E-Discovery and its Implications for the ABA Model Rules

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I. Introduction

The American Bar Association's (ABA) greatest challenge in meeting its ethical objectives is technological change. Once upon a time, the files, work products, and conversations lawyers had were confined to paper and telephone lines. Now, these elements of the lawyer trade are transferred and stored through computers, electronic mail, fax, web pages, servers, and numerous other media sources. Many of these sources are highly transferrable and highly susceptible to corruption.[1] Technological changes have proven to be an especially challenging variable for the rules of professional conduct.

As technological advances continue, the ethics implications of e-discovery, in particular, become ever more important to address. The ABA recognizes the important implications of e-discovery on the lawyering field and has started to take steps to address them. In 2009, then-president of the ABA President Carolyn Lamm recognized these implications and created the ABA Commission on Ethics 20/20. This commission had a primary task to review the Model Rules in the context of technological advances and make suggestions to improve these rules.[2] To date, the Commission has released some recommendations, but these recommendations have not gone far enough to ensure continued ethical practice in

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[1] *See generally*: J. Barkett, The Ethics of E-Discovery, at 1 (ABA Publishing 2009), at chapter 1.

[2] ABA COMMISSION ON ETHICS 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. (Last visited 05/29/2014).

the field of law. The recommendations are often to minor points in the Model Rules, and are focused on small, specific subsections. Examples of this will be explored in later sections of this paper.

In order to properly address changes in technology as they affect e-discovery the ABA should consider adopting a more flexible rules strategy. More specifically, it should consider adopting a rule that incorporates industry best practices standards. This paper provides an example of one of many models that could be adopted to address the growing issues associated with the Model Rules and advances in technology in the context of E-Discovery. The model this paper will use as an example is the flexible and comprehensive Electronic Discovery Reference Model (EDRM).[3] EDRM is a model created by a consortium of more than 260 groups consisting of 170 service and software providers, 63 law firms, three industry groups, and 23 corporations involved in e-discovery governance. Adapting and adopting a comprehensive model like the EDRM will incorporate industry e-discovery best practices by reference into the model rules which will allow the rules to adapt organically over time with inevitable changes to industry best practices.[4]

Part II of this paper will explain the history of the ABA Model Code. Part III will then discuss why the work the Commission on Ethics 20/20 is not meeting its goals as set by the ABA. Part IV addresses why the work the Commission on Ethics 20/20 does is important. Part V explains why that the ABA should adopt an

[3] ELECTRONIC DATA REFERENCE MODEL, EDRM.net, http://www.edrm.net/ (Last visited 05/29/2014).

[4] *Id.*

external industry best practices standard for the e-discovery procedures. Finally, part VI contains my conclusion.

II. Historical Background

In the early years of the U.S. legal profession, attorneys operated local governing bodies for their profession[5]. State bar associations began to form in the 1870s.[6] Eventually, leading attorneys undertook an initiative to form a national organization called the American Bar Association.[7] The ABA took on many tasks. One involves promulgating model ethical rules for attorneys to follow in the practice of their profession. As the profession grew throughout the United States, attorneys recognized that there needed to be uniform ethical standards for the legal profession. In 1908 the ABA adopted the "ABA Canons of Professional Ethics."[8] These "Canons" were a set of ideals to which attorneys should aspire. These rules feature many sections where the words "should" and "could" are used. The use of

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[5] HISTORY OF THE AMERICAN BAR ASSOCIATION, http://www.americanbar.org/about_the_aba/timeline.html. (Last visited 05/29/2014).

[6] *Id.*

[7] *Id.* The American Bar Association was first created in 1878, with 75 original members, from 20 states and the District of Columbia. By 1993 membership was greater than 300,000 and included 49 out of 50 states.

[8] *ABA Canons of Professional Ethics*, americanbar.org, http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf. (Last visited 05/29/2014).

this verbiage indicates that the canons are more suggestion than rule, and made it difficult for the canons to be enforced.

In 1964 the House of Delegates of the ABA created the Special Committee on Evaluation of Ethical Standards to review the Canons of Professional Ethics and make recommendations for changes to update the ethical standards of American attorneys.[9] The result of this committee's work was the "Model Code of Professional Responsibility." (Model Code) [10] This code was adopted by the House of Delegates in 1969 and became effective January 1, 1970.[11] The new Model Code revised the Canons in order to include more attorney conduct, provide editorial revision, adapt the rules to allow for practical sanctions where violations occur, and adapt the Canons to better conform to societal changes that occurred since the Canon's adoption in 1908.[12]

The Model Code was a great step forward in enforcing ethical conduct of attorneys because of two innovations found in their creation. These were introduced by separating the Code into two different kinds of rules: 1) Ethical Considerations and 2) Disciplinary Rules. These new areas of the rules were combined with updated Canons to make up the new Model Code. The Ethical

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[9] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf. at 4. (Last visited 05/29/2014).

[10] *Id.*

[11] *Id.*

[12] *Id.*

Considerations found in the Model Code are comments that attorneys should aspire to. They are not mandatory and are more like ideals that attorneys should strive to achieve than benchmarks for attorney conduct. In other words, the Ethical Considerations generally are a body of principles upon which lawyers could look to for guidance without any formal enforcement structure.[13]

The Disciplinary Rules, in contrast, are mandatory in nature. They mark the minimum level of conduct a lawyer may conduct himself at without being subject to disciplinary action.[14] The Disciplinary Rules do not explicitly state penalties for violating the Model Code. They also do not define civil liability of lawyers regarding professional conduct.[15]

The Model Code was an important evolutionary step in the ethical practice of law. Bifurcation of the Model Code into two categories meant an increase in the amount of attorney conduct that could be defined as mandatory. Violation of these mandatory rules could lead to punishment if an attorney failed to meet the proscribed minimum standards set out in the rules. The evolution of ethical rules found in the Model Code was a great step forward because it helped provide concrete guidance on the ethical practice of law. Much like attorney's needed

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[13] *Id.* at 6. Citing: *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

[14] *Id.*

[15] *Id.*

concrete guidance on ethical conduct when the Model Code was promulgated, attorneys now need more concrete guidance on e-discovery procedures.

The Model Code was a great improvement in the guidance of the ethical practice of law, but it was not perfect. As time progressed following the Model Code's inception, the profession continued to change, and new issues arose. These changes and rising public concern about ethical lawyering following the Watergate Scandal encouraged the ABA to revisit and modify its Model Code.

To update the Model Code, in 1977, the ABA created a commission, the American Bar Association Commission on Evaluation of Professional Standards, led by Robert J. Kutak.[16] The final product of this commission was named the, "Model Rules of Professional Conduct" (Model Rules), and was approved by an ABA delegation in August of 1983.[17] The Model Rules were authored as improved suggestions and commentary on the Model Code. Like the Model Code, the Model Rules had no enforceability, but were eventually adopted in large part by 48 of the 50 United States as regulatory rules for attorneys practicing in their jurisdictions.[18]

The Model Rules attempted to even more clearly define ethical attorney behavior. An example of the more clear guidelines found in the Model Rules is the

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[16] *Id.*

[17] *Id.*

[18] *Id.* California and New York have not formally adopted the Model Rules. New York used a structure patterned on the Model Code and California incorporated its ethics rules throughout various parts of its statutory code.

fact that they dropped the aspirational ethical considerations found in the Model Code. Dropping the ethical considerations aided the many states that adopted the rules in the establishment of statutes and rules that would govern attorney conduct at the state level.

The Model Rules were a great improvement on the Model Code, but also were not perfect. The advancement of time created new challenges that strained the rules once again. In response to changes in the field of law and advancements in technology, ABA leaders convened a new commission to address the twenty first century's new challenges.

In 1997 the ABA charged a 13-member commission with undertaking a comprehensive evaluation of the Model Rules.[19] The commission was named the "Ethics 2000 Commission." This commission's chief goals were to fix disparities between different jurisdictions' applications of the Model Rules, address public trust issues, clarify existing rules, and address new issues raised by changes in technology as they affected the legal profession.[20] The Ethics 2000 Commission was the ABA's first real acknowledgement of the fact that modern technology has large implications on the ethical practice of law.

Even though the Ethics 2000 Commission stated that it recognized the importance of technological change to its mission of defining ethical law practice, it made only very modest updates to the Model Rules. Specifically, the Ethics 2000

[19] Charlotte Beck Stretch, Overview of Ethics 2000 Commission and Report, 1.

[20] *Id.*

Commission made three changes. First, under Model Rule 7.2, which addresses attorney advertising, the Commission deleted specification of types of public media in paragraph (a), addressing communication, and added a reference to electronic communication.[21] Second, it modified Rule 7.2 to permit payments to for-profit lawyer referral services.[22] Third, the Commission extended the Model Rule's prohibitions to "real-time electronic contact" under Model Rule 7.3, covering attorney solicitation of clients. This change prohibits attorneys from directly soliciting clients using real-time electronic communication. This change mirrors the prohibition under Model Rule 7.3 of face-to-face and telephone solicitation of services which protect against people in need of legal services being bullied, or forced, into an attorney-client relationship.[23] These three changes were an important start but were not by any means far-reaching. Numerous questions about lawyering and technology were not addressed including competency during e-discovery procedures, competency during the supervision of e-discovery procedures, how meta-data should be handled, and many more.

Following the Ethics 2000 Commission, the ABA recognized it still had more work to do to properly address the ethical implications of the advancements of technology and globalization. The ABA's most recent attempt to modernize the Model Rules is the Commission on Ethics 20/20 (Commission), created in 2009 by

[21] *Id.* at 3.

[22] *Id.*

[23] *Id.*

ABA President Carolyn Lamm, tasked the Commission with thoroughly reviewing the ABA Model Rules of Professional Conduct in the context of advances in technology and global legal practice.[24] The Commission has released eight work products containing suggestions for amendments to the Model Rules since its inception in 2009.[25] The work products consist of two issues papers, and six drafts of proposals. Two of these drafts were final drafts. These final drafts consisted of recommendations to change rules regarding technology and client development, and technology and confidentiality.[26] Specifically, the Commission suggested in its two final drafts to modify Model Rules 1.0, 1.1, 1.4, 1.6, 4.4, 1.18, and 7.2.[27] There have only been seven modifications to rules suggested. Of those seven modification suggestions, only one change since 2009 addresses Model Rule 1.1, competence. In the next section I will discuss how the Commission's work products fall short of meeting the goals the ABA set for it.

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[24] ABOUT THE COMMISSION, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. (Last Accessed 06/20/2014).

[25] WORK PRODUCT, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html. (Last accessed 05/29/2014).

[26] *Id.*

[27] ABA COMMISSION ON ETHICS 20/20, REVISED DRAFT RESOLUTIONS FOR COMMENT –TECHNOLOGY AND CLIENT DEVELOPMENT (2012). *See also*: ABA COMMISSION ON ETHICS 20/20, REVISED DRAFT RESOLUTIONS FOR COMMENT — TECHNOLOGY AND CONFIDENTIALITY (2012).

III. Ethics 20/20 Falls Short on Developing Rules in the Context of Technology

Technology perpetually changes the way lawyers do business. The problem is the Model Rules are not perpetually changing at the same pace. As just discussed, the ABA appointed Commissions or committees to amend the Model Rules from time to time. Through this process a few rules and associated comments may be changed, if the ABA House of Delegates then approves them. Further, the states do not automatically adopt these new rules or comments; it takes time for each state to review and consider adopting the new rules the ABA promulgates.

A prime example of where this process has fallen short can be found in the Commission proposed amendment of Model Rule 1.1. This rule addresses competence in the client-lawyer relationship. It states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[28] A major concern for the profession is defining competence in the context of technological advances. The ABA recognized that this was a major

[28]RULE 1.1: COMPETENCE, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html. (Last accessed 05/29/2014)

concern and asked the Ethics 20/20 committee to provide suggestions for an updated rule.[29]

The result of the Commission's investigation was an amendment. The amendment was not made to the rule itself, but to one of the comments on the rule, comment 8. The new comment reads, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[30] This language signals the beginning of the development of new more specific rules, not the end result of considering how technology should affect rules application.

The Ethics 20/20 ABA legislative notes further indicate that this comment change is not intended to clearly define competence in technology. They read, "[t]he proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and

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[29] MATT NELSON, NEW CHANGES TO MODEL RULES A WAKE-UP CALL FOR TECHNOLOGICALLY CHALLENGED LAWYERS, http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech. (Last accessed 05/29/2014).

[30] COMMENT ON RULE 101, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html. Amendment adopted in August of 2013. (Last accessed 05/29/2014).

risks associated with it, as part of a lawyer's general ethical duty to remain competent."[31] In this case, it appears that the ABA has recognized a concern, but has not addressed it outright. This amendment more or less sweeps the issue of technology and competence under the rug by refusing to impose new obligations on attorneys. This amendment and its associated comment are similar to the Canons, which requested that lawyers independently approach ideals. This approach is a step back in the modernization of the Model Rules. It would be more appropriate for the ABA to take a more firm stance on the amendments by imposing new, clearer, obligations on lawyers. This approach would more concretely codify rules and provides clearer guidance for lawyers to follow. The issue is that it is difficult to promulgate concrete rules for technology that is perpetually changing. As technology rapidly evolves, the best practices for handling technology rapidly evolves as well. Therefore, the key to rulemaking on issues involving lawyers' use of technology is to provide lawyers more concrete standards while also focusing on keeping up with continuous technological change. The ABA's traditional way of promulgating rules will not work for this purpose. The ABA must find a better approach to handle the rapid changes in technology in the context of legal ethics issues. Such a new approach is discussed below.

Another area of concern with the Commission is its method of amending outdated rules. Generally, where a rule uses outdated terminology, the committee

[31] *See supra* note 25.

will simply strike the old wording, and insert new wording.[32] This is a good approach to changing areas of the rules that are specific to the rule. Where amendments are problematic, though, is where they are textually long to note material changes in the rules created by technological advancement. An example of such a rule can be found in an amendment to rule 4.4, which defines lawyers' ethical duties to attend to the rights of third parties in legal proceedings.[33] One aspect of this rule pertains to third-party privacy. Comment 2 addresses situations where a lawyer inadvertently sends a communication. The amendment added approximately ten lines of clarifying information. The comment more than doubled in size and is now nineteen lines long. This amendment is one example where the rules have been made longer by amendments addressing technological changes.[34]

Although the overall substance of the amendment to Model Rule 4.4 is good, the added length is a symptom of future problems. As technology continues to change, rules committees will continuously be challenged with new technological

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[32]AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE DELEGATES, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_technology_and_confidentiality_posting.authcheckdam.pdf. At 4. Rule 1.4 is amended to include all communications, not just phone calls as the prior rule required. (Last accessed 05/29/2014).

[33]*Id.* At 5.

[34]*Id.* at 3. Rule 1.18 Comment 2; Rule 1.6 comment 16; *See further Id.* at 4. Rule 7.2 comments 3 and 5; Rule 7.3 comment 1. Each of these rules see added elements of complexity due to large extensions to their comments sections.

implications. This may lead to ever longer and more technical rules. Further, as these rules become more complex, ABA ethics committee members charged with writing the rules may be challenged by their lack of comprehensive technical expertise. Although the members of the ABA committees are highly qualified in their field, it is optimistic to think that the current members understand the great breadth of technical knowledge necessary to promulgate comprehensive ethics e-discovery rules. It is even more optimistic to suggest the committee members will be able to stay abreast of the continuous change of the field as technology advances. If the rulemaking process stays status quo, it may further slow an already slow rule promulgation process. It would be more appropriate to allow experts in the field, in consultation with attorneys, to promulgate and maintain rules in this area.

A final area of concern with the Commission's work is the slow pace at which it addresses technological issues in reference to ethics rules. Since its inception in 2009, the Commission on Ethics 20/20 has suggested very few changes to the Model Rules. Only eight work products addressing minor changes have been produced by the Commission to date.[35] The committee acknowledges its deficiency in addressing technology-related rule changes in its 2012 committee report noting to the ABA delegates that, "rule-based guidance and ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving

[35] *See supra* note 25.

security risks associated with that technology."[36] This statement acknowledges the systemic limitations the Commission has when attempting to meet its own mission statement in the technology area, indicating different steps may need to be taken to meet its goals. This statement may also be why the ABA has not approved a 20/20 Commission amendment to a technology-related rule since 2012.[37]

IV. Why the Work the Ethics 20/20 Commission is Doing is Important

The major advances in technology in the decades following the original adoption of the Model Rules have numerous implications to the legal profession. Lawyering is a profession that inherently is intertwined with the exchange of information. In modern civil and criminal practice, evidence often includes digital video, digital audio, electronic bank records, electronic sales receipts, electronic mail, text messaging, a list that is ever growing with continued technological innovation. Each type of digital information may have unique ethical implications to lawyers.

John M. Barkett's *The Ethics of E-Discovery* provides a comprehensive list of reasons why electronic information, in comparison with traditional paper information, is so problematic in the context of legal practice. First, Barkett notes

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[36]ABA COMMISSION ON ETHICS 20/20 REVISED PROPOSAL, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_confidentiality_revised_resolution_and_report_posting.authcheckdam.pdf. (Last accessed 05/29/2014).

[37]*See supra* note 2.

that everyone is a file keeper.[38] In previous eras of legal practice specific employees were assigned to specific phases of information storage and transfer. The attorney would receive and review information, would give it to a clerk for input into storage systems, which would also generally handle all transfer of information upon receiving a request or court order for the information. There would be only one original copy of any piece of information. Copies were easy to maintain and track down. Now, every computer that sends or receives files pertaining to a case, in one way or another, stores this information.[39] The information is temporarily stored in the email of users, on their clipboards, and on their hard-drives. This leaves data vulnerable to intentional, or inadvertent material alteration, or disclosure to parties that are not meant to see it.

Another major concern with storage-keeping is that when employees leave an office the files may leave with employees on their phones, laptops, or other electronic devices. This further increases the odds of accidental or intentional dissemination of data. An equally problematic issue is unintentional deletion of important information.[40] This occurs where a case ends, all users delete their emails and data about the case, and no individual archives the information in case

[38] J. Barkett, The Ethics of E-Discovery, at 1 (ABA Publishing 2009).

[39] *Id.*

[40] *Id.*

of further proceedings. Where this happens valuable information on appeal may be lost forever.[41]

A second difference Barkett noted is the issue of Metadata.[42] Metadata is defined as "data typically stored electronically that describes the characteristics of" electronically stored information.[43] Metadata raises serious issues in the ethical practice of law. Metadata allows for attorneys, through professionals who know how to access metadata, to see much more than what is literally on a page of electronic information. Metadata allows for a user to see the different key-strokes, edits, and revisions that the original user did in the process of creating a document.

The most important ethical implication in this area involves what types of metadata, if any, attorneys should be able to mine and view. Attorneys are bound to their clients to provide zealous representation. Further, they are bound to act ethically. This creates a grey area where an attorney knows the importance of metadata, and the party in opposition of the attorney's client does not. The attorney in this case, if acting zealously, should mine the metadata and use any advantage he can from any document he receives. On the other hand, the opposing party likely would not want the attorney to know anything but what was written on

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[41] *Id.*

[42] *Id.* at 2.

[43] *Id.* (citing and quoting, The Sedona Conference Glossary: E-Discovery & Digital Information Management 2nd Ed. (Dec. 2007), http://www.thesedonaconference.org/dlt.Form?did-TSCGlossary_12_07.pdf, (*Sedona Glossary*).

the document he sent out as he sent it. Further, this begs the question: is the opposition attorney acting within his competency requirements where he does not know the implications associated with metadata? These are questions that need to be answered as technology progresses.

The third difference Barkett noted is that deleted data does not necessarily die.[44] When a user chooses to delete a file from his computer pertaining to a case, he is only deleting it from his local desktop. Whole files or parts of the file are stored in other areas of the computer such as the hard drive.[45] A technically savvy attorney or staff member can restore this information in whole or part, again giving access to a multitude of potentially unintentional users.

A fourth difference that raises issues is the multiple sources of data storage available to users in modern times.[46] Current data sources include CDs, DVDs, BluRay discs, USB, external hard drives, servers, clouds, and so on. This list is ever growing as creative minds come up with innovative ways to more efficiently and effectively store and send data. The multitude of storage devices and their mobility mean greater chances of data storage unintentionally being left when a user abandons a device, or being sent to opposing parties.

This list of reasons why electronically stored information is so different and therefore more dangerous than paper-stored information gives valuable insight into

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[44] *Id.* at 3.

[45] *Id.*

[46] *Id.* at 4.

why electronic information must be more closely regulated. The current Model Rules were written long before electronically stored information was widely in use in any context. Because the Model Rules did not consider the implications of electronically stored media, many cases have arisen where the Model Rules were not able to provide proper guidance. The *Qualcomm* case, discussed below, is one example of this expanding problem.

Yet another consideration is the multitude of access points for data. These days data can be accessed from phones, PCs, tablets, laptops, watches, the list continues to grow. This means that all of the issues concerned with data listed above are further propagated by the dizzying number of devices that could have accessed and stored any number of sensitive legal documents. This creates issues of scope in what is a reasonable request for discoverable sources.[47]

A prime example where the Model Rules were unclear in the context of e-discovery can be found in the *Qualcomm* case.[48] In this case, the court sanctioned several attorneys under California ethics rules. This case arose in the Southern District of California as a patent infringement case.[49] Qualcomm sought injunctive relief, compensation, and attorney's fees, alleging that Broadcom infringed upon

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[47] This may have not been referenced by Barkett because the book, authored in just 2009, may not have been written in a time where it was so commonplace for people to access information from remote locations.

[48] *Qualcomm Inc, v. Broadcom Corp.*, 2008 WL 66932 (S.D. Calif. 2008).

[49] *Id.* at *2.

Qualcomm's patent rights by manufacturing, selling, and offering to sell certain products.[50] A central point to this case was when and if Qualcomm had been involved in the production of an industry standard for video compression technology, set through a Joint Video Team Standard Setting Board (JVT).[51] The standard defined a "technically aligned, fully interoperable" video compression standard.[52] Had Qualcomm been involved in this JVT before a certain date, its patents would not be protected, thus it would not be eligible to pursue patent infringement claims, and its case would be moot.[53]

Two separate experts provided testimony on behalf of Qualcomm stating that Qualcomm had not been involved in the JVT during the period of time in question.[54] Opposing counsel cross-examined and impeached each witness for providing misleading information. The basis for impeachment was information found in the

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[50] *Id.* at *1.

[51] *Id.* at *3. ("Joint Video Team Standard Setting Board" Hereafter referred to as "JVT")

[52] DAVID C. BREZINA, THE BACKSTORY IN QUALCOMM V. BROADCOM PROVIDES LASTING GUIDANCE IN THE STANDARD SETTING ORGANIZATION - INTELLECTUAL PROPERTY INTERFACE, http://www.iptoday.com/articles/2009-3-brezina.asp. (Last accessed 07/28/2014).

[53] *See supra* note 48 at *2. If Qualcomm's patent had been chosen as a standard by the JVT due to Qualcomm's participation in the JVT, the patent would not be protected because maintaining the patent would be an unfair advantage to the sole producer of the product produced under the patent.

[54] *Id.* at *3-4.

pre-trial e-discovery file.[55] Prior to this testimony, in-house counsel discovered in pretrial witness preparations that one of its client's witnesses, Viji Raveendran, had emails containing information contrary to that witness's later testimony.[56] At trial, general counsel for Qualcomm decided to not include this newly found information, saying that the information did not fall within the scope of the initial discovery request.[57]

The jury found for Broadcom after opposing counsel produced the emails indicating that Qualcomm had been involved in the JVT in question, and therefore its patents were not protected. [58] The judge's remedy for Broadcom took into consideration the unethical conduct that Qualcomm's attorneys engaged in to attempt to conceal Qualcomm's involvement in the JVT proceedings stating, "[c]ounsel participated in an organized program of litigation misconduct and concealment throughout discovery, trial, and post-trial before new counsel took over lead role in the case on April 27, 2007."[59]

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[55] *Id.* The witnesses indicated they did not review emails prior to trial that may refresh their memory about communications between their company and the JVT.

[56] *Id.* at 5.

[57] *Id.* At sidebar, the attorney for Qualcomm stated that questions regarding the emails in question were not relevant to this trial because although he knew of them, he was unsure if they were relevant because he had not read them, and was unable to determine if they should be have been produced to defense counsel in the first place.

[58] *Id.*

[59] *Id.*

The scope of the documents that counsel for Qualcomm searched for during the pretrial discovery phase included more than 300,000 pages of documents.[60] Qualcomm centered its defense of its exclusion of documents that undermined its case on two pillars: first, Model Rule 1.6,[61] which protects confidentiality of client information, and second, an argument that, due to the massive amount of information found in discovery, its ability to quickly assess its confidentiality rights in these emails was hindered, so they erred on the safe side and did not disclose the newly found information. This argument runs afoul of the duty of candor rule under Model Rule 3.3,[62] which states that attorneys may not make statements they know to be false.[63]

Barkett wrote on this particular case and notes that Model Rule 3.3 trumps the confidentiality rule, and the court agreed.[64] The judge ordered $8,568,633.24 in

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[60] *Id.* at 6.

[61] RULE 1.6: CONFIDENTIALITY OF INFORMATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html. (Last accessed 05/29/2014).

[62] RULE 3.3: CANDOR TOWARD THE TRIBUNAL, americanbar.org, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html. (Last accessed 05/29/2014).

[63] Barkett, *supra* note 21, at 66-67.

[64] *Id.*

sanctions, and referred the six involved attorneys to the California State Bar for an investigation into possible ethics violations.[65]

The second defense that Qualcomm raised was that trial counsel had not been made aware of the new discovery because in-house counsel handled the discovery matters. Post-trial, the in-house counsel continued to dispute whether the information he was being punished for not providing should have been provided.[66] Sometime later the trial counsel wrote letters to the judge apologizing for not discovering the emails sooner. Trial counsel acknowledged it would not have made the arguments it made at trial had it had knowledge of the approximately 47,000 pages of information that in-house counsel thought was not important.[67]

The *Qualcomm* case highlights an inherent Model Rule 1.1 concern: When is counsel, trial or in-house, competently gathering e-discovery information? Currently, there is no definition of the qualifications necessary for an attorney to be considered competent in the performance of court-ordered e-discovery. [68] As technology advances, cases like the *Qualcomm* case will become more common. In

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[65] *Qualcomm Inc.*, 2008 WL 66932 at *20.

[66] *Id.* at *6.

[67] *Id.*

[68] RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY, http://www.law.cornell.edu/rules/frcp/rule_26. (Last accessed 05/29/2014). Federal Rule 26 b(2)b requires that e-discovery requests not place an undue burden or cost on a party. This rule has ethics implications in that parties must be able to prove what burden is undue, and must be genuine in these arguments.

order to promote judicial system efficiency and promote ethical conduct of lawyers in similar litigation, the ABA should consider adopting industry best-practices standards that when establish the necessary training and qualifications for lawyers who take on responsibility for handling the e-discovery aspects of engaging in complex litigation that entails electronic discovery.

The *Qualcomm* case is also an example of three of the troublesome factors inherent in electronically stored information: 1) everyone is a user, 2) data can be accessed from many points, and 3) data does not die. Because there were so many users, accessing from so many points, the scope of the discovery was absolutely massive. This brings about two problems. The first is that files like the "missing files," even at approximately 47,000 pages were easily obscured in the other 350,000 files.[69] The second is it is very difficult for in-house attorneys to communicate every piece of information to trial counsel in enough time for the trial counsel to be able to fully review and know the information, which would allow them to confidently say they were acting ethically in their representations.

Next, the fact that data doesn't die was clear in this case. The emails that were used to discredit Qualcomm's defense took a great deal of time to find. They were first found in one user's email. Next, a keyword from the original email was used to track down some 21 more emails.[70] This means that 21 emails consisting of at most a few hundred pages was obscured in 300,000 or more pages, but an

[69] *Qualcomm Inc.*, 2008 WL 66932 at *9

[70] *Id.* at *4

information technology professional working for the opposite party was able to find them even though the client apparently was not.

Finally, the Qualcomm case asks what duties the supervising attorney had in supervising subordinate attorneys that prepared the discovery file. Under Model Rules 5.1 and 5.3 a supervising attorney is accountable for the misconduct of a subordinate attorney or non-attorney employee.[71] Model Rules 5.1 and 5.3 require attorneys to make "reasonable efforts" to assure their attorneys comply, without making it clear what reasonable efforts are in the context of e-discovery.[72]

The *Qualcomm* case is a prime case to show the potential the ABA Ethics 20/20 committee has to model best practices for attorneys so they can clearly see what is ethical performance of the duties of an attorney in regards to changes in technology. *Qualcomm* reveals the symptoms of a system that needs progressive reforms but does not have procedures for efficiently finding them. It shows us that clearer definitions of competence in e-discovery procedures are needed. It also shows us that clearer definitions of the roles attorneys play during e-discovery

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[71] RULE 5.1: RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer.html. (Last accessed 05/29/2014). *See also* RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANT, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html. (Last accessed 05/29/2014).

[72] *Id.*

procedures can help clarify further issues. Finally, *Qualcomm* shows us that a new class of complex litigation has risen out of technological progress that will more likely become the rule rather than the exception in courtrooms, which affirms the necessity to adjust the rules accordingly.

V. A Potential Solution is to look to Industry Best Practices

In order for the ABA to stay ahead of technological advancement it should adopt a best-practices model that is flexible enough to change at the rate technology advances. A great place to find such a model is in the private sector. An example of an e-discovery best practices model which meets the needs of the ABA was first created by EDRM in 2005.[73] EDRM is comprised of more than 260 organizations, including 170 service and software providers, 63 law firms, three industry groups and 23 corporations involved with e-discovery and information governance.[74] EDRM's goal is to provide standards and guidelines for e-discovery procedures.[75]

EDRM's structure has many valuable features. EDRM is made up of various types of entities, including attorneys who combine their different experiences, expertise, and values into one working model for e-discovery. EDRM releases updated models regularly that clearly outline e-discovery best practices, and also clearly define every aspect of the model.

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[73] EDRM, http://www.edrm.net/. (Last accessed 06/20/2014).

[74] *Id.*

[75] *Id.*

EDRM breaks down e-discovery into six phases. Each phase has at least one main element. The phases are: 1) Information Governance, 2) Identification, 3) Preservation and Collection, 4) Processing, Review, and Analysis, 5) Production, and 6) Presentation.[76] Each phase and its included sections have long, in-depth definitions sections that discuss standards for each element.

The e-discovery process and its guidance from EDRM are underlined by a five e-discovery principles: 1) Professionalism, 2) Engagement, 3) Conflicts of Interest, 4) Sound Process, and 5) Security and Confidentiality.[77] Each principle has a short statement defining the principle, a related corollary, specific, numbered guidelines for the principle, and a discussion section.

If the lawyers in *Qualcomm* had applied these industry best practices, they would have avoided engaging in the sanctionable conduct the court disciplined them for in Qualcomm. As previously noted, the attorneys in *Qualcomm* failed to include 21 critical emails about Qualcomm's participation in a JVT standards setting board. Likely, the actions that lead to these emails being left out were an outcome of counsel's deficient knowledge and expertise in e-discovery procedures. Steps two and three EDRM's six-step process for e-discovery could have provided counsel with the guidance it needed to properly, and ethically perform its e-discovery obligations.

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[76] EDRM STAGES, http://www.edrm.net/resources/edrm-stages-explained. (Last accessed 06/20/2014).

[77] EDRM MODEL CODE OF CONDUCT, http://www.edrm.net/resources/mcoc (Last accessed 06/21/2014).

EDRM's step two is called "Identification" and is broken up into four sub-steps, 1) Develop the identification strategy and plan, 2) Establish the identification team, 3) Identify potentially relevant ESI (electronically stored information) sources, and 4) Certify potentially relevant sources.[78] In the first step, counsel develops the strategy and plan for e-discovery. Under EDRM's model, strategy formulation begins with data mapping. Data mapping is the process of reviewing the different systems a client uses to store and send data.[79] This process locates servers, computers, tablets, cell phones, clouds, and other backup systems that may contain important data.[80]

Once the data is mapped, the team then moves to sub-step two, preparing the identification plan. In this step, counsel identifies the parameters of their search for information they must provide.[81] EDRM then suggests that identification can break down a business by geography, job function, date ranges, entity, etc.[82] Finally, EDRM recommends that counsel make a template for all parties it is interested in investigating noting their name, title, source-type, the information

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[78] IDENTIFICATION GUIDE, http://www.edrm.net/resources/guides/edrm-framework-guides/identification. (Last accessed 07/19/2014).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

they provided, and any other information that may be pertinent throughout the discovery process.[83]

Step two in this process is establishing the identification team. This step is where counsel selects the team of people that are responsible for indentifying the key players, data custodians and data relevant to the matter.[84] EDRM provides guidance in their model as to which personnel, corporate counsel, IT personnel, and others, may be useful members of an identification team. The identification team is responsible for executing the identification plan and strategy from step one.[85]

Once an identification team is set, the plan moves to step 3 of implementation, where the team identifies potentially relevant ESI sources. In this step, the identification team reviews all of the data sources identified in step one, along with the information they identified by interviewing identified staff members, and then delves deeply into the identified systems using keywords, and other useful information from the interviews.[86] There are ten sub-steps embedded into step three: 1) Identify key witnesses and custodians, 2) Determine key timeframes, 3) Keyword lists, 4) Identify potentially relevant document and data types, 5) File storage, 6) E-mail systems, 7) Determine relevance of backup media, retired

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

hardware and disaster recovery systems, 8) Legacy systems, 9) Cloud computing or third-party systems, 10) additional data sources.[87]

Once step three is complete, and a comprehensive review of the identified systems is complete, the process advances to step 4, certifying potentially relevant ESI sources. In this step, counsel supervising the process reviews all of the identified ESI sources. They also review any ESI sources identified by the team during the investigation that could not be located, making sure to have proper documentation of all steps included in the investigatory process.[88]

Once the entire identification process is complete, step 3 of the EDRM process takes place, Preservation and Collection. This process has a similar framework to identification. Steps are taken to identify what needs to be preserved and collected, who will collect it, and how it will be collected.[89] EDRM notes that each process is not necessary iterative.[90] Sometimes steps need to be omitted because they are superfluous, other times, steps need to be repeated multiple times to assure that the step is successfully, and competently completed.[91] EDRM strives to assure each of its steps, and sub steps, is legally defensible, proportionate,

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[87] *Id.*

[88] *Id.*

[89] PRESERVATION GUIDE, EDRM.net, http://www.edrm.net/resources/guides/edrm-framework-guides/preservation. (Last accessed 07/19/2014). *See also* COLLECTION GUIDE, EDRM.net, http://www.edrm.net/resources/guides/edrm-framework-guides/collection. (Last accessed 07/19/2104).

[90] *Id.*

[91] *Id.*

efficient, and auditable. EDRM suggests that these four factors are often considered in the investigatory and judicial proceedings that e-discovery may be used during.[92]

The key factors of the EDRM model for steps three and four that could have been useful to counsel in *Qualcomm* are accountability, thoroughness, and continuity. The structure of the EDRM procedure for e-discovery defines a set team, led by one individual, to handle the entire e-discovery procedure. This way, the team's work may be held accountable by the leader. The leader can then be held accountable by the client, the court, and potentially by more senior counsel because the leader certifies the work of their team. This structure makes it clearer who is to blame when deficient discovery files are presented at trial or for other proceedings.

The EDRM model also provides a heightened level of thoroughness. The multiple, highly-defined, sub steps within each main step of the EDRM procedure provide a leave-no-rock-unturned structure from which the e-discovery team can make sure that they did not miss any information that was mandatory to disclose.

Also, the certification portion of the process provides insulation for attorneys where information could not be found based upon the input of their client. This missing information would be brought to light when a member of the identification team finds out a data location of interest through an interview or review of stored information, but then cannot locate the data location of interest. As part of certification, the team member would report the missing data location to the team

[92] *Id.*

leader. It would then be the team leader's job to ask the client about the missing data location, or delegate a team member to do the same. If the data could be found, then the team is doing their job. If the data cannot be found, and the team leader has documentation of a comprehensive search, the team may be able to protect itself if the presence of the missing information is later deemed a discovery violation.

Finally, the EDRM procedure provides continuity. The framework of the EDRM process is much like a roadmap. It guides attorneys and supervised staff during e-discovery processes through the inherently difficult task of mining huge amounts of information. The process allows for a checklist to be completed step-by-step. If universally adopted, the courts could look to the EDRM procedure when discovery violation hearings come up, and ask counsel for their certifications and checklists, and more efficiently make decisions about how and where violations occurred, and who is responsible.

Had counsel in *Qualcomm* used the EDRM process, they likely would have properly identified the data they needed to find, and where it is located, and likely could have provided a comprehensive discovery packet. Most importantly, though, had counsel made the diligent effort to find and provide the information they were later censured for, they would have been able to produce documentation supporting their position that they provided all the necessary information they could locate. The EDRM process' final product is a packet of documents that can show an investigatory body into violations; solid proof of what a team did to produce

discovery files for clients. This packet could have been a valuable resource for counsel at their ethics investigation, and could have protected them against censure.

VI. Conclusion

It is clear that the implications of technology on the e-discovery process are very important. The ABA set out to address these implications when it formed the Commission on Ethics 20/20. Unfortunately, the Commission's efforts fell short. In order to efficiently and effectively oversee the ethical practice of law in context of e-discovery, the ABA should adopt an industry best-practices model in consultation with attorneys similar to the EDRM industry best practices model for e-discovery procedures described above.

An industry best-practices model in consultation with attorneys provides a comprehensive roadmap for counsel to follow while preparing e-discovery files that not only educates attorneys on best-practices, but also creates a record of how the discovery team created their file, thus providing evidence that may be able to help attorneys during investigations if they properly follow the new rules. By adopting an external model using industry best-practices, the ABA can avoid the long investigative and legislative processes necessary to adopt the suggestions the Commission on Ethics 20/20 makes. Also, the ABA can ensure that attorneys are conducting e-discovery processes ethically and efficiently.

Finally, adopting industry best practices is not a solution limited to e-discovery procedures. As time progresses, ethical practice of law will continue to

grow in complexity as technology advances. Industry best practice adoption may be a solution to other ethical issues facing the ABA in the future. Adopting these industry best practices may provide a roadmap to future successes in ethics rulemaking.