

# Ethical Obligations in Responding to Discovery

**Sedona Conference WG1 Annual Meeting**

**Ethical Obligations in Responding to Discovery**

**Friday – 12n – 1:00 p.m.**

This panel will explore the ethical obligations counsel faces in responding to requests for documents. Specifically, this panel will discuss counsel's ethical obligations when searching for and collecting responsive documents, when selecting custodians, and when evaluating a requesting party's search terms and custodian picks. The panel will use hypotheticals that will help explore areas where a producing counsel must make decisions that pit his or her obligations with a client to his or her ethical obligations to opposing counsel and the court. The panel will address applicable Professional Rules of Responsibility, Federal Rules, related case law, and applicable Sedona principles.

Hon. Judge Helen Adams, US District Court for the Southern District of Iowa

Lea Bays, Robins Geller

Andrea D'Ambra, Norton Rose

Travis Bustamante, Nelson Mullins

Tessa Jacob, Husch Blackwell

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- **Where do the ethical obligations stem from?**

- Rule 26 g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. **By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:**

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

- **Rules of Professional Responsibility**

- **Rule 1.1: Competence**

- Client-Lawyer Relationship*

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- **Rule 3.3: Candor Toward the Tribunal**

- Advocate*

- (a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure

to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

▪ **Rule 3.4: Fairness to Opposing Party and Counsel**

*Advocate*

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

▪ **Rule 4.1: Truthfulness in Statements to Others**

*Transactions With Persons Other Than Clients*

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

▪ **Rule 4.4: Respect for Rights of Third Persons**

*Transactions With Persons Other Than Clients*

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

▪ **Rule 5.1: Responsibility of a Partner or Supervisory Lawyer**

*Law Firms And Associations*

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

▪ **Rule 8.4: Misconduct**

*Maintaining The Integrity Of The Profession*

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

- **Relevant Sedona Principles**

- **Principle 6** - Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.
- **Principle 11** - A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.

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**Facts:** *Eagle Brand Co. is in litigation with its supplier, Falcon Products. Eagle issued discovery to Falcon. In their ESI Protocol, the parties agreed to provide search terms used to cull electronic files/emails and agreed to provide the requesting party the opportunity to suggest additional search terms. There is no provision in the ESI protocol relating to validation of search terms. The parties also agreed to provide a list of custodians they would be searching within 14 days of serving objections or responding to RFPDs*

- **Hypo 1 - SEARCH TERMS:**

- Eagle provided a list of search terms soon after serving discovery. Falcon's counsel had his Litigation Support Department run the search terms, which resulted in what he thought was a reasonable set of hits. He did not consider any other terms. He also did no validation testing. He did not test the search terms by reviewing a sample set of hits. He did not do a null set sample review. He simply replied to opposing counsel email with a response – "We agree to run these terms and will produce responsive, nonprivileged emails/documents."
- Has Falcon's counsel met his obligations under R. 26(g)?
- Has Falcon's counsel violated an ethical obligation?
- Issues to consider/discuss:
  - Since the Requesting party provided search terms does the responding party have an independent obligation to develop terms if he just assumes the search terms are locating relevant, responsive items?
  - If Falcon's counsel did not know of any missing search terms, is that sufficient? Does he have to discuss potential terms with his client?

- **Hypo 2 - Validation**

- Did Falcon's counsel violate a discovery rule or ethical rule by not doing any validation at all?
- When there is no validation protocol or even mention of validation in the ESI protocol – what kind of validation is required to meet your obligations under R. 26g or other ethical obligations?

- **Hypo 3 - Custodians**

- Falcon has identified 6 employees who were either involved in the contract negotiations or product development. One of them is no longer with the company and her data was deleted. This person was not identified by either party in their initial disclosures. In fact, Falcon's counsel only learned about this person after the Initial Disclosures were filed.
  - Does Falcon's counsel have an obligation to supplement Initial Disclosures?
  - Since there is no data for the former employee to search, Falcon's counsel left the relevant, former employee off the list of custodians to be searched. Is there an issue?

- **Hypo 4** (*disclosures/duty of competency*): Falcon's counsel agreed to run Eagle's search terms without discussing the terms or the cost of the review with his client. When he provided the estimate, his client got upset about the high costs and asked his outside counsel to use the new generative AI Tool that someone in outside counsel's firm mentioned during a recent presentation. Falcon's counsel doesn't know much about the tool except that he heard one of the junior associates state that you can load in thousands of documents and then type in the RFPDs and ask the software to find responsive documents. He agrees to use the tool on some of the custodians' data. There is no provision regarding the use of AI in the ESI agreement. In fact, when Eagle's counsel asked about TAR, Falcon's counsel stated they would not be using TAR. There were no discussions regarding generative AI.
  - Is failure to disclose use of the generative AI a violation of either R. 26 or a rule of professional responsibility?
  - Is counsel's lack of understanding about how the AI tool works an issue?
- **Hypo 5** (*issues: Reasonable Inquiry/outourcing*)- The client has eDiscovery capabilities in-house and has invested in technology and personnel. The client assures you it can handle responding to RFPDs. The client's process is to have its paralegals craft search terms and run search terms in Microsoft 365. The paralegal will provide a hit report and give you the opportunity to provide search terms as well. Once you approve the search terms, results are loaded into the client's instance of Relativity. The client has an outside managed review company it hires for large reviews; this team includes a supervisor and QC Team. Although you are invited to help train the review team, you feel like the outsider and that the client is directing responding to discovery.
  - What steps do you need to take to ensure you have made a "reasonable inquiry" under R. 26?
  - As it relates to the review vendor, how do you ensure you meet your ethical obligations?
- **Hypo 5a** - The client also insists they do not collect from cell phones because all relevant employees use personal cell phones and employees are instructed to use the MS Teams App on their phone for message and not text about company business.
  - What steps do you need to take to ensure you have made a "reasonable inquiry" under R. 26?