

Over the next several weeks the *E-Discovery Alert* will focus on the strategy and tactics for handling sixteen specific ESI issues throughout pretrial discovery. Whether it is a "meet and confer" or request for production these are the critical issues to focus in requesting or producing ESI. The legal issue excerpts will be derived from the *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics* (2008-2009). The *Guide* is cross-referenced and hyperlinked with the *Arkfeld on Electronic Discovery and Evidence* (2nd ed.) treatise and part of the CD-ROM.

§ 3.6 CONTROLLING COSTS

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A. Overview

The cost of discovering, and especially producing electronic information, can be startling. However, if you are discovering electronic information, the costs of searching electronic data can be substantially reduced if you require disclosure in an electronic format. Instead of manually searching paper documents, a computer can immediately search and locate vital information relevant to your case.

Estimating the cost for the conversion and extraction of data from ESI is difficult because data is generally measured in gigabytes as opposed to the number of bankers' boxes full of paper documents. In addition, due to the recent development of new software tools and an increased number of vendors, the cost structure for the conversion of electronic data is undergoing a rapid and constant change.

As an example, the cost structure for processing ESI used to depend on the type and amount of electronic information. ESI is produced in computer files that consist of a unit of measurement such as KB (kilobyte), MB (megabyte), or GB (gigabyte). The question was how many e-mail and units of ESI are contained within the storage device. Once you determine the volume of data within the storage unit you can estimate the cost of extracting and converting electronic data into database abstracts, text and images. Many service bureaus now charge a flat rate for ESI based on the number of gigabytes of data that need to be processed and converted, instead of the type of ESI.

Cross-references [to *Arkfeld on Electronic Discovery and Evidence* treatise]

- § 1.2(I), *Searching Electronic Information — Costs*
- § 1.3(C), *Costs*
- § 4.7(E), *Payment of Costs*
- § 5.2(A), *Comparison of Managing ESI in an Electronic vs. Paper Format*
- § 5.2(A)(1), *Time and Cost Savings*
- § 5.6, *ESI Processing Stages — Technology and Cost Issues*
- § 7.3(G)(3), *Cost Allocation — 26(b)(2)(iii)*
- § 7.12, *Taxation of Costs*

B. Ways to Limit Costs and Avoid Objections

The cost of electronic discovery can increase quickly, so it is important to communicate your cost constraints to your litigation team, outside vendors and forensic specialists. There are many avoidable stories of unexpected and substantial cost overruns in electronic discovery. In addition, requesting excessive data may increase the burden on the requesting party in conducting a meaningful review of the data.

Though you may have preserved a significant amount of ESI, the amount of data to actually collect and process will usually be substantially less. At the outset, meet with opposing counsel to try and negotiate limitations on the scope of ESI preserved in order to limit production costs. It is suggested that the parties' IT personnel be present, or if negotiations become difficult, a special master or neutral third party be present to assist.

There are several techniques to limit the cost of electronic discovery and production:

- Narrow the subject matter of the request to the specific “claims” or “defenses” of the case.

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- Limit your discovery to specific individuals, departments and organizations.

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- Set forth a time frame for the information that you are requesting.

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- Limit the search to specific types of files; e-mail, word processing, databases, etc.

- Try to reach an agreement on specific search terms to use on the collected data, since the resulting volume of ESI will determine review costs, etc.

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- Obtain a nonwaiver agreement and court order regarding confidential information.
- If it comports with statutory and regulatory mandates and there is no anticipated litigation, advise clients to enforce retention policies.
- Generally, it is not necessary to obtain the application and operating software that created the data.

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- Collect discovery in an electronic format. It is far less costly to obtain information in an electronic format than to scan paper, code and/or use optical character recognition software to convert the information to an electronic format.
- Consider an on-site inspection.

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- Discuss and reach agreement as to whether metadata will be processed, reviewed and disclosed.

- Reach agreement on the criteria to be used when deduplicating ESI.
- Try to obtain agreement on what ESI is “not reasonably accessible.”
- Consider a sampling of the data in question to determine relevancy and burdensome issues.

Cross-references [to *Arkfeld on Electronic Discovery and Evidence* (2nd ed.)]

- § 5.7, *Ways to Limit Your Cost Exposure*
- § 7.4, *Production and Protection of Case Information*
- § 7.4(F), *Scope of Production — Rule 26(b)(1)*
- § 7.4(F)(3), *Relevancy and Overbroad Concerns*
- § 7.4(G)(1), *Not Reasonably Accessible — Rule 26(b)(2)(B)*
- § 7.4(G)(2), *Burdensome — Rule 26(b)(2)(C)*
- § 7.4(G)(4), *Sampling*
- § 7.4(K), *Meet and Confer — Rule 26(f)*

C. Requesting Parties Strategy

- Generally, it may not cause a burden to issue a broad request for ESI because of the ease of searching by keyword or concept for the “smoking gun.” However, if you intend to perform analysis of the ESI for patterns and conduct, it may be extremely difficult to filter and sift through a large amount of ESI to support your factual contentions. It may be more prudent to limit your requests based on time, witnesses, etc. to key events. If the opposing party refuses to filter ESI then you can object to a “data dump” and noncompliance with Rule 34.
- Agreeing to search terms to limit the ESI can be problematic.

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D. Producing Party Strategy

- The negotiation of the data population that has to be produced is one of the most important tasks for the producing party. It will determine the costs of processing, reviewing and disclosing ESI.

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E. Checklist

- ☐ Have the parties agreed to exchange ESI in a searchable electronic format?
- ☐ Advise clients to enforce retention policies before litigation is “reasonably anticipated.”
- ☐ Have the parties narrowed the subject matter of their request?

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