An overview of E-discovery

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DISCOVERY

Discovery is a pre-trial phase of a lawsuit in which a party obtains evidence from the opposing party. The process can include discovery of documents, oral examinations (called examinations for discovery), and inspection of property. Should you or your business become involved in litigation, in most cases you will be required to proceed to the discovery phase, which brings with it certain obligations.

Under Manitoba's court rules, parties in litigation are required to provide the opposing party with an Affidavit of Documents, which is a list given under oath of every relevant document that is or has been in the party's possession, control or power. Any of those documents that are not subject to privilege must also be provided to the opposing party upon request. Relevance has been interpreted broadly by the courts.

Manitoba's court rules provide that a "document" includes a record in any format. Electronic records are "discoverable": they must be disclosed in litigation.

WHAT IS E-DISCOVERY?

In litigation, E-discovery refers to the discovery of electronically stored information. This can include e-mail, web pages, word processing files, databases – virtually all information that is stored on an electronic device or in an electronic format.

With the increased use of electronically stored information and 'paperless' offices, electronic documents are a routine part of most businesses. This may pose a challenge if you are involved in a lawsuit, because electronic documents are easier to duplicate and will be greater in number than paper documents. For example, one e-mail message could be sent to a number of recipients, who in turn forward those messages to other users, and so on, creating further records. Records may be backed up, archived or stored off-site with a third party. Electronic documents will contain information such as creation dates, edit dates and authors (referred to as "metadata"). Electronic documents can also change over time, whether on their own, or with editing. They may be overwritten by updated information. The sheer volume of records that might conceivably be disclosed in E-discovery may seem overwhelming.

IF YOU ARE INVOLVED IN LITIGATION

If you or your business become involved in a lawsuit, you will have an obligation to take reasonable and good faith steps to preserve electronically stored documents that you would reasonably expect to be relevant to the case. If you do not take those steps, you could face sanctions from the court down the road.

In order to reduce the risk of losing relevant information, it would best to take steps to preserve information as soon as litigation may be on the horizon. You should turn your mind to what information would be relevant or important to the issues at hand in the lawsuit. If a client-related matter, for example, have you maintained all of your e-mail correspondence with your client? If not, are you able to retrieve

deleted e-mails? Is the client information maintained in an electronic file? Have you preserved the client file, or must it be restored from back up?

You should seek legal advice as soon as possible for guidance on how best to prepare for your discovery obligations down the road. The courts and the legal profession have begun to develop some guidelines to deal with the unique challenges associated with E-discovery, but just as technology is evolving, this is still a developing area and some questions remain to be answered. For now, it appears that "proportionality" is a guiding principle when it comes to the extent of E-discovery in a given case. For example, a case where millions of dollars are at stake may be one where extensive and costly E-discovery is justified, whereas a much smaller case should not carry the burden of lengthy and costly production of thousands of electronic documents, unless there is some compelling reason to do so. That said, every case is unique, and obtaining legal advice at the outset is important to ensure that you do not find yourself offside of any of your obligations.

Just as every case is unique, there is no one-size-fits-all answer to the question of how extensive your electronic search and preservation efforts must be. In the majority of cases, however, when you search for relevant electronic documents, your search should be focused on your active data or any information you have stored in a way that would anticipate further use. The scope of searches is meant to be reasonable, in proportion with the scope and extent of the litigation itself.

You should also think about whether there could be metadata attached to the electronically stored information that may be important to preserve, or whether you would need production of metadata from the opposite party. If you would want access to that metadata, it would be prudent to have your lawyer put the opposite party on notice as early as possible in the process in order to avoid a lengthy and complicated process to retrieve it.

From a business perspective, it is always advisable to have policies and procedures in place regarding the maintenance and storage of electronic information, and established processes regarding access and retrieval of the information. That way, if you find yourself in litigation, you will have reduced the risk of losing track of information that might end up being important to the case.

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