# MEMBER/PUBLIC COMMENT

## The State Bar of California
## 180 Howard Street, San Francisco, CA 94105-1639
## http://www.calbar.ca.gov

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**SUBJECT:** Proposed Formal Opinion Interim No. 11-0004 (ESI and Discovery Requests)**.**

**BACKGROUND:** The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with Tab 19, Article 2, Section 6(g) (as modified by Tab 12, Title 1, Division 2, Rule 1.10) of the State Bar Board Book, the Committee shall publish proposed formal opinions for public comment.

**DISCUSSION/PROPOSAL:** Proposed Formal Opinion Interim No. 11-0004 considers: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

The opinion interprets rules 3-100, 3-110, 3-210, 5-200, and 5-220 of the Rules of Professional Conduct of the State Bar of California; and Business and Professions Code section 6068.

The opinion digest states: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law. Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI. An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

At its February 28, 2014 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 11-0004 for a 90-day public comment distribution.

**ANY KNOWN FISCAL/PERSONNEL IMPACT:** None

**ATTACHMENT:** Proposed Formal Opinion Interim No. 11-0004

**SOURCE:** State Bar Standing Committee on Professional Responsibility and Conduct

**DEADLINE:** 5 p.m., June 24, 2014

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**THE STATE BAR OF CALIFORNIA**
**STANDING COMMITTEE ON**
**PROFESSIONAL RESPONSIBILITY AND CONDUCT**
**FORMAL OPINION INTERIM NO. 11-0004**

**ISSUES:** What are an attorney's ethical duties in the handling of discovery of electronically stored information?

**DIGEST:** An attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law. Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI. An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

**AUTHORITIES INTERPRETED:** Rules 3-100, 3-110, 3-210, 5-200, and 5-220 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068.

## STATEMENT OF FACTS

Attorney defends Client in litigation brought by Client's Chief Competitor ("Plaintiff") in a judicial district that addresses e-discovery[2/] in its formal case management. Opposing Counsel wants e-discovery. Attorney refuses. They are unable to reach an agreement by the time of the initial case management conference. At that conference, an annoyed Judge informs both attorneys that they must reach a compromise and orders them to return in 2 hours with a joint proposal.

Opposing Counsel offers to do a joint search of Client's network, using her chosen vendor, but based upon a jointly agreed search term list. She further offers a clawback agreement that would permit Client to claw back any inadvertently produced ESI that was otherwise "protected by law" ("protected ESI").

Attorney mistakenly thinks that the clawback agreement is broader than it is, and will allow him to pull back *anything*, not just protected ESI, so long as he asserts it was "inadvertently" produced. Attorney then erroneously concludes there is *no* risk to Client in Opposing Counsel's proposal, and after so advising Client, Attorney agrees to the proposal. The Judge thereafter approves the attorneys' agreement, and incorporates it into a Case Management

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[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

[2/] Electronic Stored Information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. See, e.g., Code of Civil Procedure section 2016.020, subdivisions (d) & (e).) Electronic Discovery, also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

Order, including the provision for the clawback of inadvertently produced protected ESI. The Court sets a deadline three months later for the network search to occur, and a case management conference a month after that, to monitor the status of discovery and the case.

Back in his office, Attorney prepares a list of keywords he thinks would be relevant to the case and then emails those notes to Opposing Counsel as Client's agreed upon search terms. Attorney then reviews Opposing Counsel's additional facially neutral proposed search terms and agrees to include them as well. A joint search term list is created, and upon Attorney's instructions to Client to provide access, the court ordered network search proceeds on Client's network, with the vendor running the search using the joint search term list. Other than instructing Client to provide the vendor access to Client's network, Attorney does not take any other action. Attorney mistakenly reasons that he will simply claw back anything he does not like, asserting "inadvertent" production under the clawback agreement.

Subsequently, Attorney receives a copy of the data retrieved by the vendor search and puts it in the file without review. The parties return to Court for the continued Case Management Conference, during which, in response to the Judge's questions, Attorney assures the Judge that he has reviewed everything and the e-discovery is in full compliance with the Court Order, and Client's discovery obligations. Two weeks after that hearing, Attorney receives a letter from Opposing Counsel accusing Client of destroying evidence/spoliation. Opposing Counsel threatens motions for monetary and evidentiary sanctions. Only after Attorney receives this letter does he, for the first time, attempt to open his copy of the data retrieved by the vendor search, but finds he can make no sense of it. Attorney finally hires an e-discovery expert ("Expert"), who accesses the data, conducts a forensic search, and tells Attorney it appears that potentially responsive ESI has been routinely deleted off of company computers as part of Client's normal document retention policy, resulting in gaps in the document production. Expert also advises Attorney that due to the breadth of the jointly agreed search terms, it appears both privileged information, as well as highly proprietary information about Client's upcoming revolutionary product, was provided to Plaintiff in the data retrieval, even though such proprietary information was not relevant to the issues in the lawsuit.[3/] What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?

## DISCUSSION

### Attorney Duties Concerning Electronically Stored Information ("ESI")

### 1. Duty of Competence

While the requirements and standards of e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under subdivision (B) of that rule, "competence" includes the learning and skill necessary for performing legal services.

Legal rules and procedures, when placed in conjunction with ever changing technology, produce professional challenges that attorneys must meet in order to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." (ABA Model Rule 1.1, Comment [8].)[4/] Rule 3-110(C) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Another permissible choice would be to decline the representation. In

[3/] This opinion is not intended to discuss what disclosure obligations Attorney may owe to Client as a result of the release of proprietary information and the allegations of spoliation.

[4/] In the absence of on-point California authority and conflicting state public policy, the ABA Model Rules may provide guidance. *City & County of San Francisco v. Cobra Solutions, Inc*. (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

an e-discovery setting, association or consultation may be with a non-lawyer technical expert, if appropriate under the circumstances. Cal. State Bar Formal Opn. No. 2010-179.

Not every litigated case ultimately involves e-discovery; however, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness in the matter has used email or other electronic communications, stores information digitally, and/or has other forms of ESI related to the dispute. Under this backdrop, the law governing e-discovery is still evolving. In 2009, the California Legislature passed California's Electronic Discovery Act adding or amending several California discovery statutes to make specific provisions for electronic discovery and ESI. See, e.g., Code of Civil Procedure section 2031.010, subdivision (a) (now expressly providing for "copying, testing, or sampling" of "electronically stored information in the possession, custody, or control of any other party to the action").[5/] However, there remains little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena. Thus, to analyze a California attorney's current ethical obligations relating to e-discovery, we look to federal jurisprudence for guidance, as well as applicable Model Rules, and apply those principals based upon the California ethical rules[6/] and California's existing discovery law outside the e-discovery setting.

We start with the premise that "competent" handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues, if any, might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If it is likely that e-discovery will be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must take steps to acquire sufficient learning and skill, or associate or consult with someone with appropriate expertise to assist. Rule 3-110(C). Taken together generally, and under current technological standards, attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. initially assess e-discovery needs and issues, if any;
2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
3. analyze and understand a client's ESI systems and storage;
4. identify custodians of relevant ESI;
5. perform appropriate searches;
6. collect responsive ESI in a manner that preserves the integrity of that ESI;
7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
9. produce responsive ESI in a recognized and appropriate manner.

See, e.g., *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462-465.

In our hypothetical, Attorney had a general obligation to make an e-discovery evaluation early in his handling of the case, and certainly prior to the initial case management conference. The fact that it was the standard practice of the judicial district in which the case was pending to address e-discovery issues in formal case management only

[5/] In 2006, revisions were made to the Federal Rules of Civil Procedure, Rules 16, 26, 33, 34, 37 and 45, to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly parallel provisions in the 2006 federal rules amendments. See Evans, *Analysis of the Assembly Committee on Judiciary regarding AB 5* (March 3, 2009).

[6/] Federal decisions are compelling where the California law is based upon a federal statute or the federal rules. *Toshiba America Electronic Components, Inc. v. Superior Court (Lexar Media, Inc.)* (2004) 124 Cal.App.4th 762, 770 [21 Cal.Rptr.3d 532].

highlighted Attorney's obligation to conduct an early initial e-discovery evaluation. At the very least, Attorney's obligation to make an e-discovery evaluation should have been obvious even to him when he became aware that Opposing Counsel intended to pursue e-discovery in this particular case.

Notwithstanding the above, Attorney made *no* assessment of the case's e-discovery needs or of his own capabilities. Attorney exacerbated the situation when he took no steps to consult with an e-discovery expert prior to the initial case management conference. He agreed to Opposing Counsel's proposed e-discovery plan under a mistaken belief as to its scope, and thereafter allowed that proposal to be transformed into a Court Order, again without any expert consultation, and in the face of his lack of expertise in the area. Attorney participated in preparing joint e-discovery search terms without expert consultation, and was so inexperienced in ESI that he did not recognize the danger of overbreadth in the agreed upon search terms.

After the Court ordered a search of his Client's network, Attorney took no action other than to instruct Client to allow vendor to have access to Client's network. Attorney allowed the network search to move forward on Client's network without taking any steps to review it, relying on the parties' clawback agreement, the scope of which he misunderstood. After the search, Attorney took no action to review the gathered data until after Plaintiff's attorney asserted spoliation and threatened sanctions. Attorney then attempted to review the search results, only to discover he could make no sense of it. It was only then, at the end of this long line of events, that Attorney finally consulted an e-discovery expert and learned of the e-discovery problems facing Client. By this point, the potential prejudice facing Client was significant, and much of the damage was already done.

Once Opposing Counsel insisted on e-discovery, it became certain that e-discovery would be implicated in the case, and the previously *potential* risk of a breach of the duty of competence became an *actual* risk, which should have resulted in Attorney taking immediate steps to comply with rule 3-110(C), such as consulting an e-discovery expert. Had the expert been consulted at the beginning of the case, or at the latest once Attorney realized e-discovery would absolutely occur in the case, the expert could have helped to structure the search differently, and could have controlled the agreed upon search terms to be less overbroad and less likely to turn over privileged and/or irrelevant but highly proprietary material.

Rule 3-110(A) addresses intentional, reckless, or repeated failures to perform legal services with competence. In our hypothetical, while not intentional, Attorney's failures in this instance were arguably reckless and/or at the very least repeated. Attorney has breached his duty of competence.[7/]

**2. <u>The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege</u>**

A fundamental duty of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Business and Professions Code section 6068, subdivision (e)(1). "Secrets" includes "information, other than that protected by the attorney-client privilege, 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." Cal. State Bar Formal Opn. No. 1988-96. Both "secrets" and "confidences" are protected communications. Cal. State Bar Formal Opn. No. 1981-58. "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Rule 3-100(A).

Similarly, an attorney has a duty to assert the attorney-client privilege to protect confidential communications between the attorney and client which are sought in discovery. Evidence Code sections 952, 954, 955. In a civil discovery setting, while the holder of the privilege is not required to take strenuous or "Herculean efforts" to resist disclosure in order to preserve the privilege, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure *only if* the attorney and client act reasonably to protect that privilege in the first instance. *Regents of University of California v. Superior Court (Aquila Merchant Services, Inc.)* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186]. This approach also echoes federal law. See Federal Rules of

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[7/] This Opinion does not intend to set or to define a standard of care of lawyers with respect to any of the issues discussed herein, as standards of care can be highly dependent on the factual scenario in any given situation.

Evidence, rule 502(b).[8/] A lack of reasonable care to protect against the disclosure of privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. See *Kilopass Technology Inc. v. Sidense Corp.* (N.D. Cal. 2012) 2012 WL 1534065 at *2-3 (attorney-client privilege deemed waived as to privileged documents released through e-discovery because screening procedures employed were unreasonable); see also *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D. Md. 2008) 250 F.R.D. 251, 259-260, 262.

Accordingly, the reasonableness of an attorney's actions to ensure *both* that secrets and confidences, *as well as* privileged information, of a client remain confidential and that the attorney's handling of a client's information does not result in a waiver of any confidence, privilege, or protection, is a fundamental part of an attorney's duty of competence. Cal. State Bar Formal Opn. No. 2010-179.

In our hypothetical, as a result of the actions taken by Attorney prior to consulting with any e-discovery expert, Client's privileged information has been disclosed, and such disclosure may be found not to have been "inadvertent" and thus, may constitute a waiver. Further, non-privileged but highly confidential proprietary information about Client's upcoming revolutionary new product has been released into the hands of Client's chief competitor, all as a result of search terms Attorney participated in creating. All of this happened completely unbeknownst to Attorney, and only came to light after Plaintiff accused Client of evidence spoliation. In the absence of Plaintiff's accusation, it is not clear when the "inadvertent" disclosure would have come to Attorney's attention, if ever.

The clawback agreement, heavily relied upon by Attorney under a mistaken understanding of its breadth, may or may not work to retrieve the information. By its terms, the clawback agreement was limited to inadvertently produced, protected ESI. Both privileged information and non-privileged confidential and proprietary information have been released to Plaintiff.

Under these facts, Client may have to litigate the issue of whether Client (through Attorney) acted diligently enough to protect its attorney-client privilege. Attorney took no acts whatsoever to review Client's network prior to allowing the network search, Attorney participated in drafting the overbroad search terms, and Attorney waited until after Client was accused of evidence spoliation to even look at the data – all of which would permit Opposing Counsel to viably argue either that (a) Client failed to exercise due care to protect the privilege in the first instance, such that the disclosure at issue was not inadvertent, and/or (b) at the very least, the Parties' clawback agreement does not apply to protect the proprietary, but non-privileged, produced information.[9/] Client may further have to litigate its rights to return of non-privileged but confidential proprietary information.

Whether a waiver has occurred under these circumstances, and what Client's rights are to return of the non-privileged/confidential proprietary information, are legal questions beyond the scope of this opinion. The salient point is that Attorney did not take reasonable steps to minimize the risks and was directly responsible for the release of

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[8/] "(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B)."

[9/] While statutes, rules, and/or case law provide some limited authority for the legal clawback of certain inadvertently produce materials, those provisions may not work to mitigate the damage caused by the production in this hypothetical. Such "default" clawback provisions typically only apply to privilege and work product information, and require both that the disclosure at issue was truly inadvertent, and that the holder of the privilege took reasonable steps to prevent disclosure in the first instance. See, Federal Rules of Evidence, rule 502; see also, generally, *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 [82 Cal.Rptr.2d 799]; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818 [68 Cal.Rptr.3d 758]. As noted above, the effect of Attorney's acts on the question of "inadvertence" are at issue in our hypothetical.

Similarly, Attorney finds even less assistance from California's discovery clawback statute, which deals merely with the procedure for litigating a dispute on a claim of inadvertent production, and not with the legal issue of waiver at all. See, Code of Civil Procedure section 2031.285.

Client's confidential and privileged information to Plaintiff. Even if Client is able to retrieve all such information, Client may never be able to un-ring the bell.

While the law does not require perfection by attorneys in acting to protect privileged or confidential information, it does require the exercise of some level of reasonable care. Cal. State Bar Formal Opn. No. 2010-179. Here, Attorney took minimal, if any, reasonable steps to protect Client's ESI, and instead chose to release everything without prior review, relying on a clawback agreement the scope of which he mistakenly interpreted. Client's secrets are now in Plaintiff's hands and a waiver of Client's attorney-client privilege may be claimed by Plaintiff. Client has been exposed to a potential dispute as the direct result of Attorney's actions. Attorney has breached his duty of confidentiality to Client.

### 3. The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege

#### A. Duty Not to Suppress Evidence

In addition to protecting their clients' interests, attorneys, as members of the profession, have a general duty "to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Kirsch et al. v. Duryea* (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218].

Rule 5-220 states, "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."

Thus, while the legal ramifications for failure to preserve evidence are consequences imposed by law, the duty not to suppress evidence is an ethical one imposed by the rules of professional conduct. The close relationship between the duty not to suppress evidence and the duty of candor (discussed below) mandates that an attorney pay particular attention to how these ethical duties manifest themselves in e-discovery:

> . . . [T]he risk that a client's act of spoliation may suggest that the lawyer was also somehow involved encourages lawyers to take steps to protect against the spoliation of evidence. Lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence. (Bus. & Prof. Code, § 6106 ["The commission of any act involving moral turpitude, dishonesty or corruption ... constitutes a cause for disbarment or suspension."]; *id*., § 6077 [attorneys subject to discipline for breach of Rules of Professional Conduct]; Rules Prof. Conduct, rule 5–220 ["A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."].) The purposeful destruction of evidence by a client while represented by a lawyer may raise suspicions that the lawyer participated as well. Even if these suspicions are incorrect, a prudent lawyer will wish to avoid them and the burden of disciplinary proceedings to which they may give rise and will take affirmative steps to preserve and safeguard relevant evidence.

*Cedars-Sinai Medical Center v. Superior Court (Bowyer)* (1998) 18 Cal.4th 1, 13 [74 Cal.Rptr.2d 248].

None of these duties are new. However, where ESI is concerned, the interface between legal and ethical duties manifests in a unique way, and strongly urges that an attorney assist the client in implementing a "litigation hold" at the outset. A litigation hold is a directive issued by or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such ESI, pending further direction.[10/] See generally The Sedona Conference® WG1, *Sedona Conference® Commentary on Legal Holds: the Trigger and the Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260-270, 277-279.

The developing federal case law governing litigation holds finds that it is the client's obligation to issue an immediate and appropriate litigation hold whenever litigation becomes reasonably foreseeable. See *Hynix Semiconductor, Inc. v.*

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[10/] Of course, whether or not ESI exists or is relevant, clients and attorneys should consider issuing litigation holds to avoid destruction of relevant paper files.

*Rambus, Inc.* (C.A. Fed. Cir. 2011) 645 F.3d 1336, 1344-1345. Cases also have held that the obligation to ensure litigation holds or similar directions are timely issued falls on both the party and on outside counsel working on the matter.[11/] This Committee notes that litigation holds are legal duties, and not ethical ones. Nevertheless, the distinction between a legal duty to preserve evidence and an ethical duty not to suppress evidence can be very narrow when the failure to request immediate preservation of electronic information can result in a significant potential for its loss or mutation, as electronic data can easily be deleted or altered, either inadvertently through routine document retention policies, or even intentionally. Counsel would be prudent to consider the proper use and monitoring of litigation holds to assist him or her in complying with the duty not to suppress evidence.

In our hypothetical, Attorney did not discuss a litigation hold with Client. Attorney further failed to advise Client about the potentially significant harm to Client and Client's case that could result from the improper deletion of relevant ESI after the obligation to preserve evidence had commenced. Client's actions in deleting ESI after the litigation hold obligation was triggered could provide the basis for sanctions, either monetary, evidentiary, or terminating. Due to Attorney's inaction, Client may not have been aware of the need to preserve its ESI, and may not have knowingly caused the subsequent deletion of responsive ESI. The significant consequences Client now faces may have been avoided altogether had Client been timely advised of its ESI risks and obligations. Here, the ethical issue is not the lack of a litigation hold instruction itself. Rather, the ethical issue is the duty not to suppress evidence. Here, Attorney's failures in counseling his client relating to e-discovery has resulted in potential suppression of evidence.

### B. The Duty of Candor

Business and Professions Code section 6068 also addresses a number of ethical duties an attorney owes the court, in addition to the duties owed to the client. Significant to the facts of this opinion, an attorney owes a tribunal a duty of candor, and must "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Business and Professions Code section 6068, subdivision (d); *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 219-220.

The Rules of Professional Conduct establish similar requirements. "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with the truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice of false statement of facts or law; . . . and (D) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness." Rule 5-200(A), (B), and (D).

These provisions "unqualifiedly require an attorney to refrain from acts which mislead or deceive the court." *Sullins v. State Bar* (1975) 15 Cal.3d 609, 620-621 [125 Cal.Rptr. 471]. "The presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of" Business and Professions Code section 6068, subdivision (d). *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175, citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144. It also is "settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163 [162 Cal.Rptr. 458], citing *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [46 Cal.Rptr. 513]; *Sullins v. State Bar*, 15 Cal.3d 609, 622; and *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574 [131 Cal.Rptr. 379].

In our hypothetical, in response to the Judge's questions, Attorney assured the Judge that he reviewed the ESI and that it was in full compliance with the Court Order and Client's discovery obligations. He made such assurances even though he had not reviewed the data retrieved by the search, and had no reasonable basis to make such assurances. Attorney turned out to be wrong, a fact he learned after the hearing. In the subsequent sanctions

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[11/] See, e.g., *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.") and *Zubulake v. UBS Warburg LLC.* (S.D.N.Y. 2003) 229 F.R.D. 422, 432 ("Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.").

motions threatened by Plaintiff, Attorney likely will be faced with the uncomfortable situation in which he will have to explain to the Judge why his earlier misrepresentation was not a willful violation of the duty of candor.

## CONCLUSION

Electronic document creation and/or storage and electronic communications have become standard practice in modern life. Attorneys who handle litigation may not simply ignore the potential impact of evidentiary information existing in electronic form. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It may also result in violations of the duty of confidentiality, the duty not to suppress evidence, and/or the duty of candor to the Court, notwithstanding a lack of bad faith conduct.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.