

Tips for Preparing for E-Litigation

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By , ,

E-litigation—litigation that is either paperless or virtual—is the way of the future. This was already becoming true when we conducted the first paperless trial in the history of the construction courts in Toronto in early 2020, and it is even more apparent during the ongoing COVID-19 pandemic the world finds itself in.

Choosing to conduct e-litigation provides the parties involved with access to functionality which is not available in traditional, paper-based processes. If correctly planned for, volumes of bankers boxes can be reduced to one USB key, zip folder or drop-box, eliminating the time and expense of producing and riffling through paper materials, and hearings, examinations or mediations can be conducted with multiple parties in different rooms, or cities. The flexibility provided for by the electronic storage of materials and the ability to prepare witnesses from afar can support both effective and cost efficient hearings if properly planned for at the outset. It may also improve access to justice on the whole.

This paper can help. We will go over some best practices for creating an electronic record that contains all the materials required for your mediation, arbitration, or hearing. This electronic record can easily be transferred to the other parties or to the trier in a paperless or virtual proceeding. We will also discuss strategies for using video-conferencing and screen-sharing platforms to prepare witnesses and to conduct virtual litigation.

This paper proceeds in five parts: A) The Basics, B) Software & Hardware Requirements, C) An E-Litigation Protocol, D) Hyperlinking, and E) Expanded Options for Examining Witnesses.

The Basics

The decision to conduct e-litigation affects every aspect of the preparation process—from organizing and preparing documents, to preparing witnesses and clients, to the practice and conduct of the hearing.

Because of this, the decision to proceed electronically should be made early in the process. Many of the steps outlined below, especially hyperlinking, can be easy to do at the beginning of the document drafting process, and much more time consuming to do at the end.

Creating the most basic electronic record can be as simple as using the tools available to you in a basic Microsoft Office package and the C:Drive or desktop of your computer. This paper assumes that you want to create an electronic folder that contains both a main document (such as an affidavit) and the supporting documents (such as exhibits) within the same folder or set of folders. Additional protocols will have to be explored between you and the other parties if you and your team want to link to places outside of one such folder, such as to file site, to a drop box or directly to document management software. If Apple products are to be used, this too will need to be factored in early on in the process as they can sometimes be incompatible with other Microsoft-based products that most law firms in Toronto currently use.

Software & Hardware Requirements

Knowing your hardware and software options, and knowing the advantages and the limits of each, is crucial. We found the following software to be essential:

1. **Host for electronic record:** There will need to be a method to transfer files as between the parties and between the parties and the trier. There are three possibilities for this: a drop box, USB keys, or simply hosting a folder on your company's O:Drive or your laptop's C:Drive and sending a 'zipped' version of that folder via email or large file transfer. The parties should consider the reliability of the internet connection if there is the expectation to share files during the hearing using a drop box or another internet-based application.
2. **Document Management Platform:** Document management platforms (e.g. Relativity, EDT, or Veritas) can be used to store documents in their native format, to assign each document a unique document identification number ("**DocID**"), and to convert each document into a searchable PDF. DocIDs provide a neutral identifier for each document, allowing the parties and the Court to speak the same language when referring to specific pieces of evidence. If you have a large number of documents, a document management platform may likely have already been used as part of the discovery process.

A document management platform is helpful for e-litigation because they can be used to store, categorize and easily search documents, and can produce a spreadsheet listing each document in the database (or in a subset of a database). This spreadsheet can be used to sort documents by any relevant identifying information, including DocID, description, date, author, and user-generated tags, and can be of use for the mass hyperlinking of documents (explained further in part D below).

Organizing your party's (and the other party's) documents in your document management software early on can become useful later as it provides expanded options for searching documents, which may not be possible with documents stored elsewhere.

Zoom or other Video-Conference Platform & Screen-Sharing Software: Video or tele-conferencing software is required for virtual litigation. In the virtual litigation context, screen-sharing platforms can allow a user to share a document or a portion thereof with everyone in the video or tele-conference.

It can also be useful for paperless litigation, as it can be used in the witness preparation process (explained in part E below) and in the courtroom, screen sharing software can be used to allow the witness to 'zoom' in to explain a document or to make notations on a particular document in the context of his or her testimony.

In both situations, the person sharing the document or the examining counsel should have ultimate control of the documents and the choice of whether to provide control of the display to the witness.

If your litigation matter is to be paperless but not virtual, there are a few additional steps you will have to take to address the setup of the courtroom or office space. You should confirm in advance which space will be used for the hearing and have familiarity with the room.

If it is your responsibility to set up the space, you will likely need the following hardware items:

A screen projector or monitors: This allows everyone in the courtroom to see exactly what is happening regardless of where they are seated, and allows witnesses and/or counsel to draw attention to specific points of a document without having to resort to cumbersome verbal guidance. Examining counsel will have ultimate control of the documents and the choice of whether to provide control to the witness.

We suggest that using monitors—one for each party, one for the witness, and one for the trier—is preferable but it depends, of course,

on space and resources.

1. If monitors are being used, a **splitter**, which allows the monitors to be networked together so they are always mirroring the display of the controlling laptop.
2. **One laptop per party:** Or, at a minimum, a lead laptop to operate the monitors. In our case, every counsel and the Master had their own laptop or tablet (sometimes both!).
3. **A portable Wi-Fi router:** While essential for virtual litigation, Wi-Fi is not strictly essential for paperless litigation. However, Wi-Fi can also be useful in court and parties should consider sharing the cost of a portable Wi-Fi router—particularly if they have chosen to utilize cloud-based document hosting services in lieu of physical storage mediums for documents.
4. **A tablet or laptop for the witness:** This is useful if you want the witness to be able to flip through or handle materials as though they were paper-based, or if the use of screen-sharing during an examination is contemplated (explained more in part E below).

An E-Litigation Protocol

All lawyers know: the cooperation of counsel can make a strenuous process quite easy—and the reverse is true as well. With e-litigation, no matter the level of cordiality between the counsel, the parties should put together an “e-litigation protocol” early on in the process, even if the protocol needs to be adapted as time goes on.

Procedural protocols drafted for e-litigation should consider the steps to be taken in the traditional course of proceedings, as well as the unique requirements of e-litigation. A protocol should include an agreement on topics such as:

- hardware and software requirements;
- what format documents should be in (we recommend PDF and that a requirement be that all documents, to the extent possible, be OCR'd);
- how documents should be identified (for example DocID numbers produced by an electronic document management database versus a number from a joint record (such as a joint book of documents) prepared by the parties, or both);
- authenticity of the electronic documents;
- how evidence or briefs will be filed and how files will be transferred between parties or between the parties and the trier (for example, by secure drop box, email, USB, or airdrop);
- how the display of documents will proceed; who will have control over the screen (if a screen-share platform or networked monitors are used) at what time;
- how new exhibits or new documents entered into the record at the hearing or after the initial exchange of documents will be handled;
- any alternative protocols agreed-upon by the parties, such as the omission of jurat pages in exhibits to an affidavit (since the same document may be an exhibit to multiple affidavits);
- how and whether “originals” should be filed (and what constitutes an original);
- how the trier is to be provided with an extra copy of the materials for their personal use (in addition to the court copies); and/or
- any specific items that the trier has requested.

Agreeing to these procedural elements is important to the success of any e-litigation, as agreement mitigates against the risk of compatibility issues down the line, and ensures that each party has a clear understanding of what the end products will look like. Agreement also makes it easier to produce a record that is consistent and easy to use for the trier.

In certain matters, such as hearings, long motions, trials, arbitrations, or in any matter that is case-managed, your protocols should be brought to the attention of and ideally endorsed by the trier. The trier should be asked early on whether she has certain preferences

(for example with respect to the naming of the documents, alternative protocols for entering exhibits, etc.) Having the trier on board for the electronic process used is extremely helpful to counsel.

Hyperlinking

Central to unlocking the functionality of e-litigation is the process of drafting litigation briefs (including affidavits, mediation briefs, facta, etc) that are hyperlinked to the documents that they reference. Hyperlinking documents can be one of the more technically demanding components of e-litigation—but one that ultimately saves a large amount of time if done right.

Depending on the written product or products that are to be produced, hyperlinking source documents can save both you and your office a lot of time during preparation for the hearing, and save the parties time during the hearing itself. Proceeding in this fashion allows counsel, the trier and in some cases witnesses, to truly take advantage of the value of e-litigation-ready documents. It also reduces court time.

Consider Your Written Product

Various types of source data can be hyperlinked, whether that data is the exhibits to an affidavit, the cases or tabs of a book of authorities referred to in a factum, or documents referred to in a mediation brief. For e-trials specifically, evidence in chief by way of affidavit should be considered as it allows the parties to most fully take advantage of the flexibility and ease of hyperlinking. Depending on the agreed upon protocols, these affidavits can always be supplemented by *viva voce* testimony.

Tips for Hyperlinking Documents

Two options are available for hyperlinking documents: 1) absolute links, where all documents are statically located on a particular drive, for example a USB drive; or 2) relative links, where all documents are contained in one head folder that the source document (i.e. the Microsoft Word document or PDF that contains the document that is hyperlinked) is located in. With the latter, the head folder can be moved around or transferred between computers as long as all the documents remain in that folder. As a general proposition, while they are somewhat trickier to execute, relative links are preferred.

There are a myriad of ways to hyperlink. We found the easiest process to be to mass create hyperlinks using Microsoft Excel or Notepad++, and then to copy and paste those hyperlinks into our Microsoft Word documents. To ensure links are “relative” rather than “absolute”, simply type in *only* the portion of the hyperlink URL that comes after the portion that shows where the source document is located. Two hyperlinking “hacks” we found useful were:

- **To hyperlink all instances of a particular string of text in one document:** hyperlink one instance of the string of text and copy the hyperlink. Pull up the “find and replace” screen in Microsoft Word, put the string of text you want to hyperlink in the “find” row and “^c” in the “replace” row. When you hit ‘replace all’, Word will replace all instances of the text in the “find” row with the hyperlink.
- **To mass edit hyperlinks already in a Word document:** press Alt + F9 and all hyperlinks in the documents will be displayed at the same time. You can then use the “find and replace” function to edit them en masse.

Creating a Joint Record

Another step that is useful for the parties is the creation of an electronic joint record (such as a book of documents or exhibit book). This will involve some cooperation by the parties, but compiling all document references can be as easy as copying and pasting the hyperlinks into one big list, and, crucially, removing duplicates.

We found that in addition to creating the list itself, it was useful to have a column in the joint book that indicated where each document could be found, per the below:

In particularly document heavy hearings, this will result in a crucial organizational tool that is searchable by the parties and the trier.

Expanded Options for Examining Witnesses in E-litigation

Electronic Preparation Strategie

Incorporating electronic tools, such as video conference and screen-sharing platforms, into witness preparation plans allows counsel to simulate the effect of an in-person meeting without the time or costs normally associated with same. This approach is all the more significant when witnesses live far away from counsel, or circumstances otherwise render in-person meetings impractical.

A screen-sharing platform allows counsel to look at the same document as a witness in real-time. The best versions of these programs will allow all involved parties to make updates to documents in real-time while preserving a separate window for videoconferencing.

For example, using Zoom, counsel can put a complex set of shop drawings to a witness in a different country. Counsel can remotely walk the witness through the shop drawings page by page and highlight particular sections for clarification or as points of reference. Witnesses can respond, drawing out diagrams or highlighting portions of the document themselves—all of which is observable in real-time.

Incorporating Electronic Functionality into Examinations

The more interesting combinations of witnesses and technology in e-litigation involve what can be achieved during in court examinations in a courtroom. Particularly creative counsel will be able to adapt the above-mentioned witness preparation tactics for use in the courtroom.

For example, in paperless litigation where examining counsel is bringing up documents via the controlling laptop, an expert witness can be provided with a tablet or laptop, set up to allow screen-share, to share in simultaneous control of the lead monitor. Through this setup, an expert can respond to questions by taking control of the display of monitors in the courtroom to explain a small detail on a drawing or bring the court's attention to a particular provision of a document.

More interestingly, expert witnesses can use the tablet (after some practice) as a virtual whiteboard, drawing diagrams or example calculations out directly on the document displayed on all dummy monitors. These marked up documents can then be saved (for example to a USB plugged directly into the tablet). At the end of the expert's examination, the USB key can be marked as an exhibit and filed. These documents can then be copied onto additional USB keys and provided to the parties as their own exhibit copies. In e-litigation utilizing drop box software in place of USB keys, counsel can use the lead monitor to directly save the document to the appropriate drop box location for exhibits allowing open access to all involved parties and the Court at any time.

In theory, a process similar to the above can be used to conduct entire hearings remotely. In a virtual trial, counsel, witnesses, and the trier can all be connected over Zoom or a similar videoconferencing app with screen-sharing functionality. Counsel can present arguments from their respective offices, with witnesses examined over videoconference, all while a trier observes the proceedings interjecting with questions from his or her home. To make the process truly remote, drop-box software would have to be employed, allowing parties to file both pre-trial materials and exhibits produced during litigation with the trier by saving them into the appropriate drop box. Although hypothetical at the moment, protocols similar to this may quickly become more commonplace based on the Chief Justice's [recent call to expand Ontario's virtual court framework](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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