

Inside Counsel

Technology: Using ESI to Your Advantage

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Electronically stored information (ESI) collection not only dominates the discovery phase of every e-discovery case, but it also is a key litigation strategy. The strategic element can be especially painful when you are on the wrong side of a case involving asymmetrical obligations.

Asymmetrical obligations arise when one party has a disproportionate share of ESI burden. An example of this situation would be an aircraft manufacturer in a case involving an airplane crash, consumer-based class actions, securities litigation and usually in any type of employment case.

When you are on the wrong side of the burden, it is tempting for the other side to use ESI as a sword to increase the blackmail value of the case. Counsel must be strategic in defending overbroad ESI requests. The key to handling these issues is targeted collections.

Because much of the ESI costs relate to the attorney review, you should “preserve broad and collect small.” Just because you preserve something doesn’t mean you have to collect it. Broad preservation is important because once something is appropriately preserved, you can always go back to it. Targeted collections are critical to the often disproportionate costs of collecting and reviewing ESI, especially in asymmetrical situations.

The 3 keys to targeted collections

1. **Plan for ESI.** Find out all of the potential sources of ESI before you are sued. A lot of people talk about data mapping, but it's more effective to think of people mapping—that is, focus on how key individuals at the company store their information.

2. **Take control of the process from the beginning.** It's vital to have ESI obligations defined at the beginning of the case. Complete the preservation process and then focus on collection. At the beginning of the case, only agree to collect information from non-redundant sources and key people. Tell your adversary exactly what you are going to do and dare them to go to the court to complain about it.

This point is counter-intuitive to many lawyers, especially defense counsel. Many times they want to avoid discussing ESI, hoping that the plaintiffs won't bring it up. Sometimes this works, but it's like playing Russian roulette. Even if your adversary does not initially ask for ESI, they often will in the middle of discovery. By the time the ESI is requested, it may have already been deleted and, in that case, you are facing an expensive spoliation fight. The solution is to develop your own plan for what you agree to collect. Be reasonable and not too narrow because you do not want the judge to think you are trying to avoid your ESI obligations.

3. **Be willing to fight.** If the other side balks at your targeted collection plan, file a motion and go to court. It is much more effective to try to convince a judge to limit your ESI obligations at the beginning of the case. Most spoliation sanctions occur when ESI issues arise toward the end of discovery. Instead of allowing more time for discovery, the court will issue sanctions to preserve the trial date that is usually very difficult for the court to schedule in the first place.

If you lose the motion, who cares? At least you know what the rules of the game are at the beginning. If the court disagrees with your approach for targeted collections, it is easy to go back to what you have already preserved and collect more data. While this may be more expensive, at least the data is still there and you are not dealing with a spoliation fight.

The lesson is that ESI doesn't have to ruin or dominate your litigation strategy. If you use targeted collection from the beginning of the case to establish the parameters for ESI moving forward, you will not waste time and money doing "discovery about the discovery." You will be able to focus on the substantive issues of the case and ensure ESI will not be used as a sword against you.

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