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Consilio Institute: Practice Guide

THE EVOLVING DUTY OF TECHNOLOGY COMPETENCE

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About this Practice Guide

In this practice guide, we will discuss various aspects of lawyers' duty of technology competence for eDiscovery and how to fulfill them, using the California approach as a model.

THE EVOLVING DUTY OF TECHNOLOGY COMPETENCE IN EDISCOVERY

In discovery specifically, and in legal practice generally, the role of electronically-stored information (ESI) and new technology has grown exponentially over the past decade, as new sources have proliferated, as new tools have become normalized, and as new communication channels have supplanted the old. As a result, it has become a practical reality that effective legal practice and effective discovery requires some level of technology literacy and competence. Since 2012, that practical reality has been transforming into a formal requirement, which may be "a very scary wake-up call for some lawyers."[1]

A Formal Duty of Technology Competence

In August 2012, the American Bar Association (ABA) implemented changes[2] to its Model Rules of Professional Conduct, which most state bars look to as a model for their own. Among the changes implemented was a change to make the need for technology competence explicit.

Model Rule of Professional Conduct 1.1[3] establishes a lawyer's general duty of competence in their work, which is the foundational requirement of professional practice:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The last Comment to that rule[4] covers *"Maintaining Competence"* over time through continuing legal education (CLE), individual study, and other efforts. The change revised that comment to add technology as an explicit focus[5]:

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

Although this change was spurred in large part by the rapid rise of ESI and eDiscovery, it is not limited to just that area[6]:

> Broadly speaking, there are five realms of technology competence reasonably necessary for many engagements:
>
> - Safeguarding client information
> - eDiscovery, including the preservation, review and production of ESI . . .

[1] *Victoria Hudgins, States Require Lawyers to Have Tech Competency, But Observers See Some Struggling, LEGALTECH NEWS, https://www.law.com/legaltechnews/2018/10/25/states-require-lawyers-to-have-tech-competency-but-observers-see-some-struggling/ (Oct. 25, 2018), available at https://www.yahoo.com/news/states-require-lawyers-tech-competency-160028982.html.*

[2] *Debra Cassens Weiss, Lawyers Have Duty to Stay Current on Technology's Risks and Benefits, New Model Ethics Comment Says, ABA JOURNAL, http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits/ (Aug. 6, 2012).*

[3] *ABA Model Rules of Prof'l Conduct R. 1.1 (2021), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.*

[4] *ABA Model Rules of Prof'l Conduct R. 1.1, Cmt. 8 (2021), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html.*

[5] *Aug. 2012 Amends. to ABA Model Rules of Prof'l Conduct (2012), available at http://www.abajournal.com/files/20120808_house_action_compilation_redline_105a-f.pdf.*

- The technology that lawyers use to run their practices . . .
- A traditional realm — understanding the technology used by our clients to design or manufacture products or to offer particular services
- The technology used to present information in the courtroom.

Widespread Adoption

In the nine years since the change to the Model was implemented, thirty-nine states have adopted some form of this technology competence requirement for lawyers.[7] The vast majority of those states have adopted the change either verbatim or without any major differences. Those thirty-four states are:

- Alaska (2017)
- Arizona (2015)
- Arkansas (2014)
- California (2021)
- Connecticut (2014)
- Delaware (2013)
- Idaho (2014)
- Illinois (2016)
- Indiana (2018)
- Iowa (2015)
- Kansas (2014)
- Kentucky (2018)
- Louisiana (2018)
- Massachusetts (2015)
- Michigan (2020)
- Minnesota (2015)
- Missouri (2017)
- Montana (2016)
- Nebraska (2017)
- New Mexico (2013)
- New York (2015)
- North Carolina (2014)
- North Dakota (2016)
- Ohio (2015)
- Oklahoma (2016)
- Pennsylvania (2013)
- Tennessee (2017)
- Texas (2019)
- Utah (2015)
- Vermont (2018)
- Virginia (2016)
- West Virginia (2015)
- Wisconsin (2017)
- Wyoming (2014)

A few states have made more noteworthy modifications or taken different approaches entirely.

Notable Variations

Colorado, Florida, New Hampshire, South Carolina, and Washington have each made some noteworthy modifications to the model comment in their implementations:

- Colorado made their version place a greater emphasis on communications technologies and protecting client data and communications.[8]
- Florida's version adds an explicit technology CLE requirement and explicitly addresses the role of technical experts in fulfilling the duty.[9]
- New Hampshire's variation adds qualifiers stressing reasonable efforts and evaluation against peers.[10]
- South Carolina's version limits the scope[11] from "relevant technology" to "technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client."
- Washington's version adopted the model comment but also added an additional comment[12] about the potential role of that state's Limited License Legal Technicians[13]:

  In some circumstances, a lawyer can also provide adequate representation by enlisting the assistance of an LLLT of established competence, within the scope of the LLLT's license and consistent with the provisions of the LLLT RPC.

[6] Steven M. Puiszis, Perspective: Technology Brings a New Definition of Competency, BLOOMBERG LAW, https://news.bloomberglaw.com/business-and-practice/perspective-technology-brings-a-new-definition-of-competency (Apr. 12, 2016).

[7] Robert Ambrogi, Tech Competence, LAWSITES, https://www.lawsitesblog.com/tech-competence (last visited July 2, 2021).

[8] Rule Change 2016(04) to Colo. Model Rules of Prof'l Conduct (2016), available at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Rules_of_Professional_Conduct_Committee/2016(04).pdf.

[9] In re: Amends. to Rules Regulating the Florida Bar 4-1.1 and 6-10.3, No. SC16-574 (Fla. Sept. 29, 2016), available at http://www.abajournal.com/files/OP-SC16-574_AMDS_FL_BAR_SEPT29_(1)_copy.pdf.

[10] Order adopting amendments to court rules effective January 1, 2016 (N.H. Nov. 10, 2015), available at https://www.courts.state.nh.us/supreme/orders/11-10-15-Order.pdf.

[11] Re: Amendments to Rules 1.0, 1.1, and 1.6, Rules of Professional Conduct, Rule 407, South Carolina Appellate Court Rules, Case No. 2019-000318 (S.C. Nov. 27, 2019), available at https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2433.

[12] Wash. Model Rules of Prof'l Conduct R 1.1 (2021), available at https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_01_00.pdf.

[13] Robert Ambrogi, Washington state moves around UPL, using legal technicians to help close the justice gap, ABA JOURNAL, https://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the (Jan. 1, 2015).

THE CALIFORNIA APPROACH

California did not formally adopt the model change until 2021,[14] but six years earlier, it took another approach to ensuring technology competence for eDiscovery. In 2015, it promulgated a detailed ethics opinion establishing a duty of technology competence for eDiscovery. Formal Opinion No. 2015-193[15] established that:

> Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery. Depending on the factual circumstances, **a lack of technological knowledge in handling eDiscovery may render an attorney ethically incompetent to handle certain litigation matters involving eDiscovery, absent curative assistance . . . .** [emphasis added]

This opinion went beyond just establishing a general duty, however. It also identified nine core competency requirements necessary to fulfill this duty of technology competence for eDiscovery:

1. "Initially assess eDiscovery needs and issues, if any"
2. "Implement/cause to implement appropriate ESI preservation procedures"
3. "Analyze and understand a client's ESI systems and storage"
4. "Advise the client on available options for collection and preservation of ESI"
5. "Identify custodians of potentially relevant ESI"
6. "Engage in competent and meaningful meet and confer with opposing counsel concerning an eDiscovery plan"
7. "Perform data searches"
8. "Collect responsive esi in a manner that preserves the integrity of that ESI"
9. "Produce responsive non-privileged ESI in a recognized and appropriate manner"

This list of requirements has been widely discussed as a useful model for all attorneys seeking to fulfill their duty of technology competence for eDiscovery.

1. Initially Assess eDiscovery Needs and Issues, if Any

The first requirement is that an attorney – or an attorney collaborating with an eDiscovery expert – be able to spot eDiscovery implications at the outset of each new matter. This requirement in some ways incorporates the other eight within it, as it asks you to think ahead about eDiscovery needs and issues that might arise throughout the course of the upcoming matter.

As several of the following requirements make clear, the most important things to be able to assess initially are (a) potential sources of ESI that will need to be considered and (b) any risks of loss associated with those sources that must be mitigated. Many kinds of mistakes can be remedied further down the road, but the loss of unique, relevant ESI cannot.

[14] *Robert Ambrogi, California Becomes 39th State To Adopt Duty Of Technology Competence, LAWSITES, https://www.lawsitesblog.com/2021/03/california-becomes-39th-state-to-adopt-duty-of-technology-competence.html (Mar. 24, 2021).*

[15] *The State Bar of California Standing Committee On Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (June 30, 2015), available at https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL 2015-193 %5B11-0004%5D (06-30-15) - FINAL.pdf.*

2. Implement/Cause to Implement Appropriate ESI Preservation Procedures

As we just noted, acting quickly to identify and prevent the loss of ESI sources is core to fulfilling the duty of eDiscovery competence. ESI spoliation remains a frequent issue – particularly in the gray area where new devices, applications, or services are transitioning from niche adoption to mainstream use. The first and most important step for preservation in most instances is the issuance of an effective legal hold, and the second is monitoring ongoing compliance with that hold (including the suspension of automatic janitorial functions). The third is moving quickly to collect and preserve a copy of any ESI source that is at too a high risk of loss or alteration to preserve in situ (e.g., smartphones, Slack channels).

3. Analyze and Understand a Client's ESI Systems and Storage

This requirement is the one most likely to require the assistance of technical experts, both your own and your client's. Every organization has a unique combination of enterprise, departmental, and individual computers, devices, and software (as well as third-party service providers and other potential sources). Moreover, each organization has its own standard operating procedures – both formal, documented ones and unofficial ones – that dictate how things are created, where things are stored, and for how long.

Untangling that unique mess to identify all the places that potentially-relevant ESI may be hiding typically requires the involvement of:

- Someone with intimate knowledge of those systems and practices (i.e., organization IT)
- Someone who understands the relevant legal scope and likely discovery obligations (i.e., in-house or outside counsel)
- Someone who can understand the technical details presented and assess them against the scope and obligations (i.e., an internal or external eDiscovery expert)

4. Advise the Client on Available Options for Collection and Preservation of ESI

There is obvious overlap between this requirement and the requirements above, but as we have noted, avoiding spoliation of ESI is at the heart of the duty of eDiscovery competence. This additional requirement is primarily aimed at making sure practitioners understand the range of data handling options available and the importance of maintaining forensic soundness.

For example, this would encompass understanding the importance of metadata, how easily it is altered, and how to ensure its preservation. This would also extend to understanding the risks associated with allowing self-collection, to understanding (at least at a high level) imaging and targeted collection options, and to considering newer remote collections solutions. As with the requirement above, this requirement is often fulfilled with the assistance of an expert that can provide a greater depth of both technical knowledge and collection experience.

5. Identify Custodians of Potentially Relevant ESI

This requirement fits hand-in-glove with the above requirements, which are more focused on the source systems and devices than the people wielding them. In addition to being able to identify and address those source systems and devices, practitioners need to be able to identify the key individual custodians. *Since* Zubulake V[16] in 2004, the phrase "key players" has been used to describe these essential custodians within an organization. Key players are those with direct knowledge of the underlying events or those most likely to have relevant information or materials, including ESI. They are often also the best source for information about how ESI is actually created, handled, shared, and stored on a day-to-day basis within the organization.

Beyond individual custodians, you must also be able to identify the custodians responsible for other kinds of potential ESI sources, such as those individuals who administer departmental or enterprise systems, those who oversee outsourced functions and outside services, and those who handle issuance and recycling of employer-issued laptops and mobile devices.

6. Engage in Competent and Meaningful Meet and Confer with Opposing Counsel Concerning an eDiscovery Plan

After all of the initial investigative and scoping steps, and after initial preservation is assured, the next requirement an attorney must be prepared to fulfill is engaging in meaningful discussion about eDiscovery during the meet and confer with opposing counsel. Fulfilling the initial five requirements is a condition precedent to being able to fulfill this one.

Negotiating meaningfully about an eDiscovery plan requires already having some concrete knowledge of what ESI exists, where it exists, and in what forms it exists. It requires having already considered the applicable collection options and their associated limitations, risks, and costs, as well as any ESI that may not be reasonably accessible due to burden or cost. Additionally, it requires looking ahead to the later steps in the discovery process (and the later requirements in this list) to assess potential search protocols, review methodologies, and production plans.

It is entirely too common for parties to commit themselves to eDiscovery plans that wind up being either excessively burdensome or technically impossible in some way, because they negotiated the plans without adequate knowledge of the actual facts on the ground or without adequate understanding of (or expert guidance about) the technical realities associated with later steps. On the other hand, when handled effectively, negotiation of an eDiscovery plan can provide an opportunity to dramatically limit the time and cost of discovery through agreed limitations on scope, through preemption of downstream conflicts, or through adoption of a phased discovery plan.

16*Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004), available at https://casetext.com/case/zubulake-v-ubs-warburg-llc-3.*

7. Perform Data Searches

Once actual discovery work has begun, the next requirement attorneys must be able to satisfy – either on their own or with the assistance of an appropriate expert – is the effective execution of data searches. This applies both to searches of source systems for materials to collect and to searches of processed materials for the right materials to review and produce. Searching effectively at any point in the eDiscovery process requires understanding both substantive and technical realities:

- Substantively, you must have some understanding of the content of the source materials and the likely content of the specific materials you are seeking within them. You must have some sense of the language used generally and some idea where the specific language you seek might be found.
- Technically, you must have some understanding of the capabilities and limitations of the specific search tools you are using. For example, some tools search automatically within nested content (e.g., attachments and container files), and some tools cannot do so at all. Some tools can understand complex Boolean logic, some can only handle simple keywords, and others have their own custom search syntax that must be followed. Some have limitations on where they can search or how many results they can return.

Failure to understand these realities increases the chances of ineffective searches and of difficult-to-detect gaps in your results.

8. Collect Responsive ESI in a Manner that Preserves the Integrity of that ESI

We touched a bit on the goal of this requirement above, in our discussion of the requirement that attorneys be able to advise their clients on options for preservation and collection of ESI. Unlike physical documents, electronic documents are very easily changed – even accidentally. They can be changed by being moved or copied or forwarded. They can be changed simply by being opened and viewed. Consequently, ESI must be handled very carefully to collect it and work with it in a way that both preserves the original and produces accurate copies for use in a legal matter.

Avoiding self-collection strategies and informal data handling practices is essential to fulfilling this aspect of the duty of technology competence for eDiscovery. Metadata must be preserved, forensic soundness must be ensured, and chain of custody must be documented.

9. Produce Responsive Non-Privileged ESI in a Recognized and Appropriate Manner

The final requirement is that attorneys be able to produce ESI effectively. This is another requirement that is almost always fulfilled in collaboration with an internal expert or an external service provider, but it is important for attorneys to understand the range of possibilities and their differing requirements, limitations, and costs.

Depending on what is negotiated or required, ESI production may be as simple as creating a few PDF files, or as complicated as custom load files with extracted text and redacted, Bates-numbered page images. Relational database sources will also require negotiations about what reports or exports to generate and how best to present that information.

How materials are produced affects how long they take to prepare and how easily they can be searched, reviewed, and used later in depositions and at trial. Negotiating production format, including details like whether and what metadata will be provided, can both ensure maximum usability of what you receive and preempt disputes over what you produce and how you produce it. Failure to understand and negotiate in advance remains a common cause of discovery disputes.

Key Takeaways

There are three key takeaways from this practice guide to remember:

1. In 2012, the ABA promulgated a change to its Model Rules of Professional Conduct making "the benefits and risks associated with relevant technology" a required subject for maintaining competence.
2. Since then, thirty-nine states have adopted that change or a variation on it, including California, which also issued Formal Opinion No. 2015-193 identifying nine core competencies required to fulfill the duty of technology competence for eDiscovery.
3. Those nine core competencies provide a useful model for anyone seeking to ensure their own technology competence for eDiscovery, emphasizing effective identification and preservation of ESI, effective collection and production of that ESI, and effective negotiation about those processes.

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