
# Monday, October 25
# 2:30pm-4:00pm

# 311 - Ethical Challenges of Electronic Discovery

**Don Broadfield**
*Senior Attorney*
American Airlines

**Andrea Marshall, Esq.**
*Discovery Services Consultant*
Kroll Ontrack

**Cynthia Nichols**
*Litigation Counsel*
Taco Bell Corporation

**Neil Vachhani**
*Discovery Services Consultant*
Kroll Ontrack

# Faculty Biographies

**Don Broadfield**

Donald E. Broadfield is trademark counsel for American Airlines, Inc. in Fort Worth, TX.

His previous experience includes work as an associate in antitrust & trade regulation law for Morgan Lewis & Bockius; and work in mergers & acquisitions for Crowell & Morning.

His publications include authored sections of Antitrust Evidence Handbook, 2d ed.; Antitrust Law Developments, 5th ed., 2002 Annual Review; Antitrust Law Developments, 5th ed., 2003 Annual Review; Model Jury Instructions in Civil Antitrust Cases, 2d ed.

He received a BGS from the University of Kentucky and graduated from Case Western Reserve University School of Law.

**Andrea Marshall**

Andrea S. Marshall is a Kroll Ontrack Discovery Services consultant based in Dallas, Texas. Ms. Marshall advises corporate professionals on the nuances and intricacies associated with electronically stored information (ESI) for discovery. A practiced expert in discovery case law, methodologies, tools and technology, Ms. Marshall works with clients to define repeatable and defensible discovery strategies that optimize efficiencies and reduce time and costs.

Ms. Marshall has more than five years of direct experience as a litigator and legal consultant. After a judicial clerkship in the Montgomery County Circuit Court of the State of Maryland, she practiced law as an associate at the law firm of Eccleston & Wolf in Baltimore, Md. There, she primarily litigated professional liability matters in defense of legal and financial professionals. Prior to joining Kroll Ontrack, Ms. Marshall also participated on the electronic discovery teams of toxic tort, telecom anti-trust and products liability matters.

Ms. Marshall regularly conducts CLE presentations and seminars for legal professionals about managing complex investigations and legal discovery where electronically stored information is an issue.

Ms. Marshall received her JD and Master's degree from the University of Maryland, and her BA from Trinity University in San Antonio, Texas.

**Cynthia Nichols**
Taco Bell Corporation

**Neil Vachhani**
Kroll Ontrack


October 25, 2010

# Ethical Challenges of Electronic Discovery

Cynthia Nichols, Litigation Counsel, Taco Bell Corporation
Don Broadfield, Senior Attorney, American Airlines
Neil Vachhani, Esq., Discovery Services Consultant, Kroll Ontrack
Andrea Marshall, Esq., Discovery Services Consultant, Kroll Ontrack

BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Discussion Overview

- The Rules in Relation to E-Discovery
- Mining of Metadata
- New Technologies & Issues
- Parting Thoughts & Questions


# The Rules in Relation to E-Discovery


## Ethics & Electronic Evidence

- Ethical obligations do exist when it comes to electronic discovery – even if they have yet to be formally recognized
- In the past several years, the courts more clearly articulated counsel's affirmative duty to act competently and diligently when assessing and integrating electronic information into their cases
- In 2010 and beyond, counsel can expect to be held to a higher standard than ever before


# Model Rules of Professional Conduct

- Rule 1.1
- Rule 1.13
- Rule 1.6
- Rule 3.3
- Rule 3.4
- Rule 4.4
- Rule 8.4

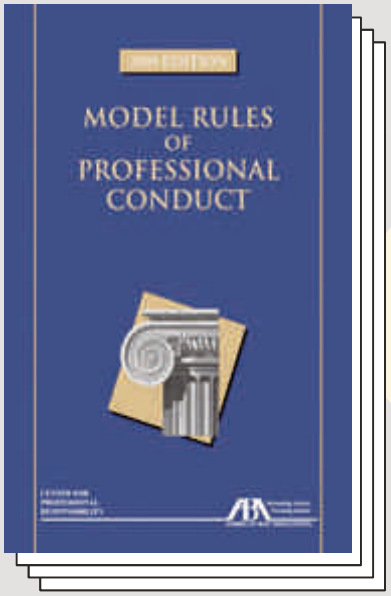
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Rule 1.1: Competence




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 Rule 1.1 Competence*


## Duty of Competence

- Competence in locating, reviewing and producing electronically stored information in litigation and regulatory work is among the greatest challenges for lawyers today
- Whether dealing with e-mail, databases, network share data or other loose electronic files, counsel's ability to examine and produce this information is central to managing discovery in the modern age


## **Duty of Competence:** Legal Knowledge & Skill

- When to hire a consultant:
  - **Anytime the training and experience of your staff or your client's staff would make you uncomfortable** if you had to call them as witnesses
  - Anytime **conflicts of interest** might really hurt your case
  - Anytime the current **workload of your staff would prevent them from focusing** on your case
  - Anytime your **staff lacks the tools and equipment** to handle the job

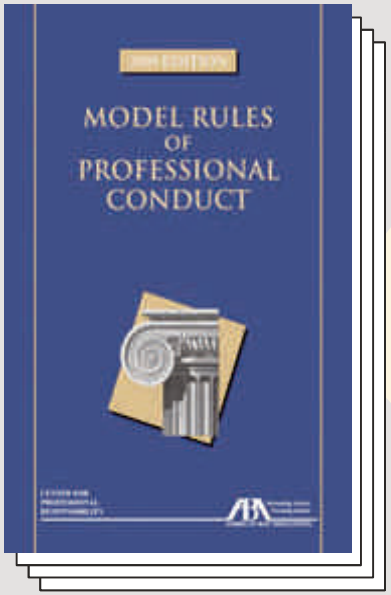
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Rule 1.13: Organization As Client




(b) If a lawyer for an organization knows [associated person with organization] is engaged in action, intends to act or refuses to act in a matter…that is a violation of a legal obligation to the organization, or…is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization

*- ABA Model Rule 1.13 Organization As Client*

## **Rule 1.13:** Organization As Client

- Although not specifically stated, electronic discovery failures may be presumed to be:
  - "A violation of a legal obligation to the organization" that is "likely to result in substantial injury to the organization"
- Case law is rife with sanctions against corporations for improper discovery practices
  - **In-house counsel has even been sanctioned for discovery failures**
    - *Swofford v. Eslinger*, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009) (sanctioning in-house counsel for failure to implement a litigation hold and ensure preservation).



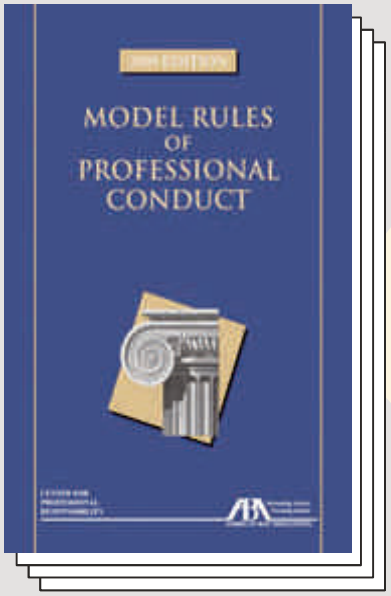
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Rule 1.6: Confidentiality




A lawyer must act competently to safeguard information relating to the representation of a client **against inadvertent or unauthorized disclosure** by the lawyer…

*Comment 16, ABA Model Rule 1.6 Confidentiality of Information*

## Duty of Confidentiality: Privilege Issues

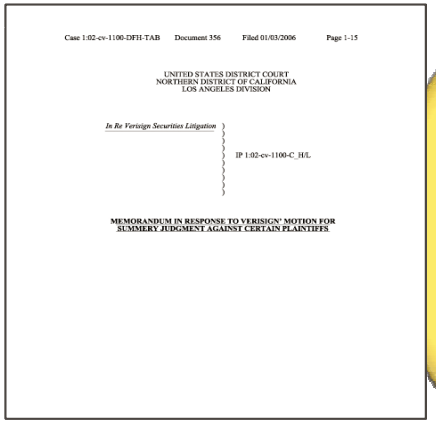
- Protecting privilege in the era of electronic discovery is growing increasingly difficult given the volume of data
- Counsel should consider entering into a protective order, clawback agreement or quick peek agreement
  - Prevent inadvertent production of privileged or confidential information
- Counsel should also familiarize themselves with Fed.R.Evid. 502

BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## *Alamar Ranch, LLC v. County of Boise:*
## Attorney Beware



Case 1:02-cv-1100-DFH-TAB Document 356 Filed 01/03/2006 Page 1-15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

*In Re Verisign Securities Litigation*

IP 1:02-cv-1100-C_H/L

MEMORANDUM IN RESPONSE TO VERISIGN' MOTION FOR SUMMERY JUDGMENT AGAINST CERTAIN PLAINTIFFS

- **Court found privilege was waived regarding e-mails sent via company e-mail addresses using company computers**

- **Attorney should have been aware client's employer would be monitoring and accessing e-mail sent to that address since it is now a common practice**

*-Alamar Ranch, LLC v. County of Boise,* 2009 WL 3669741(D. Idaho. Nov. 2, 2009).

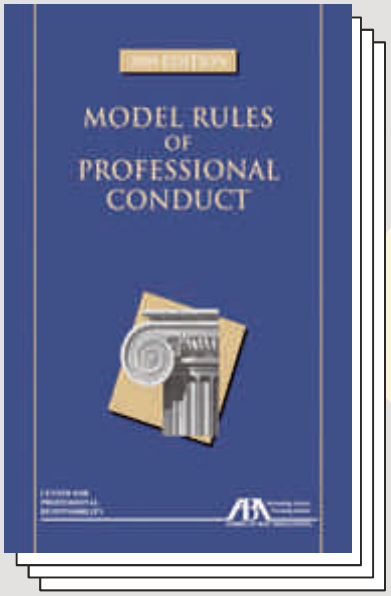
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Rule 3.3: Candor Toward The Tribunal




(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law…

***

(3) offer evidence lawyer knows to be false

*- ABA Model Rule 3.3 Candor Toward The Tribunal*

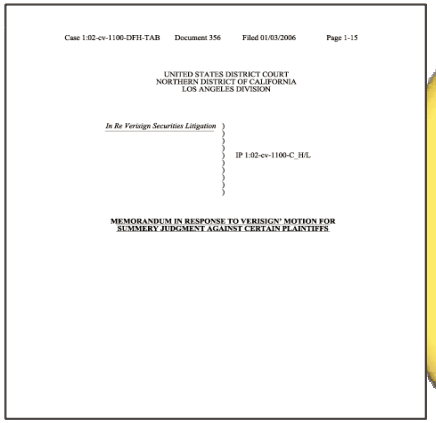
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

# Duty of Candor



Case 1:02-cv-1100-DFH-TAB Document 356 Filed 01/03/2006 Page 1-15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

*In Re Verisign Securities Litigation*

IP 1:02-cv-1100-C_H/L

MEMORANDUM IN RESPONSE TO VERISIGN' MOTION FOR SUMMERY JUDGMENT AGAINST CERTAIN PLAINTIFFS

- **Defendant improperly limited discovery search, made false, misleading and evasive responses, and willfully violated discovery rules**

- **Court found the defendant, a "sophisticated multinational corporation experienced in litigation," deserved a default judgment sanction worth $8 million**

*-Magaña v. Hyundai Motor Am.*, 220 P.3d 191 (Wash. Nov. 25, 2009).

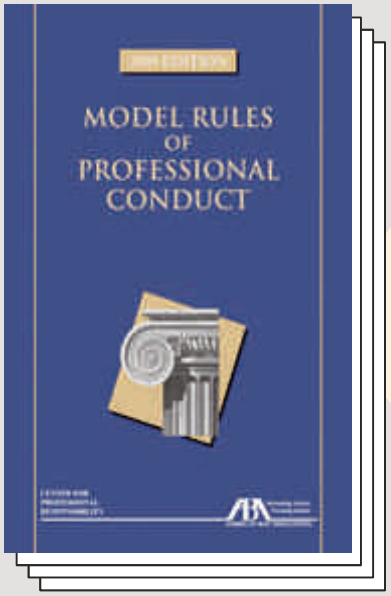
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## **Rule 3.4:** Fairness
*Preservation of Discoverable Documents & Data*




A lawyer shall not:
(a) 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….

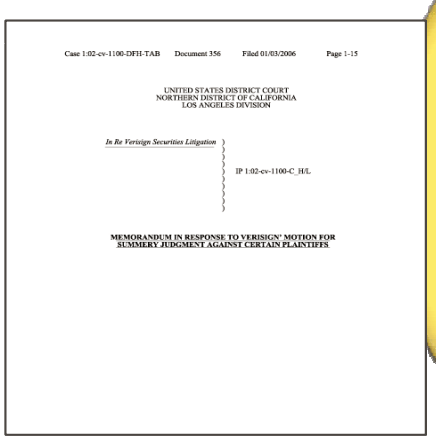
*- ABA Model Rule 3.4 Fairness to Opposing Party and Counsel*

BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Duty to Preserve



Case 1:02-cv-1100-DFH-TAB Document 356 Filed 01/03/2006 Page 1-15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

*In Re Verisign Securities Litigation*

IP 1:02-cv-1100-C_H/L

MEMORANDUM IN RESPONSE TO VERISIGN' MOTION FOR SUMMERY JUDGMENT AGAINST CERTAIN PLAINTIFFS

- **"It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation."**
*-Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

**"[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."**
*-Treppel v. Biovail Corp.*, 2008 WL 866594 (S.D.N.Y. April 2, 2008)(quoting *Zubulake v. UBS Warburg LLC* ("*Zubulake IV*"), 220 F.R.D. 212 (S.D.N.Y. 2003)).

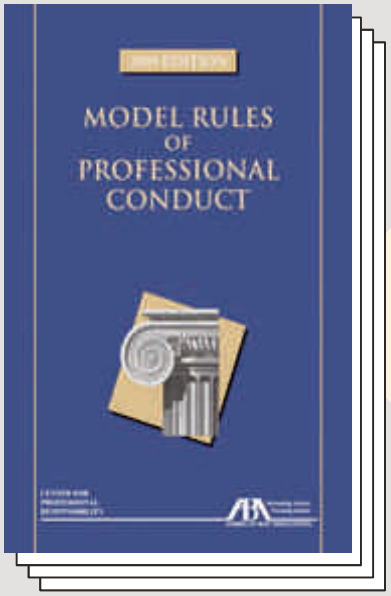
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## **Rule 3.4:** Fairness
*Unobstructed Process & Access to Evidence*




A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence….

*- ABA Model Rule 3.4 Fairness to Opposing Party and Counsel*

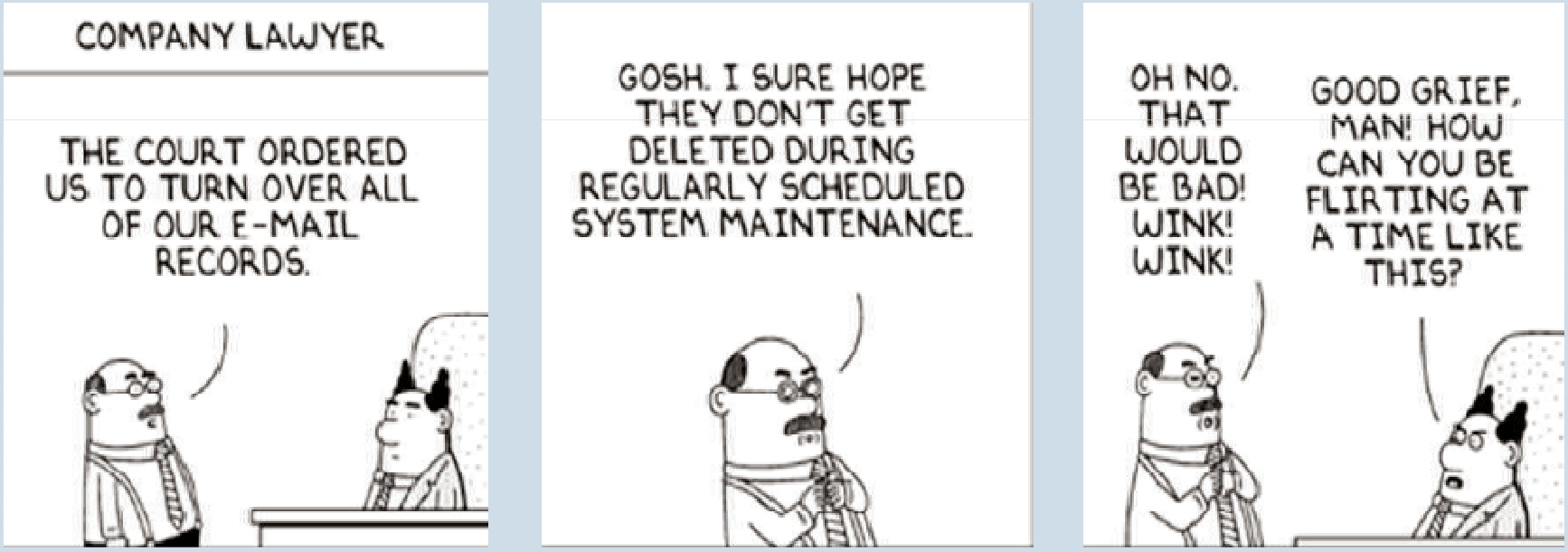
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

# **Duty of Fairness:** Unobstructed Process & Access to Evidence



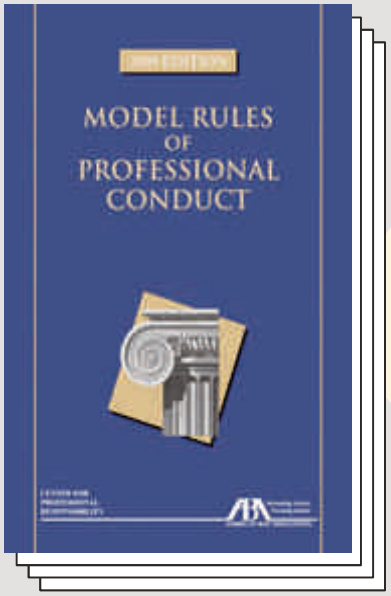

*Scott Adams, Inc./Dict. by UFS, Inc.*

BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## **Rule 3.4:** Fairness
*Non-Frivolous Litigation Tactics*




A lawyer shall not:
(d) 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….

*- ABA Model Rule 3.4 Fairness to Opposing Party and Counsel*

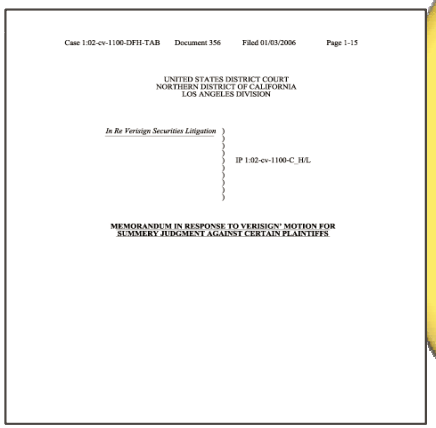
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Courts Require Efficiency, Expertise & Amicability in Discovery



Case 1:02-cv-1100-DFH-TAB Document 356 Filed 01/03/2006 Page 1-15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

*In Re Verisign Securities Litigation*

IP 1:02-cv-1100-C_H/L

MEMORANDUM IN RESPONSE TO VERISIGN' MOTION FOR SUMMERY JUDGMENT AGAINST CERTAIN PLAINTIFFS

- After failing to meet discovery deadlines, court issued a "wake-up call" to defendants to "tighten up discovery practices"
- Emphatically directed opposing counsel to act reasonably and in good faith, working through "disagreements amicably"
  - Court "has neither the time nor the resources to resolve every discovery agreement"

*-Camesi v. Univ. of Pittsburgh Med. Ctr.*, 2010 WL 2104639 (W.D.Pa. May 24, 2010).

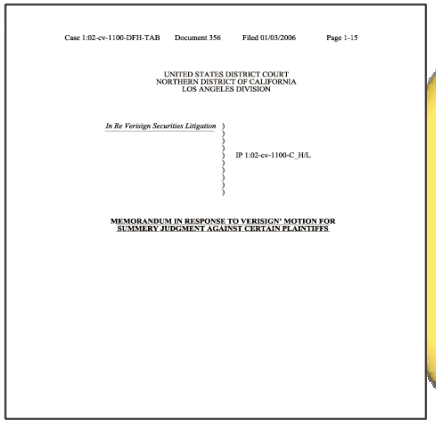
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Courts Demand Cooperation in Discovery



Case 1:02-cv-1100-DFH-TAB Document 356 Filed 01/03/2006 Page 1-15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

*In Re Verisign Securities Litigation*

IP 1:02-cv-1100-C_H/L

MEMORANDUM IN RESPONSE TO VERISIGN' MOTION FOR SUMMERY JUDGMENT AGAINST CERTAIN PLAINTIFFS

- **"Discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose, and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter"**

*-Mancia v. Mayflower Textile Servs. Co.*, 2008 WL 4595175 (D.Md. Oct. 15, 2008).

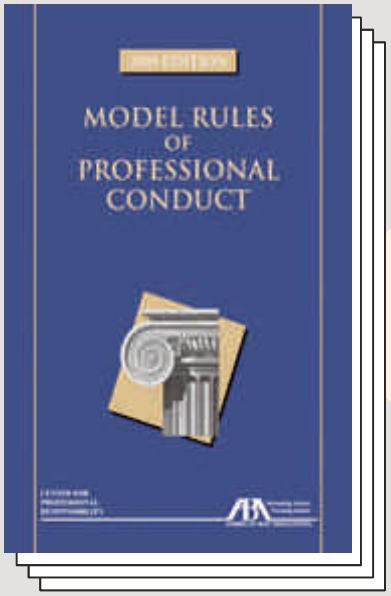
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## **Rule 4.4:** Respect for Rights of Third Persons




It is professional misconduct for a lawyer to:
violate…the Rules of Professional Conduct…
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation…
(g) Knowingly fail to comply with a final court order…

*- ABA Model Rule 8.4 Maintaining The Integrity Of The Profession*


## Respect for Rights of Third Persons

- Issue of defendants' lawyers review and use of privileged e-mails sent between plaintiff and her lawyer in recent case
- Court determined attorneys' retention of a computer forensic expert to retrieve the privileged e-mails and the subsequent use of those e-mails violated Rule 4.4(b)
  - Attorneys' did not set aside the arguably privileged messages and failed to notify the plaintiff or seek court permission for use
- Referred to trial court what remedy was appropriate (including disqualification of the firm)
  - *Stengart v. Loving Care Agency, Inc.*, 2010 WL 1189458 (N.J. Mar. 30, 2010).

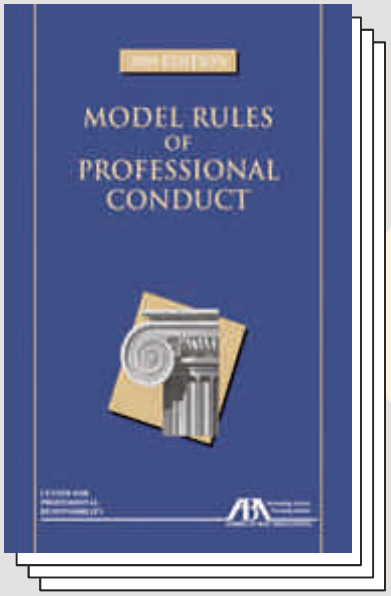
BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## **Rule 8.4:** Maintaining the Integrity of the Profession




It is professional misconduct for a lawyer to:
violate…the Rules of Professional Conduct…
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation…
(g) Knowingly fail to comply with a final court order…

*- ABA Model Rule 8.4 Maintaining The Integrity Of The Profession*


## **Maintaining the Integrity of the Profession:** Abuse May Equal Default Judgment

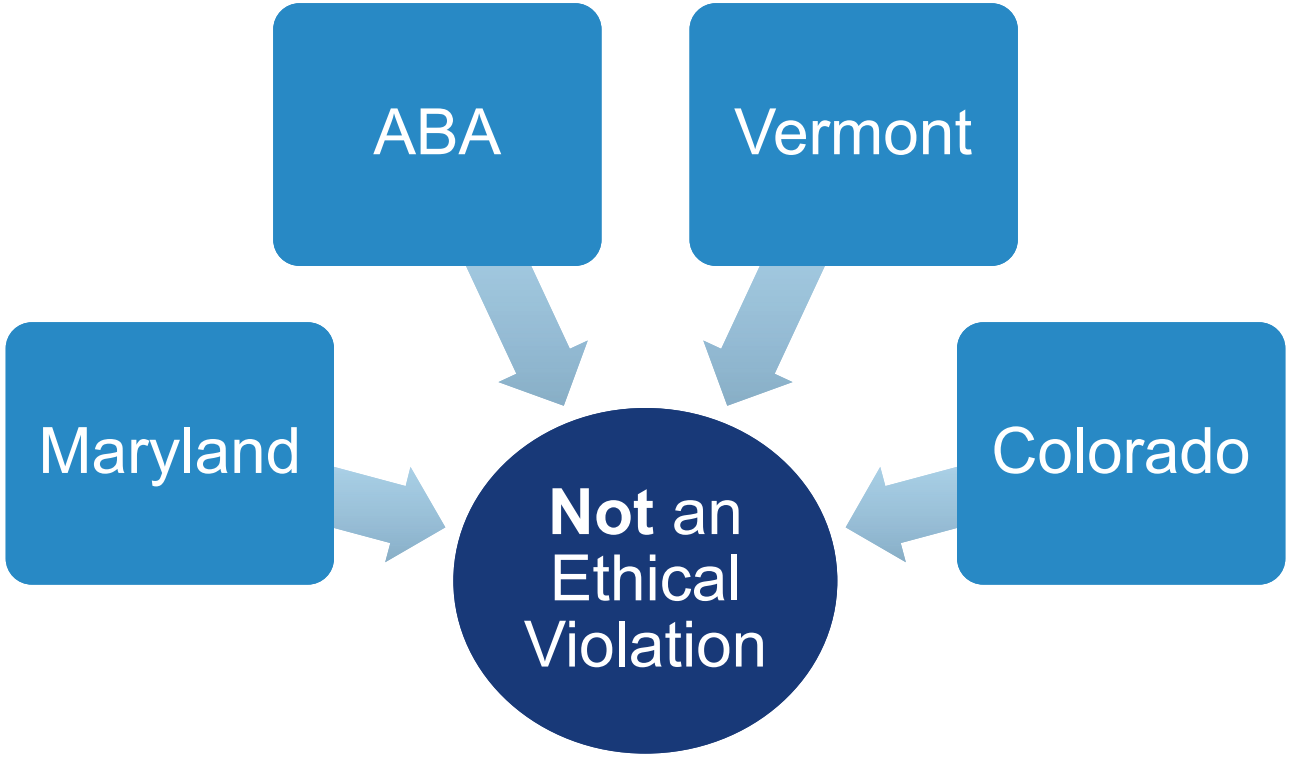
- Court of appeals determined defendant had stonewalled in producing highly relevant documents resulting in severe prejudice to the plaintiff
  - **Repeated and egregious violations of discovery laws threatened the integrity of the judicial process**
  - Reversed the trial court judgment and remanded for imposition of default judgment sanction
- Awarded **$402,187** in attorneys' fees to plaintiff
  - *Doppes v. Bentley Motors, Inc.,* 94 Cal. Rptr. 3d 802 (Cal. App. 4 Dist. 2009).


# Mining of Metadata


## Metadata Issues

- **Sender's Duty:**
  - Majority of jurisdictions impose a "reasonable care" standard
- **Recipient Review of Metadata:**
  - Jurisdictions possess divergent views on this issue
  - Four jurisdictions do not view metadata mining as an ethical violation, while eight do
  - Two vary on case-by-case basis
- **Notification by Recipient:**
  - Majority of jurisdictions addressing this topic do require notification, largely if recipient knows or should know disclosure was inadvertent

## Mining of Metadata: *Not* an Ethical Violation



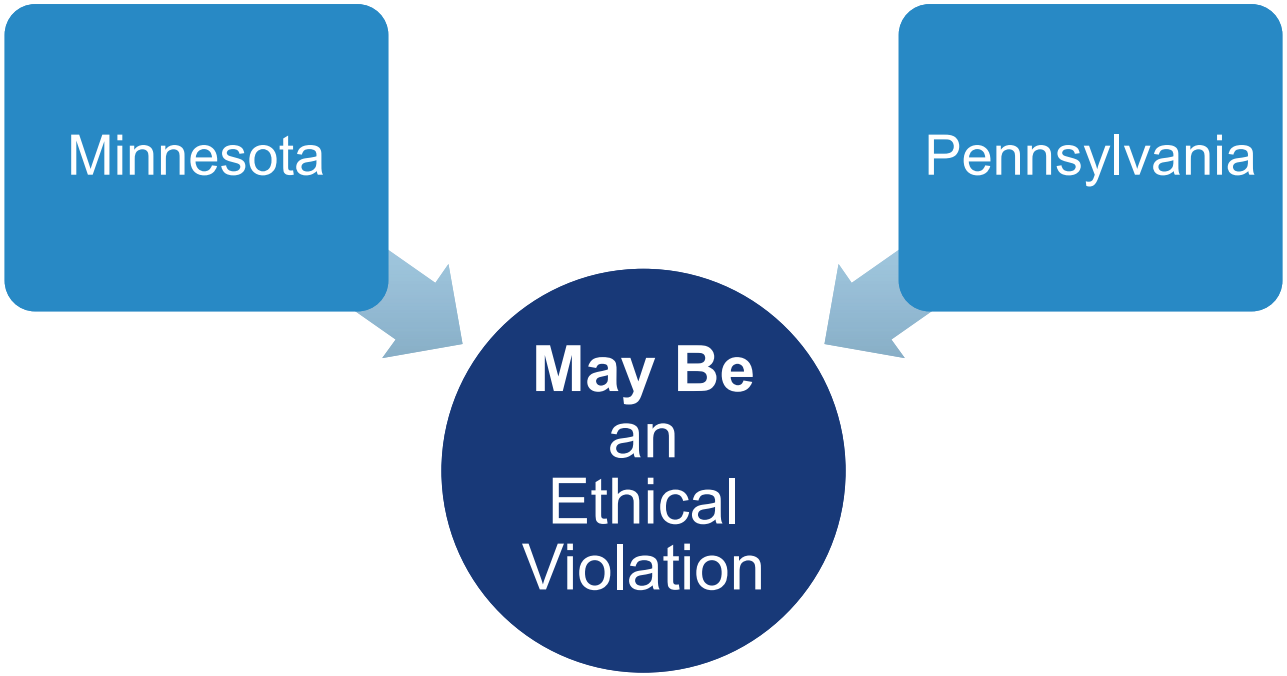

Source: http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html



BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

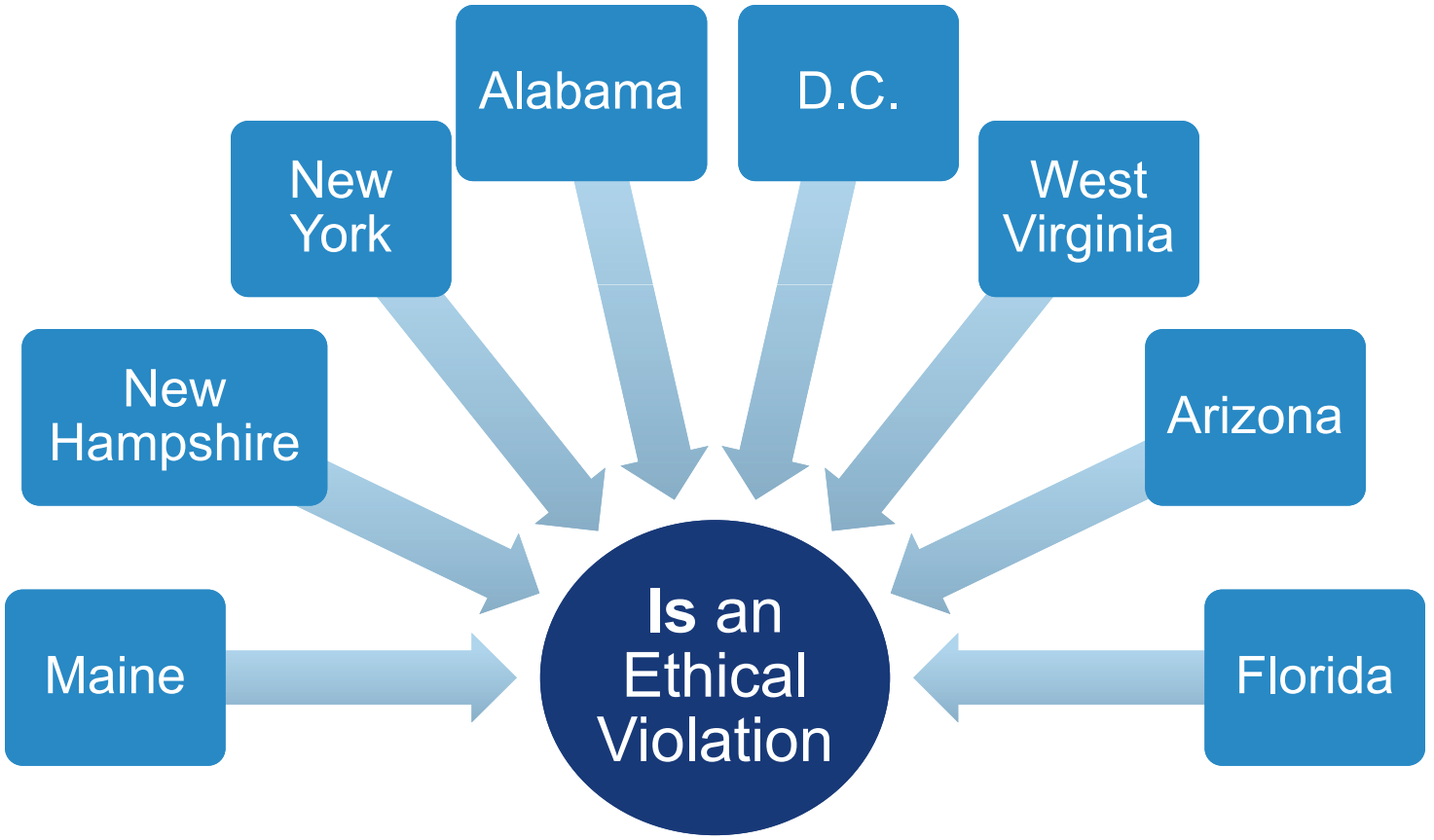
# Mining of Metadata: *May Be* an Ethical Violation




Source: http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

## Mining of Metadata: *Is* an Ethical Violation




Source: http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html


# New Technologies & Issues

BE THE SOLUTION.

ACC's 2010 Annual Meeting • October 24-27

Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

## Social Networking & Blogs

- Use of social networking sites and blogs creates potential for ethical violations or disciplinary action for misconduct
  - Raises confidentiality, integrity and propriety issues
  - Attorneys cannot "friend under false pretenses" to gain access to profiles and information otherwise kept private
- As an example, the Florida Bar reprimanded and fined an attorney $1,200 for violating ethics rules, by writing on a courthouse blog the judge was an "evil, unfair witch" with an "ugly, condescending attitude"

## Cloud Computing

- Cloud computing raises legal ethics issues, particularly around competence and confidentiality of information as information stored in the cloud is outside the lawyer's control, and is often in numerous locations, including different countries
- Lawyers must ensure steps are taken to safeguard security and confidentiality of client information
- North Carolina Bar Association drafted proposed ethical opinion on lawyers' use of software as a service "SaaS"
  - Rules a law firm may contract with a vendor of SaaS provided the risks that confidential client information may be disclosed or lost are effectively minimized


# Parting Thoughts & Questions

KROLL ONTRACK®

## Ethical Obligations – An Inherent Part of the E-Discovery Process

By Andrea S. Marshall, Esq., and Neil Vachhani, Esq.[1]

Electronic evidence poses new ethical dangers for practicing attorneys. While ethical obligations specifically regarding electronic discovery have yet to be formally recognized, courts are increasingly articulating counsel's affirmative duty to act competently and fairly when integrating electronic information into their case. Understanding the details of each e-discovery phase and how that corresponds to the Model Rules of Professional Conduct is absolutely vital in avoiding judicial sanctions, ethical violations and malpractice claims.

### Competence

Counsel must provide competent representation to a client, including the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[2] A relatively new challenge for many lawyers is the responsibility is to locate, review and produce ESI in litigation and regulatory work. Whether dealing with e-mail, databases, network share data or other loose electronic files, counsel's ability to examine and produce this information is central to managing discovery.

Competent knowledge and skill means counsel must accurately evaluate and understand their own, as well as their client's, technical skills and limits, and know when to hire a consultant. Additionally, courts will likely intervene if counsel falls short. In *Multiven, Inc. v. Cisco Systems, Inc.*, producing parties had rejected the idea of using an outside vendor and instead relied on a small handful of attorneys to review a "giant mass of information" without using search terms to narrow the amount of data.[3] The court, anticipating "no end in sight," ordered the parties to retain an outside vendor "to assist with this increasingly perilous situation" and appointed a Special Master to help the parties resolve subsequent discovery issues.

### Organization as a Client

If a lawyer for an organization knows a person associated with that organization "violates a legal obligation to the organization" or "is likely to cause substantial injury to the organization," then the lawyer "shall proceed as is reasonably necessary in the best interest of the organization."[4] Depending on the circumstances, electronic discovery failures may be presumed to be such a violation. Recent trends in case law support this presumption, as the frequency and amount of sanction awards for improper discovery practices are on the rise against corporations, and even against in-house counsel. In *Swofford v. Eslinger* for example, in-house counsel faced sanctions for failing to issue a legal hold, which resulted in the deletion of relevant e-mails and wiping of a laptop's hard drive.[5] In other recent cases, electronic discovery-related sanction awards have topped out at over $8 million.[6]

---

[1] Andrea Marshall is a discovery services consultant for Kroll Ontrack. In her role, Andrea advises corporate professionals on the nuances and intricacies associated with electronically stored information for discovery. Neil Vachhani is a discovery services consultant for Kroll Ontrack. In his role, Mr. Vachhani advises attorneys and other professionals on all facets of legal technology, including electronic evidence and discovery involving the exchange of ESI.

[2] ABA Model Rule of Professional Conduct (MRPC) 1.1 Competence.

[3] 2010 WL 2813618 (N.D. Cal. July 9, 2010).

[4] ABA MRPC 1.13 Organization as Client.

[5] 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009).

[6] *See, e.g. Magaña v. Hyundai Motor Am.*, 220 P.3d 191 (Wash. Nov. 25, 2009); *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D.Cal. Jan 7, 2008); *In re Hecker*, 2010 WL 654151 (Bkrtcy.D.Minn. Feb. 23, 2010).

KROLL ONTRACK®

## Confidentiality

The Model Rules state that "a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer"[7] and "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[8] The duty of confidentiality has long been intertwined with the issues of attorney-client privilege and work product doctrine, but given the now-constant expansion of the volume of electronic data, protecting privilege during discovery is growing increasingly difficult.

Protective orders, clawback agreements or quick peek agreements can be helpful to prevent inadvertent production of privileged or confidential information. While helpful, it is also important to note that these tools can never substitute for proper and thorough document review methods and quality control sampling. In *Mt. Hawley Insurance Co. v. Felman Production, Inc.*, the court found the plaintiff waived privilege by failing to perform critical quality control sampling and not taking reasonable steps to prevent disclosure.[9] In making its decision, the court noted that the disclosed e-mail was "a bell which cannot be unrung," emphasizing the importance of careful discovery precautions to protect privileged documents.

Courts have also recently been grappling with the issue of attorney-client privilege in conjunction with employees' expectation of privacy in the workplace and inadvertently disclosed communications sent from employer-issued electronic devices. In *Alamar Ranch, LLC v. County of Boise*, the court found privilege was waived regarding e-mails that an employee sent to her attorney using her company e-mail address and work computer.[10] Deeming it "common practice" for employers to monitor and access e-mails sent from their systems, the court stated that the "attorney should have been aware" of the decreased expectation of privacy and likelihood of waiver. In contrast, the court in *Stengart v. Loving Care Agency* found an e-mail to be privilege-protected when it was sent from an employer-issued computer using the employee's private, password-protected Yahoo! account.[11] In both of these cases, the existence, clarity and enforcement of the company's computer usage policies played into the issue of the employee's reasonable expectation of privacy.[12]

## Candor Toward the Tribunal

Model Rule 3.3 prohibits a lawyer from knowingly making "a false statement of fact or law" or offering "evidence the lawyer knows to be false." This duty of candor extends to electronic discovery as well. In *Magaña v. Hyundai Motor America*, for example, the court found that a defendant – a "sophisticated multinational corporation experienced in litigation" – improperly limited its discovery search, made false, misleading and evasive responses and willfully violated discovery rules, deserving of an $8 million default judgment sanction.[13]

---

[7] Comment 16, ABA MRPC 1.6 Confidentiality of Information.
[8] ABA MRPC 4.4 Respect for Rights of Third Persons.
[9] 2010 WL 1990555 (S.D.W. Va. May 18, 2010).
[10] 2009 WL 3669741 (D. Idaho Nov. 2, 2009).
[11] 2010 WL 1189458 (N.J. Mar. 30, 2010).
[12] *See also Leor Exploration & Prod. LLC v. Aguiar*, 2009 WL 3097207 (S.D. Fla. Sept. 23, 2009) (employee had no reasonable expectation of privacy since the employee handbook stated that all electronic communications were owned by the company).
[13] 220 P.3d 191 (Wash. 2009).

KROLL ONTRACK®

## Fairness

A lawyer's ethical duties relating to ESI also extend to his or her reasonable efforts to locate and produce relevant documents during discovery. Under the Model Rules, it is unethical for a lawyer to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[14] With regard to electronic discovery, this ethical duty plays out in conjunction with the duty to preserve evidence, which arises when the party anticipates litigation.[15] In an organization, preservation of relevant documents requires suspension of routine document retention policies and issuance of a legal hold.[16]

The duty of fairness further requires a "coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action,'" and courts routinely require efficiency, expertise and amicability in the process. Moreover, the Model Rules require lawyers to maintain the integrity of the profession, stating it is unethical to violate "the Rules of Professional Conduct, engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or "knowingly fail to comply with a final court order."[17] In one recent case, *Aliki Foods, LLC v. Otter Valley Foods, Inc.*, the court found that a party's "flagrant defiance" of court orders and discovery obligations resulted in "tremendous waste of resources – and largely for naught," leaving no "alternative to dismissal."[18] Among other conduct the court found to be "willful and in bad faith," the party alleged that a critical hard drive "failed" (suspiciously coinciding with the court's order to produce it) and later signed over the hard drive to a non-party after the court had ordered it to be forensically imaged, without ever having attempted to image the drive.

The ethical duty of fairness also prohibits lawyers from making a "frivolous discovery request or fail[ing] to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party."[19] Echoing the sentiments of many, one court stated it "has neither the time nor the resources to resolve every discovery agreement" and urged the parties to act reasonably and in good faith, and to work through their "disagreements amicably."[20]

## Conclusion

The connection between electronic discovery and current ethics rules is arguably growing stronger with each case issued. Advances in new technologies continue to add to the already gray area that is inherent in many of the ethical obligations lawyers must abide by. For instance, the use of social networking sites and blogs creates potential for violations or disciplinary action for misconduct, and raises serious confidentiality, integrity and propriety issues. Another recent technological trend – cloud computing – also raises interesting ethical issues, particularly around areas of competence and confidentiality of information. Information stored in the cloud is outside the lawyer's control and is often in numerous locations, including

---

[14] ABA MRPC 3.4 Fairness

[15] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2010 WL 184312 (S.D.N.Y. Jan 15, 2010).

[16] *Treppel v. Biovail Corp.*, 2008 WL 866594 (S.D.N.Y. Apr. 2, 2008 ) (quoting *Zubulake v. UBS Warburg LLC* ("*Zubulake IV*"), 220 F.R. D. 212 (S.D.N.Y. 2003)).

[17] ABA MRPC 8.4 Maintaining The Integrity Of The Profession

[18] 2010 WL 2982989 (D. Conn. July 7, 2010).

[19] ABA MRPC 3.4 Fairness; 8.4 Maintaining The Integrity Of The Profession

[20] *Camesi v. Univ. of Pittsburgh Med. Ctr.,* 2010 WL 2104639 (W.D. Pa. May 24, 2010); *see also Doppes v. Bentley Motors, Inc.,* 94 Cal. Rptr. 3d 802 (Cal. App. 4 Dist. 2009) (court held the defendant had stonewalled in producing highly relevant documents resulting in severe prejudice to the plaintiff, and the defendant's repeated and egregious violations of discovery laws threatened the integrity of the judicial process).

KROLL ONTRACK®

diverse countries with diverse laws. Lawyers must undertake efforts to ensure all client data stored in the cloud is secure and remains confidential. Social networking and cloud computing are merely the tip of the rapidly developing technology iceberg that lawyers must be on the lookout for. Developing a stronger understanding of electronic discovery and the interplay with ethical obligations will help lawyers ensure they are upholding the important oath integral to this grand profession.

## Extras from ACC

We are providing you with an index of all our InfoPAKs, Leading Practices Profiles, QuickCounsels and Top Tens, by substantive areas. We have also indexed for you those resources that are applicable to Canada and Europe.

Click on the link to index above or visit http://www.acc.com/annualmeetingextras.

The resources listed are just the tip of the iceberg! We have many more, including ACC Docket articles, sample forms and policies, and webcasts at http://www.acc.com/LegalResources.