Legal Ethics Considerations in the Agriculture Tech World

ROSE LAW FIRM

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Mark is rated as AV-Preeminent™ in both legal ability and ethics, and he serves as counsel in complex federal litigation representing universities, agricultural companies, software development companies, retail vendors, and multi-national corporations having intellectual property rights in the United States. He is a registered patent attorney and earned a Master of Laws (LL.M.) in agricultural law.

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Presentation Overview

I. Federal Litigation e-Discovery

There are several ethical considerations surrounding updates in the Federal Rules of Civil Procedure. Attorney Client Privilege and Electronically Stored Information (ESI).

a. Civil Procedure Rule 26(b)(1) – Proportionality Factors Restored
b. Civil Procedure Rule 26(f)(3) – Electronically Stored Information
c. Civil Procedure Rule 16(b)(3)(B) – ESI and Federal Rule of Evidence 502
d. Federal Rule of Evidence 502 – Attorney-Client Privilege and Work Product
e. Civil Procedure Rule 37(e) – Test for balancing interests for "lost" ESI
f. Helpful Guidance on Scheduling Orders for claw-back provisions.
g. Case Study – *Cuker v. Walmart Stores, Inc*. 5:14-cv-05262-TLB (Western District Arkansas)

    Sanction - $400,299.96 for "vexatious, oppressive, and abusive" discovery tactics involving ESI and computer coding.

II. Enforcement of Intellectual Property Rights for public institutions.

Universities develop new seed varieties and have in place a recovery of those costs regimen for licensing. An attorney may need to balance the public disclosure requirements potentially tied to state Freedom of Information Act laws with the ability to enforce intellectual property rights in an effective manner across an array of jurisdictions.

South Dakota Board of Regents v. Fevold Farm Services, 3:18-cv-3005 (N.D. Iowa)

a. Professional Conduct Rule 4.3 – Dealing with unrepresented persons
b. Model Rule 8.4 – "professional misconduct for a lawyer to . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
    a. 1974 - ABA Formal Opinion 337 – prohibiting secret recordings
    b. 2001- ABA withdrew it in favor of Formal Opinion 01-422
    c. 2/3 of state statutes permit taping of conversations (one-party consent)
    d. 2012 – Congressional Research Service – Tape Recordings and Legal Ethics.

RULES CITED - FEDERAL LITIGATION E-DISCOVERY

There are several ethical considerations surrounding updates in the Federal Rules of Civil Procedure. Attorney Client Privilege and Electronically Stored Information (ESI).

A. Civil Procedure Rule 26(b)(1) – *Proportionality Factors Restored*

(b) DISCOVERY SCOPE AND LIMITS.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

B. Civil Procedure Rule 26(f)(3) Civil Procedure Rule 16(b)(3)(C) and (D) – *connection to FRE 502 and Scheduling Orders.*

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

C. Federal Rule of Evidence 502 – *Attorney-Client Privilege and Work Product*

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

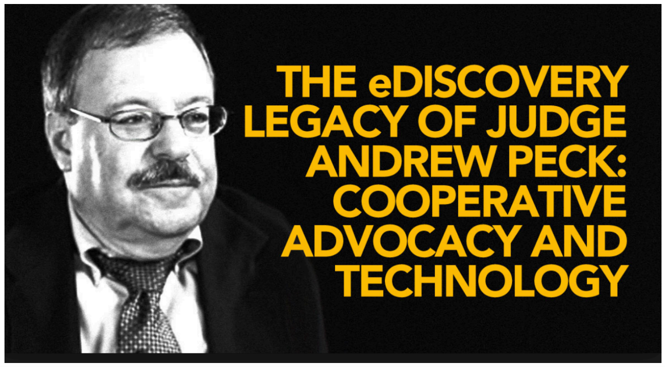
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the 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 Civil Procedure 26(b)(5)(B).



Judge Andrew J. Peck, 1 of E-Discovery's Most Influential Figures, Retires From the Bench

: **<u>RULE 502(d) ORDER</u>**

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ANDREW J. PECK, United States Magistrate Judge:

1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

D. Civil Procedure Rule 37(e) – *Test for balancing interests for "lost" ESI*

RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS

(e) **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

E. Case Study – *Cuker v. Walmart Stores, Inc*. 5:14-cv-05262-TLB (Western District Arkansas)

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MULTI-JURISDICTIONAL ENFORCEMENT OF UNIVERSITY-DEVELOPED INTELLECTUAL PROPERTY

Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.

Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.

Recording requires the consent of all parties in 10 states: California, Florida, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington.

While illegality and false statements exist as exceptions to a general rule that permits surreptitious recording, evidence gathering is an exception to a general rule that prohibits such recordings. The earlier ABA opinion conceded a possible exception when prosecuting attorneys engaged in surreptitious recording pursuant to court order. Various jurisdictions have expanded the exception to include defense attorneys as well as prosecutors. Some have included use in the connection with other investigations as well. https://fas.org/sgp/crs/misc/R42650.pdf

“The value of secret tape recordings in ferreting out truth is beyond question, and this Court has observed that the admission of such recordings into evidence is sometimes "fully justified." *Miller*, 484 So. 2d at 338; *see also Wilkins v. Bancroft*, 248 Miss. 622, 160 So. 2d 93 (1964) (surreptitious recording properly admitted into evidence to impeach adverse party).” *Attorney M. v. Mississippi Bar*, 621 So. 2d 220 (1992)(Mississippi Supreme Court).