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# ETHICS AND E-DISCOVERY

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# Big picture ethical concepts

- **A lawyer's ethical obligations are grounded in fiduciary duty**
- **Primary tenets include**
  - **Loyalty**
  - **Honesty; and**
  - **Confidentiality**
- **Ontario Rules of Professional Conduct**  
[NB. I paraphrase only specific Rules, so please read them in full and note specific wording]

## **Rule 2.01 - Competence**

- (2) A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer**

## Rule 2.01 (1) - Who is 'competent'?

A 'competent lawyer' applies relevant skills, attributes, and values, and includes:

*a. Knowing principles of substantive law and procedure*

- educate yourself – discovery rules; Sedona Principles, recent case law
- preservation, disclosure, privacy, privilege

## Rule 2.01(1) - Competence (cont.)

***b. Investigating facts, identifying issues, ascertaining client objectives, considering options, developing and advising on different courses of action***

- At the outset - investigate your client's IT infrastructure, operations, DM policies and PRACTICES
- Be prepared to assist with risk management

## Rule 2.01(1) - Competence (cont.)

***e. Performing all functions conscientiously, diligently and in a timely and cost-effective manner***

→ Staffing teams

→ Who will do collection, processing, initial document review

→ “250,000 documents to review? No problem. We can assemble a team of 10-15 lawyers.”

- ***h. recognizing limitations in one's ability to handle a matter or some aspect of it and taking appropriate steps***
- Must know 'what' before 'who' ie. Expert to assist on technical aspects of e-discovery, with forensic recovery, identification, preservation, review?
- Software vendor, litigation support provider, document management expert, forensic specialist?

# Isn't a vendor a vendor??

- **Categories of vendors**
  1. **Consulting/professional services;**
  2. **Data collection/processing;**
  3. **Data recovery/forensics;**
  4. **Hosting/review/production/delivery;**
  5. **Other litigation support services, such as scanning, coding and OCR'ing.**



## Rule 2.01(1) - Competence (cont.)

- ***k. adapting to changing professional requirements, standards, techniques, and practices***

→ Many counsel are having particular difficulty adapting to the meet and confer and requirement for a joint discovery plan



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## Rule 2.02(1) – Honesty and Candour

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- **“The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.”**
  - Costs and risks
  - Options

## 2.03(1) – Confidential Information

**“A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client...and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.”**

## 2.03(1) – Confidential Information

- **The ethical rule is wider than the concept of lawyer-client privilege and applies without regard to the source of the information or the fact that others may share the knowledge**

→ Metadata

→ Privilege, confidential info and privacy review

→ Juicy but irrelevant information

## Rule 4.01 – The Lawyer as Advocate

**(1) “When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect”**

## Rule 4.01 – The Lawyer as Advocate (cont.)

- **“a lawyer is not required to assist an adversary”**
- **Is this reconcilable with the openness of the meet and confer?**
- **Consider this: “...lawyer should avoid or discourage the client from...attempts to gain advantage from slips or oversights not going to the merits, or from tactics that will merely delay or harass the other side.”**

## Rule 4.01 – The Lawyer as Advocate (cont.)

- **4.01(4): Discovery Obligations**

**Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate,**

- (a) shall explain to his or her client**
  - (i) the necessity of making full disclosure of all documents relating to any matter in issue, and**
  - (ii) the duty to answer to the best of his or her knowledge...**
- (b) shall assist the client in fulfilling his or her obligations to make full disclosure, and**
- (c) shall not make frivolous requests for the production of documents...**

**→ Withdrawal From Representation, Rule 2.09**



## Outsourcing - case study

“2,500,000 documents to review? No problem. We can assemble a team of 10-15 contract lawyers. Better yet, we will outsource the job to India.”

# Outsourcing as a case study

- **Outsourcing e-discovery services raises a host of ethical issues, including**
  - **Preventing unauthorized practice [Rule 6.07(1)]**
  - **Duty to supervise non-lawyers [Rule 5.01(2)(b)]**
  - **Avoiding conflicts of interest [Rule 2.04]**
  - **Duty of confidentiality [Rule 2.03]**
  - **Preservation of client's property [Rule 2.07]**

- **QUESTIONS???**
- **THANK YOU!!**