The ESI Data Map: An In-Depth Review

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By John P. Collins, JD
Vice President, Consulting
The Ingersoll Firm
www.theingersollfirm.com

"Counsel who come to a conference armed with details about their client's electronic data systems are more likely to be able to offer informed suggestions for an efficient discovery plan and will receive a warmer reception from the court."

> **James C. Francis, United States Magistrate Judge, Southern District of New York, from <u>eDiscovery for Corporate Counsel, 2009 ed.</u>** By Mary Mack and Carol Basri, West Publishing 2009

"Counsel should have educated themselves by that point (indeed, by much earlier) about the client's information and record keeping systems, including discussion with the client's business and IT personnel."

> **Andrew J. Peck, United States Magistrate Judge, Southern District of New York, from <u>eDiscovery for Corporate Counsel, 2009 ed.</u>** By Mary Mack and Carol Basri, West Publishing 2009

"A pro-active approach means that corporate counsel must be prepared to deal with the challenges of electronic discovery before litigation even commences. Education is an essential component of that preparation process. At a minimum, corporate counsel should have more than passing knowledge of how their organization manages electronically stored information and its information technology. In-house counsel should have a basic understanding of how the organization GENERATES and STORES electronic information, in WHAT MANNER and FOR HOW LONG that information and data is retained, and to WHAT EXTENT the organization can search for and retrieve data."

> **Craig B. Shaffer, United States Magistrate Judge, District of Colorado, from <u>eDiscovery for Corporate Counsel, 2009 ed.</u>** By Mary Mack and Carol Basri, West Publishing 2009

"When a case involves discovery of electronically stored information the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties information systems. It may be important for the parties to discuss those systems, and **accordingly important for counsel to become familiar with those systems before the conference**."

> FRCP Rule 26(f) Committee Note

"In order to preserve documents, it is important to know where they reside. Work with the IT group to **develop a map of the locations of various types of data** which might be relevant to litigation or a regulatory investigation."

> From EDRM Preservation Node at www.edrm.net

"…ultimately, it is **the legal counsel protecting the client's interests who must learn the most about the client's IT architecture, policies, personnel, and culture…a successful preservation plan will be nearly impossible if legal counsel is not fully aware of all the places in the client's electronic world where relevant material may be stashed**."

> From EDRM Preservation Node at www.edrm.net

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What Is An ESI Data Map?

Introduction

An ESI Data Map is a comprehensive and defensible inventory of an organization's IT systems that store information—electronically stored information or ESI—which may be relevant to litigation, regulatory proceedings, government investigations, or audits. An ESI data map is created via a methodical process which systematically identifies potentially relevant IT systems and gathers pertinent facts about the configuration and operation of those IT systems. An ESI data map represents a good faith and reasonable effort to document an organization's IT systems, and is the cornerstone for both an effective information management program and a sound litigation response plan. The focus in this white paper is on the ESI data map's place and value within the context of a litigation response plan.

The ESI data map serves an eminently fundamental purpose: it identifies the potential sources of ESI; where those sources of ESI reside; the retention, purging, and deletion of the ESI; who manages those sources of ESI; and details about the scope (for example, age) of ESI available from those sources. Consequently, the ESI data map is an indispensable reference tool for legal and RIM professionals who are responsible for an organization's compliance with discovery obligations. Ideally, the ESI data map empowers going beyond mere compliance to take a strategic approach to discovery by leveraging detailed knowledge of the organization's IT systems.

Key Elements of an ESI Data Map

1. Identification of IT systems most likely to be relevant based on the organization's discovery portfolio[1].
2. "Plain-English" description of IT systems purpose and role
3. Answers to critical discovery questions about IT systems, such as:
    a. How old is ESI residing on the IT system?
    b. Has there been any purging, deletion, overwriting, or alteration of ESI on the IT system?
        i. Who is responsible for suspending such activity in response to a legal hold?
    c. What is the native file format of the ESI?
    d. Where is e-mail stored?
    e. Where are user's documents (Word, Excel, PowerPoint, Visio, etc.) stored?
    f. What are the backup policies for relevant IT systems?
    g. Do "random" backup tapes exist?
    h. Who are the proper contacts for each relevant IT system?

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[1] The phrase "discovery portfolio" is meant to encompass discovery in a broad array of contexts, including: litigation, governmental investigation, audit, regulatory proceedings, and third-party subpoena.

What's NOT an ESI Data Map?
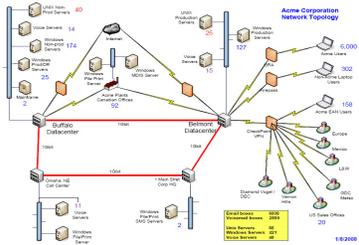
At first blush, some legal and RIM professionals will, in response to a question about whether or not their organization has an ESI data map, respond in the affirmative. This response is often perfunctory; there is an assumption that "of course IT maintains detailed and extensive documentation about our systems—they must have an ESI data map." In reality, for many organizations the existence of, type, and range of IT documentation varies widely—and in most instances such documentation has limited value in a discovery context. Furthermore, many legal and RIM professionals are often surprised to learn their IT counterparts maintain relatively little formal documentation. When contemplating building an ESI data map, a key question to ask is: does the organization keep and maintain documentation about the IT infrastructure? If yes, then the next question is does it provide similar information to that contained in a defensible ESI data map? As explored below, the answer to these questions is frequently no.

Does the organization keep and maintain documentation about the IT infrastructure?

Having worked with a number of Fortune 500 corporations, here is a sampling of what has been discovered with regards to IT documentation:

- One organization's decentralized IT group maintained NO documentation describing the number of servers, age of the servers (when they were deployed), applications and services running on the servers.
- Another organization kept spreadsheets with information about server hardware and included deployment dates and warranty information. However, the spreadsheets were at least 12 months out of date and contained no information about the age of data on the servers nor whether or not any data had ever been purged or deleted from the servers.
- Another organization had a temporary intern create documentation in response to a request for information in the course of building an ESI data map. The assignment of this important (at least from a legal and RIM perspective) task to a relatively inexperienced employee illustrates the typical perspective with which IT views documentation: as a "nice to have but we don't have the time or resources to invest in it."

The above observations do not reflect a systematic survey of IT documentation at Fortune 500 corporations, and as a result, are only anecdotal in nature. There are organizations which do maintain detailed and up to date IT documentation, especially in regulated businesses. However, even those instances where there is substantial IT documentation, such documentation usually lacks the type of information required by legal and RIM professionals.

Does the documentation kept by IT provide similar information to that contained in a defensible ESI data map?

Some of the types of documentation frequently found at organizations include the following:

- "Network Map", a graphic depiction of the organization's IT infrastructure focused on the hardware employed, such as servers, bridges, routers, hubs, gateways, etc. Network maps often show the links between various server and network elements. These documents usually employ cryptic abbreviations and technical jargon as descriptors. While these documents can be helpful in building an ESI data map, they require significant translation into plain English, and usually do not contain

substantive information about how the ESI contained in the elements depicted is managed from a purging or retention perspective.

- Spreadsheets listing elements of the organization's IT infrastructure. These vary widely in terms of content, scope, and depth of information and like Network Maps, often cryptic abbreviations and technical nomenclature.
- Asset management system reports. There are software applications designed to inventory and track the software and hardware deployed throughout the organization. Typically deployed for operational, financial, and license compliance purposes, these systems do frequently provide information that is understandable and useful to legal and RIM professionals; however, the scope of the information is usually limited (for example, purging and retention routines are not captured) and the overall breadth of the systems covered is sometimes limited (for example, on Windows based systems are included.)

IT is focused on supporting the business and meeting the formidable challenges of ensuring the IT infrastructure is secure and resilient while at the same providing users with uninterrupted access to computing resources. These are the imperatives which drive the IT function at most organizations. Investing significant effort to create and keep IT documentation up to date is at best a secondary consideration, and often, not a consideration at all.

How Does an Organization Build and Maintain an ESI Data Map?

The following is a high-level overview of how to build and maintain an ESI Data Map.

1. Identify, as completely as possible, all the IT systems, applications, programs, and platforms in the company's IT infrastructure.
2. Using the list created in step #1 above, identify those IT systems, applications, etc. that are most likely to be relevant to the type of discovery with which the company is typically involved.
3. Once the relevant IT systems, applications, etc. have been identified, organize them by their priority in a discovery context. For example, the most likely targets of discovery could be labeled "Tier 1," less likely targets "Tier 2," and marginal targets "Tier 3."
4. Gather information about the IT systems. The level of detail gathered will vary based on the system's "Tier," with Tier 1 requiring the greatest level of detail, Tier 2 a reduced level of detail, and subsequent Tiers, if necessary, a progressively lesser amount of detail.
5. Once the information about the IT systems is gathered, it needs to be compiled, analyzed, and presented. A key objective is making sure the ESI Data Map is understandable to non-technical readers, which entails translation of technical terms and concepts.
6. Presentation may be in paper, such as a notebook, or electronic, such as a database or linkable PDF document. The primary goal with regards to presentation is ensuring the information is understandable and accessible.
7. Maintenance. A consideration in building an ESI Data Map is keeping it up to date. Most company's IT infrastructures change on a regular basis, as systems are upgraded, new applications are installed, and computer hardware is retired and replaced. While keeping an ESI Data Map up to date can be challenging, there are several approaches that may be taken. For example, the company can conduct monthly, quarterly, or annual "audits" of the ESI Data Map. These audits would consist of interviewing designated IT personnel to determine changes in the IT infrastructure since the creation of the ESI data map or last audit. For company's with significant litigation portfolios, an attorney or paralegal could take ownership for keeping the ESI Data Map up to date; ideally, this would be the company's "point person" for collaborating with IT on discovery. Such an individual would

be responsible for continuously updating the ESI data map during ongoing collaboration with IT on legal matters.

What are the Benefits of BUILDING an ESI Data Map?

There are a number of benefits which accrue to the organization which undertakes the process of building an ESI data map. These benefits, while intensely complimentary to the benefits derived from having and using an ESI data map, are distinct. These benefits are distinct in that they arise from the processes, mechanics, and labor of building the ESI data map. If an organization could manufacture an ESI data map without engaging in the work of building the ESI data map, then these tangible, and ultimately invaluable benefits, would not be realized in the same manner or degree—and perhaps not be realized at all. Following is a review of some of the most salient of these benefits.

1. **Grassroots in the trenches education of IT staff and others** who are interviewed and from whom information is gathered during the ESI data mapping process. In my experience, each interaction with IT and other staff has revealed itself to be an opportunity to educate the other person about electronic discovery, legal process, records management, information governance. This benefits the organization by helping ensure non-legal staff are aware of the organization's responsibilities with regards to ESI; and, it goes beyond mere awareness to enabling a deeper and practical understanding of the implications of day to day decisions that are made by IT. This grassroots type of education can start to instill a culture of awareness that is reflected in the ongoing decisions made about information technology—such as what to buy, how to configure it, how to manage it, ensuring technology is harmonized with records management, records retention, and legal responsibilities. The grassroots education is ongoing, in-the-trenches (as opposed to in a classroom), and done in the context of the regular work-day—as opposed to a one hour training session conducted in a classroom. A prepared, aware, and educated IT staff.

2. **Education of legal staff about the organization's IT systems.** During the course of an ESI data mapping project, there are dozens of meetings and conference calls with project participants. Legal staff's participation in some (or all) of these meetings creates a learning environment; legal staff are able to hear about how the organization's systems function, and can ask questions of IT staff to help clarify their understanding of how the systems function. In many instances, during the course of a discussion, legal staff will express their surprise at how a particular system works, as they thought it worked in a different fashion—this is the proverbial "light bulb" going off. Creates awareness of the issue(s) of electronic discovery among IT staff. There are two levels of education with which legal staff may engage with regards to an ESI data map.
    a. The first level entails the reading and use of the ESI data map. By reading, studying, and using and applying the ESI data map, legal staff will become familiar with their organization's IT infrastructure at a fairly deep level of detail. This first level is more passive than the next level, but represents the minimum baseline to which legal staff should aspire regarding understanding their organization's IT systems.
    b. This second level is more challenging for legal staff, but also pays larger dividends than the first level. The second level entails legal staff's direct involvement in the ESI data mapping process, primarily represented by participating in interviews (face to face, conference calls, follow discussions, etc.) of IT professionals. Being present during these interactions with IT professionals enables legal staff to develop a deeper understanding of IT systems through hearing first-hand how such systems operate. Legal professionals can ask questions, and this can add a valuable element to the dialog as legal staff brings their perspective to the table. Also, another byproduct of legal staff's direct involvement in the process is the interaction and collaboration that takes place with IT professionals. This interaction helps create the foundation for

legal and IT to understand one another's issues and objectives, serving as a framework for this necessary collaboration to take place.

3. **Identification of elements of the IT infrastructure which may be retired, removed, canceled**, etc. In some instances, building the ESI data map will uncover software or hardware which is no longer being used but is still on maintenance or subscription. Experience has shown that in some instances IT is not aware that the business users no longer need the software or hardware, and the systems can be retired and the associated costs removed.

4. **Establishes a framework for cooperation/collaboration/dialog between legal and IT.** This is valuable because both legal and IT can have reservations/questions about how to go about working with each other. This is due (at least in part) to the different terms, concepts, and issues of each discipline (legal vs. Information Technology.) The ESI data map project establishes an objective (identification and description of IT systems for the purpose of managing discovery of ESI.) This objective enables legal and IT to explore the issues from their different perspectives, but with a common objective. This common objective "forces" each to evaluate the other's perspective, and necessitates each having to learn about the substance of the other's perspective. Establishes a "common ground" on which to work.

5. **Gap identification.** The process of building an ESI data map will identify gaps between the organization's IT operations and legal requirements, records management, and records retention. Identification of these gaps is a critical step towards closing these gaps by harmonizing the organization's legal, records and retention requirements with IT operations. Some examples of the types of gaps identified include: 1) no policy to deal with the management of ESI of departed employees; 2) records retention schedule calling for destruction of certain documents but no method for applying such retention to e-mail subject to the retention schedule; 3) lack of knowledge of who to contact to preserve ESI residing on certain systems, especially at acquired companies; 4) legal hold process. While the purpose of the ESI data map is not to recommend solutions to these gaps, the ESI data map nevertheless serves as the launching pad for addressing these gaps. To identify discrepancies between records management and retention policies versus IT data management procedures. There is sometimes (often) a disconnect between what policies state should happen and what actually occurs on the IT systems.

What are the Benefits of HAVING an ESI Data Map?

There are, literally, dozens of benefits realized from having a defensible ESI data map. Some of these benefits are obvious, such as knowing where your ESI is located and whether or not there is a systematic purging routine which should be suspended for a legal hold. Other benefits, such as reducing random and unexpected disruptions of IT staff are perhaps less obvious, but no less valuable to a business seeking to maximize productivity and revenue: every minute spent by IT on litigation matters is one less minute spent supporting the businesses revenue generating functions. Following is an extensive review of the benefits of having an ESI data map.

1. **Reduce the risk of sanctions** due to the company destroying or not being able to produce responsive ESI by taking a comprehensive inventory of the company's IT systems, and capturing critical details about those IT systems so regardless of what systems are targeted, inside counsel, outside counsel, and others are able to make informed, careful, and appropriate judgments regarding what information is potentially responsive, where that information resides, and who is responsible for ensuring the information is properly preserved.

2. **Reduces the risk that there won't be enough time** to adequately prepare for the 26(f) meet & confer. An ESI data map created using a reasonable and good faith process

provides counsel with a comprehensive, accurate, up to date, and understandable description of the organization's IT systems most likely to be relevant based on the organization's discovery portfolio. The significant task of identifying the many different IT systems, who operates those IT systems, and what the scope of data is on those IT systems, is 90% done if the organization has an ESI data map. That is, the "heavy lifting"—the interviews with IT administrators, the search for historical information about legacy systems, the identification of who knows what about certain systems—this has all been done, systematically, and over a reasonable period of time. If an organization waits until the Meet & Confer is scheduled to start the process of identifying the "what, where, who, and how" about IT systems, that organization is likely to either run out of time or run the risk of missing clearly relevant ESI. This is because the heavy lifting takes time: meeting with IT staff, interviews, follow up questions, clarification of issues—these require analysis, research (it is rare to find a single IT professional who has all the answers to all the questions.) The more compressed the time frame to complete the heavy lifting, the more likely something will be missed, overlooked, or left out due to haste or strategic decisions that at the time seem sound but later turn out to have been based on unreliable or incomplete information.

3. Where appropriate, **counsel can make specific, factually detailed assertions regarding why particular ESI is not reasonably accessible** (or avoid making unwarranted assertions.) Counsel is in a position to make these specific, factual, and detail assertions because the data mapping process will have systematically identified all[2] IT systems residing within the organization's IT infrastructure, and will have captured details about those IT systems which relate to the accessibility or relative inaccessibility of the ESI. For example, the "term legacy system" is used frequently to describe computers or IT systems which have been retired and superseded by newer systems; in some instances it has been suggested that legacy systems are somewhat synonymous with "not reasonably accessible" or inaccessible. While this is true in some instances, experience suggests that in many situations, legacy systems are kept around not for sentimental reasons, but because certain business users may occasionally (or frequently) seek information contained on such systems—and as a consequence, these legacy systems are actually maintained in a (seemingly) reasonably accessible state. A systematic investigation of these dynamics reported in a data map will ensure counsel are on notice with regards to systems that may be potentially classified as inaccessible, and most importantly, will have enough information to make careful, reasoned judgments and inquires prior to asserting the accessibility or inaccessibility of ESI residing on such systems.

4. **Informs Risk management[3] analysis**. A data map enables sound risk management by providing counsel with accurate, detailed, and up to date information about the organization's IT systems. Having this information assists counsel in making informed judgments about the cost, burden, and scope of potential discovery in a matter. As risk management involves balancing priorities and potential risks, and one of the primary risks encountered in litigation involving electronic discovery is its potential to swallow the value of the case, counsel is in a much better position to assess risk related to the cost of discovery if counsel knows what the universe of potentially discoverable information is, and certain details and characteristics of that information (such as accessibility, format, volume, etc.).

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[2] It is important to note that, in the realm of IT and ediscovery, all does not mean 100% or perfection in the identification process. The Ingersoll Firm's ESI data mapping process represents a reasonable and good faith effort to identify and inventory an organization's universe of IT systems. There are, invariably, IT systems which escape identification; if a good faith reasonable process has been employed to inventory the organization's IT systems, such systems should be a small percentage of the overall number of systems—and perhaps most importantly—should be systems that are highly unlikely to be relevant given the organization's discovery portfolio.

[3] "*Risk management* is a structured approach to manage uncertainty related to a threat, a sequence of human activities including: risk assessment, strategies development to manage it, and mitigation of risk using managerial resources. The strategies include transferring the risk to another party, avoiding the risk, reducing the negative effect of the risk, and accepting some or all of the consequences of a particular risk." From Wikipedia

5. **Aids the internal case strategy:** go to trial? Settle? Negotiate from a position of knowledge? Negotiate from a position of strength? Negotiate from a position of weakness? A data map aids the internal case strategy by providing counsel with a detailed, consolidated description of the organization's potentially discoverable ESI. Counsel can review the data map and via this single source develop insight into the potential scope of discovery. Understanding the potential scope of discovery informs the analysis of the case: is discovery anticipated to be more costly than the case is worth from a monetary or principle standpoint? Is the anticipated expense of discovery less than what the case is worth? The data map ensures decisions are based on accurate information as opposed to speculation and conjecture.

6. **Foundation for a reasonable and defensible legal hold process.** When discovery targets ESI, it is imperative counsel responsible for the legal hold ensure the hold is broad enough and enacted in such a way so that potentially relevant ESI is not destroyed or altered. While the scope of the legal hold is based on analysis of the legal and factual issues, the enactment of the hold is (in large part) based on an analysis of the "IT facts." The IT facts include the following dynamics:

   a. How the IT systems are configured (e.g., is Cached Exchange Mode enabled for e-mail in a Microsoft Exchange and Outlook environment?)

   b. Specific operating protocols and procedures applied to the IT systems (e.g., what is the retention period for Exchange Server backup tapes? Are there multiple retention periods based on day of the week?)

   c. How users access the IT systems and the nature of such access. How users access IT systems encompasses user behavior and habits (e.g., using home or other non-business computers to access work related ESI or applications; creating "independent" or one-off backup of a desktop or laptop computer.)

   d. The ESI data map is one of the foundational elements for a reasonable and defensible legal hold process (the other being legal and fact analysis) because the ESI data map identifies and explains to counsel in plain English the WHAT, HOW, WHO, and WHERE of the ESI subject to the legal hold:

      i. WHAT: an ESI data map provides counsel with a comprehensive inventory from which to determine which systems may be implicated in a particular matter. The data map, because it has been created systematically, improves the legal hold process by ensuring a comprehensive scope of potentially relevant systems is the baseline for the hold, with systems eliminated only after careful analysis. For a legal hold to be defensible it must address all potentially relevant ESI. The data map helps ensure this happens.

      ii. HOW: the ESI data map includes details regarding any ongoing purging, deletion, overwriting, or alteration of ESI, enabling counsel to identify these routines quickly and at the outset of the duty to preserve, and thus ensure IT staff effectuate a suspension of ongoing purging and take steps necessary to preserve ESI subject to the legal hold. Legal often has minimal grasp of how a legal hold will be implemented from an IT configuration and operations standpoint. This lack of knowledge prevents legal from being able to actively monitor the legal hold implementation. Essentially, legal "throws the legal hold over the fence" to IT, and hopes IT implements the hold correctly. The ESI data map virtually eliminates the knowledge issue by describing—from a discovery perspective—how the targeted IT systems are operated. This description ensures counsel has a reasonable understanding of how the IT systems operate and what is required for the legal hold to be implemented.

      iii. WHO: an ESI data map includes details regarding the IT contacts responsible for implementing the suspension of ongoing ESI purging, deletion, overwriting, or alteration.

      iv. WHERE: the ESI data map identifies where potentially responsive ESI resides, ensuring clarity and understanding with regards to the scope and impact of the legal hold on the organization's operations.

7. **Reduces opposing party's ability to exploit disconnects between stated policies and actual practices.** By having a data map, counsel can determine where there may be a disconnect (gap) between stated policies and IT processes. The data mapping process will have identified IT processes related to each IT system, so situations where polices, such as a records retention policy, which states ESI is retained for X amount of time, but in reality, it is kept for Y amount of time on the IT system—such situations can be recognized and resolved or addressed. Opposing counsel may be able to exploit disconnects by pointing out the organization does not have a reliable grasp of how its ESI is managed—thus opening the door to an onerous preservation order.

8. **Is the embodiment of a reasonable and good faith effort to understand an organization's IT systems.** The ESI data map is a systematic, thoughtful, and <u>reasonable</u> approach to identifying the potentially relevant sources of ESI within an organization's IT infrastructure; it is compelling evidence an organization takes its discovery responsibilities seriously and is the embodiment of good faith when it comes to understanding the nature and scope of an organization's IT systems.

9. **More realistic understanding of the burdens of electronic discovery.** A data map provides specific and detailed information about the IT systems housing potentially responsive ESI. Counsel can obtain a solid understanding of targeted IT systems quickly, and also can connect quickly with the responsible IT person. This understanding and interaction between counsel and IT should result in counsel being made aware of how burdensome it will be to preserve and produce certain ESI. This will guard against counsel making unsubstantiated and unrealistic commitments regarding the organization's ability to preserve and produce ESI. For example, if a company has a legacy system containing ESI which may have to be produced but will require 6 weeks for IT to produce due to the need to provision hardware, install software, and construct queries—at a cost of $30,000.00 and an IT "time cost" of 120 hours—then counsel shouldn't agree to produce such ESI within 4 weeks, and should also consider seeking cost shifting as well.

10. **Reduces random and unexpected disruption of IT staff.** When a court or government entity controls the timeline for discovery, discretion over the timing of gathering information from IT is taken away from the organization. The litigation or investigation becomes a major priority while business and IT responsibilities are pushed into the background. Given that most organization's IT departments are stretched thin already, having to drop everything to help the organization comply with a discovery request can have a serious impact on the businesses ability to continue to function at optimum levels. The process of building a defensible ESI data map incorporates a strong regard for the amount of time and disruption to IT staff caused by the information gathering process, and minimizes such disruption by allowing information gathering activities to be organized around IT and business schedules—and not the rigid schedules of a court or government entity.

11. **Enables transparency.** Case law, The Sedona Conference, leading experts, and the EDRM advocate transparency as part of the paradigm shift that needs to occur in the age of electronic discovery. In this paradigm shift, adversaries discuss their viewpoints regarding electronic discovery. The objective is to reduce the cost and burden of electronic discovery by encouraging parties to discuss the nature and scope of their ESI early on in the litigation, so that contentious and potentially costly disputes and motion practice are minimized and the case can proceed on the merits. Having an ESI data map enables an organization to marshal all their facts regarding their IT systems efficiently and early—and thus be prepared to negotiate from a position of strength and knowledge—and not have to rely on the types of "hide the ball" techniques often employed in discovery.

12. **To ensure consistent and accurate representations are made in various courts and tribunals regarding the company's IT infrastructure.** This is important to both inside counsel and outside counsel. If the IT infrastructure is evaluated on a case by case basis, there is a higher probability of inconsistent representations being made about the scope and nature of ESI within the organization's IT systems. This is because IT will sometimes provide conflicting or contradictory information depending on who happens to

be available to answer questions on a particular day. For example, a question about whether or not the organization has deployed Offline or Cached Exchange Mode may result in a no answer from one IT staff member and a yes answer from another IT staff member. These conflicting answers arise from the fact that most IT departments do not maintain system configuration documentation; rather, IT staff will log in to a system to see what the configuration settings are, and some staff may go to the wrong screen or interpret the screen incorrectly. Having an ESI data map ensures different counsel working on different matters are telling the same story about the organization's IT systems.

13. **Having an ESI Data Map helps ensure counsel meets their fundamental ethical obligations**. These ethical obligations are arguably called into question when electronically stored information is involved, as it is not a given that counsel will understand the underlying information technology involved, and thus not be able to effectively manage and negotiate discovery. If counsel does understand have the requisite understanding of IT systems (what constitutes this requisite understanding is not clearly defined), it will be difficult to plan and execute an adequate discovery plan. The following excerpt from **eDiscovery for Corporate Counsel, 2009 ed.,** by Mary Mack and Carol Basri, West Publishing 2009 provides a cogent summary of one of the ethical obligations (competent representation) addressed by having, understanding, and using an ESI data map:

Counsel's duty to be technically competent

In this new eDiscovery world, the failure of an attorney to be technologically competent can have serious consequences for the client. It can also lead to sanctions and malpractice claims against the lawyer. Model Rule 1.1 requires that a lawyer provide competent representation to a client, and obligates the lawyer to have the "legal knowledge, skill thoroughness, and preparation necessary for the representation." A lawyer's ethical duty to provide competent representation under Model Rule 1.1 and the new amendments to the Federal Rules, requires that attorneys who will be involved in litigation discovery keep up to date with technology and eDiscovery law. An attorney cannot simply pass the responsibility for the preservation, collection, and preservation of ESI to the client's information technology (IT) department.

14. **Facilitates the defensible collection of ESI.** Decisions need to be made regarding how to preserve and collect ESI. When such decisions are made without time for due consideration and investigation, mistakes may be made which impact the integrity or scope of the collection. The wrong collection method may be employed (forensic instead of active) or too much or too little may be collected, which impacts cost (too much) or defensibility (too little.)

Conclusion

A defensible ESI Data Map provides legal professionals with a comprehensive, accurate, and up-to-date inventory of a company's IT systems that are potentially relevant to discovery. The benefits of having a defensible Data Map are difficult to overstate. It is axiomatic to suggest that in order to effectively communicate and discuss a subject or advocate a position, one must have an adequate understanding of the subject. This is certainly true in the realm of electronic discovery. Given the considerable complexity and diversity of IT systems, it is especially challenging for the non-technical to master the nuances of IT systems. While there are a growing number of legal professionals mastering computer technology, there remains a significant majority who do not have the technical knowledge necessary to effectively manage electronic discovery. For this significant majority, there is good news and bad news. The bad news: there is no way to avoid learning, at the very least, the basics about how computers and IT systems work when the very nature of discovery involves examining and analyzing how a company has configured and operates its computers and IT systems. The good news: a defensible Data Map clearly identifies, explains, and de-mystifies those IT systems potentially relevant to discovery, and in doing so reduces the learning curve for less technically knowledgeable legal professionals. While a Data Map is not a replacement for learning about IT systems in general, and learning details about a particular company's IT systems specifically, it is a powerful foundation for building a deep understanding of a particular company's IT systems—and by extension, a general understanding of how IT systems operate.

The benefits of a data map are so fundamental and pervasive that is axiomatic to state that companies and organizations either anticipating litigation or involved in litigation should build and maintain one. If discovery will involve ESI, (and unless typewriters and carbon paper are how the company creates information), a data map will provide significant <u>tactical</u> and <u>strategic</u> benefits to the organization.

Checklist of Reasons to Build an ESI Data Map

√ To ensure there is adequate time to make carefully considered decisions regarding discovery.

√ To minimize disruption of business operations, particularly IT.

√ To create awareness of the issue of electronic discovery among IT staff.

√ To educate IT staff about the specifics of electronic discovery (legal process, evidentiary considerations, and consequences of actions.)

√ It fosters an environment of collaboration and cooperation between legal, records management, and IT.

√ To educate legal staff about the company's IT infrastructure.

√ To ensure consistent and accurate representations are made in various courts and tribunals regarding the company's IT infrastructure.

√ To empower and enable counsel to more effectively limit the scope of discovery by being in a position to make specific particularized statements about the company's ESI.

√ "In order to be fully prepared for the 26(f) Meet and Confer."

√ It demonstrates "good faith" and a reasonable approach has been adopted by the company regarding its discovery obligations.

√ Because "traditional" network topology diagrams and documents do not capture all the essential information needed in a legal context.

√ Because "traditional" network topology diagrams do not translate the technical terminology and concepts into language understandable to the non-technical.

√ To ensure various outside counsel have a standard and consistent description of the company's IT infrastructure and systems.

√ Reduces the waste and associated costs of re-inventing the wheel for each new matter.

√ Because it is necessary to have a basic understanding of the company's data sources—a comprehensive and accurate baseline. Without such a baseline, counsel may have to rely on informal, incomplete processes which can lead to omitting important repositories. IT staff often are not aware of the dimensions of legal discovery—such as the fact not just production data is discoverable, but also data residing on test and development systems is discoverable.

√ It will facilitate the creation and implementation of a defensible legal hold procedure. This is especially important in those instances where suspension of ongoing purging and deletion routines may be necessary.

√ To identify discrepancies between records management and retention policies versus IT data management procedures. There is often a disconnect between what policies state should happen and what actually occurs on IT systems with regards to data retention.

√ To reduce the chance of spoliation via inactivity, such as a failure to stop a purging or deletion routine.

√ Relying solely on IT to identify and describe potentially relevant data is potentially dangerous, because IT's understanding of its information is governed and informed by technical considerations—not legal or records management considerations.

√ It places the company in a better position to negate and thwart an opposing party's attempt to use discovery as a weapon.

√ To explain in detail what the company has (IT-wise) and why the data is not reasonably accessible.

√ Knowing up front (early on) what data it has allows the company to make better informed (and faster) decisions about whether or not to settle, to go to trial, and proper case strategy.

√ If assistance from the court is sought in a discovery dispute, the ESI data map will provide factual detail to support arguments for assistance.

√ Studying a client's ESI data map helps an attorney understand the opposition's IT systems, as there are general concepts applicable to all IT environments, such as e-mail servers housing e-mail, file servers containing user's files, databases containing transactional information, etc. While the configuration details may vary (considerably) from one organization to the next, the general concepts apply. The more conversant attorneys become with IT systems in general, the more effective they will be in understanding specific systems.

About The Ingersoll Firm

The Ingersoll Firm is one of the nation's leading ESI data mapping consulting firms, and one of the only firms in the United States dedicated to ESI data mapping for legal and regulatory discovery purposes. The Ingersoll Firm has created ESI data maps for a variety of national and international organizations, including:

- A leading 15 billion dollar global manufacturer with over 500 business units located in 40 countries and over 30,000 employees.
- One of North America's largest building products manufacturers with facilities across North America and over 12,000 employees
- One of the largest not-for-profit hospital systems in the United States. This organization has over 60,000 employees and more than 400 facilities.

About John P. Collins

John Collins is the Founder and Vice President, Consulting, for The Ingersoll Firm, one of the nation's leading ESI data mapping consultants.
Mr. Collins has responsibility for ESI data mapping projects for a variety of international corporations, large not-for profits, and AMLAW 200 law firms. Mr. Collins has developed a methodical, cost-effective, and defensible process for creating comprehensive and understandable ESI data maps. Combining a legal education, Information Technology background, and excellent communication skills, Mr. Collins is able to uniquely—and effectively—bridge the gap between legal and IT.

In addition to his ESI data mapping consulting practice, Mr. Collins has also established a reputation as an accomplished teacher and lecturer on Information Technology for legal and RIM professionals. Mr. Collins has developed a unique educational curriculum which teaches non-technical lawyers, paralegals, and RIM professionals the "nuts and bolts" of how corporate IT systems work—for the purpose of enabling legal and RIM professionals to better communicate with IT professionals.

Contact Information

The Ingersoll Firm
1823 Kings Gate Lane
Crystal Lake, IL 60014
Phone: 815-788-8165
Fax: 815-516-0166
jcollins@theingersollfirm.com
www.theingersollfirm.com