E-Discovery Ethics: Emerging Standards of Technological Competence

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In August 2012, the American Bar Association amended the comments to Rule 1.1[1] of the Model Rules of Professional Conduct to link lawyer competence to expertise in technology. The comments were modified to state: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology …"[2] This change was the first time the comments to the ABA Model Rules addressed the importance of being competent about technology. Since then, the comments to rules of professional conduct applicable in many states have changed to follow the ABA's lead.[3]

On its face, the phrase "the benefits and risks associated with relevant technology" may appear simple and relatively innocuous, but its vagueness leads to the need to describe what technological e-discovery competence entails. At least one knowledgeable author[4] outlined several areas of practice where relevant technology becomes critical.

- Cybersecurity
- Internet marketing and investigations
- Employing cloud-based services (in the practice of law)
- Implementing automated document assembly and expert systems (in the delivery legal services)
- E-discovery

There are additional areas of technological competence, but these five areas seem to predominate.

This article focuses exclusively on technological competence with respect to e-discovery and posits an answer to the question: What does "understanding the benefits and risks associated with relevant technology" in the context of e-discovery mean? While the changes at the national and state level linking lawyer competence to an understanding about technology have been useful, the changes lack specifics and provide little practical direction for lawyers attempting to determine what minimum level of skills they need to develop or acquire to meet this emerging ethical competency requirement in the discovery context. The California State Bar's Standing Committee for Professional Responsibility and Conduct has taken an important step in providing the required detail in a Formal Opinion, No. 2015-193 (June 30, 2015), that identifies nine key e-discovery skills required to achieve e-discovery technological competence.[5] This article builds on those nine skills by providing the next level of detail to further describe those skills in order to develop a useful and practical guide to help lawyers determine what key e-discovery skills they need to develop or whether they need to associate with a lawyer who is competent in the e-discovery field.

Some may question whether it is too early to attempt to provide specific guidance about what competence means in the technological e-discovery sphere and consider definitive guidance to be far off.[6] While it may be difficult to provide comprehensive specifics, it is

both necessary and helpful at this time to provide at least a minimum of practical guidance to lawyers to help them meet their requirements under the applicable rules of professional conduct.

Ongoing Efforts To Help Determine and Develop E-Discovery Technological Skills

As a threshold matter, it is worth noting that some courts have already launched efforts to help lawyers identify and develop e-discovery skills to enhance their e-discovery technological competence. For example, a group of practicing lawyers, judges, academics, and e-discovery experts in the Seventh Circuit formed the Seventh Circuit Electronic Discovery Pilot Program Committee in 2009 to promote lawyer understanding and execution of critical e-discovery skills.[7] That program recognizes e-discovery performance standards for lawyers, including expecting lawyers to be familiar with the e-discovery provisions of the Federal Rules of Civil Procedure, understand the e-discovery principles developed by the court, and be aware of e-discovery case law and relevant publications on e-discovery by the Sedona Conference, a well-recognized think-tank on e-discovery issues for the past decade. The Pilot Program Committee has also launched a website (www.discoverypilot.com) that contains written educational material and webinars.

In the U.S. District Court for the Western District of Pennsylvania, the E-Discovery Series, which is sponsored by the local chapter of the Federal Bar Association, has provided ongoing CLE e-discovery education and training to more than 1,200 lawyers in 35 quarterly sessions that began in 2007. Since its inception, this series of programs has had the active support and participation of the federal judges in the district. The programs have addressed a variety of e-discovery topics like:

- How To Conduct a Meaningful Rule 26(f) "Meet and Confer"
- Determining Where the Data Is—Effective Questioning of IT People
- Understanding Predictive Coding (CAR and TAR); When and How To Use It Effectively
- Negotiating Effective ESI Search Protocols
- Admissibility of Social Media
- Effective Use of E-discovery Special Masters in Federal Court

These efforts have succeeded in increasing the awareness and knowledge of the local lawyers about e-discovery issues and enhanced specific e-discovery skills. However, prior to the California Bar committee's effort, no organization had attempted to describe standards for measuring e-discovery competence.

California Bar Committee Describes Skills Needed for E-Discovery Competence

The California Bar committee has provided some concrete and specific guidance regarding what is meant by e-discovery technological competence. Using federal case law as its basis, the committee identified nine basic e-discovery skills that a lawyer is required to develop or acquire in order to handle a case involving electronically stored information (ESI) in a competent, and, therefore, ethical manner.

Under the California Bar committee's opinion, if a lawyer has a case where ESI is likely to be sought in discovery, the duty of competence under Rule 3-110 requires that the lawyer take the steps necessary to develop the skills the lawyer lacks, associate or consult with a lawyer who has the requisite skills, or refuse the representation. (California State Bar Opinion No. 2010-179 allows that "when e-discovery is at issue, association or consultation may be with a non-lawyer, technical expert if appropriate in the circumstances"). Because the nine skills identified by the California Bar committee are based largely on federal case law, they may have applicability to lawyers in other states. These identified skills, however, are brief descriptions of complex activities. The descriptions of the skills lack the specifics necessary for successful execution. This article is not meant to offer a comprehensive explanation of each skill or how a skill can best be executed. It is, however, meant as a next step in the development of practical tools designed to provide useful guidance to lawyers trying to determine how best to execute these skills and whether they can develop the skills or need to associate with a lawyer who has the skills to fulfill the ethical duty of technological competence as it relates to e-discovery.

Nine Basic E-Discovery Skills

Skill 1: Initially assess e-discovery needs and issues, if any.

This skill is fundamental and perhaps the most important. Many lawyers unfamiliar with ESI are suspicious of the new jargon, additional costs, and unknown pitfalls of e-discovery. Consequently, they may be likely to try to avoid e-discovery, often at the risk of losing the possibility of acquiring relevant electronic evidence that could help their clients' cases. Counsel from larger firms with their own in-house e-discovery practices have commented that this is an advantage provided to their clients when opposing counsel elect not to pursue discovery of ESI.[8] Similar views regarding a wide disparity in e-discovery skills among lawyers practicing in federal court were expressed by federal judges participating in a recent survey.[9] Yet the widespread practice of not pursuing ESI discovery continues, as documented in a recent review of Rule 26(f) Reports in at least one federal jurisdiction.[10]

Certain fundamental considerations must be included in this initial assessment: (1) the dollar worth or value of the case, or the importance of the claims raised if the monetary value is insignifi-

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cant or not sought, *as compared with* the cost of ESI discovery based upon the volume of data to be collected, filtered, searched, reviewed, and produced; (2) the date ranges for the time period of the search, which may impact the amount of data to be collected; and (3) the media types involved (i.e., disk, tape, text, social media, audio). Weighing the estimated worth or value or the significance of the issues raised in the case against these ESI discovery cost elements may make obtaining ESI uneconomical. In this assessment, counsel need to be guided by the principle of proportionality that under the proposed amendment to Rule 26 of the Federal Rules of

Civil Procedure will define the scope of discovery.[11] The court will assess proportionality in determining the reasonableness of the scope of the ESI that counsel has requested be collected and produced.

Other important factors to consider in this initial ESI discovery assessment are the level of sophistication of opposing counsel and the court. Lack of knowledge or cooperation can unnecessarily delay the proceedings, require additional time, and increase motion practice and costs. The costs of retaining e-discovery co-counsel and e-discovery suppliers must also be considered. A knowledgeable e-discovery co-counsel can help a party assess these e-discovery costs in advance of a decision to proceed. It is worth stressing again that the largest ESI discovery costs will be determined by the scope, that is: (1) the number of custodians (i.e., key people from whom data must be collected), (2) the date ranges for the time period of the search, and (3) the types of media (i.e., accessible, active data on disk or devices, or inaccessible data that has been deleted or resides on tape and must be restored). ESI discovery costs will also be increased if text messages and social media must be collected.

At the conclusion of this initial assessment, a lawyer must be able to answer the following threshold question: Do the anticipated benefits of collecting and producing ESI justify the costs when compared against the value or interests involved in the case?

Skill 2: Implement or cause to implement appropriate ESI preservation procedures.

There are two key steps recommended for a lawyer to meet the requirements of this skill:

1. Obtain a thorough understanding of the client's information technology (IT) environment, outline in detail the client's preservation responsibilities, follow up any verbal discussions with the client with written instructions in a litigation hold letter that outlines the specific preservation responsibilities, send the letter to each custodian, and follow up to determine if the custodians complied with the instructions.[12]
2. Create and send a preservation letter to opposing counsel outlining all of his or her client's preservation obligations and placing that counsel on notice regarding the extent to which the lawyer's client intends to pursue ESI in a case; the letter, if possible, should outline in some detail (i.e., by person, system, and application) where relevant ESI may be found.

Skill 3: Analyze and understand a client's systems and storage.

A lawyer must be familiar with his or her client's IT environment. The lawyer needs to be able to speak knowledgeably with the client's IT staff. If a client is a business entity or operates a substantial business, these systems may be complex and may require the questioner to have some IT background and experience. Advance preparations may be helpful, such as requesting data maps of a system's architecture and application inventories.[13] The goal is to understand where potentially relevant information for key custodians may reside (i.e., by system, application software, or specific device) and whether it resides on accessible media that is easily recoverable (i.e., disk) or inaccessible media that is more difficult to recover and may need to be restored at an additional cost (i.e., tape or audio). A preliminary estimate of the cost to preserve and collect (as well as search and produce) this data, based upon the number of custodians and the time frame involved, should be obtained. These estimates can be provided by e-discovery suppliers, who may provide this service at no charge.

Skill 4: Advise the client about available options for collection and preservation of ESI.

The first issue to consider with respect to this skill is the breadth of the preservation. Large corporations or businesses may have significant preservation and operation costs associated with the preservation of data for a large number of custodians over a long period of time. These costs may be disproportional to the value of the case or the interests involved in the case. Proportionality is a guiding principle in determining the breadth and extent of the preservation required. As noted, the proposed amendment to Rule 26 of the Federal Rules of Civil Procedure includes using the principle of proportionality in determining the scope of discovery. Counsel should discuss the scope of preservation at the Rule 26(f) "Meet and Confer." If the costs of preservation, collection and production of ESI are disproportional, the court may need to decide what is the appropriate scope of discovery in the case.[14] With respect to collection, to avoid inadvertent metadata spoliation, custodians should generally not be collecting their own ESI. Sometimes collection can be performed by the client's IT staff, under the supervision of counsel. In situations where a client does not have its own experienced e-discovery personnel, and to ensure proper collection techniques as well as objectivity, the best practice is to have an e-discovery supplier perform the ESI collections, as long as the costs are reasonable.

Skill 5: Identify custodians of relevant ESI.

The key people who had or may have data relevant to this case need to be identified. Experience dictates that it may be helpful to create two categories: (1) primary custodians, whose involvement in the case is direct and obvious; and (2) secondary custodians, whose involvement is less direct. The number of custodians and the date ranges for the time period of the search have a direct and significant impact on the amount of data that needs to be handled during each phase of the e-discovery process (i.e., collecting, filtering, processing, searching, reviewing, and producing), which can have enormous cost implications. Negotiating scope (i.e., number of custodians and time frame) will set the parameters to help control the total costs of e-discovery. Fewer custodians and a more limited date range for the search will significantly reduce e-discovery costs. Counsel can demonstrate a proportional ESI discovery approach by seeking ESI from primary custodians first and only seeking additional data from secondary custodians if required. A phased, proportional approach can be applied to other ESI elements, such as number and type of data sources, and in selection of the kind and method of search to be used.

Skill 6: Engage in a competent and meaningful Meet and Confer with opposing counsel concerning an e-discovery plan.

This skill is addressed in some detail in the article "In re ESI: Local Rules Enhance the Value of Rule 26(f) Meet and Confer,"[15] which provides specific advice about how to conduct a successful Rule 26(f) Meet and Confer. The overriding prerequisites for a successful Meet and Confer are having: (1) someone on both sides who has adequate technical skills and experience to permit meaningful

discussions about technical ESI issues, (2) a willingness to cooperate with opposing counsel to reach an acceptable resolution of each of the key ESI issues, (3) a working knowledge of ESI e-discovery best practices,[16] and (4) the skill and willingness to negotiate complex technological issues and finalize in writing a proposed joint ESI discovery protocol order that may be submitted to the court.

Skill 7: Perform data searches.

This skill involves an assessment of the most effective and efficient search approach for a particular case. Two approaches currently predominate: keyword search and predictive coding, also referred to as TAR (technology-assisted review) or CAR (computer-assisted review). Most lawyers are familiar with keyword searching that uses Boolean logic to locate within electronic documents specific words or phrases that have been selected by lawyers familiar with the issues in the case. Predictive coding, which, in cases involving large amounts of electronic data, studies have shown[17] to be more effective in finding relevant electronic documents at far less cost, involves the application of artificial intelligence and requires that knowledgeable lawyers create a small and representative "seed set" of relevant documents that are used to train a computer to perform searches of a much larger number of electronic documents. In addition to greater accuracy, the cost savings can be as much as 50 to 70 percent less than a keyword search followed by manual document review.[18]

Courts may be reluctant to impose one of these approaches. Usually the parties agree which to use. As noted, predictive coding may offer significant advantages. Some counsel, however, have objected to its use unless there is transparency regarding the documents used to train the computer referred to as the seed set, but others have argued that the seed set is entitled to work product protection under certain circumstances.[19] Because the entire process is more intricate and less widely known, keyword searching is still the most used approach, although this has already begun to change as the technology, methodology, and practice of predictive coding continues to mature.

Skill 8: Collect responsive ESI in a manner that preserves the integrity of the ESI.

At least two important considerations are essential to this skill:

1. It is necessary to select the format in which the ESI is to be produced. Generally, the requesting party has the right to request the format in which the ESI will be produced.[20] The format selected will determine how the data will be presented and whether metadata (the data about data that is embedded within every electronic document)[21] will be preserved or altered. For example, an electronic document in NATIVE format will preserve the metadata of that document when produced, but a static TIFF or PDF image version may make the metadata inaccessible unless the document is made searchable or a separate metadata load file is requested and attached.
2. It is necessary to preserve the integrity of the relevant ESI by selecting an appropriate method by which it is collected. For example, merely copying an electronic document may alter the "create date" or "modification date" metadata fields of that document. Proper collection methods (forensic collection) must be used to prevent this kind of inadvertent document modification.

Skill 9: Produce responsive, non-privileged ESI in a recognized and appropriate manner.

This e-discovery skill relates not only to format, as described in Skill 8 above, but also to technical specifications regarding the file formats of the data being produced and the review software to be used. The media upon which the ESI is to be produced needs to be specified between the parties. The process should allow the documents to be loaded, searched, and reviewed in the most efficient manner in the review tool that has been specified by the receiving party. Having the technology people from the IT staff of the parties (or the technology staff of the e-discovery supplier) specify the correct file formats will facilitate the most efficient and least costly manner to achieve the loading, searching, and reviewing of the electronic documents. Communication, attention to detail, and cooperation will be needed. Detailed specifications of production file formats should be negotiated and specified in any joint proposed ESI protocol order developed and attached as part of the Rule 26(f) Report to the court. In the joint proposed order, the parties should specify an expectation and method of communication between the IT staffs to address how unforeseen technological issues will be addressed cooperatively during the execution phase of the process.

Conclusion

The California Bar committee took an excellent first step in helping to describe the minimum level of e-discovery competence required to satisfy the new standard embodied in the comments to ABA Model Rule 1.1—requiring lawyers to "keep abreast of … *the benefits and risks associated with relevant technology*"—by articulating nine basic e-discovery skills. This article builds upon that effort by providing additional specifics regarding how each skill can be successfully executed and is intended to provide guidance to lawyers to help them determine if they can develop these skills or must associate with a competent lawyer who has these skills.

In 2006, the same year the Federal Rules of Civil Procedure were modified to include provisions regarding discovery of ESI, the plaintiff in *Martin v. Northwestern Mutual Life Insurance Co.* sought to excuse his noncompliance with e-discovery requests on the ground that he was "so computer illiterate that he could not comply with production."[22] While most lawyers today would not make such an admission in court, in December 2014, in *James v. National Finance LLC*, the court warned a lawyer that "[p]rofessed technological incompetence is not an excuse for discovery misconduct."[23] In those eight years, while the technology, case law, and the practice of e-discovery moved forward at breakneck speed, it has been hard to hold lawyers accountable for technology e-discovery competence that no one has been able to describe. Standards by which e-discovery technological competence or incompetence can be measured have not yet been established.

Starting with the guidance provided first by the amended comment to ABA Model Rule 1.1, resulting in similar changes to the comments to rules of professional conduct in a growing number of states, and the identification of nine basic e-discovery skills by the California Bar committee, standards of e-discovery technological competence for lawyers have begun to emerge. The additional specifics provided in this article should help further describe the appropriate skills needed by lawyers and help them determine whether they need to develop e-discovery skills or acquire those skills through associating with competent co-counsel. ⊙


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Endnotes

[1]ABA Model Rule 1.1 provides:

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.

Model Rules of Prof'l Conduct R. 1.1 (2013).

[2]Model Rules of Prof'l Conduct R. 1.1 cmt. [8] (2013) (emphasis added).

[3]*See, e.g.*, Ark. Rules of Prof'l Conduct R. 1.1 cmt. [8] (2014) (identical to ABA Model Rule); Del. Lawyers' Rules of Prof'l Conduct R. 1.1 cmt. [8] (2013) (same); Kan. Rules of Prof'l Conduct R. 1.1 cmt. [8] (same); Pa. Rules of Prof'l Conduct R. 1.1 cmt. (8) (2013) (same); *"E-Discovery in 2015: Will You Feel the Earth Move Under Your Feet?"*, Daniel R. Miller and Bree Kelly, *Legal Insights* posted on K&L/Gates website, January 2015. www.ediscoverylaw.com/files/2015/01/E-Discovery-in-2015.pdf

[4]"The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence," Professor Andrew Perlman, Suffolk School of Law, The Professional Lawyer, Vol. 22, No. 4 (2014). www.americanbar.org/publications/professional_lawyer/2014/volume-22-number-4/the_twentyfirst_century_lawyers_evolving_ethical_duty_competence.html.

[5]The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193 (June 30, 2015). The opinion is *available at* calbar.ca.gov.

[6]"Litigation, Technology & Ethics: Changing Expectations," Victoria A. Redgrave, Jonathan M. Redgrave, and Keltie H. Peay, Practical Law The Journal, August/September 2014.

[7]Seventh Circuit Electronic Discovery Pilot Program, www.discoverypilot.com (last visited Feb. 19, 2015).

[8]Comments recently made at an FBA-sponsored E-Discovery Series at the Federal Courthouse in Pittsburgh, Pa., Nov. 20, 2014.

[9]Federal Judges Survey, "E-Discovery Best Practices and Trends." *See* www.externo.com.

[10]"E-Discovery Special Master (EDSM) Program: Progress Update," The Federal Lawyer, April 2014, www.lettierilaw.com/documents/EDSM.pdf.

[11]The proposed amendment to Rule 26(b) provides:

> (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.

Fed. R. Civ. P. 26(b)(1) (Proposed Amendment 2014)(emphasis added), *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil_rules_redline.pdf.

[12]As stated in California Opinion No. 2015-193 at p. 4, these skills relate to the attorney's ethical obligations relating to his own client's ESI, not to an attorney's duty of competence relating to obtaining opposing party's ESI.

[13]The steps outlined in the following article describe this process in greater detail: "In Re ESI: Local Rules Enhance the Value of Rule 26(f) 'Meet and Confer,'" The Judges' Journal, Vol. 49, No. 2, Spring 2010, www.lettierilaw.com/documents/articlespringwithimage2010conti_letteri.pdf.

[14]The Committee Notes to Rule 37(e) of the proposed amendments to the Federal Rules of Civil Procedure expected to take effect in Dec. 2015, explicitly point to proportionality as a factor in determining the reasonableness of a party's preservation efforts:

> Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data—including social media—to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Fed. R. Civ. P. 37 comm. note (Proposed Amendment 2014), *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil_rules_redline.pdf.

[15]*See supra note* 13.

[16]Many of these ESI discovery best practices have been codified in a series of documents produced by The Sedona Conference at no charge; thesedonaconference.org/publications.

[17]*See* TREC—Legal Track, trec-legal.umiacs.umd.edu/, especially jolt.richmond.edu/v17i3/article11.pdf.

[18]This analysis for the sake of conciseness is somewhat simplistic. The two approaches may be combined, and various techniques and technologies may be used in a search. For a more detailed explanation of this complex issue, please *see* "Cooperation, Transparency, and the Rise of Support Vector Machines in E-Discovery: Issues

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Raised by the Need To Classify Documents as Either Responsive or Non-Responsive," Desi V Workshop in Rome, Italy, June 14, 2013. www.umiacs.umd.edu/~oard/desi5/additional/Baron-Jason-final.pdf.

[19]Hon. John M. Facciola and Philip Favro, *Safeguarding The Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection*, 8 Fed. Cts. Law. Rev. (Feb. 2015), www.fclr.org/fclr/articles/pdf/safegaurding-final-publication.

[20]*See* Fed. R. Civ. Proc. 34(b)(2)(E).

[21]For a brief and understandable explanation of metadata, see "What is Metadata Scrubbing, and Is It Good for Business?" Executive Counsel, July/August, 2006. www.krollontrack.com/Publications/metadata_scrubbing.pdf.

[22]*Martin v. N.W. Mut. Life Ins. Co.,* Case No. 804CV2328T23MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 5, 2006) (noting that such an excuse "is frankly ludicrous").

[23]*James v. Nat'l Fin. LLC,* C.A. No. 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014).

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[86]*Id.* at 493.

[87]*Id.* at 492.

[88]*Id.*

[89]*Id.*

[90]*Id.*

[91]*Id.* at 493.

[92]*Id.* at 494.

[93]507 F. Supp. 1312 (D. Del. 1981).

[94]A lawsuit filed under 42 U.S.C. § 1983 is a civil rights claim against a government agency or agent for violating the plaintiff's constitutional rights.

[95]*Chrisco*, 507 F. Supp. at 1314.

[96]*Id.* at 1318.

[97]*Id.* at 1319.

[98]*Id.* ("Recognizing the important role played by counsel in plea bargaining, I conclude that there can be factual contexts in which the sixth amendment right to counsel attaches prior to the time formal criminal charges have been filed.").

[99]*Id.* at 1319-1320 (stating the importance of counsel to be present is "to ensure that any decision or agreement by the defendant to plead guilty is knowing, voluntary and intelligent.").

[100]*United States v. Busse,* 814 F. Supp. 760, 763-64 (E.D. Wis. 1993).

[101]*Id.* at 761.

[102]*Id.* at 761-762.

[103]*Id.* at 763-64.

[104]*United States v. Wilson,* 719 F. Supp. 2d 1260, 1268 (D. Or. 2010).

[105]*Id.* at 1264.

[106]*Id.*

[107]For more information on the appointment of counsel through the Criminal Justice Act, see 18 U.S.C. § 3006A (2012).

[108]*Wilson*, 719 F. Supp. 2d at 1264.

[109]*Id.*

[110]*Id.*

[111]*Id.* at 1265.

[112]*Id.*

[113]*Id.* at 1266.

[114]*Id.* at 1267.

[115]*Id.* at 1267-68.

[116]*Id.* at 1268.

[117]At the time of publication, this author is unaware of any Supreme Court petitions for a writ of certiorari that would allow the Court to directly address this issue. While there is a circuit split as to whether the bright-line test should be strictly applied, which would be sufficient for the Court to take the case under Supreme Court Rule 10(a), it would likely take an appeal from a circuit court case that rules consistent with the opinion in this article in order for the Court to weigh in on this important issue.

[118]*See Wilson*, 719 F. Supp. 2d at 1268 (describing the plea negotiations as "adversarial" for the purposes of attaching the Sixth Amendment right to counsel).

[119]*See Missouri v. Frye,* 132 S. Ct. 1399, 1408 (2012); *Lafler v. Cooper,* 132 S. Ct. 1376 (2012).

[120]*Frye*, 132 S. Ct. at 1407.

[121]*See id.* at 1407-08. *See also* Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v. Cooper, 46 Loy. L.A. L. Rev. 457, 469 (2013).

[122]*Johnson v. Zerbst,* 304 U.S. 458, 463 (1938) ("That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.").

[123]*See United States v. Moody,* 206 F.3d 609, 615-16 (6th Cir. 2000) ("There is no question in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified.").

[124]*Kirby v. Illinois,* 406 U.S. 682, (1972) (plurality opinion).

[125]*United States v. Wilson*, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010) ("Courts look to whether the prosecution has committed itself to prosecute, and whether the adverse positions of the government and defendant have solidified, such that the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.").

[126]*Moody*, 206 F.3d 616.