

ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

MODEL DOCUMENT #9:

CHECKLIST FOR PREPARING A DISCOVERY PLAN

Purpose of the document

Rule 29.1 of the Ontario *Rules of Civil Procedure* requires parties to an action to agree upon a discovery plan before proceeding with discovery.

This checklist provides a list of steps that may usefully be taken by parties and their counsel in the negotiation of an appropriate discovery plan for their case. The checklist is detailed, but not all steps will be required in all cases.

Discovery plan templates

The E-Discovery Implementation Committee (EIC) has also prepared two model precedents for a discovery plan – a long form template (Model Document #9A) and a short form template (Model Document #9B). Both templates are designed to incorporate all of the elements of a discovery plan mandated by Rule 29.1. Parties are invited to use and adapt these templates as appropriate for their case. Counsel may consider it appropriate to use the short form discovery plan in cases under Rule 76 or in other matters involving relatively straightforward or narrow legal and documentary production issues.

For a more comprehensive model agreement dealing with discovery issues, see Model Document #1: Discovery Agreement. For an example of a letter agreement confirming the elements of a discovery plan, see Sample Document #1: Letter Confirming Discovery Agreement. The EIC has also prepared an Annotated E-Discovery Checklist (Model Document #8), which is a comprehensive checklist designed to address all of the steps to be taken with respect to the preservation, production and use of relevant documents in a litigation matter, with annotations throughout on how to minimize e-discovery costs.

The discovery plan templates and all of the EIC's model documents and other publications are available on the Ontario Bar Association's website at:

http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx

Overview of requirements of Rule 29.1

Rule 29.1.03(3) requires that the written discovery plan address:

- a. the intended scope of documentary discovery under rule 30.02, taking into account relevance, cost and the importance and complexity of the issues in the action;

- b. the dates for service of the parties' affidavits of documents
- c. the timing, cost and manner of production of documents by the parties and any other persons;
- d. the names of discovery witnesses and information regarding the timing and length of the discoveries; and
- e. any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

In considering whether proposed steps in the discovery process are proportionate, parties must take into account the importance and complexity of the case, the amounts and interests at stake, and the costs, delay, burden and benefit associated with each step, among other things.

Rule 29.1.03(4) expressly directs parties to consult and have regard to *The Sedona Canada Principles Addressing Electronic Discovery* (the “*Sedona Canada Principles*”). The *Sedona Canada Principles* are a set of national guidelines for e-discovery in Canada, which reflect both existing legal principles and a set of identified best practices.¹

Rule 29.1 requires that the discovery plan be prepared in the early stages of the litigation, before discovery begins. Rule 29.1.04 also requires parties to update their discovery plan during the conduct of the action. Under Rule 29.1.05, the court may refuse to grant discovery relief or to award costs if the parties have not agreed upon or updated a discovery plan.

Note regarding use of this document

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Feedback on EIC materials

The EIC welcomes comments on all of its model documents and other publications. Any comments or suggestions can be provided to Michele A. Wright at mwright4@toronto.ca.

ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

CHECKLIST FOR PREPARING A DISCOVERY PLAN

PHASE I. ISSUE IDENTIFICATION AND SCOPE OF DISCOVERY

1. **Identify the issues in the litigation.**
 - The parties should begin by identifying each cause of action and each defence raised in the action and the heads of damages. (The objective of the discovery plan is to assist parties in identifying and focusing on the important issues in the litigation in order to promote fair, expeditious, and efficient results.)
 - It will be helpful for the parties to prepare, exchange and attempt to agree on outlines of the causes of action, defences and heads of damages in advance of the discovery plan negotiations.
2. **Identify the applicable legal tests.**
 - For each cause of action, each defence and each head of damages, identify the specific legal test to be met or responded to (in order to articulate reasons why particular evidence may be relevant).
 - Again, this is best accomplished by agreement in advance of the discovery plan negotiations.
3. **Consider, for each legal issue, the type of evidence required by each party.**
 - For each cause of action, each defence and each head of damages, identify the type of evidence required to prove or defend that element of the case (*e.g.*, testimony, documents, other evidence), as part of the analysis as to the nature and scope of potentially relevant records.

PHASE II. IDENTIFICATION OF RELEVANT RECORDS

4. **Identify, for each issue, the location of relevant records held by each party.**
 - The purpose is to identify the location of all potentially relevant documents² in both paper and electronic formats.
 - In respect of each cause of action, defence and head of damages, consider and identify:
 - a. the individuals who had a role in the relevant events on behalf of the party, whether as a decision-maker, implementer, observer, or otherwise;

- b. other individuals who had a role in the events, as a decision-maker, implementer, observer, or otherwise, including agents of the party, consultants, or unrelated third parties and others; and
 - c. other potential sources of records (including banks, accountants, lawyers, insurers, third party service providers, affiliated companies or internet service providers, for example).
- In identifying sources of documentary evidence, consideration must be given to how a party creates, stores, and maintains electronic records generally.³

5. Identify the types of potentially relevant records held by each party.

- Consider with respect to each party and individual/organization identified above as an anticipated source of evidence:
 - a. what types of documents it is anticipated that those individuals/organizations created or obtained that may be “relevant to an issue in the action”;⁴
 - b. during what time period is it anticipated that such records would have been created, obtained, archived, backed up and/or destroyed; and
 - c. where these records may be located, if they still exist.⁵
- Prioritize who the most important records custodians are likely to be, the key time frames, and the most important and easily accessible locations where records are likely held.
- Where there are multiple copies of certain types of information, identify the sources that are the most readily available and easiest to preserve and retrieve.

PHASE III. PRESERVATION AND RETRIEVAL OF POTENTIALLY RELEVANT RECORDS

6. Agree what is to be preserved by each party⁶ and how urgently the preservation measures must be taken.⁷

- For each party, consider and determine:
 - a. whether an e-discovery consultant or computer forensics specialist is needed in order to preserve and collect relevant records;
 - b. whether to preserve more broadly (such as by making forensic/bitmap copies of hard drives and servers, with culling for relevance to occur later) or more narrowly based on specific relevance parameters;⁸
 - c. whether forensic/bitmap copies of hard drives, servers or portable devices

- are needed for other reasons, such as in order to preserve the machine or device or for other evidentiary reasons;⁹
- d. what methods are to be used to search for the client's records, including the possible use of indexing software and other search tools;
 - e. whether and to what extent to preserve metadata¹⁰;
 - f. whether to preserve archival and backup media and, if so, whether to seek to retrieve specific records from the archival and backup media;¹¹
 - g. whether and how to seek to preserve deleted or residual data or records that use obsolete hardware or software;¹²
 - h. the cost associated with all contemplated preservation steps and resources required
 - i. the cost associated with retrieval of all preserved records;
 - j. what constitutes a proportionate preservation response,¹³ taking into account the amounts at issue, the importance of the case, the importance of various types of files, the total volume of material to be preserved, and retrieved and other factors;¹⁴
 - k. the risks associated with not undertaking the contemplated preservation steps; and
 - l. what steps will not be undertaken due to the cost, burden or delay associated with doing so.
- Consider what documentation shall be maintained to demonstrate compliance with the preservation measures agreed upon.
 - Record the basis for decisions. Such a record may be important if parties are required to later defend a decision as having been reasonable, particularly where parties have (unilaterally or jointly) decided not to take a particular step or not to preserve or retrieve particular types or categories of records.
 - Consider whether amendments to the pleadings are likely to be made and consider whether or how to preserve other records that may become relevant and the cost/benefit of taking such steps at the outset or in the future.
 - Reference to the EIC's Model Document #8 (Annotated E-Discovery Checklist) is encouraged for further information regarding considerations relating to the preservation, review and production of electronic records in particular.

PHASE IV. SEARCHING AND FILTERING RECORDS

7. **Agree upon the parameters to be used in isolating records to be produced from within the records that have been preserved.**
- Within the subset of materials to be preserved, consider and discuss how to identify the relevant records for production and, if appropriate, use electronic tools and processes to assist in doing so.¹⁵
 - Consider a phased approach to identifying relevant documents, based on the key custodians, record types or locations or other factors identified above.¹⁶
 - Relevant electronic records may be identified using:
 - a. Keyword search terms (such as employee names, key words in the litigation, names of persons on the other side, etc.) using Boolean, whole language and fuzzy electronic searching tools;¹⁷
 - b. date range; and
 - c. file type.¹⁸
 - Consider also using electronic analytic tools for clustering records, for concept mapping, for deduplicating records and for identifying e-mail strings.
 - Relevant records may also be sought in some or all specific physical locations, whether in hard copy record storage or on servers, desktop computers, laptops, home computers, PDAs such as Blackberrys or Palm Pilots, floppy disks, CDs, DVDs, zip drives, backup media, external hard drives and USB (“thumb”) drives.
 - Conduct a cost/benefit analysis. For all contemplated steps, evaluate what constitutes a proportionate response, taking into account: the amounts at issue; the importance of the case; the importance of various types of files;¹⁹ the total volume of records that may be generated;²⁰ the cost and resources required in undertaking particular steps; and other factors.²¹
 - Record the basis for the decisions made, particularly decisions made not to take a particular step. Consider whether there are any variables the full scope or impact of which cannot be assessed that may impact timing or cost.²²

PHASE V. REVIEW OF RECORDS

8. **Agree upon a protocol for reviewing and refining the records identified in any initial search as potentially relevant.**

- Consider again whether a phased approach to reviewing records may be appropriate, based on the same cost/benefit considerations as outlined in Step #7 above.
- Identify what measures can be taken to eliminate duplicate records.²³
- Identify what measures are to be taken with respect to private, personal or commercially sensitive information identified in the course of the search and review.²⁴
- Consider how processing and review of the records will be managed to ensure completeness, to track information as it is collected, and to avoid delays. Identify whether the use of specific software or specialist services are appropriate.
- Record the basis for the decisions made, particularly decisions made not to pursue a particular step.

PHASE VI. EXCHANGING RECORDS

9. Establish a protocol for the exchange of relevant records.

- Consider and, if possible, agree upon:
 - a. the format for exchange of electronic and paper records (whether in paper, native file formats or .tif format, for example).²⁵ The production of electronic records in electronic form is to be preferred;²⁶
 - b. whether specific software or hardware must be made available in order to allow electronically stored information to be inspected;
 - c. whether to use a common third party litigation support service provider to scan and/or code or process producible records;
 - d. whether to use a common protocol for coding records to be produced (which is important to facilitate the exchange of records between parties) and for preparing affidavits of documents;
 - e. measures to be taken to redact documents;²⁷
 - f. other measures to be taken to protect privilege, privacy, trade secrets or other confidential information (including measures to address inadvertent production of privileged documents);²⁸
 - g. whether a cost sharing/allocation agreement is desirable; and
 - h. a time frame for complying with obligations agreed upon.
- Consider again whether a phased approach to producing records may be

appropriate, based on the same cost/benefit considerations as outlined in Step #7 above.

10. Consider whether agreement can be reached or procedures are required to ensure the authenticity and integrity of records.

- Identify specific procedures to be implemented to ensure the authenticity and integrity of producible electronically stored information.²⁹

PHASE VII. EXAMINATIONS FOR DISCOVERY

11. Agree whether to exchange “contextual facts” in advance of oral discovery.

- Contextual facts are the facts required in order to place other facts in their appropriate context. Examples of contextual facts that parties might wish to exchange in advance of oral discovery, in order to streamline the discovery process and reduce cost and delay, include: casts of characters, organizational charts, corporate structure charts, chronologies of events, IT infrastructure maps, information regarding the source of documentary productions, and the parties’ records retention policies, among others.

12. Identify who is to be produced for discovery as the representatives of each party.

- Consider whether it would facilitate the discovery process to produce more than one representative per party, with each representative to be examined on a limited range of topics within their personal knowledge (with one representative to answer any other proper questions).

13. Establish dates when oral examinations for discovery are to be conducted, and confirm the number of hours of discovery to be conducted by each examining party.

- Rule 31.05.1 limits the duration of oral examinations conducted by any one party to seven hours, regardless of the number of parties or persons to be examined, unless the parties consent or leave of the court is obtained.
- If an increase in the number of hours for the conduct of examinations for discovery is to be negotiated, identify the considerations militating in favour of such an increase of time, and how much additional time is to be allocated.
- For simplified procedure actions, oral discovery is limited to 2 hours. A longer period of oral discovery is not permitted: Rule 76.04(2).

PHASE VIII. OTHER FORMS OF DISCOVERY

14. **Agree whether part or all of the discovery is to be conducted through written questions and answers.**
- Consider and, if appropriate, agree whether some questions may be asked in written form in advance of oral discovery so as to make the oral discovery more efficient.
 - Review Rule 35 regarding the procedure for written discoveries.
 - Note that a party does not have the right to conduct both written and oral discovery except with leave of the court: Rule 31.02. However, the parties may consent to conduct both written and oral discovery.
 - Written discovery is prohibited in simplified procedure actions: Rule 76.04(1).
15. **Consider whether the inspection of property is required.**
- Under Rule 32, the court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding. In cases where an inspection of property is appropriate, the parties should seek to agree in the discovery plan on the terms under which the inspection will occur.
16. **Consider whether a physical or mental examination of a party is required.**
- Under Rule 33, a party may bring a motion for an order for the physical or mental examination of a party whose physical or mental condition is in question. In cases where a physical or mental examination is appropriate, the parties should seek to agree in the discovery plan on the terms under which the examination will occur.

PHASE IX. OTHER ISSUES

17. **Address the possibility of changes to the discovery plan.**
- Parties should agree that, as additional information becomes available throughout the action, it may become apparent that: (a) it is impracticable or impossible for a party to complete all of the steps contemplated by the discovery plan or to do so in a cost and time-efficient manner, or (b) further steps, beyond those set out in the discovery plan, are required in order for a party to obtain access to relevant documents in the action.
 - Parties should agree to notify each other promptly of such changes in

circumstances and agree to negotiate in good faith with respect to any potential changes or, in appropriate cases, seek the assistance of the court.

- Note that Rule 29.1.04 requires that the parties ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03(3).

18. Consider whether it is appropriate to share the reasonable costs required to comply with this discovery plan.

- In general, parties may claim the reasonable costs incurred in complying with the discovery plan as “costs of and incidental to a proceeding or a step in a proceeding” for purposes of s. 131 of the Courts of Justice Act. Parties should consider whether it is appropriate to agree upon a different allocation or sharing of costs.

¹ A copy of the *Sedona Canada Principles* may be downloaded from www.thesedonaconference.org, where they are found under the list of publications for Working Group 7. http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs170 with the actual PDF at: http://www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf.

² The word “document” is used in this Model Document in its broadest sense, as meaning “information recorded in any form, including electronically stored information”. The word “document” is used interchangeably with the word “record”.

³ Comment 3.c. of the *Sedona Canada Principles* recommends that counsel be prepared in a substantive way to discuss their client’s documentary discovery and production obligations with opposing counsel by gaining “a thorough understanding of how electronically stored information is created, used and maintained by or for the client.” To this end, it is useful for counsel to ask the client and its IT representative to complete an IT questionnaire, or to provide information orally in advance of the discovery plan negotiations, regarding:

- a. system architecture (network structure, geographic location of hardware, etc.);
- b. types of hardware and software used by the client;
- c. what forms of potentially relevant electronically stored information exist, such as emails, word processing documents, databases, Excel documents, voice mail records, web-based files or metadata;
- d. methods of data storage, such as on servers, desktop computers, laptops, home computers, PDAs such as Blackberrys or Palm Pilots, floppy disks, CDs, DVDs, zip drives, backup media, external hard drives and USB (“thumb”) drives;
- e. data storage by third parties such as banks, accountants, lawyers, insurers, third party service providers, affiliated companies or internet service providers;
- f. the client’s backup protocol, including types of backups performed and their schedule;
- g. the physical location of backup media;

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- h. procedures for retrieving data from backup media;
 - i. the client’s archiving protocol, if applicable, and procedures for retrieving data from archives;
 - j. costs and resources required to retrieve information from backup and other storage media; and
 - k. any retention policies and/or schedules for the systematic destruction of paper and electronic records.

For sample IT questionnaires, see *The Electronic Evidence and Discovery Handbook* (ABA Law Practice Management, 2006) at pp. 3 and following.

⁴ Rule 30.02 and 30.03 are amended effective January 1, 2010 to require that every document “relevant to any matter in issue” be produced. The broader language of “relating to any matter in issue” is repealed effective January 1, 2010.

⁵ Review the party’s record retention policy, if one exists. Consider providing written litigation hold notices to all employees, contract workers and third parties who may be custodians of potentially relevant documents to inform them of the need to preserve these documents in their original format without modification. Consider involving the client’s IT department in the litigation hold process. A description of the litigation hold obligation, and a sample litigation hold notice, are found in the EIC’s model memorandum to a corporate client regarding documentary discovery (Model Document #3).

⁶ Principle #3 of the *Sedona Canada Principles* states that “As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information”. The *Sedona Canada Principles* also recognize, however, that “it is unreasonable to expect organizations to take every conceivable step to preserve all electronically stored information that may be potentially relevant” and a “reasonable inquiry based on good faith to identify and preserve active and archival data should be sufficient.”

⁷ Determine immediately whether there are urgent preservation issues because relevant records may be destroyed, altered or removed in the short term, whether by your party/client, other parties, or non-parties. For example, consider: whether the litigation is concerned with very recent or ongoing events, such that there is a risk of destruction of relevant records in “real time”; the frequency with backup media may be recycled; whether there is any email deletion policy; the possibility of alteration to electronic records that are in continuing use, such as databases or portable devices including smart phones; destruction of potentially relevant records in the ordinary course pursuant to a records retention policy; and the possibility of a relevant hard drive, portable device, etc. being scrubbed or otherwise rendered inaccessible (e.g., the personal computer of a departing employee). Refer to the EIC’s Annotated E-Discovery Checklist (Model Document #8).

In addition, consideration should be given to sending a preservation letter to the opposing parties or their counsel as soon as litigation is commenced, and sometimes before. Consider that several preservation letters may be useful as the action proceeds and parties are able to better define the scope of preservation in terms of date range, record types, custodians, search terms, etc. See the EIC’s model preservation letters (Model Documents #5 and #6) and the model preservation order (Model Document #7).

⁸ Preserving broadly and then using culling software to identify relevant records will in some cases be quicker and more efficient than seeking to identify relevant records on an individualized basis. Consider what volume of information will have to be stored outside of the day-to-day business environment and the costs for any additional hardware or software or services that may be required.

⁹Comment 4.c of the *Sedona Canada Principles* suggests that “[w]hile the making of bit-level images of hard drives is useful in selective cases for the preservation phase, the further processing of the total contents of the drive should not be required unless the nature of the matter warrants the cost and burden. Making forensic image backups of computers is only the first step in a potentially expensive, complex, and difficult process of data analysis. It can divert litigation into side issues involving the interpretation of ambiguous forensic evidence.” Note that it is difficult in practice to make a forensic copy of a server, as servers are typically not able to be brought out of service for copying. However, in a smaller organization, the simplest and most effective way to preserve electronic evidence may be simply to make a forensic copy of the drives.

¹⁰ Metadata is information about a particular data set or document which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Metadata can be altered intentionally or inadvertently. It can be extracted when native files are converted to image. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed. Counsel are encouraged to refer to the EIC’s Annotated E-Discovery Checklist (Model Document #8) for additional information regarding metadata.

¹¹ Relying upon backup media in order to locate relevant records is generally costly and inefficient. Backup media should be preserved only where they contain unique information that cannot otherwise be obtained, or where other special circumstances apply.

¹² Principle #6 of the *Sedona Canada Principles* states that “A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.” Comment 6.a suggests that deleted or residual data that can only be accessed through forensic means should not be presumed to be discoverable and ordinarily, searches for electronically stored information” will be restricted to a search of active data and reasonably accessible online sources. The “evaluation of the need for and relevance of such discovery should be analyzed on a case by case basis” as “only exceptional cases will turn on “deleted” or “discarded” information”.

¹³ Rule 1.04(1.1) states that, in applying the rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

¹⁴ In considering the proportionality principle, note that extreme preservation efforts should not be requested except in unusual circumstances: Comment 3f, *Sedona Canada Principles*. Consider also the party’s own ability and willingness to undertake the same preservation steps, since any preservation demand made of opposing parties may be reciprocated. Also, make sure to maintain careful records of the preservation and retrieval plan as it is implemented. Counsel should consider whether to send written confirmation to the client, documenting the preservation plan.

¹⁵ Principle #7 of the *Sedona Canada Principles* states that parties may satisfy their obligations “by using electronic tools and processes such as data sampling, searching and/or the use of selection criteria to collect potentially relevant electronically stored information.” Comment 7.a indicates that, as it may be impractical or prohibitively expensive to review all information manually, parties and counsel should where possible agree in advance on targeted selection criteria. Comment 7.b suggests various processing techniques to use in searches including filtering, de-duplication, sampling and validation.

¹⁶ Consider which custodians, time frame and/or locations are likely to produce the most significant information. Also evaluate whether there are alternate sources for information that may no longer be

available or may be burdensome (whether due to cost or time) to retrieve, process, review, and/or produce. In a phased approach, the parties may agree, for example, that the records of specific custodians or found in specific locations are to be searched for relevance as part of a first phase, and then, after a review of those results, parties may consider whether or what additional steps are required in a second phase to search for and/or produce additional records.

¹⁷ Obviously, narrow search terms will yield a more manageable volume of records, but parties face the risk of inadvertent omission of relevant records. The selection of appropriate search terms requires legal judgment, and the search results should be tested to evaluate whether relevant records are being caught. Consider collaborating with counsel for the other parties regarding appropriate search terms and developing search terms with advice from key individuals involved or from a review of the key documents identified (to identify commonly used terms or names, for example). Keep careful records of the search terms and tools used and techniques employed.

The search tools used can also affect the reliability of the searches conducted. Determine whether your search tools permits only keyword searching, or also permits Boolean, whole language and fuzzy searching. Some tools permit concept mapping or clustering of related records using algorithms which analyze the records and look for patterns in the words used within the record.

¹⁸ In most cases, the vast majority of electronic records will consist of e-mail, word processing documents and data within databases.

¹⁹ Electronic searches for relevant records may omit nested emails, attachments, or compressed, encrypted or corrupted files, depending upon the process and software used. Address whether this is a concern.

²⁰ Pursuant to Rule 29.2.03, the court will consider the overall volume of documents that may be produced in response to a request before granting an order for production.

²¹ Principle #5 of the *Sedona Canada Principles* states that “The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.” Comment 5.a suggests that, given the volume and technical challenges associated with the discovery of electronically stored information, the parties engage in a cost benefit analysis, weighing the “cost of identifying and retrieving the information from each potential source against the likelihood that the source will yield unique, necessary and relevant information”. Counsel are encouraged to exercise judgment based on a reasonable good faith inquiry having regard to the location and cost of recovery or preservation. The more costly and burdensome the effort that will be required to access a particular source “the more certain the parties need to be that the source will yield responsive information”. Comment 5.a suggests that, if potentially relevant documents exist in a format that is not “readily usable”, cost-shifting may be appropriate. Refer to the EIC’s Annotated E-Discovery Checklist (Model Document #8), which provides more detailed suggestions regarding steps to be considering in preserving, collecting, and processing and reviewing records.

²² Parties should advise each other forthwith if, at any stage of the process, information becomes known that will impact on their ability to comply with their discovery plan obligations – for example, if records are discovered to be corrupt or inaccessible for a reason unknown at the time that the discovery plan was agreed upon.

²³ Consider, for example, whether there are types of emails, office documents or file types that can be automatically removed from collection (such as social notices, marketing, emails from lists, and news sources). Consider the use of technology to remove duplicate copies of records, facilitate identification

and tracking of email chains, etcetera. Refer to the EIC’s Annotated E-Discovery Checklist (Model Document #8) for additional suggestions and information.

²⁴ For example, counsel may consider employing a combination of electronic search techniques and manual review to identify private, personal or commercial sensitive information.

²⁵ Principle #8 of the *Sedona Canada Principles* states that “[p]arties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.” See the EIC’s Annotated E-Discovery Checklist (Model Document #8) and the model Discovery Agreement (Model Document #1) for an annotated and expanded list of topics to consider. Also, it may be necessary to deal with certain issues in successive meetings during the proceedings; Principle 4 of the *Sedona Canada Principles* recommends that counsel and parties meet and confer on an ongoing basis.

²⁶ Comment 8.a of the *Sedona Canada Principles* states that “production of electronic documents and data should be made only in electronic format, unless the recipient is somehow disadvantaged and cannot effectively make use of a computer, or the volume of the documents to be produced is minimal and metadata is known (and agreed by all parties) to be irrelevant”. Comment 8.a suggests that the practice of producing electronically stored information in paper form should be discouraged in most circumstances. Comment 8.b and 8.c suggest that parties attempt to agree on “methodology of production that (a) preserves metadata and allows it to be produced when relevant; (b) communicates accurately the content; (c) protects the integrity of the information; (d) allows for the creation of a version that can be redacted; (e) assigns a unique production identification number to each data item, and (f) can be readily imported into any industry-standard litigation review application”. Recommended default standards for the format of exchange of electronic records are set out in the model Discovery Agreement prepared by the EIC (Model Document #1), at sections 6 and 10.

²⁷ Do not redact documents using white, as it may not be clear whether redaction has occurred or the extent of the redaction. Use black.

Also, if redacting electronically, ensure that the method of redacting images of electronic records also removes the associated text. Otherwise, the text will remain searchable even if the text is not visible within the image.

²⁸ Principle #9 of the *Sedona Canada Principles* states that “[d]uring the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data”. Consider, for example, entering into a “clawback” agreement with opposing parties, under which the parties agree to permit one another to retrieve inadvertently produced privileged records. To mitigate the risk of inadvertent disclosure of privileged documents, conduct searches for the names of counsel, for example, during the search and review phase to identify potentially privileged documents. Consider how metadata and embedded data will be reviewed when native production is required.

²⁹ Section 12 of the EIC’s model Discovery Agreement (Model Document #1) contains suggested provisions regarding authenticity and reliability.