

# **ESI ADVICE AT THE INITIAL CONSULT**

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# ABA's Model RPC, Rule 1.1

A lawyer *must* keep abreast of **changes in law** including benefits & risks associated with **relevant technology.**

# Simple Definition of ESI

**ESI =  
Digital/Technology  
Information**

**ESI**

## **Material Created & Communicated on Devices**

**Smartphones, iPads, Laptops,  
Desktops & other hardware that  
require software to operate...**

# What is My Ethical Duty to a Potential Client from the 1<sup>st</sup> Meeting?

- o **Client's Duty to Preserve ESI Evidence**

**&**

- o **Client's Duty to Avoid Creating Harmful ESI Evidence that could be used against them or to waive the attorney client privilege**

# Are Lawyers Liable for Not Properly Advising Clients to Preserve ESI?

***Qualcomm v. Broadcomm,***

**2008 WL 66932**

**(S.D. Cal. Jan. 7, 2008)**

**Magistrate Barbara Major**

# **LITIGANT'S DUTY TO PRESERVE ESI**

**Zubalake v. UBS Warburg,**

**216 F.R.D. 280, 283 n. 30**

**(S.D.N.Y. 2003)**

**Judge Shira Sheindlin**

# ETHICS OPINIONS

- “[C]ounsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.” N.H. 2012.
- Lawyers who lack competence in e-discovery could violate CA’s ethics rules and the attorney’s duty of confidentiality. CA 2015
- “Rule 1.1 requires lawyer to provide competent representation to clients. Comment [8] to the rule specifically state that a lawyer” .... [should keep abreast of relevant technology.] *‘Relevant technology’ includes social media.* NC 2015



# YOUR ADVICE

- Turn on all security settings
  - Passwords, Approval of FB posts, FB Tagging etc,
- Turn off SHARING on all Apple devices,
- Turn off GPS tagging on Social Media posts (FB, Twitter, Instagram) &
- Turn off GPS location services on an iPhone.

# WHY????



# As NC's '15 Ethics Opinion States, Their Attorneys...

- Can advise clients **to delete** a harmful post *BUT ONLY AFTER YOU, MAKE A COPY OF IT & PRESERVE.*
- If the OP later requests the post in discovery, you must turn it over!

**BUT, NOT EVERY STATE'S ETHICS OPINIONS NECESSARILY AGREE WITH ANOTHER STATE'S POSITION**

# 4 Hot Tips for Every Initial Consultation

- Tell Clients to Secure their Digital Hardware with Passwords & other Security Options
- Tell them to Preserve their Social Media Postings in accordance with YOUR State's Ethics Rules
- Make Written Notation About Your Advice
- Follow up with a Thank You letter/email sent to a secure location outlining the advice you gave them.

## **A Family Lawyer's Ethical Obligation to Implement Guiding Principles about ESI into Their Every Day Practices**

Melissa Fuller Brown, November 2015.

ESI (Electronically Stored Information) is information created, manipulated, communicated, stored, and best utilized in digital form, and it requires the use of computer hardware and software. ESI is found on any device having electrical, digital, magnetic, wireless, optical or electromagnetic capabilities including on PDA's, cell phones, smart phones, digital cameras, GPS devices, portable hard drives, external hard drives, internal hard drives, thumb/flash drives, servers, tablets, I-pads, I-pods, workstations, desktops, and laptops.

In 2006, formalized changes were made to the Federal Rules of Civil Procedure about the use of electronic discovery. Now, at least 49 states have e-discovery and ESI rules. These rules may differ from state to state or, where they might even be identical, the states might still interpret the lawyer's compliance differently "due to varying jurisdictions' different social mores, population bases and historical approaches to their own ethics rules and opinions."<sup>1</sup>

States such as New Hampshire,<sup>2</sup> California,<sup>3</sup> and North Carolina<sup>4</sup> have issued ethics opinions to help specifically advise their attorneys about their ethical obligation to not only understand technology but also to advise potential and current clients about how to preserve ESI evidence. North Carolina even provides various fact scenarios to guide its attorneys depending upon the nuances of a particular situation.

The bottom line is that family law attorneys do have an ethical obligation to stay abreast of technology, social media and the responsibility to preserve evidence related to each. Given the rapid changes in these arenas, it is best for family law attorneys to implement principles, not necessarily "best practices,"<sup>5</sup> to remain

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<sup>1</sup> Social Media Ethics Guidelines of NY State Bar Association's Commercial & Litigation Section, updated June 9, 2015. <http://www.nysba.org/socialmediaguidelines/>

<sup>2</sup> "[C]ounsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation." N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

<sup>3</sup> Lawyers who lack competence in e-discovery could violate CA's ethics rules and the attorney's duty of confidentiality. [http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20\[11-0004\]%20\(06-30-15\)%20-%20FINAL.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20[11-0004]%20(06-30-15)%20-%20FINAL.pdf)

<sup>4</sup> "Rule 1.1 requires lawyer to provide competent representation to clients. Comment [8] to the rule specifically state that a lawyer" .... [should keep abreast of relevant technology.] 'Relevant technology' includes social media." <http://www.ncbar.com/ethics/ethics.asp?page=1&keywords=Spoliation>

<sup>5</sup> Social Media Ethics Guidelines of NY State Bar Association's Commercial & Litigation Section, updated June 9, 2015. <http://www.nysba.org/socialmediaguidelines/>

aware of their state's ethics opinions and to advise potential clients from the very first meeting about their duty to preserve ESI evidence so the potential client does not unintentionally destroy evidence and perhaps create their own ethics delimita by having failed to educate the client about this duty.