

Lead Article

Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery

by Ralph C. Losey*

Electronic discovery jurisprudence appears to have more published decisions with judges bemoaning attorney misconduct than any other area of law. Sometimes this judicial anger stems solely from the conduct of the parties to litigation, such as in *United States v. Johnson*.¹ In this criminal case, the defendant slipped altered e-mails to his counsel for use during trial. His attorney withdrew from representation as soon as he discovered what his client had done, and after a mistrial, the truth of what happened was later uncovered.² However, in the majority of cases, the misconduct from which the judicial anger stems originates

* Shareholder of Akerman Senterfitt; co-chair of the firm's e-Discovery practice group. Author of *Introduction To e-Discovery: New Cases, Ideas, and Techniques* (ABA 2009); *e-Discovery: Current Trends and Cases* (ABA 2008); the *e-Discovery Team Blog* (ralphlosey.wordpress.com); and numerous other articles and book contributions on the subject of e-discovery or computer law. Member, State Bar of Florida.

1. 553 F. Supp. 2d 582 (E.D. Va. 2008).

2. *Id.* at 612-14.

from either the lawyer and the client or the lawyer alone.³ Examples of unethical behavior range from outright intentional fraud to gross negligence to simple attorney negligence. Negligence is not only malpractice, but it can also be unethical.⁴

Most experts in the field of e-discovery agree that the technology revolution of the last few decades and the information explosion that has followed have severely challenged the legal profession's ability to render competent legal services.⁵ Anecdotal evidence from e-discovery vendors confirms this. E-discovery vendors probably deal with more attorneys and law firms around the country than anyone. These vendors privately state that very few of their customers are technologically sophisticated. They often have humorous anecdotes regarding attorney requests illustrating their lack of technological competence. Of course, when you do not have sophisticated buyers, sellers tend to take advantage of them. This is one of the reasons e-discovery vendor costs are often shockingly high.

Negligence is a large part of the story on ethical misconduct in e-discovery, but not the whole story. Caselaw, exemplified by *Qualcomm, Inc. v. Broadcom Corp.*,⁶ suggests there is far more to the sanctions being imposed by judges all over the country than just lawyer incompetence.⁷ When I began my career in 1980, the imposition of sanctions, especially against attorneys, was a very rare event and motions based on spoliation were unheard of. Now they are commonplace. Why is this? It is a difficult and puzzling question.

3. See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002) (holding that simple negligence alone is sufficient to justify an adverse inference sanction, especially when plaintiff's counsel was "purpose[ly] sluggish[ly]" in not producing the e-mails until after the trial had started); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, No. 6:07-cv-222-Orl-35KRS, 2009 WL 546429 (M.D. Fla. Mar. 4, 2009) (imposing sanctions against client, attorneys, and attorneys' law firm); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006) (imposing sanctions against both client and attorney).

4. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

5. See George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 68 (2007) (stating that "the future of litigation as we know it is at risk unless law and its practice coevolve with information").

6. No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

7. See *The Lessons of Qualcomm: A Wake Up Call for the Legal Profession*, e-Discovery Team, <http://ralphlosey.wordpress.com/2008/06/01/the-lessons-of-qualcomm-a-wake-up-call-for-the-whole-legal-profession/> (June 1, 2008, 15:53 EST).

Surely the profession has not suddenly become more sinister than before. Although, some suggest that the dominance of large firms as mega-business enterprises is causing a significant decline in overall ethics.⁸ There may be some truth to this, but a general decline in ethical standards does not explain why e-discovery jurisprudence is so rife with malfeasance.

LAWYERS ARE NOT KEEPING UP WITH TECHNOLOGY

Part of the answer lies with the incredible technological advances that have occurred over the last thirty years. The concept of society has transcended the paradigm of a nation-based industrial world to that of a global-based, techno-centric world. The rapidity of this change in civilization is unprecedented in human history. For good or bad, we are now all drowning in a flood of ephemeral, electronic information triggered by these new technologies. The dramatic inflation in the amount of information stored by companies and individuals today, along with the intangible and disorganized nature of this information, is having profound effects on litigation processes.⁹ In fact, e-discovery was birthed from this paradigm shift.¹⁰

Business and all other sectors of society have undergone this same rapid transformation. Yet, they seem to be rising to the challenge of new technologies better than the legal profession. True, there have been some spectacular ethical disasters in business, symbolized by the collapse of Enron and Arthur Andersen, and more recently by the subprime mortgage disaster and Wall Street greed. But once again, you

8. See Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

9. Paul & Baron, *supra* note 5, at 67-68.

Information inflation reflects the fact that civilization has entered a new phase. Human beings are now integrated into reality quite differently than before. They can instantaneously write to millions. They engage in the real time writing of instant messages, wikis, blogs, and avatars. Accordingly, the flux of writing has grown exponentially, with resulting impact on cultural evolution. All this affects litigation. Vast quantities of new writing forms challenge the legal profession to exercise novel skills. This means litigation must become more collaborative. It means more use of computer technology. It means there will be new legal rules. And the future of litigation as we know it is at risk unless law and its practice coevolve with information.

Id.

10. See RALPH C. LOSEY, E-DISCOVERY: CURRENT TRENDS AND CASES 14 (ABA 2008).

could place some of the blame on their attorneys, especially their in-house counsel, who failed to steer these companies towards conduct consistent with the requirements of established law.

The failure of the legal profession to keep up with technology is primarily a result of two factors: (1) the archetypical personality of most lawyers and (2) the failure of most law schools to adapt to the modern technological revolution. Most lawyers are not strong in math, science, or engineering. There are exceptions, of course; we call them IP (Intellectual Property) lawyers. But for the most part, "The Law" attracts people who are gifted with a particular kind of liberal arts, logically based intelligence that inclines them to "computer-phobia." In fact, the Law School Admission Test (LSAT), designed to sort and rank potential law school applicants, solely tests logical reasoning and reading comprehension skills. A student could easily achieve a perfect score on the LSAT without knowing how to plug in a computer.

Most law schools have ignored the problem of e-discovery altogether and offer no classes on the subject. There are a few notable exceptions, such as Georgetown Law School, Cumberland Law School, and the University of Florida Levin College of Law. These schools are the exception to the rule, and most law schools have not stepped up to the plate to address this problem.

Because the root of the lawyer "*Luddite*" mindset is grounded in legal education, the answer also lies within the legal education system. Law schools should include electronic discovery in their standard curricula and broaden their recruitment and admission standards to include the technologically gifted.

The prevalence of technology in the law is a strong driving force behind the decline of ethics in e-discovery. This is clear. But this observation, in and of itself, does not provide a theoretical construct to understand the root of unethical conduct in e-discovery. Such understanding requires a thorough analysis of the rules of ethics and observation of legal practice. This Article presents such an analysis and offers a theory defining the root of ethical malfeasance in e-discovery situations.

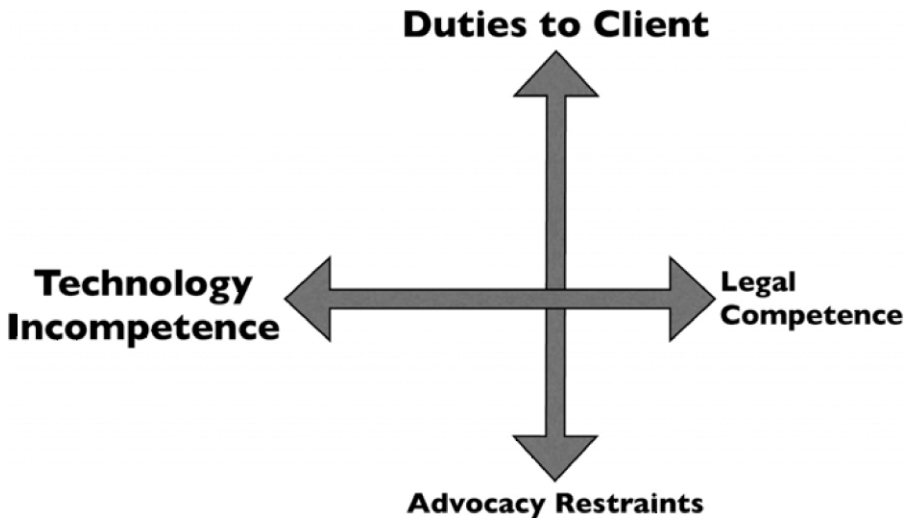
THE WICKED QUADRANTS:
A RUBRIC TO UNDERSTAND THE ROOT OF
UNETHICAL CONDUCT IN E-DISCOVERY

There are four fundamental forces at work in e-discovery, which when considered together, explain most attorney misconduct: (1) a general lack

of technological sophistication, (2) over-zealous attorney conduct, (3) a lack of development of professional duties as an advocate, and (4) legal incompetence. These “Wicked Quadrants” are depicted in the circular-diagram and cross-format diagram below.



The above circular diagram shows each quadrant in equal size. In reality, the four quadrants are not of equal power and influence. The four-arrow cross-graphic below is designed to show how these forces interact in an imbalanced fashion to explain lawyer misconduct.



The previously discussed radical transformation of society, and the problem of technology incompetence that comes with it, is the first and foremost of the four factors to consider to understand e-discovery misconduct. The other three factors arise from general ethical considerations that are not in any sense unique to electronic discovery and are addressed in the American Bar Association's Model Rules of Professional Conduct.

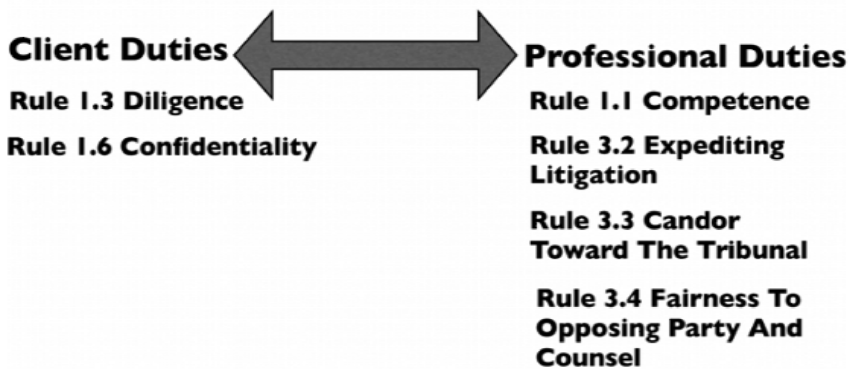
These four criteria interact with each other in varying ways to explain the many forms and types of *attorney* e-discovery misconduct. Unethical or illegal behavior by parties to litigation themselves is influenced by different factors, including raw emotional ones such as greed, fear, and hate. These four criteria do not apply to the parties to litigation; they apply only to their attorneys.

DUTY TO CLIENTS V. PROFESSIONAL DUTIES

The Wicked Quadrant consists of two fundamental and diametrically opposed duties applicable to all attorneys. On one side of the scale lies

an attorney's duty to clients. On the other side lies an attorney's ethical duty to the profession, including opposing parties, opposing counsel, and the courts.

Two Primary Ethical Forces at Work in e-Discovery



There are four rules regarding an attorney's ethical duty to the profession that are relevant to e-discovery: Rule 1.1 Competence,¹¹ Rule 3.2 Expediting Litigation,¹² Rule 3.3 Candor Toward the Tribunal,¹³ and Rule 3.4 Fairness to Opposing Party and Counsel.¹⁴ Subsection (d) of Rule 3.4 pertains specifically to discovery and prohibits a lawyer from making "a frivolous discovery request" or failing "to make reasonably diligent effort to comply with a legally proper discovery request."¹⁵ The commentary to Rule 3.4(d) explains that "[t]he 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

11. MODEL RULES OF PROF'L CONDUCT R. 1.1. Note that competence is usually classified as a client duty.

12. MODEL RULES OF PROF'L CONDUCT R. 3.2 (2007).

13. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

14. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007).

15. *Id.* R. 3.4(d).

concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.”¹⁶ In most instances of e-discovery misconduct, these four rules of professional duties are outweighed by two rules codifying an attorney’s duty to clients: Rule 1.3 Diligence¹⁷ and Rule 1.6 Confidentiality.¹⁸

The first, and by far the most “wicked” of the client duty rules, is Rule 1.3 Diligence. “A lawyer shall act with reasonable diligence and promptness in representing a client.”¹⁹

As the commentary to the Rule 1.3 explains:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.²⁰

Of course a client will readily appreciate the actions taken by his or her lawyer to fulfill these duties. In fact, the commentators recognize the inherent dangers of an overzealous advocate and warn about excesses, but they stop short of actually banning them:

A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.²¹

A lawyer is not *bound* to press every advantage, but is not prohibited either. A lawyer is not *required* to use offensive tactics, but such tactics are not forbidden by the ethical code. Naturally, lawyers frequently engage in overzealous representation, and clients normally react favorably to this behavior. The client is, after all, in a dispute with the opposing party and emotions frequently run hot, even in commercial litigation between large businesses.

The second client-directed ethics rule, Rule 1.6 confidentiality, also encourages misbehavior at times, albeit not nearly as often as the zealous advocacy rule. “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent,

16. *Id.* R. 3.4 cmt. 1.

17. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2007).

18. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2007).

19. MODEL RULES OF PROF’L CONDUCT R. 1.3.

20. *Id.* R. 1.3 cmt. 1.

21. *Id.*

the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).²²

The secrecy rule of ethics, buttressed by the attorney-client privilege and the attorney work-product privilege, has served as a cover, and sometimes an excuse, for a host of misconduct. The lawyer may know that his client has not disclosed all of the harmful e-mails they possess or has engaged in a deliberately negligent search, but the lawyer feels constrained by his duty of confidentiality. This duty is antithetical to the transparency of e-discovery conduct that facilitates cooperation between counsel and the court.

The impact of this rule is obvious in the *Qualcomm* case, when outside counsel tried to blame the nondisclosure of thousands of e-mails on the client. When the massive fraud designed to conceal highly relevant e-mails was later discovered, one of the excuses offered by outside counsel was that counsel could not disclose their suspicions of fraud because they were prohibited by the California state equivalent of Rule 1.6.²³

Three rules of ethics based on duties to the profession as a whole are particularly relevant in e-discovery. In theory, these rules should balance and constrain the two client-centered rules by acting as three angels whispering in the good ear of each litigation attorney. They are, in pertinent part, the following:

(1) Rule 3.2 Expediting Litigation:

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”²⁴

(2) Rule 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; . . .

(3) offer evidence that the lawyer knows to be false. . . .

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

22. MODEL RULES OF PROF'L CONDUCT R. 1.6.

23. *Qualcomm, Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *12-13 n.8 (S.D. Cal. Jan. 7, 2008).

24. MODEL RULES OF PROF'L CONDUCT R. 3.2.

(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.²⁵

(3) Rule 3.4 Fairness To Opposing Party And 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;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(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.²⁶

When attorney e-discovery misconduct arises, it can usually be attributed to the failure of an attorney to follow the counsel of one or more of these three ear-whispering angels. There is, however, another rule of professional conduct that frequently comes into play in e-discovery, the rule of professional competence. Rule 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁷

Rule 1.1 is considered a duty to clients, but in my analysis it falls on the side of professional duties, yet is unlike the three angels in many respects. Indeed, it has always enjoyed a special prominence in our legal tradition for a variety of reasons, including pride in quality craftsmanship. Competence has also played an important role in tempering excessive zeal in diligence. By tradition, the most highly skilled do not need to resort to adversarial excess to prevail. Their competence alone will carry the day without the use of bluster and sharp elbows.

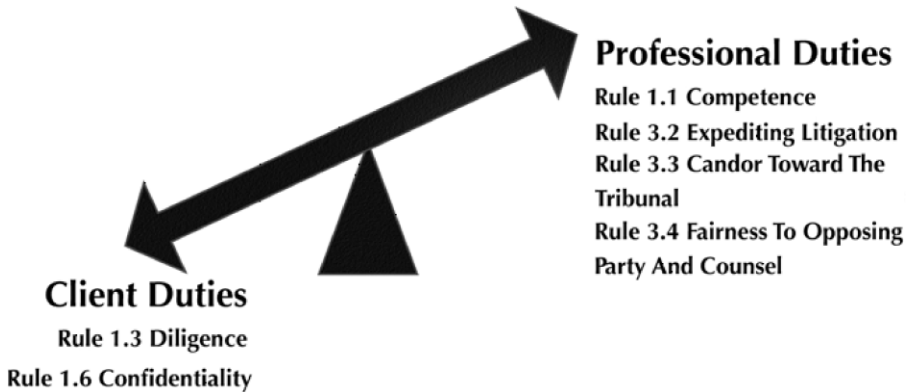
These six ethical duties, two on the side of client representation and four on the side of the court and the profession as a whole, should, in theory, be in balance. But in practice, especially in the field of e-

25. MODEL RULES OF PROF'L CONDUCT R. 3.3.

26. MODEL RULES OF PROF'L CONDUCT R. 3.4 (a)-(d).

27. MODEL RULES OF PROF'L CONDUCT R. 1.1.

discovery when unethical conduct is involved, these rules do not balance. The duties to the client are given far more weight by many attorneys than the duties to the profession.²⁸



The reason for this imbalance is easy to understand—the client duties have built-in economic incentives. Their benefits are obvious to the client. When an attorney carries out these duties, the fees for the attorney’s services are more likely to be paid. The client is likely to further reward this behavior by requesting additional legal services. This then leads to a secondary reward for this conduct by the law firm in which the attorney is a member. As law firms grow larger and closer to businesses, these rewards are intensified. Bluntly, money is the thumb on the scale, and greed may sometimes corrupt attorneys’ ethical compasses.

Conversely, when an attorney discharges professional duties, the benefits to the client, if any, are only secondary and remote from the client’s view. For instance, the client might not realize that candor to the tribunal makes his or her attorney more effective in advocating the

28. It should be noted that most of the comments in this section, and elsewhere, apply primarily to civil cases and might not apply equally to criminal cases, an area of law in which the Author has no personal experience. Certainly different factors apply in criminal proceedings, especially the weight provided to Rule 3.3, Candor Toward Tribunal, and the countervailing duty in Rule 1.6 to preserve a client’s confidential, privileged communications. See generally Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

client's position. The discharge of these professional duties might not only be unappreciated, but in many circumstances, they might be resented. For example, a client might not want to disclose an e-mail that significantly damages his or her case, especially if the client naively thinks he or she could easily get away with hiding it and win. The client might resent it when the lawyer discloses the e-mail anyway, especially if this later leads to the loss of the case.

Fulfilling these professional duties may in some circumstances lead to conflicts between the attorney and the client. It can also often lead to passive resistance, such as delays in payment of bills or refusals to pay altogether. Even if a fee is paid, many clients will think twice about retaining that lawyer again because they might resent the divided loyalty between professional obligations and zealous representation. An unsophisticated client might not realize that every lawyer worth his or her salt takes both of these obligations seriously. The incentive not to listen to the three angels is magnified by the law firm in which the lawyer is a member. The firm may only see an attorney without a growing client base and, while it may respect the partner's ethics, the firm will rarely reward such behavior economically.

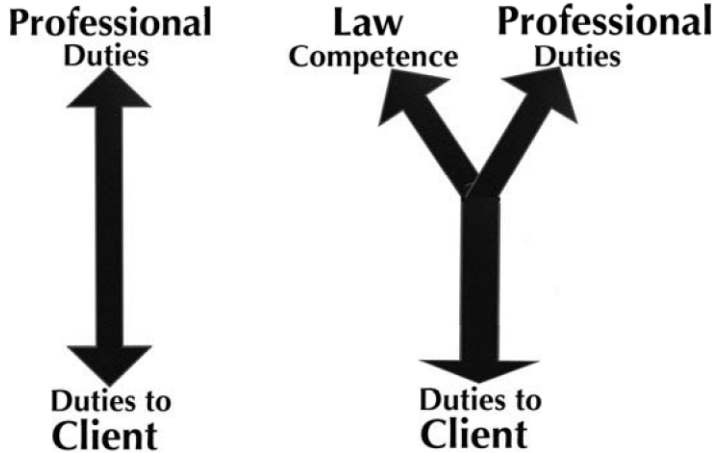
Since the fulfillment of professional duties has no built-in financial reward, and in fact can sometimes be costly, it often is outweighed by an attorney's economic interests. This may explain why the Bar has developed so many professional duties and rules over the years. It was done in the vain hope that the sheer quantity of the rules would outweigh the obvious financial disincentives. They have not. The state bar associations could promulgate ten more rules requiring professional conduct, and it would not put these competing interests in balance. The fundamental issue is that financial rewards are primarily offered for only one side of the equation. Further, violations of the professional duty-type rules are only rarely detected and, when complaints are filed, the disciplinary actions imposed are relatively light. The bar associations are primarily focused on trust account violations, not candor to the tribunal or fairness to opposing counsel.

ATTORNEY COMPETENCE

Attorney competence and corresponding Model Rule 1.1²⁹ are such powerful forces in the legal tradition in the United States that it is an

29. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

over-simplification to solely look at the problem of ethics in e-discovery in a dualistic manner—client versus profession—as we have above. Another element of complexity must be added to get a better understanding of the problem. Competence should be understood as its own ethical force, and the issue should be triangulated as shown below.



This tripartite structure is a better diagram to understand the true dynamics of legal practice. Legal competence serves as an independent upward force, along with professional duties, to counter-balance the pressures and temptations involved with fulfillment of duties to clients. The forces of law and profession work hand-in-hand to offset the demands of some clients, typically implied, to prevail over their adversaries at all costs.

Most of the time the temptations of greed and power do not cause “lawyers to behave badly.” Certainly, lawyers do not make a practice of lying to courts and opposing counsel, even though they could probably get away with it and maximize their income in the process. There is more to this picture than simple economics. The law, after all, attracts many who are concerned with justice and care about doing the right thing. Most lawyers have strong moral fiber and need little encouragement to do the right thing. The vast majority of lawyers are more than pen-and-quill mercenaries. Integrity, professional pride, and competence temper their financial motivations. Moreover, some enlightened clients recognize and financially reward professional competence and are influenced by professional reputation in the lawyer selection process.

Unfortunately, most clients are not in a position to evaluate attorney competence. Only repeat litigants, typically large corporations, have enough experience with litigation to gain knowledge of the competence of litigation attorneys. The largest litigant class in the United States is the insurance industry. Insurance companies make up the bulk of every court's civil docket. In the past, they would routinely employ the best skilled attorneys in every locale and were willing to pay for such quality representation. Although the defense bar is still usually of superlative quality, more and more insurance companies today are driven primarily by cost. They are unwilling to pay for quality representation. In fact, low rates demanded by insurance companies have become notorious. Over the past ten to fifteen years this "penny wise and pound foolish" approach by the insurance industry has driven many of the best defense practitioners into other areas of practice. These seemingly sophisticated clients should know better.

Since legal competence seems to be rewarded economically less and less in *all* fields of litigation, not just e-discovery, the decline of pecuniary benefit to attorneys does not fully explain the dramatic decline of ethics in e-discovery. Here, the decline has been disproportionately great. The explanation lies in the previously mentioned competence gap in e-discovery by most trial lawyers. This deficiency, coupled with the dramatic changes in technology over the last few decades, has led to our current tenuous ethical position in e-discovery.

To further test and weaken the restraints that competence and other professional duties typically place upon unethical conduct, the strategy demanded in e-discovery, when it is performed competently, is fundamentally different than traditional adversarial strategy. When practitioners in e-discovery attain a high degree of technical competence, they realize that the cooperative model must be employed to focus the issues and control costs. In fact, the Author has yet to meet an experienced attorney in this field who does not agree with this proposition.

COOPERATIVE MODEL OF DISCOVERY

Transparency and cooperation, or at least attempts at cooperation, are imperative for e-discovery to be performed in an efficient and economic manner. This is discussed at length in my recent essay, *Hospital*

Defendants Martyred in the Cause of Cooperative e-Discovery.³⁰ This new model of competence is at odds with the training of most experienced attorneys who treat discovery just like every other component of litigation. They justify “hide the ball” practices as required by Model Rules 1.3³¹ and 1.6,³² diligence and confidentiality. This belief is misplaced. “Diligence” neither prohibits cooperation nor sanctions deception. As the *Sedona Conference Cooperation Proclamation*³³ points out, cooperation in discovery is perfectly consistent with zealous advocacy: “Cooperation does not conflict with the advancement of their clients’ interests — it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.”³⁴

The cooperative approach is not new and radical, as some presume. It is already mandated by the rules of ethics as previously shown, especially Rule 3.4(d).³⁵ It is also already required by the Federal Rules of Civil Procedure and well-established caselaw. The law behind cooperative discovery was discussed and reviewed by Magistrate Judge Paul Grimm, a well-known expert on discovery, in his recent decision *Mancia v. Mayflower Textile Services Co.*³⁶

Some also dismiss the cooperative model as naive idealism without first investigating its merits. The cooperative approach to discovery does *not* mean the elimination of disputes or advocacy. Rather, it means the refinement of disputes and avoidance *when possible* and the enhancement of advocacy. Even with competent counsel of good will, some discovery disputes may still arise. The cooperative model still contemplates motion practice for judicial intervention, either in the form of protective orders or orders to compel. Now, however, the issues presented for adjudication will be much more focused and refined. The disputes will be based on disclosure and known facts, not rampant speculation, as is now so often the case. Adjudication will require

30. *Hospital Defendants Martyred in the Cause of Cooperative e-Discovery*, e-Discovery Team <http://ralphlosey.wordpress.com/2008/09/21/hospital-defendants-martyred-in-the-cause-of-cooperative-e-discovery/> (Sept. 21, 2008, 17:30 EST).

31. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

32. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

33. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION, available at www.thosedonaconference.org/content/+sc_cooperation_proclamation/proclamation.pdf (2008).

34. *Id.*

35. MODEL RULES OF PROF'L CONDUCT R. 3.4(d) (2007).

36. No. 1:08-CV-00273-CCB (D. Md. Oct. 15, 2008). The Author discussed this opinion at length in *A New Opinion by Judge Grimm Makes the Legal Case for Cooperative Discovery*, e-Discovery Team, <http://ralphlosey.wordpress.com/2008/10/19/a-new-opinion-by-judge-grimm-makes-the-legal-case-for-cooperative-discovery/> (Oct. 19, 2008, 10:11 EST).

interpretation of the law and evaluation of the case as a whole, not a computer forensics trial. The courts and the parties will not waste their time on what should be mundane facts, such as where and how the information is stored and what it will cost to find and produce the information. In paper discovery you would not think about fighting over these things, but in e-discovery, with computer storage systems and retrieval methods most lawyers do not understand, it happens all of the time.

A concrete example might help illustrate what is meant by a cooperative, transparent approach. A defendant's attorney cooperates with plaintiff's counsel and discloses the details of his client's preservation efforts and computer systems. Sufficient information of the computer systems is voluntarily disclosed to allow for a knowledgeable evaluation of the preservation effort and proposed production. Defense counsel also discloses the search parameters they propose to use to extract all relevant electronically stored information (ESI) from the systems. Plaintiff's counsel might also be invited to suggest alternative search parameters or otherwise participate in the process, including sampling and testing of proposed keywords for search filtering. There is full disclosure of the techniques and technology that the defendant will use to locate, process, and collect the relevant ESI and the forms in which it will be produced. There is also disclosure as to the estimated costs of the different search and production scenarios.

Frequently, the requesting party, here the plaintiff, will want the responding party to expend more resources and money to try to find relevant ESI than the responding party thinks is needed or required under the discovery proportionality rule, Federal Rule of Civil Procedure 26(b)(2)(C).³⁷ This is because parties in litigation, especially at the commencement of a case when discovery plans are formed, rarely agree on the value of a case. This disagreement produces disputes regarding what effort is fair and reasonable under the circumstances. It may be fair to require a defendant to spend \$100,000 on discovery in a

37. FED. R. CIV. P. 26(b)(2)(C). Rule 26(b)(2)(C) states,

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

\$2,000,000 case, but obviously unfair in most cases with only a \$200,000 value.

Plaintiff's counsel, who thinks he has a \$2,000,000 case, will necessarily have a different view as to the reasonability of the discovery burden than defense counsel, who only values the case at \$200,000. Thus, the plaintiff might demand the e-mail from twenty witnesses for five years, even though the defense shows that (1) this involves four gigabytes of ESI having a paper page count equivalent of 300,000 pages, (2) the cost to locate, review, and produce this much e-mail will be between \$100,000 and \$125,000, and (3) the time to complete this work will be from five to six months. There will be full disclosure by defense counsel of the facts behind these assertions, not merely objections and blustering exaggerations. The defense might object and instead propose to only search the e-mail of ten witnesses over three years. Counsel would then show exactly why and how this will cost \$50,000 and take three months.

The cost issues, although complicated and requiring disclosure, should not be fought over any more than the costs to make simple paper copies. This kind of disclosure and discussion should occur at the mandatory Rule 26(f)³⁸ conference of counsel. The parties should not turn the basic facts of e-discovery into an argument; they should instead focus their advocacy on the proportionality factors of Rule 26(b)(2)(C). The areas of disagreement would then be hashed out at a Rule 16(b)³⁹ hearing with the judge or magistrate.

If both parties cooperate, it is possible to at least fairly estimate the range of costs that will be associated with different search parameters. This can and should be stipulated to so that the real issues can be addressed. By cooperation and disclosure on the purely factual matters, the attorneys should be able to advocate based on concrete alternatives. The court will evaluate the case as a whole, its value, the importance of the issues and discovery sought, and other criteria required under the rules,⁴⁰ and then decide what discovery should be allowed. The order will be based upon knowledge regarding the likely costs and burdens imposed by the decision.

For instance, in the example above, the court may divide the discovery into phases and limit the first phase of discovery to ten witnesses over three years as the defense requested, but do so without prejudice to the plaintiff trying again later. The plaintiff would be allowed to renew the request for the other ten witnesses and extended time based upon a

38. FED. R. CIV. P. 26(f).

39. FED. R. CIV. P. 16(b).

40. In addition to Rule 26(b)(2)(C), see FED. R. CIV. P. 26(b)(2)(B) concerning evaluation of not reasonably accessible ESI.

specific showing from the ESI received in the first request or other sources. The ESI received might allow the plaintiff to make a more focused second request. The evidence discovered might also support or undercut the plaintiff's evaluation of the merits of the case. After these attorneys see and understand the approach taken by the court, in the next case with different parties, they may well resolve the dispute themselves by agreeing to such phased discovery.

All too often in a traditional adversarial model, disputes such as this are presented to the court for resolution with only vague information concerning underlying facts and the real costs associated with the differing discovery scenarios. If there is information, it is only obtained after expensive formal "discovery about discovery" or the even greater expense of evidentiary hearings. Enormous time and fees are wasted to try to determine what should be mundane matters of fact, albeit complicated facts, regarding the details of the computer systems. The adversarial approach has often resulted in significant delays, multiple motions, and orders that surprise the losing party into making expenditures far greater than they ever conceived possible.⁴¹ E-discovery expenses of \$3,000,000 in just five months are fairly commonplace, even in cases later resolved by summary judgment.⁴² Further, in this noncooperative model, time is wasted on the proof of mundane facts, such as the type of computer filing systems used, or proof of expert facts, such as how many hits a particular search technique will likely produce among a select group of custodians and what it will cost to review and produce. These are facts that are routinely disclosed under the cooperative model so that the parties and the court can focus on the real issues.

As Judge Grimm points out in *Mancia v. Mayflower Textile Services Co.*,⁴³ this kind of cooperation in discovery is assumed in the rules and the law.⁴⁴ It is not contrary to our basic adversarial system of justice as some contend. Judge Grimm quotes celebrated Harvard Professor Lon L. Fuller on the subject:

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,

41. See, e.g., *In re Fannie Mae Sec. Litig.*, No. 08-5014, 2009 WL 21528 (D.C. Cir. Jan. 6, 2009) (affirmed order requiring a nonparty to spend \$6,000,000 to comply with a subpoena for email on backup tapes).

42. See, e.g., *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006).

43. No. 1:08-CV-00273-CCB (D. Md. Oct. 15, 2008).

44. See *id.*, slip op. at 20.

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 dependant 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.⁴⁵

The Author knows from twenty-eight years of practice the truth of Professor Fuller's words. Since our system of justice depends upon voluntary disclosure of information by the parties, cooperation on discovery issues is essential to due process. This kind of collaboration underlies all of the rules of procedure. Indeed, Federal Rule of Civil Procedure 1⁴⁶ begins with the admonition that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."⁴⁷

The traditional model of adversarial discovery is contrary to these fundamental principles. As Judge Grimm stated:

A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost

45. *Id.*, slip op. at 20-21 (ellipses in original) (quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958)).

46. FED. R. CIV. P. 1.

47. *Id.*

for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the deciding tribunal not easier, but more difficult, and violating his or her duty of loyalty to the procedures and institutions the adversary system is intended to serve.⁴⁸

Discovery abuses of this kind often happen in e-discovery because attorneys do not understand the complex technologies involved in the storage and retrieval of digital evidence. Attorneys are out of their element. Because they are acting out of ignorance and fear, they do not cooperate and stipulate. Instead, attorneys fight over everything. This makes the process terribly over priced. It also makes the task of the deciding tribunal much more difficult than it need be.

TECHNOLOGICAL INCOMPETENCE

Attorneys today on the whole appear to be better educated and more intelligent than attorneys of the past. Certainly the standards for admission to law schools are steadily increasing and the increase has attracted many gifted people. Further, the vast majority of people in the legal profession have very solid moral ethics and good judgment. Indeed, the screening of applicants by state bar associations appears to be more severe and careful than in the past. Yet, the growing bad behavior of lawyers in the field of e-discovery is indisputable.

The challenges and inherent conflict between duties to clients and professional duties have been present in the law for a long time. The balance appears to have shifted in the past few decades toward the duties to clients. Some believe this can be explained by the general shift of law firms to more business-like operations.⁴⁹ Still, this shift in business models does not fully explain the glut of bad behavior in e-discovery attorney conduct.

E-discovery is particularly vulnerable to ethical indiscretions due to the same exponential explosion of technology that created the field to begin with. Keeping up with ever-changing technology is a challenge for all legal practitioners. However, if lawyers in other fields fail to keep up

48. *Mancia*, No. 1:08-CV-00273-CCB, slip op. at 21-22 (internal quotation marks omitted).

49. See, e.g., Galanter & Henderson, *supra* note 8.

with technology, it usually does not affect their core competency as an attorney. They can be technologically incompetent and still practice at a very high level of legal competence. Their professional competence can thus serve as a strong buoying force to protect them from the temptations of unprofessional behavior.

But this is not so with e-discovery. In this field and this field alone, technological incompetence has a direct and very severe negative impact on one's professional competence to do e-discovery work. The challenges of technology act as a countervailing force to legal competence as shown in the diagram below.



Because most attorneys called upon today to do e-discovery have very limited technology competence, they necessarily also have limited legal competence to do this work. Thus, the buoying force of competence is far less, or absent entirely, to restrain excessive advocacy. Instead, the added challenges of technology serve as an anchor to bring out the basest behaviors. As shown in the diagram below, with the added weight of technological challenges, the upward forces of legal competence and duties to the profession are now insufficient to counter the temptations arising from duties to clients. The influence of technology greatly strengthens the downward forces and leads to an overall lowering of ethical conduct.



Attorneys not competent in technology are well aware of their situation, although they will often go to great lengths to conceal it from others. This creates a precarious situation in which attorneys are not comforted by legal competence but are still pressured by clients and the economy. This leads many to make bad decisions and choices when it comes to compliance with the dictates of Model Rules 3.2 Expediting Litigation,⁵⁰ 3.3 Candor Toward The Tribunal,⁵¹ and 3.4 Fairness to Opposing Party and Counsel.⁵²

Finally, it is important to note that no one is fully competent in all fields of technology that might be encountered in e-discovery. It might be possible to master the law of e-discovery, but not all of the technologies underlying it. These facts are too complicated and ever-changing for any one person to master. Every modern lawyer is stressed and challenged by the enormous tidal wave of technology we have “enjoyed” in the past few decades. Each attorney is a perpetual student who must strive to keep abreast of the rapid inventions and progress of the unstoppable tidal wave of technological evolution.

50. MODEL RULES OF PROF'L CONDUCT R. 3.2 (2007).

51. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

52. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007).

THE WICKED QUADRANTS

The four factors shown in the diagram below and at the beginning of this Article constitute the basic components underlying unethical behavior in e-discovery. The diagram below adjusts the size of the four quadrants to reflect the imbalance that leads to lawyer misconduct.

In the field of e-discovery, the Author places most of the blame on the incredible challenges of technology. No other generation of lawyers in history has ever faced this kind of rapid change. It is no wonder that it has shifted the delicate balance otherwise in effect between the competing forces of client satisfaction, competence, and professionalism. Technological challenges have undercut and weakened legal competence, which in turn has strengthened some lawyers' perceived duties to clients at the expense of duties to the profession. Attorneys who succumb to unethical behavior in e-discovery do so because they give far greater weight to the financially rewarded duties to the client over the countervailing duties to the profession—duties intended to act as restraints upon excessive advocacy.



This represents a situation of excessive adversarial practice not adequately tempered by duties to the profession or by legal competence. Instead, overly high levels of technological challenges aggravate the imbalance. This common situation today explains the high incidence of lawyer misconduct in e-discovery.

This analytical rubric suggests a remedy to the problem it illustrates: lawyers need more legal training in e-discovery and in technology. The professional advocacy restraints to excessive zeal must also be strengthened and better understood. Lawyers must come to understand that they have sacred duties to expedite litigation, to have candor to the judge, and to be truthful and fair to the opposing party and opposing counsel. These things are more important than money. They are at the very core of our profession. They separate the law from mere business. They justify the powers entrusted in our profession since the days of the Founding Fathers.

Integrity and the abhorrence of unethical conduct cannot be forced by the enactment of more rules. Only further education and the strict enforcement of our current rules will get us there. This enforcement requires much greater energy and attention to these issues by both the state bar associations and the judges who are often sad witnesses to such misbehavior. All too often such misconduct is tolerated. In the rare occasions when disciplinary actions are taken or when sanctions are imposed, they are far too weak to deter similar conduct by the rest of the bar. The *Qualcomm*⁵³ case provides a perfect example of this situation. Although the court spent hundreds of pages in multiple decisions describing the misconduct of Qualcomm's attorneys—including direct lies to the judge in the midst of a trial—to date, no attorney or law firm involved has been sanctioned.⁵⁴ Further, although there have been threats to refer the attorneys to the California Bar for disciplinary action, this has yet to happen.

We need a strong judiciary that enforces the rules and rewards collaboration. That, coupled with a better educated, technologically savvy Bar, will lead us out of the shadow of the wicked quadrant.

53. *Qualcomm, Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

54. Mild preliminary sanctions were reversed on appeal with a remand for a full trial. See *Qualcomm*, 2008 WL 66932, at *3.