

## Electronic Discovery Cost Effective Compliance with Minimized Disruption

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Today, lawyers are being faced with the rapid increase in the number of cases involving electronic discovery — the process of reliably recovering and handling of electronically stored information (“ESI”), including email, web pages, word processing files and databases — related to their clients’ investigations, and civil and criminal court cases. The role of electronic documents in litigation is well documented in many court cases across the country.

The Ontario Rules of Civil Procedure defines a document as “a sound recording, videotape, film, photograph, chart, graph, map, plan, and survey, book of account, and **data and information in electronic form.**”

Although, generally the document discovery process does not distinguish between paper and ESI, there are certain characteristics specific to ESI, which make them different from paper documents, for example:

- Informal and candid – electronic communications tend to be less formal than paper documents. Thus, they may yield more candid information.
- Voluminous and easy to duplicate – as a result of inexpensive storage media with increasing capabilities, people are retaining ESI in exponential numbers and for longer periods of time. The use of email for document transfers can also contribute to the increase of volume and duplication.
- Searchable – ESI are generally easier to search. By using key words, a user can reduce the time it takes to search for information and increase accuracy in review.
- Likely to contain non-printing information – ESI retain more information (i.e., metadata and embedded information) than printed documents.
- Fragile and vulnerable – ESI are susceptible to tampering and can be manipulated or inadvertently modified or destroyed.
- Difficult to destroy – fragments of ESI can remain in the hard drives of most computers and storage devices despite attempts to erase or destroy them.
- Subject to complex retrieval and preparation processes – the storage and retrieval methods for ESI are more complex. In some cases, certain ESI may be incomprehensible if they are separated from their environment or can only be viewed using appropriate software.

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Considering all of these characteristics and the challenges involved in dealing with electronically stored information, an e-discovery process can be divided into the following five steps:

**1. Identify**

Define the scope of the litigation hold / protective order and locate potentially relevant sources of documents, such as company servers, back-up tapes, laptops and desktops. Given the on-going changes in technology, one should be aware of all sources of documents such as USB thumb drives, Blackberries, PDA's, mobile phones, MP3 players, and removable memory cards (to name a few).

Other considerations in this stage would be to assess the accessibility, timing and potential cost of retrieving the documents to ensure it is in line with the case objectives (e.g. how much will it cost to access and review the information; and how significant is information to the case?).

**2. Preserve**

To avoid inadvertent or intentional data destruction or spoliation, steps must be taken to ensure the relevant data and, where appropriate, their associated containers (storage media) are preserved. The process and methodology used for preservation must ensure the chain-of-custody and integrity of data is maintained.

**3. Collect and Process**

The objective of data collection and processing is to extract the potentially relevant data, reduce the volume through deduplication and put them in a common format for ease of review and keyword searches.

During the data collection process one should determine what data needs to be collected in what order – have a priority list. Also, one should consider potential relevance, ease of access and format of data.

As mentioned, electronic data is widely dispersed. This combined with the increase in cost-effective storage-media capacity have contributed to the

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exponential increase of electronic documents, both in volume and duplication, in recent years.

As a result, the data needs to be deduplicated and culled to reduce the volume to a manageable size for review purposes.

**4. Review**

Perhaps the most effective approach to reviewing electronic documents is using keywords. While one should not rely completely on keyword searches to identify the responsive documents, a well thought set of keywords could help focus the reviewer on the most relevant documents.

Depending on the case and the volume of data to be reviewed, the review process may involve only one review, or multiple layers of review (e.g. review for responsiveness and then review for relevance by someone more senior). It is important to consider the review strategy prior to selecting an e-document review system. Not all systems are capable of effectively managing complex review strategies.

When developing a review strategy, consideration should be given to the protocols required for the identification and handling of personal and privileged documents.

**5. Produce**

Today, there is a wide range of options available for the production of relevant electronic documents, from printing the responsive documents to providing them in electronic format suitable for import into another document review system. Each option has its benefits and challenges/costs, and they should be considered early in the discovery process (i.e. collection stage) to avoid unnecessary need for conversion of data at a later stage.