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E-Discovery Basics: Why Should I Care About E-Discovery?

This is the first in a series of brief introductory guides to practical issues in electronic discovery. If you would like to subscribe to future installments of E-Discovery Basics, please [click here](#).

It is not uncommon to hear from in-house counsel and outside lawyers that they have little interest in learning about electronic discovery. Like death and taxes, however, electronic discovery is unavoidable in an era in which virtually all business information and communications are digital.

Electronically stored information (often referred to as "ESI") poses numerous challenges in litigation and investigations. For example, it is usually voluminous. It can be difficult to locate. It is fragile. Users can routinely modify and delete it, and information systems can automatically modify, delete and overwrite it. It also includes metadata, information about the document or file that the computer stores but may not be accessible to the computer user. An e-mail message, for example, may routinely have over a thousand different metadata elements. And spoliation, the inadvertent or intentional destruction of relevant evidence after a duty to preserve has attached, is of vital significance both to judges interested in ensuring the integrity of the "search for truth" and to litigation adversaries seeking to gain an advantage.

Cases can be won and lost based on preservation and collection failures. Sanctions motions can create expensive and sometimes embarrassing satellite litigation. And courts have imposed sanctions not only on parties, but also on their in-house and outside counsel. The costs of electronic discovery also can be enormous, particularly at the stage when ESI must be processed, loaded onto a review tool, reviewed and produced. But those costs can be mitigated in some circumstances through the appropriate use of new technologies and methodologies.

Some familiarity with the basics of electronic discovery can help prevent costly mistakes—which may occur even before the commencement of litigation or an investigation—and can help position a company and its counsel to best deal with the challenges that electronic discovery presents. Toward that goal, in this E-Discovery Basics series we will present brief introductory guides to a variety of practical issues in electronic discovery.

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Be on the lookout for upcoming installments of E-Discovery Basics on the following topics, among others:

The E-Discovery Life Cycle: We will provide an overview of the electronic discovery life cycle based on the Electronic Discovery Reference Model.

Litigation Preparedness: We will discuss steps that companies can take to be prepared for electronic discovery in litigation and investigations. Being prepared can both mitigate the risks and reduce the costs associated with electronic discovery.

Legal Holds: Once a duty to preserve attaches, it is important to identify and preserve relevant ESI as soon as practicable. We will discuss triggers of the duty to preserve and implementation of timely and defensible legal holds.

Preservation: In the first of two installments relating to preservation, we will discuss five general categories of data that businesses should consider preserving pursuant to a legal hold (and for later collection and review in response to document requests or a subpoena): active data, inactive data, archived data, residual data and legacy data. In the second installment, we will discuss more specifically certain common sources and types of ESI that may require preservation.

Collection: In litigation and investigations, it is important that relevant ESI and its associated metadata be collected in a manner that is legally defensible, targeted, proportionate to the matter, auditable and efficient. We will discuss three different collection methodologies: employee self-collection, IT-assisted collection, and collection by an outside service provider or specialist.

Processing and Review. After preserving and collecting ESI, it is necessary to determine what is relevant or responsive to document requests and should be produced or used, versus what is privileged, irrelevant or non-responsive and should be withheld and not used. We will discuss the processing of collected ESI so that it can be searched and reviewed in a review tool, culling options both pre- and post-processing, and new technologies that can make review more efficient and less costly.

Production: Courts are now providing more concrete guidance regarding what is acceptable—and not—in the production of electronically stored information. Some practices—*e.g.*, producing ESI in hard copy or in non-searchable PDF or image files without associated metadata, merging multiple documents without indicating any separate files, merging paper with electronic records, and failing to produce emails with attachments—are becoming increasingly untenable. We also will discuss the advantages and disadvantages of the principal forms of production—native, for example, or searchable images with load files containing associated metadata.

Admissibility. Litigants need to be mindful throughout the litigation process that they are developing the necessary evidentiary foundation and handling ESI in a manner that will allow it to be admitted into evidence in support of motions, in hearings and at trial.

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Cross-Border Discovery Challenges: Companies with operations in non-U.S. jurisdictions can face numerous difficulties with respect to electronic discovery beyond the logistical issues inherent in any international undertaking or dispute. Many countries, particularly in Europe and Asia, have enacted laws and regulations restricting the transfer and processing of data, including data privacy laws and "blocking statutes" designed to thwart the efforts of litigants subject to U.S. discovery rules. Companies with operations outside of the U.S. need to be aware of and comply with these requirements in collecting, reviewing and producing ESI for U.S.-based litigation and investigations.

We hope that these brief introductory guides not only will help our clients and friends with the issues they currently face, but also will generate additional interest in learning about electronic discovery and its importance in litigation today.

Other installments in our E-Discovery Basics series are available [here](#).

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Lawyers in Gibson Dunn's Electronic Discovery and Information Law Practice Group can assist in implementing defensible and proportionate approaches at all stages of the e-discovery process. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following Chairs of the Electronic Discovery and Information Law Practice Group:

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