

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
Suffolk University Law School

“E-discovery has shaken up litigation across America.”¹ As a result of using computer technologies in civil litigation, courts are faced with a myriad of issues involving e-discovery.² Firms have recognized the great need to retain e-discovery consultants in order to make up for the lack of expertise in such a complicated area of law.³ Equally intricate ethical issues are embedded within the legal complexities surrounding e-discovery. In his book *The Ethics of E-Discovery*, John Barkett recognizes this distinction, and educates his audience about the interplay between technology and the American Bar Association’s Model Rules of Professional Conduct (“Model Rules”). His proficiency in e-discovery matters has developed over the course of his career as a litigator, mediator, consultant, professor and author. Barkett’s expertise translates well onto the written page, as he clearly and articulately expresses his concerns and recommendations.

In order to provide the reader with a basic framework within which to analyze

¹ JOHN M. BARKETT, *E-DISCOVERY: TWENTY QUESTIONS AND ANSWERS*, ix (American Bar Association) (2008).

² Lauren Katz, *A Balancing Act: Ethical Dilemmas in Retaining E-Discovery Consultants*, 22 GEO. J. LEGAL ETHICS 929, 929 (2009).

³ *Id.*

In 2007, law firms and corporations spent \$2.7 billion on electronic data discovery services, a growth of 43% from 2006. The e-discovery services market is expected to net \$4.6 billion annually by 2010...It has become necessary for firms to retain e-discovery services as computer technologies have become more complex, and the volume of information kept in electronic mediums has expanded exponentially.

Id.

ethical issues, Barkett first outlines how electronically stored information differs from paper. In this chapter, he seeks to demonstrate why electronic information inherently poses such a problem, while also de-mystifying some key terminology necessary for understanding the rest of his book. Barkett explicates what is commonly known: paper presents fewer issues because once a document is shredded or destroyed, it is gone forever.

Unlike paper documentation, digital files may be archived in local storage media or backup tape, creating the likelihood it could be found again. More problematic is the existence of metadata, and the fact that digital data can survive deletion. Ultimately, use of electronic information becomes troublesome in litigation as it may be stored in several places, some of which are easier than others to navigate. With this divide between the paper and digital world in mind, Barkett offers a “primer” on the federal e-discovery rules. This is especially useful to help his audience place ethical e-discovery issues in context, and he avoids making the assumption that all readers are well-versed in the rules.

Subsequently, Barkett moves into the heart of his book, a discussion of e-discovery under the Model Rules. Instead of providing an introductory paragraph about how e-discovery generally implicates the Model Rules, he moves directly into a specific rule. While this seems abrupt at first, Barkett proves that he is able to clearly convey to the reader how each individual rule plays into the larger picture. Model Rule 1.1 seems an appropriate starting point, as it mandates that lawyers provide competent representation to a client.⁴ By providing readers with a comment to the rules, it makes clear that part of this duty on lawyers entails continuing education in order to provide competent representation. Barkett recognizes that many litigators are not independently competent

⁴ ABA Model R. Prof. Conduct 1.1 (1983).

to handle e-discovery issues, but emphasizes that they must take active steps to either become competent or hire outside consultants.

Barkett expands on the basic duty of competence as he tackles the more complicated issue, which concerns the inadvertent production of privileged information. Model Rule 4.4 mandates that a “lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent...promptly notify the sender,”⁵ and comments to the Rule suggest that this is not limited to privileged documents. In order to know what to do when you are informed by a sender that a privileged document was unintentionally transmitted, lawyers should look to Fed. R. Civ. P. 26(b)(5)(B), which Barkett simplifies as not requiring the return of the document unless the recipient fails to sequester or destroy the document. As Model Rule 4.4 and Fed. R. Civ. P. 26(b)(5)(B) collide, the propriety of mining metadata associated with the inadvertent transmittal of privileged documents comes into question. Barkett offers insight from the ABA and various state ethics committees to demonstrate how jurisdictions differ in either permitting or not permitting the mining of metadata. While this does provide insight into specific state practices, its underlying theme is consistent with the rest of his book; namely, that lawyers should be very cautious in this area of law, and consult someone from their jurisdiction before making any assumptions about e-discovery practice. Barkett’s opinion that metadata mining is ethically improper seems tangential, as it is ultimately the opinion of state ethics committees that governs.

While the ethical duty of confidentiality seems straightforward and unlikely to present e-discovery problems, Barkett illuminates how even basic confidentiality

⁵ ABA Model R. Prof. Conduct 4.4 (1983).

obligations may be unduly compromised if one is not careful with electronic information. He poses a hypothetical situation which seems relatively common: sending a third party a document that both lawyer and client have edited. Earlier discussion about the recipient's obligations under the Model Rule 4.4 is paralleled in this section now focusing on the sender's obligations.⁶ Barkett uses an opinion from the ABA Standing Committee concerning Rule 1.6 and various state ethics opinions to highlight that a sender typically has the duty to safeguard information.

After discussing a somewhat exhaustive list of Model Rules, Barkett next moves into a discussion of a recent case, *Qualcomm v. Broadcom*, which involved the imposition of sanctions on lawyers for the conduct of their client, who failed to conduct an appropriate search for electronic documents.⁷ At trial, the sanctioned lawyers were not permitted to use attorney-client privileged communications to defend themselves, and appealed on this ground. Barkett provides a clear procedural history of the case, and uses this fact pattern to illustrate a "colossal e-discovery failure."⁸ First, if the lawyers were unable to get their client to perform an adequate search, they should have withdrawn from the case, as the duty of candor under Model Rule 3.3⁹ trumps the duty of confidentiality under Model Rule 1.6.¹⁰ Second, the duty of disclosure imposed on in-house counsel under Model Rule 1.3 required the lawyers to honor the corporation's discovery obligations in litigation. Barkett gives readers a takeaway lesson, in order to not be the "sequel" to *Qualcomm*: "an organization's lawyer who learns of civil conduct that has sufficiently large penalties attached to it has to move up the chain of command if

⁶ *Id.*

⁷ 2008 WL 66932 (S.D. Calif. Jan. 7, 2008).

⁸ BARKETT, *supra* note 1, at 66.

⁹ ABA Model R. Prof. Conduct 3.3 (1983).

¹⁰ ABA Model R. Prof. Conduct 1.6 (1983).

the responsible constituent does not end the conduct.”¹¹

The ethical implications of outsourcing e-discovery work, while not directly addressed in formal ethics opinions, seems to offend the rules of professional conduct. Barkett addresses this overarching ethical concern surrounding e-discovery practice in his last chapter. The potential need to hire outside resources remains a threat throughout his book, and this chapter finally discusses how such help may in and of itself violate the ethical rules governing the legal profession. Although Barkett analyzes this dilemma via many of the Model Rules, the most compelling analysis is in response to the question he poses concerning client consent: must a client’s informed consent be obtained before outsourcing e-discovery work?

Model rule 1.0(e) defines informed consent as indicating the “agreement by a person to a proposed course of conduct when the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”¹² A lawyer might need to advise their client if a temporary lawyer was hired to work independently without close supervision. Is a lawyer ever mandated to obtain informed consent? Technically, no, or so it seems. Barkett again cites various state ethics committee opinions, none of which use definitive language. He concludes by explaining that the “facts dictate the obligation,” leaving it up to the lawyer to make the judgment call.¹³

E-discovery can be a time-consuming, confusing, expensive, and risky venture. While lawyers and ethics committees are trying to navigate their way through these uncharted waters, Barkett does not contend that he has all of the answers. Rather, he

¹¹ BARKETT, *supra* note 1, at 79.

¹² ABA Model R. Prof. Conduct 1.0(e) (1983).

¹³ BARKETT, *supra* note 1, at 94.

wishes to alert practitioners to the inherent dangers in the digital world. His foundation for writing this book is the hope that lawyers will recognize when they need help, and obtain that advice. While it may seem like an elementary conclusion – after reading through all of the intricate ethical e-discovery issues – Barkett provides a simple yet effective final piece of advice that many lawyers may need. While law school provides individuals with the tools they need to become effective lawyers, it is crucial not to forget that specialized areas of law may be best left to the specialists.