

ISO Code of Practice for E-Discovery: A Worthy Level-Setting Endeavor

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By **Peter J. Pizzi and Julia L. Brickell** | October 30, 2017



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In this Outside Counsel column, Peter J. Pizzi and Julia L. Brickell write: The expertise required to conduct electronic discovery with competence and defensibility will again be in the spotlight when the International Organization for Standardization (ISO) publishes ISO 27050-3, its "Code of Practice" for electronic discovery. The draft standard is under publication and release is imminent.

The expertise required to conduct electronic discovery with competence and defensibility will again be in the spotlight when the International Organization for Standardization (ISO) publishes ISO 27050-3, its "Code of Practice" for electronic discovery. The draft standard is under publication and release is imminent. Internationally recognized, ISO provides requirements, specifications, guidelines or characteristics that, according to [their website](#), can be used to ensure that materials, products, processes and services are fit for their purpose.

The utility of ISO's endeavor is that the Code articulates a methodology; it delineates a systematic approach to the problem posed by the explosion of digitally available human communication and the application of processes and technologies developed to address this

phenomenon in e-discovery. Setting forth requirements for effectiveness in e-discovery phases—from identification, preservation, and collection through processing, review, analysis, and production—ISO's Code rightly demands rigor in planning and execution. In light of the prevalence of technology in all phases of e-discovery and the Code's own emphasis on supporting technology, its emphasis on expertise is particularly important.

The Code fosters forward thinking and advance planning. For each phase in e-discovery, it identifies the objectives of the phase and enumerates considerations to avoid failure, illuminating areas of risk and principles that, if followed, can mitigate that risk. Further, it delves into these principles, explaining the planning, technology, expertise, measurement for quality control, flexibility, transparency of process, and documentation, which, when well applied, will tend to obviate problems.

For each phase, the Code goes on to spell out ISO's requirements and present a series of recommendations. Meeting the requirements and giving due consideration to the recommendations should increase defensibility and provide an end product entitled to greater credibility. Necessarily, the suggested methodical approach will help to level-set a team engaged in e-discovery and serve as a reference point as a project progresses.

Use of Technology in Review

The greatest challenge posed by e-discovery is the sheer volume of data that must be reviewed in order to identify and produce the narrower subset of documents that actually meet discovery or investigative demands in civil, criminal or administrative proceedings, or tell an important story. That reality has given rise to an abundance of technological tools used to process and cull data, and yet others to predictively “review” it.

The ISO Code aims high, attempting to address discovery from paper to pixel; the Code notes that its principles apply to review of both hard copy and electronic information and to techniques ranging from linear review to extensive use of advanced information retrieval tools and methods. Calling out the need for expertise in this effort, the Code points to the competencies of “information retrieval science (computer science, statistics, linguistics, etc.)” It wisely points out that those conducting the document review should be educated not only about the pertinent subject matter, legal issues, and strategy, but also about the ways in which the communities from whom documents were collected use language, (hence the need for linguistic expertise.) The Code posits two ways this latter education process may occur: the “top-down track” involves

interaction with individuals having the requisite knowledge and expertise; the “bottom-up track” involves learning from the document collection itself. The Code concludes that the “two sources each provide unique kinds of information and both must be utilized” for the review to be successful.

Precedent for the ISO Code

ISO is not the first body to have tackled these e-discovery challenges in some way or other. Certain bar organizations and court committees have issued guidelines for lawyers handling e-discovery projects, and a variety of groups have authored thought-leadership papers on the topic. The closest comparison to the ISO Code is found in The Sedona Conference’s e-discovery papers, such as The Sedona Principles for Electronic Document Production, published in 2007, and its Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, published in Fall 2014. The latter is more focused upon the implementation of search technology and moving beyond Boolean logic in reviewing collections of electronically stored information (ESI). In the bibliography for the ISO Code, the authors reference the New York Bar Association’s Best Practices in E-Discovery in New York State and Federal Courts, Version 2.0, December 2012, and Seventh Circuit Electronic Discovery Pilot Program—Final Report on Phase Two, May 2012. As useful as these documents are, none of these authorities goes as far as ISO, or even attempts to set forth a step-by-step methodology which would enable the user to undertake an e-discovery project and then, once complete, show the method by which each step was executed.

Global Application of the Code

The need to retrieve and study individual communications in aid of retrospective fact-finding is far-reaching. Lest one think that ISO was designing a code specifically suited to U.S. civil litigation, consider that a vast array of organizations may need to retrieve ESI in order to make a decision about an issue. In addition to parties to civil litigation in state and federal United States courts, ESI is in demand worldwide by criminal prosecutors, administrative agencies, legislative committees, arbitration panels, international law courts, war crimes tribunals, standard-setting organizations, sports regulatory associations and other regulatory bodies.

Impact on Collaboration

The ISO Code does not explicitly mention the role of disclosure and cooperation with the adverse or the investigating party in the steps involved in an e-discovery project. Yet communication and cooperation are at the core of past bar association efforts to articulate standards of practice in the e-discovery realm, as noted in the authorities cited above. The New York State Bar Association's Commercial and Federal Litigation Section's 2013 Report on E-Discovery stresses cooperation on all points along the e-discovery continuum, explaining the perceived benefit to the client: "Because cooperation in e-discovery can facilitate an efficient process, thus reducing costs, most clients should prefer that their counsel adopt a cooperative approach." While ISO's Code is neutral on collaboration, the improvement in planning, internal transparency, and documentation likely to flow from implementation of the Code should position counsel with robust information on which to draw when communication, cooperation, or collaboration is part of counsel's (or the client's) action plan. In addition, the forethought on methodology will enhance counsel's ability to display the organization and methods that create credibility when sharing is warranted.

Certification According to ISO 27050-3

The locution "ISO Certified" is something of an oxymoron because ISO does not certify anything. ISO issues standards, and then other organizations apply a particular ISO standard to "certify" firms or organizations, which may then claim to be "certified" according to the specific ISO certification.

The question arises, then, whether bar associations or other regulatory entities will undertake to issue certifications according to ISO/IEC DIS 27050-3 attesting to a corporation's or law firm's implementation of the ISO standard and fulfillment of its requirements across a range of examples. It seems likely and would re-enforce the benefits of the ISO standards and serve the goals of transparency, repeatability and regularity in e-discovery projects.

ISO's draft standard ISO/IEC DIS 27050-3 is titled "Information technology—Security techniques—Electronic Discovery—Part 3: Code of Practice for electronic discovery."

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