

E-Discovery Litigation Response Strategy

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Snapshot of the Ontario E-Discovery Guidelines

- 13 principles which deal with issues of preservation of info, pre-discovery discussions with counsel, privilege, production
- Practical tool - suggest ways existing rules can be adapted to deal with e-docs
- [Sycor Technology Inc. v. Kiaer](#), 2005, Master Calum MacLeod specifically directed counsel to [Ontario eDiscovery Guidelines](#) and [eDiscovery issue of LAWPro Magazine](#) and told them to come back if necessary after meet and confer.

E-discovery readiness

Exponential increase in discoverable information → Cost

STEP 1 – KNOW THE STATUS QUO

STEP 2 – SHOULD WE CHANGE RECORDS MANAGEMENT
POLICIES?

STEP 3 – REACT TO ANTICIPATED LITIGATION

STEP 4 – CREATE WRITTEN RECORD

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Step 1 - Know the status quo

- Consult with records management employees and IT staff to determine how your systems are structured and how they operate in practice
- Consult with HR if necessary to identify the individuals responsible for which systems and understand the chain of command
- What corporate records does each employee have and where?
- Review records retention and destruction policies

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What records does each employee have and where?

Mandatory employee questionnaire

Paper – office, file rooms, cabinets, on-site storage, off-site storage, archives, home office, home attic, car, garage...and the list goes on!

Electronic – Primary hard drive, PDAs/Phone/Blackberry, removable storage, voicemail, instant messaging, office e-mail, e-mail back-up systems, archives, home e-mail, emergency back-up, flash memory cards, MP3 players...and the list goes on!

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STEP 2 - Change policies? Systems? Software?

Records retention and destruction policies

- Paper and Electronic data
- Design in conjunction with IT personnel
- Responsive to how employees actually store information
- Train/Easy to understand
- Rigorously enforce
- Litigation hold
 - Have a litigation response team – ie. Group of people that can alter any document destruction policy quickly

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STEP 3 – REACT TO ANTICIPATED LITIGATION

Consult with litigation counsel to:

- Determine relevance parameters
- Determine role of meta-data
- Decide how production is to be made (paper, native files...)
- Determine how duplicates should be treated
- Determine need for e-discovery vendor
- Trigger
 - Litigation Hold
 - Litigation Response Team

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Relevance Parameters

- Determined by the pleadings
- Expect and demand clarity from litigation counsel
 - Timing? Who? Issues?
- Determine
 - Custodians
 - Locations
 - Sources of information

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What about meta-data?

Case alleges anti-competitive behaviour

- E-mail says : “Let’s do lunch, we need to talk.” Producible?
- Paper documents – Do they get produced in original file folders? Reorganized by date? Inspect originals? Leave it to oral discovery?
- If e-mail is delivered with the meta-data (ie. in native electronic form and not a printed copy), it will be disclosed that it was in the “Kill the Competition” Outlook sub-folder

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The Litigation Hold

- E-mail / memo
- To whom? IT, records management personnel, key players
- Content
 - Explain the need for evidence preservation
 - Tell them where to look for data
 - Ask for other key players/places
- Visit IT department (remove back-up tapes to Legal)
- Visit key players / custodians and their assistants
- Once is not enough
- Monitor compliance

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STEP 4 – CREATE WRITTEN RECORD

- Relevance parameters rationale
- Preservation steps
- Record-gathering steps
 - Create charts: list each possibly relevant custodian/source, what has been done, who has provided what, employee certification

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Conclusion

- 4 Cs of E-discovery
 - Coordination, Communication, Compliance, Cost
- Business Records Rule
- Avoid adverse inference / Spoliation
- Improve
 - Limit the creation of e-data
 - Audit and review Retention/Destruction and Litigation Response Strategies

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