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ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

MODEL DOCUMENT #8:
ANNOTATED E-DISCOVERY CHECKLIST
(with suggestions on how to minimize e-discovery costs)

Session III:
Snowed Under: EDiscovery and Document Production in Competition Cases

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Presented by the Canadian Bar Association’s (CBA) National Competition Law Section and the Professional Development Committee of the CBA

Présentée par la Section nationale du droit de la concurrence de l’Association du Barreau canadien (ABC) et le Comité du développement professionnel de l’ABC
Purpose of the document

This annotated e-discovery checklist is designed to provide guidance to counsel and their clients regarding the main steps to be taken with respect to the preservation, production and use of relevant documents, including all types of electronically stored information, within an action or other legal proceeding. The annotations provide suggested methods of minimizing costs throughout the e-discovery process.

Every case is unique, and not all steps identified in the checklist may be required for all actions, while in some actions additional e-discovery steps may be called for.

Proportionality

In any legal proceeding, the parties should ensure that all steps taken in the discovery process are proportionate, taking into account, among other things, the importance and complexity of the case, the amounts and interests at stake, and the costs, delay, burden and benefit associated with each step.

This annotated e-discovery checklist treats proportionality as a guiding principle, identifying circumstances in which certain e-discovery steps may not be required, or in which the steps may be accomplished more efficiently and with less cost and other burdens.

Annotations

Annotations are included at various points throughout the model document, identifying issues that the parties may wish to consider. Many of the annotations refer to The Sedona Canada Principles Addressing Electronic Discovery (the “Sedona Canada Principles”). Civil litigants in Ontario are required, pursuant to Rule 29.1 of the Rules of Civil Procedure, to consult and have regard to the Sedona Canada Principles in preparing a discovery plan for an action. The Sedona Canada Principles are a set of national guidelines for e-discovery in Canada, which reflect both

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1 The word “document” is used in this Model Document in its broadest sense, as meaning “information recorded in any form, including electronically stored information”. The word “document” is used interchangeably with the word “record”.

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existing legal principles and a set of identified best practices. A copy of the Sedona Canada
Principles may be downloaded from www.thesedonaconference.org, where they are found under
the list of publications for Working Group 7.

Note regarding use of this document

This checklist and all of the EIC’s model documents and other publications are available on the
Ontario Bar Association’s website at:

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Feedback on EIC materials

The EIC welcomes comments on all of its model documents and other publications. Any
comments or suggestions can be provided to Michele A. Wright at mwright4@toronto.ca.
## ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

### ANNOTATED E-DISCOVERY CHECKLIST

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ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

ANNOTATED E-DISCOVERY CHECKLIST

(with suggestions on how to minimize e-discovery costs)

I. ADVISING THE CLIENT

1. **Address urgent preservation issues**: Determine immediately with the client whether there are urgent preservation issues because relevant records may be destroyed, altered or removed in the short term - see subsection II-A below ("Address urgent issues").

2. **Advise the client regarding the preservation obligation**: Advise the client orally to the extent required regarding:
   - the obligation to preserve all relevant records, whether the records are helpful or not
   - the requirement to disclose and produce relevant non-privileged records
   - the requirement to disclose (but not produce) relevant privileged records
   - the need to preserve, disclose and produce electronic records as well as paper records
   - the different types of electronic records and different media in which they are stored
   - the importance of preserving electronic records in their original, unaltered form in order to ensure admissibility at trial
   - the potential consequences of spoliation
   - the cost savings and other benefits associated with a comprehensive and systematic approach to collecting relevant records

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2 Consider not only records in the client’s possession, but also records held by opposing parties, and records held by non-parties.

3 The nature of the communication with the client and the scope of the advice given will vary depending upon, among other things, the client’s degree of knowledge and sophistication, and whether the client is a new or existing client. A more detailed discussion of possible advice to be given to the client is set out in the model memoranda regarding documentary discovery prepared by the Ontario E-Discovery Implementation Committee (Model Documents #3 and #4) for corporate clients and individuals.
• the proportionality principle and its application to documentary discovery

• the application of the client’s documentary discovery obligations to records that are not in the client’s possession but that are under its power or control

• the need to implement a litigation hold, and the steps involved - see subsection II-C below (“Initiate a litigation hold”)

• the utility of conferring with opposing parties regarding what is to be preserved, disclosed and produced and in what form - see Section III below (“Conferring with opposing counsel”)

• the process for preserving, collecting, reviewing, processing and producing relevant records - see subsection II-B below (“Prepare the preservation plan”).

3. **Explain the documentary discovery process:** Explain the documentary discovery process to the client, including:

   • all main steps involved in preserving, collecting, processing, reviewing and producing the client’s records;

   • the personnel at the law firm and elsewhere (if applicable) who will be involved in the process;

   • the demands that will be placed on the client in terms of time and personnel;

   • the financial and other benefits of conducting the entire process electronically (including scanning of paper documents);

   • the likely timeframe for completing the process; and

   • the associated financial costs of all steps (being careful not to underestimate the potentially very significant financial cost).

4. **Deliver advice in writing:** Deliver an advice memorandum or letter to the client, if appropriate, describing:

   • the client’s obligations with respect to documentary discovery

   • the essential steps in implementing a litigation hold in order to preserve potentially relevant records

   • key issues to be addressed by the client in determining how best to fulfill its obligations to preserve, disclose and produce records in a strategic,
proportionate and cost effective manner.⁴

5. **Diarize to provide follow up advice:** Diarize to remind the client of its preservation and production obligations at subsequent stages of the litigation (e.g., after the initial affidavit of documents is served, after discoveries, etc.).

### COST REDUCTION TIPS FOR THIS STEP:

Ways to reduce legal fees:

1. Counsel: Use a precedent memo regarding the documentary discovery process (such as the EIC’s Model Documents #3 and #4), as an outline of the topics to review with the client orally, and as the starting point for an individualized advice memo or letter to the client.

2. Counsel: Maintain a model litigation hold policy and sample litigation hold notices to make available to the client.

3. Counsel: Become fully familiar in advance with the issues associated with preservation of electronic records, so that the client need not pay for counsel to inform themselves. The client can similarly reduce fees by achieving such familiarity itself, whether through in-house counsel or otherwise.

4. Client: Have an established litigation hold procedure in place as part of a litigation readiness plan.

In smaller cases:

1. Preservation advice may be provided at the same time as counsel is meeting with the client to collect records, gather facts and prepare file strategy.

2. Written advice regarding preservation may not be required if, for example, counsel is satisfied that all relevant records have been preserved and provided.

3. Counsel must give advice regarding the client’s preservation obligations that is proportionate taking into account the dollar value, importance, and other features of the case. The obligation to preserve cannot reasonably be as onerous in smaller cases as it is in cases involving larger dollar values.

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⁴ In many cases, this step may be accomplished by way of a letter outlining the client's obligations with respect to the preservation of electronic evidence. For existing or sophisticated clients, particularly those with in-house legal counsel, it may not be necessary or desirable to provide a written advice memo in each case regarding obligations with respect to documentary discovery. Counsel must use their judgment in deciding what advice to provide in writing. The extent to which clients require assistance with preservation will vary from client to client and the assistance given should take account of the principle of proportionality. For model advice memos, see the E-Discovery Implementation Committee’s Model Documents #3 and #4.
II. PRESERVING RELEVANT RECORDS

A. ADDRESS URGENT PRESERVATION ISSUES

1. **Identify imminent spoliation concerns**: Determine immediately whether:
   
   - the client has relevant records that may be destroyed, altered or removed in the short term
   
   - an opposing party has relevant records that there is reason to believe they may destroy, alter or remove in the short term
   
   - a non-party (such as a consultant, affiliate, etc.) has such records.

   For the client, issues to consider in determining whether there is an imminent risk of destruction of relevant records include:
   
   - whether the litigation is concerned with very recent or ongoing events, such that there is a risk of destruction of relevant records in “real time”
   
   - the frequency with which the client recycles backup media
   
   - whether the client has a regular email deletion policy under which emails are deleted routinely after a certain number of days if not otherwise filed
   
   - the possibility of alteration to electronic records that are in continuing use, such as databases
   
   - destruction of potentially relevant records in the ordinary course pursuant to the client’s records retention policy
   
   - the possibility of a relevant hard drive, portable device, etc. being scrubbed or otherwise rendered inaccessible (e.g., the personal computer of a departing employee).

2. **Prepare and implement an urgent preservation plan**: If there are relevant records at imminent risk of destruction, immediately discuss with the client and implement a proportionate response to the need to preserve these records. Among other things:
• Determine whether there is anything on the backup media that cannot be preserved otherwise\(^5\)

• Identify the least expensive and least disruptive means of effectively preserving email that would otherwise be subject to an automatic email deletion process\(^6\)

• Identify the least expensive and least disruptive means of effectively preserving records scheduled for destruction pursuant to the client’s records retention policy\(^7\)

• As appropriate, issue litigation hold notices immediately to persons who might otherwise destroy or discard relevant records - see subsection II-C below (“Initiate a litigation hold”).

3. **Consider an urgent preservation motion**: Consider whether an immediate motion seeking the preservation of records held by opposing parties or non-parties is required (whether by way of *Anton Piller* order or otherwise).\(^8\)

4. **Consider urgent preservation letters**: Consider whether to send a preservation letter to the opposing parties or to non-parties requesting preservation of records that may be imminently destroyed - see subsection II-D below (“Send preservation letters”).

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<td>1. Client: Have an established litigation hold procedure in place as part of a litigation readiness plan and broader records management process, with provision for addressing urgent preservation issues.</td>
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\(^5\) The expense of taking backup media out of circulation, and preserving and restoring them, should be avoided if there is an alternative, less expensive means of preserving the same data.

\(^6\) Suspension of the email deletion process on a company wide basis is not the preferred approach, if less expensive and less disruptive alternatives are available such as email filing or copying.

\(^7\) Suspension of destruction of all records under the records retention policy should be avoided if it is possible to identify specific subclasses of records, or specific records, that are potentially relevant to the litigation.

\(^8\) An annotated model *Anton Piller* order has been prepared by the Ontario Commercial List Users Committee and is available online at the website of the Ontario Superior Court of Justice at [http://www.ontariocourts.on.ca/scj/en/commerciallist/](http://www.ontariocourts.on.ca/scj/en/commerciallist/)
2. Counsel and client: Maintain and use standard form preservation letters that may be quickly modified to the circumstances of the case. Preservation letters can be sent by the client rather than counsel if appropriate.

Ways to reduce consulting fees:

1. Limit the extent to which it is necessary to retain consultants to assist with urgent preservation steps relating to electronic records by:
   - implementing a records management process through which company records are regularly or automatically filed;
   - training internal IT staff on how to implement preservation procedures for electronic records (urgent and otherwise), if appropriate;
   - acquiring some of the available affordable software tools that permit clients to make forensic copies of their own hard drives, if appropriate; and
   - strictly limiting the retention period for backup media to the short time needed for disaster recovery purposes (where that is the sole purpose of the backup media).

In smaller cases:

1. Forensic copying of hard drives, whether by consultants or on a DIY basis, can be a relatively inexpensive means of preserving all relevant data in cases where few computers are involved.

2. Urgent preservation steps can be combined with all other preservation and collection steps in a single “blitz”.

**B. PREPARE THE PRESERVATION PLAN**

1. **Identify an IT liaison:** Identify an information technology liaison person at the client, to coordinate the preservation of electronic records.

2. **Complete an IT questionnaire:** Ask the client and its IT liaison to complete an IT questionnaire, or to provide information orally, regarding:
   - system architecture (network structure, geographic location of hardware, etc.);

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9 For sample IT questionnaires, see *The Electronic Evidence and Discovery Handbook* (ABA Law Practice Management, 2006) at pp. 3 and following.
• types of hardware and software used by the client;
• what forms of potentially relevant electronically stored information exist, such as emails, word processing documents, databases, Excel documents, voice mail records, web-based files or metadata;
• methods of data storage, such as on servers, desktop computers, laptops, home computers, PDAs such as Blackberrys or Palm Pilots, floppy disks, CDs, DVDs, zip drives, backup media, external hard drives and USB (“thumb”) drives;
• data storage by third parties such as banks, accountants, lawyers, insurers, third party service providers, affiliated companies or internet service providers;
• the client’s backup protocol, including types of backups performed and their schedule;
• the physical location of backup media;
• procedures for retrieving data from backup media;
• the client’s archiving protocol, if applicable, and procedures for retrieving data from archives;
• costs and resources required to retrieve information from backup and other storage media.  

3. **Prepare an IT inventory**: Ask the IT liaison to prepare an inventory of storage media containing potentially relevant records.

4. **Prepare a preservation plan**: Meet or speak with the client, including the IT liaison, to prepare a preservation plan. Topics for discussion and decision include:
   • whether an e-discovery consultant or computer forensics specialist is needed in order to preserve and collect relevant records;
   • the extent to which counsel or law firm personnel should be directly

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10 Comment 3.c. of the *Sedona Canada Principles* recommends that counsel be prepared in a substantive way for a meet and confer session with opposing counsel by gaining “a thorough understanding of how electronically stored information is created, used and maintained by or for the client.”

11 Principle #3 of the *Sedona Canada Principles* states “[a]s soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve relevant electronically stored information.” Note, though, that while most cases require thought to be given to e-discovery issues, not every case requires a strenuous chasing-down of electronic records and information. E-discovery can be an expensive diversion. Approaching it blindly can be counterproductive. Before starting any search for electronic evidence, counsel and client should analyze the issues in the case and prioritize them, and then determine the likely relevance of electronic records to those issues, in order of priority.
involved;
• the role to be played by the client in preserving and collecting records;
• what methods to use to search for the client’s records, including the possible use of indexing software and other search tools;
• whether to preserve more broadly (such as by making forensic copies of hard drives and servers, with culling for relevance to occur later) or more narrowly based on specific relevance parameters;\textsuperscript{12}
• the relevant search parameters to narrow the scope of preservation and collection, such as:
  o custodians;
  o date range;
  o geographic location;
  o file type;\textsuperscript{13}
  o email suffix;
  o search terms (such as employee names, key words in the litigation, names of persons on the other side, etc.);\textsuperscript{14}
• whether and to what extent to preserve metadata;
• whether to preserve backup media and, if so, whether to seek to retrieve specific records from the backup media;\textsuperscript{15}
• whether and how to seek to preserve deleted or residual data;
• whether to make forensic copies of hard drives and servers;\textsuperscript{16}
• the cost associated with all contemplated preservation steps;

\begin{itemize}
\item Preserving broadly and then using culling software to identify relevant records will in some cases be quicker and more efficient than seeking to identify relevant records on an individualized basis.
\item In most cases, the vast majority of electronic records will consist of e-mail, word processing documents and data within databases.
\item Principle #7 of the Sedona Canada Principles states that parties may satisfy their obligations “by using electronic tools and processes such as data sampling, searching and/or the use of selection criteria to collect potentially relevant electronically stored information.”
\item Comment 3.a. of the Sedona Canada Principles states that “[t]he general obligation to preserve evidence … must be balanced against the party’s right to continue to manage its electronic information in an economically reasonable manner, including routinely overwriting electronic information in appropriate cases. It is unreasonable to expect organizations to take every conceivable step to preserve all electronically stored information that may be potentially relevant.”
\item In a smaller organization, the simplest and most effective way to preserve electronic evidence may be simply to make a forensic copy of the drives.
\end{itemize}
• the risks associated with not undertaking the contemplated preservation steps; and

• a determination of what constitutes a proportionate preservation response, taking into account the amounts at issue, the importance of the case, the importance of various types of files, and other factors.

5. **Keep a written record of the preservation plan**: Make sure to maintain careful records of the preservation plan. Consider whether to send written confirmation to the client, documenting the preservation plan.

### COST REDUCTION TIPS FOR THIS STEP:

#### Ways to reduce legal fees:

1. Limit the scope of the preservation plan by agreement among the parties.

2. Counsel: Maintain a precedent IT questionnaire.

3. Client: Provide complete and detailed information in response to the IT questionnaire, to reduce the need for legal time in gathering this background information.

4. Reduce or eliminate the role of lawyers in carrying out preservation steps once the preservation plan is prepared. As a general matter, this work can be carried out either by the client or by consultants, with only periodic consultation with counsel. If law firm personnel must be involved on a day-to-day basis, law clerks or contract lawyers should be considered where appropriate, given their lower billing rates.

#### Ways to reduce consulting fees:

1. Carry out preservation steps using client personnel, where appropriate. E-discovery consultants and computer forensics specialists play an important role in many cases, but their involvement is not required in all cases, especially where electronic records are not particularly important, or where the client is sufficiently sophisticated to be able to carry out preservation tasks without outside assistance.

2. Consider carefully whether the more complicated forms of preservation (involving backup tapes, deleted and residual data, metadata, etc.) are required in the circumstances of the particular case.

#### Ways to reduce employee time:

1. Rely upon software tools rather than employee review to search for relevant records.
C. INITIATE A LITIGATION HOLD

1. **Appoint an overseer:** Consider the appointment of one individual at the client to oversee the implementation of the litigation hold.

2. **Identify and implement the litigation hold policy:** Determine whether the client has an existing records retention policy that includes a litigation hold procedure.\(^\text{17}\)
   - If so, consider obtaining a copy of the records retention policy, reviewing its adequacy, and advising the client of any deficiencies.
   - If not, provide the client with a model litigation hold procedure, including sample hold notices.\(^\text{18}\)

3. **Issue litigation hold notices:** Issue litigation hold notices in writing to all employees, contract workers and third parties who may be custodians of potentially relevant documents to inform them of the need to preserve these documents in their original format without modification. Recipients of the litigation hold notice should include:
   - all persons at the client with direct knowledge of or involvement with the matters at issue;
   - all persons likely to have possession of records relevant to the matters at issue

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\(^\text{17}\) A client may have several records retention policies for different divisions, departments or affiliates, and may have a separate retention policy for electronic records.

\(^\text{18}\) A description of the litigation hold obligation, and a sample litigation hold notice, are found in the model memorandum to a corporate client regarding documentary discovery prepared by the Ontario E-Discovery Implementation Committee (Model Document #3).
4. **Ensure compliance with the litigation hold**: Client or counsel (if appropriate, with the assistance of an e-discovery consultant or computer forensics specialist) must work with the client’s IT department to ensure that electronic records affected by the litigation hold are properly preserved. Counsel should follow up with the client to ensure the litigation hold has been implemented – see Section IV below (“Collecting Relevant Records”).

5. **Issue follow up litigation hold notices**: Over the course of the litigation, issue litigation hold notices to new employees who will have access to relevant documents. Consider the necessity of additional litigation hold notices as issues in litigation evolve.

6. **Keep an audit trail**: Ensure that the chain of custody for the preserved records is properly documented,\(^{20}\) to ensure the ability to prove the authenticity and integrity of the records at trial.\(^ {21}\)
   - Consider whether any additional information is required to be preserved regarding the integrity of the system in which the records were stored.

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\(^{19}\) See Comments 3.d. and 5.c. of the *Sedona Canada Principles*. Consideration must be given to contacting outsourced vendors or non-party custodians of data of the client. As stated in Comment 5.c., “[m]any organizations outsource all or part of their information technology systems or share electronically stored information with third parties for processing, transmitting or for other business purposes.” Note that where the client is an individual rather than a corporation, the obligation to ensure that certain third parties preserve relevant records still applies.

\(^{20}\) For sample chain of custody documentation, see *The Electronic Evidence and Discovery Handbook* (ABA Law Practice Management, 2006) at pp. 14-15

\(^{21}\) See s. 34.1 of the *Evidence Act* (Ontario) and ss. 31.1 to 31.8 of the *Canada Evidence Act*, on establishing the authenticity and integrity of electronic records. See also *Electronic Records as Documentary Evidence*, published by the Canadian General Standards Board (CAN/CGSB 72.34-2005)
### COST REDUCTION TIPS FOR THIS STEP:

#### Ways to reduce legal fees:

1. **Counsel:** Maintain a model litigation hold policy with sample hold notices, as well as sample chain of custody documentation, to provide to clients as needed.

2. **Client:** Maintain an up to date litigation hold policy and records management system, including chain of custody procedures and documentation, to minimize the need for legal help in implementing the litigation hold.

3. **Client:** Implement the litigation hold using company employees, without the direct involvement of counsel in the implementation stage, where appropriate.

#### Ways to reduce consulting fees:

1. Where appropriate, implement the litigation hold without the involvement of outside consultants. The question of whether outside consultants are needed should be discussed with counsel.

2. Limit the scope of the litigation hold, as part of preparing the preservation plan, to reduce the quantity of data and records to be preserved.

#### In smaller cases:

1. Prepare the preservation plan, implement the litigation hold and collect relevant records as part of a single meeting or exercise, where possible.

### D. SEND PRESERVATION LETTERS

1. **Consider scope of preservation requests:** Consider carefully what preservation steps opposing parties should be asked to undertake.\(^{22}\) Among other things:
   - Determine what relevant electronically stored information opposing parties may have
   - Determine as far as possible the relevant parameters that should be used to identify relevant documents. For example:
     - the persons, places and types of materials to be searched; and

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\(^{22}\) Consider the proportionality principle in determining what preservation steps opposing parties should be asked to undertake. Extreme preservation efforts should not be requested except in unusual circumstances: see Comment 3.f of the *Sedona Canada Principles*. Consider the client’s ability and willingness to undertaking the same preservation steps, since any preservation demand made of the opposing parties may be reciprocated.
2. **Send preservation letters:** Send preservation letters to opposing parties outlining some or all of the following, as appropriate:\(^{23}\)
   - their e-discovery preservation obligations
   - the steps to be taken to preserve
   - the types of electronic records that should be preserved
   - the devices where that information may be located and identifying as far as possible the potentially relevant search terms
   - specific documents or classes of documents to be preserved, or specific custodians of relevant documents, or applicable date ranges, if known
   - a request that litigation hold notices be issued to third party custodians of electronically stored information
   - a request to meet and confer early in the proceedings to discuss appropriate preservation steps.

3. **Consider a preservation motion:** Consider whether a motion is necessary to compel preservation, where an opposing party refuses to confirm preservation steps have been taken or to participate in a meet and confer session. In this regard, consider the terms of the order you want, for example:
   - duration;
   - what is to be preserved;
   - how relevant documents are to be identified and where they may be found;
   - the search terms to be used;
   - how extensive preservation shall be;

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\(^{23}\) See the sample preservation letters prepared by the Ontario E-Discovery Implementation Committee (Model Documents #5 and #6). A preservation letter should be sent to opposing counsel as soon as litigation is commenced, and sometimes before. At that time, counsel may have limited information about potentially relevant information in the possession of the other side. Therefore, it will usually be necessary to establish and enforce preservation obligations in a progressive manner. The first letter to opposing counsel may simply be a very general request to preserve relevant electronic information. It may be appropriate to then send one or more additional, more focused preservation letter with a defined scope in terms of date range, record types, custodians, search terms, etc.
4. **Consider preservation of records held by non-parties**: Consider whether to send preservation letters to non-parties.

**COST REDUCTION TIPS FOR THIS STEP:**

Ways to reduce legal fees:

1. Focus on the records that matter.
2. Avoid preservation demands that will generate unnecessary disputes over the scope of the preservation obligation.
3. Work cooperatively with opposing parties to identify and limit the scope of the preservation obligation.
4. Bring a preservation motion only where truly necessary to protect the client’s interests.
5. Use model preservation letters as a basis for crafting a preservation demand appropriate to the circumstances of the case.

### III. CONFERRING WITH OPPOSING COUNSEL

1. **Consider a meet and confer session**: Consider the appropriateness of conferring with opposing counsel early to attempt to agree on preservation and other discovery planning issues.

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24 See the sample preservation order prepared by the Ontario E-Discovery Implementation Committee (Model Document #7).

25 Rule 29.1 of the Ontario Rules of Civil Procedure requires parties to agree upon a written discovery plan for the action that addresses the intended scope of documentary discovery taking into account proportionality issues, dates for service of affidavits of documents, information regarding the timing, costs and manner of production of documents, the names of discovery witnesses, information regarding the timing and length of examinations for discovery, and any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action. The rule requires parties to consult and have regard to the Sedona Canada Principles in preparing the discovery plan. Principle #4 of the Sedona Canada Principles states that “Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of
As an alternative, consider writing to opposing counsel with a proposal with respect to discovery planning, and inviting agreement.

2. **Consider topics of discussion**: Topics for discussion at the meet and confer include the following discovery planning issues:

   **Preservation Steps Taken**
   - preservation steps taken to date to prevent destruction of records
   - physical location of records
   - whether to use a consultant to assist in preservation steps
   - whether to send preservation notices to non-parties (e.g. contractors, vendors)
   - whether any additional preservation steps need to be taken

   **Searches to be Performed**
   - search parameters to be used to locate relevant records, such as:
     - the physical locations to search;
     - custodians whose records are to be searched;
     - authors of records;
     - file types; and
     - the relevant date range
   - whether, in light of the volume of records, it is appropriate to do sampling or to use a phased approach to production
   - whether to produce metadata
   - whether to produce information stored on back up media
   - whether to use a consultant to search for relevant records

   **Exchanging Records**
   - format for exchange of electronic and paper records

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Comment 4.a states that the purpose of the “meet and confer” is to identify and resolve e-discovery related issues in a timely fashion. Meeting early is “one of the keys to effective e-discovery for all sides”.

26 See the model discovery agreement prepared by the Ontario E-Discovery Implementation Committee (Model Document #1), for an annotated and expanded listing of topics for the meet and confer. See also Model Document #9: Checklist for Preparing a Discovery Plan.

27 Recommended default standards for the format of exchange of electronic records are set out in the model discovery agreement prepared by the Ontario E-Discovery Implementation Committee (Model Document #1), at sections 6 and 10.
• whether specific software or hardware must be made available in order to allow electronically stored information to be inspected
• whether to use common litigation support software, and in any event ensuring compatibility between software that is to be used and in the selection and coding of fields (i.e., author, recipient, date, document number, etc.)
• whether to use a common third party litigation support service provider to scan and/or code producible records
• whether to use a common protocol for coding records to be produced and for preparing affidavits of documents
• measures to be taken to protect privilege, privacy, trade secrets or other confidential information (including measures to address inadvertent production of privileged documents)
• whether a cost sharing/allocation agreement is desirable
• time frame for complying with obligations agreed upon
• electronic service of court documents, except if impractical.
• agreement upon the authenticity and integrity of electronic records
• identification of an e-liaison person for each party to coordinate technical issues (i.e., a litigation support clerk at each firm)

**Subsequent events**

• procedure if a party is unable to comply with an agreed step or if compliance becomes too onerous
• procedure where a party requests additional discovery steps beyond those agreed upon
• procedure with respect to inspection of records in their native or original form.\(^{28}\)

3. **Confirm whether session is without prejudice:** Confirm whether the meet and confer session (or part of the session) is without prejudice.\(^ {29}\)

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\(^{28}\) Counsel should consider the effect that entering into an agreement at the meet and confer session will have on their discovery rights. It may be appropriate to enter into an agreement with respect to some issues with a reservation of rights. For sample agreement language dealing with this point, see the model discovery agreement prepared by the Ontario E-Discovery Implementation Committee (Model Document #1), at section 4.

\(^{29}\) It is recommended that counsel agree that negotiations be without prejudice, but that any agreement reached be with prejudice.
4. **Select method of confirmation of agreement:** Consider the most appropriate method of recording the parties’ agreement (e.g., by letter, by formal agreement, by consent court order).\(^{30}\) Consider whether to record areas of disagreement and the basis for the disagreement.

5. **Consider whether to bring a motion:** Consider whether to bring a motion in connection with matters of disagreement.

6. **Hold further meet and confer sessions:** Conduct additional meet and confer sessions as appropriate during the course of the litigation.\(^{31}\)

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**COST REDUCTION TIPS FOR THIS STEP:**

Ways to reduce legal fees:

1. The meet and confer process is itself a means of reducing legal fees, because it has the potential to narrow the scope of discovery, to streamline the discovery process, and to help the parties avoid costly discovery disputes.

2. Counsel: Maintain a checklist of topics to address at a meet and confer session, and a model discovery agreement and/or model confirming letter and/or model discovery planning proposal.

3. Client: Maintain precedent materials describing the organization’s IT infrastructure (hardware, software, and networks) to assist counsel in preparing for a meet and confer session.

4. Seek to agree on the simplest, narrowest and most cost efficient discovery plan that is appropriate to the circumstances of the case.

Ways to reduce consulting fees:

1. Consider carefully whether an outside consultant is required. In some cases, the retainee of an outside consultant is an essential expense, or results in a net cost saving because the consultant’s involvement reduces legal fees. In other cases, using a

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\(^{30}\) See, for example, the following documents prepared by the Ontario E-Discovery Implementation Committee: (1) model long form discovery plan (Model Document #9A); (2) model short form discovery plan (Model Document #9B); (3) sample confirming letter regarding discovery plan (Sample Document #1); (4) model discovery agreement (Model Document #1); and (5) model preservation order (Model Document #7).

\(^{31}\) In most cases, counsel may be able to deal with issues related to preservation, disclosure and production in the early stages. In more complex cases, it may be necessary to deal with various parts of these issues progressively in successive meetings. Principle #4 of the *Sedona Canada Principles* recommends that counsel and parties meet and confer “on an ongoing basis”.
consultant is unnecessary and the associated expense can be avoided or reduced.

In smaller cases:

1. The meet and confer session may consist of a phone call followed by a confirming letter.

2. Except in unusual cases, the parties should agree to a narrow scope of e-discovery using simple methods.

3. The importance of proceeding in a collaborative fashion is particularly acute in smaller matters, where any discovery dispute may result in disproportionately high transaction costs.

IV. COLLECTING RELEVANT RECORDS

1. **Decide who should collect records:** Decide with the client whether counsel or a consultant should be involved in physically collecting the relevant records for delivery to counsel.\(^\text{32}\)

2. **Instruct client on collection:** Instruct the client on proper methods of collection of records, if appropriate.

3. **Keep careful records of the collection process:** Make sure that the parties engaged in collecting the records maintain careful records of all collection steps, and maintain chain of custody documentation.\(^\text{33}\)

4. **Ensure prompt collection:** Ensure that all records are collected promptly and comprehensively from all relevant sources, including third parties, in accordance with the preservation plan and any agreement reached with opposing parties.

5. **Review and assess results of data sampling:** When data sampling is being conducted to confirm whether relevant records are contained within a data set, counsel or the client should review the results of the data sampling and determine whether further

\(^{32}\) Except in rare cases, counsel need not be involved in actually collecting the records.

\(^{33}\) Counsel should be in a position to provide the client with sample chain of custody documentation, to make clear to the client what information relating to the chain of custody needs to be preserved.
sampling, or collection of records, is required.\textsuperscript{34}

6. **Review and assess search results:** When software tools are being used to locate relevant records for collection through the use of search terms or other parameters, counsel or the client should review the results of the searches to determine whether the searches are effective in identifying relevant records. If necessary, modifications to the search terms should be made to ensure that relevant records are located and collected and, to the extent reasonably possible, irrelevant records are not captured (bearing in mind that further filtering can be conducted by counsel during the review stage).

<table>
<thead>
<tr>
<th>COST REDUCTION TIPS FOR THIS STEP:</th>
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<tbody>
<tr>
<td>Ways to reduce legal fees:</td>
</tr>
<tr>
<td>1. Avoid involving counsel in the collection stage. Little if any of the work at this stage requires a direct role for lawyers.</td>
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<tr>
<td>Ways to reduce consulting fees:</td>
</tr>
<tr>
<td>1. Consider carefully whether the client or a consultant should carry out the collection of records. If the client has the ability and knowledge to conduct the collection exercise itself, consulting fees can be saved.</td>
</tr>
<tr>
<td>Ways to reduce employee time:</td>
</tr>
<tr>
<td>1. Employees collecting relevant records should be instructed not to engage in detailed relevance review. It is quicker and more efficient to collect a broader group of records, and then to filter them for relevance using software tools.</td>
</tr>
<tr>
<td>2. Electronic searches can be used to identify collections of records containing relevant material, thereby avoiding the need for detailed manual review by employees in identifying potentially relevant material for review by counsel.</td>
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<tr>
<td>In smaller cases:</td>
</tr>
<tr>
<td>1. There are inexpensive software programs capable of conducting electronic searches of a client’s computer system to locate relevant records.</td>
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<tr>
<td>2. As a matter of proportionality (weighing the cost of retaining a consultant against the dollar value or importance of the case), the use of consultants to collect records in</td>
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\textsuperscript{34} Principle #7 of the *Sedona Canada Principles* states that “[a] party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.”
smaller cases should be rare.

V. PROCESSING AND REVIEWING THE RECORDS

1. **Decide on reviewing software**: Decide on the software tools to be used to filter and manage records collected by the client, such as:
   - e-discovery processing software (which reviews electronic data provided by a client, classifies it by file type, quantifies it, converts it into a form that may be loaded into litigation case management software, etc.)
   - culling software (through which irrelevant records can be culled by filtering based on parameters such as date, author, email suffix, search terms, etc.)
   - de-duplication software (through which duplicates or “near duplicates” are identified)
   - litigation case management software (the tool used to code records as relevant/irrelevant, privileged/not privileged, etc., and to manage records for use in the litigation)
   - webhosted litigation case management software (through which parties may review records remotely through the internet).

2. **Identify who will process the records**: Decide whether counsel or a consultant will conduct the processing, culling, de-duplicating, etc.

3. **Import the records from the client**: Import the collected records received from the client.

4. **Scan and code paper records**: Arrange for scanning and coding of paper records.\(^{35}\)

5. **Assess the resources required in order to review**: Assess the volume of records requiring manual review for relevance, privilege, confidentiality, etc. and assess the human resource and time requirements to review these records. In this regard,

\(^{35}\) Scanning paper documents in a manner so that they are electronically text-searchable greatly increases the ease of searching paper records for relevance, privilege, etc. Note that, ideally, counsel should agree with opposing counsel in advance on the database fields to be coded and the format of coding, to ensure ease of exchange of records.
consider:

- whether to engage in manual review of records at all, or instead to rely upon software tools to search for relevant, non-privileged records (with audits of the search results to confirm the effectiveness of the searches in filtering out irrelevant and privileged records)
- who should conduct the manual review of records (e.g., counsel, contract lawyers, client representatives, etc.)
- what fields are to be coded during manual review (e.g., relevance, privilege, confidentiality, key documents, issues, etc.).

6. **Review the records**: Conduct the manual review for relevance, privilege, etc.

7. **Redact**: Redact privileged or, where appropriate, confidential irrelevant text using a black box or other conspicuous marking.  

8. **Address confidentiality issues**: Address the requirements of any protective order regarding the identification of confidential records.

### COST REDUCTION TIPS FOR THIS STEP:

Ways to reduce legal fees:

1. Use software tools to locate relevant or privileged records, to the extent reasonable and permitted in the circumstances. Seek to reach agreement with the opposing parties on the use of these tools if possible.

2. Minimize to the extent possible the number of records requiring manual review.

3. Use contract lawyers or other lower-priced labour to conduct manual review of records.

In smaller cases:

1. In smaller cases that nonetheless involve large volumes of records, the use of search tools to identify relevant and non-privileged material is recommended in lieu of broad ranging manual review, since the latter could be prohibitively expensive.

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36 Redactions in white are not recommended, as it may not be apparent to the parties receiving the redacted records whether a redaction exists, or its scope.
2. There are inexpensive and easily accessible software programs available for managing and reviewing records in smaller cases.

VI. DISCLOSING AND PRODUCING

1. **Agree on format of disclosure**: Seek to agree with the opposing parties on the format of disclosure (i.e., the format of Schedules A, B and C to the affidavit of documents). In this regard:
   - consider dispensing with unnecessary coding of fields such as the document description field, author, etc. – bearing in mind that the Schedules themselves are unlikely to be used to identify or search for records
   - agreement on coded fields will make it easier to integrate each party’s productions into the opposing parties’ litigation case management software.

2. **Agree on format of production**: Seek to agree with the opposing parties on the format of production. In this regard, consider:
   - whether to produce native files
   - whether to produce OCR versions of scanned paper productions
   - what fields of data to produce (e.g., all metadata, only selected metadata, etc.).

3. **Address privilege and confidentiality issues**: Address privilege issues, as well as issues of privacy, trade secrets and other confidential information. Considerations here include:
   - entering into a “clawback” agreement with opposing parties, under which the parties agree to permit one another to retrieve inadvertently produced privileged records
   - whether to seek an order from the court endorsing or authorizing the claw back arrangement
   - redacting partially privileged or confidential records

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37 Principle #8 of the *Sedona Canada Principles* states that “[p]arties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process”.
determining how to produce native files that are partially privileged.\textsuperscript{38}

4. **Advise client regarding continuing preservation**: Advise the client of the need to preserve, disclose and produce relevant documents on an ongoing basis. This relates to relevant documents created or obtained after initial documentary disclosure.

5. **Advise client regarding deemed undertaking**: Advise the client about its obligation of confidentiality pertaining to opposing parties’ productions.

**COST REDUCTION TIPS FOR THIS STEP:**

Ways to reduce legal fees:

1. Clawback agreements can be effective in allowing a party to conduct their privilege review electronically (with or without manual audits of the results) rather than requiring the party to conduct a manual review of all relevant records for privilege.

2. Reaching agreement at an early stage on the format of disclosure and production can save considerable time spent by law clerks after the fact in seeking to reconcile incompatible production sets.

**In smaller cases:**

1. Production of records in electronic form can be accomplished effectively and cheaply in smaller cases even if counsel or the client does not have access to sophisticated litigation case management software.

**VII. EXAMINATIONS FOR DISCOVERY**

1. **Consider written e-discovery questions**: Consider whether it is appropriate to ask some questions relating to e-discovery in written form in advance of oral discovery so as to make the oral discovery more efficient. If so, contact opposing counsel to obtain agreement to use a combined written/oral process. Consider too whether it would be useful to provide opposing counsel in advance of the discovery with an outline of some technical areas to be covered in order to enable the examinee to become appropriately

\textsuperscript{38} Principle #9 of the *Sedona Canada Principles* states that “[d]uring the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data”.


2. **Review available information**: Review what has previously been agreed upon between the parties with respect to preservation and production. Become familiar with any information provided on a with prejudice basis about the other parties’ IT and records management systems through the process to date.\(^{39}\)

3. **Use precedents**: Maintain and use precedent lists of e-discovery questions.\(^{40}\)

4. **Prepare questions**: Whether the examination for discovery will proceed in writing, orally, or both, allow sufficient time to prepare detailed questions to be asked in respect of electronic records, if appropriate. In this regard:
   - prepare questions designed to confirm whether or not the agreed upon steps at the meet and confer have been taken. Be prepared to question further if there appear to be gaps or inconsistencies with respect to the steps taken and/or there appear to be any issues of spoliation
   - consider questions with respect to any steps that were not agreed upon in the meet and confer stage and not submitted to the court for determination.

5. **Work with a consultant if appropriate**: If a third party service provider has been retained, work with the provider to identify appropriate questions. If not, depending on the nature of the case, consider consulting a third party service provider for the purpose of preparation for the examination.

6. **Address admissibility issues**: Review common law and statutory requirements with respect to admissibility of electronic evidence. See in particular s. 34.1 of the *Evidence Act*, R.S.O. 1990, c. E.23 and ss. 31.1-31.8 of the *Canada Evidence Act*; R.S.C. 1985, c.C-5 to determine what steps must be taken to ensure that the electronic evidence is admissible. Consider any challenges to the admissibility of the opposing party’s electronic evidence.

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\(^{39}\) If the parties have engaged in a meet and confer process that resulted in an agreement on some or all issues, it is still important to ensure that what has been agreed upon forms part of the examination for discovery record. This could in some circumstances be done by making the agreement an exhibit. It is also important to ask questions to confirm what has been done and probe for any gaps or inconsistencies. The agreement can also be used as a template for questions.

\(^{40}\) Useful lists of sample questions can be found in *The Electronic Evidence and Discovery Handbook* (Chicago: American Bar Association, Law Practice Management Section, 2006), especially in Chapter Five. Although designed for U.S. depositions, the lists can be readily adapted for examinations for discovery.
7. **Maintain a reasonably narrow scope:** Consider the scope of the questions: while it may seem useful to obtain everything possible, the information received through very broad undertakings to produce could be overwhelming in relation to the issues.

**COST REDUCTION TIPS FOR THIS STEP:**

Ways to reduce legal fees:

1. Maintain and use precedent lists of e-discovery questions.

2. Be reasonable in assessing the need for oral discovery on e-discovery issues. Much can be addressed through agreement between counsel in most cases.

In smaller cases:

1. Do not spend time engaging in oral discovery on e-discovery issues unless it is of central importance to the case. It is a needless distraction in many instances.

2. The need for agreement on e-discovery matters is all the more acute in smaller cases, where any discovery dispute can be disproportionately costly.

**VIII. ELECTRONIC TRIAL**

1. **Confer with opposing counsel:** Prior to trial, confer with opposing counsel to determine if agreement can be reached with respect to admissibility, the manner of presentation of electronic evidence and, if appropriate, confidentiality.

2. **Follow e-trial checklist:** See Model Document #11: E-trial Checklist prepared by Ontario E-Discovery Implementation Committee, and the companion document “What is an Electronic Trial?”.