

# E-DISCOVERY

The process in which electronic data is sought, located, secured, and analyzed with the intent of using it as evidence in a civil or criminal legal case.

## I. Guidance Regarding the Amended Federal Rules of Civil Procedure and E-Discovery

1. Rule 16: Pretrial Conferences
2. Rule 26(f): Planning for Discovery
3. Rule 26(b)(2): Discovery into Electronically Stored information that is not Reasonably Accessible
4. Rule 26(b)(5) (B): Inadvertent Waiver of Privilege (Clawback)
5. Rule 33: Interrogatories to Parties
6. Rule 34: Production of Documents
7. Rule 37(f): Failure to Make Disclosure / Sanctions
8. Rule 45: Subpoena to non-Parties

## Rule 16: Pretrial Conferences

The amendments to Rule 16 and Rule 26 recognize the importance of addressing preservation and discovery of electronic data at an early stage in litigation.

The proposed amendment to Rule 16 sets up a framework for the parties to address the “disclosure or discovery of electronically stored information,” and to identify issues relating to protection of privileges at the Rule 16 Scheduling Conference.

## Rule 26(f): Planning for Discovery

The proposed amendment to Rule 26(f) requires parties to discuss “any issues relating to preserving discoverable information,” and “any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced[.]” at least 21 days before a Scheduling Order Conference is held or Scheduling Order is submitted by the parties.

## **Rule 26(b)(2): Discovery into Electronically Stored information that is not Reasonably Accessible**

Proposed Rule 26(b)(2) addresses the distinction between accessible and inaccessible data and allows the Court, for good cause shown, to shift the costs of producing inaccessible documents to the responding party. This is perhaps the most significant proposal set out in the new Civil Rules. Searching and producing data that is “not reasonably accessible” can exponentially increase the costs of litigation and can spell the difference between a client being financially able to pursue litigation, or having to settle a case because it lacks resources.

## **Rule 26(b)(5)(B): Inadvertent Waiver of Privilege (Clawback)**

When a party produces information without intending to waive a claim of privilege it may, within reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.



## Rule 33: Interrogatories to Parties

The proposed amendment to Rule 33 clarifies that where business records are stored in electronic format, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, the responding party may simply identify the electronic data and allow the requesting party reasonable opportunity for inspection and copying.

## Rule 34: Production of Documents

The proposed amendments to Rule 34 focus on clarifying the production of electronic data.

First, Rule 34(a) is amended to provide that a party may serve on any party a request to produce any designated electronically stored information or any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations in any medium).

Second, Rule 34(a) allows parties to request to sample any designated electronically stored information. The comment to Rule 26(b)(2) notes that such a sampling or testing to gauge the likelihood that relevant information will be obtained, is one method the court might use to determine appropriate terms and conditions for production of electronic data. Courts have used this approach under the current rules to determine the parameters of electronic discovery.



## Rule 37(f): Failure to Make Disclosure / Sanctions

A provision requiring intentional or reckless failure to preserve in order to impose sanctions.

(f) Electronically Stored Information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:

- (1) The party intentionally or recklessly failed to preserve the information; or
- (2) The party violated an order issued in the action requiring the preservation of the information.

## Rule 45: Subpoena to non-Parties

The proposed amendments to Rule 45 acknowledges that electronic information can be sought through a subpoena as well as traditional discovery requests. The proposed amendments to Rule 45 incorporate the changes to Rule 26 and 34 to provide parameters for production of electronic data through a subpoena. For example, Rule 45 (a)(1)(D) is amended to allow a party requesting documents to specify the form of production.

## II. Evidence Life Cycle Management

1. Identification of ESI
2. Preservation of ESI
3. Collection of ESI
4. Processing of ESI
5. Review of ESI
6. Analysis of ESI
7. Production of ESI

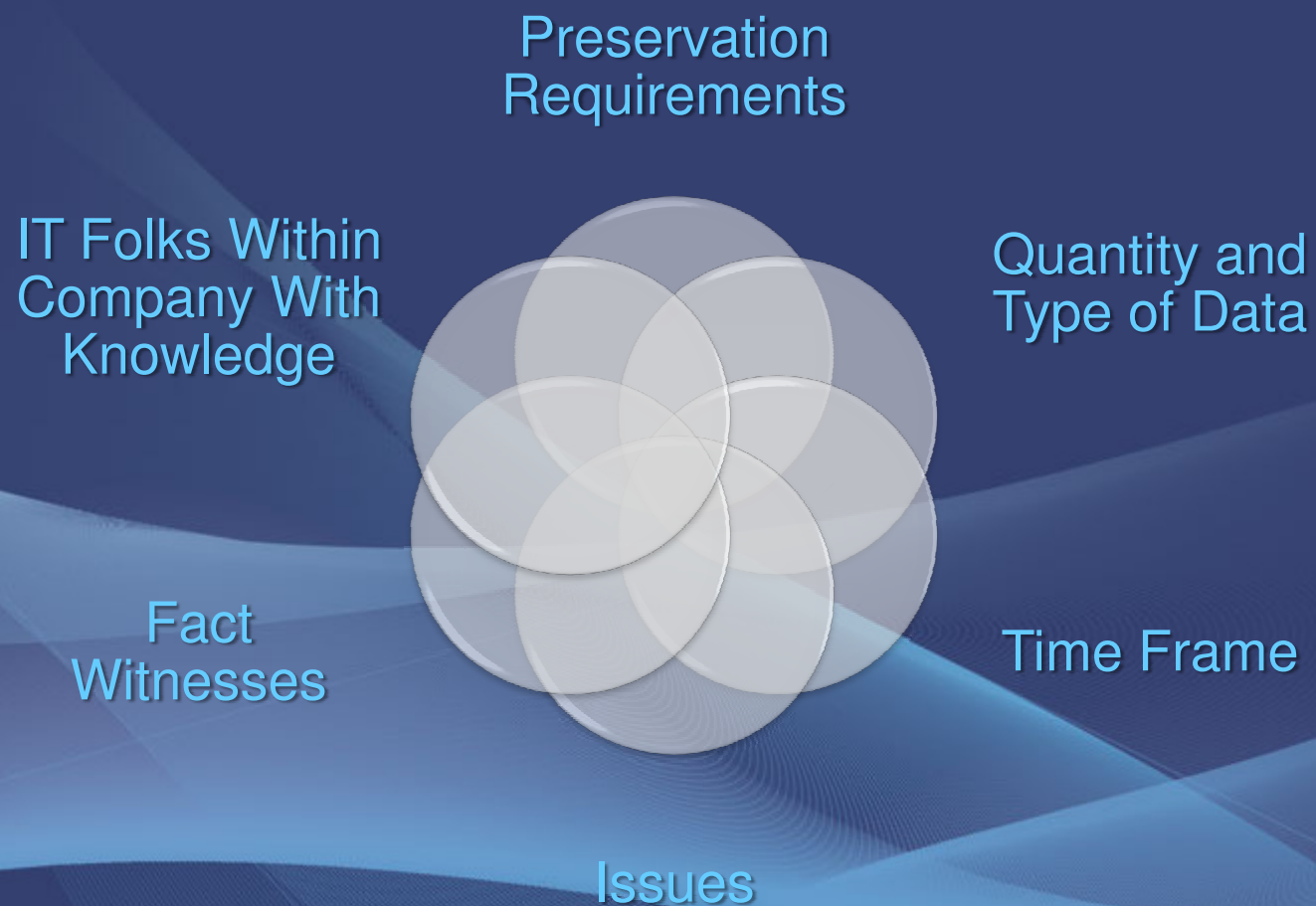
## Identification of ESI



10 years Ago A Large  
Case May Have  
Involved Hundreds of  
Documents

Today, Not Uncommon  
To See Hundreds of  
Thousands or Millions  
of Documents

## Preservation of ESI

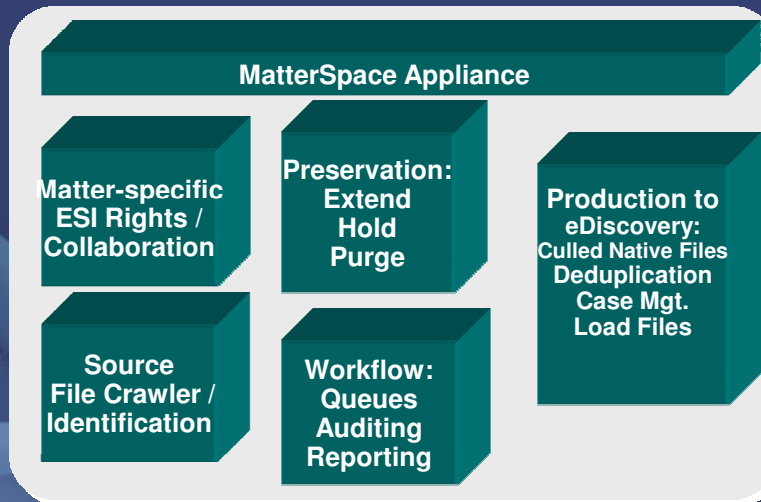
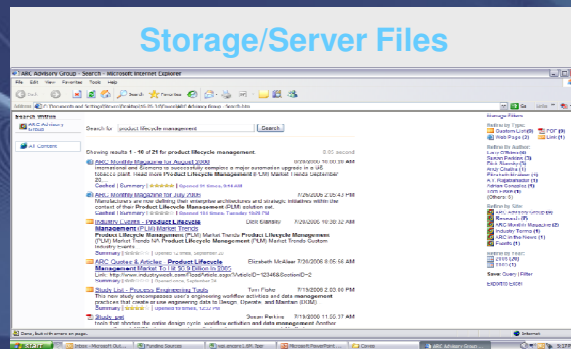
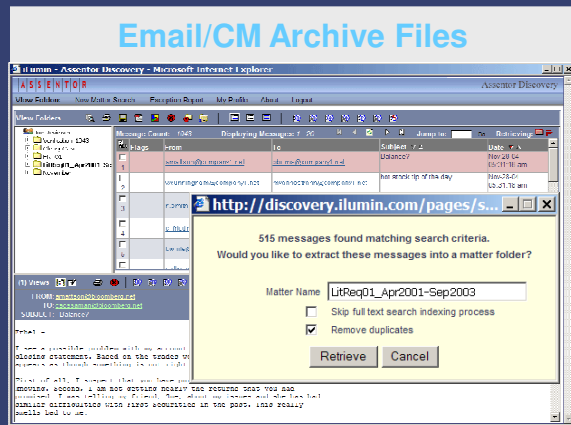


## Collection of ESI

Data Type	Cost	Characteristics
Active	Easiest to get, least costly	Active documents are those that you can see in a file manager or email inbox.
Archival	Requires restoration	Files are stored on an off-line device(s) including backup tapes and optical media.
Forensic	Most Expensive, requires special tools	Files that are hidden or have been erased, damaged or fragmented.



# eRecords through eDiscovery Bridge



## eDiscovery Alliance Partners

**eDiscovery:**  
File Extraction  
File Conversion  
Filter  
Concept Folding  
Clustering  
Smart Coding

## Legal Review & Production

**Review:**  
Refine  
Flag/Notate  
Metadata  
Produce

## Processing of ESI

Once Data Has Been Collected, It Is Formatted and Prepared For A Document Database.

### Points of Interest:

Duplicate  
Emails and  
Documents

Information  
Filtering

Data  
Relationships

## Review of ESI



## Analysis of ESI

In Addition, You Have Litigation Support Professionals In-House and Access to host of Experts Specialized in Every Aspect of your Case.

Litigation Support Specialists Combine Aspects of Discovery Support of the Paralegal with Technical Skills such as Database Development Found in Information Technology Professionals.

## Production of ESI



Manage  
Documents  
For Trial

Consider  
Issue Coding

Bring  
Database to  
Trial

### III. E-Discovery in the News

#### [Umbrella Rulings Can't Cover All Data](#)

By Tom Allman, *Law Technology News*, August 30, 2007

#### [Authenticating E-Discovery As Evidence](#)

*The Metropolitan Corporate Counsel*

#### [Gibbons' E-Discovery Conference: Helping The Client Develop Defensible Practices](#)

*The Metropolitan Corporate Counsel*

#### [Electronic Document Retention and Production](#)

*The Sedona Conference®*



## IV. Case Rulings

Annotated Case Law on Electronic Discovery,  
By Kenneth J. Withers, Updated June 1, 2006

Zubulake v. UBS Warburg,  
United States District Court Judge Shira A. Scheindlin

Electronic Discovery and Computer Forensics Case  
Law, Kroll Ontrack Inc., Last Revised 8/07

## V. Using Metadata as a Timeline

1. The broadness of characterizations such as "information about information" or "data about data" has led some analysts to suggest that online metadata has the following characteristics.
  - a. exists in the **electronic** environment
  - b. describes the **attributes** of an electronic resource
  - c. characterizes its **relationships** to other resources
  - d. supports the discovery, management and efficient use of that resource
2. Beyond Data about Data: The Litigator's Guide to Metadata,  
By Craig Ball, © 2005, <http://www.craigball.com>