



# Electronic Discovery

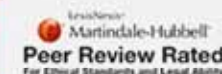


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# New standards for electronic discovery

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- Available at ABA Litigation Section website:  
[www.abanet.org/litigation/taskforces/electronic](http://www.abanet.org/litigation/taskforces/electronic) (published Aug. 2004)

## New standards for electronic discovery

- The Civil Discovery Standards do not carry the force of law, but they effectively summarize the state of the law on electronic discovery issues.
- Using the Civil Discovery Standards, plaintiffs' counsel and defense counsel can create practical checklists on electronic discovery issues.

## Discoverability of electronic documents

- Fed. R. Civ. P. 34 authorizes requests for the production of documents, including “electronic data compilations.” See, e.g., *Simon Prop. Group, L.P. v. Simon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (holding that computer records, including those that have been “deleted,” are discoverable documents under Rule 34).

## Discoverability of electronic documents

- Courts routinely require litigants to demonstrate good faith efforts to identify discoverable electronic data, and to inform opposing counsel when data is available for production in electronic form. See, e.g., *In re Bristol-Myers Squibb Secs. Litig.*, 205 F.R.D. 437 (D.N.J. 2002).

## Discoverability of electronic documents

- The requesting party should specify whether electronic information should be produced in hard copy, or in electronic form, or in both forms.
- Think carefully about how you want to view the documents because there are tactical advantages to reviewing “hard” (printed) copies.

## Duty to investigate and disclose

- At the commencement of litigation, and before receiving any formal discovery request, a party must disclose to opposing parties certain information, including a description by category and location of documents and data compilations. Fed R Civ P 26 (a)(1)(B).

## Duty to investigate and disclose

- A party must search available electronic systems for relevant information. See *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001).
- Responsive electronic information may be stored in hard drives, networks, backup tapes, laptops, floppy disks, employees' home computers and PDAs.

## Sanctions for failing to investigate & disclose

- *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 3804 (S.D.N.Y. Mar. 30, 2000) (Wal-Mart forced to pay fees and expenses totaling nearly \$110,000 because its counsel failed to determine that local sales data was stored for one year in centralized computer system).

## Checklist 1: potential types of electronic information

- E-mail, including attachments and “metadata” (information about when an e-mail was created, to whom it was sent, when it was opened, responded to, and who received blind copies).
- Word processing documents, including drafts.
- Spreadsheets.

## Checklist 1: potential types of electronic information (cont'd)

- Presentation documents.
- Graphics/animations/images.
- Audio/video/audiovisual recordings.
- Voicemail.

## Where is electronic information stored?

- Most electronic information is stored in platforms, which might be held by the client or a third party under the client's control (employee, outside vendor, etc.).
- What potential types of electronic databases should counsel look for and inquire about?

## Checklist 2: Potential Electronic Databases

- Networks
- Computer systems (hardware and software), including systems no longer in use (“legacy systems”)
- Servers
- Archives
- Backup or disaster recovery systems

## Checklist 2: Potential Electronic Databases (cont'd)

- Tapes, discs, drives, cartridges and other storage media
- Laptops, personal computers, personal digital assistants (PDAs)
- Mobile phones & paging devices
- Audio systems, including voicemail
- Internet data/Web logs/cookies

## Practice Tip: Reminder Letter

- If you represent plaintiff and you want to make sure that opposing party does not discard potentially relevant electronic information before you can prepare and serve request for production, send a letter to the opposing side reminding them of their duty to preserve potentially relevant information, including electronic information.

## Practice tip (cont'd)

- Use Checklists 1 and 2 as starting points for naming specific types of electronic information and platforms you think should be preserved.
- Caution: Make sure to review checklists and letter with your client before sending it to ensure that your client is following the same rules of preservation.

## Checklist 3: requesting electronic information

- Specify format in which you prefer to receive electronic data, such as in “native” (original) format or in a searchable format.
- Request production of “metadata” associated with responsive data.
- Request software necessary to retrieve, read, or interpret electronic information if such software or vendors who can provide it are unavailable.

## Checklist 3: requesting electronic information (cont'd)

- Inquire as to how data are organized and where data are stored.
- Use Rule 30(b)(6) to depose designated information technology (“IT”) person to obtain substantive information about opposing party’s computer system and document management protocols. *See Alexander v. FBI*, 188 F.R.D. 111, 119 (D.D.C. 1998).
- Consider consulting with your own IT expert to help you ask the right questions.

## Electronic discovery conference

- Civil Discovery Standards recommend that certain topics be subject of every initial discovery conference and pretrial conference.
- Check relevant Local Rules (and “local local rules”) to determine when conference must be held.

## Checklist 4: electronic discovery conference

- Subject matter of proposed electronic discovery and relevant time period.
- Identification or description of persons currently or formerly affiliated with responding party who are knowledgeable about information systems, technology and software to access potentially responsive data.

## Checklist 4: electronic discovery conference (cont'd)

- Potentially responsive data that exist, including platforms on which, and places where, such data may be found.
- Data retention policies applicable to potentially responsive data, and preservation of such data.

## Checklist 4: electronic discovery conference (cont'd)

- Discussion of data retention policies should address (a) preservation of data generated after filing of litigation; (b) data otherwise customarily subject to destruction in ordinary course of business; and (c) “metadata” reflecting creation, editing, transmittal, receipt, or opening of responsive data.

## Checklist 4: electronic discovery conference (cont'd)

- Does potentially responsive data exist in searchable form?
- What key terms or other selection criteria can we agree upon to search potentially responsive data for discoverable information?
- Can we agree on independent IT consultants who can assist us jointly?

## Checklist 4: electronic discovery conference (cont'd)

- Can we identify the initial production (or tranches, or subsets) of potentially responsive data so that we can evaluate the likely benefit of producing additional data?
- Can we reach an agreement as to allocation of costs?

## Performing and paying for discovery

- Amended Civil Discovery Standards identify number of factors that parties and court should consider in resolving motions to compel or protect against production of electronic information or related software and/or to allocate costs of such discovery.

## Checklist 5: factors considered in allocating costs of electronic discovery

- The burden and expense of discovery, considering the total cost of production in absolute terms and as compared to amount-in-controversy.
- The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources.

## Checklist 5: factors considered in allocating costs of electronic discovery

- The complexity of the case and the importance of the issues.
- The need to protect the attorney-client privilege and/or attorney work product, including the burden and expense of a “privilege review” by the producing party.
- Whether the information or software needed to access the information is proprietary or considered confidential business information.

## Checklist 5: factors considered in allocating costs of electronic discovery

- Whether efforts have been made to confine initial document production to tranches or subsets of potentially relevant data.
- The extent to which production would disrupt the normal operations of the responding party.
- Whether the requesting party has offered to pay some or all of the discovery expenses.

## Checklist 5: factors considered in allocating costs of electronic discovery

- The relative ability of each party to control costs and its incentive to do so.
- Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly expensive.
- Whether the responding party has deleted, discarded, or erased electronic information after it knew that litigation was probable and, if so, the responding party's state of mind in doing so.

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