



ELECTRONIC DISCOVERY



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Welcome

We are pleased to bring you the first instalment of our newsletter dedicated to electronic discovery.

We recognize that for many lawyers electronic discovery is uncharted territory; riddled with incomprehensible technical jargon and terrifying pitfalls for the novice.

We started this newsletter to assure lawyers that you can learn enough about electronic discovery to become competent in this area. After all, you don't need to know how to build a car in order to drive one! You can add e-discovery tips and tricks to your litigation arsenal while leaving the technical aspects in the hands of the experts.

We also hope that you will participate in our upcoming electronic discovery immersion sessions.

Yours Truly

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The Challenges of E-Discovery: Are You Ready?

There is an old adage that the only thing we can be certain of in life is CHANGE.

As a seasoned litigator you have seen all the tricks in the book, and even used some to good effect in difficult cases. PD3 of 2009 (the "E-Discovery PD") introduces a whole new world of technology-driven discovery which will challenge even the most seasoned litigator.

Prior to the E-Discovery PD, technology-related issues would rarely have featured as an issue of concern for your client, a factor in negotiations with the other side, or in arguments in Court. All this is about to change. With the publication of the E-Discovery PD, technology related issues might well be the straw that breaks the camel's back.

read on....>



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Electronic Discovery in Singapore: Background & Evolution

Discovery involves mutual disclosure of relevant documents by parties to a dispute thereby helping lawyers prepare for the trial. Historically, an index of disclosed documents is written up, and parties exchanged bundles of paper. Today, most documents are created electronically (using a word processor and email), and generated in far greater quantity than in the past. According to recent estimates, 93% of business documents are created electronically and more than 50% are never printed.

As evidence is increasingly likely to be found in digital media rather than printed on paper, the evolution of electronic disclosure or “e-discovery” is both essential and highly anticipated. Electronic discovery involves a high-tech digital trawl through computer systems in search of relevant electronic files and databases, for explicit and hidden data.

Even prior to the publication of the E-Discovery PD, electronic discovery has always been available to litigants under the general principles of discovery (Order 24). However, electronic discovery issues have surfaced only in a handful of local cases. All this is about to change. The E-Discovery PD presents a new E-Discovery Protocol and enlightens us on the Court’s thinking in relation to the disclosure and inspection of electronically stored documents, namely:

- How requests for electronic documents should be made and what details such requests should contain.
- Early and good faith collaboration with the opposing party to reach an understanding on potential electronic discovery issues.
- Whether the duty to disclose extends to the meta-data (hidden data) in the electronically stored documents.
- Duty of the party giving discovery to provide technical assistance, and to identify and remove duplicates of the same document from multiple sources.

A noteworthy point is Paragraph 43G of the E-Discovery PD which provides for copies of electronically stored documents (ESD) to be supplied in “*native format*”. Implicit in this paragraph - *printouts of electronically stored documents (eg, email correspondence) is actively discouraged by the Courts.*

We anticipate that with the passing of the E-Discovery PD, electronic discovery will now become an unavoidable component in most litigation cases. **Post E-Discovery PD, any lawyer who ignores electronic discovery issues and obligations may be jeopardizing their client’s case and risking sanctions of the Court.**

In other jurisdictions, counsel’s mismanagement of electronically stored documents have resulted in adverse inferences by the judge; and in severe cases, have had their cases thrown out without full consideration of its merits. Quite clearly, pleading ignorance will not win you any points with the Judge.



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Why “Electronic” Documents are Different from Paper

For the litigator, electronic documents poses new challenges which did not exist for “paper” documents.

Briefly, these differences are:- a. Electronic documents are normally stored in much greater volume than paper documents; b. Electronic documents contains non apparent data (generally referred to as “metadata”) that provides contextual and other useful information; and c. Electronic documents can be incomprehensible when separated from the systems that created it.

Impact of E-Discovery PD on Litigation

By way of example, here are two common scenarios to illustrate how the E-Discovery PD will affect the way you manage your case:-

Scenario 1: Your client delivers a set of printed emails, and informs you “I believe these are all the relevant emails on this issue”.

Post E-Discovery PD: your obligations require you to enquire about the repositories where emails may be stored, to conduct a reasonable search through the repositories and to advise your client of their duty to preserve the evidence.

Scenario 2: Lawyers acting for the opposing side requests for all “relevant” emails in your client’s PC in its native (digital) format, using a specified search criteria as the measure of “relevance”.

Post E-Discovery PD: it will be increasingly difficult for you to get away with an excuse such as “my client prefers to give you printed copies” as Paragraph 43G of the PD specifically requires electronically stored documents to be delivered in native (digital) format. For your response to be acceptable, you need to establish that the request breaches the requirement of “proportionality” by virtue of inaccessibility and costs.

What does this mean for you as a litigation lawyer?

1. Electronically stored documents (email and Microsoft Word documents) will feature prominently in most business litigation, and increasingly in personal litigation.
2. As a measure of your competence and professionalism, you must develop an “e-discovery sensibility” in relation to your client’s and the opposing party’s electronically stored documents.
3. As the lawyer handling a case that involves electronically stored documents, you must develop the skills and competence to facilitate the electronic discovery process that includes the identification, collection, processing, review and production of evidence in electronically stored documents.
4. Unlike EFS, this is not technology that you can delegate to your support staff as it involves evidence potentially damaging or helpful to your case.



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Bizibody & E-Discovery

As technology consultants with a legal background, the intersection of law and technology is an area that we excel in. In line with our mission to bridge the gap between legal process and technology, Bizibody's goal is to help resource-challenged smaller law firms and in-house counsel develop an awareness of what electronic discovery entails; and equip you sufficiently to meet these challenges face-on.

In particular, we will help you to –

- Build competence in electronic discovery so that you are not disadvantaged or caught out by the opposing party;
- Be aware of technology-driven litigation strategies, software and expertise available today, and how to use them to your advantage;
- Avoid pitfalls and potential court sanctions for failure to comply with your electronic discovery obligations;
- Include electronic discovery tricks and smarts in your litigation strategies when aggressive advocacy is called for; and
- Use knowledge of case law and legal positions in relation to the discovery of electronically stored documents to your advantage.

To begin, we intend to help lawyers expand their “E-Discovery Awareness” by running educational workshops; and by providing a forum for dialogue on electronic discovery issues with litigation practitioners and specialists in this field. We appreciate that this is a new area and there are uncertainties and gray areas; but the E-Discovery PD and existing case law will serve as useful guiding posts.

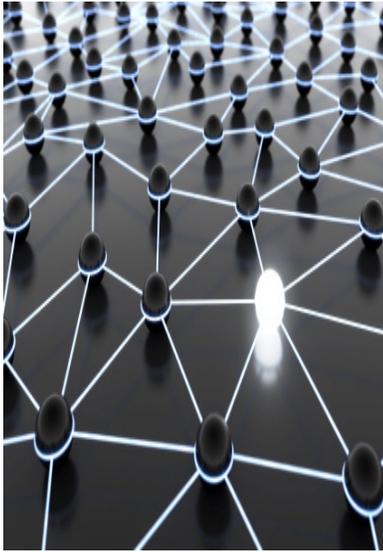
How Bizibody Can Help You

1. Honing your Electronic Discovery Competence

Our E-Discovery Immersion Courses will get participants thinking about and discussing electronic discovery concepts, and related processes and legal issues. Our aim is to help you feel comfortable with electronic discovery; so that you develop your own understanding of where electronic discovery fits into your case preparation and litigation strategies.

2. Getting Ready for Electronic Discovery

Aside from education and thought leadership, we will be working with partners who are experts in this field to provide law firms with electronic discovery support. This one-stop service will enable you to draw on the knowledge and resources of Bizibody and its Partners whenever you need access to expertise, experience, or quite simply, another pair of hands on deck, to manage the electronic discovery component in your litigation case.



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Bizibody's Electronic Discovery Support Services

Our proactive electronic discovery support services comprise:

1. Advising on electronic discovery issues.
2. Implementing early assessment of the volume of electronic evidence involved.
3. Assistance in crafting and formulating your electronic discovery plan and strategy.
4. Assistance in implementing your electronic discovery plan and strategy, including:
 - i. Questionnaires, checklists and advisories.
 - ii. Dialogues and interviews with your client or their IT personnel to identify potential sources of relevant electronic evidence and its accessibility.
 - iii. Assistance in conveying the electronic discovery strategy; including the dos and don'ts to your clients.
 - iv. Crafting electronic discovery protocols, requests, responses and challenges.
 - v. Assistance in brainstorming keywords and sample testing.
 - vi. Assistance in budget and project managing of the electronic discovery components of your case.
 - vii. Setting up electronic discovery processes and work flows in your practice; including digitization, search, and litigation support systems.
 - viii. Creating copies of the electronic documents and indexes in the prescribed formats.
 - ix. Collecting and processing digital evidence, including making forensic copies with chain of custody, de-duplications through hashing function, redactions of privileged data, and forensic reviews of file fragments, and deleted files.
 - x. Provision of electronic discovery inspection rooms and facilities (including computers and software) operators, where additional human resources are required.
5. Legal Research on E-Discovery Case Law.
6. Non Legal Research involving New Media such as Facebook, Twitter and cloud computing.



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