Management of Documents in Your Firm

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Document Management in Complex Litigation Files

Prepared by:
Melanie R. Gaston
Blake, Cassels & Graydon LLP
Calgary, Alberta
and
Matthew Huys
Blake, Cassels & Graydon LLP
Calgary, Alberta
and
Ian Clarke
Blake, Cassels & Graydon LLP
Calgary, Alberta

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IS IT UNETHICAL TO NOT UNDERSTAND E-DISCOVERY?

Do lawyers have a duty to know how e-discovery works? To put it simply: they do. To date, there have been two types of litigation lawyers – those who have been lucky enough not to deal with large electronic production reviews, and those who have. In the future though, the former category may become non-existent. E-discovery is a mainstay in litigation, and will only be increasingly more common in all areas of litigation practice. Despite the prevalence of e-discovery, however, many lawyers are not aware of how easy it is to run afoul of their ethical obligations arising from it. This article will discuss the relationship between a lawyer’s ethical duties and the process of e-discovery under the Law Society of Alberta’s Code of Conduct (the “Code of Conduct”),¹ and demonstrate how easy it can be to contravene the Code of Conduct’s provisions.

COMPETENCE

Rule 2.01(2) of the Code of Conduct requires a lawyer to perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.² Competence involves more than simply an understanding of legal principles; it requires adequate knowledge of the practice and procedures by which such principles can be effectively applied.³

While lawyers may have spent years perfecting their paper discovery processes and techniques, e-discovery requires different skills and knowledge, and comes with different risks and considerations for both lawyer and client. Collecting, reviewing and searching email, electronic documents and other electronic data presents evolving and often complicated issues. At a minimum, a lawyer must acknowledge and appreciate their own technological ability and understanding, know how to reasonably inquire about their clients’ systems, processes, and limitations, and know when outside assistance is necessary.⁴

Two examples of areas where a lawyer could easily fall short of their duty of competency in e-discovery include: the preservation of evidence, and the review and management of electronic records.

Preserving Evidence

According to Rule 4.01(9)(c), a lawyer must not counsel or participate in the destruction of property that has potential evidentiary value or the alteration of property so as to affect its evidentiary value.⁵

² Code of Conduct, ibid at Rule 2.01(2).
³ Ibid at Rules 2.01(1)(a), 2.01(2) commentary.
⁴ Ibid at Rule 2.01(h), Rule 2.01(h) commentary.
⁵ Ibid at Rule 4.01(9)(c).