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California's New E-Competence Rule

By Lisa Sherman and Benjamin Rose – January 8, 2015

A recent decision issued by the district court of the Southern District of California should serve as a wake-up call to companies, and their counsel, nationwide to become e-competent and immediately update their practices as soon as their clients are put on notice of possible litigation involving potentially relevant electronically stored information (ESI).

In *NuVasive, Inc. v. Madsen Medical, Inc.*, 2015 WL 4479147 (S.D. Cal. July 22, 2015), the court issued an adverse inference instruction to a jury, in part, due to the plaintiff company's failure to properly preserve text messages from its employees who were classified as key data custodians. Thus, the jury was allowed to infer that the evidence would have been adverse to the plaintiff and to adopt the defendants' reasonable interpretation of what the text messages would have said.

Defendant Madsen Medical, Inc., alleged that plaintiff NuVasive, Inc., failed to preserve text messages from four employees who were key to its defense of the trade secret litigation. Madsen contended that the text messages may have contained evidence of secret dealings between NuVasive and former Madsen employees to "poach" Madsen's employees. Madsen had notified NuVasive of its duty to preserve evidence, including text messages of the four employees, as early as August 2012. The court found NuVasive deficient in ensuring that its employees complied with the litigation hold.

The adverse inference instruction was issued against the NuVasive, despite the company's notice and repeated reminders to employee custodians of their obligations and despite the fact that the defendants obtained most of the missing texts from other individuals.

The majority of state and federal courts, like the Southern District of California, hold that a duty to preserve potentially relevant evidence, including ESI, arises as soon as a party is put on notice of anticipated litigation, as was the case here. Although NuVasive promptly and properly notified its employees of their obligations initially and again in September 2013, the court held that prompt notification and even a reminder alone were simply not enough for NuVasive to meet its preservation obligations.

In this case, in January 2014, one custodian was instructed to bring his phone to an office for imaging and brought the wrong phone. The custodian later wiped the phone that was subject to the hold, before giving it to his son. Another custodian was told to turn over his phone, and a number of text messages were missing from the relevant times at issue in the litigation. Then another key employee custodian turned in his phone for an upgrade, not once, but twice, and the phone was likely wiped and recycled with a third-party vendor. It did not help NuVasive that the last key employee custodian did not even produce his phone for over a year, representing that relevant text messages may have been deleted.

Also significant is that the court glossed over Madsen's failure to preserve these communications, merely stating that Madsen should have taken steps to preserve its former employees' text messages when the custodians worked for Madsen. Nonetheless, the court did not relieve NuVasive of its duty to comply with the obligations arising under the litigation hold. Significantly, the court ordered the adverse inference instruction, even though Madsen had obtained most of the deleted or lost text messages through other individuals. Because NuVasive could not provide any meaningful assurances that Madsen captured *all* of the relevant text messages, the adverse inference instruction was ordered, and, obviously, it was detrimental to NuVasive's case.

The Significance of This Case to Attorneys in California and Elsewhere

Spoliation motions resulting in drastic sanctions, as in this case, are likely to become more prevalent as ESI goes missing, even unintentionally, and companies and their counsel are found not to have timely complied with their preservation obligations, which, more often than not, occurs long before litigation begins.

A lawyer's duty of competence now includes knowing and ensuring that clients take sufficient measures to properly preserve ESI. The American Bar Association adopted amendments to the Rules of Professional Conduct in 2012 that included a new comment to Rule 1.1 on competence. It states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." No fewer than 14 states have mirrored the ABA language in their own rules of professional conduct.

New York, Florida, and now California raised the bar on the ethical duty of competence even further in June and July 2015 by requiring attorneys to acquire a basic understanding of how the most relevant technologies work, what ESI is in particular, how communications containing client confidences may be exposed, and their ethical obligations.

Indeed, California's Rule of Professional Conduct 3-110 states, in no uncertain terms, that a lawyer "*shall not* intentionally, recklessly, or repeatedly fail to perform legal services with competence." *See* Cal. Rules of Prof'l Conduct r. 3-110(A). "Competence," under Rule 3-110(B), in any legal service "shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability *reasonably necessary for the performance of such service*." (Emphasis added.) However, where an attorney is not competent, under Rule 3-110(C), the attorney is still permitted to perform services by "1) associating with or, where appropriate, professionally consulting with another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Until recently, California's Business and Professions Code and Rules of Court codified lawyers' obligations to complete approved continuing education to achieve this standard. *See* Cal. Bus. & Prof. Code § 6070; Cal. R. Ct. 9.31.

On June 30, 2015, the Committee on Professional Responsibility and Conduct of the State Bar of California quietly issued Formal Opinion 2015-193, which has now raised the bar (no pun intended) for California attorneys involved with ESI. By way of background, the impetus for this detailed opinion, which had two prior revisions, is the California judiciary, whose members are sick and tired of California litigators appearing before them without complying with the e-discovery rules. Unlike any other state bar opinion, California's Formal Opinion 2015-193 details a hypothetical set of facts and what is expected now of California counsel.

Significantly, in anticipation of a narrow reading of the opinion by non-litigators who will contend that they are exempt from coverage because their law practices do not involve e-discovery, the opinion sets a standard that goes beyond e-discovery to encompass e-competence:

> Not every litigated case involves e-discovery. Yet, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness has used email or other electronic communication, stores information digitally and/or has other forms of ESI related to the dispute.

Cal. Formal Op. 2015-193 at 3 (emphasis in original).

In defining the parameters of the ethical duty of competence, the opinion states:

> The ethical duty of competence requires an attorney to assess *at the outset of each case* what electronic discovery issues might arise during litigation, including the likelihood that e-discovery will or should be sought by the other side.

Id. (emphasis added).

Therefore, if discovery of ESI will likely be sought, the opinion requires the attorney to assess his or her own e-discovery skills and resources to determine whether the attorney can fulfill the duty of providing competent representation to the client. If the attorney lacks such skills or resources, the attorney must either (1) "acquire sufficient learning and skill" or (2) "associate or consult with someone with expertise to assist." The opinion lists nine tasks the attorney should be able to perform either himself or herself or in association with competent counsel or expert consultants:

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

Id. at 4 (footnotes omitted).

Footnote 6 of the opinion is important in a situation where a company touches any potentially relevant ESI pre-litigation because often, a litigation hold has already been triggered and it has been determined who will be held liable for the duty to comply. The opinion states that it "does not directly address ethical obligations relating to litigation holds"; however, it then goes on to address them head-on! The rest of the footnote is the most important part of the opinion for California counsel and their clients whenever potentially relevant ESI is accessed prior to formal litigation. It states, in relevant part:

> A litigation hold is a directive issued to, by, or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such documents, pending further directions. . . . Prompt issuance of a litigation hold may prevent spoliation of evidence, and *the duty to do so falls on both the party and outside counsel working on the matter. . . . The spoliation of evidence can result in significant sanctions, including, monetary and/or evidentiary sanctions, which may impact a client's case significantly.*

Id. at 3 n.6 (emphasis added; citations omitted).

Therefore, if a litigation hold and preservation obligations are triggered, whether before or after suit is filed, the duty to comply will fall not only on the party but also on "outside counsel working on that matter."

While the opinion notes that the level of e-competence will vary on a case-by-case basis, if the attorney determines he or she lacks the requisite skills, the attorney has three options, which are far broader than California Rule of Professional Conduct 3-110:

> (1) acquire sufficient learning and skill before applying them, (2) associate with an ESI-competent attorney or a technical consultant, or (3) decline the client representation altogether.

The opinion goes one step further. It explicitly states that if the attorney opts for the second option by associating in another lawyer or technical expert, the attorney is saddled with the additional non-delegable duty of "supervis[ing] the work of the expert." Cal. Formal Op. 2015-193 at 5 (emphasis added). This begs the question of how is a self-declared e-incompetent attorney supposed to supervise the expert who was brought in for that very competence?

> 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.

Id.

So is there really a choice here? No. A California attorney must become sufficiently e-competent or associate with someone who is and become sufficiently e-competent to be able to supervise that expert. While the opinion is advisory only and is not binding on the courts, the California judiciary is the driving force behind the new opinion and it is pushing legislation to amend the Business and Professions Code by 2017, which make it hard to imagine that the judiciary will not rely on this opinion. For all other practitioners, it is likely only a matter of time before the rest of the country will follow, as it often does, when California takes the lead.

The Most Important Takeaways

Smartphones and other mobile devices have become ubiquitous in today's society. These devices store a tremendous amount of data that may be relevant to a legal matter. While emails, for example, may be duplicative and more easily accessible from other sources, other classes of data, such as images, videos, instant messages, and text messages, may be found only on these devices.

Due to their nature, smart phones have a limited practical "shelf life." As manufacturers continuously develop their products with additional features, consumers will upgrade to the latest and greatest on a recurring basis, sometimes every year or two. Moreover, theft and accidental damage to smart phones occur with regularity. When these devices are identified as potential sources of digital evidence, the data contained within these devices must be preserved in a timely manner, without waiting until litigation begins, oftentimes years down the road, when it is discovered the information is now missing or simply inaccessible.

Plaintiffs, as well as defendants to an action, are not exempt from these preservation obligations, nor is the custodian's dependence on the device a valid excuse to bypass the preservation process. Because this is digital evidence, it must be handled according to industry-accepted best practices. A variety of hardware and software solutions exist to perform this work, but it is important to note that self-collection by interested custodians or assigning collection to the information technology department should be avoided at all costs. Evidence collection is a

profession, and practitioners should be vetted like any other specialist who supports the legal profession in litigation matters.

The challenges are not unique to small or large organizations. All companies that are or may be involved in litigation matters need to develop clear, repeatable, and auditable processes for addressing their obligations to preserve ESI. The legal, human resources, and information technology departments must work together as key stakeholders to develop sufficient workflows in this area and ensure that all potentially relevant information is properly and timely preserved and collected.

The takeaway messages are simple. Attorneys have a duty to be well versed and educated in this rapidly changing field. Competent advice to clients in electronic preservation matters is an ethical obligation that attorneys cannot afford to ignore. Even carefully crafted legal hold and preservation letters are simply insufficient defenses where relevant evidence is missing, corrupted, unusable, or not collected in a forensically sound manner. Companies, and their counsel, are required to do more, including taking sufficient measures to ensure timely compliance with the legal hold and that collection is done in a forensically proper manner. Their failure to do so will give opposing counsel an arsenal to gut even the most damning of evidence, not to mention the possible ethical violations and a potential malpractice claim their failure will expose them to.

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Lisa Sherman is president of Sherman Law Corporation in Los Angeles, California. Benjamin Rose is a managing partner with Townsend, Carden & Rose, Inc. in Cupertino, California.