

PRACTICE TIP SHEET

An eDiscovery Checklist

Some of us in litigation deal with eDiscovery routinely, while others of us may rarely deal with electronically stored information in our cases. However, this is bound to change over time, as more and more of our clients maintain information in electronic format. These days, even individuals and very small companies aren't just storing documents in their file cabinets any longer; they have information on their computers, laptops, smart phones, thumb drives, and in the cloud as well.

What would some typical steps be in the discovery process where electronically stored information (ESI) is involved? Here is a helpful checklist:

1. **What relevant information does your client have, and how is it stored?** At the outset of the case, lawyers and their staff must become familiar with their client's records, and how and where those records are maintained, whether in paper or electronic formats. It is probable that email accounts and hard drives, and possibly social media accounts as well, may hold data pertinent to the litigation. If so, these sources will need to be examined and evaluated with a view toward possible production.
2. **Document retention policies.** Lawyers and their staff must also ascertain what policies their client has in place for either preserving or destroying hard copy documents or ESI. If information is routinely destroyed, either by deletion, overwriting backup files, shredding, or other means, lawyers must talk with their clients about the need to keep relevant data once litigation is in the offing. Severe sanctions can result from failure to preserve records, including ESI.
3. **Litigation hold notice.** In the case of businesses, lawyers must work with their client to make sure written preservation hold notices are issued instructing employees and agents to retain any potentially relevant documents and ESI in their custody, and not to alter or destroy potentially relevant material until the end of the lawsuit.
4. **Meet and confer.** Lawyers should meet and confer with opposing counsel early on in the case, in order to seek cooperation on technical issues, and to find out what discoverable data the parties have and what steps they are taking to preserve it. They should also discuss production formats and what metadata might be relevant. They should also come to an agreement on confidentiality concerns and dealing with inadvertent disclosure of privileged information, perhaps by means of a Stipulated Protective Order.
5. **Collection.** Lawyers must work with their client to develop a plan for collecting any potentially relevant documents, whether the data is in paper or electronic format. They will need to decide whether expert or IT assistance is required to collect the electronic data. Self-collection of ESI by employees risks pertinent files being missed, risks the altering of relevant metadata, and has resulted in sanctions.
6. **Determine production formats.** The parties must decide on the preferred format in which to make and receive document productions. Federal and California statutes require that ESI be produced either in the form in which it is ordinarily maintained - which suggest native format, or in a reasonably usable format - which necessitates that, at a minimum, the production must be searchable. Thus, parties must determine whether to provide native productions, or productions in searchable flat file formats such as PDFs or TIFFs with OCR. In addition, parties must decide what metadata is relevant to the case, if any, and make a plan to preserve and produce it.

7. **Other sources of discoverable information.** Counsel will need to determine whether discoverable ESI is available from any third parties, and if so, how they will obtain it.
8. **Costs.** Lawyers will need to evaluate with their client the expected costs of eDiscovery. They should determine whether the costs outweigh the potential benefits, and whether the costs are proportionate as to the parties.
9. **Processing and review.** After all relevant paper and electronic information has been collected, data is usually processed into the format in which review and/or production will take place. Exact duplicates are removed, and the collection is culled for relevancy and privilege. In the case of large document collections, this culling can often be done via carefully crafted electronic searches and tagging within a database. However once this pairing down is completed, it's usually lawyers and paralegals who do a final review of the documents to determine what to produce and what to withhold. Technologies capable of streamlining this process even further (such as [Technology Assisted Review](#)) are advancing steadily, and should be considered by counsel and client should the volume of data warrant it.
10. **Production.** Documents and information determined to be relevant and non-privileged are prepared for production to opposing parties in the format determined in the meet and confer.