

## E-Discovery

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“Discovery is the formal process by which the parties to a case in court exchange information about the case. This includes information about the witnesses and evidence to be presented at trial. Its purpose is to make the parties aware of the evidence which may be presented at trial.”<sup>1</sup> Electronic discovery (e-discovery) is an ever growing and evolving part of the discovery process. In many cases, the discovery process for legal cases will involve electronically stored information (ESI) which may be requested for production.<sup>2</sup> Examples of ESI are emails, electronic documents, voicemails, social media, and websites.<sup>3</sup> Since emails, electronic documents, social media, and other forms of e-discovery are widely used, the volume of data available for discovery is extensive, which can raise challenges for parties handling this process.<sup>4</sup> This blog will cover the basics of e-discovery, the challenges associated with e-discovery, and some programs that have been developed in order to help with the complex e-discovery process.

There are nine typical stages of e-discovery: information governance, identification, preservation, collection, processing, review, analysis, production, and presentation.<sup>5</sup> Information governance describes procedures for data collection and data preservation.<sup>6</sup> Identification is when the parties have to determine which data should be preserved.<sup>7</sup> This is done through interviews with stakeholders, a review of the facts of the case, “and analyzing the digital environment.”<sup>8</sup> Once the data has been identified, the owners must preserve it for purposes of litigation, and then there are specific legal processes for collecting the data while ensuring that essential metadata are not altered.<sup>9</sup> The data is reviewed so that the necessary information can be separated from unnecessary information and attorney-client privileged documents are identified.<sup>10</sup> Then, the digital assets are analyzed and organized in order to be presented, before the digital assets are converted to physical documents and turned into presentable evidence.<sup>11</sup>

Common examples of e-discovery include “emails, documents CAD/CAM files, databases, image files, instant messaging chats from Slack and other platforms, websites, and any other relevant electronic information. The eDiscovery process also includes metadata and raw data,

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<sup>1</sup> *Overview – What is Discovery?*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-07/whatisdiscovery.pdf> (last accessed March 19, 2025).

<sup>2</sup> *The Basics: What is e-Discovery?*, CDS, <https://cdslegal.com/knowledge/the-basics-what-is-e-discovery/> (last accessed Mar. 16, 2025) [<https://perma.cc/35FH-QBJ6>].

<sup>3</sup> *Id.*

<sup>4</sup> *eDiscovery: Challenges, Benefits, and How CivicDocs Can Help*, CIVICEYE, <https://www.civiceye.com/ediscovery-challenges-benefits-and-how-civicdocs-can-help/> (last accessed Mar. 16, 2025) [<https://perma.cc/PEV5-ESAR>].

<sup>5</sup> *What Is E-Discovery?*, PROOFPOINT, <https://www.proofpoint.com/us/threat-reference/e-discovery> (last accessed Mar. 16, 2025) [<https://perma.cc/7B52-MDNR>].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

which may include evidence forensic investigators can reveal.”<sup>12</sup> For the most part, these are common tools that people use regularly. Most people have emails that they check regularly, websites they frequently visit, instant messaging chats that are used very commonly as a form of casual communication, and electronic documents that are convenient for both personal and business purposes. Given the increasing availability of technology and additional usage by growing numbers of people, it is no wonder that data and information available to be discovered has grown both in volume and in complexity.

Despite its advantages, e-discovery presents several challenges. ESI is often massive in volume, so scope of discovery can be a complicated issue. With the volume of ESI that is generated, identifying and collecting evidence that is relevant to the case can be a problem.<sup>13</sup> Discoverable data has grown, and the file type has become more complex with the evolution of technology. E-discovery expenses have increased with these changes, with little guidance from courts on how to handle the rising cost.<sup>14</sup> Many aspects of e-discovery contribute to these costs. The document review process can be costly because of the software required, the amount of documents to be reviewed, and who is able to do the work.<sup>15</sup> Additionally, complex file types and large files are likely going to contribute more to the costs than simple and small files.<sup>16</sup> The staff reviewing the documents are also costly.<sup>17</sup> In addition to these main factors, the software type and the amount of time required to process the data can also drive the costs, as well as efforts to maintain safe and secure data.<sup>18</sup>

Having a wide array of electronic data types can also be a challenge with e-discovery, as it can make the process more complicated due to different collection and analysis requirements for different formats of data.<sup>19</sup> Another issue arises when technical expertise is required for the collection and analysis of electronic data, as data sources might be complex.<sup>20</sup>

While the volume of data, cost of review and collection, and the complexity of data systems can raise challenges for parties in litigation, there are certain platforms designed for easing the process of e-discovery. “Ediscovery software is a solution that automates the discovery process, helping legal teams save both money and time. It enables teams to upload, review, and produce documents to streamline discovery.”<sup>21</sup> There are many aspects to consider when legal professionals are choosing an e-discovery tool for use in their practice, including state and federal requirements, costs, time value, and data spoliation risks among other things.<sup>22</sup>

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<sup>12</sup> *eDiscovery Definition Explained*, DRUVA, <https://www.druva.com/glossary/what-is-ediscovery-definition-and-related-faqs> (last visited Mar. 16, 2025) [<https://perma.cc/VYA8-8H89>].

<sup>13</sup> *eDiscovery: Challenges, Benefits, and How CivicDocs Can Help*, *supra* note 4.

<sup>14</sup> Justin Smith, *Ediscovery Costs in 2025*, EVERLAW (Feb. 11, 2025), <https://www.everlaw.com/blog/ediscovery-best-practices/ediscovery-costs-in-2025/> [<https://perma.cc/QU59-Q57B>].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *eDiscovery: Challenges, Benefits, and How CivicDocs Can Help*, *supra* note 4.

<sup>20</sup> *Id.*

<sup>21</sup> *What Is Ediscovery Software?*, EVERLAW (Aug. 8, 2022), <https://www.everlaw.com/blog/ediscovery-software/what-is-ediscovery-software/> [<https://perma.cc/TTD5-GAAY>].

<sup>22</sup> *Id.*

Some people in the legal field still prefer manual methods for analyzing and organizing their e-discovery items with programs such as Adobe Acrobat or Excel.<sup>23</sup> There are also third party vendors that can be employed for parts of the e-discovery process, and these third party vendors are usually technologically experienced, as well as expensive.<sup>24</sup> On-premises software systems are available, which usually begins with investment in the necessary software, hardware, and IT support team, allowing the e-discovery process to be performed in-house.<sup>25</sup> Cloud-based software services are commonly used for e-discovery as they are efficient and have predictable costs, and are “also simple to use, easily scalable, and automate many steps — like data ingestion, indexing, and preliminary quality control.”<sup>26</sup>

A couple of examples of e-discovery software solutions are Intradyn and CloudNine.<sup>27</sup> Intradyn provides parties with advanced email searching solutions, such as searching through email attachments, searching emails at a company, department, or individual level, and performing complex searches such as range and proximity searches.<sup>28</sup> CloudNine provides both on-premise and cloud-based e-discovery software that allow users “to upload, review and produce documents from one platform in minutes.”<sup>29</sup> The product description for CloudNine Review SaaS/Cloud-Based states that the product allows users to “[p]rocess, search, review, and production of traditional (email and files) and modern data (texts, chat messages, etc.) in a unified review platform.”<sup>30</sup>

In addition to these solutions, Microsoft offers three e-discovery solutions, including their Content search, eDiscovery (Standard) and eDiscovery (Premium).<sup>31</sup> The Content search tool essentially allows users to search Microsoft 365 data sources for content that can then be exported.<sup>32</sup> The eDiscovery (Standard) tool is a little more advanced than the basic Content search tool, allowing users to create their cases for eDiscovery and assign members to those cases, and allowing certain searches and exports to be connected with certain cases.<sup>33</sup> The premium tool provides users with “an end-to-end workflow to identify, preserve, collect, review, analyze, and export content that's responsive to your organization's internal and external investigations.”<sup>34</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Caitlin Harris, *The Top 11 eDiscovery Software Solutions*, EXPERT INSIGHTS (Dec. 17, 2024), <https://expertinsights.com/insights/the-top-ediscovery-software-solutions/> [<https://perma.cc/X8L6-8W4T>].

<sup>28</sup> *Archiving Solution for All Office 365 Exchange Online Plans*, INTRADYN, <https://www.intradyn.com/office-365-email-archiving/> (last visited Mar. 16, 2025) [<https://perma.cc/ZLR5-UN5A>].

<sup>29</sup> *Discover How Simple eDiscovery Can Be*, CLOUDNINE, <https://cloudnine.com/> (last visited Mar. 16, 2025) [<https://perma.cc/Y47Z-YQ87>].

<sup>30</sup> *CLOUDNINE SOLUTIONS*, CLOUDNINE, <https://cloudnine.com/ediscovery-software/> (last visited Mar. 16, 2025) [<https://perma.cc/M8HS-GS8U>].

<sup>31</sup> *Microsoft Purview eDiscovery solutions*, MICROSOFT (Oct. 31, 2024), <https://learn.microsoft.com/en-us/purview/ediscovery> [<https://perma.cc/8MQN-AWEL>].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Generally, e-discovery is a massive part of the litigation world, both in terms of time spent by legal professionals and in terms of cost. With massive electronic data generation happening all the time on countless different platforms, it logically follows that e-discovery is becoming a more complex and time-consuming aspect of litigation. There are useful tools developed for the sake of easing and streamlining the e-discovery process, and tools will likely continue to develop as the types of data collected during e-discovery evolve.