

The Ethics of E-Discovery

By John M. Barkett
Chicago, Illinois, 2009; ISBN 978-1-60442-256-6
Price \$69.95, pp. 125

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Journal of High Technology Law
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E-discovery is an up and coming topic in the legal world. Recently its popularity has been growing and it is quickly taking over the way law firms conduct discovery and store information and documents. As with any major change in practice, certain problems and new issues are bound to arise. John M. Barkett recognized that ethical and malpractice issues concerning E-discovery are becoming more and more prevalent in law firms across the country. In *The Ethics of E-Discovery*, Barkett addresses this rapidly growing approach to discovery. Barkett addresses numerous ethical issues that may occur because of E-discovery. He mainly focuses his attention on the American Bar Association's Model Rules of Professional Conduct to discuss the widespread topic of E-discovery and the ethical issues that today's lawyers face. Barkett is an E-discovery connoisseur; his work on the subject includes the book *E-Discovery: Twenty Questions and Answers* and countless articles dealing with the nuts and bolts of E-Discovery and the recent changes in the Federal Rules governing E-discovery. Barkett has also studied legal ethics extensively and written different articles on the Model Rules and ethical issues in multiple areas of law. This is the first book in which he combines his two areas of expertise.

To begin his analysis, Barkett analyzes the difference between electronically stored information and information on paper. He starts by discussing various situations that may occur in law firms and compares the difference in the outcome if the firm used electronic information

or paper. Barkett uses these examples to enter into a detailed discussion of the main key differences between the two systems, such as the way files are stored in a paper world versus a digital world, the existence of metadata and how that enhances electronically stored information, the fact that digital data can survive deletion while paper cannot, the abundance of digital sources over paper sources, the benefits of back-up tapes, and many others.

In order to ease into the ethical rules governing discovery, Barkett next gives a brief overview of the 2006 amendments made to the Federal Rules of Civil Procedure that related to E-discovery. Barkett uses these rules as a foundation for discussing the Model Rules relating to E-discovery.

Finally, after a thorough introduction to E-discovery, a discussion on the differences between electronic information and paper, and the amendments to the Federal Rules that apply to E-discovery, Barkett takes a closer look at the numerous Model Rules that may pertain to E-Discovery. He goes through different rules and discusses how they concern the relevant E-discovery issues; he then looks at the Rules governing different states to discuss the disparities between state lines. When discussing the various applicable Model Rules, Barkett looks at different states to show the ways various committees have addressed similar issues. While it is interesting to see the variety of rules across state lines, it seems slightly pointless to dedicate this much time and energy to discussing the way a small portion of states vary on the relevant issue. The reader would have been better served had Barkett addressed all states and how they vary; if your state is not one of his chosen few, then you are on your own to find out how your state's committee has written on the issue.

Barkett does a good job of going through the Model Rules and discussing the ones that could possibly be relevant to E-discovery issues. He begins by stating each Model Rule that he

finds of relevance and then shows how it relates to E-discovery by offering important tips and pointers lawyers need to pay attention to at different stages of discovery. Where appropriate, he asks specific questions that might arise when dealing with this issue and offers different ways respond and settle the problem before greater complications arise. His analysis is thorough and he addresses smaller sub-issues that may arise as well.

Barkett next dedicates an entire chapter to *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Calif. Jan. 7, 2008). He discusses this case in order to show how it represents a “colossal e-discovery failure.” *Qualcomm Inc.* is demonstrative of the kind of abuse that can occur when a case involves electronic documents. The case deals with a big-time law firm that hid hundred of thousands of important electronic documents that were detrimental to their case. While the first half of the book is extremely helpful and user-friendly, the chapter dedicated to *Qualcomm Inc. v. Broadcom Corp.*, seems to drag on. The point Barkett tries to make with this chapter could be easily shortened and possibly even footnoted in a previous chapter; dedicating an entire chapter to this topic takes away from the rest of the book as the tone and method of delivery is different from his previous chapters.

The final chapter discusses outsourcing E-discovery and how law firms can send their electronic documents to foreign-licensed lawyers or contractors when dealing with enormous amounts of documents. While this topic has not been addressed directly in the Model Rules, there are several opinions that discuss this issue along with its advantages and disadvantages.

In his short conclusion, Barkett discusses the ever-present need for prudent lawyers. In order for this to happen, he believes strongly in following the rules of E-discovery and being sure to remember how the Model Rules relate. Barkett’s previous work tends to address the rigid rules of E-discovery by taking a more “how to” approach with his writing rather than analyzing

the rules and their effect when applied to specific areas of law. In *The Ethics of E-Discovery*, he begins by laying a foundation of E-discovery in a successful attempt to draw in readers who are less than knowledgeable in the area. Then Barkett delves into the Model Rules, discussing how they apply to E-discovery and how they can help or hurt law firms in a more analytical fashion.

In *The Ethics of E-Discovery*, Barkett spends a lot of time cautioning readers who think they understand the rules of E-discovery; appearing both cynical and skeptical of them. In a way this approach successfully addresses those types of lawyers know that they too can benefit from learning all there is to know about E-discovery and the governing ethical rules. However, at times he seems to take it a little too far with his examples of ways lawyers can get themselves into trouble. This may just be Barkett's way of trying to reach every lawyer who has had some experience with E-discovery and possibly does not even realize the harm that could have been caused.

It seems clear that Barkett is addressing three different audiences in this book. First, he seems to be addressing those lawyers who have absolutely no knowledge of how E-discovery works or how to store information electronically. As a result, lawyers who need an introductory book on E-discovery while also receiving helpful advice on ethical issues that may arise will find this book extremely helpful. His opening discussion of what E-discovery is contains many definitions in order to get novice E-discovery lawyers up to speed before he discusses the common ethical issues. The second audience this book seems to address is lawyers who think they know enough about E-discovery to partake in it and get by but truly should know more in order to not run into ethical and malpractice problems. Barkett comes right out and blatantly tells readers that E-discovery will “change litigation as many litigators have known it” and even recommends that firms hire “E-discovery counsel” who have expertise in this new area,

so they can advise them correctly in order to stay out of trouble (Barkett 18,19). Finally, this book also addresses a third audience: those who know the ins and outs of E-discovery but still have not related their knowledge to the Model Rules and the problems that can arise because of that.

Because of its relevancy and growing popularity, more and more E-discovery issues will continue to surface. Barkett's book addresses an important issue that many lawyers face and do not know how to deal with: the ethical concerns of E-discovery. This book will help those who know next to nothing about E-discovery, those who need to know more, and those who have not yet taken the leap to connect what they know about E-discovery to the Model Rules. It is important for all lawyers who use E-discovery to take the time to read this book in order to avoid being on the other side of the stand at trial. Overall, *The Ethics of E-Discovery* is a book that should be on the shelf in every law firm in the country. The benefits one would get out of reading this book are definitely worth the price tag. Knowing the valuable information that Barkett discusses here could be the difference between keeping your job and not being able to practice law.