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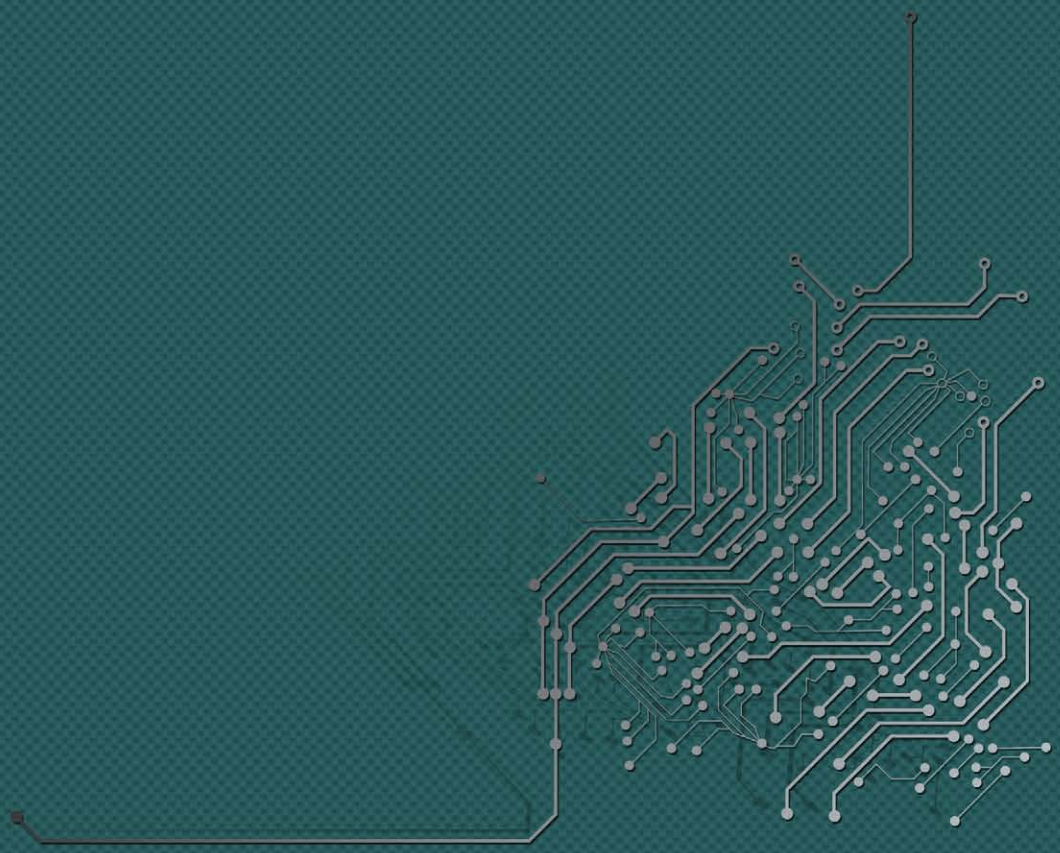
E-BOOK

E-DISCOVERY

LEGAL ISSUES GUIDEBOOK



Chapter 10

Ten practical steps for streamlining e-discovery from a lawyer's perspective

In Ireland, as in other common law jurisdictions, parties to civil legal disputes are required to formally disclose documents (including electronic data) relevant to the dispute so that they can be inspected by the other side. This process is known as discovery. It is intended to ensure that relevant evidence is available to both sides and placed before the Court.

The disclosure of electronic documents has become an increasingly important feature of litigation. The sheer volume of electronic documents may present huge logistical challenges. The issues relating to e-discovery are relatively recent in nature and the manner in which e-discovery is treated is still evolving. However, difficulties with the discovery (and especially with e-discovery) can be embarrassing, time consuming and expensive. To protect their position and discharge their obligations to the Court, lawyers and their clients need to adopt a carefully planned and practical approach to the issue of e-discovery, designed to balance the need for appropriate disclosure with the need to avoid disproportionate effort and expense.

The purpose of this article is to set out ten practical steps that lawyers should take in streamlining e-discovery.

1. **Stop Notice**
   As soon as parties become aware of the possibility of Irish litigation they are under an obligation to the Court to preserve relevant evidence. This extends to preserving electronic data and other documents. Such documentation should be secured at the first sign of a possible claim. Clients and their lawyers must act as early as possible to retain and preserve any documents that appear likely to be necessary or relevant in the dispute. This extends to both hard copy and electronic files and includes a consideration of all possible repositories, such as back up tapes, decommissioned servers, hard drives of departing employees and information in other media. Parties should take a broad view at an early stage in determining what documents should be preserved. They may not know exactly documents will be relevant and necessary as the issues in dispute may not crystallise until later. However parties to actual or contemplated litigation must preserve and retain any documents which are likely to be discoverable, including electronic information. Relevant documents created subsequently may also be discoverable and must also be preserved. A breach of these obligations could lead to serious sanctions. The parties need to appreciate that any default in this regard could fatally prejudice the party's position in the litigation.
   Accordingly, appropriate steps are required to disseminate an appropriate "stop" notice to avoid inappropriate document destruction and to secure potentially relevant documents. For example, all employees who are likely to hold relevant documents should be formally notified of the need to preserve relevant documents including electronic documents. The client must also ensure that routine document destruction policies are altered to ensure that relevant documentation is preserved. They should consult their lawyer in respect of these obligations.

2. **Early assessment of size/numbers of documents**
   From an organisational perspective it is important to assess the size, number and type of documents held that may be responsive. A rigorous scoping process involving the client, its management and IT function and the legal advisors is essential to ensure that the project is undertaken properly and also cost effectively. External IT forensics expertise will be invaluable at this stage in large cases.
   Knowing the number, extent and original file format of the document is important from a planning perspective. Resources will be required at the appropriate level to determine whether documents are required to be disclosed or if they are protected by legal privilege (such as confidential lawyer-client communications). Some reviewing and identification of documents

may be undertaken electronically, but generally the documents required additional review prior to disclosure. Where large volumes of data are involved paralegals can ensure this process is undertaken quickly and cost effectively. However, uncertainty as to whether particular documents require disclosure should be resolved at a senior level.
Deduplication can be used to reduce the cost of the process somewhat. This is a process to identify multiple copies of the same electronic document so as to avoid repeating the review and disclosure of the same documents, such as different copies of the same email sent to different people. Software programs can identify and remove documents that are 85 – 100% identical in key respects. The courts have favoured approved the appropriate use of such technology to reduce the discovery burden and expense and to avoid unnecessary and repetitive discovery.

3. **Categories of documents**
In Ireland a party seeking discovery must identify the categories of documents sought and give reasons to justify their relevance and the need for their disclosure. The party furnishing discovery will try to narrow the categories as much as possible, limiting them by reference to certain dates etc. By contrast the party seeking discovery will seek to make the categories as broad as possible. The court will resolve the extent of discovery in the absence of agreement between the parties. However it is important to remember the cost of the process throughout, and to remember that discovery should not be an end in itself but a process designed to obtain material required for the fair trial of the proceedings. The party seeking discovery should focus on the key documents which are likely to be required at trial.

4. **Custodians**
The importance of identifying potential document custodians is particularly important in the context of ESI. This is especially important if the litigation involves a large transaction, has an international dimension or if a large number of stakeholders in an organisation are involved. Emails are frequently sent to multiple recipients many of whom may only have a peripheral involvement. Sometimes removing less relevant custodians from the list can significantly decrease the number of documents involved in the discovery process, reducing its cost accordingly while still ensuring that key documents are disclosed.

5. **Key words**
A key word search can be used to electronically filter a large volume of data so as to identify documents requiring disclosure. For example, you can identify all emails passing between key protagonists or between certain dates or in which certain terms appear. This technique avoids the need to review other data which is likely to be irrelevant. However, care is required in selecting the key words. If they are too broad then they may generate huge numbers of "false positives", unnecessarily increasing the cost involved in the discovery process. If they are too narrow then they may exclude responsive documents. Ideally before either side makes discovery, both sides should agree on the appropriate key words to be employed. The selection of key words needs to be discussed with all stakeholders in the process.

6. **Document Review**
The process of reviewing documents is critical and can be expensive depending on the volume and complexity of the documentation involved, especially with electronic data. The review will generally be undertaken or supervised by lawyers who will review the hard copy and electronic data to determine whether it is required to be disclosed or whether it is irrelevant. Other documents may be exempt from disclosure on grounds of legal privilege. Examples include solicitor/client communication for the purposes of furnishing or obtaining legal advice and documents created for the purposes of the litigation, but privileged documents must still be listed. This means that you must advise the other party of their existence but you are entitled to withhold copies. Ascertaining whether a document is privileged will require input from a lawyer (with assistance from a client). The context in which a document is created is crucial to this determination. It is important to be able to demonstrate to the Court that the documents were rigorously reviewed to identify all responsive documents and ensure that privilege was only claimed in appropriate cases. A 2012 decision of the English High Court [1] demonstrated the pitfall with a party receiving cost sanctions following a botched e-discovery process. Part of the review had been undertaken by a litigation support company based in India subject to supervision by its lawyers. The Court criticised inadequacies in the process for identifying, collecting, reviewing, assembling, listing and furnishing the documents. The court accepted that disclosure in complex projects is always difficult and acknowledged the need for give and take and cooperation between all parties and their solicitors in relation to such matters. Nevertheless the Court imposed significant cost sanctions on the lawyers representing the party held to be in default.
The decision demonstrates the far reaching nature of the obligation on a party's lawyers to ensure that the discovery process is rigorous and comprehensive. It also illustrates the importance of strict supervision of any litigation support company and the far reaching consequences of any deficiencies in that regard.

7. **Finalising disclosure**
It will generally be necessary to bring in more senior fee-earners to review some or all of the documents or the schedule. It

[1] West African Gas Pipeline Company Limited v Willbros Global Holdings Inc 2012 EWHC 396 (TCC)

is necessary for a senior person in the client organisation to swear an affidavit averring that the documents referred to are all that they hold or have held in this regard.
The lawyer must be satisfied, and should obtain confirmation from relevant representatives of the client to confirm, that:

- appropriate electronic and physical searches have been carried out, all likely custodians identified, and all reasonable steps taken to ensure that all responsive documents have been disclosed;
- the disclosure approach has been consistent across the board;
- all privileged documents have been identified and removed from the main part of the discovery listing, the first part of the list;
- the privileged log (which is the second part of the document listing) only contains privileged documents and lists and properly describes all such documents;

8. **Ongoing disclosure obligation**
Even documents created after the initiation of legal proceedings may be subject to discovery. Parties should be careful in their creation of documents which may be used against them in due course.
Furthermore, a claim can change during the course of proceedings and additional claims may be added leading to the disclosure of additional documents. Furthermore if responsive documents are overlooked during the discovery process but later identified, then they should be disclosed forthwith with an explanation as to why they were not disclosed in the first place.

9. **Presentation of documents**
Documents may need to be presented in their original format . They must generally be furnished in electronically searchable format. Consultation at an early stage with the other side can lead to efficiencies where both sides are willing to be co-operative. For example, if both parties are using the same software documents can be uploaded onto the other side's system. Electronically searchable format usually means in native searchable format but unless agreed at the outset the production received may only contain non-searchable pdf production.
Once the listing of responsive documents has been prepared an officer of the company, a senior representative or the person with the most knowledge of the proceedings swears the affidavit of discovery. This sets out the details of the searches undertaken, the categories of discovery, and details regarding withheld documents. Th affidavit od discovery also verifies the listing and confirms that the party hold no other responsive documents. Two listings are appended to the affidavit of discovery. One is a log of privileged documents which lists all documents over which the party legal privilege is claimed. The other side may challenge the assertion of privilege in which case the Court will determine whether a document is privileged.

10. **Dealing with queries**
Once parties have received and reviewed the e-discovery furnished by the other party, they generally raise queries and comments on each other's discovery. The party making discovery should provide responses to these queries. If necessary the party reviewing the discovery can apply to court for a variety of different remedies, for example:

- to seek further and better discovery
- to test the claim of the privilege
- to strike out the other party's claim/defence for failure to make adequate discovery

Conclusion

In conclusion, it is necessary to ensure that care is taken to plan and execute a process which meets a party's disclosure obligations. Each side must ensure that all relevant and necessary documents, and only such documents, are disclosed. The lawyers need to ensure that it is done correctly. Proper planning at an early stage is critical. Shortcuts at the outset could lead to significant difficulties expense and prejudice in the litigation as the case proceeds.

About the author

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