

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 "SCOPE OF DISCOVERY" TO LIMIT OR EXPAND THE ESI DATA POPULATION?

**ANSWER:** YES

Excerpt from [Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics](#) (2008-2009), § 3.2 - *Scope of Discovery*

**DISCUSSION:**

□ A. *Scope*

Fed. R. Civ. P. 26(b)(1) permits discovery of matters that are not privileged and "relevant to any party's claim or defense" as long as "the discovery appears reasonably calculated to lead to the discovery of admissible evidence . . . ." "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action . . . ." The scope of your request should be no different than when you are seeking paper-based discovery. A discovery request should be broad, but not so broad as to be construed as a fishing expedition.

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

- § 7.4(F), Scope of Production - Rule 26(b)(1)
- § 7.7(D), Possession, Custody or Control
- § 7.9(A)(1), Preservation Obligation
- § 7.9(A)(2), Scope of Preservation Obligation
- § 7.9(A)(5)(a), Affirmative Continual Obligation to Preserve and Disclose

*B. Determining the Scope of Discovery* □

There are several methods for determining the scope of ESI production. From an informal meeting with opposing counsel to a formalized court proceeding, these methods should assist in determining what ESI to preserve and subsequently disclose. Always remember that the "triggering date" for the preservation obligation is usually earlier than the events set forth below.

- Informal Meeting with Opposing Counsel

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- Preservation Letter

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- Meet and Confer - Rule 26(f). The parties are to "confer to consider the nature and basis of their claims and defenses . . . to discuss any issues relating to preserving discoverable information . . . .". . .

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- Fed. R. Civ. P. 16 - Court Management Tool. . . .

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*C. Requesting Party Strategy*

- The broader the scope of the "claims or defenses" the more difficult and burdensome it will be for the producing party to identify, preserve and review the ESI. However, you may subject yourself to a "data dump," if the opposing party complies with the request.

- If you argue for a broad interpretation of "claims or defenses" you will be subject to objections based on relevancy, overbroad and burdensome arguments.

*D. Producing Party Strategy*

- Argue for a narrow interpretation of the scope of the "claims and defenses" to reduce your costs to process and review ESI.

- When the producing party receives a preservation letter, it is important to respond to it. . .

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- The producing party may choose to send its own preservation notice setting forth what is being prepared and requesting the requesting party to set forth any additional ESI to preserve that fits within the scope of the "claims or defenses" of the case.

*E. Checklist*

- [ ] Have the parties narrowed the scope to the specific "claims" or "defenses" of the case?
- [ ] Have you determined what ESI types can prove the factual allegations in your case?
- [ ] Have you decided what ESI media, devices and locations should be searched?
- [ ] Have you limited the discovery to specific individuals or organizations?
- [ ] Have you determined the timeframe for the ESI that you are requesting?
- [ ] Have you limited the search to specific file types; e-mail, word processing, databases, etc.?
- [ ] Have you determined whether metadata will be important in your case?
- [ ] Have you determined whether metadata will be processed, reviewed and disclosed?
- [ ] Have you determined the date range for the ESI?

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