

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:** WHAT ARE THE DIFFERENT TYPES AND LOCATION OF ESI SHOULD I REQUEST?

**Resources:**

Excerpt from [\*Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics\*](#) (2008-2009), § 3.4 - *ESI Discovery, Type and Storage*.

### § 3.4 ESI DISCOVERY - TYPE AND STORAGE

Courts, for many years, have supported the discovery of electronic information realizing that it is simply keeping pace with change in business and with technological advances.

On December 1st, 2006, the federal rules were amended and now provide for the discovery of "electronically stored information" (ESI). The changes to Fed. R. Civ. P 16, 26, 33, 34, 37, 45 and Form 35 provide mandates as to the preservation, discoverability, production, accessibility, and costs associated with ESI which include e-mail, word processing documents, spreadsheets, voice mail, databases and more.

In noting the expansive nature of the definition of ESI, the Fed. R. Civ. P. 34, Advisory Committee Note of 2006 provided:

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically (emphasis added).

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This section catalogues a wide range of potential storage media, devices, and locations of "electronically stored information" (ESI). Each of these sources should be considered in creating a discovery plan for either the discovery or production of electronic data. In addition, new sources of electronic data are constantly being created, such as instant and text messaging. Given the constant change in this area, it is important for lawyers to keep current on evolving technologies.

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

- § 1.3(A), Discovering Electronic Information
- § 7.1(A), FRCP Amendments
- § 7.1(B), Local Rules of Practice
- § 7.1(C), State Rules - Electronic Discovery [see also [www.elawexchange.com](http://www.elawexchange.com)]
- § 7.7(B), "Document" and "Electronically Stored Information (ESI)"

### A.□□ ESI Types

There are many different data types that may contain electronic information relevant to your case. These different file types are discoverable. As stated in *Kleiner v. Burns*, No. 00-2160, 2000 WL 1909470, at \*4 (D. Kan. Dec. 15, 2000):

As used by the advisory committee, 'computerized data and other electronically-recorded information' includes, but is not limited to: voice mail messages and files, back-up voice mail files, e-mail messages and files, backup e-mail files, deleted e-mail, data files, program files, backup and archival tapes, temporary files, system history files, Web site information stored in textual, graphical or audio format, Web site log files, cache files, cookies, and other electronically-recorded information.

The court noted that they did not intend the list to be exhaustive. *Id.* at \*4, n.6.

The different types of ESI include:

- E-mail
- Database
- Spreadsheet
- Word Processing document
- Fax
- Audio
- Graphic, Photograph & Image

- Presentation
- Video
- Metadata
- Conferencing
- Multimedia
- Spyware
- Business software application
- Audit Trails, Logs and Registries
- Internet

Web page

Text and Instant Messaging

Newsgroup

Chat room

Listserv

Cookie

Internet history log

Cache file

Firewall

Web log

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#### *B. ESI Storage*

Understanding the possible storage media, devices and locations of electronic information will assist with not only the discovery, but also the production of ESI. ESI is classified as to storage media - hard drive, floppy, etc. (§ 2.4, Storage Media), storage devices - desktop and handheld computers, etc., (§ 2.5, Storage Devices) and storage locations - home, office, remote storage, etc., (§ 2.6, Storage Locations). ESI can be found on many different types of storage media and devices, and located in many places.

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#### *1. Storage Media*

- Floppy Disk
- Pen or Thumb Drive
- Hard Drive
- Magnetic Tape Drive
- CD-ROM
- DAT (Digital Audio Tape)
- DVD (Digital Video Disk)
- Compact Flash Card
- Blu-ray Disk
- Smart Card
- Jaz and Zip Disk

- Microfilm/Microfiche
- LS -120 (SuperDisk)
- Micro Drive
- PC Card (PCMCIA Card)
- Memory Stick
- MD (Minidisk)
- Bernoulli Drive

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### 2. Storage Devices

- Mainframe Computer
- Server (Networking)
- Personal Computer
- Laptop
- Personal Digital Assistant (PDA)
- Cellular Telephone
- Cordless Telephone
- Voice Mail and Answering Machine
- Caller ID Device
- Paging Device
- Facsimile Transmission (Faxes)
- Smart and Magnetic Stripe Cards
- Scanner
- Printer
- Copier
- Compact Disc Duplicator
- Cameras/Camcorder (Digital)
- Electronic Game Devices
- Home Electronic Devices
- Global Positioning System (GPS)
- Security Systems
- Vehicle Computer Devices
- RFID
- Biometric
- Other New Devices

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### 3. Storage Locations

- Service Providers

Internet

Application  
Satellite  
Pager  
Telephone  
Cellular  
Financial Institution/Credit Card Issuer  
Cable Service Provider  
Gas Utility  
Electric Utility  
Water Utility

- Backup Computer Files
  - Archived Data
  - Legacy Data
  - Residual Data
  - Cache Data and RAM
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- Internet Storage Locations

World Wide Web  
Web Pages  
Chat Room  
Newsgroups  
Listserv  
Cookies  
Internet History Log  
Cache Files

- Firewalls
- Audit Trails, Logs and Registries
- Other Lawsuits
- Storage Devices
- Storage Media

C. Requesting Party Strategy

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D. Producing Party Strategy

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E. Checklist

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