Educational Event
Spring 2015

Ethics: How In-House Counsel and RIM Personnel Deal With Each Other
Who are you?
Who are we?

- Lauren Barnes
- Mark Berman
- Ron Hedges
- Frank LaSorsa
What is ESI?

- Electronically Stored Information
- Can I find that in a redweld?
- What is your experience with ESI?
WHAT MAKES ESI DIFFERENT?

Bit [a binary digit—either 0 or 1]

Byte [8 bits]
   10 bytes = a single word

Kilobyte [1,000 bytes]
   2 kilobytes = a typewritten page

Megabyte [1,000,000 bytes]
   5 megabytes = the complete Shakespeare

Gigabyte [1,000,000,000]
   50 gigabytes = a floor of books

Terabyte [10^{12} bytes]
   10 terabytes = Library of Congress

(dispute over discovery of four terabytes or about 880 million pages).
WHAT MAKES ESI DIFFERENT?

Voluminous and distributed

Fragile yet persistent

Capable of taking many forms

Contains non-apparent information

Created and maintained in complex systems
ESI

Personal computers at work and/or home
Laptop computers and tablets
Networked devices (i.e., “the Internet of Things”)
Photocopiers
Removable media (disks, flash drives)
Disaster recovery backup media
Third-party providers (incl. social media)
“Wearable” technology
ESI and Ethics

• What are the ramifications that organizations, counsel and information professionals are confronted with as a result of the ESI/Big Data explosion?

• What are the ethical duties around information for the law firm attorney, in-house counsel and the information professional?
Information Governance

For an overview, see *The Sedona Conference Commentary on Information Governance* (Dec. 2014).

Going beyond the hype, what might it mean beyond “simple” RIM?

You could be in trouble!

§8B2.1., United States Sentencing Guidelines (Effective Compliance and Ethics Program):

• Uses two factors in determining whether to mitigate fines
  – The existence of effective compliance and ethics programs
  – Efforts at self-reporting, cooperating with authorities, and accepting responsibility
What is an effective compliance and ethics program? Among other things an organization should:

– Exercise due diligence to prevent, and protect against, criminal acts
– Be generally effective in doing so
– Have personnel at various governance levels who are aware of the program and engage in its oversight and administration
– Evaluate the program periodically for effectiveness
– Have and publicize a system for employee reporting of criminal acts without fear of retaliation
Information Security/Risk/Ethical Duty

- Do we need all our connections? Would reducing the types and frequency of connections improve our risk management?
- How do we evaluate evolving cyber threats and vulnerabilities in our risk assessment process for the technologies we use and the products and services we offer?
- How do our connections, products and services offered, and technologies used collectively affect our financial institution’s overall inherent cybersecurity risk?
Privacy

There have been instances in which a court has directed a party to provide access to, for example, the party’s Facebook page or online dating service account.

Why should an adversary be permitted to “rummage” through social media that may be irrelevant or subject to legitimate privacy concerns?

What can be done to limit “rummaging?”

And note that there is a vendor which states that its product is “the industry’s first investigative solution specifically designed to enable *** professionals to effectively address social media content and web content ***.”
Without a winning strategy, litigation is a lot like playing chicken.

> bingham.com
Case Law

*Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc.*, 973 So.2d 1120 (Fla. Sup. Ct. 2007) (ending the litigation saga that began in 2005 with an adverse inference instruction and a jury award of $600 million in compensatory damages and $800 million in punitive damages)


*Zubulake*
Cooperation


The Sedona Conference® Cooperation Proclamation (July 2008)

J.W. Craig, “LaRussa’s Dilemma: Does an Advocate Have a Duty to the Client to Press Every Advantage?” PP&D (Spring 2009)

Definition of a record – anyone?

What exactly is a “record?” The classic definition, at least for the Federal Government:


Translation = A “record” is reliable documentary evidence of a business process related to an organization’s business purpose.
Record Definition – Who cares?

Note: This definition is much narrower than that of “document” for purposes of discovery.

“Record” is not equal to “document” in the “possession, custody, or control” of a party or nonparty subject to a duty to preserve.
Policy, Compliance, Ethical Obligations

What, if anything, might be a consequence of an organization’s failure to comply with its own records retention policies?

• *Brigham Young Univ. v. Pfizer*, 282 F.R.D. 566 (D. Utah 2012) (“A violation of private corporate policy does not always equate to a violation of the law ***”)

Begs the question: When does it, if ever?


Isn’t that a legitimate purpose of a document retention policy?

• *Crawford v. New London*, Case No. 3:11cv1371 (JBA) (D. Conn. May 23, 2014) (finding no spoliation because (1) demand letter received after original DVD had been recorded over consistent with sixteen-day retention policy, (2) no evidence of culpable state of mind in recording over DVD, (3) identical copy of original DVD existed, and (4) no evidence that copy of lesser quality than original)
Litigation Hold

Assume these facts:

• A corporation reasonably anticipates that it will be named as a defendant and institutes a legal hold.
• The corporation is not named as a defendant when “the” civil action is commenced.
• Has the duty ended? If not, when does it end?

What if the corporation is instead served with a subpoena?
Should the corporation release the hold once it has complied with the subpoena?
A collision between search and ethics?

• Assume a party’s attorney knows that search terms proposed by adversary counsel, if applied to the party’s ESI, will not lead to the production of relevant (perhaps highly relevant) ESI.

• Absent a lack of candor to adversary counsel or the court under RPC 3.4 (which implies if not requires some affirmative statement), does not RPC 1.6 require the party’s attorney to remain silent?

• What if the “nonproduction” becomes learned later? If nothing else, will the party’s attorney suffer bad “PR” if nothing else?

• If the party’s attorney wants to advise the adversary, should the attorney secure her client’s informed consent? What if the client says, “no?”

(with thanks to Judge Facciola)
Code of Ethics

• Is the code of ethics for attorneys and information professionals so different?
CRM Ethics

• Integrity
• Respect legal guidelines
• Protect confidentiality
• Honesty, Integrity
• Transparent
• Competence
ABA (American Bar) Model Rules

- Competence
- Communication
- Confidentiality
- COI (Conflict of Interest)
- Impartial
- Honesty, Integrity
What **does** it mean to be a Professional?

- Accountability
- Transparency
- Integrity
- Protection
- Compliance
- Availability
- Retention/Disposition
GOT ETHICS?