E-Discovery[1] Primer for Chartered Business Valuators

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Documentary Discovery

The theory behind the discovery process in civil litigation is that each side gets the opportunity to know the other sides' evidence. This is a timely and complicated process, because parties are required to disclose, with few narrow exceptions, all relevant information and documentation. The upshot of this process is that most disputes settle when all the facts are on the table.

There are two major components to the discovery process. First is the documentary production stage, and second is the oral discovery phase. During the first stage, both parties disclose the relevant documents they have in their power, possession or control.

The term "document" has been given a very broad meaning under *Ontario's Rules of Civil Procedure.* It includes such things as correspondence, internal memoranda, memos to file, diary entries, handwritten notes, rough notes, agreements, invoices, telegrams, bills, notes, securities, vouchers, sound recordings, video tapes, films, photographs, charts, graphs, maps, plans, surveys, books of accounts and information stored or recorded in a computer, or on a disk, tape, or other devices.

The courts also take a broad approach to relevance in this context. Any document that may bear a "semblance of relevance" to any of the issues in the lawsuit is considered to be relevant and must be produced. Relevant documents are not to be limited to those that are helpful or to those which are intended to be used as part of one party's case.

The parties to a lawsuit are required to list all relevant documents in a sworn Affidavit of Documents. In that document, a representative of each party swears that they have made a diligent search of records and that all documentation relevant to the litigation has been listed. The opposing litigant is then entitled to make copies of these documents at their own expense.

Documentary Discovery in the Electronic Age

Traditionally documentary discovery was a fairly straightforward task. Counsel would meet with his or her clients and generally identify the key people that were involved in the facts relating to the claim. Each of these individuals is asked to gather all relevant documents and counsel would compile and review them in formulating the Affidavit of Documents. It is in this context that the rules of discovery were formulated; however, recent technological advances have had a significant impact on the way that organizations deal with information and documents. The modern world generates far more "documentation" than ever before, and this has necessarily impacted the way that litigators undertake the documentary disclosure exercise. In today's world, litigators must consider electronic discovery or "e-discovery" as it has some to be known when dealing with electronic sources of information and "documentation" for litigation.

Electronic information is different than paper information: it is far more voluminous, easily deleted, sometimes recoverable and potentially more costly to review and may contain private or privileged information. Identifying the varied sources of electronic information can be a challenge in itself. In addition to a user's computer, relevant information can be found on other less obvious places such as servers, removable media (e.g. CDs, DVDs, floppies), portable devices (e.g. USB thumbdrives, iPods, external hard drives), communication devices (e.g. Blackberry, PDA, smart phones), and backup tapes. All of these sources can be found in the custody of the litigants or with external third parties such as internet service providers or off-site storage/hosting facilities.

Even after the potential sources of the relevant information have been identified, there are further issues and challenges based on the type and format of the information. These challenges are illustrated with the following questions:

1. This article refers mainly to legislation and practice in Ontario although reference is also made to the Sedona Canada Working Group which covers all of Canada.

- Are only the active files relevant or is a full forensic analysis required (i.e. deleted information)?
- Is the relevant information in an accessible format, or are additional steps required to access the information? (e.g. outdated backup software, encrypted information, legacy accounting system)
- Is file metadata important? (e.g. creation date, modified date, author, etc.)
- Is there privileged, personal, or confidential but not relevant information that needs to be separated before production for litigation from any of the different sources?

Depending on what information is required for litigation and in what media it is stored, the format of electronic information can also add significantly to the overall cost of production.

While the traditional methodology for undertaking documentary discovery still applies, the challenges created by technology have resulted in a judicial attitude of proportionality when it comes to the disclosure and production of electronic information. Courts are becoming more mindful of the effort, time and cost required to be incurred, relative to the benefits. The Sedona Canada Working Group (WG7) has recently released the final version of the Sedona Canada Principles governing electronic discovery (the Sedona Group was originally a U.S. based think tank developing best practices and guidelines for managing electronic discovery). In addition, the Ontario Bar Association Discovery Task Force also produced E-discovery Guidelines that were influenced by the work of the original US Sedona Group.

Courts are deferring to the Sedona Canada Principles with increasing frequency. One recent appeal dealt with what might be considered the core principle of proportionality. For example, *Vector Transportation Services Inc. v. Traffic Tech Inc. et al.*, Justice Perell quoted widely from the Sedona Canada Principles, and observed that "the innovations of technology combined with the ingenuity of advocates can yield an infinite class of information that might satisfy the test of a semblance of relevancy".

Generally, a party's production obligation does not normally require it to create documents. This request often comes up when a database may contain relevant information, but reproduction of the database is impractical or impossible (e.g. customer relationship management system). The court can make an order that a litigant produce new documentation (e.g. generate reports from a database), but such an order is discretionary and the court will analyze how onerous the request is, and balance that against the anticipated relevance and probative value of the evidence being sought.

Despite this general rule, when undertaking documentary disclosure one should consider whether generation of a new document that did not exist prior to litigation from an electronic database makes sense (i.e. a report from an accounting database.). This may be prompted by a request from the other side, or it may simply be a good way to present information in a useful manner. Often, helpful evidence can be extracted. Moreover, during the oral phase of discovery the opposing party will be entitled to obtain through discovery questions whatever relevant "information" or "documents" are contained in electronic records. Hence, the generation of a responsive document is often the most efficient way to address these types of questions. If, at an early stage, the parties can be clear about the information they need, then the litigation process can be effectively streamlined and simplified

Technology to Assist Review of Electronic Documents

It may seem that the use of technology has simply added to the complexity of litigation in the discovery phase; however technology is also part of the solution. There are many service providers that assist in the collection, sorting, review and production of electronic documents, some by using innovative technologies as discussed below.

The use of technology is also not a new concept for many law firms. Many have been using document management applications to assist in the discovery phase and trial preparation for well over a decade now. Years ago, lawyers recognized the benefits of taking hardcopy documents and digitizing them by scanning the documents and pairing the scanned images with a searchable database. Technologies like OCR (optical character recognition) came into use to take the content of the physical document into a digital form to make it electronically searchable and ultimately reduce the volume of non-responsive documents for the producing party to review.

Technology currently used in e-discovery is based on the same concept as the document management systems for digitized hard copy documents, essentially electronic documents are linked to a searchable database. Since most current hard copy documents originated in a digital form, it was only a matter of time before the electronic source documents were sought as a part of discovery. E-discovery focuses on preserving the original source of documents (computers, disks, servers, tapes, etc.) and culling down the non-relevant information (which can be very voluminous with electronic sources).

The rapid growth of the technology services industry related to e-discovery has produced some very powerful tools for assisting counsel and their clients in sifting through the enormous quantities of electronic information common to litigation today. Some technologies focus on the culling of documents by eliminating de-duplication[2], so that when identical electronic documents are identified, counsel only has to review the document once. Other technologies assist counsel in the review stage using techniques like clustering (grouping documents with similar content) or concept searching (identifying documents that might have a relationship to key documents even if it does not exactly match search parameters).

Expert Witnesses' Role in Discovery

With the proliferation of digital information, the "documents" requested during discovery can come in many forms and large volumes. As a result, experts (such as Chartered Business Valuators) are being called upon more often to assist counsel in processing, reviewing, and organizing this information to identify and highlight salient facts, particularly when the subject at the heart of the litigation involves valuation or other specialized expertise. The increased significance placed on electronic documents has expanded the role of the expert in their ability to assist counsel. Now the expert must be familiar enough with e-discovery concepts and be in a position to understand the client's obligations and ability to produce relevant information during discovery. An expert should also be able to recognize when a computer forensics expert or an e-discovery vendor is required to assist in accessing the information that they need for their own work, and they should have a working understanding of the operative legal framework.

Chartered Business Valuators may be called on to act as experts in either a consultative or testifying role. Best practices dictate that counsel be in contact with potential experts early on. Doing so earlier rather than later enables the expert to communicate what data and information he or she needs to best address the questions posed to provide an opinion. In turn, this may shape the evidence that is provided as part of discovery and the scope of relevance in documentary disclosure. For example, an expert may be able to inform counsel early on what data is relevant for the analysis that will ultimately be performed, despite the appearance on its face otherwise. Counsel should work with experts to make sure that the ultimate testifying expert gets the right data early on to support the expert's report.

Early consultation with counsel can also be helpful in structuring and detailing the oral discovery of the other side. Knowing what information the expert wishes to review enables counsel to conduct a more efficient and effective oral examination of the opposing party and get undertakings to provide information needed. Experts can add tremendous value during examination of the opposing party, if he or she can also advise about potential electronic sources of evidence that the opposing party may have in their control.

Expert Witnesses' Working Papers

Experts should bear in mind the capacity in which they have been retained. If an expert is not going to present a report and testify (a consulting expert) his or her notes and working papers may be protected by litigation privilege and will not be subject to disclosure to the other side. The situation is quite different for an expert retained for the purpose of providing testimony. As soon as the expert's report is delivered (as is generally required before trial), any documentation that the expert created or received during the course of his or her retainer will likely be required to be disclosed to the opposing counsel on its request. This means that testimonial experts should be very careful about what documents, including electronic documents, they produce. Computer forensic techniques can be used to resurrect old drafts and opinionated emails. Some counsel often requests a preliminary review and oral opinion before anything is committed to paper. In other instances, counsel may also seek to work with the expert while he or she drafts the report to ensure that clear language that would assist the court is used and to minimize or avoid the exchanging of drafts.

Civil Justice Reform Project

On November 20, 2007 Ontario Justice Coulter Osborne issued his Summary of Findings and Recommendations of the Civil Justice Reform Project to the Attorney General of Ontario. His report focused on reform of the civil justice system to make it more accessible and affordable thus enhancing access to justice for Ontarians. The discovery phase of litigation, in most cases, is the most expensive component of litigation. Given the additional expenses associated with e-discovery, Justice Osborne had specific recommendations with respect to e-discovery.

The report encouraged use of the Ontario Bar Association Discovery Task Force's E-discovery Guidelines and the Sedona Canada Principles through a Practice Direction. Justice Osborne suggests that this could be achieved through the courts refusing to grant discovery relief or appropriate cost awards on a discovery motion where parties have not considered the E-discovery Guidelines or Sedona Canada Principles. Justice Osborne also recommended that the Civil Rules Committee consider ways to more fully incorporate e-discovery concepts in the Rules of Civil Procedure, similar to the direction being taken in the United States.

2. De-duplication is the automated process of eliminating identical documents using specialized software to improve the efficiency of review by reducing redundancy.

What the Future May Hold

The attention that electronic evidence has received from the Canadian legal community demonstrates the importance it will play in the future of litigation in Canada. Likewise, the valuator needs to seriously consider e-discovery and the guidelines developed by the legal community to deal with it; the guidelines have implications relating to what foundational material is ultimately available to the valuator, both as a consulting expert and a testifying expert. As these guidelines, are put into practice, case law will further clarify how e-discovery is carried out and how this will further affect the role of the expert.

As technology plays a greater role in litigation today, the valuator needs to become more familiar with e-discovery concepts and the available solutions. The valuator that can identify situations when to involve additional experts to deal with electronic evidence (and the right kind of expertise) will be in a better position to assist their clients.

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