2-20-2009

E-Pitfalls: Ethics and E-Discovery

Debra Lyn Bassett
Southwestern Law School, dbassett@swlaw.edu

E-Pitfalls: Ethics and E-Discovery

Debra Lyn Bassett

Forthcoming in the Northern Kentucky Law Review (2009)

Northern Kentucky Law Review

VOLUME __ _____ 2009 NUMBER _

E-PITFALLS: ETHICS AND E-DISCOVERY

DEBRA LYN BASSETT*

Written for a symposium on e-discovery, this Article addresses the convergence of ethics and e-discovery, and contends that the surprise and concern often expressed regarding ethical issues in e-discovery, which seem to view the use of such ethical considerations as novel, unusual, and contrary to traditional discovery practices, are overstated. In particular, this Article argues that despite the seeming distinctiveness of issues concerning electronically stored information, well-established ethical rules apply to these issues in very familiar patterns and approaches. After examining the interplay between legal ethics and the practice of law generally, the Article analyzes the recent Qualcomm *decision and offers some insights into both the reasons behind the* Qualcomm *court's insistence on employing ethical precepts in the e-discovery context, and why the use of ethical principles in*

* Professor of Law and Judge Frank M. Johnson, Jr., Scholar, University of Alabama. I would like to thank the Law Review for the invitation to present this paper at its "Symposium on E-Discovery: Navigating the Changing Ethical and Practical Expectations." Many thanks also to the Symposium panelists and attendees for their helpful comments, to Rex Perschbacher for his comments on an earlier draft, and to Dean Ken Randall for his encouragement and research support. I presented an earlier version of this article at a meeting of the Tallahassee Bar Association.

discovery is likely to continue. Specifically, two provisions within Federal Rule 26(g) invite the continued use of ethical principles: (1) the limited nature of Rule 26(g)'s authorization of sanctions, and (2) the "reasonable inquiry" required by Rule 26(g) before signing a disclosure, discovery request, or response.

INTRODUCTION

Constant communication has become a ubiquitous part of our lives generally, and of the practice of law in particular. Clients often have both their lawyers' office phone number and cell phone number, giving them either direct and immediate access or the ability to leave a voicemail message. Cell phones also potentially offer text messaging opportunities. In addition, clients typically have their lawyers' e-mail addresses, which may also offer an instant messaging opportunity. Even if the lawyer is out of the office, the combination of remote e-mail access and the proliferation of BlackBerry and iPhone devices have rendered lawyers perpetually available to clients.

This accessibility is generally a good thing, but communication technologies also carry risks. The Federal Rules of Civil Procedure expressly include "electronically stored information" within their discovery provisions.[1] These discovery provisions potentially render voicemail, e-mail, text messages, and instant messages open to discovery, as well as, at least in some instances, metadata embedded in those communications.

This Article initially addresses ethics in the practice of law generally, and then turns to some of the ethical issues that can arise in connection with communication technologies, with a specific focus on e-mail communication. This ethical tour begins, in Part I, with some foundational ethical precepts.[2] Part II analyzes the interplay between e-mail and ethics generally, encompassing issues of competence, communication, confidentiality, recordkeeping, and supervision.[3] Part III

[1] *See, e.g.*, FED. R. CIV. P. 26(f)(3)(C) (referring to "discovery of electronically stored information"); FED. R. CIV. P. 34 (referring to a request for production of "electronically stored information").

[2] *See infra* notes 7-40 and accompanying text.

[3] *See infra* notes 41-67 and accompanying text.

explores the convergence of ethics, e-mail and e-discovery by examining and analyzing the decision in *Qualcomm, Inc. v. Broadcom Corp.*,[4] and offers some insights into the *Qualcomm* court's use of ethical precepts.[5] Finally, Part IV explains why courts likely will continue to rely on ethical principles in the discovery context.[6]

I.
ETHICAL FOUNDATIONS

In the United States, a lawyer's ethical obligations are governed by a combination of sources. Prominent among these sources is the guidance found in model codes and rules promulgated by the American Bar Association,[7] supplemented by the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*.[8] Both the American Bar Association and the American Law Institute provisions are potential sources of ethical guidance in a broad variety of areas, ranging from conflicts of interest, to fees, to confidentiality, to the sale of a law practice,

---

[4] 2008 WL 66932 (S.D. Cal. 2008), *vacated in part*, 2008 WL 638108 (S.D. Cal. 2008).

[5] *See infra* notes 68-80 and accompanying text.

[6] *See infra* notes 81-88 and accompanying text.

[7] *See* MODEL RULES OF PROF'L CONDUCT (2003); MODEL CODE OF PROF'L RESPONSIBILITY (1983) (providing model provisions of professional conduct).

[8] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

> In many instances, . . . the Restatement significantly departs from the code formulations. These departures are carefully considered and were extensively debated. As those of us involved in the drafting of the codes will testify, many of these departures simply clarify the intendment of the code provisions and others seek to supersede drafting mistakes. Other departures reflect recognition that experience with the codes revealed that better resolutions were to be had on a variety of issues.

GEOFFREY C. HAZARD, JR., *Foreword to* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, at XXII (2000).

to multi-jurisdictional practice, to trial publicity, to restrictions on the right to practice law.

However prominent nationally, however, these provisions are not self-executing and carry no independent authority—ultimately a lawyer's ethical obligations are determined by the laws (or rules) of the state (or states) in which the lawyer is licensed to practice. In other words, a state must formally adopt the provisions set forth in the American Bar Association or American Law Institute provisions in order to render those provisions enforceable in that state.[9] In adopting model provisions, of course, the state has the authority to accept some provisions and reject others, as well as to amend model provisions or create new ones. Almost all of the states have adopted the substance of the American Bar Association's Model Rules of Professional Conduct, usually with revisions that typically are minor.[10]

The ethical rules adopted by a particular state are often supplemented by Ethics Opinions—some promulgated by courts in the course of litigation or upon formal request by individual lawyers or bar associations, and others adopted by specialized ethics entities, including the American Bar Association, various State Bar associations, and various local bar associations.[11] Ethical rules often are also supplemented by statutory law that creates responsibilities or liabilities in specific contexts.[12]

[9] Thirty-nine states, plus the District of Columbia and the Virgin Islands, have adopted the Model Rules; with the exception of California, the remaining states base their standards on the Model Code. *See* COMPENDIUM OF PROF'L RESPONSIBILITY RULES AND STANDARDS 517, at 7-8 and inside back cover (1997). California has adopted neither the Model Rules nor the Model Code. *See* CAL. RULES OF PROF'L CONDUCT (1992).

[10] *See, e.g., A Chart Comparing the Language of the State Confidentiality Rules, in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES (John S. Dzienkowski ed., 2008-09) at 107-14 (contrasting each state's ethical provisions regarding the mandatory and permissive disclosures of confidential client information).

[11] *See* ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT (containing formal and informal ethics opinions).

[12] For example, California supplements its Rules of Professional Conduct with a number of statutory provisions within its Business and Professions Code. *See,*

Again, however, despite this broad diversity with respect to the sources of ethical obligations, a lawyer's ethical duties are much the same from state to state.

A lawyer's ethical obligations are anchored in the underlying tenets of loyalty, honesty, and confidentiality.[13] Examples of each of these basic tenets can be found within specific provisions from the Model Rules. The concept of loyalty is encompassed within a number of the Model Rules, including those covering conflicts of interest, in which we insist that a lawyer's loyalty to a client cannot be compromised by conflicting loyalties to (or interests of) other clients, former clients, third parties, or the lawyer's own self-interest. The concept of honesty is also encompassed within a number of the Model Rules, insisting that a lawyer may not make a false statement of law or fact to a third party generally or to a tribunal specifically; a lawyer may not offer evidence that the lawyer knows to be false; a lawyer may not assert frivolous claims or defenses; and a lawyer may not falsify evidence. The concept of confidentiality is encompassed within the Model Rules restricting the circumstances under which a lawyer may reveal information conveyed within the lawyer-client relationship, and protects the information regarding current clients, former clients, and even merely prospective clients.

There is sometimes a tendency to want to separate questions, problems, or issues that are "legal" from those we regard as "ethical." We are not always completely clear as to when and how those concepts overlap, and sometimes we entertain the uneasy suspicion that the two concepts actually have nothing to do with each other. My argument, as you are about to see, is that actually these two concepts have everything to do with each other.

e.g., CAL. BUS. & PROF. CODE §§ 6068 (duties of an attorney); 6090.5 (prohibited agreements); 6103.5 (written settlement offers); 6126 (unauthorized practice of law); 6147 (contingency fee agreements); 6152 (unlawful solicitation).

[13] *See, e.g.*, Steven Krane, *Regulating Attorney Conduct: Past, Present, and Future*, 29 HOFSTRA L. REV. 247, 263 (2000) (noting that "there is a nucleus of common ethical precepts [in attorney regulation]: loyalty, honesty, confidentiality").

In 2000, the American Law Institute issued a Restatement specifically aimed at lawyers' ethics. Like its previous Restatements, this Restatement also has a specific subject-matter title—the *Restatement (Third) of the Law Governing Lawyers*. With the issuance of this Restatement has come a shift in terminology from an almost exclusive use of the word "ethics" to the term "law of lawyering."[14]

I posit that by referring to the ethical rules as the "law of lawyering," the American Law Institute's Restatement is reflecting a practical reality. Many people think of the ethical rules as something separate—as an additional restriction on, or perhaps even as a distraction from, what they think of as the real practice of law, meaning the underlying substantive law. However, the ethical rules are part of the day-in, day-out practice of law.

Within the world of law generally, legal norms and processes necessarily intersect with the rules regulating those who are engaged in the day-to-day business of invoking, or avoiding, or challenging those norms—that is, lawyers. These rules and concepts that regulate lawyers, which we formerly called simply the ethical rules, are what are known today as the law of lawyering. All of law practice is interlaced with these complex issues of intersection and interaction. Typically, however, legal norms are viewed as distinct from lawyers' professional obligations, and so to the extent that anyone thinks about this interaction, there is typically an assumption that the rules regulating practitioners are neutral—that they leave intact the underlying legal norms and processes that are the subject of lawyers' practices. And sometimes they do. But many times, perhaps even more often than not, the law of lawyering—lawyers' professional obligations—will advance or hinder, or clarify or distort, the underlying norms and procedures within any given area of practice.

In this relationship, the ethical rules—the law of lawyering—constitute part of the substantive practice of law. As a beginning

[14] The Restatement (Third) of the Law of Lawyering was not the first use of the "law of lawyering" term. For many years, Professors Hazard and Hodes had employed the term "law of lawyering" for "ethics" in the title of their highly esteemed ethics treatise. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1998).

illustration, let us turn to the notion of fiduciary duty. There are many areas of the law in which one is said to have a fiduciary duty to another. Some conventional fiduciary relationships include trustee-trust beneficiary, agent-principal, lawyer-client, guardian-ward, director-corporation, and partner to fellow partner and partnership.[15] Atypical or non-conventional fiduciary relationships have been found, at least under some circumstances, between such actors as stockbroker-client,[16] bank-depositor,[17] financial institution-loan applicant,[18] and others.[19]

The term "fiduciary" generally applies to "any person who occupies a position of peculiar confidence towards another,"[20] refers to "integrity and fidelity," and contemplates "fair dealing and good faith."[21] Generally, fiduciary relationships arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first; (2) when one person assumes

[15] *See* Andrew D. Shaffer, *Corporate Fiduciary-Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About*, 8 AM. BANKR. INST. L. REV. 479, 483-84 (2000) (noting that "a full catalog of fiduciary relationships would be a large volume," but that "[a]mong the more established fiduciary relationships are the doctor-patient, attorney-client, and the principal-agent relationships").

[16] *See, e.g.*, Pace v. McEwen, 574 S.W.2d 792, 796 (Tex. App. 1978) (finding fiduciary relationship between stockholder and client).

[17] *See* Kenneth W. Curtis, *The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationships*, 20 LOY. L.A. L. REV. 795 (1987). *See generally Existence of Fiduciary Relationship Between Bank and Depositor or Customer so as to Impose Special Duty of Disclosure Upon Bank*, 70 A.L.R.3d 1344 (collecting cases).

[18] *See* Cecil J. Hunt, II, *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 WAKE FOREST L. REV. 719 (1994).

[19] *See, e.g.*, Brett G. Scharffs, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 B.Y.U. EDUC. & L.J. 159 (discussing fiduciary duty between student and teacher).

[20] WILLIAM GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 140 (3d ed. 2001).

[21] Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 512 (1942).

control and responsibility over another; (3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship; or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, such as with a lawyer and a client.[22]

Generally, a fiduciary owes his or her principal "a high duty of good faith, fair dealing, honest performance, and strict accountability."[23] These general duties include the duties of "loyalty and utmost good faith," "candor," "full disclosure," and "to refrain from self-dealing."[24]

The attorney-client relationship has been described as one of "most abundant good faith"[25] and it requires "absolute perfect candor, openness, and honesty, and the absence of any concealment or deception."[26] Moreover, "[t]he attorney has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes."[27] Indeed, "[b]reach of a fiduciary duty by an attorney most often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to a client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of a client's trust, engaging in self-dealing, and making misrepresentations."[28]

Unlike the general perception that the primary remedy for an ethical violation is a disciplinary proceeding, remedies for violations of

---

[22] BLACK'S LAW DICTIONARY 1315 (8th ed. 2004).

[23] *See* Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 847 (2006) (quoting Punts v. Wilson, 137 S.W.2d 889, 892 (Tex. App. 2004)).

[24] *Id*. at 847 (citing cases).

[25] *See, e.g.*, Hefner v. State, 735 S.W.2d 608, 624 (Tex. App. 1987); State v. Baker, 539 S.W.2d 367, 374 (1976).

[26] *See supra* note 25 and cases cited therein.

[27] Jennings, *supra* note 23, at 847 (citing Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App. 2000)).

[28] Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App. 2001).

fiduciary duty by a lawyer can include out-of-pocket losses,[29] lost profits,[30] damages for mental anguish,[31] and in appropriate cases, fee forfeiture[32] and profit disgorgement.[33]

Accordingly, the law applicable to fiduciary duty can best be understood as responsive to circumstances that justify the expectation that an actor's conduct will be loyal to the interests of another. In law, this underlying fiduciary duty is the basis for nearly all of the ethical rules that are mandatory (rather than permissive) in nature—and this underlying fiduciary duty is part and parcel of the substantive practice of law. For example, Model Rule 1.1 requires lawyers to provide "competent representation" to a client.[34] Model Rule 1.3 requires lawyers to "act with reasonable diligence and promptness."[35] Model Rule 1.4 requires lawyers to keep their clients "reasonably informed" and explain matters to the extent reasonably necessary to permit the client to make informed decisions.[36] Model Rule 1.5 prohibits lawyers from charging an unreasonable fee.[37] Model Rule 1.6 generally prohibits lawyers from revealing confidential client information without the client's informed consent.[38] Model Rules 1.7, 1.8, 1.9, 1.10, 1.13, and 1.18 all deal with conflicts of interest in various contexts, and generally prohibit lawyers

[29] *See, e.g.*, NRC, Inc. v. Huddleston, 886 S.W.2d 526, 531 (Tex. App. 1994).

[30] *See, e.g.*, Bright v. Addison, 171 S.W.3d 588, 601-02 (Tex. App. 2005).

[31] *See, e.g.*, Perez v. Kirk & Carrigan, 822 S.W.2d 261, 266-67 (Tex. App. 1991).

[32] *See, e.g.*, Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999).

[33] *See, e.g.*, Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 187 (Tex. App. 2005).

[34] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.1.

[35] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.3.

[36] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.4.

[37] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.5.

[38] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.6.

from being disloyal to their clients.[39] Model Rule 1.15 requires lawyers to safeguard their client's property and to maintain appropriate client trust accounts.[40]

My point is that as a general matter, our rules of ethics primarily reflect our underlying fiduciary duty to our clients and are largely a matter of common sense—they are part and parcel of the duties owed generally by lawyers (and non-lawyers) in positions of trust. One would be hard-pressed to justify engaging in any of the prohibited behaviors in light of the well-established fiduciary duty between lawyer and client.

In other words, much of what often is characterized as merely ethics—and by virtue of that characterization, is often considered somehow supplemental to, or different from, the actual practice of law—is, in fact, actually part of the parcel of lawyers' legal duties to their clients, a legal duty that is part of the substantive practice of law and enforceable as such. Accordingly, the ethical rules are not a separate and independent overlay—they are integral to the practice of law, and the basic underlying ethical concepts are integrated into the substantive law more thoroughly than we sometimes recognize. Ethics is a full partner in the substantive practice of law.

II.
E-MAIL (AND OTHER E-DISCOVERY) AND GENERAL ETHICAL CONCERNS

Because e-mail is no longer a novelty, it is important to see how e-mail both resembles older, more traditional means of communication—such as letters and telephone calls—and how e-mail is distinctively different due to its informality and greater dangers of exposure. As a general matter, e-mail implicates practical concerns and ethical rules pertaining to communication, confidentiality, competence, and diligence. This Section examines those considerations.

A. Communication

[39] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.7, 1.8, 1.9, 1.10, 1.13, 1.18.

[40] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.15.

ABA Model Rule 1.4 is entitled "Communication" and provides:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[41]

This provision has several implications for e-mail and e-discovery. E-mail has greatly enhanced lawyers' ability to maintain regular contact with clients and to keep clients informed. Unlike telephoning a client's business number, where the central switchboard may shut down at the close of business hours, the lawyer who sends an e-mail message may do so at any hour and thereby generates a written record of the message's content, when the message was sent, and, at least potentially, may receive confirmation that the client received the message by return receipt. Lawyers who are traveling need not worry about time zones. E-mail eliminates potential concerns about calling at an inopportune time, interrupting a meeting, being trapped in a lengthy conversation, or having one's conversation overheard by others. E-mail would thus appear to be a boon to the legal profession, which has often been criticized for failing to communicate regularly with clients. Despite these genuine benefits, however, e-mail also suffers from some serious drawbacks.

From a general business perspective, one of e-mail's greatest dangers is actually its ease and frequency of use. Perhaps because e-mail is a common means of communicating with friends and family as well as clients; perhaps because the instantaneous nature of e-mail seems to command an immediate response; or perhaps because many individuals are multi-tasking, there is a notable tendency to draft e-mail messages in a casual and hasty manner. Typographical and grammatical errors, informal language, and content lacking clarity, detail, and depth of reasoned reflection are common characteristics of e-mail messages. The potential problem is that an e-mail message to a client is an official business communication, even if the lawyer was jotting a hasty one-liner on her BlackBerry while stuck in traffic or attending a child's soccer game.

[41] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.4.

Informalities in an e-mail message may be interpreted as curtness, rudeness, or nonchalance by the client, thereby causing unintended offense that can undermine the attorney-client relationship. Thus, the specific content of the e-mail communication can undermine the value of e-mail as a means of keeping clients informed.

B. Confidentiality

A second drawback of e-mail communication is the potential for misdirecting e-mail messages, resulting in an unintended sharing of confidential information. The ability to "reply to all" rather than one particular recipient is perhaps the least of one's worries in this regard. Inadvertent sharing can also occur when one forwards a message without carefully checking the message's entire content. A sender who forwards an interesting message without scrolling the entire length of the message, checking all attachments, or reading all previous exchanges within the thread may be sharing much more information than she realized. Auto-completion features in many e-mail systems enhance the possibility of clicking on the wrong recipient—and not discovering the error until the very moment of clicking "send." Such errors can be embarrassing when, for example, a personal message is mistakenly sent to a work colleague. When, however, the misdirected e-mail message contains confidential client information, the ramifications go beyond mere embarrassment.

The lawyer's duty of confidentiality is governed by Model Rule 1.6, which provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client

> was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[42]

Even if inadvertently shared information comes within the attorney-client privilege, and even if the lawyer uses a disclaimer at the bottom of every e-mail message stating that its contents are privileged, carelessness in transmission has the potential to result in a waiver of the privilege. And even if privilege is not an issue, the broader duty of confidentiality may nevertheless still be a problem. The duty of confidentiality is central to the attorney-client relationship, and when an client's confidential information is compromised, the violation of trust is likely to irreparably damage that relationship. Depending on the specific content of the misdirected message, the error may impact potential settlement value, may cause the client to terminate the firm's services, or may result in the filing of a malpractice or disciplinary action.

C. Competence and Diligence

A lawyer owes her client a duty of competence and diligence under Model Rules 1.1 and 1.3, which provide:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[43]
>
> . . .
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.[44]

These duties of competence and diligence dovetail with the lawyer's duty of confidentiality to require particular care in the drafting and transmission of e-mail messages. A competent lawyer is careful and thoughtful; a diligent lawyer is attentive and focused. The comments to

[42] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.6.

[43] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.1.

[44] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.3.

Model Rule 1.6's duty of confidentiality expressly state that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure."[45] Similarly, the comments to Model Rule 1.6 also state that "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[46]

In the context of e-mail communications, these provisions require lawyers to remain cognizant of their role as counsel and their concomitant responsibilities. E-mail requires heightened, not lessened, attention. Although most lawyers will be accustomed to using e-mail casually and informally, the lawyer must adopt a different, more formal, approach when dealing with clients or client information. Careless drafting or careless transmissions hold the very real potential for costing the client her case, and costing the lawyer her job.

Turning to e-discovery in a broader sense, there are additional areas in which ethical considerations are implicated. These additional areas are the subject of the next Section.

D. Additional E-Discovery Areas with an Ethical Component

This Section addresses four additional areas related to e-discovery that carry an ethical component: supervision of attorneys, supervision of clients, managing electronic documents, and metadata.

1. Supervision of Attorneys

Discovery traditionally has been the province of new associates and paralegals, and the Model Rules of Professional Conduct impose ethical responsibilities upon both supervising and subordinate lawyers. The responsibilities of lawyers who supervise other lawyers are detailed in Model Rule 5.1, which provides, in pertinent part:

[45] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.6, cmt. 16.

[46] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.6, cmt. 17.

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[47]

The responsibilities of lawyers who supervise non-lawyers are detailed in Model Rule 5.3, which provides, in pertinent part:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[48]

[47] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 5.1(b), (c).

[48] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 5.3.

Subordinate lawyers also have ethical responsibilities under the Model Rules. In particular, Model Rule 5.2 provides:

> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.[49]

Although Model Rules 5.1, 5.2, and 5.3 have long imposed these ethical duties, some former practices raise problems in the context of e-discovery because the nature of supervision is more complicated. Unlike paper documents kept in storage cabinets, which can be sorted readily by a conscientious attorney (or paralegal), e-discovery requires sophisticated knowledge—both of a party's specific systems and operations, and of preservation, search, and retrieval techniques. Due to the need to attain the requisite knowledge and achieve the requisite techniques, partners can no longer assign new associates or paralegals to discovery involving electronic data and assume that careful reading and common sense will suffice. Instead, attorneys may need—indeed, likely will need—to retain a technology expert or other consultants to aid in the process of e-discovery. The need for an outside expert or consultant raises its own ethical issues in the form of potential confidentiality issues. The use of an outside consultant falls within Model Rule 5.3 above, and the necessity of retaining an outside consultant in computer forensics carries over into the subject of the next subsection, involving the management of electronic documents.

2. Supervision of Clients

Federal Rule 11 provides, in part, that attorneys, by presenting any "pleading, written motion, or other paper" to the court, are certifying that "the factual contentions [contained therein] have evidentiary support."[50]

[49] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 5.2.

[50] FED. R. CIV. P. 11(b).

However, Rule 11, by its terms, does not apply to discovery,[51] and Federal Rule 37, the discovery sanction rule, permits a tailoring of any discovery sanctions to apply to "the disobedient party, the attorney advising that party, or both"[52]—thereby implicitly acknowledging that attorneys often do not have personal knowledge of the adequacy of their clients' discovery responses. Similarly, the ethical rules observe that although attorneys are responsible for drafting pleadings and other litigation documents, they "usually [are] not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, . . . not assertions by the lawyer."[53] Nevertheless, attorneys cannot hide behind their clients' representation of the facts blindly, without inquiry or substantiation.[54] In particular, Federal Rule 26 creates its own signature-as-certification provision, in which "every discovery request, response, or objection" must be signed by an attorney of record, and thereby constitutes a certification that, "to the best of the [attorney's] knowledge, information, and belief formed after a reasonable inquiry," it is "complete and correct" (if a discovery disclosure), and is "consistent with these rules" (if a discovery request, response, or objection).[55]

Accordingly, just as an attorney may not blindly rely on a client's representations in drafting pleadings, the attorney may not blindly rely on the client's production in response to a discovery request. The "reasonable inquiry" necessary under Federal Rule 26 requires attorney involvement, and thus in the e-discovery context, attorneys must supervise not only subordinate lawyers and employees, but must also supervise their clients.

---

[51] FED. R. CIV. P. 11(d).

[52] FED. R. CIV. P. 37(b)(2); *see also* FED. R. CIV. P. 37(a)(5).

[53] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.3, cmt. 3.

[54] *See* EM Bagels, Ltd. v. Bagel Emporium of Armonk, Inc., 86 F. Supp. 2d 348, 353 (S.D.N.Y. 2000) ("Before filing a patent infringement action, . . . Plaintiff's counsel must do more than simply rely on a client's lay opinion that Defendant is infringing the patent."); Vista Mfg., Inc. v. Trac-4, Inc., 131 F.R.D. 134, 142 (N.D. Ind. 1990) (noting, in the context of Federal Rule 11, that "[b]lind reliance on the client is seldom a sufficient inquiry") (quoting Southern Leasing Partners, Inc. v. McMullan, 801 F.2d783, 788 (5th Cir. 1986)).

[55] FED. R. CIV. P. 26(g).

As explored in greater detail later in this Article, this "reasonable inquiry" standard has an ethical component, and accordingly, although the ethical component involved in the supervision of clients is perhaps less direct, it nevertheless exists.[56]

3. Managing Electronic Documents

As one resource explains:

> A "records retention policy" is generally understood to mean a set of official guidelines or rules governing storage and destruction of documents or [electronically stored information]. Such policies typically define different types of records, how they are to be treated generally under the policies for retention purposes, and often provide retention schedules defining specific time periods for retention of certain records.[57]

Records retention policies are common,[58] and Federal Rule 37 contains a safe harbor for electronic information that is lost due to the "routine operation of an electronic information system."[59] However, Federal Rule 37's safe harbor is tempered by both ethical considerations and common sense.

---

[56] *See infra* notes 82-88 and accompanying text (discussing the "reasonable inquiry" standard of Federal Rule 26); *see also In re* Rosenthal, 2008 WL 983702 at *11 (S.D. Tex. 2008) (stating that counsel's failure to disclose client's deletion of e-mail documents violated the Texas Disciplinary Rules of Professional Conduct).

[57] SHIRA A. SCHEINDLIN ET AL., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 76 (2009).

[58] *See* Rambus, Inc. v. Infineon Technologies AG, 222 F.R.D. 280 (E.D. Va. 2004) (stating that one of the litigants "correctly notes that today virtually all companies have document retention policies").

[59] FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

Before the proliferation of electronic information, counsel could not, as an ethical matter, avoid producing damaging information in discovery through the intentional destruction of relevant documents. Model Rule 3.4 expressly prohibits lawyers from "unlawfully . . . destroy[ing] or conceal[ing] a document or other material having potential evidentiary value."[60] The same basic principle holds true with respect to electronic information. The advisory committee note to Federal Rule 37 explains:

> A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.[61]

---

[60] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.4.

[61] FED. R. CIV. P. 37, Advisory Committee's Note to 2006 Amendment to Rule 37 (2006). The idea of a litigation hold letter has been with us for some time now. *See In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997). In the *Prudential* case, the court ordered the parties to preserve all documents and other records relevant to the litigation. Unfortunately, despite the court's order, documents were destroyed at several Prudential offices. Although Prudential's management had distributed document retention instructions to agents and supervisory employees via e-mail, some employees lacked e-mail access and others did not read their e-mail messages. The court held that Prudential lacked a "clear and unequivocal document preservation policy," inferred that the destroyed documents were relevant and would have reflected negatively on Prudential, and imposed $1 million in sanctions. One of the lessons from the *Prudential* case is that senior management cannot treat a litigation hold obligation lightly, nor merely

Consistent with a common sense implementation of these principles and provisions, the courts have closely examined litigants' claims regarding "records retention policies" to ensure that such policies are not used to mask intentional destruction of relevant information. As one court noted, in finding spoliation:

> [A]lthough [this party] has presented evidence that, in concept, it structured its document retention program like a lawful program and that some of its articulated reasons for adopting the policy were conceptually valid, these arguments ignore the rather convincing evidence that [the party] intentionally destroyed potentially relevant documents notwithstanding that, when it did so, it anticipated litigation. In any event, even if [the party] had been instituting a valid purging program, it disregarded the principle that even valid purging programs need to be put on hold so as to avoid the destruction of relevant materials when litigation is "reasonably foreseeable."[62]

---

delegate the matter to lower-level management without follow up. As the *Prudential* court observed, as of the entry of the court order, "it became the obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees." This idea, of course, has continued in subsequent court decisions. *See, e.g*., Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) ("[T]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. . . . While a litigant is under no duty to keep or retain every document in its possession, . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."). Of particular note is the potential for the duty to preserve to pre-date the formal filing of a complaint. *See Zubulake*, 220 F.R.D. at 216 (noting that "the duty to preserve may have arisen even before the EEOC complaint was filed"); *see also* FED. R. CIV. P. 37, advisory comm. note ("When a party is under a duty to preserve information because of pending *or reasonably anticipated litigation*, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'") (italics added).

[62] Rambus, Inc. v. Infineon Technologies AG, 222 F.R.D. 280 (E.D. Va. 2004).

Again, ethical considerations—in this instance the proscription against destroying potential evidence—are at work in the substantive practice of law, ultimately governing the interpretation and implementation of the discovery provisions.

4. Metadata

Metadata—"[i]nformation describing the history, tracking, or management of an electronic file"[63]—has generated some spirited debate,[64] and ethics opinions have reached differing conclusions as to whether metadata is fair game for analysis when produced during discovery.[65] The

[63] FED. R. CIV. P. 26, Advisory Committee's Note to 2006 Amendment to Rule 26 (2006). One resource provides an exceptionally thorough explanation, defining metadata as:

> Data typically stored electronically that describes characteristics of ESI, found in different places in different forms. Can be supplied by applications, users or the file system. Metadata can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted. Can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image.

SCHEINDLIN ET AL., *supra* note 57, at 692.

[64] *Compare* Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 652 (D. Kan. 2005) (stating that "when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata") *with* Wyeth v. Impax Labs., Inc., 248 F.R.D. 169 (D. Del. 2006) (stating that "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata").

[65] *Compare* N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 749 (12/14/01) (asking if a lawyer may "ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents," and concluding that "in

advisory committee notes to the Federal Rules of Civil Procedure decline to provide a hard-and-fast rule in this regard, instead stating that "[w]hether this information should be produced may be among the topics discussed in the Rule 26(f) conference."[66] The Sedona Conference Working Group on Electronic Document Production provides that production should "tak[e] into account the need to produce reasonably accessible metadata."[67]

---

light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit of these Disciplinary Rules") *with* Md. State Bar Ass'n, Comm. on Ethics Op. 2007-092 (2006) ("[T]his Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata.") *and* Pa. Bar Ass'n Formal Op. 2007-500 ("[I]t is the opinion of this committee that each attorney must . . . determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.").

[66] FED. R. CIV. P. 26, Advisory Committee's Note to 2006 Amendment to Rule 26 (2006).

[67] THE SEDONA PRINCIPLES, SECOND EDITION: BEST PRACTICES RECOMMENDATIONS AND PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Principle 12 (2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf (last visited 02/26/09).

> Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

Id. This position represents a change from the original Sedona Principles, which had provided that "[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court." SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC

Metadata is perhaps a particularly difficult area, because on the one hand, in light of the ethical rule of confidentiality and the general admonition against the inadvertent disclosure of client confidences, a general presumption against disclosing metadata absent the litigants' agreement or a court order might seem appropriate. On the other hand, however, metadata certainly has the potential for leading to additional relevant evidence, such as, for example, additional editing—and additional editors—of the document. Yet with this potential for yielding additional relevant evidence comes, as observed in the Sedona Principles, an equally cautionary potential for yielding inaccurate information.[68] Accordingly, it would appear that the intermediate approach adopted by the Federal Rules may indeed be the most useful, whereby metadata is one of the topics for conference discussion.

DOCUMENT PRODUCTION, SEDONA PRINCIPLES FOR ELECTRONIC DOCUMENT PRODUCTION, Principle 12; *see id*. at Comment 12.a. ("Although there are exceptions to every rule, especially in an evolving area of the law, there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata."); *see also* Aguilar v. Immigration & Customs Enforcement Div., No. 07-8224, 2008 U.S. Dist. LEXIS 97018, at *11-15 (S.D.N.Y. Nov. 20, 2008) (noting that the second edition removed any presumption against the production of metadata).

[68] THE SEDONA PRINCIPLES, SECOND EDITION: BEST PRACTICES RECOMMENDATIONS AND PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Cmt. 12.a (2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf (last visited 02/26/09).

> Care should be taken when using metadata, as the content of a given piece of metadata may convey information that is contextually inaccurate. For example, when a Microsoft Word document is created, the computer on which that document is saved may automatically assign the document an "author" based on the information available on that computer. That document may be used as a template by other persons, but the "author" information is never changed. Thus, subsequent iterations of the document may carry as an "author" a person with no knowledge of the content of the document. . . .

Id.

As we have seen, a host of ethical issues exist in the e-discovery context. The next Section returns to the specific example of e-mail, which I use as an archetype in examining the interplay between discovery issues and ethical considerations. Despite the seeming distinctiveness of issues concerning electronically stored information, I argue that well-established ethical rules apply to these issues in very familiar patterns and approaches.

III.
E-MAIL, E-DISCOVERY, AND CONSIDERATIONS OF ETHICS

The 2006 amendments to the Federal Rules of Civil Procedure codified existing practices that rendered e-mail and other electronic information subject to discovery.[69] The vortex at which e-mail, e-discovery, and ethics intersect raises a number of difficult issues. Some groundbreaking court decisions have been at the center of this vortex, thus placing those cases at the forefront of the discussion in this area. Accordingly, this Section begins with an examination of ethics issues in discovery generally, and then analyzes the *Qualcomm* case—currently the most prominent decision involving ethics and e-discovery.

A. *Generally*

As an initial matter, the basic dangers of e-mail communication outlined in the previous section—the tendency to draft e-mail messages casually and hastily, and the potential for misdirected e-mail transmissions that result in inadvertent sharing—are dangers not only for e-mail messages by lawyers to clients, but also for e-mail messages by clients to lawyers, e-mail messages sent within an organization, e-mail messages sent by clients to third parties, and countless other scenarios.

[69] *See* FED. R. CIV. P. 34, Advisory Committee's Note to 2006 Amendment (noting that "[l]awyers and judges interpreted the term 'documents' [in Rule 34] to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. . . . Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.").

In brief, ethical issues arise in e-discovery in the same general manner in which ethical issues arise in discovery more generally—in retaining documents and in producing documents. Although massive document productions are not new in civil litigation, the sheer number of e-mail transmissions, and the relative permanency of those transmissions, complicate discovery. With the average user processing seventy-five or more e-mail messages per day,[70] the number of messages that may need to be retained and reviewed for potential responsiveness to a document request can quickly become overwhelming, even if the pool of relevant information can be narrowed to a relatively small number of individuals. After all, the average worker does not generally produce seventy-five paper documents per day; e-mail raises retention and review to exponentially higher levels. Magnifying the sheer numbers of e-mail messages is their unique permanence: unlike older methods of creating documents that involved typing and carbon paper, deleting an electronic document—or even shredding a paper document—today often does not genuinely eliminate the document. Not only may the document still actively exist (or be retrievable) from the original word processing program, but marked-up copies and even signed copies often are scanned and transmitted as attachments to e-mail messages, thus creating a potentially permanent record or e-trail.

Precisely due to this permanence—because deleting an e-mail message and emptying the deleted messages folder does not truly erase the e-mail message—most organizations have no real choice but to adopt retention-management-purging practices. Thus, unlike business practices before the era of electronic information, it has become much more difficult to maintain comprehensive archives due to the storage needs necessary to accommodate the tremendous increase in the number of documents generated. Moreover, far more information is potentially available, not just in terms of the number of documents, but also in terms of potential details—details found through information embedded within the document (metadata) and details found through intermediary and supplementary messages, documents, and general information. For example, although one formal document may purport to summarize a proposal, an event, or an individual's job performance, e-mail messages may constitute a source of valuable additional information, offering perhaps more candid reactions to,

[70] *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239, 239 (2007).

and assessments of, that proposal, event, or individual's job performance. Accordingly, due to its rich and voluminous potential, one must anticipate and assume that discovery in any civil lawsuit will include requests for electronic information.

In terms of retaining electronic information, the ethical issues that arise are the same as those in discovery generally. Intentional destruction of electronic documents raises ethical issues beyond a mere procedural failure to produce, identical to those raised by the intentional destruction of non-electronic documents.[71] To the extent that the intentional destruction of non-electronic documents may be part of a routine periodic document purge, the lawyer, pursuant to the ethical duty of competence, has a responsibility to send the client a litigation hold letter, directing the client to suspend such scheduled procedures, when the attorney or the client has reason to believe that litigation may be filed. The same ethical duty of competence also requires a litigation hold letter when electronic information is the subject of the client's routine purges.

Similarly, in producing documents, the analysis is a parallel one. The production of documents is, in most ways, identical for electronic and non-electronic documents. And although the general parameters of discovery in the federal courts are set forth in the Federal Rules of Civil Procedure, much of the practical implementation of those provisions—for both electronic and non-electronic information—has an ethical component.

In other words, the Federal Rules contain guidance such as the presumptive number of interrogatories and the basic scope of discovery, but an ethical component often plays a role in evaluating the reasonableness of the action undertaken and whether sanctions are warranted. This ethical component is seen even when the ostensible legal source is a specific Federal Rule, such as provisions for sanctions under Rule 11 or Rule 37. The Federal Rules do not stand alone in determining the propriety of sanctions, but instead operate within a broader ethical

[71] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.4 (including the duty to preserve evidence); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (2000) (prohibiting the destruction of evidence).

sphere. An example of this phenomenon occurred in the recent high-profile decision in *Qualcomm, Inc. v. Broadcom Corp*.[72]

B. Taking Ethics Seriously: The Qualcomm *Case*

Qualcomm has variously been referred to as an e-discovery case and as an ethics case. In reality, it is both. In *Qualcomm*, the federal magistrate judge imposed $8.5 million in sanctions and referred to the State Bar six attorneys who had failed to reasonably respond to requests to produce electronically stored information.[73] In brief, Qualcomm sued Broadcom for patent infringement; Broadcom's defense was that the patents were unenforceable due to waiver. During discovery, Broadcom sought, among other things, all documents given to, received from, or reflecting interactions between Qualcomm and the Joint Video Team (JVT); JVT was the group responsible for creating the H.264 standard relating to the processing of digital video signals for the Qualcomm patent. Qualcomm, in response, argued aggressively that it did not participate in the JVT during the time that the H.264 standard was being developed.

While preparing a Qualcomm employee to testify at trial, Qualcomm's counsel learned of twenty-one e-mail messages between that employee and the JVT. However, Qualcomm did not produce these e-mail messages to Broadcom. Broadcom eventually learned of the existence of the e-mail messages by "ask[ing] the right question" at trial while cross-examining the employee. In the course of post-trial proceedings, Qualcomm searched the e-mail archives of its employees and located "more than forty-six thousand documents (totaling more than three hundred thousand pages), which had been requested but not produced in discovery."[74] As summarized by the federal district judge, "Qualcomm

[72] 2008 WL 66932 (S.D. Cal. 2008), *vacated in part*, 2008 WL 638108 (S.D. Cal. 2008).

[73] The federal district court subsequently left intact the $8.5 million sanction, but vacated the portion of the order involving the State Bar referral to permit the attorneys to introduce additional evidence. *Qualcomm*, 2008 WL 638108 (S.D. Cal. 2008). As of the time of this writing, the additional evidence has not yet been introduced and there has been no further court ruling, so it is unknown whether the portion of the original order pertaining to the State Bar referral will eventually be reinstated.

[74] *Qualcomm*, 2008 WL 66932, at *6.

withheld tens of thousands of e-mails showing that it actively participated in the JVT in 2002 and 2003 and then utilized Broadcom's lack of access to the suppressed evidence to repeatedly and falsely aver that there was 'no evidence' that it had participated in the JVT prior to September 2003. Qualcomm's misconduct in hiding the e-mails and electronic documents prevented Broadcom from correcting the false statements and countering the misleading arguments."[75]

Thus, in *Qualcomm*, the underlying issue implicated both e-discovery and ethics, but the problem arose due to very traditional types of litigation failures: the initial problem was a failure to locate relevant and responsive documents, which was then followed by the failure to produce those documents. Accordingly, three more ethics-based factors become relevant to our consideration—candor, fairness, and good faith.

The duty of candor is governed by Model Rule 3.3, and provides in part: "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . or (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."[76] In *Qualcomm*, the e-mails were inconsistent with Qualcomm's representations at trial, where Qualcomm had argued that it had not participated in creating the H.264 standard and therefore was not required to license them royalty-free.

More broadly, the ethical duty of fairness requires that:

> A lawyer shall not:
>
> (a) 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;

[75] *Id*. at *6.

[76] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.3.

> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . .[77]

In *Qualcomm*, of course, Qualcomm's counsel initially "fail[ed] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party" under subsection (d), by failing to search diligently for responsive electronic documents. This initial failure was followed both by "unlawfully obstruct[ing] another party's access to evidence" through its gamesmanship during discovery, and by "unlawfully . . . conceal[ing] a document or other material having potential evidentiary value" under subsection (a), by failing to disclose the twenty-one e-mail messages discovered while preparing the Qualcomm employee to testify—and then calling the Qualcomm employee as a witness but carefully structuring the direct examination so as not to reveal the existence of the e-mail messages.

The events in *Qualcomm* also raise the related issue of failing to act in good faith. Model Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . . ."[78] The comments to Model Rule 3.1 go on to explain that "[t]he law, both procedural and substantive, establishes the limits within which an advocate may proceed."[79] Similarly, Model Rule 1.16 requires a lawyer to withdraw from representing a client if "the representation will result in violation of the rules of professional conduct or other law."[80]

---

[77] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.4.

[78] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.1.

[79] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 3.1, cmt. 1.

[80] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, Rule 1.16.

The *Qualcomm* court's imposition of $8.5 million in monetary sanctions and State Bar referrals grabbed attention, due in part to the large dollar amount, but also due to the ethical foundation of the sanctions. More typically, the consequences of discovery misbehavior tend to include fee shifting, adverse inferences, or perhaps default judgments. As a practical matter, the sanctions imposed in *Qualcomm* were chosen for two very specific reasons: (1) Federal Rule of Civil Procedure 26(g) authorizes sanctions only as to the attorney who signs the discovery response (or request), and only one attorney had signed the discovery responses in *Qualcomm*, not all six attorneys,[81] and (2) in seeking an appropriate sanction without the aid of Federal Rule 26(g), the attorneys' ethically questionable conduct invited a court reaction with an ethical foundation. Indeed, the attorneys' failure to locate the responsive documents in the first instance, particularly when followed by their apparent attempt to deceive both opposing counsel and the court, demanded a strong penalty. In *Qualcomm*, the court fashioned an appropriate penalty, relying primarily on ethical provisions rather than the formally limited procedural remedies. As the next Section explains, this approach is likely to continue.

IV.
CONTINUING TO TAKE ETHICS SERIOUSLY IN DISCOVERY

There is reason to believe that we will continue to see the courts use ethical precepts in the context of e-discovery—and in the context of discovery more generally—due to the provisions of Federal Rule 26. Specifically, two provisions within Federal Rule 26(g) invite the use of ethical principles: (1) the limited nature of Rule 26(g)'s authorization of sanctions, and (2) the "reasonable inquiry" required by Federal Rule 26(g) before signing a disclosure, discovery request, or response.

A. Limited Sanctions

As observed in the previous Section, Federal Rule 26(g) contains a limitation on the authorization of sanctions. Federal Rule 26(g)(3) provides for the imposition of sanctions "on the signer [of the disclosure,

[81] *Qualcomm*, 2008 WL 66932, at *13 n.9 ("Rule 26(g) only imposes liability upon the attorney who signed the discovery request or response.").

discovery request, or response], the party on whose behalf the signer was acting, or both." The term "signer" suggests, and practical reality bears out, that only one attorney signs the document and accordingly only one attorney carries responsibility. Although in many lawsuits indeed only one lawyer is handling discovery, in many other lawsuits a number of lawyers participate in the discovery process. In the latter circumstance, if the court determines that sanctions are warranted due to a violation of Federal Rule 26(g), the court may decide that the appropriate imposition of sanctions reaches beyond just the signer. In such a situation, *Qualcomm*'s analysis provides a ready precedent for relying on ethical rules as a supplemental basis for sanctions.

B. Reasonable Inquiry

In signing a disclosure, discovery request, or response, Federal Rule 26(g) provides that the signature acts as a certification. Federal Rule 26(g) states, in pertinent part:

> By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
> (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
> (B) with respect to a discovery request, response, or objection, it is:
> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[82]

[82] FED. R. CIV. P. 26(g)(1).

In *Qualcomm*, the court analyzed this "reasonable inquiry" standard, noting that "[t]he Federal Rules [of Civil Procedure] impose an affirmative duty upon lawyers to engage in discovery in a responsible manner and to conduct a 'reasonable inquiry' to determine whether discovery responses are sufficient and proper."[83] As the *Qualcomm* court explained:

> For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery obligations.[84]

"Reasonable inquiry," although ostensibly a legal standard, employs an ethical foundation in practical application. In particular, the focus of reasonable inquiry is essentially Model Rule 3.4's ethical duty of fairness. As discussed above, Model Rule 3.4 prohibits an attorney from "unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document," and requires an attorney to "make reasonably diligent effort[s] to comply with a legally proper discovery request by an opposing party."[85] Rather than permitting lawyers to circumvent these requirements through claims of burdensomeness, *Qualcomm* illustrates not only a willingness, but an insistence, by the courts to take these ethical precepts seriously.

Qualcomm is not alone in viewing the "reasonable inquiry" requirement as having an ethical component. In *Mancia v. Mayflower*

[83] *Qualcomm* at *13.

[84] *Id*. at *9.

[85] *See supra* notes 59 & 76 and accompanying text (discussing Model Rule 3.4).

Textile Services Co.,[86] the court, in discussing Federal Rule 26(g), observed:

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the deciding tribunal not easier, but more difficult, and violating his or her duty of loyalty to the procedures and institutions the adversary system is intended to serve. Thus, rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery.[87]

The *Mancia* court specifically cited to Model Rules 3.4 and 4.4, making clear that complying with Federal Rule 26(g) is not only a procedural requirement, but also an ethical obligation.

The recent precedents created by *Qualcomm* and *Mancia* provide compelling rationales for integrating ethical considerations into discovery in a direct manner.[88] In light of Federal Rule 26(g)'s "reasonable inquiry" standard, and the Rule's limited provision for imposing sanctions solely upon the signer, to the exclusion of other attorneys who also bear

[86] 253 F.R.D. 354 (D. Md. 2008).

[87] *Id*. at 362-63.

[88] For another example of an e-discovery case citing to ethical provisions, see *In re* Rosenthal, 2008 WL 983702 at *11 (S.D. Tex. 2008) (stating that attorney's failure to reveal his client's deletion of relevant e-mail documents violated provisions of the Texas Disciplinary Rules of Professional Conduct).

responsibility for the sanctionable behavior, courts are likely to draw on these precedents in future cases.

CONCLUSION

In sum, the surprise and concern expressed regarding ethical issues in e-discovery, which seem to view the use of such ethical considerations as novel, unusual, and contrary to traditional discovery practices, are overstated. Ethics is, in fact, an integral part of the substantive practice of law, not merely a narrow set of rules to be trotted out on rare and sporadic occasions. Obstreperousness, obstructionism, and evasion have never been the hallmarks of adversarial lawyering; adversarial lawyering does not require doing, literally, everything in one's power to help one's clients at any cost. Recent court decisions employing ethical precepts in the discovery context are likely the beginning of the wave of the future. Ethical rules provide a useful supplement to Federal Rule 26, because subsection (g)'s provision for the imposition of sanctions only on the signing attorney will be too narrow in many cases. In addition, the Rule's "reasonable inquiry" standard implicates not only procedural requirements, but also ethical principles. Ethical considerations are part and parcel of the substantive practice of law, and the use of ethical rules in recent discovery decisions merely reflects this reality.