

Ethics and Technology at the Intersection of Proportionality and Scope of Discovery

ETHICS AND TECHNOLOGY AT THE INTERSECTION OF PROPORTIONALITY AND SCOPE OF DISCOVERY

I. OVERVIEW

- A. Beyond an attorney's ethical requirement of competence with technology, there are other rules of professional conduct that may be easy to miss as applicable to a litigator's discovery practice.
- B. The rules calling for candor to the court and fairness to the opposing party and counsel may be implicated when an attorney negotiates or uses technology in the realm of proportionality or scope of discovery.

II. THE RULES

A. ABA Model Rule of Professional Conduct 3.3: Candor Toward the Tribunal

1. Rule 3.3(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;**
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed to opposing counsel; or**
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."**

- 2. Rule 3.3(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."

- 3. Rule 3.3(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."

4. Rule 3.3(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.”

B. ABA Model Rule of Professional Conduct 3.4: Fairness to Opposing Party & Counsel

1. **Rule 3.4(a): “A lawyer shall not 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”**
2. Rule 3.4(b): “A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law”
3. Rule 3.4(c): “A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists”
4. **Rule 3.4(d): “A lawyer shall not in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party”**
5. Rule 3.4(e): “A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issues except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused”
6. Rule 3.4(f): “A lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”

III. THE SCENARIOS

A. Identification of Responsive and Discoverable Documents that Exist Outside of Search Parameters

1. After you have decided on a search methodology (search terms, TAR, CAL, SAL, etc.), you identify additional documents—outside the scope of those parameters—that are responsive and discoverable (via early case assessment, preliminary investigation, client sent them to you, click outside of where you’re supposed to, etc.); do you have an ethical obligation to produce those documents? Do you have an ethical duty to expand your search (search terms/custodians/etc.) and review to include similar documents?
 - a. Rule 3.4(a) prohibits a lawyer from obstructing “another party’s access to evidence” or concealing “a document or other material having potential evidentiary value”
 - b. Rule 3.4(d) prohibits a lawyer from failing “to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party”
 - c. On the one hand, it’s a no-brainer; after all, search methodologies are merely tools to identify responsive documents
 - d. On the other hand, producing parties almost always know of additional sources of responsive and discoverable documents that have not been produced, but producing parties do not have an obligation to produce every responsive and discoverable document; it’s understood that scoping a search (e.g., custodian limitations, search terms, TAR) will result in responsive and discoverable material being left unproduced

B. Resisting Discovery on Proportionality Grounds

1. When opposing requested discovery on proportionality grounds (arguments related to an ESI protocol, a discovery request, a motion to compel, etc.), what do you divulge to the requesting party? What do you represent to the court?
 - a. In addition to the aforementioned Rules 3.4(a) and (d) (prohibiting concealing documents from opposing counsel and requiring reasonably diligent efforts to comply with discovery requests, respectively), which apply here too, Rule 3.3(a) prohibits a lawyer from knowingly making “a false statement of fact” and from offering “evidence that the lawyer knows to be false.”

- b. In general, and consistent with Sedona Principle 6, the producing party is not obligated to open the hood for the requesting party on discovery processes and search methodologies. *See, e.g., Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020) (“Plaintiffs’ insistence that the Cirty must collaborate with them to establish a review protocol and validation process has no foothold in the federal rules governing discovery.”); *Kaye v. New York City Health & Hosps. Corp.*, No. 18-CV-1237 (JPO) (JLC), 2020 WL 283702, at *2 (S.D.N.Y. Jan. 21, 2020) (“When documents are produced in discovery, whether they be produced electronically or otherwise, the Court does not believe that, in the first instance, the receiving party has a right to examine and evaluate the way the production was made or require collaboration in the review protocol and validation process.”) (citing Sedona Principle 6). But where a producing party agrees to collaborate on a search methodology with the requesting party, a court may hold the producing party to that agreement. *See In re Valsartan, Losartan & Irbesartan Prods. Liab. Litig.*, No. 19-2875 (RBK/JS), 2020 WL 7054284 (D.N.J. Dec. 2, 2020) (“The Court agrees with the line of cases that holds that a producing party has the right in the first instance to decide how it will produce its documents. *Hyles, supra*, at *2. As will be discussed, however, this general principle is trumped by the requirements in an agreed upon ESI Protocol memorialized in a Court Order.”).
 - c. But when a producing party is arguing that requested discovery is disproportionate, a bald objection will not suffice. Some quantification of the burden—by the producing party—may be necessary. *See* Fed. R. Civ. P. 26 advisory committee note to 2015 amendments (“A party requesting discovery, for example, may have little information about the burden or expense of responding.”).
 - d. How much should you disclose to opposing counsel to avoid requiring court intervention? To the extent you require court intervention, will the court agree that what you have disclosed is enough?
2. Are the expenses you are claiming in your argument reflective of the costs or cost savings associated with the technologies you will actually end up using in your process? For example, do you have to disclose information relating to reduced burden/volume associated with applying de-duplication, TAR/CAL/SAL, threading, and other analytics (e.g., communications analysis, conceptual analytics)? Is this information material to the other party’s/the court’s assessment? To what extent do the costs of procuring those technologies and/or training them factor into the burden calculation?

3. The reality is that (1) review burden isn't the sole measure of proportionality (not only are there are five factors to consider other than burden, but there even the burden factor is impacted by more than just review (identification, collection, processing, hosting, etc.) and (2) the cost of review is not entirely predictable

Hurley v. BMW of N. Am., LLC, No. 18-cv-05320-JD (E.D. Pa. Apr. 27, 2021) (“Turning to the remainder of the analysis required under Rule 26(b)(1), there has been precious little information supplied that would suggest that production of the three categories of documents would be disproportionate to the needs of this case. At the hearing BMW acknowledged with admirable candor that there would be little expense or burden associated with the production of the three categories of documents, as they already have been digitized and indexed for production in the *Bang* litigation. Plaintiffs seek only a fraction of the documents produced in *Bang*. The issues at stake in this litigation are important to the parties and to the wider public: there is widespread litigation involving the N63 engine, as the parties’ papers attest. The amount in controversy is not high, but neither is the cost of the discovery sought. BMW has access to the documents, and Plaintiffs do not. BMW has more resources than Plaintiffs. The documents stand some likelihood of being important to the resolution of issues in this case. The burden and expense of producing the documents, which is minimal, do not outweigh the likely benefits of production. *See Fed. R. Civ. P. 26(b)(1)*. . . . I am directing narrowly tailored production of three categories of documents that are relevant and proportionate to the needs of the case.”)

C. Relevance Redactions and Production of Contextual ESI

1. What about when you want to redact irrelevant information from an otherwise responsive and discoverable document? When you produce text messages, instant messages, or social-media communications, do you have an obligation to produce contextual messages, posts, and comments?
 - a. Again, Rule 3.4(a) prohibits a lawyer from unlawfully obstructing “another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”
 - b. With respect to relevance redactions, some courts have permitted such redactions while others have prohibited them. *See Bonnell v. Carnvial Corp.*, No. 13-22265-CIV-WILLIAMS/GOODMAN, 2014 WL 10979823 (S.D. Fla. Jan. 31, 2014) (“it appears there is virtually an even split on this issue”).
 - i. On the one hand, requesting parties might be concerned that relevance redactions might be improperly applied to relevant material and that important context might be redacted

- ii. On the other hand, a requesting party is not entitled to sensitive information (competitive business information, personal information, PII, PHI, etc.) that is immaterial to the claims and defenses and unnecessary for providing context
- c. With respect to contextual content, a court recently ordered both parties to produce context-related text messages. *Sandoz, Inc. v. United Therapeutics Corp.*, No. 19-cv-10170, 2021 WL 2453142 (D.N.J. June 16, 2021); *Sandoz, Inc. v. United Therapeutics Corp.*, No. 19-cv-10170, 2021 WL 1192664 (D.N.J. Mar. 29, 2021).