



NEWSLETTER

What Ethical Duties Do Attorneys Have When Handling Discovery Or Electronically-Stored Information?

By Cheryl L. Stengel, Esq.

The State Bar of California Standing Committee on Professional Responsibility and Conduct recently issued Formal Opinion No. 2015-193 which addresses a number of issues regarding an attorney's ethical duties in the handling of discovery of electronically stored information ("ESI").

"ESI" is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. "Electronic Discovery", also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes (Code Civ. Proc. §2016). In 2006, revisions were made to the Federal Rules of Civil Procedure to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly-parallel provisions in those 2006 federal rules amendments.

Although California ethics committee opinions are advisory in nature and not binding on courts, these opinions should be consulted by members for guidance on proper professional conduct. Opinion No. 2015-193 highlights the challenges lawyers face in a rapidly changing technical environment to become and stay competent.

The Opinion notes that while e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of ESI. The duty of competence may require a higher level of technical knowledge and ability in certain cases, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI.

Upcoming Events Calendar

August 11
FBA – Padres Game
7:05 p.m. at Petco Park
Contact:
Garrison "Bud" Klueck for tickets
619-448-6500
Garrison@FamilyLawSanDiego.com

August 13
Estate Planning and Probate Section
12:15 - 1:15 p.m.
Law Offices of Nancy Kaupp Ewin, Esq.
8166 La Mesa Blvd., La Mesa
Topic: TBA
Speaker: TBA

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An attorney handling e-discovery matters should be able to:

1. Initially assess e-discovery needs and issues, if any;
2. Implement/cause to implement appropriate ESI preservation procedures;
3. Analyze and understand a client's ESI systems and storage;
4. Advise a client on available options for collection and preservation of ESI;
5. Identify custodians of potentially relevant ESI;
6. Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
7. Perform data searches;
8. Collect responsive ESI in a manner that preserves its integrity; and
9. Produce responsive non-privileged ESI in a recognized and appropriate manner.

In today's technological world, almost every litigation matter potentially involves e-discovery. Electronic document creation and/or storage, and electronic communications, have become commonplace in modern life. For example, it is likely that a party or a witness has used e-mail or other electronic communication, stores information digitally, and/or has other forms of ESI related to the dispute.

For those lawyers who are skilled in the nuances of e-discovery, the above list is not problematic. But, for an attorney who is not experienced in the legal and technical aspects of e-discovery, the challenge is daunting. To advise a client regarding options for collecting and preserving ESI as well as protecting client confidences and privileges, lawyers need to understand the technical aspects of the ESI systems at issue and the tools available for each system. They also need to understand how a tool selection will impact the ability to produce responsive ESI in the appropriate manner.

While the Opinion is helpful in raising awareness of the numerous legal rules and procedures regarding e-discovery, it is important to remember that lawyers must understand the specifics of the technology involved. If an attorney is not familiar with the benefits and risks associated with the relevant technology and cannot acquire sufficient learning and skill before performance is required in the representation, the attorney must either decline the representation or associate with or consult competent counsel or technical experts who are familiar with the technology. Should the attorney choose to associate with others, the attorney must understand that they retain an ongoing ethical obligation to oversee the work that is done by the counsel or expert and that the attorney must make certain that the team (including non-lawyers) is compliant with all relevant ethical obligations.

The State Bar of California Standing Committee on Professional Responsibility, Formal Opinion 2015-193, is available at <http://ethics.calbar.ca.gov/Ethics/Opinions.aspx> (superseding Formal Opinion Interim No. 11-0004).

OMG-FBA @ Padres Game on August 11!

As Yogi Berra once said, “It’ll be later than you think before you know it.” It is only a short time before your Foothills Bar Association goes to a Padres game. The game is against the Cincinnati Reds on Tuesday evening, August 11. Don’t be the person who hears later about the great time that everybody else had at the ballpark but just delayed buying the tickets for the FBA outing until it was too late.

The Padres have been hot since the All-Star break. On the other hand the Cincinnati Reds appear to be one of the weaker teams in the National League. As a result, the chances of our seeing a San Diego victory appear very good.

Please remember that because Padre night games start at 7:05 PM—so there is time to complete a full day of work and still make it to Petco Park on time. There are lots of drink and food concessions at the ballpark and we can all feast there!

FBA has qualified for a great group rate! Also, these are terrific tickets with a great discount. The tickets are in sections 111-119 on the Field level. The tickets normally sell for \$54.50 and the discounted group rate is just \$42 a ticket—a 23 % discount! Such a deal!

Again, don’t be the person who thought about going and did not commit in time! Take yourself out to the ballgame! Take yourself “out with the crowd” (of FBA lawyers and judges). Please contact the Foothills Bar Special Events Chairperson, Bud Klueck. Bud’s email address is Garrison@FamilyLawSanDiego.com and the law firm’s telephone number is 619-448-6500. Please contact “Jodi” at the Klueck law firm to add your name to the list of attendees. Good seats are still available but they are going fast!

REMINDER:

It’s time to renew your Foothills Bar Association membership for the 2015-2016 year. Membership renewal for existing members or sign up for new members may be done on-line at:

<http://foothillsbar.org/membership/>.

The membership application is also provided with the newsletter.

Rescission Prevails Over Inequitable Equity

By Keith Jones, Esq.

California law permits a wide variety of remedies for parties involved in contract disputes. One such remedy includes rescission of a contract under Civil Code Section 1689 when the aggrieved party can establish that its consent resulted due to mistake, or through fraud, duress or undue influence, among other scenarios.

A party seeking rescission may also seek damages related to the contract. Under Civil Code Section 1692, the award for damages may not include duplicate or inconsistent items of recovery. Furthermore, a court may order the party obtaining rescission to pay compensation to the non-prevailing party to effect justice and may further adjust the equities between the parties.

Conceptually, rescission seeks to restore the parties to positions as closely as possible to their original positions even though doing so can't be reproduced to the exact status. Courts use equitable powers to adjust the parties' respective positions to achieve as close as possible to the original status. In real estate transactions, a buyer obtains rescission by returning title and possession to the seller, and the seller refunds the payments received from the buyer. Other equitable adjustments may be appropriate so that the parties can recover or receive credit for commissions, escrow expenses, interest, rental value, and other costs. But as lawyers, we know these cases aren't always matters of simple addition and subtraction.

The California appellate court recently reversed a trial court's decision which denied rescission for the sale of a residence. Rather than rescission, the trial judge applied equity and awarded a judgment in favor of the buyer requiring the seller to indemnify the buyer for up to \$360,000 for repairs and other expenses for a ten year period related to an undisclosed private sewer line. The buyer had sued for fraud and other claims in seeking to rescind the purchase of the \$2.35 million residence and after spending nearly \$300,000 towards renovations.

During this period, the seller claimed that the buyer had dramatically changed the residence, and that seller had purchased another home and spent approximately \$100,000 towards improvements. The seller successfully argued at trial that rescission would place an undue burden on it. The trial court reasoned that rescission was not fair or appropriate due to the parties' changes to their circumstances, and then applied equitable adjustments so that the private sewer line costs would be borne by the seller for ten years.

The appellate court found that the trial court abused its discretion in denying the buyer rescission even though doing so would be difficult and prejudicial to the seller. It ruled that the buyer was entitled to rescission since the trial court found fraud on the seller's part, and the statute permitted the court to make other adjustments to balance the equities. To do otherwise in this particular case would have enabled the fraudulent seller to receive special equitable consideration to avoid unwinding the transaction, which the appellate court deemed unfair to the innocent buyer. The fact that the buyer couldn't be restored to exact status quo should not have permitted a seller to benefit since its own misconduct led to the disastrous circumstances.

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Looking for Speakers for Future FBA Civil Litigation Section Meetings:

If you have a litigation topic you would like to present at an upcoming Civil Litigation Section MCLE meeting, please contact Section Co-Chairs Mark Raftery at mraftery@epsten.com or Elizabeth Smith-Chavez at liz@smithchavezlaw.com.

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The Foothills Bar Association seeks a chairperson for the criminal law section. Responsibilities will involve scheduling speakers for lunch time MCLE programs on topics of interest and providing Section meeting status reports to the Foothills Board of Directors. Interested attorneys should contact Glen Honig at honigesq@gmail.com or (619) 315-9962.

Foothills Bar Association Notice of Board Meeting:

The Foothills Bar Association Board of Directors meets on the third Tuesday of each month. The next meeting will be on August 18, 2015 at the Kriger Law Firm, 8220 University Avenue, 2nd Floor conference room, La Mesa, CA 91942. The meeting will begin at 4:45 p.m. If you want your voice to be heard in policy discussion and upcoming events planning or would simply like to learn more about the organization, your attendance is welcome.

The Family Court needs settlement conference judges. Please volunteer and share your expertise. Contact Kelly Fabros at 619-456-4065 or Kelly.Fabros@SDCourt.CA.Gov.

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SUBMISSIONS

Your submissions are welcome! Send articles, letters, flyers, and other non-advertising submissions to Cheryl Stengel at clstengel@outlook.com.

ADDRESS CHANGES

Send change of address or telephone number to Bradley Schuber at bschuber@krigerlawfirm.com

**Foothills Bar Association
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