

# Paradigm

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# A Primer on Electronic Discovery

As the owner of a business that may be a party to a lawsuit, you need to know about the discovery of electronically stored information (ESI), also known as e-discovery. Why? Because the requirements to preserve and produce ESI are quickly evolving and have often taken over lawsuits as if e-discovery has a life of its own. This article will address the basics of e-discovery so that your business can start taking steps to minimize its impact.

## What Is E-discovery?

There is a phase in most lawsuits and arbitration proceedings when parties are required to exchange information. Before computers and other electronic devices were regularly used in business,

the exchange of information required a company to look through its paper files for relevant documents, including letters, internal memoranda, and the like, which would then be copied and provided to the other party or made available for copying.

As businesses started using computers to create and store company information and email to communicate, a new treasure trove of relevant documents emerged, namely, the documents that were stored on the company's computer. Before the widespread use of text messages, communications were limited to emails, and email communication was also limited as many companies preferred faxes and snail mail instead. Thus, in its infancy, it was easy to produce ESI because the volume of ESI was minimal. As hard drives increased in storage capacity and more companies relied on a shared computer network rather than stand-alone computers, companies realized the benefit of storing information electronically as it would allow them to reduce the amount of paper.

Unfortunately, the pervasive use of electronic devices has created an explosion of ESI. ESI has now grown from merely reviewing and producing emails to scouring all of a company's electronic devices for evidence, in the form of documents, emails, text messages and instant messages. These are not merely stored on a company's individual computers or server, but also on other electronic storage devices, including external hard drives, tablets, laptops and cell phones. The bigger the company, the more bytes of information that need to be scoured. E-discovery thus now encompasses the discovery of information stored on all of these electronic devices.

## Law Relating to Discovery of ESI

Both the California Code of Civil Procedure and Federal Rules of Civil Procedure (AFRCP) permit e-discovery in pending litigation. The rules for e-discovery in California can be found at Code of Civil Procedure 2019.040 [applying the discovery rules to ESI], 2031.010(e) [party may demand production of ESI], 2031.210 [objecting to discovery of ESI], 2031.280 and 2031.285 [production of ESI]. In federal actions, the rules can be found at FRCP Rules 34 [permitting production of ESI] and 37 [failure to cooperate with discovery]. In fact, virtually all states have similar laws that permit the discovery of ESI.

## What to Do When ESI May Have to be Produced

Most often, a company is confronted with issues surrounding the discovery of ESI when first notified that a lawsuit may be filed. At that time, company representatives and counsel should get together to determine if there is ESI that relates to the claim. If there is any possibility that there is, the company should institute a "litigation hold." This is the process by which the company identifies any sources of ESI that may be discoverable (i.e., may be relevant or lead to the discovery of admissible evidence), and then take affirmative steps to preserve the ESI. This may be difficult.

Once a litigation hold is in place, it is important to take steps to make sure that the litigation hold remains in place. Why? Because if ESI is destroyed once you know a claim may be made for which ESI may have to be produced, the court may make



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an inference that the ESI was destroyed because it was harmful to your case. If that happens, it can be extremely damaging to your case.

During the lawsuit, any party can request discovery once the proper time has passed, which is generally 20 days after service of the lawsuit in state court and once the parties have completed their initial conference with the parties in federal court. One such discovery request is a request for the production and copying of documents. As noted above, both state and federal civil procedure allows a party to ask that the adverse party produce ESI. The request must set forth the category of documents sought and whether an inspection of a computer or other electronic storage devices is sought.

Once such a demand is made, the real work starts. Hopefully, prior to the request, your company instituted a litigation hold. If so, then steps must be taken to determine the scope of what must be produced and how it will be recovered. For a small company, this may be easy as the amount of ESI is limited. For a larger company, this exercise may be one of the most costly parts of the lawsuit. That is because a protocol is often needed. Where there is a large volume of materials, this may require counsel (with the help of their e-discovery experts and the client) to determine how to best search for responsive documents. This may require the parties to agree to search terms or, if an agreement cannot be reached, court intervention.

Once you have identified the ESI to be produced, the next step is getting it off electronic devices. Once that is done, it is necessary to have it reviewed to make sure that information that is privileged or otherwise protected from disclosure is not turned over. That generally requires review by your lawyers. Based on the volume of data to be reviewed, this can be yet another expensive proposition.

## Shifting the Cost of Production of ESI

In many instances, the cost of producing ESI can be extremely high and it is unknown whether the cost of production

outweighs the benefits. Because of this, the California Code of Civil Procedure provides ways to minimize or shift the cost of production. These include:

- Meeting and conferring with the opposing counsel to limit the scope of the discovery request;
- Obtaining an order from the court to limit the scope of the discovery sought, known as a protective order; or,
- Asking that the court shift the burden of producing the ESI to the opposing party.

In larger cases, the need to shift the cost of production may be important. Thus, working in advance with your counsel, your ESI expert and internal IT professionals to determine the cost of production and alternatives to reduce expenses is important.

## Protections for Inadvertent Production

Despite best efforts, there are times when confidential, privileged or otherwise protected documents are produced. Both state and federal laws anticipate that by permitting the “clawback” of inadvertently produced documents.

As the name implies, a clawback is a request to return an inadvertently produced document. When this happens, the producing party must advise the opposing party of the inadvertent production and demand that the improperly produced document be returned. If the receiving party disputes that the document should be returned, the producing party can ask the court for an order for the return of the document(s). If the court finds a party unjustifiably refuses to return the documents or makes an unjustified request for the return of documents, the court may award fees to the prevailing party.

## Failure to Produce ESI

Some companies are reluctant to produce ESI for various reasons: they believe it may prevent adverse information from being provided, the documents were lost due to the destruction or failure of the device storing it, the documents were

purposely deleted to avoid production, or through sheer carelessness either from improperly searching for the documents (i.e., use of the wrong search terms) or downloading them. Whatever the reason, both state and federal courts provide that sanctions may be imposed against the party that fails to comply with production. The sanctions vary depending on the severity of the omission and include:

- An award of fees and costs incurred by the requesting party in obtaining a further order;
- An order precluding the producing party from producing any further documents;
- A monetary sanction payable to the court and opposing party as a penalty for non-production;
- An instruction to the jury that the jury could consider the failure to produce the ESI was because the ESI was damaging; and,
- An order striking the non-producing party’s pleadings and entering judgment against them.

## Conclusion

The above makes clear that e-discovery is fraught with danger. Any wrong move could damage your case. That is why a cottage industry has been created that assists companies with all aspects of ESI.

Being proactive can protect your company in many ways. Working with your counsel, your IT department and ESI experts can help your company develop a plan to organize your computers to make it easier to preserve, retrieve and produce ESI if the need arises. What is certain is that if you are threatened with a lawsuit, your company needs to be prepared to address ESI and e-discovery. We thus urge you to speak with your IT department and counsel to make sure you are ready. Taking steps now may save you in the future. 