

**NEW JERSEY
OFFICE OF ATTORNEY ETHICS**

ESI & ETHICS

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A SHORT INTRODUCTION TO ESI & eDISCOVERY

MATERIALS

- R.J. Hedges, *Electronic Discovery: Trends & Developments Under the Federal Rules and Beyond* (July 4, 2015) (available via download)
- The Sedona Conference Glossary: *E-Discovery & Digital Information Management* (Fourth Edition: April 2014)

MATERIALS

- California State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193 (June 30, 2015)
- R.J. Hedges & A.W. Wagner, “Competence with Electronically Stored Information: What Does It Mean in the Context of Litigation and How Can Attorneys Achieve It?” 15 *DDEE* 134 (2015)

MATERIALS

- Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the of the New York State Bar Ass'n (June 9, 2015)
- The Florida Bar Best Practices for Effective Electronic Communications (Aug. 7, 2015)

MATERIALS

- Report and Recommendations, Supreme Court Special Committee on Attorney Ethics and Admissions (May 12, 2015) (“Special Committee Report”)

THE NATURE OF ESI

- Voluminous and distributed
- Fragile yet persistent
- Capable of taking many forms
- Contains non-apparent information
- Created and maintained in complex systems

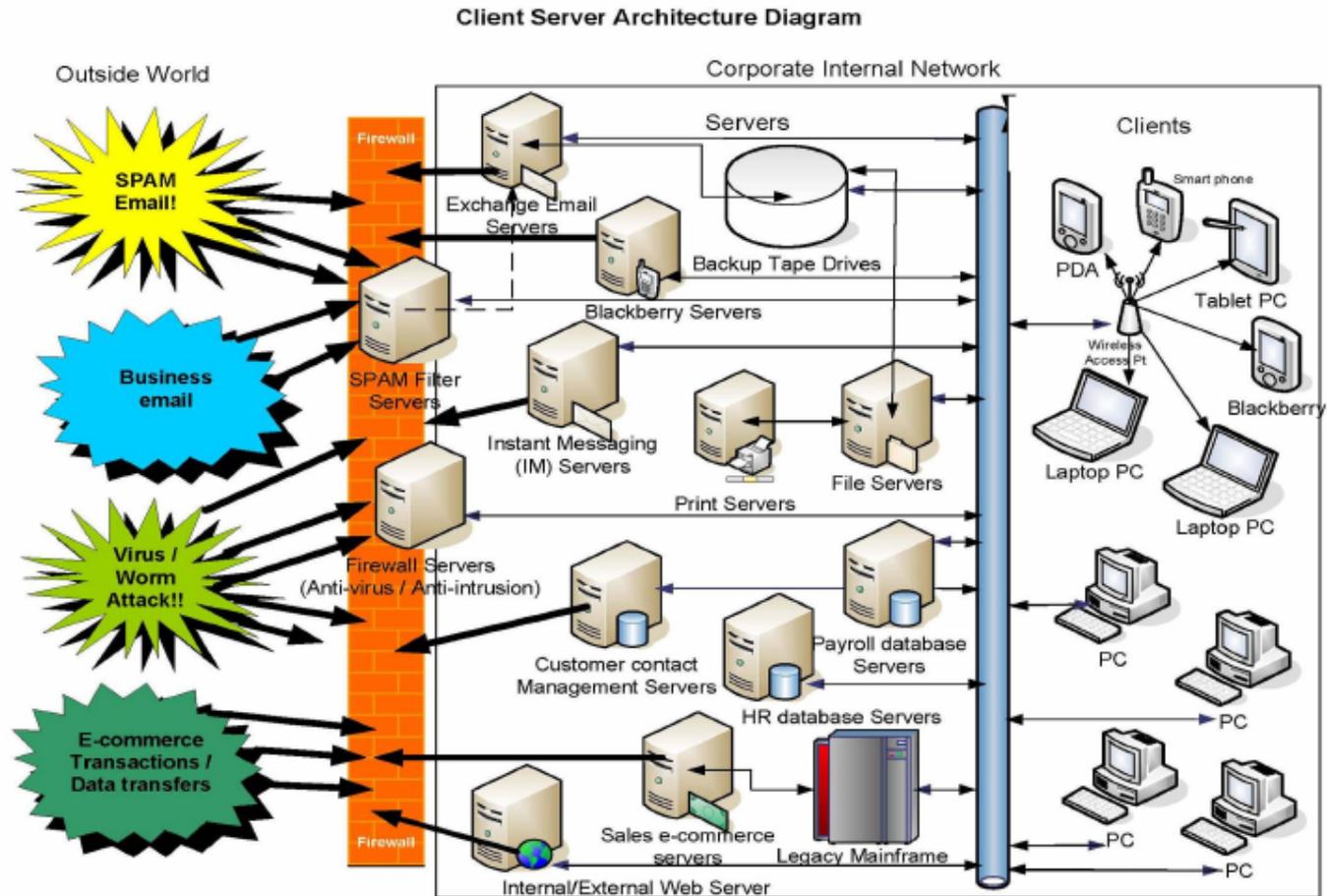
THE NATURE OF ESI

- Personal computers at work and/or home
- Laptop computers, phones and tablets
- Networked devices (*i.e.*, “the Internet of Things”)
- Photocopiers
- Removable media (disks, flash drives)

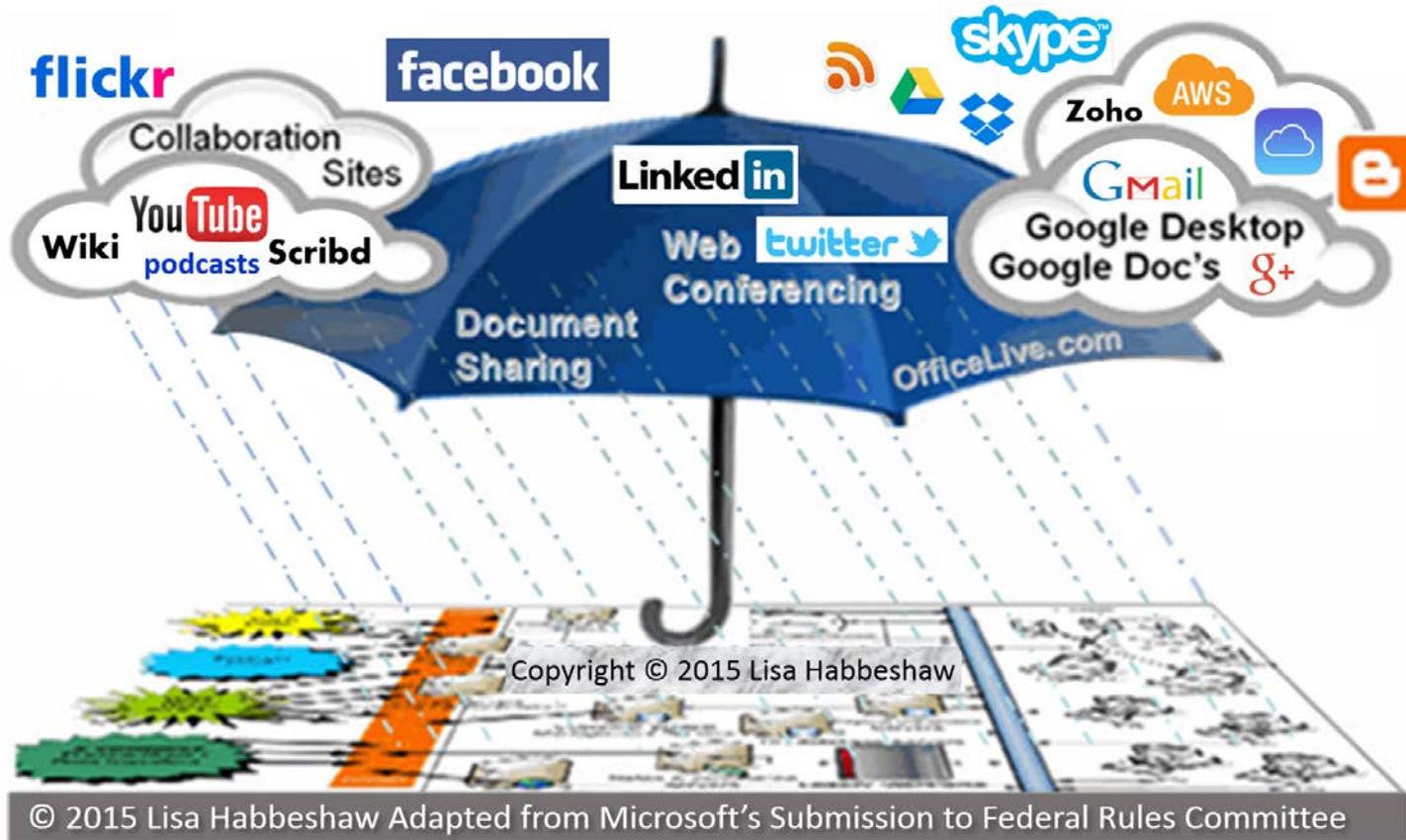
THE NATURE OF ESI

- Third-party providers (incl. social media)
- “Wearable technology”
- Vehicular ESI
- Drones
- Body Cameras

THE NATURE OF ESI



THE NATURE OF ESI



THREE “TROUBLESOME” eDISCOVERY TOPICS

- *R. 4:18-1(a)*: “possession, custody or control”
- *R. 4:18-1(b)*: “form or forms”
- Search

ETHICS & ESI

ESI & COMPETENCE

August 2012 Amendments to the ABA Model Rules of Professional Conduct:

- Rule 1.1 requires competent representation of clients
- Comment requires lawyer to “keep abreast of changes in the law and its practice”
- Comment amended to include “the benefits and risks associated with technology”

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Special Committee Report:

- “would introduce a new element into our ethics rules”
- “significant financial burden on smaller firms and solo practitioners”
- New Jersey attorneys guided by 2006 opinion
- No need to “single out technology”

ESI & COMPETENCE

California State Bar Standing Committee on Professional Responsibility and Conduct
Formal Opinion No. 2015-193 (June 30, 2015):
Attorneys should have the technical competence and skill – either by themselves, co-counsel, or expert consultants – to

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- “initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client’s ESI systems and storage;

ESI & COMPETENCE

- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;

ESI & COMPETENCE

- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner.”

(footnotes omitted)

ESI & COMPETENCE

What should a competent attorney know in the wills and estates context?

- A. Eisenberg, “Bequeathing the Keys to Your Digital Afterlife,” *New York Times* (May 25, 2013)
- S. Kellogg, “Managing Your Digital Afterlife,” *Washington Lawyer* 28 (Jan. 2013)

ESI & CONFIDENTIALITY

August 2012 Amendments to the ABA Model Rules of Professional Conduct:

- Rule 1.6 requires confidentiality
- Amended to require lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client”

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- Comment amended to include factors to be considered in determining whether lawyer made reasonable efforts
- to state that, “[a] client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures ***”
- to note that state or federal laws may require lawyer to take additional steps, but that this is “beyond the scope of these Rules.”

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Special Committee Report:

- “explicitly require lawyers to take reasonable measures to prevent unintended disclosure”
- “Lawyers *** must evaluate the adequacy of their electronic security measures”
- “balances interest in data security and the costs to the lawyer”
- Lawyer may “obtain written client consent to forgo otherwise required security measures otherwise required”

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August 2012 Amendments to the ABA Model Rules of Professional Conduct:

- Rule 4.4(b) amended to reference document or “electronically stored information” that lawyer receives and knows or reasonably should have known was sent inadvertently
- Comment expanded to include “electronically stored information” and reference “embedded data (commonly referred to as ‘metadata’)”
- Comment expanded to state: “Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer”

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Special Committee Report:

- Encompass electronic information
- Address documents wrongfully obtained
- Give attorney option to delete
- Metadata requested and produced not inadvertent
- Recommendation only codifies existing law

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Advisory Committee on Professional Ethics
Opinion 701 (2006) (“Electronic Storage And
Access of Client Files”)

- “The touchstone in using “reasonable care” against unauthorized disclosure is that:
- (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and

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- (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then “reasonable care” will have been exercised.”

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What should a competent attorney know to protect attorney-client privilege, etc.?

- *Stengart v. Loving Care Agency*, 201 N.J. 300 (2010)
- *Liebeskind v. Rutgers University*, Docket No. A-0544-12T1 (N.J. App. Div. Jan. 22, 2015 (*per curiam*))

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- State Bar of California Standing Comm. on Prof. Respon. and Conduct, Formal Op. No. 2010-179 (“Does an attorney violate the duties of confidentiality and competence *** by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?”)
- New York State Bar Ass’n Comm. on Prof. Ethics Op. 1019 (Aug. 6, 2014) (“Confidentiality; Remote Access to Firm’s Electronic Files”)

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- C. J. Hoffman, “How Law Firms Can Protect Client Confidences and Private Data from Hackers,” 14 *DDEE* 485 (2014)
- V.I. Polley, “Cybersecurity for Lawyers and Law Firms,” 53 *Judges’ Journal* 11 (ABA Jud. Div.: Fall 2014)

ESI & THE DUTY TO SUPERVISE

August 2012 Amendments to the ABA Model Rules of Professional Conduct:

- Comment to Rule 5.3 amended to address use of “Nonlawyers Outside the Firm.” Requires attorney to “make reasonable efforts to ensure that the services are provided in a manner that is compatible with the attorney’s professional obligations” and to “communicate directions appropriate under the circumstances ***”
- Comment also amended to address client selection of “a particular nonlawyer service provider outside the firm”

ESI & ADVERTISING

August 2012 Amendments to the ABA Model Rules of Professional Conduct:

- Comment to Rule 7.2 amended to address reference electronic media in context of attorney advertising

ESI & ADVERTISING

NYCLA Ethics Opinion 748 (Mar. 10, 2015):

- An attorney may have a LinkedIn profile
- Depending on content, a profile may constitute Attorney Advertising
- An attorney must ensure that content truthful
- Inaccurate endorsement should be excluded
- Profile should be monitored

ATTORNEYS & SOCIAL MEDIA

Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the of the New York State Bar Ass'n (June 9, 2015):

- Guideline No. 1 Attorney Competence
- Guideline No. 2 Attorney Advertising
- Guideline No. 3 Furnishing of Legal Advice Through Social Media

ATTORNEYS & SOCIAL MEDIA

- Guideline No. 4 Review and Use of Evidence from Social Media
- Guideline No. 5 Communicating with Clients
- Guideline No. 6 Researching Jurors and Reporting Juror Misconduct
- Guideline No. 7 Using Social Media to Communicate with a Judicial Officer

QUESTIONS?
COMMENTS?
THANK YOU

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