

Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Search Technology in E-Discovery

Maura R. Grossman & Gordon V. Cormack



Recommended Citation: Maura R. Grossman & Gordon V. Cormack, *Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Search Technology in E-Discovery*, 12 SEDONA CONF. J. 89 (2011).

Copyright 2011, The Sedona Conference

For this and additional publications see:

<https://thesedonaconference.org/publications>

SOME THOUGHTS ON INCENTIVES, RULES, AND ETHICS CONCERNING THE USE OF SEARCH TECHNOLOGY IN E-DISCOVERY

*Maura R. Grossman¹
Wachtell, Lipton,
Rosen & Katz
New York, New York*

*Gordon V. Cormack
University of Waterloo
Waterloo, Ontario*

In e-discovery, search technology is often used to find documents that are responsive to a request for production, or to identify documents that may be withheld on the basis of attorney-client privilege or work-product protection. In choosing whether or not to employ a particular search methodology, counsel will typically be influenced by various incentives, rules, and ethical considerations, whether they are aware of it or not.

In identifying the responsive information for production, is counsel operating primarily as an advocate, or as an officer of the court? As an advocate, what choices would best aid the client? As an officer of the court, what choices would best aid the administration of justice? Are these incentives consistent? If not, how should they be balanced? Do the rules of civil procedure and/or professional responsibility affect the balance? Are they sufficient to overcome incentives to conduct an inadequate search?

As a thought exercise, let us imagine three possible scenarios:

1. Counsel is acting purely as an advocate for the responding party;
2. Counsel is acting purely as an advocate for the requesting party (but is determining or influencing the search method to be used by the responding party); or
3. Counsel is acting purely as a truth-seeker on behalf of the court.

Transcending these three possible scenarios is the issue of who stands to gain (or lose) from the use of any particular search method: the client, the adversary, the court, counsel, or a third-party service provider?

First, we consider the available options, and what choices counsel might be incentivized to make, absent rules or ethical considerations specifically governing search. Then, we consider how the existing rules and ethical considerations might constrain counsel, and finally, whether such rules and ethical considerations are sufficient to encourage the use of effective and efficient search protocols.

¹ The views expressed herein are solely those of the author and should not be attributed to her firm or its clients.

I. SEARCH TECHNOLOGY IN E-DISCOVERY

In the last quarter century, the technology to retain and access vast amounts of electronically stored information (“ESI”) has ushered in an age of information abundance.² In 1985, the ability of an enterprise to accumulate and use information was limited by the capacity of available storage media, whether boxes of paper, magnetic tapes, or computer disk drives. A natural consequence of these physical limitations was that typically, only the most valuable data were retained and the data were relatively well organized. The volume and organization of the data rendered discovery more practical using fairly simple approaches; for example, by reviewing stored paper documents, or printed versions of electronic documents. Nonetheless, the applicability of search tools was the subject of debate in 1985, as it is today.

At that time, Blair and Maron conducted a study in which skilled paralegal searchers were instructed to retrieve at least 75% of all documents responsive to 51 requests for information pertaining to a legal matter.³ For each request, the searchers composed keyword searches using an interactive search system (“STAIRS”), retrieving and printing documents for further review. This process was repeated until the searchers were satisfied that 75% of the responsive documents had been retrieved. Although the searchers believed they had found 75% of the responsive documents, they had, in fact, identified only 20%. That is, the *recall* of their search effort was a mere 20%.

Blair and Maron argue that the searchers would not have been able to find more responsive documents had they continued their search, due to well-known ambiguities in word usage. These same arguments are repeated today, both to impugn the value of keyword search, and to tout new search technologies, commonly referred to in the industry as “concept search.”

Blair and Maron do not suggest that the paralegals were offered any incentive to find 75% or more of the responsive documents, in fact, it is likely that their remuneration as research subjects was *not* dependent on the volume of responsive documents they identified. The searches were done specifically for the purpose of the study, and because the study was not blind, it is conceivable that the authors’ expectation that keyword search would be inadequate may have been tacitly communicated to the searchers. The paralegals also were given no way to determine what fraction of responsive documents they had identified so as to make an informed decision about whether or not to continue searching. Finally, the paralegals were either unaware of, or prohibited from using, the *ranked retrieval* capability of STAIRS, which might have improved their ability to locate responsive documents.

Blair and Maron instructed the paralegals to find all and only the responsive documents. While “all” was quantified (at least 75%), “only” was not. On average, 79% of the documents identified as responsive by the paralegals were, in fact, responsive. That is, the *precision* of their search effort was 79% – competitive with the optimum that could be expected for any human review effort. Had they been instructed that precision of, say, 20%, would have been adequate, they might well have used a broader interpretation of responsiveness in order to improve recall.

2 George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007), <http://law.richmond.edu/jolt/v13i3/article10.pdf>; Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9 (2011), <http://jolt.richmond.edu/v17i3/article9.pdf>.

3 David Blair & M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28:3 COMM’NS OF THE ACM 289 (1985).

Although Blair and Maron state that keyword search “does not operate at satisfactory levels,” they neither quantify what would be a satisfactory level nor show how such a level might be achieved. Would having the same paralegals manually review the entire set of 40,000 documents have achieved a satisfactory level of recall? Would such an effort have achieved a satisfactory level of cost and timeliness?

Our discussion of the Blair and Maron study serves to illustrate some of the factors that can affect the choice of a search method:

1. The *recall* that can be achieved, considering all factors. (Recall is the number of responsive documents identified by a search, divided by the total number of responsive documents);
2. The *precision* that can be achieved, considering all factors. (Precision is the number of responsive documents identified by a search, divided by the total number of documents identified by that search);
3. The *cost* and *timeliness* that can be achieved, considering all factors;
4. The *competence, knowledge, and motivation* of any humans upon whose judgment the design or execution of the search method depends; and
5. The *ability to compare* the recall, precision, cost, and timeliness of *alternative search methods*.

Since 2006, the Text Retrieval Conference (“TREC”), sponsored by the National Institute of Standards and Technology (“NIST”), has undertaken to evaluate search methods for e-discovery.⁴ The TREC Legal Track Interactive Task requires that participating teams find all and only the documents in a large collection that are responsive to one or more production requests.⁵ The effectiveness of each effort is measured by recall and precision, as well as *FI*, a summary measure that combines both recall and precision. In 2009, two of the best-performing TREC participants (H5 and the University of Waterloo), using interactive search methods, achieved an average recall of 76.7%, and an average precision of 84.7%, over five production requests.⁶ In a follow-up study, the authors found that a manual review by the TREC assessors achieved an average recall of 59.3%, and an average precision of 31.7%, on the same five topics.⁷

Why are the TREC 2009 participant results so much better than those of Blair and Maron? Is it because search technology has improved so dramatically since 1985? While TREC is a workshop with published results, and not a product evaluation, participants were nonetheless strongly incentivized to showcase their results by achieving

4 Jason R. Baron, *The TREC Legal Track: Origins and Reflections on the First Year*, 8 SEDONA CONF. J. 251 (2007); see also Jason R. Baron et al., *TREC-2006 Legal Track Overview*, in NIST Special Publ'n: SP 500-272 NIST, The Fifteenth Text REtrieval Conference (TREC 2006) Proceedings 1-2 (2006), available at <http://trec.nist.gov/pubs/trec15/papers/LEGAL06.OVERVIEW.pdf>.

5 Bruce Hedin et al., *Overview of the TREC 2009 Legal Track*, in NIST Special Publ'n: SP 500-278, The Eighteenth Text REtrieval Conference (TREC 2009) Proceedings (2009), available at <http://trec-legal.umiacs.umd.edu/LegalOverview09.pdf>; Douglas W. Oard et al., *Overview of the TREC 2008 Legal Track*, in NIST Special Publ'n: SP 500-277, The Seventeenth Text REtrieval Conference (TREC 2008) Proceedings (2008), available at <http://trec.nist.gov/pubs/trec17/papers/LEGAL.OVERVIEW08.pdf>.

6 Hedin, *supra* note 5.

7 Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. & Tech. 11 (2011), available at <http://jolt.richmond.edu/v17i3/article11.pdf>.

good recall, precision, and F1 scores. The professional searchers were perhaps more competent, knowledgeable, and motivated than the paralegals employed by Blair and Maron. Two of the best-performing TREC 2009 participants (H5 and the University of Waterloo) used sampling and modeling to estimate recall and precision, and used those estimates in deciding when to terminate their interactive search processes.

Why are the TREC 2009 participant results so much better than those of the TREC 2009 manual reviewers? One possible theory is that the TREC assessors were obliged to look for very rare needles (responsive documents) in a vast haystack (of nonresponsive documents), with the consequence that they missed the needles while grabbing at many straws. A competing theory is that, while the assessors had the necessary competence (being law students for some topics and lawyers employed by commercial service providers for others), they had no particular incentive to do a good job. Whatever the reason, the results illustrate that one should not accept, without evidence, the assertion that manual review of each and every document will yield a better result than a technology-assisted search process, or that incentives do not matter.

We omit any discussion of the details of search technology, as our present concern is with the *factors influencing the choice* of a search method, as opposed to any particular approach. For more specifics on particular search technologies, the interested reader is referred to *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*⁸ and *What Lawyers Need to Know About Search Tools*.⁹

II. COUNSEL AS ADVOCATE FOR THE RESPONDING PARTY

In answering a request for production, counsel for the responding party has two principal goals that may be addressed using a process involving search technology:

To identify the ESI that is responsive to the request; and

To identify the ESI that may be withheld on the basis of attorney-client privilege or work-product protection.

Absent any rules or ethical considerations specifically governing the conduct of the search, would counsel for the responding party be incentivized to maximize or minimize recall, to maximize or minimize precision, and to maximize or minimize effort and cost for each of these objectives?

For the first goal – identifying responsive ESI – it might initially seem advantageous to the responding party to conduct an ineffective search with very low recall, or very low precision. Further analysis, however, suggests offsetting advantages to conducting an effective search with high recall and high precision.

One reason that the responding party might be incentivized to conduct a low recall or low precision search is to impede the requesting party's ability to make their case: a low recall search might deprive the requesting party of evidence it needs to prove its

⁸ 8 SEDONA CONF. J. 189 (2007)

⁹ Maura R. Grossman & Terry Sweeney, *What Lawyers Need to Know About Search Tools*, NAT'L L.J. (Aug. 24, 2010), available at <http://law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202470952987>.

claims; a low precision search might flood the requesting party with ESI, rendering it costly and difficult to find useful evidence. If counsel has reason to believe that the responding party's case will be harmed by the evidence, he or she might be incentivized to do a less effective search, resulting in poor recall or poor precision. A search method with poor recall might fail to locate the compromising evidence, while a search method with poor precision might impede the responding party in recognizing that evidence. Both of these alternatives, however, would involve risk to the responding party, as the compromising evidence might still be found in the production, or the requesting party might obtain it by other means, such as through a non-party production.

A second reason that the responding party might be incentivized to conduct a low recall or low precision search is cost. It is often easier – and hence less expensive – to perform a superficial search, identifying and reviewing only a small number of responsive documents (achieving low recall). It is also sometimes easier to produce a “document dump” of vast amounts of ESI in the party's possession, custody, or control (achieving high recall, but correspondingly low precision).

There also are countervailing considerations that may provide an incentive to perform an effective search for responsive documents, with high recall and high precision. Responding counsel is incentivized to achieve high recall in order to determine the weight of evidence supporting or refuting the adversary's claims, so as to be able to mount a vigorous defense, or to negotiate an appropriate settlement. If there is helpful evidence to refute the adversary's claims, it is obviously in the interest of the responding party to locate the evidence that will bolster its defense, and therefore, the responding party will be incentivized to do as effective a search as possible. If there is harmful evidence that supports the adversary's claims, it is also in the interest of responding counsel to quickly locate that evidence, so as to prepare a defense, or to negotiate a settlement. There is little incentive to proceed without knowledge of the evidence, regardless of whose case it supports. Choosing a search strategy to deliberately omit evidence known to be compromising could be construed as deliberate concealment, and of course, once a search is undertaken and responsive documents have been identified, counsel for the responding party would be obligated to produce any responsive, non-privileged documents identified by that search. Failure to do so could amount to obstruction of justice, over and above any other search-specific rule or ethical considerations.

At the same time, the responding party also is incentivized to achieve high precision so as to avoid the cost and burden of reviewing massive amounts of ESI that have no bearing on the case. A further incentive arises from the need to identify privileged and protected documents, as well as sensitive nonresponsive documents, which should not be produced. The cost – and risk of inadvertent production – are minimized by a high-precision search.

For the second goal – identifying privileged or protected ESI – high recall is of paramount importance. A low-recall search might result in the inadvertent disclosure of privileged or protected documents, potentially resulting in the waiver of any privilege or protection. High recall, on the other hand, would be advantageous because it would result in the identification of nearly all the privileged or protected documents. But high recall achieved at the expense of low precision could compromise that advantage because the party could risk sanctions by improperly withholding non-privileged documents subject to a production requirement. For these reasons and others, counsel for the responding party

often chooses to eschew automated search in favor of exhaustive manual review for privilege (which is, in its own right, an expensive, low-technology search method which may be of questionable effectiveness).¹⁰

In choosing a search method to reflect the responding party's interests, counsel must weigh the cost and timeliness of the search against the potential value of the evidence. If the cost of search exceeds the cost of resolving the dispute, the search method is clearly unjustified. To make an informed choice of search method, it is necessary for counsel to have a reliable estimate of the cost and effectiveness of the various alternatives. If the case is strong and can be supported by a few easy-to-find documents, there is little reason for the responding party to conduct a more thorough, more expensive search. If the case requires a hard-to-find "smoking gun," or a similar item of exculpatory evidence, its disposition may depend on a more thorough, more expensive, search.

In general, the responding party's interests are best served by using a search method that is as efficient as possible, while effectively meeting the needs of the case. Estimating both efficiency and effectiveness entails some uncertainty, which must be factored in. What is the risk that the search will be less efficient or less effective than intended? How will counsel defend the choice of search method to the client, opposing counsel, or the court?

Finally, we note that counsel may have an additional incentive or disincentive to maximize efficiency and effectiveness. A low precision search, for example, might generate considerable revenue in a review for responsiveness. A high precision search might permit the case to be resolved in a favorable and timely manner, which would inure to the benefit of counsel remunerated by contingency fee, but not at an hourly rate. While these incentives are rarely discussed, the direct and indirect costs of a poor quality search tend to enrich counsel for the responding party.

III. COUNSEL AS ADVOCATE FOR THE REQUESTING PARTY

In posing a request for production, counsel for the requesting party has the principal objective of discovering evidence to support the propounding party's case. Although the responding party is generally responsible for conducting the search and producing responsive ESI, the requesting party has a strong interest in the manner in which the search is conducted, and may influence the choice of search method through the meet and confer process. In any event, the anticipated search method may influence the formulation of the request for production.

Because there is an adversarial relationship between the requesting party, who formulates the request for production, and the responding party, who effects whatever search is necessary to satisfy the request, the requesting party may have little trust and faith that the responding party will choose a reasonable method, or that the humans executing that method will be incentivized to do a good job. Requesting counsel may employ any of a number of strategies in response to this uncertainty; it is far from obvious which of the possible strategies is optimal, from a game theory perspective.

The adversarial relationship may incentivize requesting counsel to pose requests for production with the objective of saddling the responding party with high costs, to

¹⁰ See *id.*; see also Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J.L. & TECH. 8 (2011), available at <http://jolt.richmond.edu/v17i3/article8.pdf>.

pressure that party to settle. The adversarial relationship also may incentivize requesting counsel to pose overly broad requests for production, either to hide the true nature of the information being sought, or to ensure that the pertinent data are produced, even if the responding party is less than diligent in its search efforts. Under these circumstances, the requesting party would incur the cost and burden of performing a secondary search to identify the ESI that is truly relevant to the case, and the costs to both parties might be considerably higher than if the responding party had been permitted, by virtue of a narrower discovery request, to conduct a more targeted search. Finally, the adversarial relationship may also incentivize requesting counsel to overspecify the manner in which the search is to be conducted; for example, by demanding documents containing specific keywords, as opposed to ESI related to a particular subject, or by insisting on exhaustive manual review.

IV. COUNSEL AS TRUTH SEEKER

In the capacity of truth seeker, counsel's primary objective would be to discover the evidence most likely to dispose of the case, with a minimum of cost and delay. To achieve this end, counsel would have to predict which evidence is necessary to resolve the dispute, and which search method is most likely to produce this evidence most efficiently. How much bearing on the case will the response to a particular request have? Is low recall acceptable, so long as representative exemplars are produced, or is near-perfect recall required? Are the costs and burdens commensurate with the amount in dispute, and are they within the budget of the parties?

Because the truth seeker would represent neither the requesting nor responding party, he or she should have no incentive to employ search methods particularly advantageous to one over the other, and he or she should have no incentive to use tactics designed to game the system for the purpose of inconveniencing either party.

It has been argued that counsel for either party cannot properly fulfill the role of truth seeker, and that an impartial third-party should be appointed, either by the court or by mutual agreement, to choose the search method and to determine the search protocol:

The idea is that the judge appoints a special master to sit as the independent third-party neutral working at the direction of the court to assist in crafting the protocol, language and direction of the e-discovery process, bringing together both sides, and perhaps even helping to choose the right technologies and consultants to use. This puts the special master in a position to make certain judgment calls on what is allowable and what is not allowable and also to play the role of referee between the two sides so that the e-discovery process is more streamlined, more effective.¹¹

Gamesmanship in discovery and the litigator's dilemma can be effectively mitigated by entrusting the supervision or execution of electronic document discovery to a neutral intermediary – an honest broker of discovery. This entity would undertake certain elements of discovery under well-defined obligations toward the parties and the court, much in

11 Erik Laykin, *Machines Versus Humans in E-Discovery – Strengths And Weaknesses*, THE METROPOLITAN CORPORATE COUNSEL (Feb. 28, 2011), available at <http://metrocorpcounsel.com/current.php?artType=view&artMonth=March&artYear=2011&EntryNo=12006>.

the way a court-appointed expert witness or special master serves the interest of all parties. Because the honest broker would not be a party to the litigation, it would not have any incentive to engage in gamesmanship in the discovery process and could, therefore, be trusted by the courts and tolerated by the litigants. The honest broker would not replace or trump cooperation among the parties but would bolster that cooperation and thereby serve as a vital component of the discovery process.¹²

But does an independent third-party neutral have its own set of economic incentives that might interfere? And if the third-party is a nonlawyer, would making these choices reflect legal judgments that would run afoul of the ethical proscriptions against the unauthorized practice of law?¹³

V. A PRISONER'S DILEMMA?

The "litigator's dilemma" referenced in the second quotation above refers to the well-known characterization of discovery as an example of the hypothetical scenario from game theory, the "prisoner's dilemma," in which there is mutual advantage to both parties in pursuing common interests so long as both act cooperatively and in good faith, but tremendous disadvantage to the party that acts cooperatively and in good faith, if the other does not.¹⁴ There is a lesser disadvantage – but a disadvantage nonetheless – if both parties act uncooperatively and in bad faith. According to game theory, the "rational choice" in this situation is for each party to act uncooperatively and in bad faith, incurring the lesser disadvantage, so as to avoid the risk of the more severe disadvantage. Although the end result is disadvantageous to both (relative to acting cooperatively and in good faith), the disadvantage is *less* than would be incurred by one party behaving well, when the other party behaves poorly. Uncertainty, fear, and distrust tend to preclude the mutually advantageous outcome.

Several essential elements of the prisoner's dilemma problem are generally absent from ediscovery:

1. Prisoner's dilemma requires that each party make an irrevocable choice of strategy, without knowledge of the others' choice; in e-discovery, consultation and negotiation are possible – indeed required by Federal Rule of Civil Procedure 26(f) – and strategy may evolve in response to the opposing party's conduct.
2. Prisoner's dilemma requires that the disadvantage incurred by one party be reduced by its own bad behavior, should the opposing party also behave poorly; in e-discovery, it is not apparent that bad behavior on the part of one party serves any prophylactic effect against the other party's possible bad behavior.

12 Nicolas Economou, *Honest brokers are needed*, NAT'L. L.J. (May 19, 2008), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202421425702>.

13 See ABA Model R. of Prof'l Conduct 5.5 (prohibiting unauthorized practice of law); see also ABA Model R. of Prof'l Conduct 5.3(b) (stating that with respect to a nonlawyer employed or retained by or associated with a lawyer, "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

14 See John K. Setear, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

3. Prisoner's dilemma requires that the game be played exactly once; in e-discovery, a particular matter may involve several phases, or several rounds of production requests and responses, frequently transposing the roles of requesting and responding party. Counsel may also represent many parties in different matters over time and may come in contact with the same adverse counsel in other matters. The potential to be a "repeat player" transforms this situation into an *iterated prisoner's dilemma*,¹⁵ for which poor behavior is not a rational strategy,¹⁶ because what goes around comes around.

Whether or not e-discovery truly is a prisoner's dilemma, the belief that it is may be self-fulfilling – with the effect of incentivizing counsel for either party to engage in bad behavior, in the belief that it is the rational choice under the circumstances.

VI. APPLICABLE RULES AND ETHICAL PROSCRIPTIONS

In general, if the procedural rules and ethical proscriptions are diametrically opposed to the incentives, there will continually be a tendency for parties to explore the limits of what is permissible, rather than to explore effective search strategies, resulting in compliance problems and poor results. If, on the other hand, the rules tip the balance such that cooperation is – and is seen to be – the winning strategy, compliance issues tend to occur only in cases of genuine abuse, and as the norm, more effective results will ensue. We explore next the extent to which existing rules and ethical proscriptions tend to accomplish the former tendency, or the latter. Is all that is needed to eliminate bad behavior a rational evaluation of the incentives and alternatives within the context of the existing rules and ethical proscriptions?

After identifying the applicable rules, we consider the influence – potential and actual – of the various rules on the incentives influencing search, in the context of the following four broad categories:

1. Cooperation, Communication, and Candor;
2. Scope and Cost of Ediscovery (Proportionality);
3. Protecting Privilege; and
4. Competence.

Cooperation, Communication, and Candor

The applicable rules (or portions thereof) pertaining to cooperation, communication, and candor are the following:

– Fed. R. Civ. P. 26(f):

“In conferring, the parties must . . . discuss any issues about preserving discoverable information, and develop a proposed discovery plan. . . .”

¹⁵ Robert Axelrod, *More effective choice in the prisoner's dilemma*, 24:3 JOURNAL OF CONFLICT RESOLUTION 379 (1980).
¹⁶ See *id.* at 394.

– ABA Model Rule of Professional Conduct (hereinafter “ABA Model Rule”) 3.2(a):

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

– ABA Model Rule 3.4(a):

“A lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”

– ABA Model Rule 3.4(d):

“A lawyer shall not . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

– ABA Model Rule 4.4(a):

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

– ABA Model Rule 8.4(c):

“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

– ABA Model Rule 8.4(d):

“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”

Scope and Cost of Discovery (Proportionality)

The applicable rules (or portions thereof) pertaining to scope and cost of discovery (proportionality) are the following:

– Fed. R. Civ. P. 26(b)(1):

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”

– Fed. R. Civ. P. 26(b)(2)(C):

“[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

– Fed. R. Civ. P. 26(g)(1):

“By signing [discovery requests, responses, and objections,] an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry . . . with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”

– Fed. R. Civ. P. 37(a)(4):

“[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”

– ABA Model Rule 4.4(a):

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

Protecting Privilege

The applicable rules (or portions thereof) pertaining to privilege are the following:

– Fed. R. Civ. P. 26(b)(5)(B):

“Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

– Fed. R. Evid. 502(b):

“[A] disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Procedure 26(b)(5)(B).”

– Fed. R. Evid. 502(d):

“A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State Proceeding.”

– ABA Model Rule 1.6(a):

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted. . . .”

– ABA Model Rules 4.4(b):

“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 shall promptly notify the sender.”

Competence

The applicable rule pertaining to competence is the following:

– ABA Model Rule 1.1:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

VII. INFLUENCE OF THE APPLICABLE RULES AND ETHICAL PROSCRIPTIONS

Cooperation, communication, and candor are antithetical to the prisoner’s dilemma. To the extent that the rules and accepted practices of e-discovery engender these behaviors, the incentive to counter the adversary’s poor behavior with one’s own is substantially lessened. Federal Rule of Civil Procedure 26(f) requires that parties meet and confer regarding discovery issues, and develop a discovery plan to be submitted to the court. Rule 26(f) states that the plan must consider the scope and timing of discovery, the possibility of conducting discovery in phases, issues specifically related to ESI, and issues related to privilege and its protection. While the parties may choose, by explicit or tacit agreement, to shirk this requirement with little risk of sanction, it provides clear guidance and a good opportunity for either party to offer and demand a reasonable plan that encourages the use of effective and efficient search methods.¹⁷ The interested reader is referred to *The Sedona Conference Cooperation Proclamation*¹⁸ and *The Case for Cooperation*,¹⁹ which spell out in more detail many of the incentive structures outlined here.

Abusive search strategies are proscribed by a number of rules. Rule 26(g)(1) requires counsel to certify that a discovery request or production is not interposed for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, countering two principal incentives that counsel for either party may otherwise have to choose ineffective or inefficient search strategies. The ABA Model Rules reinforce and expand this restriction by specifying that a lawyer may not: (i) engage in conduct that has no substantial purpose other than to embarrass, delay, or burden another party;²⁰ (ii) unlawfully obstruct another party’s access to evidence;²¹ (iii) make frivolous discovery requests;²² (iv) fail to make a reasonably diligent effort to comply with proper discovery requests;²³ (v) engage in dishonesty, fraud, deceit or misrepresentation;²⁴ or (vi) engage in other conduct that is prejudicial to the administration of justice.²⁵

The Federal Rules define as discoverable any nonprivileged ESI that is relevant to any party’s claims or defenses, which is reasonably calculated to lead to the discovery of relevant evidence, subject to the considerations of proportionality set forth in Rule 26(b)(2)(C).²⁶ Federal Rule 26(b)(2)(C)(iii) provides that discovery must be limited when

17 See Ralph Losey, *An Animated View of Lawyers at a Rule 26f Conference*, e-Discovery Team blog, available at <http://e-discoveryteam.com/2011/03/02/an-animated-view-of-lawyers-at-a-rule-26f-conference/>.

18 The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

19 The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009).

20 ABA Model Rule 4.4(a).

21 ABA Model Rule 3.4(a).

22 ABA Model Rule 3.4(d).

23 ABA Model Rule 3.4(d).

24 ABA Model Rule 8.4(c).

25 ABA Model Rule 8.4(d).

26 FED. R. CIV. P. 26(b)(1).

the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, and the importance of the discovery in resolving the dispute.

Considerations of proportionality are predicated on the ability to evaluate intangible or hard-to-quantify factors such as “reasonably calculated,” “likely benefit,” “burden,” “expense,” and “importance.” Imagine, for a moment, the potential impact of a highway speed limit sign that read: “Don’t drive faster than is reasonably necessary, considering the importance of your timely arrival, the risk to yourself and others, and the cost of fuel.” Such a regulation would be ineffective, as drivers would have no tangible way to know whether or not they were contravening the speed limit, and would tend to drive as fast as they thought they could get away with. While the hypothetical speed limit might represent an aspirational goal of the traffic regulators, it would be ineffective at achieving that goal because it relies excessively on the driver’s ability and willingness to evaluate several intangible factors. Enforcement would be problematic, with the result that the rule would have very little effect. Instead, traffic regulators tend to set arbitrary limits, and to use precise measuring devices to enforce speed limits. Even so, drivers tend to follow the underlying incentive structure, and drive as fast as they can, constrained only by the perceived risk and cost of getting a speeding ticket. In the context of e-discovery, it is not clear how to quantify the constraining factors, let alone what arbitrary constraints might be imposed, or the degree to which those constraints would impact the conduct of search in ediscovery.

The Federal Rules require only the production of nonprivileged ESI. It is obviously in the responding party’s interest that their counsel not produce any privileged materials, and if they are produced inadvertently, to take immediate steps to retrieve them so as to avoid a potential waiver. ABA Model Rule 1.6(a) prohibits a lawyer from revealing privileged information, except under limited circumstances. Moreover, a lawyer who receives privileged information that is inadvertently sent must promptly notify the sender.²⁷ In addition, the Federal Rules of Civil Procedure require that privileged or protected information must explicitly be identified,²⁸ and that in the event that privileged or protected information is inadvertently produced, counsel for the producing party must notify opposing counsel, and opposing counsel must take reasonable steps to return, sequester or destroy the information.²⁹ Finally, Federal Rule of Evidence 502(b) provides that inadvertent disclosure does not constitute waiver, provided reasonable steps were taken to avoid disclosure, and prompt steps were taken to rectify the error.³⁰ Taken together, these rules strongly incentivize responding counsel to perform a diligent search for privileged and protected matter. An overbroad claim of privilege that is challenged and found to be frivolous could result in a broad waiver, or other sanctions. Too narrow a claim might result in production of privileged material that is damaging to the client, and a violation of ABA Model Rule 1.6(a). Although there are sufficient procedural mechanisms under the rules to claw back ESI that is inadvertently produced and to avoid waiver: (1) the producing party is typically compromised by the inadvertent disclosure even if the protected material can be successfully retrieved; and (2) Federal Rule of Evidence 502(b) requires that reasonable steps be taken in the first place to avoid inadvertent production. Many counsel believe that “reasonable steps” means exhaustive human review; however, there is at least some evidence that technology-assisted search techniques may do as good a

27 ABA Model Rule 4.4(b).

28 FED. R. CIV. P. 26(b)(5)(A).

29 FED. R. CIV. P. 26(b)(5)(B).

30 FED. R. EVID. 502(b).

job in identifying privileged material, if not better.³¹ Of course, the best protection against the inadvertent waiver problem is for counsel to obtain a Fed. R. Evid. 502(d) order.³²

ABA Model Rule 1.1 provides that a lawyer provide competent representation to a client, meaning that they must possess the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.³³ This consideration transcends nearly all aspects of the discovery rules, ethical proscriptions, and incentives that influence counsel's choices with regard to e-discovery. In order to competently represent their clients, both the requesting or responding parties' counsel must be aware of the strengths and weaknesses of various search methods, the capabilities of available search technologies, and be able to evaluate their impact on the case and on the budget. Armed with this level of knowledge and skill, we believe that counsel should conclude that the most effective and efficient search strategies are in the best interests of the requesting party, the responding party, and the administration of justice, and that the best approach to achieve these ends will involve cooperation, communication, candor, and proportionality.

In summary, affirmative rules mandating cooperation would appear to diffuse the motivation to engage in bad behavior in anticipation of the adversary's bad behavior. Rules proscribing egregious behavior – backed by sanctions or threat of disciplinary action – are necessary and sufficient to deal with abusive discovery practices, but likely have little impact on the incentives that govern the day-to-day conduct of e-discovery. Enforcing proportionality appears to be the most challenging – and may require extensive judicial supervision – due to the obstacles in defining and measuring the factors that determine what is proportional. The procedural rules and ethical proscriptions regarding privilege appear to provide appropriate incentives consistent with the choice of effective and efficient search protocols. And finally, competence, while a major factor in counsel's choice of a search methodology, is difficult to mandate, but may be positively affected by education and social pressure.

VIII. CONCLUSION

Whether in the capacity of counsel for the responding party, counsel for the requesting party, or as an officer of the court, a lawyer has many incentives to conduct an efficient and effective search. Incentives to conduct an ineffective or inefficient search arise largely from attempts to game the system, fear that an adversary will game the system, insufficient knowledge of the efficacy and cost of available search methods, and financial profit from the use (or failure to use) particular search methods. By and large, these incentives tend to be neutralized by the existing rules and ethical proscriptions when counsel are knowledgeable and competent with respect to search methods in e-discovery and strategies for their optimal use. The net effect is that the approach most beneficial to the client, and to the justice system, as well as least likely to violate the rules or ethical proscriptions, is to make an informed choice of the most effective, most efficient search method. Lawyers should not assume or insist that existing practices – such as exhaustive manual review – are always the best choice in the face of growing evidence that other methods can achieve as good, if not better results, at a fraction of the cost.

31 See Grossman, *supra* note 7.

32 See Grimm, *supra* note 10, at 67-69, 75-76.

33 ABA Model Rule 1.1.

