 11-0004 was the second revision of this opinion. The revised opinion addressed an attorney's ethical duties regarding competence and client confidentiality. It was a scaled-back version of the original, and added an extended discussion of the obligation to supervise subordinate attorneys' and non-attorneys' work, including clients' IT staff and ***e-discovery*** vendors.

The revised opinion referenced the American ***Bar*** Association's 2012 amendment to the Model Rules of Professional Conduct regarding the duty of lawyers to keep abreast of

changes in the law, "including the benefits and risks associated with relevant technology." Rule 3-110 C. The opinion identified various skills an attorney should be able to perform alone, with competent co-counsel or with expert consultants, including:

· initially assess ***e-discovery*** needs and issues, if any;

· implement or cause to implement appropriate ESI preservation procedures;

· analyze and understand a client's ESI systems and storage;

· identify the custodians of relevant ESI;

· perform data searches;

· collect responsive ESI in a manner that preserves the integrity of that ESI;

· advise clients on available options for collection and preservation of ESI;

· engage in meaningful meet and confer with opposing counsel on ***e-discovery*** plans; and

· produce responsive ESI in a recognized and appropriate manner.

The revised opinion explicitly states that the lead attorney should conduct appropriate tests until satisfied that he or she is meeting ethical obligations prior to releasing any ESI. Even when counsel outsources to the "experts," the attorney cannot defer to their judgment; all attorneys must be competent enough to understand the basics, to ensure that ***e-discovery*** rules are followed.

Proposed New Rule of Professional Conduct

California Business and Professions Code section 6076 authorizes the state ***bar*** to prepare professional conduct rules for submission to the California Supreme Court for approval. If the new rules are approved on or before March 2017, they become binding upon all members of the ***bar***. Violations may subject a member to discipline under Business and Professions Code Section 6077. On April 24, 2015, the state ***bar***'s board of trustees authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct, including new rules governing ***e-discovery***.

The proposed rules require an attorney lacking a basic understanding of ***e-discovery***, even an otherwise highly experienced attorney, to: (1) acquire sufficient knowledge and skill before taking on the representation; (2) associate with or consult technical consultants or competent counsel and properly supervise their work; or (3) decline the representation.

New FRCP Amendments Address ***E-Discovery*** Competence

On April 29, 2015, the U.S. Supreme Court approved proposed amendments to the Federal Rules of Civil Procedure applicable to cases litigated in federal courts, which will become effective on December 1, 2015. These changes also hold counsel to a higher level of competence in ***e-discovery***. Rule 37 added a section (***e***) entitled "Failure to Preserve ESI," which states that, if a court finds that ESI should have been preserved in anticipation of litigation and is now lost because a party failed to take reasonable steps to preserve it, the court may order measures to cure the prejudice.

Under the new amendments, If the court determines that a party intentionally deprived the other party of ESI, the court may presume that the lost information was unfavorable to that party and either instruct the jury that it may or must presume the information was unfavorable to the party; dismiss the action entirely, or even enter a default judgment against that party.

Recommendations for Counsel conducting ***E-Discovery***

California's Formal Opinion No. 2015-193 and FRCP 37 require that attorneys not only associate with competent providers, but that they also understand the fundamentals of ESI-where it is stored, preservation and collection techniques, and the issues that are likely to arise-because they will be held accountable for directing and supervising the providers.

Indeed, fundamentals will not be enough in litigation. Attorneys must have a higher level of understanding to challenge and interrogate the opposing party's designee as the person most knowledgeable about their information systems and the processes employed to collect and produce ESI. This knowledge is important not just at trial, but to leverage settlements, because if the opposing party's evidence was not collected correctly and is deemed inadmissible, even a party that has great exposure to liability will be able to attack an iron-clad case against it by arguing for the exclusion of the opposing party's ESI.

The expectation is not for attorneys to become subject matter experts, but to acquire some foundational knowledge and to work collaboratively with those technical experts and corporate technology staff hired. However, the attorneys who can successfully attack opposing party's ESI collection efforts will have a whole new weapon in their arsenal to preclude evidence at trial.

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Classification

Language: ENGLISH

Publication-Type: Newspaper

Subject: LEGAL ETHICS (92%); ELECTRONIC ***DISCOVERY*** (90%); ETHICS (90%); EDITORIALS & OPINIONS (89%); LAWYERS (89%); AGENCY RULEMAKING (89%); PROFESSIONAL WORKERS (89%); PRETRIAL ***DISCOVERY*** (78%); OUTSOURCING (78%); TRIAL & PROCEDURE (78%); BUSINESS & PROFESSIONAL ASSOCIATIONS (76%); SUPREME COURTS (73%); LITIGATION (73%); ASSOCIATIONS & ORGANIZATIONS (73%); TECHNICIANS & TECHNOLOGICAL WORKERS (70%); BOARDS OF DIRECTORS (68%); LAW COURTS & TRIBUNALS (60%)

Organization: STATE ***BAR*** OF CALIFORNIA (84%); AMERICAN ***BAR*** ASSOCIATION (54%)

Industry: LAWYERS (89%); LITIGATION (73%)

Geographic: CALIFORNIA, USA (94%); UNITED STATES (79%)

Load-Date: August 27, 2015

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