

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I serve as outside counsel to a large multi-national company. Jacob Sladder, the company's in-house counsel, has asked me to become involved in a matter involving a disgruntled former employee who claims that she was fired from the company after reporting that she was harassed by a number of her supervisors based upon her religious beliefs.

Sladder advised me that the company had received a claim letter from an attorney for the former employee, asserting that the company has a culture that promotes religious discrimination, demanding a fat settlement, and threatening suit if the matter is not resolved promptly. He explains, obviously within the boundaries of the attorney-client privilege, that he is concerned that the former employee's discrimination claims may have merit, both with respect to the individual complaining ex-employee and other potentially aggrieved employees. In particular, Sladder worries that company emails, both recent and extending as far back as five years, may include inculpatory material. He explains that although he has not examined the emails and does not know whether they contain any smoking guns, statements to him from corporate employees lead him to believe that the contents of some messages may be problematic.

From my work with the company over the years, I am aware that under its records retention protocol, each month the company's management information system (MIS) personnel remove from the company's active system emails sent during the same month a year earlier, and that emails for each such purged month are retained on back-up tapes, with separate tapes for each month. Because of the company's large-scale, worldwide operations, each month the company thus removes thousands of email messages. Inside counsel has asked me whether, on the basis of the letter from the lawyer for the former employee threatening litigation, the company has any obligation to alter its

purge-and-retention procedure. What should I tell him?

The company's MIS personnel further informed me that as long as emails remain on the company's active system (that is, are less than a year old), they may be located and searched by author, recipient, or any words or combination of words that appear in the text. Once, however, they have been purged from the system and stored on tape, they are in effect "read only" and may not be searched by any of the means available for current emails.

The net result is that if litigation begins and the company is called upon to disgorge its relevant emails, the cost to search currently maintained messages will be far less than the burden of searching the historical messages stored on the monthly tapes. I know that the company's emails include many items subject to the attorney-client privilege, and others that, although non-privileged, nonetheless contain sensitive business information that is unrelated to the claims asserted by the former employee and the company does not want outsiders to see.

Accordingly, Sladder suggests that perhaps it is time to alter the company's records retention policy to provide for purging of emails, and storage on back-up tapes, after six months or three months, not one year. If nothing else, he adds tartly, changing the policy would make it more difficult for this ex-employee, and other potential underfunded claimants, to get access to company emails. What advice do I give him?

Sincerely,
Noah Zark

Dear Noah Zark:

Electronic discovery is a rapidly evolving world that attorneys cannot ignore – and they must learn. Although the Rules of Professional Conduct (RPC) do not directly address an attorney's obligations regarding electronic discovery, numerous provisions of the RPC (and particularly, some of the Comments to the Rules) are instructive regarding the obligations of

an attorney to identify, preserve and produce relevant electronically stored information (ESI) in a given matter.

To start, Rule 1.1 establishes a lawyer's ethical obligation to provide competent representation. In particular, Rule 1.1(a) provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Though admittedly a very broad statement, in our view, this rule requires that attorneys have a basic understanding of the technologies used in the identification and preservation of ESI.

Rule 3.4 is also applicable. It requires that an attorney act with fairness to the opposing party and opposing counsel. At the outset, Rule 3.4(a)(1) states that "[a] lawyer shall not . . . suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce . . ." Additionally, Rule 3.4(a)(3) states that "[a] lawyer shall not . . . conceal or knowingly fail to disclose that which the lawyer is required by law to reveal . . ."

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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The Comments to Rule 3.4 are of particular importance. Comment [1] states that:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, “obstruct another party’s access to evidence”) that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal

Comment [2] is also relevant:

Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) [to Rule 3.4] applies to evidentiary material generally, including computerized information. (emphasis added.)

These specific provisions of the RPC suggest that an attorney must be proactive and non-evasive in the discovery process and, in particular, be fully knowledgeable in the areas of identifying, preserving and producing relevant ESI. As we have recently seen, the consequences for spoliation

of ESI have been at times drastic and decisions on these issues are often widely disseminated quickly to put attorneys on notice that spoliation of ESI will not be tolerated by the courts.

Rule 3.3 requires proper conduct before a tribunal. At the outset, Rule 3.3(a)(3) states that “[a] lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false.” Comment [5] to Rule 3.3 further provides that “[p]aragraph (a)(3) [of Rule 3.3] requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence”

Furthermore, Comment [6] to Rule 3.3 states that:

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

The duties deriving from these provisions of Rule 3.3 would suggest that in the context of the discovery process, it is necessary for counsel to act in a manner in which he or she may (without waiving any privilege issues) be fully responsive on any and all discovery questions arising in a matter and, in particular, on issues involving electronic discovery. This is of even greater importance when taking the necessary steps toward the production of ESI, since the preservation of ESI requires the attorney to take proactive measures to identify and then preserve ESI when litigation is reasonably anticipated. See *VOOM HD Holdings*

LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 36 (1st Dep’t 2012).

Turning now toward your question, the letter sent to the company by counsel to your client’s former employee would almost certainly trigger the client’s obligation to preserve ESI relevant to the alleged claim and require the suspension of its purge and retention procedure. We believe that both the content of the letter, which threatens a lawsuit, as well as Sladder’s statement to you that he is concerned that the former employee’s discrimination claims may have merit, trigger the duty to preserve and the initiation of a litigation hold. As was held in *VOOM* and further articulated in the recently released report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, titled *Best Practices in E-Discovery in New York State and Federal Courts Version 2.0* (available at <http://www.nysba.org/AM/TemplateRedirect.cfm?Template=/CM/ContentDisplay.cfm&ContentID=150025>), the duty to preserve ESI may arise not only when litigation is reasonably anticipated, but also “when a client . . . knew or should have known that information may be relevant to a future litigation.” *Id.* at 3 [Guideline No. 1]. Thereafter, a party “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *VOOM*, 93 A.D.3d at 36 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

The *Best Practices* also provide a blueprint by outlining the factors to be considered when preparing an ESI preservation plan. As Guideline No. 2 states:

In determining what ESI should be preserved, clients should consider: the facts upon which the triggering event is based and the subject matter of the triggering event; whether the ESI is relevant to the event; the expense and burden in preserving the ESI; and whether the loss of the ESI would be prejudicial to an opposing party.

See *id.* at 5.

As demonstrated here, the issues raised in Guidelines Nos. 1 and 2 with regard to preserving ESI for discovery can relate both to lawyers' obligations in their conduct before a tribunal (Rule 3.3) as well as the requirement that lawyers conduct themselves with fairness toward the opposing party and counsel (Rule 3.4).

It is also worth noting that your duties to oversee the preservation process may invoke the ethical obligations contained in Rule 5.3, especially if litigation is reasonably anticipated and you are advising the client's employees to assist in the preservation of relevant ESI. As stated in Rule 5.3(a):

A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

Furthermore, Rule 5.3(b)(1) provides that:

A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . .

Therefore, you need to work closely not only with Sladder, but also with any and all of the client's employees tasked with preserving ESI relevant to the claims asserted by the aggrieved employee.

Your follow-up question concerning Sladder's request to alter the company's records retention policy to provide for a shortened period to maintain company emails raises a flurry of ethical issues, especially in light of the fact that the company is currently facing a potential religious discrimination claim from one

of its former employees. Rule 8.4 (which governs attorney misconduct) provides that "[a] lawyer or law firm shall not . . . 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." See Rule 8.4(a). Furthermore, Rule 8.4(c) states that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." To be in compliance with these provisions of the RPC, we believe it would be best to advise Sladder to maintain the company's existing records retention policy which provides for the purging of emails from the company's active computer system and subsequent storage of those emails on back-up tapes after one year. If for some reason you endorsed the reduction in time of your client's retention period with the knowledge that the company is already anticipating a discrimination claim against it, and if the company ended up in litigation with another aggrieved employee (and that is always a possibility for any large and notable company), then you and your client could run the risk of a spoliation claim. On the other hand, just because archived emails are transferred over to back-up tapes that may not be readily accessible does not necessarily deem them to be inaccessible and therefore subject to a potential spoliation claim. That being said, the better practice is for the company to maintain its existing records retention policy in a manner allowing the most convenient access and review, thereby creating a more level playing field if litigation arises and ESI would need to be produced in discovery.

The world of electronic discovery is a potential minefield that can expose both you and your client to unnecessary scrutiny. In advising clients, and as demonstrated here, it is always best to be overly protective in preserving a client's ESI.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpert Syracuse &
Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I just received a tablet device for my birthday. I not only use my tablet for personal reasons (i.e., surfing the Web, accessing my accounts on various social media websites, watching movies, as well as sending and receiving personal emails with family and friends) but I recently found that I can use my tablet for work related to my legal practice. The tablet allows me access to almost all of the same applications I use in the office (email, word-processing programs, discovery and legal research software, billing systems, etc.) and I can access these applications (as well as most Internet websites and apps) through either a cellular data network or by way of accessing a wireless Internet hotspot. Most of the wireless hotspots I've accessed allow me to instantly connect to a wireless signal with the click of a few buttons. However, I am never asked to enter a password to access these various hotspots. I have recently read that cyber attacks are increasing at a disturbing rate and such activity oftentimes occurs through hacking over public wireless networks.

I want to act professionally and in a manner consistent with my ethical responsibilities to both my clients and opposing counsel. Are there certain obligations that I must abide by when using a mobile device for work-related purposes, especially with respect to accessing, transmitting and receiving confidential information through the device? How many passwords should I have on my device to make sure it is protected from unauthorized access? Am I obligated to stay informed of technological developments relating to the use of mobile devices? Last, am I required to set forth in the engagement letter with potential clients a stated protocol for the use of electronic communications in connection with a representation?

Sincerely,
Tech Geek