

e-Discovery

a significant issue for all cases



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Chair, Discovery Task Force

When the Discovery Task Force delivered its report in late 2003, it was aware of the growing importance of what is now known as electronic discovery.

The Rules of Civil Procedure in Ontario provide in Rule 1.03 that a document includes information in electronic form.

In 2004, a sub-committee of the Discovery Task Force was formed to consider issues relating to electronic documentation and discovery, as it was recognized that e-issues presented challenges not previously encountered in the discovery process.

As e-issues began to appear, it was believed that they applied almost exclusively to multi-party, large document cases. What has become apparent with the short passage of time is that e-issues are significant for even the most standard of cases. This has been seen in employment/trade secret cases most prominently.

There are several reasons that e-issues require a somewhat different approach from the discovery of paper documents:

1. The sheer volume that is produced on a daily basis when text messaging (e-mails) are involved was previously unimaginable.
2. Some electronic documentation thought to be destroyed in the ordinary course can be revived by a search of hard drive and/or back-up tapes, often at considerable cost.
3. E-documentation will often contain a mixture of business and private communication within the same documentation.
4. Storage of a large volume of e-documentation can be costly. Without a recognized protocol, claims of spoliation can arise.
5. Protection of privacy has become more prominent and this requires the periodic removal of personal information from databases.

These issues extend beyond those involving litigators and litigation to many aspects of the operations of business and government. The Discovery Task Force (DTF) concluded that changes to the *Rules of Civil Procedure* would not be an appropriate mechanism to address all of these issues. The DTF Report recommended the development of best practice/guidelines in various areas of litigation practice. The most prominent of these are guidelines for the retention, disclosure, production and discovery of electronic communications.

e-Discovery has been recognized in other jurisdictions as an issue requiring consideration. Of these, the United States, the United Kingdom and Australia are the most prominent. One interested U.S. group, the "Sedona Conference," has promulgated e-Discovery principles and is in the process of developing guidelines.

The Discovery Task Force has co-operated with this Sedona group and expects to post the first draft of the e-Discovery Guidelines on the Ontario Courts Web site in mid-fall. These Guidelines are intended to help members of the Ontario bar deal with e-Discovery issues. They also will be on the agenda at a full-day CLE program on November 28, 2005, sponsored by the Ontario Bar Association and The Advocates' Society.

In the interim, LAWPRO has dedicated this issue of its risk/practice management publication to the issue of e-Discovery. The articles on the following pages – all contributed by expert members of the Task Force – will help familiarize the bar with e-Discovery and the implications of electronic documents and discovery for their law practices.