

Stranger Things in eDiscovery:
Ethical Challenges and Considerations
for Discovery of New and Changing
Technologies

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I. OVERVIEW

Lawyers face an ever-changing landscape of complex technological and legal issues as new technologies create new sources of ESI and new eDiscovery tools. Current challenges include vast volumes of ESI generated by mobile devices, ephemeral messaging apps, collaboration platforms, and the increasing use of artificial intelligence. This panel of ethics and eDiscovery experts will explore the benefits and risks associated with various technologies and provide guidance on evolving duty of technological competence.

II. RULES

A. ABA Model Rule of Professional Conduct 1.1 cmt 8: 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.

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

B. ABA Model Rule of Professional Conduct Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(4) to secure legal advice about the lawyer's compliance with these Rules;

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

C. ABA Model Rule of Professional Conduct 3.3: Candor Toward the Tribunal

(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;

(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.

D. ABA Model Rule of Professional Conduct 3.4: 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.

E. ABA Model Rule of Professional Conduct 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.

III. SCENARIOS

A. Absent reasonable anticipation or actual litigation, is there an ethical duty to preserve ESI, including the associated metadata and version history, from new collaborative technologies such as fluid files and Google Docs as part of an information governance program?

- [GoogleDocs-VersionHistory.mp4](#)
- [Microsoft Loop Component-VersionHistory.mp4](#)

B. During litigation, how should counsel approach preservation and production of ESI, including the associated metadata and version history, from new collaborative technologies such as fluid files and Google Docs?

- C. What is counsel's ethical duty with respect to preservation, production, and/or safeguarding mobile data, including private or otherwise protected medical information about clients and/or third persons?

Debra Cassens Weiss, ['Probably the worst day of my legal career'](#), ABA Journal (August 29, 2022)

- D. What is counsel's ethical duty to ensure preservation of mobile data when there are new features that facilitate deletion of text messages?

- Jarrett Coco, *Apple's New Messaging Features Will Complicate E-Discovery*, Law360 (September 28, 2022)

- E. Absent reasonable anticipation or actual litigation, are there any circumstances where there is an ethical duty to preserve ephemeral data?

- [In the Matter of Barclays Capital Inc.](#), Admin. Proc. File No. 3-21164 (Sept. 27, 2022)

- F. How should counsel address preservation and production of hyperlinked documents, including underlying metadata and version history?

- *Nichols v. Noom, Inc.*, No. 20-CV-3677 (LGS)(KHP), 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021)
- *IQVIA, INC. v. Veeva Systems*, 2:17-CV-00177, 2019 WL 3069203 (D. N.J. July 11, 2019)
- *Shenwick v. Twitter*, 16-cv-05314-JST (SK), 2018 WL 5735176 (N.D. Cal. Sept. 17, 2018)

- G. What is counsel's ethical duty to understand, preserve, produce, and/or assess algorithms/AI?

- *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, Case No. MD 16-2695 JB/LF, 2018 WL 3972909, at *1 (D.N.M. Aug. 18, 2018)
- Hon. John G. Browning, *Real World Ethics in an Artificial Intelligence World*, 49 N. Ky. L. Rev. 155 (2022)

- Sharon D. Nelson, *The ABA Tackles Artificial Intelligence and Ethics*, 46 No. 1 Law Prac. 26 (2020)