Baker Hostetler

Ethics and Professionalism Issues Faced by Corporate Counsel When Dealing with Electronically Stored Information (ESI), Complex Discovery, Internal Investigations and Document Retention

Presentation to the Association of Corporate Counsel, Columbus Chapter

November 10, 2011

AGENDA

8:30 a.m. – 9:00 a.m.	**Registration**
9:00 a.m. – 10:15 a.m.	**E-Discovery: Ethical Issues at Play** A lawyer's professional and ethical obligations have direct bearing in the conduct of e-discovery. This 1.15-hour session will cover obligations in the collection and preservation process; obligations in the document review and production process; the preservation of confidential information and the sanctions for spoliation. *Judy Selby, Partner, Baker Hostetler* *James Bieker, Litigation Support Manager, Baker Hostetler*
10:15 a.m. – 10:30 a.m.	**Break**
10:30 a.m. – 11:45 a.m.	**Professionalism Considerations Regarding Discovery, Document Retention and Data Systems** Topics for discussion during this presentation will focus on the continuing need for professionalism in today's environment of electronic information with a special emphasis on the role of corporate counsel. *The Honorable Peggy L. Bryant, Judge, Tenth District Court of Appeals* *Jessica L. Mayer, Vice President - Managing Counsel, Cardinal Health* *Thomas L. Long, Partner, Baker Hostetler*
11:45 a.m. – 1:00 p.m.	**Lunch and Continued Discussions**

Baker Hostetler

The Ethics of E-Discovery

Judy Selby
James Bekier

November 10, 2011

Today's Agenda

1. ESI ethical issues as they relate to the Model Rules of Professional Conduct and Federal Rules of Civil Procedure
2. Obligations in the Collection and Preservation Process
3. Obligations in the Document Review and Production Process
4. Preservation of Confidential Information and Personally Identifiable Information (PII)
5. Sanctions for Spoliation and Adverse Inferences

The Ethics of E-Discovery

I. Model Rules of Professional Conduct

and

The Federal Rules of Civil Procedure

Ethics Basics

- There are 3 essential ethical tenants in E-discovery:
  - Competence
  - Confidentiality
  - Proper Supervision
- Sources of ethical obligations:
  - ABA Model Rules of Professional Conduct
  - Statutes/ case law of the state where the lawyer is licensed
  - Ethics advisory opinions
    - Serve as guidelines but in many states are non-binding
- Model Rules do not specifically mention or address e-discovery

E-Discovery Competence: Model Rule 1.1

- A lawyer must provide "competent representation," which means the lawyer must exhibit the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Model Rule 1.1)
- Principal areas for a basic E-Discovery competence:
  1. Knowing key differences of how ESI differs from paper
  2. Sophisticated understanding of the client's e-discovery systems
  3. Federal Rules of Civil Procedure as they relate to ESI (FRCP 26, 34, 16)
  4. Keeping up with changes in both technology and the law

How ESI Differs From Paper: Anyone Can Create It

1. ESI can be created by anyone with a computer.
- Goes beyond paper documents created by key employees which are maintained in the company filing system
- Can be created by anyone in the company who:
    - Sends an email
    - Creates word-processing documents
    - Prepares spreadsheets
    - Maintains databases

How ESI Differs From Paper: Metadata

2. Metadata is “data about data”

- Can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted
- Some metadata may be easily seen by users. Other metadata may be unavailable to computer users who are not technically adept to find it.
- Examples of metadata:
  - Name
  - Location
  - Format
  - Size
  - Dates (creation, last modification, last data access, last metadata modification),
  - File permissions (who can read the data, write to it, who can run it)

How ESI Differs From Paper: Deleted Data That Does Not Die

3. While paper can be destroyed, digital data can survive what the computer user thinks is deletion

- Deleted data may remain in whole or in part until storage media is overwritten or “wiped.”
- Even after the data has been wiped, information relating to it may remain on the computer.
- So: if data is moved to your trash bin and it is emptied, forensic experts still may be able to reconstruct it

How ESI Differs From Paper: Multiple Sources of Data

4. A key data custodian may have the same data stored in several places. Consider these possibilities:
    - Office computer and/or laptop
    - Office backup storage
    - Email systems
    - CDS/DVDs
    - Flash or “thumb” drives
    - Floppy disks
    - Home Computer and/or Personal Laptop
    - PDA/Blackberry
    - Instant messaging systems
    - Web-based storage
    - Office /home/cellphone voicemail
    - Printers/scanners/copiers w/ computer memory
    - Social Networking

How ESI Differs From Paper: Backup Tapes

5. Backup tapes can contain lots of information

- Typically used for disaster recovery purposes
- May be lots of backup tapes because backups are often duplicated
- There may be a daily backup tape, a weekly backup tape, a monthly backup tape

How ESI Differs From Paper: Identifying Key Players

6. Key players need to be identified quickly and documented

- With paper records: a company may keep the records for a long time
- With electronic information: any delay can result in the loss of information
- Examples: over-writing email retention policies or backup tape retention policies

How ESI Differs From Paper: Forms of Production

7. There are choices about the forms of production

- "Native" file as it exists on the other party's storage media, together with all the associated metadata
- TIFF or PDF to Bates-label the documents

Competence of Client ESI Systems and How to Search Them

- A lawyer must have sophistication in how the client stores/maintains electronic information, along with proper search and retrieval techniques
  - Client's methods for destroying /over-writing electronic information
- Document retention policy
- Client's data mapping and network infrastructure
- E-discovery counsel can assist:
  - (1) Assist in drafting preservation and retention policies of the company
  - (2) Familiar with architecture of ESI across many systems and platforms
  - (3) Explain the architecture to the client, w/ respect to accessible information and information which is not reasonable accessible b/c of undue burden or cost
  - (4) Understand e-discovery cost commitment
  - (5) Maintain consistency in e-discovery "meet and confer" .
  - (6) Direct efficient and properly defensible collection and preservation effort

Primer on Federal E-Discovery Rules

- On December 1, 2006 the Federal Rules of Civil Procedure were amended as they relate to e-discovery
- Key areas as they relate to e-discovery:
- 1. Definition of ESI
- 2. Early attention to issues relating to electronic discovery
- 3. Discovery of ESI from sources that are not reasonably accessible

FRCP Addition of Words “Electronically Stored Information”

- Intended to be broad enough to cover all current types of computer-based information and flexible enough to encompass future changes and technological developments
- See: FRCP 26(a)(1)(ii); FRCP 33(d); FRCP 34

FRCP 26: Early Attention to ESI

- Several of the amendments require the parties to address ESI early in the discovery process, most notably FRCP 26
- FRCP Rule 26: “meet and confer” and initial disclosures
- Ethical duty to have knowledge of client’s ESI by these occurrences:
  - Identify current / former employees who may have relevant information
  - Interview key players
  - Identify any additional information that should be preserved
  - Determine whether any additional sources of ESI exist

FRCP Rule 26:ESI in Initial Disclosures

- Rule 26(a)(1)(ii): Potential sources of ESI must be included in a party's initial disclosures
  - Provide to parties without awaiting a discovery request
  - Describe category and location of ESI

FRCP Rule 26(f): ESI in “meet and confer”

- 26(f): “meet and confer” rule requires parties to develop a discovery plan that addresses issues relating to ESI to be submitted to the court
  - FRCP 16(b)(3)(b)(iii): court to include in its scheduling order provisions for disclosure/discovery of ESI and any agreements the parties make for privilege after production
- Plan should include:
  - Discuss the form in which ESI will be produced
  - How to deal with privilege issues in the case of inadvertent production

FRCP: “Accessible ESI”

- FRCP Rule 26(b)(2)(B): A party need not provide discovery of ESI from sources that a party identifies as not reasonably accessible because of undue burden/cost
  - On motion to compel from opposing party: must show undue burden/cost
- If undue burden/cost: court may still order discovery if requesting party shows good cause

Competence: Keep Up With Changes in Law and Technology

- Technology constantly changing
- Keep up with changes in evolving e-discovery law as they relate to these changes in technology
- Example: Cloud Computing
  - Reduce information costs by storing documents, e-mails and data electronically through third-party vendors with online storage systems
  - New York: Lawyers can use these online data storage systems to store and back up confidential client information if reasonable care that client confidentiality will be maintained

Model Rules Continued: E-Discovery Confidentiality (Rule 1.6)

- Lawyers are prohibited from revealing confidential client information without the client's informed consent. (Model Rule 1.6)
- A lawyer entrusted with a client's ESI must take steps to protect it
  - For instance: is there a risk that metadata might reveal client confidence?
- Limited exceptions: reveal to prevent death/bodily harm, crime, fraud

E-Discovery Supervision of Other Attorneys: Model Rule 5.1

- Model Rule 5.1(b): Lawyers must reasonably ensure that those lawyers which they have direct supervisory authority over are in compliance with the applicable rules of professional conduct
- Lawyers who are overseen by others are still bound by the rules of professional conduct even if they are taking direction from another lawyer
- In e-discovery arena, competent supervision goes hand in hand with proper training and oversight

E-Discovery Supervision of Non-Attorneys: Model Rule 5.3

- Due to complexity of discovery, many organizations rely on consultants to provide a variety of services. These services include:
  - Preservation and retention policies
  - Collection and processing
  - Forensic analysis and complex data processing
  - Hosting and document review work flows

- While a lawyer may delegate certain tasks to non-lawyers, he or she, as supervising attorney, has the ultimate responsibility for the non-lawyer's compliance with the applicable provisions of the model rules. (Model Rule 5.3)

What to Look For In Selecting An E-Discovery Vendor

- Vendors offer a variety of software and services to assist with the E-Discovery process
- Consider the defensibility of the process in the litigation context
- Carefully consider the experience and expertise of a potential consultant before his or her selection
- Make sure everyone understands their role in the discovery process
  - Even if vendor selected for non-testifying capacity, be aware of potential need for testimony if forensic/technical expertise is used to prepare ESI for production
  - Make sure all parties understand what is protected as attorney-client work privilege and work-product

The Ethics of E-Discovery

II. Obligations In The Collection and Preservation Process

Ethical Duty: Preservation

- An attorney's ethical obligations during e-discovery include making sure that the documents likely to be discoverable are preserved
  - Model Rule 3.4: lawyer shall not "unlawfully obstruct another party's access to evidence…"
- Although the duty to preserve and produce ultimately rests on the party, counsel must involve themselves in the preservation and production of ESI (*Zubulake)*
- How to assure proper compliance: "early, often, and effective communication with client"

Duty to Preserve

- There are four scenarios under which the duty to preserve arises:
  - 1. A threat of litigation is made
    - o Standard is “reasonably anticipates” litigation
    - o Moment when duty to preserve not always a simple question
  - 2. Litigation is commenced
  - 3. A government agency sends a hold request
  - 4. A non-party subpoena is received
- Duty to preserve is broader than the duty to produce
  - Though not all documents will ultimately be discoverable, all potentially relevant documents should be preserved in the event production is required

Retention Policies

- Preservation goals and procedures:
- 1. Preserve active business records
- 2. Clear explanation why documents may or may not have been kept (Documentation of process and retention policies)
- 3. Limit areas to be searched in preparation for preservation, include technical ways to identify and organize the e-data (Data Map)
- 4. Litigation hold
  - Displacing client's document retention policies and procedures relevant to all possible data, to ensure preservation

Implementing a Litigation Hold

- As the range of ESI continues to expand, coordinating the efforts between a company's Information Technology services and counsel is key
- Counsel must have in-depth understanding of client's information technology infrastructure and document retention policies
- Recommended steps to properly implement a litigation hold:
  - Ensure the letter is distributed to appropriate personnel (IT department and key players)
  - Personally interview key players and IT personnel to gather relevant information (and potential sources of ESI)
  - Explain the letter and its importance
  - Regularly remind client/oversee compliance of the litigation hold letter.
- With ESI: it is integral to arrange for the segregation and safeguarding of archival media (backup tapes)

Just Issuing Litigation Hold Is Not Enough

- But: just putting a litigation hold in place without any further fact-specific monitoring of compliance is not enough
  - *See Zubulake v. UBS Warburg LLC 2004 WL 1620866 (S.D.N.Y. July 20, 2004)*

- Counsel retains on on-going responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests (*In Cache Le Poudre Feds v. Land O'Lakes*, 244 F.R.D. 614 (D. Colo. 2007))

The Ethics of E-Discovery

III. Obligations in the Document Review and Production Process

What Can Go Wrong in the Production of Relevant Records

- Model Rule 3.4: A lawyer shall not "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party"
- 2 Major categories:
  - Inadvertent Production and Privilege
  - Insufficient production

Inadvertent Disclosure

- Fed Rule of Evidence 502: “inadvertent disclosure of evidence” not a waiver if
  - Disclosure was inadvertent
  - Reasonable steps taken to prevent disclosure and rectify error
- Model Rule 4.4: Lawyer who receives a document and “knows or reasonably should know” that the document was inadvertently sent shall promptly notify the sender

Inadvertent Disclosure: FRCP 26(b)(5)(B)

FRCP Rule 26(b)(5)(B):

- Privileged communication inadvertently produced
- Producing party must assert claim of privilege before the recipient incurs any obligation
- After being notified: party is required to "return, sequester, or destroy" the information, including copies made
- Can't use/disclose information until claim is resolved

- Allows for:
  - Clawback Agreement- agreement that inadvertent production does not constitute waiver
  - Quick Peek Agreement- production without complete privilege review, agreement that production does not constitute waiver

Documenting Processes to Get Review Pool

- After meeting with your adversary in the Rule 26 conference the parties should have agreement on what will be collected and produced through various means such as those listed below. It is essential that the collection and filtering methodology be properly documented so it is repeatable and defensible.
  - Key word searches
  - Specific document types
  - Locations
  - Custodians
  - Metadata

Document Review Protocols

- Document review protocols must be developed and documented by counsel, as well as the instruction and guidelines that are given to the reviewers themselves

Insufficient Production

- FRCP Rule 26(g) requires a “reasonable inquiry” before an attorney signs off on a discovery response under penalty of sanctions

- *Qualcomm v. Broadcom* goes to the heart of the failure of reasonable inquiry as it relates to ESI

Qualcomm v. Broadcom: "A Colossal E-Discovery Failure"

- During post-trial proceedings, Qualcomm located more than 46,000 documents that it had not produced
- Court held outside counsel improperly accepted unsubstantiated assurances from Qualcomm that searches for documents was sufficient
- 6 lawyers were sanctioned for not conducting a proper search
- $8.5 million in sanctions were imposed against Qualcomm

Qualcomm v. Broadcom: What Went Wrong

- Qualcomm's lawyers failed to:
  - Meet with the engineers with access to responsive information to outline appropriate document collection
  - Obtain sufficient information about Qualcomm's computer systems
  - Take supervisory responsibility to verify the collection was truly complete
  - Revisit the collection of ESI during trial when faced with evidence that the collection was not complete
- Court ruled: If could not get Qualcomm to do a competent and thorough document search, counsel should have withdrawn from the case

Potential Production Problems

- Increases in technology have drastically increased the amount of stored information.
- In addition to designing a targeted search, counsel has the obligation to review the results for relevancy, accuracy and privilege.
- Potential problems include:
  - Electronic documents may be deliberately concealed
  - Relevant data may remain unearthed due to faulty searching methods, including running inadequate keyword searches
- Take note of usually large or small number of search results, for possible refinement of search technique

Outsourcing E-discovery

- Outsourcing work, such as document review, may be appealing to clients because of lower billing rates and their work may be as efficient/accurate
- Competence under Model Rule 1.1
- Supervise: make reasonable efforts to ensure their work is compatible with your obligations
- Duty of confidentiality under Model Rule 1.6
  - Get assurances that policies/process are in place to protect client data
- What you can do:
  - Reference checks
  - Interview principal lawyers about the projects
  - Inquire into hiring practices
  - Personal visits to the facility
- Most importantly: Communicate during the assignment to ensure it is meeting your expectations

The Ethics of E-Discovery

IV. The Preservation of Confidential Information and Personally Identifiable Information (PII)

Confidential Information

- A client is prohibited from revealing a client's confidential information without the client's informed consent
  - Model Rule 1.6
  - You are entrusted with this information and you must take steps to protect it
  - Avoid inadvertent or unauthorized disclosure
- Ensure the lawyers/vendors being supervised also maintain confidentiality

Personally Identifiable Information

- Be sure to redact all “personally identifiable information” when producing documents
  - Any information which can be used to identify, contact, or locate an individual
- Not only your client, but PII of others in documents

Laws Related to PII

- State/ Federal Data Privacy laws relate to PII
  - Purpose: ensure security/ confidentiality of customer information and prevent identity theft
- NY Social Security Number Protection Law: harsh penalties, if fail to protect confidentiality of Social Security Numbers
- Massachusetts Data Privacy Act
  - Most recent and comprehensive
  - Requires businesses to develop, implement, and maintain a comprehensive information security program that contains administrative, technical, and physical safeguards of personal information
- Most states have “notification” laws that require notification to individuals if there has been a privacy breach

What PII is Covered?

- What is covered usually includes:
  - Social security numbers
  - Bank account numbers
  - Birthdays
  - Home addresses
  - Phone numbers
  - Driver's license/Passport numbers

Not PII

- Not PII:
  - Entity level information (employer, job title, business phone)
  - Publicly available information
  - Age
  - Gender
  - Country, state, or city of residence

Unsure If Something Is PII?

- Know the privacy laws of your state
- If unsure if something is PII, ask yourself “can this information be used, alone or in combination with other PII to steal a customer’s identity or gain unauthorized access to a customer’s financial accounts?”
- Look at the nature of the information, not the source

Duty to Prevent the Transmission of Metadata

- New York: Lawyers must take reasonable care when transmitting documents by email to prevent the disclosure of metadata containing client confidences or secrets

Metadata Mining: Is It OK?

- Is it ethical for a lawyer to mine metadata in documents inadvertently produced which contain privileged information received from an adversary?
- Split in circuits: ABA/Maryland/D.C.: Yes
- New York State Bar: No
  - A lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in these documents
  - Lawyer-recipients have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets
- Ohio: No cases or Ethics opinions yet on the issue

Social Networking

- NY: An attorney representing a party in a pending litigation MAY access the public pages of another party's social networking website to obtain publicly available information about that party (Professional Ethics Opinion 843, September 10, 2010)
- Although akin to publicly accessible online media, there are limitations:
- An attorney cannot actively seek out an online social connection (i.e. "friend" someone on Facebook) or otherwise make contact with the party
  - Model Rule 4.2: prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior approval of their attorney
- An attorney cannot employ a third party to make the connection or "friend" the party

Social Networking Recent Opinion: Potential Access to Both Public and Private Account Information

- Romano v. Steelcase Inc. 2010 NY Slip Op 20388
  - Defendant moved for order granting access to plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information
  - The defendant believed plaintiff posted information to these sites inconsistent with claims in the current action
  - Held: Since the public portions of the plaintiff's social networking sites contained material contrary to her claims, there was reasonable likelihood that the private portions of the sites would have further evidence, and the order was granted
  - "As neither Facebook nor MySpace guarantee complete privacy, plaintiff has no legitimate expectation of privacy"
- Just because your client's account is "private" does not mean it is non-discoverable

The Ethics of E-Discovery

V. Sanctions for Spoliation and Adverse Inferences

Spoliation

- Spoliation: altered or lost evidence
- Lawyer's ethical duty after spoliation:
  - Undergo investigation to determine what happened
  - Interview persons involved in spoliation (IT Department, In-house counsel)
  - Notify opposing counsel of spoliation
  - Try to remedy, if possible

Sanctions for Spoliation of Evidence

- Depends on level of culpability
  - Negligent
  - Grossly negligent
  - Willful => intentional or reckless conduct
    - Ex. Intentional destruction of relevant records after duty to preserve has attached

Gross Negligence (According to *Pension Committee)*

- Failure to :
  - Issue a written litigation hold is likely gross negligence, while failure to issue a timely litigation hold is likely negligent
  - Collect records from key players
  - Cease deletion of emails or preserve the records of former employees
  - Preserve backup tapes when they are the sole source of relevant information or when relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources
- See: *Pension Committee v. Banc of America*, 2010 WL 184312 (S.D.N.Y. Jan 15, 2010

FRCP Rule 37(f) Safe Harbor

- Absent “exceptional circumstances,” a court may not impose sanctions on a party for failing to provide ESI lost as a result of the “routine” and “good faith” operation of an electronic system
- Ensure retention policies are defendable in litigation

Severity of the Sanctions

- Less severe sanctions: inquiry more on conduct of spoliating party rather than what documents were lost/ were they relevant
  - Ex. Fines/ Cost Shifting/ attorney's fees
- More severe sanctions: court must consider, in addition to conduct of spoilating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the lost evidence
  - Ex. Dismissal, preclusion, imposition of an adverse inference

Instances of Sanctions

- Failure to become familiar with clients' document retention policies results in adverse inference (*Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004)

- Dismissal of claim due to "defendant's willful, prejudicial, and repeated obstruction of discovery" *Grange Mut. Cas. Co v. Mack.* 270, F.App'x 372 (6th Cir. 2008)

- Finding counsel grossly negligent for "simply accept[ing] the client's representations about its lack of computers to search *Phx Four, Inc. Strategic Res. Corp*, 2006 WL 1409413 (S.D.N.Y. May 23, 2006)

- Sanctioning in-house counsel for failing to distribute discovery requests to all employees who potentially possessed responsive information *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 566 (N.D. Cal. 1987)

More Instances of Sanctions

- Finding counsel "negligent or worse" for the failure to produce a highly relevant document for nearly two years, despite being alerted to its possible existence by opposing counsel *In re Sept 11th Liab Ins. Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007)

- Dismissal and attorneys fees awarded due to the "egregious manner" in which the defendant did not comply with discovery. *Metropolitan Opera Ass'n v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003)

- There are 5 cases with monetary sanctions over $5 million, and additional four cases with sanctions over $1 million

Qualcomm Revisited

- *Qualcomm:* Insufficient production resulted in $8.5 million in sanctions
- However: issue was revisited in 2010: Judge ordered sanctions lifted
- Court: although significant mistakes, oversight, and miscommunications, it was found the outside attorneys made significant efforts to comply with their discovery obligations

What Qualcomm Can Teach Us

- If you make a mistake, don't try and hide it
- Communicate with your client, the court and your adversary

Recap

- Competence, confidentiality, and proper supervision
- Prudent lawyers will recognize when they need e-discovery advice, and then obtain and follow it.

Special Thanks

Additional research by:

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CORPORATE COUNSEL PROFESSIONALISM IN THE E-DISCOVERY WORLD

November 10, 2011

Baker Hostetler

Ethics & Professionalism – What are the Differences

- Ethics
  - In Some Sense, Standards Are More Concrete
  - Standards Are Set Out in Rules or Cannons
  - Case Law and Commentary Give Additional Guidance
  - Often Not Black & White Standards But Certainly Not Amorphous
  - Most States Utilize Variations of the ABA Model Rules
  - Legal Departments Face the Additional Standards Engrafted by Sarbanes Oxley and SEC Regulations

Ethics & Professionalism – What Are the Differences

- Professionalism
  - Justice O'Connor – Professionalism is "Doing What's Right as Opposed to Doing What You Have the Right To Do"
  - Former ABA President Jerome Shostack – Professionalism is "Finding the Proper Balance Between Zealous Advocacy on the One Hand and Independent Judgment and Moral Accountability on the Other"

Ethics & Professionalism – What Are the Differences

- As a Wise Person in Our House Says –
  - Ethics Are Your Acts About Which You Don't Want to Read in the Newspaper
  - Professionalism Are Your Acts About Which You'd be Pleased to Read in the Newspaper

Professionalism Standards

- Aspirational Standards Contained in Introduction of Most State Rules
  - Note, Most States Consider Them to be Part of the Rules
- Some States and Courts Have Formal Professionalism Creeds
  - Florida, Illinois, Kentucky, New Mexico, New York, Ohio, Texas
- American Corporate Counsel Association Has Professionalism Guidelines
- Common Sense – Really Do Not Need to Legislate or Decree How One Would Like to be Treated

Professionalism Standards – E-Discovery

- Sedona Conference Cooperation Guidance for Litigators and In-House Counsel
- Endorsed by More Than 100 Judges in Over 30 States
- Latest Version Available
- Seventh Circuit Electronic Discovery Pilot Program Has Adopted the Same Approach
- Compliance with Sedona Conference Guidance is a Factor In Many E-Discovery Dispute Decisions

Purpose of Sedona Conference Proclamation

"A National Drive to Promote Open and Forthright Information Sharing, Dialogue (Internal and External), Training and the Development of Practical Tools to Facilitate Cooperative, Collaborative, Transparent Discovery"

Is E-Discovery Professionalism New?

- Rules and Standards Have Not Changed – Just More to Deal With
- More Likely to Have Inadvertent Production of Privileged and/or Confidential Documents
- How Professional One Acts Makes All Situations Better
- Really “New Wine in Old Skin”

-Steven Bennett, Jones Day
Chair of E-Discovery Committee

Benefits of E-Discovery Professionalism

- Greatly Helps Avoid Sanctions if Mistake Occurs
- Often Results in Reduced Expense
- Often Results in Reduced Corporate Counsel Time
- Importantly, Results in Less of Burden on Business Personnel and Technology Department

Professionalism – Advocacy & Cooperation Reconciled

- Repeatedly Courts Note One Can be an Effective Advocate and Still Cooperate
  - Days of Hiding the Ball are Long Gone
  - Cooperation Often Avoids Wasted Time and Expense
  - Cooperating Usually Results in Fair Discovery to Both Sides of Dispute
- Lack of Cooperation Can Often Result in 2 Failures
  - Failure to Preserve Relevant Evidence (Both Favorable and Unfavorable)
  - Failure to Tailor Preservation – Leads to Over-Preservation

Court Guidelines for Principles of Professionalism

- Cooperation
- Fairness
- Reasonableness
- Proportionality
- COMMON SENSE

Corporate Counsel's Professionalism Role

- Begins Before Any Case Filed
- Obtain Buy-in from Corporate Executives
- Implement Effective E-Information Retention Policy
- Provide Ongoing Training Program
- Coordinate Program With All Interests
  - Business Personnel
  - IT
  - Legal
  - Compliance
  - Executive Office

Best Practices For INTERNAL E-Discovery Programs

- Build Right Cross-Functional Team
- Streamline the Legal Hold Process
- Take the End Users Out of the Preservation Loop as Much as Possible
- Focus on the Broad Array of ESI
  - E-mail
  - Documents
  - Text Messaging
  - Voice Mail

Best Practices For INTERNAL E-Discovery Programs

- Appoint an ESI Point Person
- Centralize Program as Much as Possible
- Use Technology to Automate Policies and Track Implementation
- Constantly Update a Flexible Program

Best Practices For Outsourcing E-Discovery Program Elements

- Still Remain Responsible for Outsourced Programs
- Review Effectiveness of Long-term Vendor Relationships
- Conduct Vendor Performance Evaluations
- Review Use of Web-based Data Management

Best Practices For Outsourcing E-Discovery Program Elements

- Conduct Proper Due Diligence
  - Past Performance
  - References
  - Employee Turnover
  - Quality Control
  - Infrastructure
  - Security
  - Possible Conflicts
- Ongoing Review With Quality Control Checks

Closing Thoughts

- Winkler's Rule
  - Never do Anything You Would be Afraid to Testify About a Year From Now
- Pearls of Wisdom
  - Sometimes the Right Thing and the Hardest Thing to do are the Same
    - The Fray
    - *All At Once*

Sources

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Baker Hostetler

Judy Selby

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BAR ADMISSIONS

- New York, 2001
- District of Columbia, 1994
- California, 1993
- Oregon, 1992

EDUCATION

- J.D., Brooklyn Law School, 1992
- B.S., The College of Mount Saint Vincent, 1980

Since May 2011, Judy Selby has held the position of national head of Baker Hostetler's E-Discovery and Technology Practice Group, consisting of more than 20 attorneys. Ms. Selby also leads Baker Hostetler's Discovery Management Team, which oversees all discovery and ESI issues arising from the firm's role as court-appointed counsel to the SIPA Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC.

The 80-member Discovery Management Team coordinates, develops and integrates numerous cutting-edge commercial and proprietary systems to manage all aspects of discovery in the more than 1,000 lawsuits filed prior to the December 11, 2010, statute of limitations for the SIPA Trustee in the liquidation of BLMIS. Ms. Selby has overseen the processing of over 62 terabytes of data, coordinated efforts for the review and documentation of approximately 28 million pieces of media, has been responsible for the practical and the legal establishment of multiple data rooms, as well as managed the development of a series of systems using Sharepoint to improve communications associated with the litigations, while also reducing costs and increasing efficiency. She regularly deals with issues concerning data privacy, HIPAA and bank secrecy. In this role, Ms. Selby manages a team of over 50 dedicated document review professionals, housed in Baker Hostetler offices throughout the United States.

Ms. Selby has represented domestic and foreign insurers in a wide range of first- and third-party complex insurance coverage matters. She provides a full range of services from opinion work, claims counseling, settlement negotiation, arbitration and all phases of litigation in single insurer and multi-insurer coverage cases, which typically require management of databases containing in excess of 10 million pages of documents.

Her experience includes U.S. jury trials, in federal and state courts, involving business interruption, bad faith and environmental liability claims, including a 10-week trial in which the jury returned a verdict in favor of the insurers, whom she represented, on the issues of misrepresentation and expectation of property damage. She also has extensive experience in international arbitrations and recently participated in a three-week hearing in London involving a pharmaceutical coverage claim under a specialized policy form, in which the insurer, whom she represented, prevailed on the issue of expectation of personal injury.

Ms. Selby has taken and defended numerous depositions of fact and expert witnesses and has located and retained high-quality and high-profile fact and expert witnesses from a variety of disciplines, including insurance/risk management, economics/business valuation, U.S. and ex-U.S. regulatory agencies, reasonableness of attorneys' fees, science/medicine and engineering, and has had primary responsibility for the preparation of their reports and statements and examinations at trial. She also has given presentations about U.S. insurance coverage litigation to major international insurance companies and has lectured on coverage under the Bermuda Form insurance policy.

Ms. Selby also has served as independent counsel to the Special Litigation Committee of the Board of Directors of a *FORTUNE* 500 company in a case involving allegations of securities fraud, inadequate disclosures, collusion with accounting professionals involved in accounting improprieties and other criminal conduct. She participated in the corporate investigation and made recommendations regarding settlement with the company's directors and officer liability insurance carriers. In addition, she has represented an officer of a *FORTUNE* 50 company in the corporate and FBI investigations of a massive

PRACTICE STRENGTHS

- E-Discovery and Technology
- Commercial Litigation

securities fraud and has investigated SIPC claims tendered by victims of a failed brokerage firm.

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James Bekier

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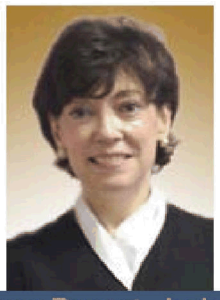
James Bekier is currently the National Litigation Support Manager for Baker Hostetler, operating out of the New York office. Mr. Bekier began his career as an attorney working on complex class action securities litigation cases at Lovell Stewart Halebian, LLP. Designated as the "point person" for educating the U.S. share partners on evolving E-discovery rulings, service offerings and solutions, Mr. Bekier was then tasked with implementing and executing E-Discovery best practices internally at the firm. After 5 years of litigating, Mr. Bekier was given the opportunity to leave the practice of law and take over as Discovery Manager for a large eDiscovery and Document Review company in NY. There, he excelled at coordinating best practices for document reviews for *Fortune* 500 hundred companies, but also developed a deep passion for the technology that supported large scale global review. In an effort to deepen his technical expertise and return to law firm culture, Mr. Bekier joined DLA Piper, one of the largest and most established litigation support departments in the AmLaw 100, as an eDiscovery Project Manager. Though his primary responsibility was to manage the full litigation life cycle and day-to-day operation of terabyte-sized cases from collection, review, production, 2nd requests, trial, and settlement; he also became deeply involved in the back-end and data analytics of some of the most advanced eDiscovery tools using in today's market. Mr. Bekier was hired at Baker Hostetler to assist with organizing the massive logistics, both technical and legal, around the Madoff matter. He was promoted to the nationwide Litigation Support Manager to establish a Tier 1 in-house litigation support service for the firm. Mr. Bekier currently supervises a team of over 15 professionals who oversee the management of 100's terabytes of data, and growing.



Peggy Bryant, Judge

JUDICIAL EXPERIENCE

Judge, Tenth District Court of Appeals.
1987-Present.

Judge, Franklin County Municipal Court.
1985-1987.

PEGGY L. BRYANT sits on the Franklin County Court of Appeals, the Tenth Appellate District, in Columbus. She was formerly a judge in Franklin County Municipal Court and has been appointed to sit by assignment on the Ohio Supreme Court. Previously, she was a partner with the firm of Alexander, Ebinger, Fisher, McAlister & Lawrence. Judge Bryant attended Miami University, graduating with a degree in history, and earned her law degree from The Ohio State University Moritz College of Law. She served as Chief Justice of the Ohio Court of Appeals Judges Association and is a member of the American Bar Association, the Ohio State Bar Association, and the Columbus Bar Association. Judge Bryant has been a lecturer for the Ohio Judicial College, the Ohio Judicial Conference, the Ohio CLE Institute, and the Columbus Bar Association. Judge Bryant served as chair of the Rules Advisory Committee and the Task Force on Rules of Professional Conduct, and she initiated and implemented Columbus' "Street Law" Program.

MEMBERSHIPS

Past Chair, Ohio Supreme Court Rules Advisory Committee.
Chair, Ohio Supreme Court Task Force for Professional Conduct.
Member, American Bar Association.
Member, Ohio State Bar Association.
Member, Columbus Bar Association.
Lecturer for the Ohio Judicial College, Ohio Judicial Conference.
National Council, The Ohio State University College of Law.
Admitted to practice before the:
- Supreme Court of Ohio, 1976
- United States District Court, Southern District of Ohio, 1977.
- United States District Court, Northern District of Ohio, 1977.
- Sixth Circuit Court of Appeals, 1980.

EDUCATION

1976 Juris Doctorate, Cum Laude, The Ohio State University College of Law, Columbus, Ohio.
1973 Bachelor of Arts, Magna Cum Laude, Miami University, Oxford, Ohio.

PREVIOUS NON-JUDICIAL WORK EXPERIENCE

Private Practice, Partner, Alexander, Ebinger, Fisher, McAlister & Lawrence.

Jessica L. Mayer

Vice President – Managing Counsel
Cardinal Health, Inc.

Jessica L. Mayer is Vice President – Managing Counsel at Cardinal Health, Inc., a $103 billion global company serving the healthcare industry with products and services that help hospitals, physician offices and pharmacies reduce costs, improve safety, productivity and profitability, and deliver better care to patients. In this role, Ms. Mayer assists the General Counsel & Corporate Secretary with the business management and day-to-day operational needs of Cardinal Health's approximately 35-attorney law department. Prior to her current role, Ms. Mayer was an Assistant General Counsel – Litigation for Cardinal Health, managing a wide variety of commercial and products liability litigation, including governmental inquires, investigations and subpoenas. Prior to joining Cardinal Health in 2006, Ms. Mayer was an attorney with Arnold & Porter LLP in Washington, D.C., where her practice focused on pharmaceutical products liability litigation. Before that, Ms. Mayer practiced commercial litigation in the Rocky Mountain region. Ms. Mayer is a *cum laude* graduate of Vassar College and a *summa cum laude* graduate of the University of Arizona College of Law.

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BAR ADMISSIONS

- U.S. Court of Appeals, Sixth Circuit, 1981
- U.S. District Court, Eastern District of Michigan, 1986
- U.S. District Court, Northern District of Ohio, 1977
- U.S. District Court, Southern District of Ohio, 1976
- Ohio, 1976

EDUCATION

- J.D., The Ohio State University Michael E. Moritz College of Law, 1976, *cum laude*
- B.A., University of Notre Dame, 1973, *magna cum laude*

Thomas L. Long has been involved in complex civil litigation throughout his 30 years of practice. He has served as the lead trial lawyer on matters ranging from antitrust actions, securities fraud claims, contested corporate control matters, contract disputes, motorsports disputes to trade secret matters.

He represents clients not only in Ohio courts but also in federal and state courts throughout the country. Because of his vast trial experience, Mr. Long is often called upon to represent clients whenever a complex matter is likely to be litigated. Mr. Long has been named in the *Best Lawyers in America*, American Lawyer Top Commercial Lawyers, Ohio's "Super Lawyers" and Columbus Top Lawyers.

Currently, Mr. Long is representing the SIPC Trustee in a variety of actions arising from the Madoff Ponzi scheme. His work includes the tracking and recovery of funds from off-shore hedge funds.

Recently, Mr. Long represented a *FORTUNE* 20 client in a series of federal securities and ERISA class actions as well as numerous shareholder derivative cases alleging waste of corporate assets, breach of fiduciary duties, and the misuse of corporate share repurchase programs designed to take advantage of market conditions. Through Mr. Long's efforts the client was able to use an innovative early mediation process which resulted in the settlement of the cases on favorable terms while avoiding great litigation expense and disruption of the client's business with the normal extensive discovery.

Mr. Long represents a client in the National Century Financial Enterprises securities litigation which is currently pending in federal court. He has also represented certain investor defendants in the *SmartTalk Securities Litigation.* During his career Mr. Long has represented both offerors and targets in nearly a dozen contested corporate control actions.

In addition to his recent securities litigation, Mr. Long successfully represented two clients in different investigations by former New York Attorney General Elliot Spitzer. He recently completed the settlement of a major consumer class action, is representing a client in a major DEA investigation and is representing a client in several "reverse payment" antitrust class actions. In addition to these civil matters, Mr. Long assists in the representation of clients and witnesses in several white collar criminal investigations.

During his career, Mr. Long served as one of the co-lead trial counsel in the successful defense of the class action antitrust trial in the Northern District of Illinois in the *In re Brand Name Prescription Drug Antitrust Litigation*. His two wholesaler clients were awarded judgment as a matter of law following a nearly 10-week trial. The trial was the culmination of almost five years of pretrial proceedings and interlocutory appeals and resulted in a total victory, upheld by the Seventh Circuit Court of Appeals.

Immediately following the victory in the *Brand Name* case, Mr. Long served as one of the lead trial lawyers defending a securities fraud claim in *Federated Management Co. v. Coopers & Lybrand*. Following the selection of the jury and winning a series of evidentiary motions, his client was able to settle the case on very favorable terms.

He also successfully represented several defendants in the UPS EVIC Insurance

PRACTICE STRENGTHS

- Antitrust and Trade Regulation
- Appellate Litigation
- Class Action Defense
- Commercial Litigation
- Securities Litigation and Regulatory Enforcement
- White Collar Defense and Corporate Investigations
- Foreign Corrupt Practices Act (FCPA)

class action that was transferred to the Southern District of New York by the Panel on Multi-District Litigation. The UPS litigation involved seven class actions that were consolidated into a single action in New York. Again, he successfully led and coordinated the defenses of several clients in his usual cost-efficient and effective manner.

In motorsports, Mr. Long has represented a major auto racing engine manufacturer in two complex disputes, a sanctioning body in an equipment dispute, drivers and race engineers in contract disputes and Paul Tracy and Team Green n/k/a Andretti Green Racing in their appeal of the results of the 2002 Indianapolis 500.

Mr. Long has regularly represented employers in trade secret and non-competition agreement cases since the early 1990s. He has taken an active role in defending clients' interests and preventing unfair competition through the improper acquisition of valuable trade information.

Mr. Long has represented clients before a number of State of Ohio administrative agencies, including the Department of Transportation, Department of Insurance, Department of Education, and the Department of Commerce, Division of Securities. For example, he successfully represented B.A.T in its contested acquisition of the Farmers Insurance Group before the Ohio Department of Insurance, and more recently represented State Automobile Mutual Insurance in its contested acquisition of the Meridian Insurance Group before the Indiana Insurance Commissioner. In the Ohio General Assembly, he represents on a regular basis one of the largest property and casualty insurers in the United States.

With the advent of alternative dispute resolution, Mr. Long has become one of the more experienced mediators in central Ohio. He not only represents clients in mediation matters but is requested on a regular basis by both state and federal judges to mediate complex matters in which he does not represent any party.

Mr. Long frequently lectures on topics of current interest in the legal field. His most recent lecture topics include: “Trial Evidence,” “Taking and Defending Effective Depositions,” “Expert Witness Procedures,” “Audit Letter Responses,” and “The Litigation of a Trade Secret Case.”