How Much Tech Do I Need to Know?

Ethical obligations have evolved to link the duty of competency with tech expertise

By Jennifer A. Brennan / iDiscovery Solutions

Metadata. MD5 hash. Native format. Disaster recovery tapes. Automatic deletion settings. Structured databases. Big data. Chances are, you did not learn this technological terminology and the implications for discovery in law school. Yet in the ever-evolving digitization of life, ethical obligations have evolved to link the duty of competency with expertise in technology.

In August 2012, the American Bar Association amended the comments to Model Rules of Professional Conduct Rule 1.1 to recognize expressly the importance of technological competence. The modified comments provide that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in the law and its practice, *including the benefits and risks associated with relevant technology . . .*" Since then, at least 20 states have adopted the revised comment to Rule 1.1 or a similar ethical duty of technical competence.

So what does this mean for you and your practice? As a threshold matter, "relevant technology" is critical in e-discovery. Nearly all evidence that supports an alleged claim or defense will consist of some form of electronically stored information (ESI). Yet the widespread practice of not pursuing ESI discovery reportedly persists, even at the risk of foregoing relevant electronic evidence that could help a client's case. The amendment to the Rule 1.1 commentary makes clear that a basic understanding of e-discovery and the benefits and risks associated with various technologies is part of the duty of competency.

The next question is: What minimum skills are needed to meet this emerging ethical competency requirement? The ethical rule commentary does not provide specific guidance about what technical competency means. The California State Bar's Standing Committee for Professional Responsibility and Conduct's Formal Opinion No. 2015-193 (June 30, 2015) squarely addresses the question of an attorney's ethical duties in handling ESI in discovery and highlights the challenges attorneys face in a dynamic technological landscape. While the Opinion is advisory in nature and is not binding on any court in California or any member of the California bar, the California Bar Committee based its opinion on federal law and therefore may have applicability in other states.

> ***Not pursuing electronically stored information persists – despite the potential to drastically help a case.***

The Opinion identifies nine basic e-discovery skills that an attorney handling such matters should possess:

1. Initially assess e-discovery needs and issues, if any;
2. Implement or 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 nonprivileged ESI in a recognized and appropriate manner.

These brief descriptions encompass a wide range of complex assessments related to the benefits and burdens associated with the identification, preservation, collection, review, and production of ESI, all of which are informed by the data sources maintained by the parties and technologies selected to effectuate discovery. For a single-plaintiff case that only involves ESI stored on a single computer, exercising these nine skills may not be problematic. In contrast, in a multi-plaintiff case involving diverse data sources, such as text messages, mobile device applications, Web-based content, structured data systems, and the like, even a seasoned e-discovery attorney may find it challenging.

Which brings us back to the original question: How much do you need to know about technology to practice law? While the level of sophistication required varies from matter to matter, the California Opinion offers practical guidance. If an attorney is not familiar with the relevant technology and cannot develop or acquire the skills needed, then the attorney should either decline the representation or collaborate with competent co-counsel or technical expert consultants who possess the requisite knowledge. As the court cautioned in *James v. National Performance LLC*, "[p]rofessed technical incompetence is not an excuse for discovery misconduct."

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