

Ethical Obligations in ESI Disclosure and Negotiation

Session 10
12:00 noon – 1:00 pm
Friday, April 28, 2023

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I. Applicable Rules of Professional Conduct

A. ABA Model Rule 1.1 – Competence

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

B. ABA Model Rule 3.3(a)(1) – Duty of Candor to the Tribunal

“A lawyer shall not knowingly . . . 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 . . . “

C. ABA Model Rule 3.4(a)(1) – Fairness to Opposing Party & Counsel

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;

(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;

(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.

II. Federal Rules of Civil Procedure

A. Rule 1

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

B. Rule 26(f)

(f) Conference of the Parties; Planning for Discovery.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

....

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced

C. Rule 26(g)(1)

(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.

Fed.R.Civ.P. 26 Advisory Committee Notes (1983 Amendment).

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. This subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney ... to sign each discovery request, response, or objection.

....

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. . . . In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case *as long as that reliance is appropriate under the circumstances*. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. *Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.*

Sampling of Cases holding Rule 37 Applies to Production

Qualcomm Inc. v. Broadcom Corp, No. 05-cv-1958, 2008 WL 66932, at *13 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (“The Federal Rules impose an affirmative duty upon lawyers to engage in discovery in a responsible manner and to conduct a “reasonable inquiry” to determine whether discovery responses are sufficient and proper.”) (citing Fed. R. Civ. P. 26(g); Fed. R. Civ. P. 26 Advisory Committee Notes (1983 Amendment)).

In re Delta/AirTran Baggage Fee Antitrust Litig., 846 F. Supp. 2d 1335, 1350 (N.D. Ga. 2012), *modified*, No. CV 09-md-2089, 2012 WL 12952328 (N.D. Ga. July 18, 2012) (finding Rule 26(g)’s “affirmative duty to engage in pretrial

discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37” is not limited to items delineated in subsection (g)(1)(B) and imposing sanctions under Rule 26(g) for failing to conduct a reasonable inquiry to support implicit representation that all relevant sources had been searched).

III. Duty of Loyalty to Procedures and Institutions

Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 361–62 (D. Md. 2008), quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958)(emphasis added).

Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult.

....

The lawyer's highest loyalty is at the same time the most tangible. It is loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

... A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness....

... It is chiefly for the lawyer that the term “due process” takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. *For the lawyer the insidious dangers contained in the notion that “the end justifies the means” is not a matter of abstract philosophic conviction, but of direct professional experience.*”

IV. Statutes

28 U.S.C.A. § 1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

V. **Application to Hypotheticals** (Discussion Period)

- A. Duty to Disclose Spoliation
- B. Duty to Disclose Sources and Custodians with Relevant Information
- C. Duties with Respect to Electronic Search and Production
- D. Duty of Technical Competence

VI. **Suggested Reading**

Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008)(discussing 26(g) and noting “rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery”).

In re Facebook, Inc. Consumer Priv. User Profile Litig., No. 18-md-2843, 2023 WL 1871107 at *11-15, *23-25 (N.D. Cal. Feb. 9, 2023) (finding bad faith where party “argue[d] . . . that any additional discovery was not proportional to the needs of the case, while withholding the fact that certain [data] were easily and readily accessible” concluding “[i]t was not for Facebook and [defense counsel] to unilaterally decide the scope and extent of discovery”).

In re Google Play Store Antitrust Litig., No. 21-md-02981, ECF No. 469 (N.D. Cal. Mar. 28, 2023) (“Google clearly had different [preservation] intentions with respect to Chat, but it did not reveal those intentions with candor or directness to the Court or counsel for plaintiffs. Instead, Google falsely assured the Court in a case management statement in October 2020 that it had “taken appropriate steps to preserve all evidence relevant to the issues reasonably evident in this action,” without saying a word about Chats or its decision not to pause the 24-hour default deletion. Google did not reveal the Chat practices to plaintiffs until October 2021, many months after plaintiffs first asked about them. At the very least, Google should have advised plaintiffs about its preservation approach early in the litigation, and engaged in a discussion with them. It chose to stay silent until compelled to speak by the filing of the Rule 37 motion and the Court’s intervention.”)

Montana v. Cnty. of Cape May Bd. of Freeholders, No. 09-cv-755, 2013 WL 11233748, at *9 (D.N.J. Sept. 20, 2013) (parties have “an independent duty to produce key relevant requested discovery even if [the requesting party] did not specifically list the precise ESI wording or spelling in its list of search terms. [Parties] may not delegate . . . [their] duty[ies] to identify its relevant requested documents.”) (citing *Tracinda Corporation v. DaimlerChrysler AG*, 502 F.3d 212, 243 (3d Cir.2007) (noting the “obligation on parties and counsel to come forward with relevant documents not produced during discovery is ‘absolute’.”).

***DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 866 (N.D. Ill. 2021)** (“The Court . . . certainly expects—and the rules require—a reasonable understanding of ESI and the law relating to identifying, preserving, collecting, and producing ESI, in addition to good faith compliance by the parties and counsel.”)

Michael Berman, E-Discovery LLP, *Is There a Duty to “Fess Up”?* – Part II (Nov. 12, 2022) (discussing *inter alia* remarks of Jason Baron at the 9th Annual Georgia Symposium on Ethics and Professionalism: “As applied in this brave new world of ESI, my argument is that failure to disclose special knowledge of the relevant characteristics of the ESI universe of your client, that would knowingly fail to optimize and impair an otherwise reasonable-sounding search strategy or protocol request, is tantamount to the suppression or concealment of evidence in conflict with one’s ethical obligations under Rule 3.4.”) For Jason’s full remarks see Ethics and Professionalism in the Digital Age 9th Annual Georgia Symposium on Ethics and Professionalism,” 60 Mercer L. Rev. 845, 866-880 (2009).

ACEDS Blog, *Beyond Competence: Technology and the Duties of Candor and Fairness in Litigation* (July 28, 2020). (“As lawyers we have an ethical duty to make honest and accurate statements to the court and reasonable efforts to comply with our clients’ discovery obligations. A pragmatic paraphrase is that we have to know what we’re talking about and what we’re doing.”)

ABA Practice Points, *Ethical Obligations in Electronic Discovery*, (June 5, 2018)

““To . . . adhere to Model Rule 3.4, attorneys must have a firm grasp on their client’s email and network infrastructure to be able to competently identify, preserve, and collect relevant documents.”

. . . .

“The preservation-and-collection process . . . raises ethical issues related to the duty of candor under ABA Model Rule 3.3. Specifically, this process raises the following issues related to counsel’s ability to accurately represent to both opposing counsel and the court: (1) the client’s capabilities related to locating and producing ESI in an agreed-upon format; (2) the thoroughness of the searches and review performed; and (3) the contents of the production of electronic discovery.”