

**INTRODUCTION:  
NAVIGATING THE CHANGING ETHICAL  
AND PRACTICAL EXPECTATIONS FOR E-DISCOVERY**

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This issue of the Northern Kentucky Law Review stems from the 2009 Spring Symposium, *Navigating the Changing Ethical and Practical Expectations for E-Discovery*, held on February, 28, 2009. The Northern Kentucky Law Review owes a debt of gratitude to the speakers who made the symposium a success for the over 140 Chase students and 80 alumni and other attorneys in attendance.

The symposium kicked off with Roland Bernier, Attorney and Senior ESI Consultant with Forensics Consulting Solutions, LLP, who laid the groundwork for the two panels. Mr. Bernier explained to the audience the scope of data available and how electronically stored information (ESI) can be inadvertently spoliated without intent and hidden from the view of one with limited IT sophistication. He also explained how lawyers and the IT industries must work together to maximize efficient results and comply with ethical obligations.

Second, panelists on the first panel, which was dedicated to “Changing Ethical Expectations” in e-discovery, were Professor Debra Lyn Bassett of the University of Alabama School of Law; Hon. John L. Carroll, Dean and Professor of Cumberland School of Law at Samford University (and former U.S. Magistrate Judge); and Gregory Harrison, a Partner at Dinsmore & Shohl LLP in Cincinnati. Professor Kreder had the pleasure to moderate this panel. Professor Bassett observed that ethical issues concerning e-discovery arise in the same manner as they do with physical documents, but that the largest difference is the sheer volume and number of documents. She pointed out how an average employee generates 75 e-mails per day, whereas an average employee rarely generates 75 pieces of paper per day.

Next, in regard to attorney competence, Mr. Harrison indicated that, as in all areas of representation, Model Rule 1.1 requires the level of competence that is

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reasonably necessary to represent the client.<sup>1</sup> There is no separate obligation for e-discovery, but because of its nature, e-discovery requires widespread attorney education on new issues. Judge Carroll emphasized that most judges did not work as attorneys in an e-discovery environment. Therefore, attorneys today must not only understand the infrastructure of their clients' IT systems, but they must be ready once litigation is reasonably anticipated to tell their client how to *not* delete anything, which often requires suspending routine IT maintenance. Mr. Harrison offered the interesting observation that in his experience, which is large corporate cases, he does not find most of the problems on the defense side, because large corporate defendants typically have some kind of knowledge that litigation is coming. He observed that the problem often comes from the plaintiff's side, because it has to anticipate filing the complaint at a time when it is not particularly thinking about preserving information.

In regard to whether attorneys seem to be meeting their ethical obligations not to needlessly increase the cost of litigation, Judge Carroll stated that there is a great potential for abuse because the cost of e-discovery can become so expensive that the party settles to avoid unnecessary costs. Professor Bassett offered general observations about ethics since the critical *Zubulake* decision,<sup>2</sup> which pre-dated the e-discovery amendments. In regard to the pivotal *Qualcomm* case,<sup>3</sup> she offered two observations for avoiding attorney sanctions: (1) attorney supervision of their clients' data collection activities is critical, and (2) attorneys and clients must work together cooperatively to understand how and where ESI is maintained. Mr. Harrison offered that *Qualcomm* potentially drives a wedge between attorney and client, because attorneys must cover themselves to avoid sanctions when the client does not follow ESI advice.

Lastly, the panel shifted to discuss new Federal Rule of Evidence 502. Judge Carroll described how it was intended to reduce the cost of the most expensive aspect of e-discovery—privilege review—by reducing the need for it to be completed “perfectly” to avoid waiver. Mr. Harrison summed up practitioners' concern that, although the new rule provides some comfort, it is “cold comfort,” because once the privileged document is “out there,” the bell can't be “un-rung.”

Finally, panelists on the second panel, dedicated to “Best Practices in E-Discovery,” were Thomas Y. Allman, Co-chair of the Sedona Conference; Steven C. Bennett, a Partner at Jones Day LLP (New York); Professor Steven Gensler of the University of Oklahoma College of Law; and Hon. Robert E. Wier, U.S. Magistrate Judge for the Eastern District of Kentucky. Professor Richard Bales of NKU Chase moderated this second panel. Judge Wier started

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1. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

2. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

3. *Qualcomm Inc. v. Broadcom Corp.*, No. 05 CV 1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05 CV 1958-RMB (BLM), 88 U.S.P.Q.2d 1169, 2008 WL 638108 (S.D. Cal. Mar 5, 2008).

the panel with a discussion of cooperation. He stressed how the Federal Rules of Civil Procedure emphasize cooperation, and that in the area of e-discovery, this is particularly important, but must still come up against the need for zealous advocacy. Mr. Allman pointed those in need of direction to the Sedona Conference Cooperation Proclamation<sup>4</sup> included in the Symposium materials, but admitted that coming recently from a large corporate legal department, he had mixed feelings about the Proclamation. Mr. Bennett offered the Boy Scout motto of “Be Prepared,” emphasizing that early preparation will pay off in the end, because it allows one to offer opponents documents early, which will be helpful should the opposition complain later to the judge about the discovery process. Professor Gensler emphasized that, while there is no duty in the Rules to cooperate, the rewards usually are worth the effort.

The panel also explored the role of vendors, which can be sensitive. Mr. Bennett explained that, despite the claim of some vendors to make lawyers’ jobs in e-discovery a “breeze,” the lawyer has ultimate responsibility to supervise the vendor and insure that discovery obligations are met. Professor Gensler stated that this also requires detailed, up-to-date knowledge of the client’s IT systems, for which a current data map is extremely useful. Mr. Allman mentioned that one of the fascinating points in the *Qualcomm* case was the focus on the ethical rules of supervision. Judge Wier emphasized that, under Federal Rule of Civil Procedure 26(g), an attorney’s signature certifies that he or she has performed due diligence and evaluated the benefit and burden of what has been requested. Professor Gensler discussed how new Federal Rule of Evidence 502 contemplates that parties may agree to perform a less perfect (or even no) privilege review without waiving privilege in a “sneak peak”. Mr. Allman indicated that the intent of the new rule was to reduce the cost and risk of privilege review by greatly and uniformly reducing the risk of waiver.

During the panel’s discussion of sanctions, Mr. Allman discussed how Federal Rule of Civil Procedure 37(e), adopted via the 2006 amendments, utilizes a “good faith” standard to determine when sanctions are warranted, which was emphasized in the *Qualcomm* opinion. Judge Wier emphasized that an attorney must not only fully understand the client’s IT systems and the scope and diligence of the search for responsive information that was completed, but must also be able to communicate it clearly to a judge in plain English. Mr. Bennett predicted that e-discovery would become more complicated and voluminous and even hypothesized that the day may come when we are discovering molecularly or biologically stored data. Professor Gensler concluded by predicting that a reasonableness standard is being woven into the case law.

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4. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), available at [http://www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation/proclamation.pdf](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf).

This volume includes articles from four of the Symposium participants, who have agreed to share their expertise here. Additionally, the three student notes in this issue add depth to the subject of e-discovery. We hope that these articles and notes increase the legal community's understanding of this developing issue.