CHAPTER THREE

E-Discovery Under the Model Rules

A number of Model Rules may apply in an e-discovery context.[1]

Competence Under Model Rule 1.1 and the Rise of E-Discovery Counsel

Model Rule 1.1 provides:

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

Comment [6] adds:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

After having read the brief tutorial above, are you competent to handle e-discovery? You may know how to copy 250 responsive word-processing documents onto a rewritable CD. You may not know that if you review documents on a rewritable CD before you transmit it, you may change the metadata associated with the documents you

[1] While the discussion that follows may appear to be exhaustive, I have selected certain rules for coverage and do not represent that I have identified every Model Rule that may apply to a particular ethics question involving e-discovery.

reviewed.[2] You may know what it means to secure a hard drive for forensic imaging. You may not know that merely turning on the computer associated with the drive will cause changes in the drive. It is one thing to handle a production of e-mail from a couple of key players. It is quite another to manage the production of e-mail, spreadsheets, presentation files, database information, and word processing documents from different software and storage systems, in multiple locations in the United States or perhaps throughout the world, where numerous key players may have different storage habits and some locations may have different retention policies than other locations, and where translation issues may become significant. A lawyer should know when to tell a client to preserve documents, but will the lawyer know enough to identify when the duty to preserve attaches and whether backup processes should be suspended until the client and the lawyer can understand whether there might be a duty to preserve electronic information stored on backup tapes?

E-discovery will change litigation as many litigators have known it because they are not independently competent to handle production of electronic documents. They also may need assistance negotiating with a vendor regarding the proper scope of an electronic production. Technology has increased productivity in our personal and business lives. Yet because technology allows parties to store so much information so cheaply, it has the potential to greatly increase the cost of litigation if lawyers are not competent to handle e-discovery smartly and sensibly, whatever the amount in controversy.

Comment [1] to Model Rule 1.1 identifies relevant factors in determining whether a lawyer has the requisite knowledge and skill to handle a particular matter. They include,

> the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[2] If the CD is not rewritable (i.e., it is "read only" or "CD-R"), a review will not affect the metadata associated with the documents on the disc. However, depending upon how one copies the documents from a CD-R to other media or even to create a new CD-R, all of the metadata may not stay the same. Opening files from a thumb drive or a hard drive will alter the metadata associated with the files. Personal Communication with Arlen Tanner, Esq. (April 21, 2008).

For entities facing numerous lawsuits, it is not at all unusual any longer to have "e-discovery counsel" who (1) have become familiar with the architecture of the client's electronically stored information; (2) can meaningfully explain that architecture, especially with respect to accessible information and information that is not reasonably accessible because of undue burden or cost; (3) understand the cost implications of each e-discovery commitment; (4) will maintain consistency in e-discovery "meet-and-confer" sessions in different jurisdictions; and (5) can direct an efficient and properly defensible collection and preservation effort. Where such counsel do not exist, lawyers must be able to take these factors, among others, into account to satisfy the requirements of Rule 1.1.[3]

If the lawyer or the lawyer's colleagues do not have the e-discovery expertise, and e-discovery counsel is not involved, finding a vendor who spends the client's money wisely, and whose mission is to work itself out of a job might be the lawyer's best friend to satisfy the requirements of Model Rule 1.1.[4]

Rule 4.4 and Ethics Issues Associated with Inadvertent Production of Privileged Information

E-discovery increases the potential for inadvertent production of privileged information. Producing parties typically do not have mechanisms in place to retrieve, restore, and cost-effectively identify electronically stored information that is privileged. Hence, individual documents have to be reviewed for privilege determinations. In a production of hundreds of thousands, or millions, of pages of electronic documents, a privileged document or two might be missed. Does a lawyer who inadvertently

[3] Comment [5] to Model Rule 1.1 adds that handling a matter competently "includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. *See* Rule 1.2(c)." Rule 1.2(c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

[4] Attending appropriate training programs may also be necessary. *See* Florida Ethics Op. 06-2, discussed below (citing to its comment identical to Comment [6] of Model Rule 1.1, Florida Rule of Professional Conduct 4-1.1 "may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic information in order to protect client information under Rule 1.6(a)").

receives a privileged document have an ethical obligation to notify the sender? Or suppose the lawyer is the sender who later discovers the inadvertent transmittal of a privileged document to a requesting party. What should the lawyer do?

Model Rule 4.4(b) and Fed. R. Civ. P. 26(b)(5)(b) now address this subject. Model Rule 4.4 provides that a lawyer who receives documents that the lawyer knows or reasonably should know were sent inadvertently[5] must "promptly notify the sender." Rule 4.4(b) reads in full:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client[6] and knows or reasonably should know that the document was inadvertently sent shall promptly[7] notify the sender.

Comment [2] to Rule 4.4 suggests that Rule 4.4 is not limited to privileged documents, but embraces any documents "that were mistakenly sent or produced by opposing parties or their lawyers." Comment [2] further states that whether the lawyer is required to do more than give notice to the sender, "such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."[8]

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[5] How is a lawyer to know whether a privileged document was sent inadvertently? In some cases, it will be obvious by the first line or few lines of the document. Or one might just ask one's opponent.

[6] The phrase, "relating to the representation of the client," is language taken from Rule 1.6, which is discussed below. A document or information "relating to the representation of a client" includes one covered by the attorney-client privilege.

[7] "Promptly" connotes an ethically required immediacy. While not every state has adopted Rule 4.4, it would still seem prudent for a lawyer-recipient, in the absence of an agreement between counsel or a court order, to advise everyone on the document review team that if a produced document appears to be privileged, it should be brought to the attention of the lawyer to ensure that the lawyer can determine whether the lawyer has a Rule 4.4 notification obligation.

[8] Comment [3] to Model Rule 4.4 provides: "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4." Lawyers should consider "applicable law" and the RPC and ethics decisions of the jurisdiction in which the lawyer is offering legal services in evaluating how to proceed under Rule 4.4. Model Rule 1.2 provides in pertinent part that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." Model Rule 1.4(a)

Fed. R. Civ. P. 26(b)(5)(B) addresses the former question. It explains what a lawyer is supposed to do when informed by a sender that a privileged document was inadvertently transmitted. The lawyer does not have to notify the sender under Model Rule 4.4, because the sender discovered the mistake before the recipient did. Since December, 1, 2006, in federal courts, Fed. R. Civ. P. 26(b)(5)(B) provides:

> (B) If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

In other words, returning the document(s) would not be required unless the recipient fails to sequester or destroy the documents. Regardless of the document-handling option chosen, the recipient must not use the information until the claim of privilege is resolved and must take reasonable steps to get copies of the documents back if they had already been disseminated before notice was received.

The combination of Rule 4.4 and Fed. R. Civ. P. 26(b)(5)(B) has sparked a debate among a number of ethics opinion writers on the propriety of mining metadata associated with the inadvertent transmittal or production of privileged documents.

ABA Formal Opinion 06-442: Mining of Metadata Permissible

In its Formal Opinion 06-442, the ABA Standing Committee on Ethics and Professional Responsibility[9] determined that the Model Rules

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provides in part that a lawyer shall "(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;" "(3) keep the client reasonably informed about the status of the matter;" and "(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

[9] The committee explained that its determination was based on the Model Rules and that, "The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442, n.2.