

Electronic Discovery
New Federal Rules Of Civil Procedure
Implications Of Non-Compliance With The Federal Rules

**Electronic Data Assessment and
Compliance Review**

Policies and Responsibilities
Strategies, Design, and Implementation
Records Process and Controls
Monitoring and Auditing
Training
Litigation Hold
Evidence Collection and Preservation
Electronic Data Production Planning

Litigation Assistance

Basic Considerations for Attorneys
Preparing For Litigation
Responding To Litigation



Percento Consulting is a multi-disciplined consulting firm. We provide professional consulting services with specialization in Information Technology, Electronic Data and Information Management, and Litigation services. We work closely with our clients to define our role on each project. By combining our clients' objectives with our consultants' expertise, we are able to develop a cooperative and successful approach to solving the challenges our clients face.

Our unique blend of talent comes from the combined experience of our senior executives and staff in both Information Technology (IT) and litigation. Our senior personnel are experienced with an array of technologies and applications and have served as experts and advisors on matters in litigation over the past decade. The unique blend of technical, commercial, and litigation experience within our organization allows us to serve as a vital partner to organizations and their legal counsel when facing the challenges of electronic information issues, litigation preparedness, and litigation response.



Electronic discovery (also called e-discovery or eDiscovery) refers to any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case. E-discovery can be carried out on a particular computer or it can be done in a network of computers. Electronic discovery also expands to include digitally stored voicemail, and information contained on personal digital assistants (PDAs) such as Blackberry devices and Palm Trios. Court-ordered or government sanctioned forensic extraction of electronic information for the purpose of obtaining critical evidence is also a type of e-discovery.

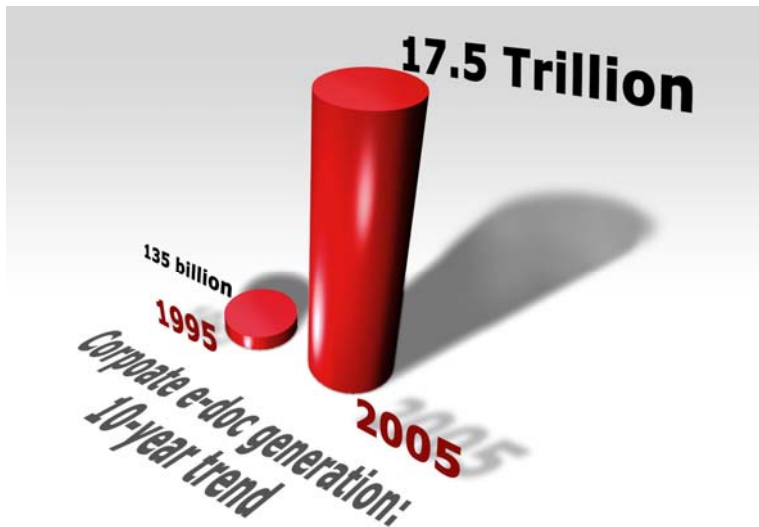
The nature of digital data makes it extremely well-suited to investigation. Digital data can be electronically searched with ease, whereas paper documents must be scrutinized manually. In the process of electronic discovery, data of all types can serve as evidence. This can include text, images, calendar files, databases, spreadsheets, audio files, animation, Web sites, and computer programs. Electronic mail (e-mail) can be an especially valuable source of evidence in

Overview

What is Electronic Discovery?

civil or criminal litigation, because people are often less careful in these exchanges than in hard copy correspondence such as written memos and postal letters.

The volume of corporate information created and stored electronically has increased dramatically in recent years. From 1995 to 2005 the estimated magnitude of electronic documents has increased by a staggering rate as illustrated in the following chart:



When an organization becomes a party in a lawsuit, often the opposing party seeks access to this electronically-stored information. Standard discovery procedures allow a party to request all relevant materials from an opposing party. This includes the discovery of electronically stored information, or e-Discovery.



In response to the obvious increase in electronically produced information, the Federal Government has updated the Federal Rules of Civil Procedure, which govern how lawsuits are conducted within U.S. courts.

On April 12, 2006, the U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure concerning discovery of electronically stored information. On December 1, 2006, the electronic discovery-related amendments to the Federal Rules of Civil Procedure went into

New Federal Rules of Civil Procedure

effect. With the new Federal Rules in effect, electronic discovery is more rigorous.

When an organization becomes a party in a lawsuit, often the opposing party seeks access to this electronically-stored information. Standard discovery procedures allow a party to request all relevant materials from an opposing party. The new Federal Rules of Civil Procedure now place a greater burden than ever before on parties to a lawsuit to preserve and produce electronic information. Accordingly, businesses need to reexamine their data backup and storage capabilities, policies, and procedures for electronic discovery or risk getting penalized during civil suits.

The new Federal Rules put the onus on IT departments to ensure they have adequate data-retention policies and an archiving system that can retrieve documents in their original format, including metadata. To satisfy evidence requirements the systems may need to demonstrate that specific documents were not changed after they were archived.

Because the rules apply to civil suits, any organization -- not just public companies or those in financial services and other data-sensitive markets -- can be affected.



If a company is not able to produce required data or show that it had a good-faith policy in place, it could face legal sanctions including spoliation, in which the jury is told that the company cannot produce potentially damaging evidence and is left to infer what that evidence could have been.

The following are a few examples of cases and rulings by the Courts in which parties have been penalized or sanctioned for their failure to properly conduct themselves or respond to electronic discovery issues in accordance with the Courts' requirements:

PML v. Hartford (E.D. Mich 2006)
“There is a point beyond which bumbling and blindness to a party’s discovery obligations sufficiently resembles the sort of...malicious conduct that calls for ... judgment by default.”

Implications of Non-Compliance with the Federal Rules

Mastercard v. Moulton (S.D.N.Y 2004)

"[Defendants] appear simply to have persevered in their normal document retention practices, [disregarding] their discovery obligations. The absence of bad faith, however, does not protect defendants from appropriate sanctions, since even simple negligence is a sufficiently culpable state of mind... [for] spoliation"

April 2007 Edition of InsideCounsel

A string of internal screw-ups could lead to sanctions for Intel Corp., which disclosed in March it may have lost e-mails it was required to produce in an antitrust case....

Despite sending notice to some of its employees to retain their e-mails, Intel neglected to inform about 400 employees to stop deleting files. In addition, some of their employees, whom Intel did not notify, wrongly assumed the company kept an archive of their e-mail. Because employees never transferred their e-mail messages to their hard drives, the e-mail system deleted the messages after a certain amount of days.

Since the incident, Intel has stated that it plans to implement an e-mail archiving system rather than relying on employees to comply with litigation holds.

The above examples are illustrative of the importance of proactively preparing for electronic discovery issues and properly handling electronic discovery through the litigation process. Percento Consulting is uniquely equipped to assist and advise clients prior to the occurrence of litigation and to work with clients and their legal counsel during the litigation process to ensure proper measures are taken relative to electronic discovery.



Percento Consulting provides electronic discovery preparedness consulting to companies, law firms, and other business entities and organizations to ensure compliance with rules and regulations governing Electronically Stored Information (ESI) discovery and retention policies. Percento Consulting advises clients and provides services relative to electronic discovery preparedness in the following areas:

**Electronic Data
Assessment and
Compliance Review**

- Policies and Responsibilities
- Strategies, Design, and Implementation
- Records Process and Controls
- Monitoring and Auditing
- Training
- Litigation Hold
- Evidence Collection and Preservation
- Electronic Data Production Planning



Percento Consulting assists a wide range of clients in the review, analysis, and establishment of cohesive policies and procedures for records and information management. Records and information management practices include the creation, collection, usage, modification, maintenance, archival, retention, and elimination of electronically stored information.

Compliance with Federal Rules relative to the duties and obligations associated with electronic information is of critical importance. In an analysis of policies and procedures relative to records and information management, consideration should be given to the following critical questions:

- Do you have a board-approved records management policy statement that obligates all employees to create and maintain records in accordance with the stated requirements of the organization?
- Does the policy contain specific references to other key policies that have a records management component to them (e.g., information security policy, business continuity planning), procedures/documents that are intended to describe the technical requirements of the records management policy?
- Has your organization assigned a senior manager (Executive Sponsor) to oversee compliance with and execution of the elements contained in the records management policy and associated procedures?

Policies and Responsibilities

- Has your organization identified specific records management authorities/responsibilities vested in each employee as part of his or her defined work requirements?

Percento Consulting assists its clients in the recognition, assessment, creation, implementation, training, monitoring, and testing of electronic records and information management practices.



Non-compliance in the regulatory environment can result in significant fines or penalties. There are numerous laws, regulations, and standards relating specifically to the management of records, evidence, and information received or created by organizations. Some of these requirements are not well-publicized, so research and understanding is necessary to identify applicable statutory requirements, legislation, and professional standards and to define retention periods that minimize risk.

Organizations should understand the need for and develop the best practice processes that will allow for properly established strategic classification plans, disposition and retention schedules, and migration and technical conversion plans. In an analysis of strategies, design, and implementation relative to electronic records and information, consideration should be given to the following critical questions:

- Has a formal risk assessment been undertaken and a subsequent report been prepared that identifies existing dangers to your organizational records?
- Has a formal design of the organization's records system "Roadmap" been completed that takes into account the strategies, tactics, requirements, and documented deficiencies that emerged in prior investigatory stages?

Strategies, Design, and Implementation

- Has the formal design been structured to include specific user roles, access rights management, authentication mechanisms, and other tools to ensure the integrity of records against unauthorized alteration?

Percento Consulting assists its clients in determination and evaluation of strategies, design, and implementation of technology solutions that allow organizations to operate efficiently while mitigating risks associated with discovery compliance issues.



The development of legally acceptable retention and disposition processes is arduous and time-consuming, but the ability to make records available according to specifically mandated periods of time is crucial. Keeping materials too long can be costly and burdensome while not keeping the materials long enough can pose a risk of loss or sanction from a legal standpoint. Any records and information technology implementation (hardware and software applications) must provide for the accurate and detailed inventory of all records types, the ability to establish defined retention periods, and the ability to tightly govern and manage the processes for permanent disposition, including archiving, releasing, or eliminating information.

When establishing an organization's records process and controls, consideration should be given to the following critical questions:

- Does the business activity classification system used by your organization include a three-level hierarchy specifying general business function, activities comprising each business function, and transactions or records associated with those activities?
- Has the business activity classification system been constructed with primary input from employees and managers who are charged with creating and managing existing records?

Records Process and Controls

- Has an authorized vocabulary list or list of basic defined terms been compiled and published for use by your employees?
- Have records retention determinations been based on the following:
 - Legal, regulatory, and administrative requirements;
 - Use of existing record types, including their use in the creation of other records and/or systems;
 - Internal/external influences such as the interests of various stakeholders; and
 - Comparisons to records reflecting similar activities within the system?
- Has a security and access classification been applied to all records that take into account key considerations such as personal privacy, intellectual property rights and commercial confidentiality, national security issues, legal and other professional authorizations?
- Are all critical processes included in the organization's existing records management framework, such as collection, metadata identification and preservation, classification, access and security, storage, tracking, and temporary and permanent disposition?
- Are the storage and handling technology selections for organizational records based on the appropriate key factors?
- Have appropriate technology choices been made to ensure retention, preservation, and continuing access to those records with long-term duration?



Integrity and authenticity are two of the critical elements of the records and information management processes that are examined by the courts during the e-discovery and document production process.

Applications and processes used to manage information

Monitoring and Auditing

should support the validation of its integrity and authentication. These applications and processes should validate who did what to the information, when they did it, who authorized it, what happened to the information next, where it had been stored, how long it was kept there or whether it is still there, and whether anyone else reviewed or changed it.

Percento Consulting assists its clients by working with designated individuals within an organization to monitor and audit the records and information management processes that have been implemented. Monitoring and auditing of these processes is a critical component of compliance. As technologies change, period monitoring and auditing of critical processes is necessary to ensure that new technologies, employees, and systems are compliant with existing processes and procedures.



Rapidly changing technology and evolving business processes require that training programs be assessed and revised regularly to ensure that the training enables staff members to remain compliant with electronic records and information management.

Training

Percento Consulting assists its clients in the evaluation and implementation of appropriate training programs to ensure up to date and ongoing compliance among an organization's employees.



The unintentional destruction of significant electronically stored information is much more likely to occur with electronic discovery than it is with traditional paper-based files. This is largely due to the routine deletion or altering of data performed in the everyday operation of most IT systems. For example, some organizations routinely purge email files based on the availability of storage space and the age of the files.

Litigation Hold

Courts have long held that the duty to preserve relevant information not only exists during litigation, but extends to the period before litigation when a party should have reasonably anticipated litigation, or when a party should have known that

evidence may be relevant to anticipated litigation.

This understanding by the courts creates unique and critical challenges for organizations in the age of electronic data and information. Once litigation is reasonably anticipated, a party must implement a systematic "litigation hold" in order to ensure good faith action.. The litigation hold process essentially creates a snap-shot of all electronic information relevant to a matter in litigation from a given time period forward. Once the hold is in place, it becomes less likely that electronic data will be lost through routine destruction.

An organization's failure to quickly and effectively respond to anticipated litigation, and implement a litigation hold relative to its electronically stored information, can have devastating effects on the outcome of litigation. Preservation must be taken seriously in order to avoid sanctions, which can include fines, a negative inference instruction to the jury, and even default judgment by the court.

When evaluating an organization's ability to comply with the critical litigation hold process, the following questions should be considered:

- Does your organization's record retention policy provide for a litigation response plan?
- Does your organization have a defined methodology for communicating to employees and third parties to preserve potentially relevant records or other electronically stored information (ESI) subject to a potential litigation or investigation?
- Does your organization monitor employees and relevant third parties to ensure they have preserved the appropriate data, as well as require an employee or related third party to respond affirmatively that the notice has been received and the party will comply?
- Can your organization create a data topology map of all sources of potentially relevant paper and ESI including information such as data source, type, and volume?
- Does your organization's litigation response plan include a protocol for preserving potentially relevant ESI within backup tapes and deleted files contained

within key employee computer hard drives?

- Does your organization have a procedure for notifying employees and related third parties to resume normal document/data retention practices after the litigation has been resolved?
- Does your litigation notice require employees to notify a designated person if potentially relevant records may be lost or destroyed?

Percento Consulting assists its clients with recognition, evaluation and implementation of the litigation hold process. In addition, Percento Consulting works with our client organizations to facilitate communication and confirmation of the litigation process with outside legal counsel.



In the ordinary course of business an organization is not required to save all documents and data within the company. However, once the duty to preserve has been triggered, information must be preserved and collected in a manner that is useful and compliant with the Federal Rules.

At the commencement of litigation, and before receiving any formal discovery request, a party must disclose to opposing parties certain information, including a description by category and location of documents and electronically stored information.

Technical e-discovery protocols will help ensure that an organization's discovery plan is the most technically accurate and efficient plan for the organization. In order to comply with discovery rules while maintaining productivity and minimizing the cost and resource burden on an organization, the following key factors should be considered:

- Does your organization have a discovery plan in place prior to involvement in any litigation and one that is applicable on a uniform organization-wide basis?
- Does your discovery plan include contact information and outline roles and responsibilities for individuals on the discovery team?

Evidence Collection and Preservation

- Does your discovery plan include data gathering procedures?
- Has your discovery plan been reviewed by counsel and a technical e-discovery expert?
- Does the plan include a template of interview questions for key employees (individual employees, department/business unit leaders, and third parties) related to the potential litigation?
- Does your organization have an inventory of IT systems and data architecture (e.g., employees' computers, servers, data storage units, tape backup drives, software applications)?
- Can your organization map its IT assets and data repositories to relevant/related individual employees, departments, and business units?
- Does your organization utilize backup tapes as a storage media for disaster recovery longer than specified?
- Does your organization include backup tapes in its discovery plan? Can your company easily produce a document detailing how data is backed up, including types of tape drives, backup software used, and the backup rotation schedule?
- Does your discovery plan include creating a forensic image of certain key computers?
- When collecting documents and electronic data from key players to the litigation, do you also consider collecting copies of removable media?
- When collecting documents and data from key players to the litigation, do you also consider collecting copies of potentially relevant files from their company-supplied home computer?
- When collecting documents and data from key players to the litigation, do you also consider collecting data

from their personal data assistant device (PDA) and/or cell phones?



The new Federal Rules direct parties to discuss electronic discovery early in the life cycle of a lawsuit. However, the planning and confirmation of an organization's ability to implement appropriate electronic data production should begin long before the discovery conference imposed by the Courts.

Percento Consulting assists clients in the planning and implementation of electronic data production. As a technical and communication bridge between an organization's internal information management team and outside counsel, Percento Consulting advises clients through the process of electronic discovery and assists counsel with at least a high-level understanding of the systems from which the data was retrieved.

Early preparation for electronic data production is an essential component of efficient implementation and cost effective action. In planning for the electronic discovery process, organizations should consider the following:

- Does your organization have an internal discovery team?
- Are there internal information technology professionals that are members of the discovery team? Are there external legal members of the team? Are there internal records and information management professionals that are members of the team? Are there external technical consultants who understand the legal process that are members of the team?
- Does your legal team adequately understand your records retention policies and practices as well as your information technology infrastructure?
- In the discovery process, does your organization de-duplicate data prior to production?

Electronic Data Production Planning

- Does your organization have a procedure in place to preserve the “chain of custody” of collected evidence?
- Before you start searching potentially relevant documents and data, what steps do you take to guarantee that the original data collected can’t be altered in the data analysis process?
- Are all of your search, review, and analysis activities repeatable?



Percento Consulting assists its clients in the preparation and response to litigation or internal compliance audits. Percento Consulting works with organizations and their legal counsel in developing consistent, repeatable and defensible processes and systems for responding to discovery/audit requests and or preservation orders.

The recently amended Federal Rules of Civil Procedure generally address how litigants must deal with electronic discovery, but unfortunately do not provide detail on how to design and implement a system for compliance. Percento Consulting’s inter-disciplined team of technical, commercial, and legal experts have the knowledge and experience necessary to work with IT professionals and outside legal counsel alike.

Percento Consulting’s combination of technical expertise and its practical understanding of business and legal processes allows for organizations and their legal counsel to proactively plan for and react to electronic discovery requirements in litigation.



In preparing for electronic discovery, attorneys should, at the very least, have a basic understanding of their client’s IT infrastructure. The following is a list of practical and relevant procedures and practices attorneys should consider when taking on a case involving electronic discovery:

- Acquire a basic understanding of the duties and

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Basic Considerations for Attorneys

obligations with respect to electronically stored information imposed by the Federal Rules, and learn the key holdings by the *Zubulake* court.

- Understand the duty to preserve as it applies to your client's case, communicate it to your client, and have a plan in place to implement it and handle litigation hold issues.
- Prepare your client for the tremendous costs and potentially massive disruption associated with e-discovery.
- Know your client's claims and defenses early.
- Acquire a basic understanding of your client's electronically stored systems, electronically stored project controls, relevant databases, accounting systems, email systems, voicemail systems, etc.
- Learn your client's IT system/infrastructure early and know their policies regarding storage of data.
- Never, never permit or rely on your client to comply with litigation holds, implement preservation plans or comply with e-discovery requests.
- Retain the right consultant who will see to it that your client's IT department has properly preserved electronically stored information (under the consultant's direction) and properly complied with appropriate e-discovery requests (once again, under the consultant's direction). The consultant will manage your client's preservation and compliance obligations.
- Be prepared for the inevitable challenge of advising your client on preservation and litigation hold issues in the face of an on-going project with a staggering amount of complex electronically stored information that is dynamic in nature.
- Reach agreements early with opposing counsel regarding party managed e-discovery.
- Be prepared for mistakes and problems. Early intervention by a good consultant coupled with your early

and active involvement in this process will reduce the number and severity of mistakes and problems.

- Understand metadata; have early discussions with your client and with opposing counsel about preserving and producing it.
- Do not delegate e-discovery to paralegals or young, inexperienced lawyers.
- Emails are a trap for the ignorant, naïve, and unknowledgeable attorney. They are ubiquitous, extremely dynamic and require special treatment and agreements by the parties.
- Remember e-discovery is a means to an end, not an end unto itself. Instill this principle into the party managed discovery process so that proportionality and practicality are key goals.



Percento Consulting works with legal counsel in multiple capacities that are custom tailored to the needs of each client. Our common services to the legal community include:

Education on Technology:

Percento Consulting educates legal professionals about technology in clear, understandable terms. With assistance from Percento Consulting, attorneys and other legal professionals can learn the basic language used by their IT counterparts and how to accurately and effectively describe an organization's IT infrastructure to a judge or another lawyer.

Serve as a Bridge of Communication:

Percento Consulting understands the litigation process and the duty to preserve information. Our professionals and senior executives have worked with attorneys on hundreds of matters in litigation spanning the last decade. In addition, our IT experts work with technology on an ongoing basis and understand the language, processes, and concerns of IT professionals. Accordingly, Percento Consulting serves as a communications conduit between the IT industry and the legal profession. We can effectively explain legal concerns to IT

Preparing for Litigation

personnel and explain technology issues to legal professionals.

Electronic Data Assessment and Compliance Review:

Perento Consulting assists clients with electronic data assessment and compliance review. This process involves numerous specific tasks, evaluations, and recommendations. Specific service areas include the following:

- Policies and Responsibilities
- Strategies, Design, and Implementation
- Records Process and Controls
- Monitoring and Auditing
- Training
- Litigation Hold
- Evidence Collection and Preservation
- Electronic Data Production Planning

Responding to Litigation

Perento Consulting works with legal counsel in multiple capacities that are custom tailored to the needs of each client. Our common litigation services include:

Education on Technology:

Perento Consulting educates legal professionals about technology in clear, understandable terms. With assistance from Perento Consulting, attorneys and other legal professionals can learn the basic language used by their IT counterparts and can learn how to accurately and effectively describe an organization's IT infrastructure to a judge or another lawyer.

Assistance with Identification of Claims and Defenses:

Understanding your client's technology and capabilities as well as costs of implementation can form a framework for claims and defenses as they pertain to electronic discovery disputes. Perento Consulting works closely with our clients in the identification of discovery issues and in the communication of systems and limitations in organizations' IT infrastructure.

Monitoring and Compliance Confirmation

Attorneys are commonly advised not to rely on their clients to

self police themselves when it comes to compliance with litigation holds, implementation of preservation plans, or compliance with e-discovery requests. Percento Consulting's IT professionals understand what's needed and have the ability to confirm compliance and communicate problems or limitations as they are encountered.

Advising Clients on Preservation and Litigation Hold Issues

Percento Consulting works side by side with legal counsel in advising your client on preservation and litigation hold issues. Communication and understanding of requirements and deadlines is a key component to successful implementation and compliance.

Discovery Processing, Review, and Analysis

The efficient use of technology can significantly reduce the cost of manual document review. By judiciously selecting technology solutions to facilitate the capture and review processes, the most relevant information can be reviewed first, allowing the legal professional to focus the most qualified resources on the most important documents.

Percento Consulting and its solutions partners work with our clients to leverage technology as a tool for early case assessment, data de-duplication, keyword and date filtering, electronic information management and organization, and web-based access to discovery. On appropriate matters in litigation, Percento Consulting and its solutions partners provide a centralized hosted review platform in an effort to minimize the cost of duplicate processing in a secure and accessible repository.



THE IMAGINATION TO
CONCEPTUALIZE

THE KNOWLEDGE TO
IMPLEMENT

THE WILL TO
SUCCEED



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