

ELECTRONIC DOCUMENT PRESERVATION FOR LAWSUITS

E-Discovery Obligations

by [Martin Rosenbaum](#), B.Com., B.C.L., LL.B

As soon as litigation is contemplated or threatened, it is essential for all parties and their counsel to go beyond paper file searching, and consider what electronic data and information exists that may need to be disclosed. Rules of Court generally require all parties to litigation to disclose to the other parties all relevant documents, whether the documents are helpful or hurtful to any particular party. Relevance is the test for disclosure. There are a limited number of exemptions to this rule. A discussion of these exceptions is beyond the scope of this article.

Documents are defined in the Rules of Court to include electronic files and data. Accordingly, in addition to locating and preserving paper documents, each party to a lawsuit must take reasonable steps to locate and preserve electronic files containing data and information that can reasonably be expected to be relevant in the litigation. Further, a litigant should also consider whether specific paper or electronic documents are known to be in the possession of others. Court rules provide specific procedures to request that such documents be disclosed and preserved as early as possible.

Once litigation is commenced, a party is mandated to immediately take reasonable and good faith steps to preserve relevant documents, including electronic files and data. In respect of electronic files and data, these steps include the following:

- (a) collect all relevant document retention, back-up, archiving and destruction policies;
- (b) issue appropriate instructions to all staff, or at least to relevant staff, to cease or suspend personal activities and practices that could result in the destruction or modification of relevant electronic documents, such as the deletion of e-mailbox entries or archives;
- (c) create litigation copies of potentially relevant active data sources, for example by means of electronic backup or forensic copying of the documents, so as to preserve potentially relevant meta-data; and,
- (d) cease or suspend the overwriting of back-up tapes, and other document retention practices that could result in the destruction or modification of relevant electronic documents in the ordinary course of business.

If a litigant anticipates that specific electronic documents, files or data could exist that are relevant to the litigation and are liable to be deleted or modified in the ordinary course of business, that litigant must immediately notify its counsel of that fact, and take appropriate steps to preserve these electronic files, documents and data. A litigant should also consider, as early as possible, whether third parties may be in possession of relevant electronic files and data, and seek advice about notifying the third parties to take appropriate preservation steps.

This article is not intended to be relied on as legal advice. Anyone involved in litigation, or about to be involved in litigation, should consult with legal counsel regarding all of their disclosure obligations that may be applicable to the particular circumstances.