

# E-Discovery Strategies

A dozen tips for requesting and producing parties.

BY CRAIG BALL

Two characteristics that distinguish successful trial lawyers are preparation and strategy.

Strategy is more than simply doing what the rules require and the law allows. Strategy requires we explore our opponent's fears, goals, and pain points—and our own. Is it just about the money? Can we deflect, distract, or deplete the other side's attention, energy, or resources? How can they save face while we get what we want?

In a world where less than one in 100 cases are tried, discovery strategy—particularly e-discovery strategy—is more often vital than trial strategy. Yet, strategic use of e-discovery garners little attention, perhaps because the fundamentals demand so much focus, there's little room for flourishes. As lawyers, we tend to cling to one way of approaching e-discovery and distrust any way not our own. If you only know one way of doing things, how do you act strategically?

Strategic discovery is the domain of those who've mastered the tools, techniques, and nuances of efficient, effective discovery. That level of engagement, facility, and flexibility is rare but you can still be more strategic in e-discovery even if you've got a lot to learn.

Here are a dozen e-discovery strategies for requesting and producing parties.

## E-Discovery Strategy for Requesting Parties

1. Anticipate sources: Just because you don't know all sources of potentially relevant information held by your opponent doesn't

mean you can't anticipate many such sources.

2. Be specific in your preservation demand. Use it to inform and close doors.
3. Lose the boilerplate discovery request. Electronically stored information, or ESI, isn't just another flavor of "document."
4. Set the agenda for discovery conferences (e.g., under FRCP Rule 26.4) in writing and afford sufficient time and direction to respond.
5. Demand production of items in native forms when static image productions will serve to hide content or impair utility and searchability.
6. Be prepared to articulate the objective behind any request, especially for data and metadata.
7. Gear the timing of e-discovery to ensure readiness for depositions.
8. Always scrutinize the capabilities and limits of your opponent's electronic search methodology.
9. Know what you want most: discovery or sanctions. You may have to choose.
10. E-discovery is a marathon, not a sprint. Tenacity pays off but you have to lay the groundwork (i.e., make the proper record) supporting what you seek.
11. Come to court armed with metrics. One good example is better than all your suspicions.
12. Always be prepared to address proportionality objections.

## E-Discovery Strategy for Producing Parties

1. Initiate a legal hold immediately and draft the hold notice with its discovery in mind.
2. Never accept anything is gone

without verification, especially when dealing with IT staff.

3. Always respond to preservation demands with a written notice of what you will and won't do.
4. Be proactive, not merely responsive. Have a reasonable e-discovery plan in place at the outset and counter unreasonable demands with reasonable proposals.
5. Requesting parties are so anxious to get something they will often agree to anything before they appreciate how much it will hurt them. Exploit this and get their concessions in writing.
6. Seek to shift costs whenever feasible, even when you will not prevail.
7. Come to court armed with metrics. Carefully quantify cost and burden. Use genuine numbers, not absurd extrapolations.
8. Promote use of highly precise keyword searches as they are least helpful to opponents.
9. Test to ensure your searches pick up known responsive and privileged items.
10. Avoid categorical representations about ESI as they rarely survive scrutiny.
11. Impose reasonable parameters limiting collection and search (e.g., custodian, interval, file types).
12. As rational, demand reciprocity in preservation, collection, search, and production. **TBJ**

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