How the Ethics Rules Influence the Role of Discovery Counsel

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by David L. Stanton and Brian D. Martin

David L. Stanton
Litigation
+1.213.488.7271
david.stanton@pillsburylaw.com

David L. Stanton is a partner in Pillsbury's litigation practice, leads the firm's nationally recognized information law and electronic discovery team, and oversees the nationwide litigation support department.

Brian D. Martin
Litigation
+1.619.544.3204
brian.martin@pillsburylaw.com

Brian D. Martin is also a partner in Pillsbury's litigation practice and is the local litigation practice section leader for the San Diego office. He represents clients in complex class actions and unfair competition litigation and advises them on a range of business and discovery issues.

This is the second in a three-part series about the critical role of discovery counsel on a successful litigation team. In Part I, we discussed the qualifications of discovery counsel and the risks of proceeding without one. Here, we explore ethical considerations that inform the role.

Competent Representation

The sophistication of the discovery process is outpacing the competence of many general practitioners, and those who don't keep up with the pace of change should welcome the involvement of specialized discovery counsel. Competence is an ethical requirement in every legal representation. As ABA Model Rule 1.1 states, competence entails "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." As in other areas of practice, competence must be developed or obtained in the field of discovery.

A recent change in the official comment to ABA Model Rule 1.1 emphasizes the importance of *technological* competence, stating the duty includes keeping abreast "of changes in the law and its practice, including the benefits and risks associated with relevant technology." This specification creates a malpractice trap for unsuspecting litigators handling technical discovery functions without the background or assistance sufficient to the task.

The State Bar of California has taken things further, issuing guidance pertaining specifically to electronic discovery. In Formal Opinion 2015-193, the California State Bar's Committee on Professional Responsibility and Conduct declared that an attorney's obligations evolve as new technologies become integrated into the practice of law. As such, "[a]ttorneys handling e-Discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI [electronically stored information] preservation procedures;
- analyze and understand a client's ESI systems and storage;
- identify custodians of potentially relevant ESI;
- engage in [beneficial 'meet and confer' discussions] with opposing counsel concerning an e-discovery plan;
- perform data searches;

- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner."

Any attorney who manages the discovery process must have the requisite skills and expertise to provide meaningful oversight. Competence is also implicit in the certification and "reasonable inquiry" requirement of Rule 26(g) of the Federal Rules of Civil Procedure. One cannot competently supervise or certify activities one does not understand and does not take the time to learn, and all litigators should frankly assess their capability to handle the technical aspects of discovery.

The attorney supervising discovery must understand relevant technologies—those employed by the client to host discoverable information and those used by vendors to support discovery projects. She may not blindly approve methods or tools and must understand why they are the right ones to adopt. An attorney performing data collections must understand the types of accounts and systems involved to guide the proportionality assessment of what to collect and what to skip. The attorney employing predictive coding must understand basic information retrieval metrics and the sampling techniques in order to validate and certify the results.

The methods of technology-assisted review are improving all the time and offer several efficiencies, but advanced tools must be operated correctly or else they lead to time-consuming mistakes and controversies. Furthermore, the emerging practice of using "precision" and "recall" to evaluate predictive coding results has broad implications for all types of document productions—including traditional, linear review. These mathematical measurements are changing how we validate and defend discovery efforts of all types, opening new lines of attack that most litigators are unprepared to defend. Qualified discovery counsel understand this, and can help clients use technology to control costs, without leaving them exposed.

The attorney lacking technological competence can cause tremendous cost overruns. Poor data collections can lead to evidence spoliation and sanctions. Inadequate quality control can lead to unnecessary efforts. The misuse of predictive coding can lead to expensive disputes, and failure to use it can be a wasted opportunity. In Formal Opinion 2015-193, the State Bar of California said that attorneys handling discovery should know how to "produce responsive non-privileged ESI *in a recognized and appropriate manner*" (emphasis added). Given this benchmark, perhaps an attorney who fails to meet a reasonable standard of discovery practice could be liable for cost overruns *regardless of the outcome of the case*.

Unlicensed Practice of Law

Another ethical consideration is the unlicensed practice of law, which is illegal in every state and expressly prohibited by ABA Model Rule 5.5. Discovery constitutes an integral part of litigation and its sole purpose is the representation of a client before a tribunal. It is a legal activity, not a business operation—advice given to a client about discovery obligations qualifies as legal, rather than business, advice, and representing a client during discovery amounts to the practice of law. Consequently, certain core discovery functions must be performed by or under the direct supervision of a competent attorney with a license to practice .

Decisions materially impacting discovery cannot be delegated to consultants, non-practicing attorneys or technicians. Legally, these participants cannot bear responsibility for essential activities like determining the sufficiency of a legal hold, establishing the parameters of responsiveness or withholding a document based on privilege. Non-lawyers may make recommendations to supervising counsel, but they may not select review teams, choose training protocols, select QC measures, decide upon keywords or filter data using advanced analytics. Any non-attorney purporting to make these decisions for a client is engaged in the unauthorized practice of law.

Accountability (and liability) for the discovery process ultimately flows to a licensed attorney. Ideally, this is someone explicitly engaged as discovery counsel, but it could also be a senior litigator on the trial team (i.e. "matter counsel") or someone within the legal department (provided this is clearly spelled out in the engagement agreement). But the accountability cannot be delegated to or assumed by project managers, non-practicing attorneys, consultants, discovery vendors or advisory firms who are not admitted to practice.

Duty to Supervise

Obviously, not every discovery function must be performed by a

lawyer or by discovery counsel herself. As in other areas of practice, discovery attorneys may use non-lawyer assistants and junior attorneys, provided they are appropriately supervised.

The most highly qualified discovery counsel routinely relies upon non-lawyers. She uses technicians to handle ESI, forensic specialists to perform acquisitions, database administrators to support reviews and project managers to facilitate productions. She consults with linguists and information scientists, and probably uses a team of junior or contract attorneys, or even non-attorneys, to perform first-tier reviews. Without this assistance, the job of discovery could hardly be done, and it almost certainly couldn't be done economically.

ABA Model Rules 5.1 and 5.3 require all non-attorneys and junior lawyers involved in a legal representation to receive competent supervision, and make the supervising attorney accountable for their conduct. As the official comment to ABA Model Rule 5.3 states, "although certain tasks are delegable, the lawyer remains responsible for ensuring that those tasks are performed competently, diligently, and otherwise in conformance with the lawyer's own ethical obligations."

Thus, according to Formal Opinion No. 2015-193, a supervising attorney who employs non-attorney discovery experts "must maintain overall responsibility for the work of the expert he or she chooses, even if that expert is the client or someone employed by the client." Notably, the lawyer's duty to supervise extends to outside vendors or contractors, even if they are selected by the client, and it also extends to the client's own personnel if they are involved in the discovery process.

The minimal steps that the responsible attorney must take to satisfy the duty to supervise discovery experts are spelled out in Formal Opinion 2015-193: "[R]emaining regularly engaged in the expert's work [and] educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by the law or by the court, and of any relevant risks associated with the e-discovery tasks at hand." Plus, the supervising attorney, "should issue appropriate instructions and guidance and, ultimately, conduct appropriate tests until satisfied that the attorney is meeting his ethical obligations prior to releasing ESI."

If they are not competently supervised, non-attorneys involved in discovery could find themselves unwittingly engaged in the unlicensed practice of law. Plus, anyone employing them could be liable for aiding and abetting their unlicensed practice. For instance, in Ethics Opinion 362, regarding "Nonlawyer Ownership of Discovery Service Providers," the District of Columbia Bar Ethics Committee has stated, "lawyers who own, manage, work for or retain a discovery service vendor that engages in the practice of law ... may violate the prohibition ... against assisting others in the unauthorized practice of law."

It is worth noting that attorneys are bound by fiduciary obligations to clients, but discovery consultants and vendors are not. Discovery providers that are not law firms can limit responsibility by contract and frequently disclaim liability for damages. This puts clients in a different position, depending on which one is engaged. It also puts a supervising attorney at risk for legal malpractice based upon the mistakes of others, since the lawyer's responsibility for the process cannot be delegated to vendors or consultants, yet these same providers are permitted to limit their liability by contract.

Discovery Teams

The truth is that non-lawyer discovery professionals are often the most knowledgeable on a legal team with regard to the process, and the line between legal advice and litigation support gets murky quickly. This blurring is particularly acute in the case of a preferred vendor engaged directly by the client through an arrangement that persists over multiple matters. In this scenario, vendor personnel often possess institutional knowledge about prior discovery efforts. It is easy to rely on these experienced professionals, and one should do so up to an appropriate point.

The distinction is that even experienced professionals must be competently supervised. Their guidance may not be followed blindly, and they must not be permitted to become de facto supervisors themselves. A preferred vendor's decision-making authority must be limited, and the supervising attorney must remain sufficiently involved in

its activities to provide meaningful oversight and accountability.

One practical approach for an organization to consider is identifying qualified discovery counsel who will oversee a team of junior lawyers and technical personnel to facilitate discovery projects from one matter to the next. In-house counsel could supervise the team, if the volume of litigation supports this, but consistently using outside counsel has benefits as well. Likewise, it is possible to dedicate internal IT resources to support these projects, but using a preferred outside vendor allows the client to maximize economies of scale and avoid the training and technology costs required to properly equip an in-house team. Some law firms offer many of the requisite technical resources under the same roof.

The goal, in any event, is to have a stable discovery team supervised by an appropriately qualified attorney who can support any type of case. Discovery can get complicated, and a dedicated team that learns and applies lessons from one case to the next will save money and achieve better results. This team can interface with trial attorneys engaged for any type of matter, and can help locate the relevant data quickly and affordably. The arrangement aligns with the ethical requirements and it facilitates continuous improvement. It should be put in place through well-defined contracts that clearly establish the responsibilities of all the parties involved.

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | +1.877.323.4171
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