

## CHECKLIST: Ethical Considerations Surrounding Electronic Discovery

- Threshold inquiry: Do I understand what “electronic discovery” encompasses in this case? Do I have experience with the production or receipt of electronic discovery? If not, have I arranged for appropriate assistance regarding electronic discovery issues?
- Have I discussed a litigation hold with the client to preserve electronically stored data until such time as it is requested or produced in discovery? Have I confirmed that any appropriate litigation hold has actually been implemented by the client?
- Have I issued a litigation hold letter to the opposing party? Are there any third parties to whom a litigation hold letter should be sent?
- In this particular matter, what types of electronic information or storage devices may be reviewed and/or disclosed?
  - Emails?
  - Metadata within Word, Excel, other files?
  - Video or audio recordings?
  - Hard drives? Personal computers?
  - Cell phones? PDAs?
  - Draft documents stored on a server?
  - Text messages?
  - Social media posts?
  - Other?
- Am I familiar with all of the client locations and devices which may contain electronic information at issue in this case?
- Are there special circumstances in this matter that will affect electronic discovery? For example, might electronic discovery involve trade secrets or other non-public information? Personal Health Information? Is this a criminal case? Are there issues of national security or other heightened circumstances that require special attention? Do I need to propose entry of a protective order regarding any such circumstances?
- Have I reviewed the Electronic Discovery Guidelines and Checklists, if any, promulgated by the court in which the matter is pending? Have I followed the appropriate procedures and conferred with opposing counsel about the scope of electronic discovery in which we will engage? Is a written electronic discovery protocol advisable here?
- Do I have a vendor who has the technical expertise to assist with the electronic discovery likely to occur in this case? Has my client consented to the use of this vendor, and agreed to pay the vendor’s costs? Have I confirmed that the vendor’s cybersecurity protocols are appropriate? Do I have a confidentiality agreement in place with the vendor?
- Do I have a client contact who is easily accessible to me and with whom I can discuss any issue relating to electronic discovery in the case?
- Am I ready and able to supervise vendors, associates, and contract attorneys regarding electronic discovery issues? What will “supervision” entail in this case?
- Do I need a clawback agreement that addresses the inadvertent production of privileged or confidential materials?
- How will electronic discovery materials be handled at the conclusion of litigation?