

THE EVOLVING ETHICS OF E-DISCOVERY: RAISING THE BAR FOR COUNSEL

Colleen M. Kenney
Jeffrey C. Sharer
Donovan S. Borvan[†]



[†] Contributions to this article were also provided by Erik Ives and Justin C. From.

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Each year, the American Bar Association (“ABA”) hosts the ABA TECHSHOW conference and expo, designed to “bring[] lawyers and technology together.”¹ In its description of the conference, the ABA says, “[g]one are the days when your work had to be done by hand. Most, if not all of your legal work can be accomplished with the help of technology.”² With technology advancing at exponential rates and showing no sign of slowing, lawyers today cannot remain willfully blind to the digital universe any more than the 18th-century Luddites could ignore the Industrial Revolution. Technology, innovation, and their myriad implications for the civil justice system—especially but not only in the area of electronic discovery—are reshaping the practice of law in the 21st century, and the near-ubiquitous presence of electronically stored information in modern litigation, often in volumes that are the digital equivalent of many warehouses filled with paper, require proficiency both in the systems that create, store, and retrieve such information and in the technologies and strategies that make it possible to review such information in litigation efficiently, effectively, and without incurring costs that dwarf the amounts in dispute.

In August 2012, the ABA Commission on Ethics 20/20 (the “20/20 Commission”) recommended, and the ABA House of Delegates adopted, updates to the ABA Model Rules of Professional Responsibility “to reflect the realities of the digital age.”³ Such updates were needed, the 20/20 Commission reported, because “technology has irrevocably changed and continues to alter the practice of law in fundamental ways.”⁴ While some of the amendments made only modest

¹ ABA TECHSHOW, <http://www.techshow.com> (last visited Feb. 14, 2013).

² ABA TECHSHOW, General Information, <http://www.techshow.com/conference> (last visited Feb. 14, 2013).

³ ABA COMMISSION ON ETHICS 20/20, RESOLUTION 105A REPORT, at 1 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf; *see generally* ABA, AUGUST 2012 AMENDMENTS TO ABA MODEL RULES OF PROFESSIONAL CONDUCT (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf.

⁴ ABA Commission on Ethics 20/20, REPORT TO THE HOUSE OF DELEGATES: INTRODUCTION AND OVERVIEW, at 3 (Aug. 2012) (“20/20 REPORT: INTRODUCTION AND OVERVIEW”), *available at*

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changes,⁵ others made significant changes, most notably in the areas of competency and confidentiality, that impact directly the ethical obligations of attorneys in matters involving electronic discovery. Taken as a whole, the amendments make clear that a lawyer cannot rely entirely on others to understand technology as it relates to the matter the he/she is handling, such as the fundamentals of the client’s information technology systems and the appropriateness and application of search technologies and document review platforms (among many other things). Instead, lawyers practicing in the “digital age” have an ethical obligation to understand those aspects of technology that are relevant to the matters they handle, including electronic discovery in such matters, and to their handling of confidential client information. Only by having such an understanding will lawyers be able to discharge their ethical obligations “to provide clients with the competent and cost-effective services that they expect and deserve”⁶ and to protect client confidences, and otherwise to fulfill the many ethical duties that they owe to their clients, to opposing parties and counsel, and to the courts.

I. MODEL RULE 1.1: “COMPETENCE” INCLUDES TECHNOLOGY.

The most significant change to the ABA Model Rules from the perspective of e-discovery practitioners appears in the comments to Model Rule 1.1. While the text of the cornerstone rule of competence is unchanged, the

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http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

⁵ For example, the ABA changed the definitions of “writing” and “written” to include all “electronic communication,” not just “email,” ABA MODEL RULES OF PROF’L CONDUCT R. 1.0(n), and revised the last sentence of Comment 4 to Model Rule 1.4, which previously stated that “[c]lient *telephone calls* should be promptly returned or acknowledged,” to state that “[I]awyers should promptly respond to or acknowledge client *communications*,” ABA MODEL RULES OF PROF’L CONDUCT R. 1.4, cmt. 4 (emphasis added).

⁶ *Id.*

comments to Model Rule 1.1 have been revised modestly but significantly.⁷ Specifically, Comment 8 (formerly comment 6) to that rule has been revised as follows (newly added text in italics):

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.⁸

According to the 20/20 Commission, it believed that “[b]ecause of the sometimes bewildering pace of technological change, ... it [was] important to make explicit that a lawyer’s duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology’s benefits and risks.”⁹ Accordingly, the 20/20 Commission explained, “the proposed amendment emphasize[d] that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent in a digital age.”¹⁰

The 20/20 Commission made clear that electronic discovery is squarely within the “relevant technology” to which Comment 18 was addressed:

Technology is also having a related impact on how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery. These tasks now require lawyers to have a firm grasp on how electronic information is created, stored,

⁷ The text of ABA Model Rule 1.1 is as follows: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ABA MODEL RULES OF PROF’L CONDUCT R. 1.1.

⁸ ABA MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8.

⁹ 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 8.

¹⁰ *Id.*

and retrieved. For example, lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations. ... These developments highlight the importance of keeping abreast of changes in relevant technology in order to ensure that clients receive competent and efficient legal services.¹¹

Keeping abreast of “the benefits and risks associated with relevant technology” is especially challenging for the e-discovery practitioner, because “relevant technology” in e-discovery “could include an endless list of software programs and hardware used to create, store, maintain, collect, process, review, and produce electronically stored information, including back-up systems, proprietary databases, network servers, ‘the cloud’, email systems, legacy systems, voicemail, instant messaging, email archives, processing software, collection software, filtering tools, review databases, predictive coding algorithms and workflows, native file viewers, redaction tools, load files, [and] image viewers.”¹² For lawyers advising clients on matters related to electronic discovery, “relevant technology” is everywhere; it pervades both the issues and problems that the lawyer is engaged to address (for example, the client’s obligations related to preservation, collection, review, and production of electronically stored information), and many of the responses and solutions to those problems (for example, the use of forensic tools to collect and process data, predictive coding and other analytic tools for search, and hosted environments for online review). As a result, lawyers representing clients in matters related to electronic discovery have a duty under the Model Rules not only to remain current on the technologies that create data relevant to litigation; but also on an entirely separate array of technologies that enable that relevant data to be preserved, collected, processed, reviewed, and produced accurately, efficiently, and in a manner consistent with all of the client’s legal obligations.

¹¹ *Id.* at 4.

¹² Troutman Sanders LLP, *Information Intersection: ABA to Lawyers—“Ignorance of Technology is not an Excuse”* (2012), <http://www.informationintersection.com/2012/11/aba-to-lawyers-ignorance-of-technology-is-not-an-excuse>.

A recent decision in *In re A&M Florida Properties II, LLC (GFI Acquisition LLC v. American Federated Title Corp.)*¹³ illustrates the need for attorneys to understand relevant technology and the potential sanctions that can result if they do not. In that case, the court imposed monetary sanctions on plaintiff’s counsel and its client, GFI Acquisition LLC, based on its finding that discovery delays and costs were caused because counsel was “uninformed on the detailed workings of GFI’s computer system and email retention policies” and “did not understand the technical depths to which electronic discovery can sometimes go.”¹⁴ Significantly, the court awarded sanctions despite the fact that no spoliation or bad faith conduct were found.

Further, sanctions may be just the tip of the iceberg when electronic discovery goes awry. For instance, *J-M Mfg. Co. v. McDermott Will & Emery*¹⁵ appears to be the first reported case in which a client has brought a legal malpractice claim against its former counsel based on counsel’s allegedly negligent handling of e-discovery. In *J-M Manufacturing*, plaintiff alleges that its former law firm breached its professional duty of care by failing to supervise its e-discovery vendors and contract lawyers and, as a result, inadvertently producing thousands of non-responsive, privileged documents to the government—not just once, but twice.

¹³ No. 09–15173, 2010 WL 1418861 (Bankr. S.D.N.Y. Apr. 7, 2010).

¹⁴ *Id.* at *2-7 (“Had Nash fulfilled his obligation to familiarize himself with GFI’s policies earlier, the forensic searches and subsequent motions would have been unnecessary. The Court finds that monetary sanctions are appropriate here and orders GFI and its counsel to reimburse American Federated its half of the cost of the forensic searches. GFI and its counsel are also ordered to reimburse American Federated for the costs associated with bringing the motion for sanctions and the motion to compel.”); *see, e.g., id.* at *2-5 (identifying the delays and costs incurred as a result of counsel’s e-discovery conduct, including for example: (i) counsel’s lack of knowledge regarding the existence of email archives and the differences between email archives and live inboxes, and (ii) counsel’s failure to recognize the differences between results of field searches and keyword searches).

¹⁵ No. BC462832 (Cal. Super. Ct., L.A. Cnty., June 2, 2011).

In its complaint, J-M Manufacturing (a pipe manufacturer and the defendant in a federal False Claims Act case) alleged that its former counsel used two well known e-discovery vendors to run search terms and a privilege filter prior to producing responsive documents to the government. Recognizing that it had received privileged information, the government returned the documents and asked counsel to conduct a second review. Counsel allegedly then hired contract lawyers from a similarly well known legal staffing firm to review the potentially privileged documents, with counsel then performing quality-control over the contract attorneys' work that allegedly consisted of "limited spot-checking of the contract attorneys' work." Counsel then produced the documents to the government a second time, and the government in turn produced them to the whistleblowers who had reported the alleged False Claims Act violations. In June 2010, counsel for the whistleblowers informed J-M Manufacturing that this production of 250,000 electronic documents included approximately 3,900 apparently privileged documents. When new counsel for J-M Manufacturing requested that these documents be returned or destroyed, the whistleblowers refused, asserting that any attorney-client privilege had been waived. Based on this alleged conduct, J-M Manufacturing brought claims against the former counsel alleging legal malpractice and breach of fiduciary duty, seeking compensatory and punitive damages as well as an accounting. At this writing, both the malpractice claims and underlying False Claims Act case remain pending.

Though *J-M Manufacturing* appears to be the first reported case of its kind, it likely will not be the last. The inherent complexity of electronic discovery, the innumerable ways that it can go off the rails without experienced counsel to guide it, and the potentially severe consequences when it does go off the rails, all strongly presage an increase in malpractice claims arising from such matters. And although the addition of "relevant technology" to the comments accompanying Model Rule 1.1 was intended by the 20/20 Commission simply to make explicit an obligation already implicitly encompassed by that rule,¹⁶ clients

¹⁶ Specifically, the Commission stated in its Report that the pre-amendment Comment 8 (then Comment 6) "implicitly encompass[ed]" the obligation to understand relevant technology's benefits and risks as part of the lawyer's general duty of competence, but that the Commission

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accusing their counsel of malpractice in electronic discovery can be expected to argue that it did more than that—*i.e.*, that it raised the standard of care for lawyers in jurisdictions adopting the revised rules.¹⁷

While attorneys may no longer be able to dispute that *some* level of technical competence is required in e-discovery matters, the key questions will be *what* level of competence is necessary. The 20/20 Commission provides some limited but nevertheless useful guidance in its report. On one hand, it notes that “[l]awyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve,”¹⁸ and, more specifically, that many tasks “now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved. For example, lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations.”¹⁹ At the same time, the 20/20 Commission acknowledged that “[i]n some situations, a matter may require the use of technology that is beyond the ordinary lawyer's expertise. For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved. Thus, another development

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believed “it [was] important to make this duty explicit because technology is such an integral—and yet at times invisible—aspect of contemporary law practice. The phrase ‘including the benefits and risks associated with relevant technology’ would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice.” The Commission further explained: “As noted in ethics opinions, such as those relating to cloud computing, this obligation is not new. Rather, the proposed amendment emphasizes that the lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent in a digital age.” 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 8 (footnotes omitted).

¹⁷ See ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7TH ED.), PREAMBLE AND SCOPE, at 2 (“[M]ost courts do look to the ethics rules as evidence of standards of conduct and care, particularly in actions for legal malpractice or breach of fiduciary duty.”) (collecting cases), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session5_amr_7th_preambleandscope.authcheckdam.pdf (last visited Feb. 20, 2013).

¹⁸ 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 3.

¹⁹ *Id.* at 4.

associated with technology is that lawyers are increasingly disaggregating work by retaining other lawyers and nonlawyers outside the firm ... to perform critical tasks.”²⁰ Taking these statements together, it appears that to be “competent” under Model Rule 1.1, most lawyers need to have a certain baseline understanding of how electronically stored information works and of how to conduct discovery of such information, but that in many cases it will be appropriate, if not expected, for “ordinary lawyers” to involve other professionals, with greater knowledge and experience specifically with the technologies at issue, where a more sophisticated technical understanding is required.

This reading of Model Rule 1.1, Comment 8, and the 20/20 Commission’s report are further supported by Comment 2 to that same rule. Comment 2, which was not amended, states in part that “[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.”²¹ But while it is clear that “special training or prior experience” is not an absolute prerequisite to handling any matter involving electronic discovery and that a lawyer doing so can and should involve other professionals—within or outside the lawyer’s firm—where specialized technical knowledge is needed, it is equally clear that because “[t]echnology affects nearly every aspect of legal work,”²² a “firm grasp” of how electronically stored information is created, stored, and retrieved and of how to conduct discovery of such information is no longer considered the stuff of “special training or prior experience,” but rather part of the baseline knowledge that all lawyers must possess “in order to ensure that clients receive competent and efficient legal services.”²³ Furthermore, because many, if not most or all, matters involving significant amounts of electronic discovery will have at least some aspects that involve “the use of technology that is beyond the ordinary lawyer’s expertise,”²⁴

²⁰ *Id.* at 5.

²¹ ABA MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2.

²² 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 4.

²³ *Id.*

²⁴ *Id.* at 5.

in-house and outside counsel handling such matters who do not possess such knowledge themselves are well advised to consult with others who do, in order to ensure that the client is properly advised on all of the myriad technical issues that may affect its interests.²⁵

Finally, the baseline knowledge needed for “competence” under Model Rule 1.1 undoubtedly will evolve with the continued development and emergence of new technology in the practice of law. For example, the duty of the e-discovery lawyer to understand technology sufficiently to advise on benefits and risks will be particularly relevant in the emerging context of predictive coding. Predictive coding and other forms of technology-assisted review:

[U]se sophisticated algorithms to enable the computer to determine relevance, based on interaction with (*i.e.*, training by) a human reviewer. Unlike manual review, where the review is done by the most junior staff, computer-assisted coding involves a senior partner (or team) who review and code a ‘seed set’ of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer’s coding. ... When the system’s predictions and the reviewer’s coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents.

²⁵ To the extent that a lawyer looks outside of his/her firm for such specialized knowledge, he/she should take note of newly added Comment 6 to Model Rule 1.1, which states that “[b]efore a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. ... The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers ... [and] the nature of the services assigned to the nonfirm lawyers” ABA MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 6.

Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.²⁶

While an extended discussion of predictive coding is beyond the scope of this article, it is sufficient to note that courts have begun to approve of the use of predictive coding in certain circumstances and that trend is likely to continue.²⁷ With the expansion of predictive coding and similar advanced technologies in the realm of e-discovery, exactly what counsel must understand, and in how much detail, in order “competently” to advise clients in the use of such technologies likely will loom as one of the larger issues of professional responsibility in this area in coming years.

There can be no doubt that, as the technology relevant to all aspects of electronic discovery continues to evolve, so too must the e-discovery lawyer gain and maintain knowledge and understanding of those technologies sufficient to ensure that he/she advises the client on such matters in a manner that is reasonable and, ultimately, defensible under all applicable legal standards. Just how much knowledge and expertise is sufficient remains to be determined, but there is no question that these issues will warrant the careful attention of all attorneys moving forward.

II. MODEL RULE 1.6: PROTECTING CLIENT CONFIDENCE.

The ABA’s most substantial amendment to the text of the Model Rules modified Rule 1.6, addressing the lawyer’s duty of confidentiality. In proposing these amendments, the 20/20 Commission observed that unlike in days of old,

²⁶ Andrew Peck, *Search, Forward*, L. Tech. News (Online), Oct. 1, 2011.

²⁷ See *Da Silva Moore v. Publicis Groupe*, 2012 U.S. Dist. LEXIS 13350 (S.D.N.Y. Feb. 24, 2012) (holding that “computer-assisted review is an acceptable way to search for relevant electronically stored information in appropriate cases”); *Global Aerospace Inc. v. Lindow Aviation, L.P.*, 2012 Va. Cir. LEXIS 50 (Apr. 23, 2012) (allowing defendants to use predictive coding to process and produce electronically stored information); see also *Kleen Prod. LLC v. Packaging Corp. of Am.*, 2012 U.S. Dist. LEXIS 139632 (N.D. Ill. Sep. 28, 2012) (discussing plaintiffs’ request that defendants use predictive coding, which plaintiffs subsequently withdrew).

when “lawyers communicated with clients in person, by facsimile or by letter,” in the practice of law today:

[L]awyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smartphones, and flash drives, as well as on law firm and third-party servers (*i.e.*, in the “cloud”) that are accessible from anywhere. This shift has had many advantages However, because the duty to protect this information remains regardless of its location, new concerns have arisen about data security and lawyers’ ethical obligations to protect client confidences.²⁸

Accordingly, the 20/20 Commission believed it was appropriate to amend the text and comments of Model Rule 1.6 to “make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used.”²⁹ The 20/20 Commission further noted that this obligation was already referenced in two existing comments to Model Rule 1.6; however, it concluded “that technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language.”³⁰

Previously, Model Rule 1.6 provided simply that “a lawyer shall not reveal” confidential information unless an exception applies. The amended Model Rule adds that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”³¹ In addition, a newly added comment—Comment 18—provides that inadvertent disclosure of client information in communication between lawyers does not violate the rule as long

²⁸ 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 4.

²⁹ *Id.* at 8.

³⁰ *Id.*

³¹ ABA MODEL RULES OF PROF’L CONDUCT R. 1.6(c).

as “the lawyer has made reasonable efforts to prevent the access or disclosure
...”³²

Regarding Comment 18, the 20/20 Commission “recognize[d] that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a file cabinet or offsite storage facility,” and explained that the proposed amendment “would not impose upon lawyers a duty to achieve the unattainable.”³³ To that end, Comment 18 provides a nonexclusive list of factors to be considered in determining whether a lawyer’s efforts to prevent disclosure are reasonable, including “the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients.”³⁴

In the 20/20 Commission’s view, a multifaceted reasonableness standard “recognize[s] that each client, lawyer or law firm has distinct needs and that no single approach should or can be applied to the entire legal profession,” and “makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.”³⁵ In the e-discovery context, safeguards built into the processes of document review and production—such as keyword searches, predictive coding and similar analytic tools, privilege filters, attorney review, and automated and human quality controls—usually will be the key factors at issue in evaluating the reasonableness of the lawyer’s efforts to discharge his/her ethical obligation under Model Rule

³² ABA MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18

³³ 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 8.

³⁴ ABA MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18.

³⁵ 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 8. Comment 18 also explains that a client may give “informed consent to forgo security measures that would otherwise be required by this Rule,” or may “require a lawyer to implement” additional security measures. ABA MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18.

1.6 to prevent inadvertent or unauthorized disclosure of confidential or privileged material.

Neither amended Model Rule 1.6, Comment 18, nor the 20/20 Commission's report mentions Federal Rule of Evidence 502(b),³⁶ which provides that an inadvertent disclosure of material subject to attorney-client privilege or the attorney work product doctrine will not operate as a waiver so long as "the holder of the privilege or protection took reasonable steps to prevent disclosure ... and ... took reasonable steps to rectify the error."³⁷ But there are strong parallels between the two rules—both of which address inadvertent disclosure of privileged information and employ similar multifactor reasonableness standards—that beg interesting questions. For example, if a court finds that an attorney failed to take "reasonable steps to prevent disclosure" under FRE 502(b), does it necessarily follow that the attorney also failed to "make reasonable efforts to prevent ... disclosure" under Model Rule 1.6(c)? It appears that the answer to this question could well be "yes." Although the two rules employ slightly different language, they prescribe substantially the same analysis—an examination of all relevant factors to determine whether reasonable measures were taken. At the very least, the parallels between the two rules suggest that attorneys should be able to look to case law applying FRE 502(b) for guidance as to what is expected under Model Rule 1.6(c).

Although FRE 502(b) was only enacted in 2008,³⁸ many courts have applied its reasonableness standard. For example, in *Coburn Group, LLC v.*

³⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2012); ABA COMMISSION ON ETHICS 20/20, RESOLUTION 105A REPORT, *supra* note 3.

³⁷ FED. R. EVID. 502(b). The Advisory Committee Notes further explain that Rule 502(b) "is flexible enough to accommodate" the consideration of a number of factors, including "the number of documents to be reviewed and the time constraints for production." FED. R. EVID. 502, advisory comm. notes. The Notes also state that, "[d]epending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure." *Id.*

³⁸ Pub. L. No. 110-322, § 1(a), 122 Stat. 3537 (2008).

Whitecap Advisors LLC, the court found that an attorney had taken reasonable steps to prevent disclosure of privileged material because he had given two experienced paralegals a six-step process to follow when reviewing documents, and he had monitored the paralegals' work by answering their questions on specific documents and conducting his own review of the documents the paralegals had marked as privileged.³⁹ The court found that the reasonableness of the attorney's efforts was supported by the fact that, of the more than 40,000 pages produced, his client only sought to show that three privileged documents had been inadvertently produced.⁴⁰

In contrast, in *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, the court found that the defendant had not taken reasonable steps to prevent disclosure where, among other things, the defendant had failed to "specify ... who reviewed the production, what steps were taken ... or whether the production was different in form from prior productions."⁴¹ The court also found it inconsistent for the defendant to claim that "several layers of attorneys ... [had] isolated privileged documents" when the defendant had failed to produce a privilege log identifying any such documents.⁴² The court explained that a finding of waiver was further supported by the large number of inadvertent disclosures the defendant claimed it had made. In total, the defendant identified 347 pages that had been produced inadvertently among approximately 7,500 total pages. The court found this number significant, given that it constituted "4.6 percent of the production."⁴³ As a result, the court determined that the defendant had waived any privilege pertaining to the documents.

These cases and others like them provide useful reference points for what it means for an attorney to "make reasonable efforts" to prevent inadvertent

³⁹ 640 F. Supp. 2d 1032, 1038–40 (N.D. Ill. 2009).

⁴⁰ *Id.* at 1040.

⁴¹ No. 2:07-CV-116, 2012 WL 3731483, at *3–6 (S.D. Ohio Aug. 28, 2012).

⁴² *Id.*

⁴³ *Id.*

disclosures under FRE 502(b)—and by logical extension, under amended Model Rule 1.6. First, it is more likely that an attorney made a “reasonable effort” when the number of privileged documents that are produced unintentionally is relatively small. Second, document review protocols that are detailed, consistently applied, and subjected to appropriate quality control are more likely to constitute “reasonable efforts.” Attorneys seeking to comply with Model Rule 1.6(c) should strongly consider aligning their document review and production protocols with these principles and others that have evolved in the case law applying FRE 502(b).

Moreover, attorneys who wish to minimize the risk of negative consequences resulting from inadvertent disclosures under both FRE 502(b) and Model Rule 1.6, should consider utilizing FRE 502(d). This rule allows a federal court to enter an order providing that unintentional disclosure of materials protected under the attorney-client privilege or attorney work product doctrine shall not result in waiver, period; an FRE 502(d) order need not, and in best practice should not, incorporate the requirement that the producing party have taken “reasonable steps to prevent disclosure” as needed to establish nonwaiver under Rule 502(b).⁴⁴ Once an appropriate FRE 502(d) order has been entered, a party can produce documents in discovery without the risk of waiving privilege—and, without needing to establish that “reasonable steps” were taken to prevent disclosure.⁴⁵ In this regard, a Rule 502(d) order provides a degree of certainty that is lacking where nonwaiver and clawback are addressed only by an agreement among the parties or by default operation of FRE 502(b). Additionally, and most powerfully, nonwaiver pursuant to an FRE 502(d) order is enforceable not only against parties to the proceeding in which the order is entered, but also “against non-parties in any federal or state proceeding.”⁴⁶ Finally, although the existence of an FRE 502(d) order does not relieve the lawyer of his/her ethical obligation to make “reasonable efforts” under Model Rule 1.6,

⁴⁴ See FED. R. EVID 502(d); *Rajala v. McGuire Woods, LLP*, No. 08-2638, 2010 WL 2949582, at *1–3 (D. Kan. July 22, 2010).

⁴⁵ See *supra* sources cited in notes 36–43.

⁴⁶ FED. R. EVID. 502, advisory comm. notes.

by requiring immediate return of unintentionally produced documents and ensuring that such production will not result in waiver of privilege, it does significantly reduce the risk that production will have undesirable consequences for the client and, in itself, is a positive step taken by the lawyer to protect the client's confidential information that should be considered in any evaluation of the lawyer's conduct under Model Rule 1.6.

III. THE EMERGENCE OF COOPERATION AS AN ETHICAL IMPERATIVE

The 20/20 Commission was spot on when it stated: “[T]echnology has irrevocably changed and continues to alter the practice of law in fundamental ways.”⁴⁷ That trend, along with globalization, “ha[s] fueled and continue[s] to spur dramatic changes to the legal profession and ha[s] given rise to new ethics issues that the 20/20 Commission’s proposals ... [sought] to address,” including through the amendments discussed above.⁴⁸ Yet, arguably the most significant development in professional responsibility that has been spurred in recent years by the many challenges associated with electronic discovery has neither resulted from, nor required, any amendments to the Model Rules. Specifically, the inherent complexity and sheer volume of information that must be navigated and the staggering costs that can result in the absence of diligence and candor have led courts, commentators, and practitioners increasingly to recognize that in many, if not most or all, cases, the interests of all parties are often best served when counsel approach electronic discovery in a cooperative manner and, furthermore, that such cooperation is not only consistent with, but in many circumstances required by, most rules of professional conduct and civil procedure.⁴⁹

⁴⁷ 20/20 REPORT: INTRODUCTION AND OVERVIEW, *supra* note 4, at 3.

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, FED. R. CIV. P. 1 (“These rules ... should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”); FED. R. CIV. P. 26(g) (requiring that discovery requests and responses be signed and providing that signature certifies that requests, responses, and objections are “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation” and are

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The Sedona Conference explained the ethical imperative of cooperation in discovery in its watershed *Cooperation Proclamation*:

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. 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.⁵⁰

As of October 2012, approximately 135 judges had endorsed the *Cooperation Proclamation*,⁵¹ along with “trial attorneys, corporate counsel, government lawyers and others” who have “pledg[ed] to reverse the legal culture of adversarial discovery that is driving up costs and delaying justice”⁵²

Most recently, in *Kleen Products, LLC, et al. v. Packaging Corp. of America, et al.*, a case closely watched by the e-discovery community, Magistrate

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“neither unreasonable nor unduly burdensome or expensive”); MODEL RULES OF PROF’L COND. R. 3.2 (Expediting Litigation); MODEL RULES OF PROF’L COND. R. 3.3 (Candor Toward the Tribunal); MODEL RULES OF PROF’L COND. R. 3.4 (Fairness to Opposing Party and Counsel); *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008) (Grimm, M.J.) (“It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot ‘behave responsibly’ during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.”); *Kleen Prod. LLC*, *supra* note 27, at *58.

⁵⁰ The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 (Supp.) Sedona Conf. J. 331, 331 (2009) (emphasis in original); *see also* The Sedona Conference, *The Case for Cooperation*, 10 (Supp.) Sedona Conf. J. 339 (2009)..

⁵¹ *Kleen Prod. LLC*, *supra* note 27, at *58.

⁵² *Cooperation Proclamation*, *supra* note 50.

Judge Nolan of the Northern District of Illinois—widely recognized as a thought leader in matters related to electronic discovery and a co-founder and former co-chair of the Seventh Circuit Electronic Discovery Pilot Program—issued a lengthy opinion that starts by quoting the “twin duties of loyalty” passage from the *Cooperation Proclamation*, then proceeds to address a series of discovery disputes through the lens of cooperation and the related doctrine of proportionality.⁵³ Judge Nolan ultimately draws three lessons from *Kleen Products* about cooperation:

First, the approach should be started early in the case. It is difficult or impossible to unwind procedures that have already been implemented. Second, in multiple party cases represented by separate counsel, it may be beneficial for liaisons to be assigned to each party. Finally, to the extent possible, discovery phases should be discussed and agreed to at the onset of discovery.⁵⁴

Finally, a number of courts have established pilot programs directed entirely or partly at electronic discovery,⁵⁵ with the goal of streamlining the discovery process and encouraging cooperation in order to effectuate the “paradigm shift” called for by the *Cooperation Proclamation* and to achieve the overarching goal of the Federal Rules, placed appropriately in FED. R. CIV. P. 1, to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

⁵³ *Kleen Prod. LLC*, *supra* note 27.

⁵⁴ *Id.* at *59.

⁵⁵ *See, e.g.*, Seventh Circuit Electronic Discovery Pilot Program, <http://www.discoverypilot.com>; Southern District of New York Standing Order, In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf; District of Delaware, Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”), <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf>.

IV. CONCLUSION

The technology relevant to electronic discovery is constantly and rapidly evolving, and the e-discovery lawyer must stay abreast of that evolution in order to provide competent representation to clients. The recent amendments to the ABA Model Rules of Professional Responsibility attempt to address the lawyer's role with respect to rapidly changing technology. A slight change in Comment 8 to Model Rule 1.1 may have widespread and long-lasting implications for what it means to be a "competent" lawyer in the 21st century. It is clear that lawyers must find a balance between maintaining an understanding of technology sufficient to provide competent representation, on one hand, yet not becoming so mired in endless intricacies that they are neither efficient nor effective in handling the substantive issues in dispute. For many attorneys, particularly those with the luxury of practicing in firms with colleagues who concentrate in such matters, the best approach will be to maintain the baseline understanding required of all lawyers by Model Rule 1.1 and to leverage the greater knowledge and expertise of such colleagues as needed in specific cases; there is simply too much technology, growing too fast and changing too quickly, for most lawyers to keep up with all of it, on top of staying abreast of one or more substantive areas of law in which they practice. Such is the nature of e-discovery in the digital age.