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# Effective dispute avoidance & resolution

throughout the project lifecycle

June 8, 2023

Hilton Santa Monica Hotel & Suites, Santa Monica, CA



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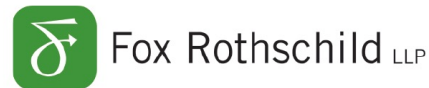
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**June 8, 2023**  
**4:00-5:00 PM**

# **Ethics Issues with Virtual Hearings and Document Production**

## **Faculty:**

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## **Session Moderator:**

**Iman Hyder-Eliz**, Vice President, Construction Division, American Arbitration Association

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LOOKING AHEAD:

This Panel will discuss various points of ethical concerns that have arisen in this new virtual world including cutting-edge issues in virtual arbitration proceedings and hearings:

- Matters to be raised at the preliminary hearing
- Challenges posed by discovery of Electronically Stored Information (ESI)
- Duties of lawyers and arbitrators
- Due process issues
- Ethical compliance



## Role of Lawyers and Arbitrators

- What search terms and parameters need to be considered?
- What is the universe of documents?
- Claw back provisions in Preliminary Hearing Scheduling Order/ESI Order.
- Knowledge and use of technology.
- Technology assisted review (TAR) a/k/a predictive coding.

See: AAA-ICDR<sup>®</sup> Best Practices Guide for Maintaining Cybersecurity and Privacy

See: AAA-ICDR<sup>®</sup> Discovery Best Practices for Construction Arbitration

See: AAA-ICDR<sup>®</sup> eDiscovery Special Master Panel

## TOPIC #1: DOCUMENT PRODUCTION AND ESI ISSUES (CONT.)

### Sample

#### STIPULATED ESI PROTOCOL

The parties signatory hereto (collectively, the “Parties”) hereby agree and stipulate through their respective counsel to be bound to the following Electronically Stored Information (“ESI”) protocol with regard to discovery matters arising in the above-captioned action.

#### ELECTRONICALLY STORED INFORMATION PROTOCOL

1. **Application and Scope.** This Protocol shall apply to all Electronically Stored Information (hereinafter, “ESI”) as well as paper documents (collectively with ESI, “Documents”) exchanged in discovery in this action.
2. **Manner of Production of ESI and Paper Documents.** The following provisions apply to the production of all ESI, with the exception of ESI described in Section 3 below, and paper documents.

### General Body Provisions

- De-Duplication
- Unitization
- Production
- Formatting (Native)
- Images
- Document Relationships
- Inspection
- Files (Scheduling; Design; Load)
- Rational Databases
- Privilege/Logs
- Cost
- Amendments
- Spreadsheets
- Attachments



## Technical Competence Requirement and Procedural Safeguards

### ABA Model Rules of Professional Conduct

See: ABA Model Rule 1.1: Competence

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

See: Comment 8

To 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...

See: ABA Standing Committee on Ethics and Professional Responsibility Ethical Formal Opinion 498 – “Virtual Practice,” issued on March 10, 2021 which addresses an attorney’s Duty of Competence When Utilizing Technology



## California State Bar Formal Opinion No. 2015-193:

Lawyers must be able to perform to the following in a matter involving e-discovery:

- Initially assess e-discovery needs and issues;
- Implement appropriate ESI preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;
- Engage opposing counsel in a competent and meaningful meet-and-confer concerning e-discovery;
- 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.

## Duties with Respect to ESI Production

### *The Usual Suspects*

- E-mail
- Network Project File
- Project Computers
- Text Messages

## Duties with Respect to ESI Production

### New Technologies

- Workplace Collaboration Tools: ProCore, BIM Collaborate Pro, Autodesk
- Communication Apps: Slack, WhatsApp
- Video Conferencing: Zoom, Microsoft Teams, Skype
- Cloud Storage: Dropbox, iCloud, OneDrive
- Mobile Devices: Personal vs. Company Issued
- BYOD (Bring Your Own Device)

## **Why and how are lawyers getting in trouble? Failure to understand.**

Examples include:

- The hearing was wrongly or inadvertently being recorded
- The microphone was on when speaking with client confidentially
- Objections were missed due to excess background noise (e.g. children or pets)
- Lack of available technology or knowledge to set up virtual room for sidebars

## Remote Practice

Practicing remotely can constitute the “unauthorized Practice of Law” if not licensed in another jurisdiction

See: ABA Standing Committee on Ethics and Professional Responsibility Ethical Formal Opinion 495 addresses the Unauthorized Practice of Law and Working Remotely

Rule 5.5(c): lawyers may, under certain circumstances, provide legal services on a “temporary basis” in jurisdictions in which they are not admitted. With Covid restrictions released, one cannot remotely practice in a jurisdiction without being licensed notwithstanding that he / she can appear before the court remotely over Zoom.

See: Sample of California Pro Hac Vice Application [Certificate of Out-of-State Attorney Arbitration Counsel (OSAAC) California CCP § 1282.4 and California Rules of Court Rule 9.43]

## Third Party Vendors

### Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

## Third Party Vendors

### Rule 5.3: Responsibilities Regarding Non-lawyer Assistance

(a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

Issues: Vendor collection of documents; Use of Vendor (AI) for Production; Clawback agreements



## Artificial Intelligence (“AI”): Use, Bias and Transparency

- “AI involves teaching computers how to perform tasks that typically require human intelligence such as perception, pattern recognition, and decision-making.”
- “The capability of a machine to imitate intelligent human behavior.”

### ABA House of Delegates Resolution No. 112, adopted August 12-13, 2019:

“...urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.”

“For all the advantages that AI offers for lawyers, there also is a genuine concern that AI technology may reflect the biases and prejudices of its developers and trainers, which in turn may lead to skewed results. It is critical for lawyers using AI to understand and address how bias can impact AI results.”

TOPIC #2: ETHICAL DUTIES OF LAWYERS AND ARBITRATORS PRACTICING REMOTELY AND IN ELECTRONIC SETTINGS (CONT.)

## AI Resources

- A Primer on Using artificial Intelligence In the Legal Profession, Jolt Digest  
<https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession>
- European Commission, Ethics Guidelines For Trustworthy AI  
<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>
- “What it Means to be An AI University,” University of Florida  
<https://ai.ufl.edu/>
- Deloitte, Ethical technology: Everyone’s responsibility  
<https://www2.deloitte.com/us/en/pages/about-deloitte/articles/technology-trust-ethics-annual-report.html>
- Blackman, A Practical Guide to Building Ethical AI, Harvard Business Review  
<https://hbr.org/2020/10/a-practical-guide-to-building-ethical-ai>



## **Preliminary Hearing Scheduling Order**

- What items should an arbitrator address regarding virtual hearings?
- See: AAA-ICDR<sup>®</sup> Model Order and Procedures for a Virtual Hearing via Videoconference

## **Can an arbitrator mandate a virtual hearing? Abuse of discretion?**

See: ABA Formal Opinion 498 addresses mistakes during virtual hearings

- All agreed to use a court reporter but no arrangements were made; no live transcript to reference
- All agreed to witness sequestration for scheduled testimony but a non-party/non-expert witness was allowed to join the hearing early; not discovered until several hours later
- All agreed to be visible on screen at all times but force of nature/technical issue caused a lawyer's screen to shut off and witness resumed testimony; opposing counsel lodged a complaint with the arbitrator
- A remote witness participating via videoconference from a separate location activated a recorder while testifying; counsel had failed to inform the witness that recordings were prohibited

## How to avoid ethical violations?

- Lawyers should prepare their witnesses to testify in a virtual setting
- Establish clear orders and rules early on
- Understand strategies for handling issues with arbitrators who are not responsive or aware of the issues in virtual hearings
- Real world example: hybrid mega-case arbitration (the LAX arbitration) – concurrent live and virtual lawyers, exhibits, witness and arbitrators all in one case

## Does the virtual hearing setting present due process hurdles?

- Parties are entitled to fully and fairly “present their case” at the hearing
  - See: Canon 1 of the Code of Ethics for Arbitrators in Commercial Disputes:
  - The arbitrator should set clear rules and have the parties agree to the authority of the arbitrator to set the virtual hearing
- Hurdles (Inefficient technology; unscrupulous parties; undetected witness coaching and/or directed testimony; witnesses joining early; etc.)
- Best Practices (Turn off chat function; confirm there are no other instant messaging programs running; rotate camera to show entire room; set up waiting room to control admittance of participants; etc.)
- How should the arbitrator guarantee the parties’ right to a fair hearing presentation?
  - See: UK Charity, the Chartered Institute of Arbitrators’ (CI Arb) publication: “Guidance Note on Remote Dispute Resolution Proceedings.”

## Discussion: Threshold Issues and Early Rulings

- Applicable procedural and substantive rules
- Competing laws (*e.g.* state versus federal)
- Contractual provisions
- Issues covered and not covered by ESI protocol

# Questions?







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