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FEDERAL E-DISCOVERY

E-Discovery Competence of Counsel Criticized in Sanctions Decision

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BIGSTOCK

In October 2015, we find ourselves 12 years post-*Zubulake*, over a decade since the publication of The Sedona Principles, nine years after the first round of e-discovery-specific amendments to the Federal Rules of Civil Procedure (FRCP), and two months from the second round of such amendments. Federal and state decisions have regularly pilloried parties for e-discovery misconduct, many with headline-generating sanctions against clients and their counsel. Practitioners on both sides of the "v" along with judges, service providers, and experts, regularly opine at seminars, during conferences, and online about best practices for e-discovery, with a focus on cooperation by and competence of counsel. Yet still, after all this, we find ourselves faced with the reality that—outside of what has been called the "Sedona Bubble"—these goals are, perhaps surprisingly, merely aspirational.

Perhaps recognizing this reality, last year the Standing Committee on Professional Responsibility and Conduct of the State Bar of California proposed, and in June of this year approved, a formal ethics opinion concerning the ethical obligations of the members of that bar in relation to e-discovery competence. This opinion was cited in a recent federal decision from California that severely criticized and imposed sanctions against counsel and client for discovery misconduct and that serves as a case study of the e-discovery-related responsibility of counsel in modern litigation practice.

E-Discovery Competence Opinion

"What are an attorney's ethical duties in the handling of discovery of electronically stored information?"[1] This is the question at issue in the California State Bar's recent Formal Opinion No. 2015-193 (Opinion), which focuses on "competent" lawyering as it relates to e-discovery—discovery of electronically stored information (ESI).[2] While the Opinion is advisory only, and then only with respect to members of the California Bar, it still reaches key conclusions that practitioners across jurisdictions should take to heart.

"Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery."[3] This is the sensible conclusion reached in the Opinion, which highlights the fact that expertise in technology is not required for competent lawyering. Rather, competent lawyering requires that counsel "acquire sufficient learning and skill, or associate or consult with

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someone with expertise to assist."[4] As the Opinion explains, "[a]n attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law."[5]

The Opinion does, though, outline for counsel a minimum expected level of e-discovery competence. With such baseline competence, counsel should be able to, either directly or with assistance, "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 on available options for collection and preservation of ESI; identify custodians of potentially relevant ESI; engage in 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."[6]

The Opinion also stresses the importance of the duty of supervision, especially as it relates to e-discovery vendors. Counsel at all times remains responsible for providing the client and e-discovery vendor with "information regarding how discovery works in litigation, differences between a party affiliated vendor and a neutral vendor, what could constitute waiver under the law, what case-specific issues [are] involved, [and] the applicable search terms."[7] A blame-the-vendor approach is not acceptable, since "[t]he duty of competence … includes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents,"[8] including paralegals, e-discovery vendors, and contract attorneys.

'HM Electronics'

With the Opinion's ink still wet, Magistrate Judge Mitchell Dembin of the Southern District of California quickly seized the opportunity to apply the Opinion's guidelines on counsels' ethical obligations and expected competency during his analysis in *HM Electronics v. RF Technologies*,[9] a case replete with examples of "sanctionable discovery practices"[10] by the defendants and by counsel. In this matter, repeated sanctionable behavior coupled with "stonewalling"[11] of the e-discovery process and being "unrepentant and deny[ing] responsibility"[12] was not a good mix and led to substantial sanctions against the defendant and their counsel in a decision that exemplifies what may generously be seen as a lack of e-discovery competence and cooperation by counsel and the defendants.

Plaintiff HM Electronics (HME), a manufacturer of drive-thru headset systems including the ION IQ, asserted claims including trademark infringement, trade libel, and unfair competition against the defendant, R.F. Technologies (RFT), which repairs such headsets, and against the CEO/founder of RFT.[13] The case endured several years of squabbling over discovery-related issues. During discovery, and even thereafter, the parties, before several different magistrate judges, participated in numerous conferences aimed at tackling what the plaintiff characterized as the defendants' reoccurring production deficiencies.

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Central to many of the disputes was a bogus report authored by the defendants. As noted by the court:

> A key piece of Plaintiff's evidence is a document entitled "HM Electronics IQ Failures" (the "Structural Failures Report" or "Report") and other documents showing the distribution of this Report to Plaintiff's competitors, customers and prospects. Plaintiff alleges Defendants created the Structural Failures Report and designed it to look like an HME internal quality control document. The Report, purportedly authored by Plaintiff, acknowledged durability problems of its ION IQ product. In fact, Defendants created the document, inserted pictures of an ION IQ headset they had disassembled, and fabricated the durability and lifetime repair cost information they distributed along with the Report. Defendants distributed the fabricated Structural Failures Report and average repair rate information to clients, potential clients, and Plaintiff's competitors, including Panasonic, who in turn distributed it to over 9,600 recipients."[14]

RFT's CEO, the day after learning the lawsuit "was complaining about RFT's use of the bogus Structural Failures Report,"[15] collected from RFT's director of sales the report itself, pictures RFT had taken that were used in the report, and emails distributing the report and created electronic and paper copies of these files.[16] Nearly two weeks later, he then issued a destroy order—emailing key employees asking them to "destroy all 'electronic and printed copies any of you may have' of the 'HME failure pictures' in the Structural Failures Report."[17] Yet during discovery, RFT's CEO "signed certifications of discovery responses specifically stating that [these] documents did not exist—even though [they] did" and lead counsel certified the "discovery responses as true, to his knowledge or belief, without conducting a reasonable inquiry."[18]

The plaintiff, perhaps not surprisingly, moved for sanctions against the defendants and their counsel for discovery misconduct. In his decision, Magistrate Judge Dembin analyzed whether sanctions were warranted under FRCP 26(g) and FRCP 37. He detailed many examples of discovery misconduct, chief among them a number of "[f]alse [v]erifications and [d]eclarations"[19] (such as the one noted above) in court, in written, certified responses to document requests and interrogatories, and in response to questions about the defendants' document production; the defendants' complete failure to implement a litigation hold; the defendants' improper withholding of a large volume of documents

as privileged due to "allow[ing] the attorneys and vendors handling the ESI production to use limiting search terms, such as the word 'confidential,' which was part of every email sent from Defendant;"[20] and a significant post-discovery "document dump"[21] by the defendants and counsel of "over 375,000 pages of ESI" originally unnoticed "because they failed to perform quality control checks or to supervise their ESI vendor."[22]

Possibly signaling a renewed judicial focus on FRCP 26(g), and a related impatience with counsel who use "false discovery certifications as a weapon to ward off further inquiry,"[23] Dembin noted that a judge *must* impose sanctions for a violation of the Rule that was without substantial justification.[24] While Dembin recognized, as some of his colleagues have, that "[f]ederal courts do not require perfection in ESI discovery" and that the "touchstone of discovery of ESI is reasonableness,"[25] he unquestionably found the defendants' and counsels' misconduct a far cry from even minimal expectations of competency, cooperation, and reasonableness, and determined that lead counsel's failure to conduct a "reasonable inquiry" prior to "certif[ying] discovery responses as true"[26] warranted sanctions against him under FRCP 26(g)(3).

With respect to potential sanctions under FRCP 37, Dembin was guided by the competencies outlined in the recent California State Bar Formal Opinion, concluding that the "[d]efendants' attorneys ignored these basic principles."[27] And where the defendants and their counsel attempted to lay blame on their temporary attorneys and e-discovery vendor assisting in the matter for their "tardy document production"[28] and other shortcomings, Dembin held that "[t]he attorneys' duty to supervise the work of consultants, vendors and subordinate attorneys is non-delegable."[29] Counsel, opined Dembin, "did not, and still do not, comprehend that it is their duty to become actively engaged in the discovery process, to be knowledgeable about the source and extent of ESI, and to ensure that all gathered data is accounted for."[30] In addition to finding sanctions to be appropriate under FRCP 37(b) for failure to comply with a court order, Dembin also found sanctions to be appropriate under FRCP 37(e) for failure to preserve information—both the current version of the Rule and the amended Rule to take effect on Dec. 1, 2015—due to the intent of the defendants to deprive the plaintiff of the use of information.

Clearly dismayed by the egregious actions and unrepentant behavior of the defendants and counsel, Dembin recommended three levels of sanctions against the defendants and defense counsel: monetary sanctions in the form of two years' worth of attorney fees for discovery disputes, an adverse inference jury instruction stating that defendant destroyed relevant evidence and that the jury should presume that such evidence was favorable to the plaintiff, and an issue sanction that it be established as a fact that the defendants had fabricated the report about the plaintiff's products.[31]

Conclusion

HM Electronics and the California ethics opinion should remind practitioners and their clients that judges may very well, and should, take e-discovery responsibilities seriously. Whether during the initial triage of litigation hold and preservation notifications, during the post-discovery clean-up phase, or anywhere in between, counsel owe their clients, their adversaries, the courts, and themselves a certain level of e-discovery competence and responsibility. Even though the new FRCP 37(e) will raise the bar on what is sanctionable conduct for failure to preserve information by requiring a showing of "intent to deprive,"[32] practitioners must still be mindful that judges will still retain authority to sanction under FRCP 37(b) (failing to comply with a court's discovery order) and FRCP 26(g) (requirement that client or counsel certify, after a "reasonable inquiry," as to the completeness of a disclosure).

Serious consequences may lie in wait for counsel and clients alike who fail to take seriously judges' expectations for how they conduct themselves throughout the discovery process. A lack of competence, reasonable inquiry, supervision, or cooperation may, as it did in *HM Electronics*, land a party—and its counsel—in hot water.

1. Cal. State Bar Formal Op. 2015-153, at 1, available at http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf.
2. Id.
3. Id. at 7.
4. Id. at 3.
5. Id. at 1; see also Social Media Comm. of the Commercial & Fed. Litig. Section, Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (June 9, 2015), available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=57103.
6. Cal. State Bar Formal Op. 2015-153, at 3-4.
7. Id. at 5-6.
8. Id. at 5; see also MODEL RULES OF PROF'L CONDUCT 5.3(b) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").
9. *HM Electronics v. R.F. Technologies*, 2015 WL 4714908 (S.D. Cal. 2015).
10. Id. at *1.
11. Id. at *2.
12. Id.
13. Id.
14. Id.
15. Id. at *3.
16. Id. at *3-*4.
17. Id. at *4. This defendant also sent another email approving of the dissemination of his destroy instruction to other employees. Id.
18. Id. at *1.
19. Id. at *4.
20. Id. at *1.
21. Id. at *27.
22. Id. at *1.
23. Id. at *20.
24. Id. at *12.
25. Id.
26. Id. at *1.
27. Id. at *22.
28. Id. at *25.
29. Id. at *24.
30. Id. at *26.
31. Id. at *23, et seq.
32. Id. at *30, citing Proposed Amended FED. R. CIV. P. 37(e)(2) as submitted to Congress on April 29, 2015, after adoption by the U.S. Supreme Court, available at http://www.uscourts.gov/rules-policies/pending-rules-amendments.