Ethical Implications in a “Big Data” Environment

September 29, 2014
12:00 – 2:00 PM
William Wallace Belt, Jr.
Speaker Deloitte Transactions & Business Analytics LLP

William Belt is a Director in the Discovery practice of Deloitte Transactions and Business Analytics LLP. Bill focuses on electronic discovery and the use of new technologies, resources and workflows to help clients find evidence and identify critical issues in the context of global data transfers, litigation, government investigations, mergers & acquisitions. He has 23 years of experience and has led multiple electronic discovery projects for national and global clients. Bill has spearheaded information governance initiatives including litigation readiness, enterprise email preservation and disposition projects. He has helped numerous companies “bring eDiscovery in-house” and developed workflows to integrate in-house and outside eDiscovery resources. Bill received his B.A. from the University of Virginia and his J.D. from the George Washington University.

wbelt@deloitte.com
Mr. Jones is senior counsel in the Washington, D.C., office of Sidley Austin LLP. Since joining the firm in 1983, he has represented clients in complex commercial and regulatory litigation, involving substantive areas such as antitrust, contracts, employment discrimination, energy, environmental law, fair lending, labor, healthcare policy and products liability. Mr. Jones also advises both law firms and in-house law departments on questions of professional responsibility, including state rules of professional conduct and federal reporting obligations prescribed by the Securities and Exchange Commission pursuant to § 307 of the Sarbanes-Oxley Act of 2002. He has handled internal corporate investigations of employee fraud and embezzlement, and related civil and administrative proceedings. In addition to federal and state court proceedings and administrative proceedings, Mr. Jones has participated in alternative dispute resolution proceedings, including both arbitration and mediation.

Prior to joining the firm, Mr. Jones was a law clerk to Judge Philip W. Tone on the United States Court of Appeals for the Seventh Circuit. Mr. Jones also served as an Assistant to the Solicitor General of the United States for two years, during which time he argued five cases on behalf of the federal government in the United States Supreme Court.
Sejal Patel
Deloitte Services LP

Sejal is a Senior Manager in Deloitte Services LP. She focuses on business development and marketing strategy and activities related to eDiscovery and document review services. Sejal’s legal background gives her an in-depth understanding of the challenges often faced by law firm partners and in-house counsel when identifying resources to help address critical and complex issues. Prior to joining Deloitte, Sejal worked at Navigant Consulting interfacing with law firms in finding resources for their matters. Sejal received her B.S. in Economics from the University of Nebraska, and her J.D. from Syracuse University.

sbpatel@deloitte.com
James Villa
Versar, Inc.

Mr. Villa is a Senior Vice President, General Counsel, Corporate Secretary, and Chief Compliance Officer of Versar, Inc., a publicly held government contractor which does environmental and construction management worldwide. Prior to joining Versar, Mr. Villa was Vice President and General Counsel of Colonial Parking, Inc. and before that, was Vice President and Chief Counsel at AOL, Inc. Mr. Villa spent 11 years as a Trial Attorney with the United States Department of Justice’s Antitrust Division and also served as a Special Assistant United States Attorney in the Eastern District of Virginia. He is a former commissioned officer in the U.S. Army Reserve, having commanded a combat support MP company in support of Operations Desert Shield, Desert Storm, and Task Force Freedom. Mr. Villa received his B.A. from the University of Michigan and his J.D. from the University of Michigan Law School.

jvilla@versar.com
Several key ethical implications of eDiscovery

- Attorney competence
- Client confidentiality
- Protection of privilege communications
- Cooperation and zealous representation
- Outsourcing and attorney/non-attorney supervision
Big Data!

196 B: average number of email sent per day

1 TB: amount of data generated by NYSE each day

50 B: instant messages sent every day...on mobile phones

500 TBs: of data are processed by Facebook daily

92%: of the world’s data was created in the past two years

---

2 http://sigappfr.acm.org/MEDES/14/index.php?option=com_content&view=article&id=22&Itemid=23
“Free it” up, or “Lock it down.”
Hypothetical 1

Use of Social Media

Associate General Counsel brings her laptop to court for jury selection.

Who thinks she can:

• Send a “friend” request to venire members to see their Facebook page;
• “Follow” them on Twitter to see their tweets (and make sure they don’t tweet during trial);
• View their publicly available LinkedIn page to see their “profile”.

Communicating with Jury or Venire Members

• ABA Model Rule 3.5: “A lawyer shall not . . . (b) communicate ex parte with ... [a juror or prospective juror] during the proceeding unless authorized to do so by law or court order.”

• VA Rule 3.5(a)(1): “A lawyer shall not …before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;

• eDiscovery implications
  – More and more channels of communication (Email, IM’s, Tweets)
  – Direct and indirect communications more likely through social media
Attorney competence in a “Big Data” environment

• ABA Model Rules 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
  − ABA Model Rule 1.1

• Comment 8: 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.
  − ABA Model Rule 1.1 Comment [8]

• eDiscovery implications
  − Lawyers cannot avoid technology in the practice of law, and need to understand the technology they are using.
  − Many social media sites (LinkedIn) send a notice to members when their profiles are viewed.
The Bar Association of the City of New York City has opined that viewing a juror’s social media page may constitute improper communication:

“For example, if an attorney views a juror’s social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably “communicated” with the juror. The transmission of the information that the attorney viewed the juror’s page is a communication that may be attributable to the lawyer, and even such minimal contact raises the spectre of the improper influence and/or intimidation that the Rules are intended to prevent.”

The Association of the Bar of the City of New York Formal Opinion 2012-2

Compare this opinion to the Missouri Supreme Court decision *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010), in which the Court advises counsel to conduct a reasonably thorough investigation of potential jurors to avoid mistrials.
Hypothetical 2

Attorney leaves his office headed to defend a key fact witness deposition in a case with millions of documents produced in discovery.

Who thinks the attorney can load the productions onto an external hard drive (or his laptop’s hard drive “just in case”)?

What are some steps he should / must take to protect the data?

• Encrypt the data;
• Keep the hard drive with him when he parks his car and goes into a restaurant to eat lunch;
• Use a “screen protector”; 
• Other steps?
Confidentiality

• ABA Model Rule 1.6 (a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) - (preventing death, substantial bodily injury, etc.)
  – ABA Model Rule 1.6

• VA Rule 1.6 (a): A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the 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 paragraphs (b) and (c).

• ABA Model Rule Subsection (c): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. (This section has not yet been adopted in VA or DC.)

• Comment 16 to ABA Model Rule 1.6 states that a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.
  – ABA Model Rule 1.6 Comment [16]
Electronic Data Implications of Rule 1.6 - Cloud Computing

Virginia Legal Ethics Opinion 1872 requires attorneys to:

- exercise care in the selection of the vendor,
- have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others,
- instruct the vendor to preserve the confidentiality of the information,
- examine the third party provider’s use of technology and terms of service in order to know whether it adequately safeguards client information,
- consult with someone qualified to determine that the safeguards are adequate
Protection of privilege communications

- ABA Model Rule 4.4(b): “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and who knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender. “
  - ABA Model Rule 4.4

- Per Comment [2], note that this applies to any documents that were mistakenly sent or produced by opposing lawyers or their lawyers (in other words, not just privileged documents).
  - ABA Model Rule 4.4 Comment [2]

- There is no counterpart to this provision in Virginia Rule 4.4, and the language of D.C. Rule 4.4(b) is notably different, it provides: (b) A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.
eDiscovery Implications of Rule 4.4

• Interaction with:
  – FRCP 26 & 34 and FRE Rule 502
  – Treatment of metadata
Additional eDiscovery Implications of Rule 4.4

- Data volumes
- Global locations
- Review challenges
- Complex discovery productions
Hypothetical 3

Opposing counsel does not understand the capabilities and limitations of litigation technology and its application and impact on the discovery process.

Who thinks in-house counsel can or should insist that her outside counsel:
• Take advantage of the tactical advantage to “zealously represent his client.”
• Explain to opposing counsel what he needs to know to discuss the discovery process and negotiate data preservation, processing, review and production issues;
• Unilaterally develop an eDiscovery strategy and present it to the court after a “meet and confer” that will likely have no value.

How should counsel respond?
Cooperation and zealous representation

• ABA Rule 1.2: “a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

• VA Rule 1.2: “A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued.”

• D.C. Rule 1.2: “A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”
ABA Preamble “Zealous” Representation

• ABA Preamble: [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

  − ABA Model Rules, “Preamble and Scope” paragraph 2.
Hypothetical 4

Associate General Counsel has responsibility for a large document review and is considering “offshoring” the initial review and retaining outside counsel.

Does either Associate General Counsel or Outside Counsel need to:

• Visit the offshore resource to vet the service and the facility;
• Interview the review team and train them on privilege and waiver before starting the review;
• Should in-house counsel insist that outside counsel “pass through” the bills for the offshore review with no mark-up.
Outsourcing and attorney/non-attorney supervision

• ABA Rules 1.1 Comments [6] and [7], 5.1, 5.2, 5.3 Comment [3] and 5.5 – “The Buck Stops Here” rules

• Opinion 08-451 – When the work will be outsourced to a foreign country, the outsourcing lawyer should also ascertain whether the legal training received in that country is comparable to that in the United States, whether legal professionals in that country share the same core ethical principles with lawyers in the United States, and whether there is an effective professional discipline system.
  – ABA Standing Committee on Ethics, Formal Opinion 08-451, August 5, 2008

• eDiscovery implications
  – ABA Formal Opinion 08-451
  – Blocking statutes and privacy rules
  – Sedona’s Working Group publications
Q&A

If you have questions, you can contact:

Bill Belt – wbelt@deloitte.com
George Jones – gjones@sidley.com
Sejal Patel – sbpatel@deloitte.com
James Villa – jvilla@versar.com
This presentation contains general information only and Deloitte, Sidley, and Versar are not, by means of this presentation, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This presentation is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor.

Deloitte, Sidley, and Versar shall not be responsible for any loss sustained by any person who relies on this presentation.