

Electronically Stored Information

Do you operate a business? Are you familiar with Electronically Stored Information (ESI)? You probably are and it's guaranteed that you have plenty of it, but maybe don't realize it. Essentially, ESI consists of documents that are kept in a paperless rather than a paper format. Therefore, it can consist of, well, nearly anything such as bills, receipts, contracts, correspondence, orders, internal memos (e-mails), payroll records, tax records, and so on. While ESI seems like it can be mundane, there is a situation that can render it very important. For various reasons, you may be required to reproduce and share information. The requirement may come from a customer, the IRS or, from someone who is suing you. It is the latter circumstance that has made ESI so prominent.

Regardless what a lawsuit may be about, each party to the suit has rights of discovery. In other words, each party has a right to see information held by the other party that is considered relevant to the dispute. Typically the information may be for an extended period, such as months or even years. The parameters that control the discovery process are found in the Federal Rules of Civil Procedure (FRCP).

As recently as a half dozen years ago, the discovery process handled electronically stored data along the same lines as traditionally stored data. However, it quickly became obvious that electronic or digital data is a far more complex creature than non-digital data. Therefore, rather than relying on regular rules of discovery, new and separate rules are evolving on E-discovery and they are radically different.

Electronic communication has taken the place of various other modes of contact. By the very nature of computers, this information never, truly, is ever destroyed. Even when information is "deleted", the only change is that its access has been moved from an active status to an inactive. This is much like the case of a library book having its catalog card destroyed, but the book is not taken off the shelf. It can't be looked up in a regular manner, but it can be found if one knows where to look.

Requests for information involved in litigation have created issues that were never contemplated by the non-digital information world. In the past, an entity that had a documented document handling/retention/destruction system could manage what happened with information and explain their handling as well. No legal consequence was likely if paper information that seemed routine was destroyed after, say, five to ten years of storage. However, digital information can become inaccessible, but not destroyed.

Businesses routinely back-up data and store it on tapes or other media. Computers themselves replicate and keep many copies of information, storing it randomly according to its software programming. However, older information may become extremely difficult to access or analyze because of obsolescence of software and changes and upgrades to software and hardware.

A defendant to a lawsuit may be found liable for producing information yet, while having the information in backups, they may be unable to actually provide the data, or to provide it in a meaningful form. Now requests for data may be under increasing control of judges who may be responsible for making technologically-laden decisions on how data searches are to be performed and on the parameters of such searches.

Businesses may have to totally reconsider their procedures on handling and storing their information. This becomes a daunting task considering the unprecedented volume in which electronic data is created.

However, as conditions and requirements are shaped in the courts, information and a business' responsibilities can no longer be considered normal or mundane.

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