

Navigating Electronic Discovery in Complex Cases

The basics of electronic discovery for litigators involved in complex cases.

By **Jonathan A. David** | April 11, 2019 at 08:00 AM



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“I’m happy to let others handle e-discovery.” Does that sound like you? Do terms like “ESI,” “native files” and “metadata” cause you anxiety? No worries. This article lays out for you the basics of electronic discovery.

If you are a litigator involved in complex cases such as multifaceted commercial disputes, intellectual property, class actions, antitrust, etc., you need to understand basic e-discovery issues that will undoubtedly be part of your case. Armed with a working knowledge of e-discovery nuts and bolts, you will be able to meaningfully weigh in on important discovery decisions, minimize costs, speak more intelligently to the court and opposing counsel when discovery disputes arise, and live a more fulfilled life, guaranteed.

E-Discovery and ESI

“E-discovery” simply refers to electronic discovery. “ESI” simply refers to electronically stored information. ESI should also not be confused with “CSI” or other similar crime scene television dramas.

Complex litigation today requires e-discovery because most evidence these days is created with computers and stored and sent *electronically*. Computer files such as email, PowerPoint presentations, PDF attachments and Word documents, *stored as information* in some type of electronic storage media, such as USB or hard drives, are all examples of ESI.

If 2006 was a rough year for you, you may have forgotten that Fed. R. Civ. P. 34 was “upgraded” that year with a new title that now reads: “Rule 34. Producing Documents, *Electronically Stored Information*, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.” As such, Rule 34 now provides that a party may serve discovery requests that include:

any designated documents or *electronically stored information*—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

Because relevant ESI must be collected and produced by both sides in discovery, you will need a plan for how it will be handled in your case. This will likely involve entering into an “ESI order” with opposing counsel, as discussed below.

ESI Orders

An “ESI order” is a court-approved order that governs how ESI will be gathered and produced in a case. It can be a stand-alone order, or part of an overall protective order entered by a court to safeguard confidential information. Parties typically negotiate both a protective order and an ESI order at the start of a case and then submit them to the court to enter. If there are no disputes, the court usually enters a stipulated (agreed to) protective and ESI order. If there are disputes, the parties can duke it out, or more commonly present competing provisions to the court as a discovery dispute requiring a ruling.

When stripped away of boilerplate, ESI orders generally include major sections relating to: (1) the format of the ESI to be produced; (2) the sources to be searched for ESI; and (3) email production. Form ESI orders can be found online, or you can check pleadings of other similar cases for examples.

ESI Formats

Typical ESI formats include “native” format, “single-page TIFF” and “PDF.” They specify how the ESI will be produced to the other side. Here is where most attorneys’ eyes start to glaze over, so now may be a good time to grab a mochachino.

- “Native” format means the original format of the actual file itself, such as an MPEG movie file, JPEG image file or PowerPoint file. It does not mean a file born and raised in this country.
- “Single-page TIFF” means a native file that has been converted into a series of individual pages in a TIFF (bitmap) format. For example, a five-page Word document would become five sequentially numbered TIFF image files. Additional information called a “load file” (usually a text file with fields of information) is also provided with the TIFF images so that everyone knows where each document starts and ends.
- “PDF” (portable document format) format is an Adobe PDF file, now a standard format, which can have one or multiple pages. Most ESI, except for audio and video files and large spreadsheets, can be readily converted into PDF format.

Each production format has advantages and disadvantages. TIFF usually requires special document review software (e.g., Relativity) and the use of an e-discovery vendor to handle the conversion and creation of load files, but is the most common format. PDFs can be easy to create but harder to work with when many files need to be searched at the same time. PDF productions also typically omit metadata. Native file productions can be tricky to work with since the files may be in a variety different of formats, and production numbers cannot be added to pages within the native file, only to each file name. However, the good news is that readily available discovery software can handle the input and review of all these different file formats.

OCR or Text-Searchable Data

Parties typically agree to provide text searchable or “OCR” data with their ESI productions. “OCR” stands for optical character recognition and means that the ESI is made text searchable so that both sides can run word searches on the documents. Having text-searchable data is usually desired by both parties to help find documents authored by a specific witness or to search for keywords such as “smoking” and “gun.”

Metadata

“Metadata” is hidden data attached to a file, which has additional information about the file itself. Metadata typically includes data such as the file’s creation date, last edit date, author, file size, sent and received dates for email, etc.

Production of ESI with or without metadata is often a key issue. Having metadata can be useful when there are issues about when a document was created if not apparent from the document (e.g., an undated draft memo). But metadata can be difficult and expensive to collect and provide, and usually requires an e-discovery vendor. To save costs, parties sometimes agree to forgo providing metadata but agree to preserve native files and their metadata in the event it becomes relevant in the future.

ESI Custodians & Locations

ESI orders may also specify where to search for relevant data. For example, parties may agree to collect and search hard drives and email of, say, five to ten “custodians” or witnesses per side. An ESI order may also specify locations to search,

such as shared network drives that many employees can access. Custodians can also be identified later on for ESI searching, such as after initial disclosures or a first set of interrogatories is served.

Email Searching

Mass searching, review and production of email can be costly, time-consuming and burdensome for both sides in complex cases. Discovery rules such as Fed. R. Civ. P. 26(b)(1), however, provide a “proportionality” standard to limit discovery to matters that are relevant “and *proportional* to the needs of the case, considering the importance of the issues ..., the amount in controversy, the parties’ relative access to relevant information, the parties’ resources ...,” etc.

With these concerns in mind, and to avoid needless anguish, most parties typically agree to reasonable limits on email collection and searching. For example, parties may agree to exchange lists of limited search terms (such as “blood or bloody” within five words of “knife, machete or axe”) to run on the other party’s collected email. Parties may also agree to defer email production until later on in the case.

If collecting and searching through email is inevitable, the parties may also agree to serve targeted email discovery requests for specific issues, rather than use up normal document requests. The parties may also agree to not serve email requests until after a given time period or case event occurs.

E-Discovery Vendors

It is important to decide early on in a complex case if you will need to use an outside e-discovery vendor to assist in gathering, reviewing and producing ESI. E-discovery vendors can be expensive and often base their rates on the amount of data (in GBs) collected, processed and stored. If the case involves large amounts of ESI and email, it may be sensible to use an e-discovery vendor. They will keep track of search locations, custodians, native files, etc., and can provide OCR text and metadata as needed. E-discovery vendors can also help collect ESI when a company’s IT department is unfamiliar with litigation e-discovery collection.

In appropriate cases, you may also be able to self-produce some or all of your ESI using your IT department, paralegals, and/or associates with e-discovery experience, using programs such as Adobe Acrobat that can convert native files into PDFs, OCR data, and electronically affix numbers and labels to the ESI to be produced. However, the ability to self-produce depends on the willingness of the other side to agree to exchange PDFs in lieu of single page TIFFs and load files, which are difficult to generate without a vendor.

ESI Exclusions

Parties also routinely agree to exclude searching of lesser relevant and harder to access locations. Most ESI orders therefore will provide that, absent a showing of good cause, neither party needs to rummage around in disaster recovery backup tapes, legacy computer systems, voicemails, instant messages, cell phone texts, social media, etc., for ESI productions.

Conclusion

Hopefully, you have now grasped many of the basics of e-discovery. If not, don’t fear. Most e-discovery concepts can be mastered with some quick online research or by asking Siri or Alexa, two very knowledgeable e-discovery litigation associates.

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