

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.

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**ISSUE:** IS IT IMPORTANT TO FOCUS ON THE "CLAIMS AND DEFENSES" TO LIMIT OR EXPAND THE ESI DATA POPULATION?

**ANSWER:** GENERALLY YES

Excerpt from *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics* (2008-2009), § 3.1,  
*Nature of Claims and Defenses*

**DISCUSSION:**

### § 3.1 NATURE OF CLAIMS AND DEFENSES

With any case, your first step is to focus on the specific, relevant information that you want from the opposing side. The nature of the case and factual issues will define the type and source of electronic information sought. In interviewing your client, make sure you understand the factual issues and the basis of your client's assertions.

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The Federal Rules of Civil Procedure mandates revolve around the "claims and defenses" of a specific case. Whether the ESI in question is connected to the "claims or defenses" may determine whether discovery is allowed, sanctions ordered or whether discovery of metadata is permitted.

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The Rule 26(f) conference is a key event to discuss the "claims or defenses" of a case and disclosure of electronic information with the opposing party.

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Cross-references [ [Arkfeld on Electronic Discovery and Evidence](#) ]

- Chapter 6, Discovery and Production Process
- § 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(K), Meet and Confer - Rule 26(f)

### *A. Requesting Party Strategy*

The "claims or defenses" of a case will determine: . . . The relevancy of ESI stored on various media and devices. . . . Whether a request is overbroad. . . . Whether a forensic specialist is needed. . . . Whether preservation of all relevant ESI was properly completed. . . . What discovery and production costs will be incurred in identifying and processing ESI? . . . To whom preservation notices should be sent or where subpoenas should be served. . . . Whether deleted or residual information is relevant to the case. . . . Whether specific keyword search terms are relevant to the case. . . .

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### *B. Producing Party Strategy*

- The Rule 26(f) "meet and confer" conference is a key event to discuss the "claims or defenses" of a case and disclosure of electronic information with the opposing party. It is suggested that the producing party have the requesting party clearly define the "claims or defenses" of their case to limit the amount of ESI that needs to be disclosed.
- It is generally more advantageous to the producing party to advocate for a narrow scope of "claims or defenses." A narrower scope of the "claims or defenses" will result in less ESI to process. . . .

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#### *C. Checklist*

- ☐ Have you determined what are the "claims or defenses"?
- ☐ Have you attempted to define the scope of the "claims or defenses" by informal sessions and/or by formal procedural rules?
- ☐ Have the parties agreed upon the "claims or defenses"?
- ☐ Have you determined the causes of action, legal elements and factual propositions of the different "claims or defenses"?
- ☐ Have you set forth the "claims or defenses" in the proposed case plan?

\* \* \* \* \* denotes content that has been omitted