The three Cs and a D of ethics in eDiscovery

March 24, 2021

DLA PIPER

Introductions

Kellin Chatfield

General Counsel, EMEA, APAC, LATAM, Litigation
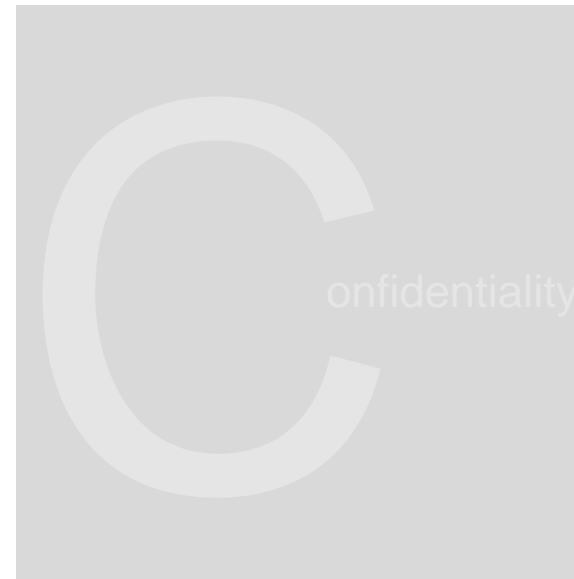*Dexcom, Inc.*

Jennifer Feldman

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DLA Piper US LLP

The three Cs and a D of ethics in eDiscovery

C ompetence

C ooperation

C onfidentiality

D iligence

The three Cs and a D of ethics in eDiscovery

Competence

Cooperation

Confidentiality

Diligence

Competence

ABA Model Rules of Professional Conduct

2020 EDITION

MODEL RULES OF PROFESSIONAL CONDUCT

ABA
AMERICAN**BAR**ASSOCIATION
Center for Professional Responsibility

Model Rule 1.1

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

Model Rule 1.1, 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*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (emphasis added)

Model Rule 1.1, Comment ¶ 2

"A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

Duty of technology competence – adoption

38 states have adopted revised comment to Rule 1.1.
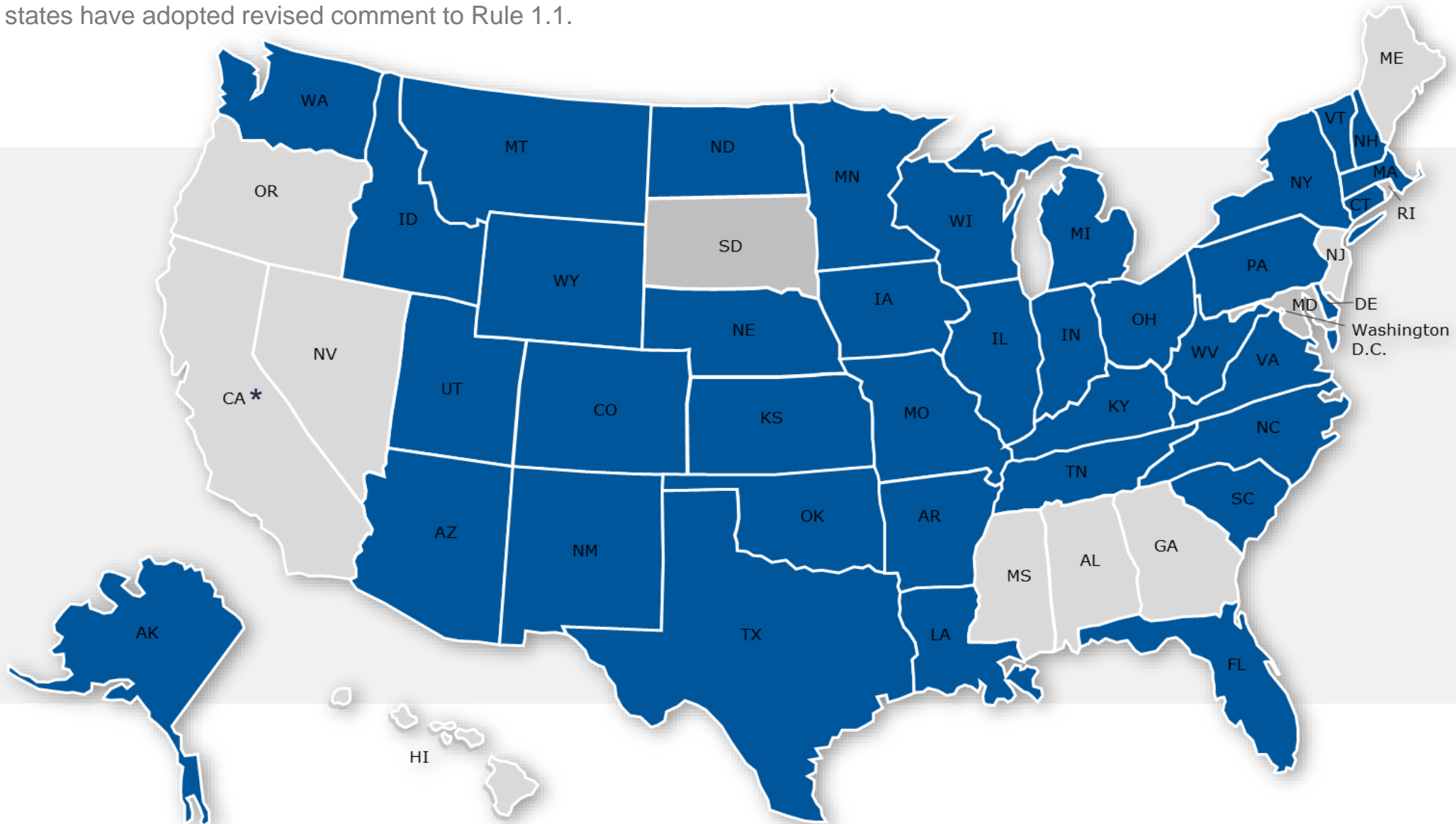
* The State Bar of California's Formal Opinion No. 2015-193 confirmed a duty of technology competence in the context of e-discovery.

Technology CLE
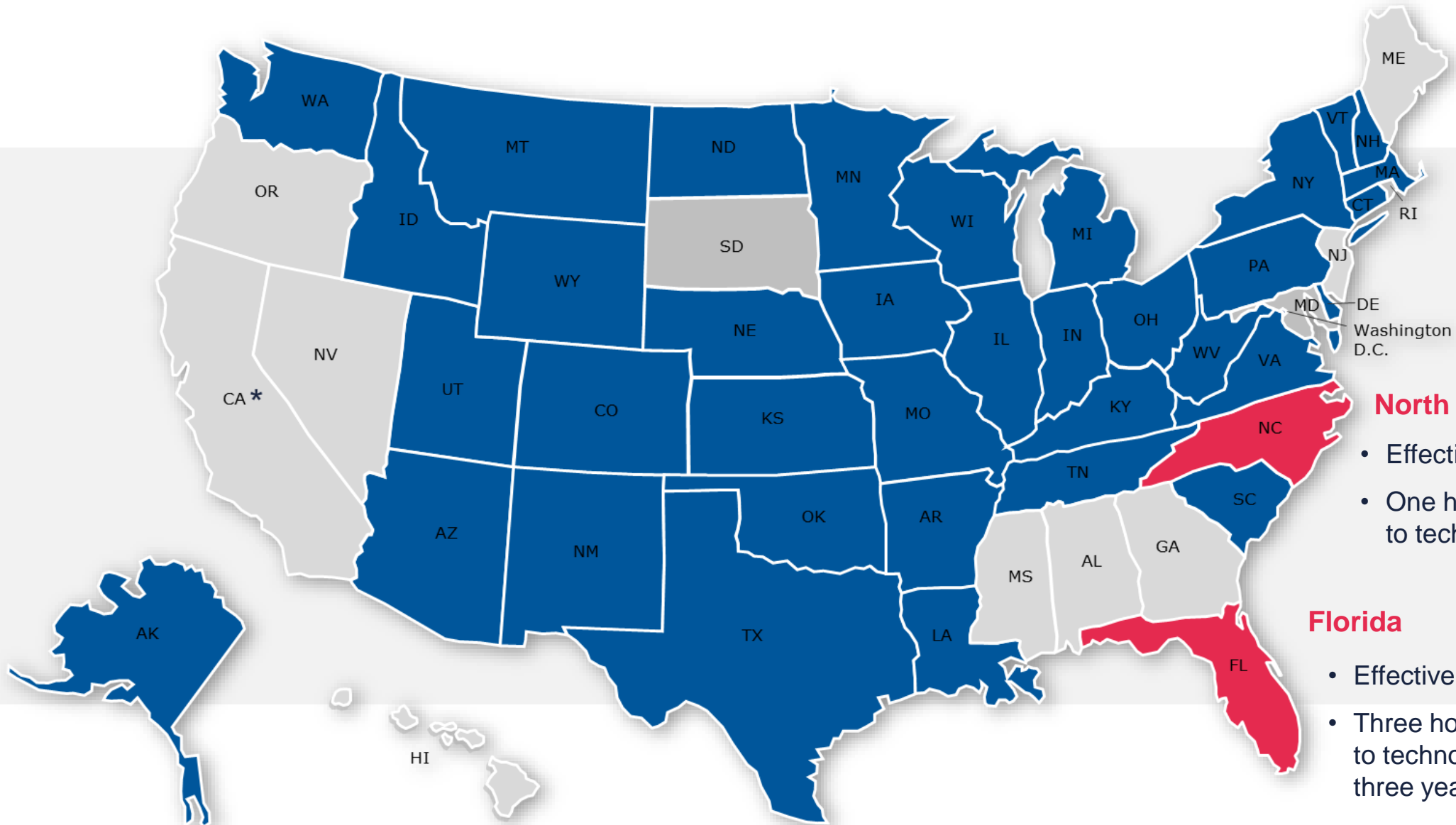
North Carolina

- Effective since 2019
- One hour of CLE devoted to technology training

Florida

- Effective since 2017
- Three hours of CLE devoted to technology training every three years

* The State Bar of California's Formal Opinion No. 2015-193 confirmed a duty of technology competence in the context of e-discovery.

Understanding eDiscovery – the required slide

Electronic Discovery Reference Model (EDRM)

Electronic Discovery Reference Model

Information Management → Identification → Preservation / Collection → Processing / Review / Analysis → Production → Presentation

VOLUME — RELEVANCE

Electronic Discovery Reference Model / © 2009 / v2.0 / edrm.net
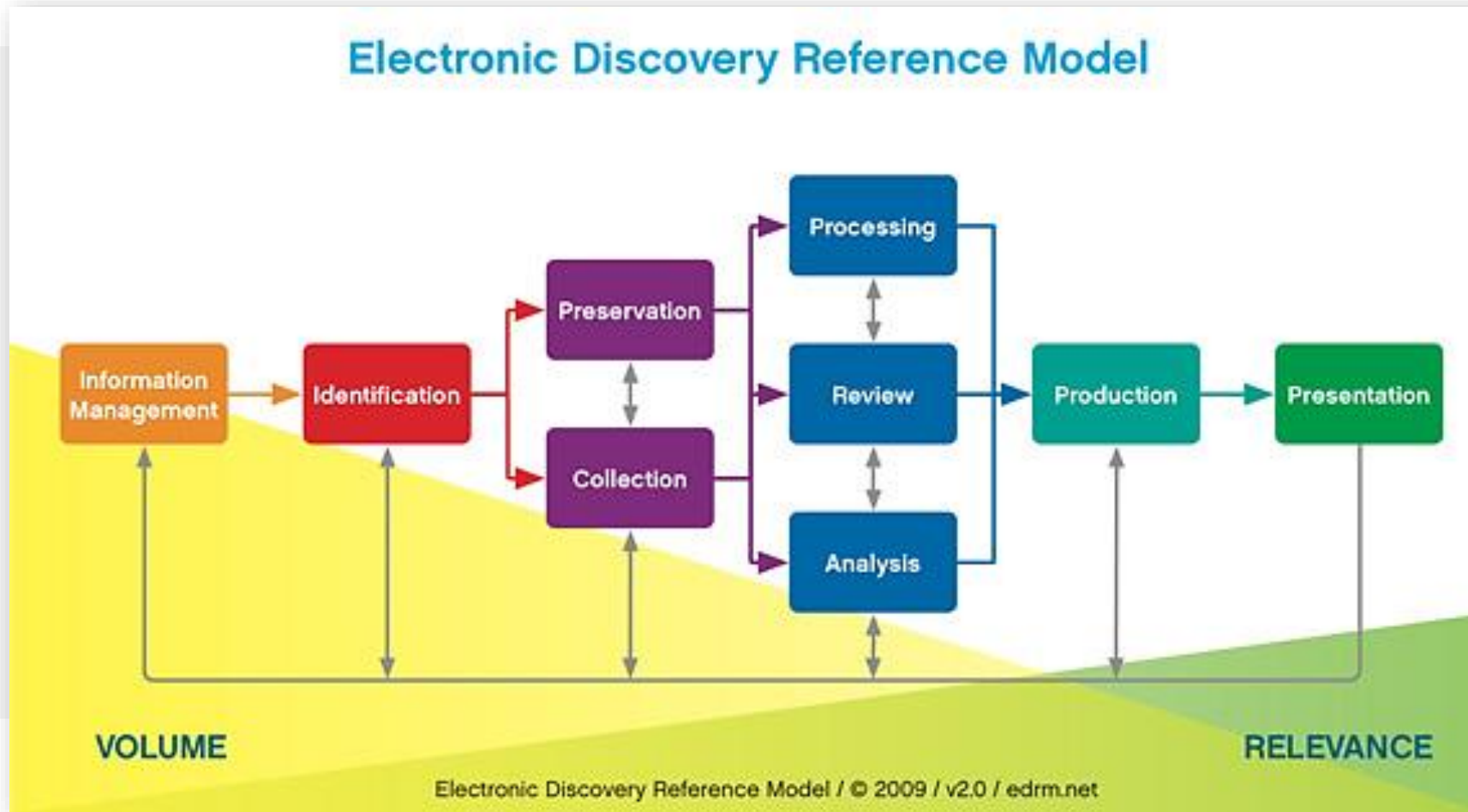
Competence – four key issues

Identification and preservation

Has the client mapped sources of potentially relevant data?

- Are data sources reasonably accessible?

- Are there technical impediments to preservation?

- Preserve-in-place or collect-to-preserve?

Legal holds

- Whether and when to issue?

- To whom to issue?

- How to issue?

- Tracking, management and escalation?

What is the impact of emerging technologies?

- Cloud suites (Office 365, Google Workspace)

- Collaboration platforms (Slack, Teams, Chanty, etc.)

- Ephemeral messaging applications (Confidence, CoverMe, Snapchat, etc.)

Competence – four key issues

Identification and preservation

Collection, processing and hosting

Who should perform the collection?

- Self-collection, in-house or outsourced?

Collection methodology

- Forensic imaging vs. forensically sound?

Unique data sources

- Cloud-based data
- Third-party hosted (eg, Facebook, Instagram)
- Mobile devices

Ex-US data sources

- GDPR and similar regulations

Preserving chain of custody

Competence – four key issues

Identification and preservation

Collection, processing and hosting

Document analysis and review

Technology Assisted Review (TAR)

- Keyword searching
- Structured analytics
- Email threading
- Near duplicate analysis
- Conceptual clustering
- Predictive coding
- Continuous active learning

Statistical sampling and elusion testing

Managing resources (Model Rule 5.3)

- Contract attorneys
- Technical professionals
- Project managers

Competence – four key issues

Competence

Identification and preservation

Collection, processing and hosting

Document analysis and review

Know the rules
Including local rules

2015 revisions to the FRCP

Rule 1

Parties, as well as the court, have responsibility to "secure a just, speedy, and inexpensive determination of every action"

Rule 26

Proportionality built into the concept of discoverability

Rules 30-33

Incorporate proportionality principle

Rule 34

Objections must be specific (no boilerplate) and state if documents are being withheld

Rule 37

Limits sanctions for failure to preserve ESI to negligent conduct resulting in prejudice or intentional conduct

At least 57 US District Courts have local rules specific to eDiscovery

48 states and the District of Columbia have adopted rules addressing eDiscovery

Rule 502(d) Order governing ESI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x
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:
- x

ANDREW J. PECK, United States Magistrate Judge:

1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d). The provisions of Federal Rule of Evidence 502(b) do not apply.
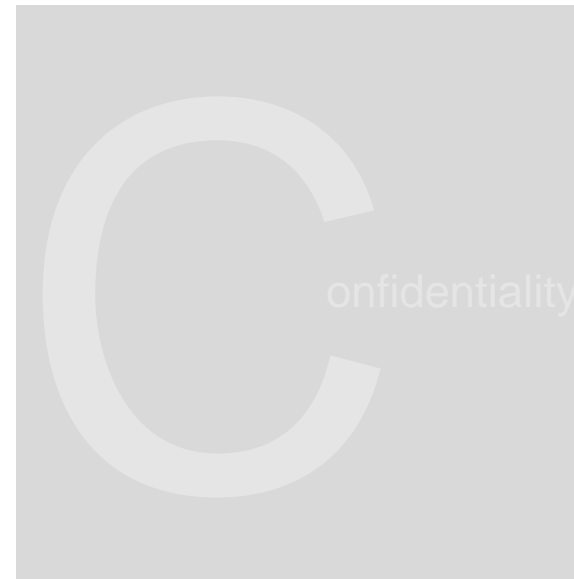
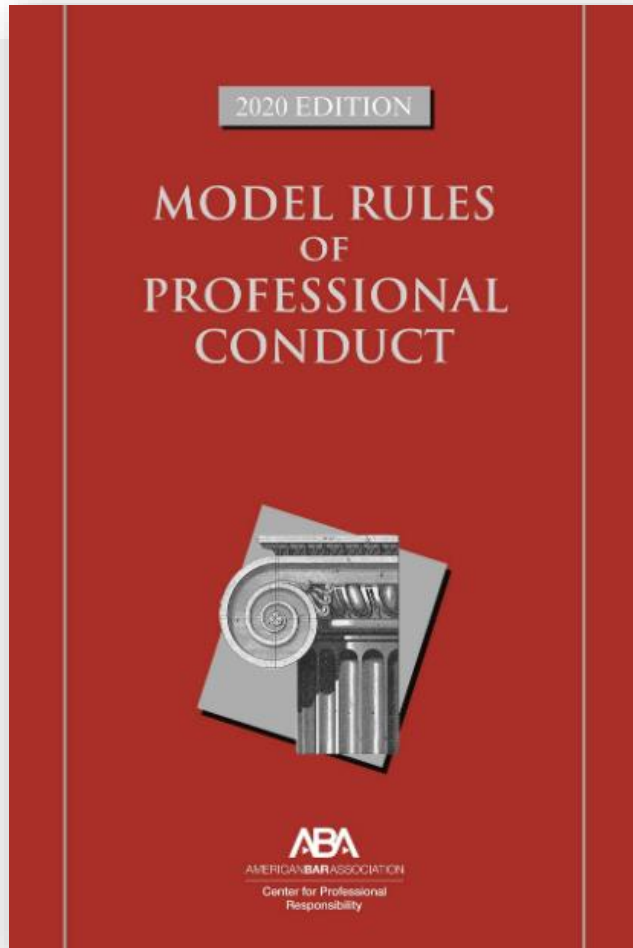2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

SO ORDERED,

Dated: New York, NY
        [DATE]

_____
Andrew J. Peck
United States Magistrate Judge

Copies by ECF to: All Counsel
                       Judge

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ABA Model Rules of Professional Conduct

Model Rules Preamble, ¶ 9

Lawyers must exercise "professional and moral judgment" to balance their "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

Model Rule 4.4(a)

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."
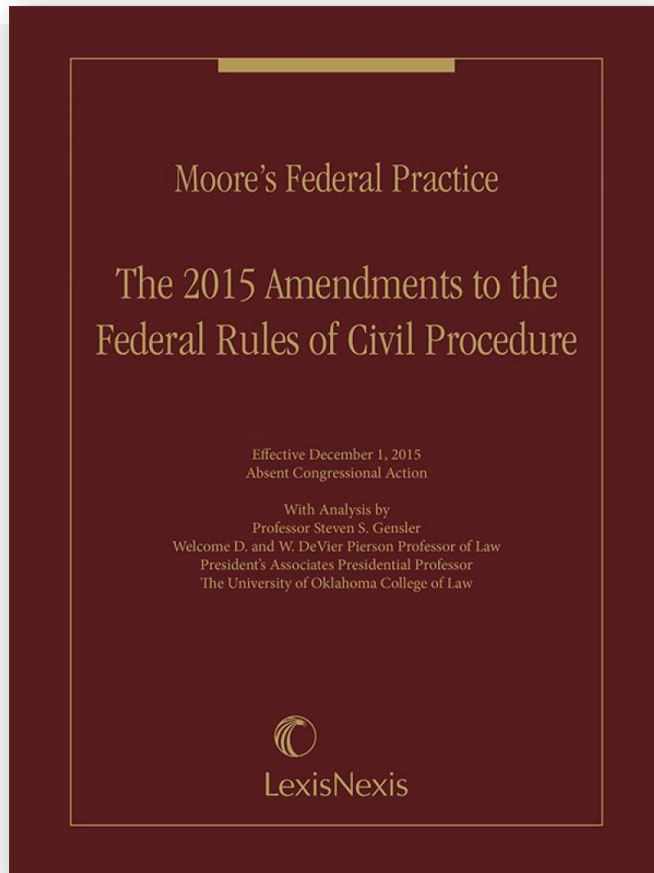
Cooperation

The Federal Rules of Civil Procedure

The 2015 amendments to the Federal Rules of Civil Procedure intended in part to **"encourage greater cooperation among counsel".**

— Justice John G. Roberts
2015 Year-End Report on the Federal Judiciary

Moore's Federal Practice

The 2015 Amendments to the
Federal Rules of Civil Procedure

Effective December 1, 2015
Absent Congressional Action

With Analysis by
Professor Steven S. Gensler
Welcome D. and W. DeVier Pierson Professor of Law
President's Associates Presidential Professor
The University of Oklahoma College of Law

LexisNexis

Federal Rule of Civil Procedure 1

"These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and **employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding." (emphasis added)
Advisory Committee Notes: *"Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."*

Federal Rule of Civil Procedure 26(f)(2)

"The attorneys of record … are jointly responsible … for attempting in good faith to agree on the proposed discovery plan[.]"
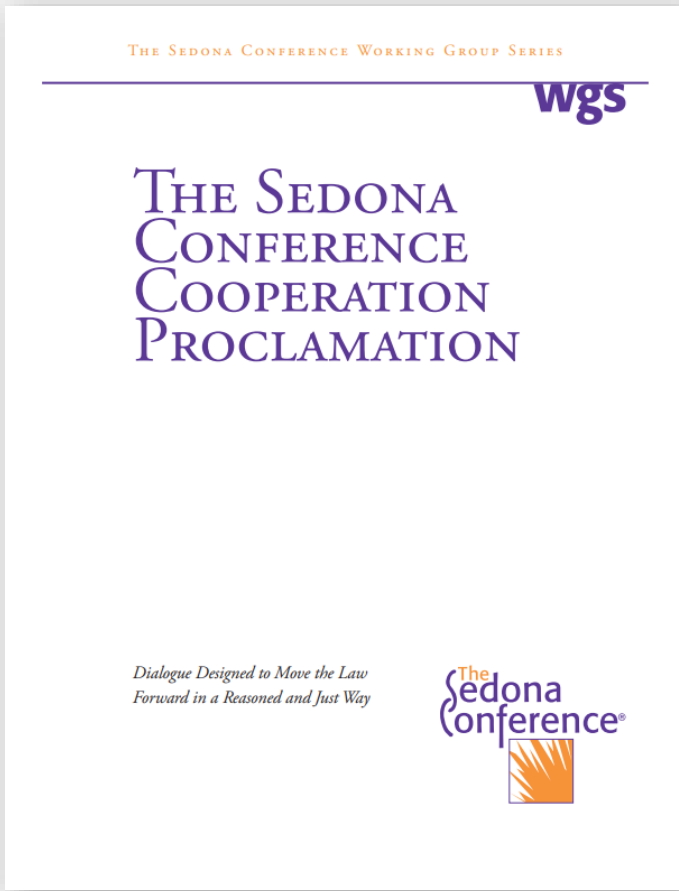
Federal Rule of Civil Procedure 26(g)(1)(B)

"By signing, an attorney … certifies that … with respect to a discovery request, response or objection, it is not interposed for any improper purpose … and neither unreasonable nor unduly burdensome or expensive[.]"

Cooperation

The Sedona Conference

Endorsed by 218 active and retired state and federal judges

The Sedona Conference Cooperation Proclamation

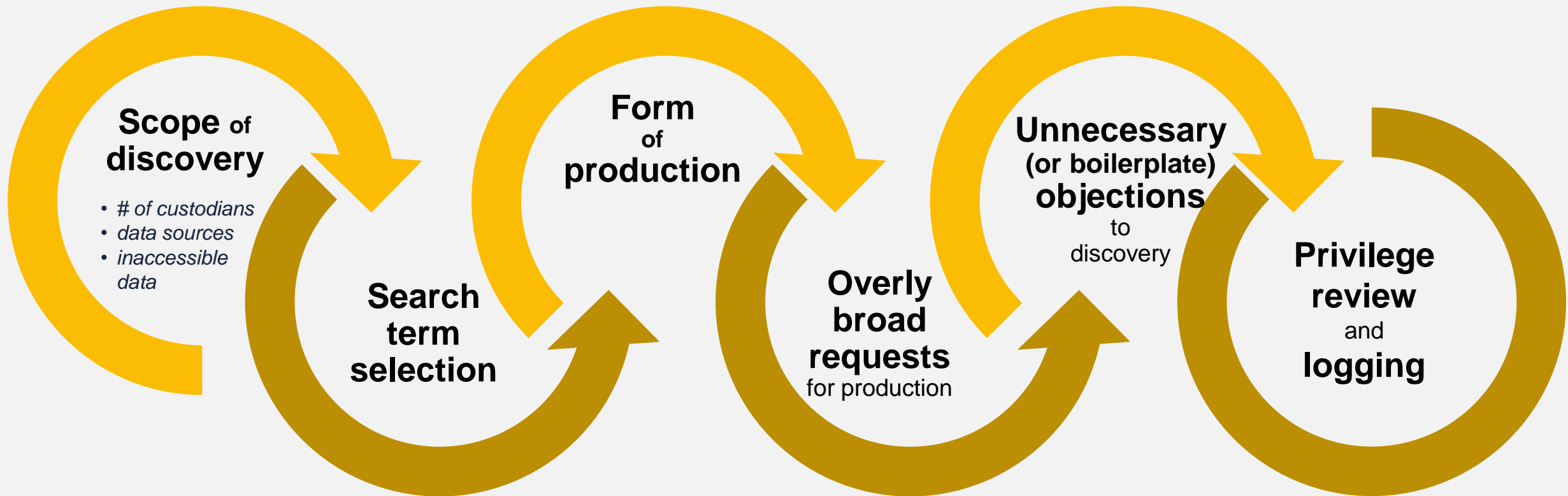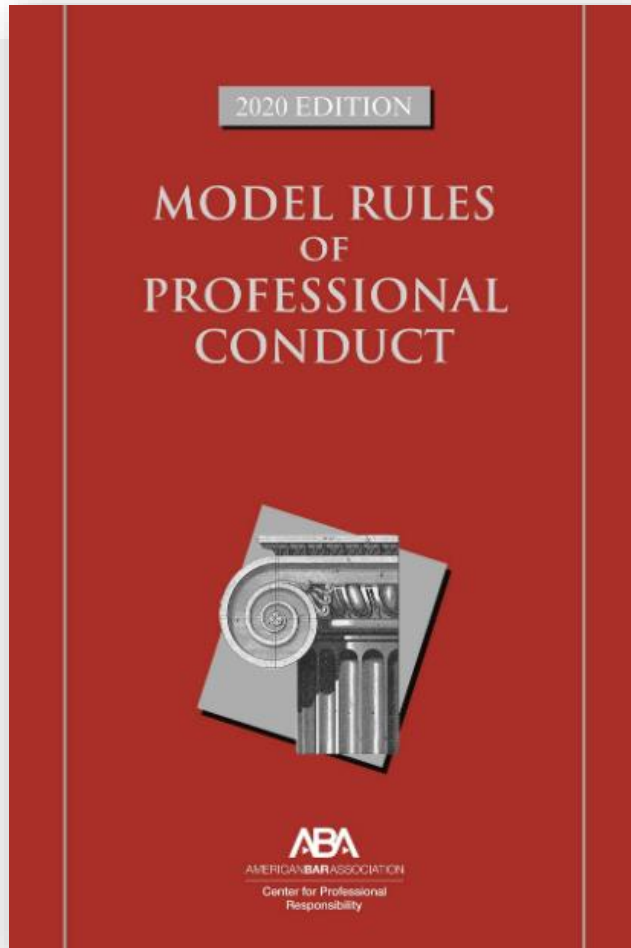| Cooperation in discovery is consistent with zealous advocacy Effective advocacy ≠ adversarial conduct	Cooperative discovery is required by the Rules of Civil Procedure	The road to cooperation • Awareness • Commitment • Tools

Common eDiscovery issues

Scope of **discovery**

- *# of custodians*
- *data sources*
- *inaccessible data*

Search term selection

Form of **production**

Overly broad requests for production

Unnecessary (or boilerplate) objections to discovery

Privilege review and **logging**

Cooperation

ABA Model Rules of Professional Conduct

### Model Rule 3.4 – Fairness to Opposing Party & Counsel

"A lawyer shall not:

unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]"

Cooperation

The boundaries of cooperation

Disclosing methods used to cull data and identify responsive documents
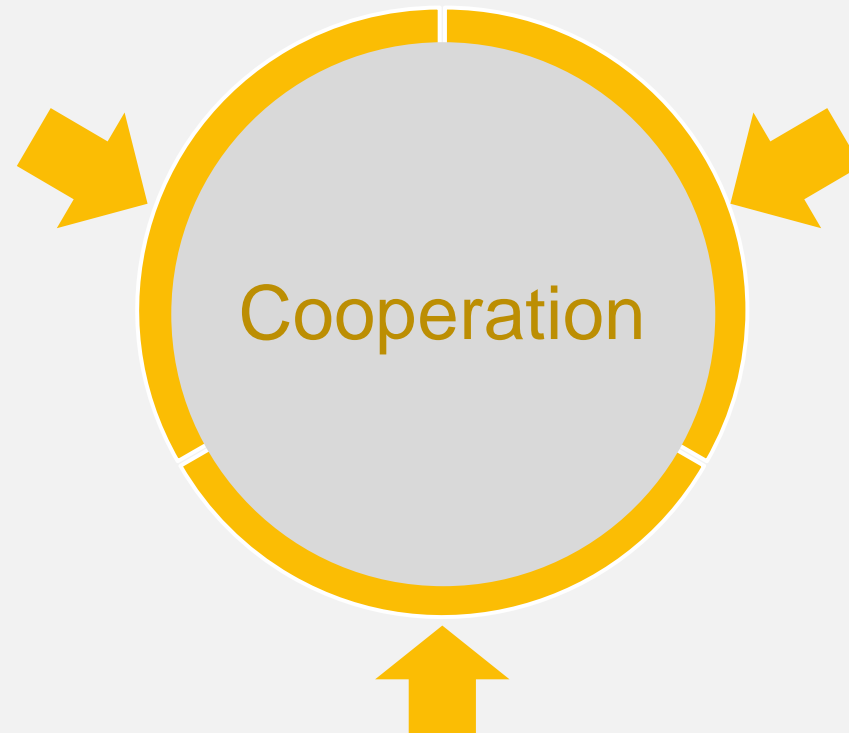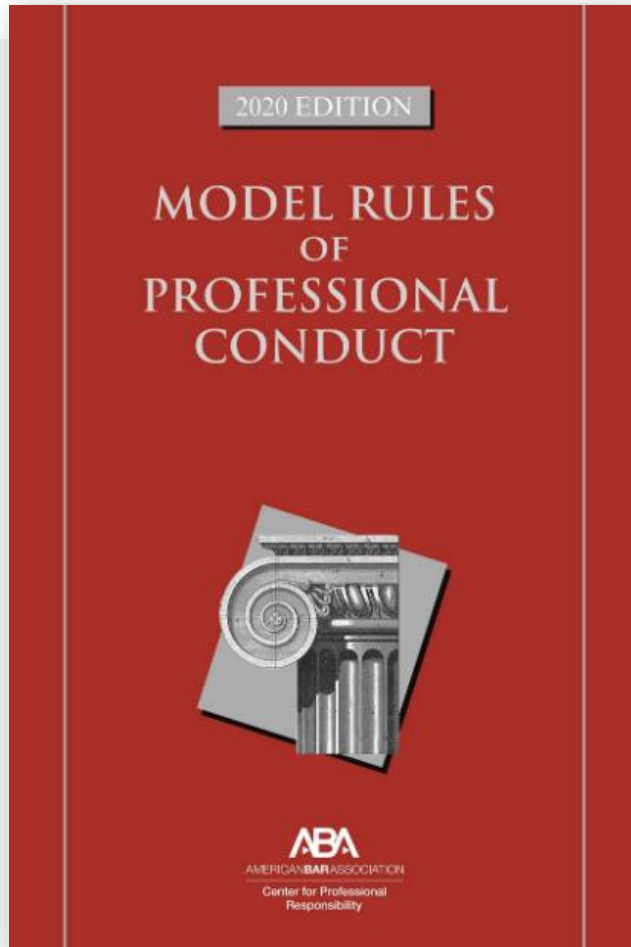
Sharing search term hit reports

Cooperation

Agreeing to ESI discovery/depositions

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Model Rule 1.6(a)

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

Model Rule 1.6(c)

"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Confidentiality: key eDiscovery issues

Private data

PPI, PHI, PCI

- Identification

- Redaction

- Metadata

- Non-textual data (eg, images)

Confidentiality: key eDiscovery issues

Private data

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Security

Secure data storage and transmission

Confidentiality: key eDiscovery issues

Private data

PPI, PHI, PCI

- Identification
- Redaction
- Metadata
- Non-textual data (eg, images)

Security

Secure data storage and transmission

Email

Encryption

Attachments

Email threads

Auto-populated addresses

Confidentiality: key eDiscovery issues

Private data

PPI, PHI, PCI

- Identification
- Redaction
- Metadata
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Security

Secure data storage and transmission

Email
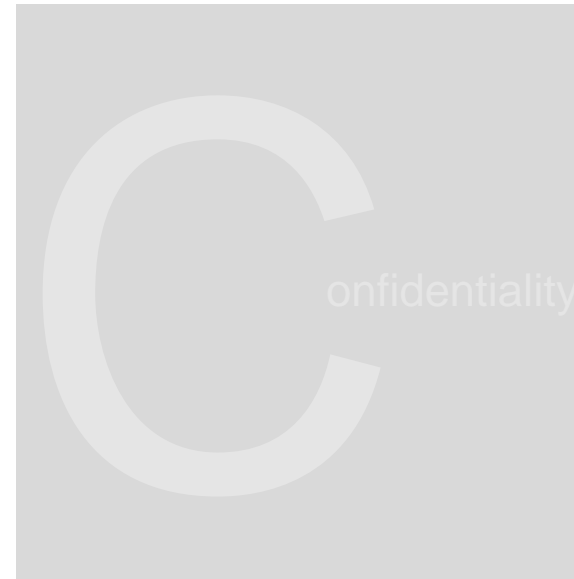
Encryption

Attachments

Email threads

Auto-populated addresses

Privilege

Attorney-client privilege and attorney work product

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Diligence: key eDiscovery issues

Supervision of technical professionals

Model Rule 5.3
Responsibilities regarding non-lawyer assistants

Diligence: key eDiscovery issues

Supervision of technical professionals

Model Rule 5.3
Responsibilities regarding non-lawyer assistants

Identifying relevant information beyond email and hard drives

- Collaboration platforms
- Ephemeral messaging
- Mobile data
- Social media

Diligence: key eDiscovery issues

Supervision of technical professionals

Model Rule 5.3

Responsibilities regarding non-lawyer assistants

Identifying relevant information beyond email and hard drives

- Collaboration platforms
- Ephemeral messaging
- Mobile data
- Social media

Advising clients on data identification and preservation

Diligence: key eDiscovery issues

Supervision of technical professionals

Model Rule 5.3

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Identifying relevant information beyond email and hard drives

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Advising clients on data identification and preservation

Protecting privileged and sensitive information

Diligence: key eDiscovery issues

Supervision of technical professionals

Model Rule 5.3

Responsibilities regarding non-lawyer assistants

Identifying relevant information beyond email and hard drives

- Collaboration platforms
- Ephemeral messaging
- Mobile data
- Social media

Advising clients on data identification and preservation

Protecting privileged and sensitive information

Setting realistic timelines for discovery of ESI

Diligence

People, process and technology
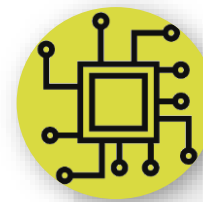
D
iligence

PEOPLE

Proper training for:

- Attorneys
- Paraprofessionals
- Technical professionals

PROCESS

Established procedures and protocols for:

- Data processing
- Privilege and sensitive data review
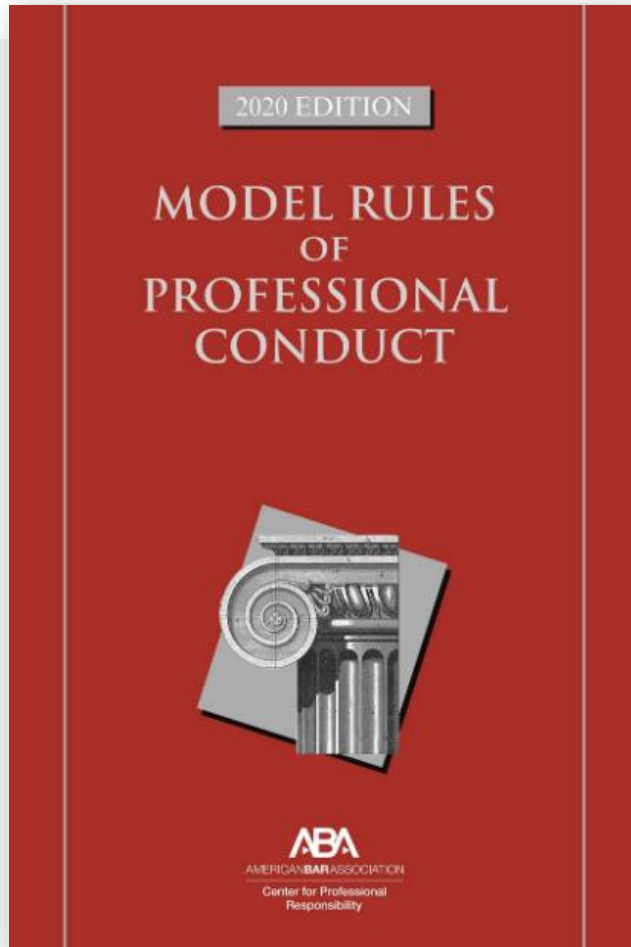- Quality control
- Production

TECHNOLOGY

Defensible and efficient use of technology for:

- Data collection
- Processing, culling and filtering
- Document review

Diligence: potential conflicts with clients

ABA Model Rules of Professional Conduct

Model Rule 1.2(d) – Client-Lawyer Relationship

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Questions?