

# What is Electronically Stored Information (“ESI”)?

June 16, 2011

*As part of Cullen and Dykman’s new E-Discovery blog, we are happy to introduce our “What is...?” series. The series is intended to demystify some of the terminology, practices, and technology used to assess Electronic Discovery (“E-Discovery”) issues that arise during litigation. The series aims to provide the reader with essential information to increase their understanding of this ever growing and complex area of law. Each short post communicates a key concept and issues related to that concept, which continue to be fleshed out by our courts.*

To start the series off, we begin with the broad concept of “Electronically Stored Information” (ESI), but before delving directly into that, a quick overview of the litigation process may be helpful to understand where ESI is introduced. A typical lawsuit, in its simplest form, looks similar to this:

The stage where ESI gets actively involved is mainly during discovery. Nonetheless, corporations and individuals should always consider the possible consequences of mismanaged ESI, even before a lawsuit is commenced. Discovery is the process of identifying, preserving, collecting, reviewing, analyzing, and producing information during a legal action. The main goal of discovery is to obtain information that will assist in developing a party’s case, and then use that information for pre-trial motions, settlement discussions, and the trial itself. Traditionally, discovery has included documents, testimony, and other information that may be deemed necessary for the litigation. As our society becomes more technologically advanced, however, the information produced during discovery also becomes more advanced. Thus, the introduction of electronic-discovery to the discovery process has become necessary.

Generally speaking, e-discovery, is the extension of the discovery process to include information that is stored electronically. The information can be found in e-mails, voice-mails, instant messages, documents, computer searches, downloads spreadsheets, databases, file fragments, metadata, digital images, digital diagrams, and any other electronic information that may be stored on hard drives, thumb drives, computers, handheld devices, backup tapes, optical disks, or any other media storage device.

This area of law was first developed after five groundbreaking opinions in *Zubulake v. U.B.S. Warburg*. *Zubulake* was an employment discrimination case in the Southern District of New York, which resulted in landmark decisions that are often cited as the standard for a majority of all e-discovery cases. (We will not discuss the *Zubulake* decisions in this article, however, as they are worthy of their own post in the “What is..?” series.) The case was so influential that it was partially written into the FRCP amendments in 2006. As noted by the Advisory Committee Note for Fed. R. Civ. 34, ESI was intended to be a broad concept, which allows the rule to include future developments in computer technology.

The Advisory Committee Note for Fed. R. Civ. 34 reads:

*“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 . . . The rule covers — either as documents or as electronically stored information — information “stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.”* Fed. R. Civ. P. 34 advisory committee’s note.

The intention of the writers was to keep the term “electronically stored information” broad enough to encompass everything from terabyte-sized databases that store EZ-Pass information to byte-sized text messages sent from a cellular phone. The information that becomes discoverable during litigation is voluminous, but it also has some limitations. In particular, the content of the information may be confidential or subject to certain privileges, which will also be discussed in a later post of the series.

In today’s society, ESI has become a core concern of most litigation due to the importance of keeping data and the sheer mass of information that is stored electronically. ESI becomes even more complex and convoluted when you include elements such as metadata (metadata is essentially the history of each document), which is embedded within each piece of information.

One of the most common problems arising in matters concerning e-discovery is the immense amount of information that is processed and the various formats in which it can be created, stored, and produced. This often leads to large litigation costs related to producing, organizing, and reviewing the ESI. Therefore, a proper case management plan becomes necessary to avoid e-discovery disasters.

Another issue related to e-discovery surrounds the fact that electronic documents are much easier to alter than paper documents, and changes to electronic documents can be done without leaving a visible sign of the alteration. Since data can be deliberately modified in numerous ways, detection of those modifications often requires computer professionals. Therefore, preservation of ESI and obtaining IT professionals who can communicate effectively to attorneys litigating the case have become growing concerns in any lawsuit.

Similarly, other issues may arise when a case involves ESI. In particular, the electronically stored files can become corrupted; the hard-drives that store the information may crash; users may accidentally or deliberately delete or overwrite a file; and document retention policies may not preserve data long enough. If any of these issues appear, the discovery process inevitably becomes more complex, time consuming and expensive.

As you can see, e-discovery has become an integral part of most litigation. Whether the case involves a divorced couple checking the spouse’s instant messages, an employer scanning employee’s internal and external uses of the corporation’s computers and email system, or a prosecutor demanding a list of EZ-Pass access points in order to find out where a criminal has traveled, obtaining ESI during discovery has become relevant in litigating almost any kind of matter. Through the Cullen and Dykman E-Discovery blog, we hope to clarify some of these issues, as well as provide case summaries to recent decisions that help refine the area of law.