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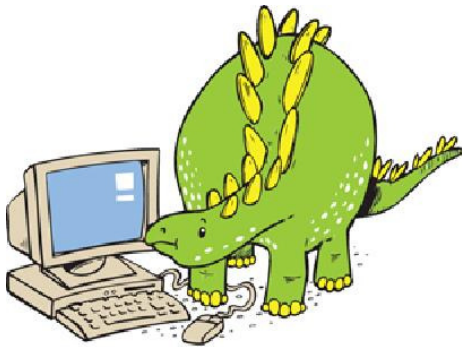
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are you a protodigitaurus?

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Welcome

In this second installment of our Electronic Discovery newsletter, we address the question: **What's The Big Deal about Electronic Evidence.**

The E-Discovery PD is a huge challenge for most lawyers because of its use of unfathomable jargon such as "metadata", "file fragments", "native formats", "forensic data". Although the PD refers to "electronically stored documents" (or ESD) – the use of the word "document" is misleading as it suggests that ESD shares the same characteristics as paper. In this article, we attempt to describe the nature of the beast called ESD; and explain why electronic discovery will only begin to make sense when you move away from a paper-centric paradigm. Managing ESD in discovery requires a different mindset, sensibilities, methods and even language.

To explain the "Big Deal" about electronic discovery, we offer a summary of Singapore and UK case law. These cases throw light on judicial thinking on the issue of discovery of electronic documents and forms a good starting point for getting acquainted with your obligations under the E-Discovery PD.

Yours Truly

Serena Lim
 E-Discovery Projects

Moving Away from Proto-Digital

The difference between electronically stored documents or ESD and paper documents is the crux of the issue; and the key to understanding your discovery obligations under the new Practice Direction.

Lawyers think of electronic evidence as analogous to paper records. There is actually a term for this mindset. It is called "*Proto-Digital*" (or first generation digital).

In the *Proto-Digital Age*, the reference point is paper. Computers are merely word processing tools designed to help the user create paper documents faster and more conveniently than using a type-writer.

Typically, users will print every document for reference and safekeeping. Even the language we use when referring to computer output – "*spreadsheets*", "*electronic mail*", "*electronically stored document*" reflects a proto-digital mindset; similar to the way we used to refer to the radio as "*wireless telegraph technology*" and motorcars as "*horseless carriages*" at the turn of the last century.

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Electronic discovery will only begin to make sense when you move away from a paper-centric paradigm. Managing ESD in discovery requires a different mindset, sensibilities, methods and even language. Let's start by explaining how ESD is different from paper documents.

The Nature of the Beast

**Vast and ever expanding,
Capable of mutation and deception,
Defying destruction with tell-tale signs.**

A. It Can Be ANYWHERE

Electronic evidence reside not only in your computers, but also in your phone, your iPod, the GPS system in your car, your camera or video-recorder in your office, your home and on your person... electronic data is multi-dimensional and takes many forms: databases, text files, images, audio or video clips.



too much information

Significance of Its Pervasiveness

The ever-expanding range of data repositories, storage locations and file types means that (i) your clients themselves may not be aware of the existence of such evidence or where they might be stored; and (ii) different technical expertise may be needed to identify, collect and preserve the data.

B. It is HUGE

ESD is far more voluminous than paper documents –

- a. Electronic mail is now the primary mode of written communication. Email messages tend to be written on-the-fly and sent off with less caution. The spontaneity and casualness of email correspondence has made email the unavoidable subject of electronic discovery in litigation.
- b. Convenience & Ease of Storage. The ease of creating, copying and disseminating electronic documents has caused ESD to outpace its paper counterpart by leaps and bounds. Once created, ESD is rarely destroyed. Storage of electronic documents uses a merest fraction of the space and cost that paper requires. A single DVD costing less than fifty cents is able to store 100,000 sheets of A4 sized paper. For this reason, corporations seldom destroy out-dated electronic data; it is merely “archived”. In 2007, the digital universe was estimated to be 281 billion gigabytes or an average of 42.6GB of data per person¹.

Significance of Its Voluminous Quality

The vast amount of electronic data has to be identified, collated, searched, reviewed and somehow organized by relevance and importance to the litigation at hand. The traditional method of having a lawyer read each and every potentially relevant piece of electronic data would take too long and cost too much in most cases.

C. It may be INDESTRUCTIBLE

The virtually “indestructible” nature of ESD is a principal difference between ESD and paper. Hitting a “delete” or “trash” key on your computer rarely destroys the data in the same way you shred a paper document as it is possible for forensic experts to recover and piece together the missing data from file fragments in your hard disk using special forensic tools.

Significance of Its Indestructibility

Lawyers need to be aware of this unique characteristic of ESD and the data forensic expertise available in the market today. The ability to retrieve or restore “deleted” data presents opportunities and obligations for counsel.

D. It may be INVISIBLE

Unlike paper documents (what you see is what you get), ESD contains data invisible on the screen. Document “*metadata*” is information about the document not apparent on the face of the document. Generally, metadata contains information on the date of creation, date of modification, date of access, and authorship. Metadata can also comprise substantive information such as the formulae used in a spreadsheet, tracked changes and comments. Understandably, metadata may sometimes have more significance as evidence than the original “apparent” content.

Another property of metadata is that it is fragile and can be inadvertently modified by normal handling of the ESD.

Significance of Document Metadata

Whether in your client’s favour or not, metadata is often relevant evidence in the litigation. For this reason, lawyers must be aware of the presence of metadata and recognise situations where it is necessary to retrieve and preserve the metadata. Due to the fragile nature of metadata, lawyers must also advise clients on the proper handling of ESD so that the metadata is not inadvertently modified before trial.

What’s the BIG DEAL in Electronic Discovery?

The Big Deal is this:

A. E-Discovery will form an increasingly significant part of your (and your opponent’s) fact-finding case strategy

The law follows social development. Whether you like it or not, ESD is here to stay – technology for the creation and transmission of electronic data has evolved into an omnipresent facet of commercial and interpersonal transactions. **Dispute scenarios will inevitably involve electronic data in some form** or other because email, soft copy documents, instant messaging, audio and video files, SMS and data posted on social media platforms is how we communicate on a daily basis. Electronic discovery of ESD will not be restricted to large commercial claims; they are likely to feature even in garden variety matrimonial disputes, breach of contract and other civil claims.

Pre-trial discovery and the presentation of evidence in court are **truth-seeking processes central to the administration of justice**. The E-Discovery PD addresses the potential problems arising from the unique characteristics of ESD by providing much needed guidance for counsel and judges. Corporations too, will find the PD useful as they implement policies to organise and manage their ever-growing mass of ESD.

B. Failure to observe the E-Discovery Rules can result in a striking out, adverse inference and cost implications.

In Singapore, leading cases on e-discovery - *Fermin Aldabe v Standard Chartered Bank*²; *K Solutions Pte Ltd v National University of Singapore*³; *Alliance Management v Pendleton Lane*⁴; - are hugely significant in that they show the importance the Law Courts have placed on the preservation and disclosure of electronic evidence.

In the United States and England where the equivalent E-Discovery rules have been in place for a longer time, the Law Courts have penalised litigants who do not take their electronic discovery obligations seriously.

In the UK, Judge Simon Brown QC in *Earles v Barclays Bank Plc* ([2009] EWHC 2500), sounded a clear warning to counsel - in relation to Practice Direction 31 2A Electronic Disclosure (the UK equivalent of the Singapore E-Discovery PD) – “*those practising in the civil courts are expected to know the rules and practice them; it is gross incompetence not to*”.



Possible consequences of your failure to meet the E-Discovery obligations include -

- **Incurring the cost and expense of a repeat discovery exercise** - *Digicel (St Lucia) Ltd and Others v Cable & Wireless Plc and Others* ([2008] EWHC 2522);
- **Having your case struck out** - *K Solutions Pte Ltd v National University of Singapore* ([2009] SGHC 143);
- **Having an adverse cost order made against you** - *Earles v Barclays Bank Plc* ([2009] EWHC 2500).

In *K Solutions Pte Ltd v National University of Singapore*, a case which turned upon the failure of the Plaintiff to preserve ESD, Justice Woo Bih Li struck out the Plaintiff's case on the basis that they had deliberately destroyed ESD. He warned that a litigant's disregard of its obligation to preserve electronic evidence arising out of *negligence or reckless conduct* may result in a striking out.

Similarly, in *Fermin Aldabe v Standard Chartered Bank*, in relation to the production and inspection of ESD, Yeong Zee Kin SAR warned litigants to be aware of the pitfalls in electronic discovery in these terms:

"I need only mention that this case turned out to be an object lesson in the pitfalls in electronic discovery which could have been avoided had parties heeded the admonition in Digicel (St. Lucia) Ltd & Ors v Cable & Wireless Plc & Ors [2008] EWHC 2522 (Ch)."

C. E-Discovery PD will change the way you prepare your case, your case strategy and determination of the outcome of your case.

Although the Courts have chosen to frame the E-Discovery PD in the context of Order 24 (Order 24 naturally precedes the advent of electronic evidence), the approach taken in the E-Discovery PD is beyond "proto-digital". Instead, PD 3 of 2009 gives full cognisance of the unique characteristics of ESD (see the "Nature of the Beast" above), and prescribes methodologies relating to the discovery and inspection of ESD which differs radically from discovery and inspection of paper documents, including:

1. Judicial acceptance that in this digital age, the sheer volume of ESD makes it impossible for any party to adopt a comprehensive review of each piece of data for relevance.

In the words of Lord Justice Jacob LJ in *Nichia Corporation v Argos Ltd*⁵: *"Perfect justice" in one sense involves a tribunal examining every conceivable aspect of a dispute. All relevant witness and all relevant documents need to be considered. And each party must be given a full opportunity of considering everything and challenging anything it wishes. No stone, however small, should remain unturned. But a system which sought such "perfect justice" in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases....."*

As such, the E-Discovery PD prescribes the adoption of a keyword search methodology⁶ with reference to documents repositories and periods during which the ESD was created, modified or received.

In the E-Discovery PD, the volume of ESD, together with other related factors; such as (i) the ease and expense of retrieving any particular ESD, (ii) the likely significance of the ESD to the case; are key factors to be considered in determining whether an application for discovery and inspection of ESD should be granted.

Judicial encouragement for parties to **collaborate in good faith** and to agree on the scope of discovery and inspection of ESD (See Paragraph 43B of the E-Discovery PD).

² [2009] SGHC 194

³ [2009] SGHC 143

⁴ [2007] 4 SLR343

⁵ [2007] EWCA Civ 741

⁶ Paragraph 1 of the sample Agreed Electronic Discovery Protocol in Appendix E Part 1 of the E-Discovery PD

2. Judicial encouragement for parties to **collaborate in good faith** and to agree on the scope of discovery and inspection of ESD (See Paragraph 43B of the E-Discovery PD).
3. Judicial encouragement not to print out ESD, and to present them in their **native format** (See Para 43G of the E-Discovery PD).
4. Judicial guidance in the handling of **metadata information** - (i) metadata information is discoverable; and (ii) internally stored metadata information may not be removed or altered without leave of court. It also sets out the procedure for a party claiming privilege over metadata information. (See Para 43A(3) and 43G(2) of the E-Discovery PD).
5. Judicial recognition (both explicit and implicit) of the **role of technology and computer experts** in the discovery and inspection of ESD in:
 - i Keyword Searches (see Para 43C(2) of the E-Discovery PD)
 - ii Identifying duplicated documents using a hashing function (see Para 43E(3) of the E-Discovery PD)
 - iii Production of ESD in its native format (see Para 43G of the E-Discovery PD)
 - iv Forensic inspection of a hard drive or electronic database (see Appendix E Part 2 of the E-Discovery PD)
6. Judicial recognition that the party providing discovery of ESD (in its native format) must also provide the **means and assistance to inspect the ESD in its native format** (see Para 43F(1) of the E-Discovery PD). This would include the provision of a computer, appropriate software that enables viewing of the ESD, and a computer operator.

The E-Discovery PD has far-reaching and profound implications on the way lawyers prepare for their cases as well as on the outcome of their cases. The E-Discovery PD will radically impact on Counsel's interaction with their clients, opposing counsel and the Law Courts.

D. ESD and E-Discovery presents opportunities for lawyers to develop special skills in this emerging area

For litigation lawyers who are up to the challenge, E-Discovery and electronic evidence provides opportunities to develop specialists skills in this emerging area. Large global firms have established specialist e-discovery teams that oversee the management of ESD elements in litigation.

A new breed of lawyers with special expertise in e-discovery legal issues -“E-Discovery Practitioners”⁷ are called in on a project basis to provide critical input on E-Discovery related issues. They are also consulted by corporations on appropriate document retention policies and litigation readiness. Global consulting firms such as Deloitte⁸ have also set up Forensic & E-Discovery Teams.

Understanding Electronic Evidence: Bizibody Workgroup Sessions

The transition from the proto-digital paradigm which has shaped our approach to legal practice for all of our professional lives will take a while. Yet the implications of the E-Discovery PD are grave enough for litigation lawyers to give thought to how they should approach this beast called ESD; and how quickly they can achieve an adequate level of understanding and competence in this area.

Like learning a new language, we believe that the intersection between technology and the law can best be experienced through a mix of guided discussions, scenario-based learning, live demos and sharing with litigation practitioners, e-discovery consultants and data forensic experts. Bizibody Technology working with the Singapore Academy of Law and E-Discovery Specialists will be organizing a series of Workgroup Sessions in the New Year focused on the discovery of evidence and related legal issues. If you are interested to attend any of these learning & networking sessions, please complete the attached **Faxback Form** or visit our website at **www.bizibody.biz/e-discovery**.

⁷ Seamus E. Byrne - <http://www.seamusbyrne.com> and Darren Cerasi - <http://www.i-analysis.com.sg>

⁸ Deloitte Discovery - <https://www.deloittediscovery.com.sg/>