

ALSM

Association of Legal Support Managers (Queensland)

PRACTICAL DISCOVERY GUIDELINES FOR LAWYERS

Practical Discovery Guidelines for Lawyers

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ALSM (Qld) was formed in 2004 by a group of litigation support professionals sharing a common interest in developing, creating an understanding of, and progressing the litigation support profession.

The ALSM has a broad membership of legal and practice support professionals (including lawyers, judicial officers, in-house litigation support professionals, and external service providers).

As part of its mission statement, the ALSM wants to:

- be an educational resource for lawyers, law firms and corporate legal departments; and
- contribute to the quality and efficiency of the delivery of legal services.

Development of the Guidelines

Costs of litigation, and specifically discovery, continues to be a major concern for those involved in the legal industry. The ALSM believes that these costs can be reduced through efficiency derived from well-planned practices and the adoption of technology.

The ALSM has drawn on the expertise of its members in preparing the following practical guidelines for lawyers undertaking discovery. Lawyers will, of course, need to adapt these to the rules and practices of the relevant court.

[The Electronic Discovery Reference Model \(EDRM\)](#) was considered when developing these guidelines, and you may wish to make further reference to that model for more detailed explanations of the various stages of electronic discovery.

The ALSM's guidelines are however directed towards assisting a broad range of legal practitioners (including those who may not be familiar with the EDRM).

We welcome any feedback or comments regarding these guidelines.

Overview

Discovery is only one aspect of managing information in the conduct of litigation. Information management should ultimately be recognised as being the responsibility of the lawyer with the conduct of the matter.

To achieve efficiency and cost-effectiveness, the information management and discovery processes adopted should be:

- **Planned and Documented** (with appropriate involvement of all stakeholders - the legal team, the client, the other parties, and the court); and
- **Proportionate** (bearing in mind the stage of the proceedings, the issues/amounts involved, time frames etc).

The Guidelines

Identification	
<ul style="list-style-type: none">Meet with your client and/or key custodians (witnesses) as early as possible - ideally prior to the provision of documents by the client	
<ul style="list-style-type: none">Understand your client's information management systems:<ul style="list-style-type: none">how communications occurwhere information is held (geographically as well as which physical systems – including archives/backups)by whom information is heldthe form in which the information is held (ie document types)any record retention policiesany practices that may affect collection of information (ie automated overwriting of backups)	
<ul style="list-style-type: none">Identify with your client and/or key custodians, and document the following:<ul style="list-style-type: none">the key custodianskey date rangesdocument types (including hard copy)likely volume of informationsteps that should be taken to preserve information (ie placing a hold on automated deletion of backups)	
<ul style="list-style-type: none">The ESI Questionnaire contained within Goodale & Ors v The Ministry of Justice & Ors [2010] EWHC B40 (QB) may assist with the above	
<ul style="list-style-type: none">Note that there are electronic tools that can speedily identify the types and likely volume of information, and be used to assist in preparing cost estimates	
<ul style="list-style-type: none">Identify any requirements of end users (ie barristers, experts, witnesses, the court, other parties) and discuss with the client – substantial additional costs can be incurred if end-users are not prepared/able to use any electronic systems chosen	
<ul style="list-style-type: none">Identify proposed document management protocols - see: Qld Supreme Court Practice Direction 8 of 2004 Federal Court Practice Note CM6	
<ul style="list-style-type: none">Identify and document the proposed scope of the search (bearing in mind the principle of proportionality), including any search criteria such as keywords or date ranges (consider the appropriateness of obtaining the consent of the other party and/or the court)	

Collection
<ul style="list-style-type: none">• Over-collection should be avoided
<ul style="list-style-type: none">• You should avoid collection of information until the steps above (under Identification) have occurred and you have identified how you will process and manage the information gathered
<ul style="list-style-type: none">• You should identify:<ul style="list-style-type: none">• the information to be collected• who will collect the information• how it will be collected• the format it will be collected in• the likely cost of collection
<ul style="list-style-type: none">• <i>Practical Tip:</i> Do not accept the forwarding of emails from your client to your own email address
<ul style="list-style-type: none">• Provide your document protocol to the person undertaking the collection

Processing
<ul style="list-style-type: none">• Processing occurs prior to any legal review. It is directed towards volume reduction and assisting in the review and production stages
<ul style="list-style-type: none">• Processing includes:<ul style="list-style-type: none">• identifying and removing duplicates (which can significantly reduce review time and costs)• converting documents to other formats (such as searchable PDF)• coding documents (ie data entry to assist finding records)• numbering documents
<ul style="list-style-type: none">• You should give careful consideration as to the processing required (for example, if you collect information in its original electronic format, there may be no need to incur the expense of converting, coding and numbering records)
<ul style="list-style-type: none">• You should document the process followed – if you propose to use search criteria (such as keywords or date ranges) to exclude records from processing, this should be documented (and consideration should be given to the need for consent of the other party and/or the court)
<ul style="list-style-type: none">• Provide your document protocol to the person undertaking the processing

Legal Review and Analysis
<ul style="list-style-type: none">• This is the process undertaken by the legal team to review records for discovery and to analyse records for the conduct of the proceedings.
<ul style="list-style-type: none">• Before proceeding with collection and processing you need to identify the physical systems you will use to undertake the review, analysis, and production of records.
<ul style="list-style-type: none">• There are a number of electronic tools that can make the process of review and analysis significantly faster.
<ul style="list-style-type: none">• You will need to consider:<ul style="list-style-type: none">• number of users (and any specific requirements they may have)• technical requirements (including ability to handle the formats of data you propose collecting)• support/training requirements• costs (including data volumes, number of users, importing and exporting costs)
<ul style="list-style-type: none">• The legal review process (to identify documents for discovery) should be documented
<ul style="list-style-type: none">• If search criteria are used to identify/exclude documents, consideration should be given to the need for consent of the other party and/or the court
<ul style="list-style-type: none">• The persons undertaking the review should be familiar with the documented process and trained in using the system

Production
<ul style="list-style-type: none">• This is the stage of producing the client's discoverable documents to the other party (and receiving the other party's discoverable documents)
<ul style="list-style-type: none">• Production should be in accordance with the agreed protocol
<ul style="list-style-type: none">• Consider whether it is necessary to incur the costs of converting documents, or whether you can exchange documents in their original format (this should be dealt with in the agreed protocol)

Presentation
<ul style="list-style-type: none">• This is the presentation of documents to others (ie barristers, experts, witnesses, and the court)
<ul style="list-style-type: none">• You should have identified any specific requirements these may have
<ul style="list-style-type: none">• This would generally be only a subset of the documents collected and discovered by the parties
<ul style="list-style-type: none">• You may wish to provide these documents in a simplified format (ie a Word document with embedded hyperlinks to relevant discovered documents)
<ul style="list-style-type: none">• With regard to parties presenting electronic documents to the Court you may wish to consider a protocol for the management of documents during any hearings