

E-Discovery and the Claim Adjuster

by Jonathan Stein, J.D., CPCU



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As technology improves, more documents are created electronically. Some estimates indicate that 90 percent of all documents are created electronically. Up to one-third of these documents may never be printed. When a document is created, not only does the document then exist, but various bits of data, some of them visible only to the computer, also exist. As commercial litigation proceeds and businesses are forced to deal with electronic discovery, claim handlers need to be aware of how this affects them, as well as how it affects counsel and the policyholder.

What Is E-Discovery?

With its most basic definition, e-discovery is discovery of any and all computer files and data. Some data, including temporary files and swap files, can be lost by simply booting up a computer. A sector-by-sector copy of the hard drive may avoid this. Some of this data may not even be in your possession, but rather the possession of a third party, such as an internet service provider (ISP) or another entity. While some question whether e-discovery is, or should be, different from paper discovery, there are intrinsic differences, including the types of documents available. The types of e-discovery documents involved may include e-mail (including dates, times, attachments), word processing files, tables, charts, graphs, database files, electronic calendars, proprietary software files, and Internet browsing applications, including bookmarks, cookies, and history logs. Further, people are usually more casual with electronic comments than they are with paper documents. Finally, electronic documents have metadata, data about data, that may not exist with physical documents.

Why Does E-Discovery Matter?

Congress and the courts have indicated a desire for preserving records that are capable of preservation. Booting a computer can destroy some types of data that may be relevant in litigation. The courts have noted that normal use of a computer may cause loss of data that is relevant to one party. *Antioch v Scrapbook Border, Inc.*, 2002 WL 31387731 (D.Minn. Apr. 29, 2002) Courts note that when one puts data in a computer system, there is an assumption that the user plans on retrieving data in the future. *Kaufman v Kirko's Inc.*, Civ. Action No. 18894-NC (Del. Ch. Apr. 16, 2002) And all of this may cost you money. *Rowe Entertainment, Inc. v The William Morris Agency, Inc.* 205 F.R.D. 421 (S.D.N.Y. 2002) (wherein the court developed an eight-factor test to balance who should pay the costs of e-discovery) Even if you do not pay for it, look out for the sanctions. Courts have imposed sanctions ranging from adverse inferences to preclusion of evidence to monetary sanctions to dismissal or default. *Residential Funding Corp. v DeGeorge Fin. Corp.* 306 F.3d 99 (2d Cir. Sept. 26, 2002) (imposing sanctions for mere negligence in destruction of e-documents)

Federal Rule of Civil Procedure 16 provides tools for maximizing the benefits of a pretrial meeting. Attorneys should use the pretrial conference as an opportunity to avoid future disputes, reduce costs, and avoid pitfalls. Being fully prepared at this conference may limit your client's exposure while maximizing your discovery from the other party. Further, Federal Rule of Civil Procedure 26 specifically requires the disclosure of electronic files, databases, and e-mails following an investigation into the case. The parties must determine the volume of e-mail and other electronic information, which may require an expert.

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How Does E-Discovery Affect Counsel?

Each state court, along with the Federal Rules of Civil Procedure, differ on e-discovery. This article does not look to address all sets of rules, as there are some very good state-specific treatises on this. Rather, what follows is a short list of some of the e-discovery rules that are exemplars.

In Illinois, documents include papers, photographs, films, recordings, communications, and all retrievable information in computer storage. (Illinois Supreme Court Rule 201(b)(1). Maryland has its own rule regarding computer-generated evidence. Every party wishing to offer computer-generated evidence must preserve it and furnish it to the clerk in a manner suitable for transmittal on appeal. (Maryland Rule of Civil Procedure 2-504.3)

If you want electronic discovery in Mississippi, you must specifically request production of electronic or magnetic data and specify the form in which you want it. The responding party to a request must produce data that is responsive



and reasonably available in the ordinary course of business. The responding party may object if it cannot produce the requested items. If there is a court order to comply with a request, the court may order the requesting party to pay the expenses of any extraordinary steps taken to retrieve and produce the documents. (Supreme Court of Mississippi Rule 26(b)(5)).

Some courts have found that inadvertent disclosure of privileged data may risk a waiver of the privilege. Both the attorney-client privilege and the attorney work-product privilege are at risk if the document, even the e-document, is voluntarily disclosed to a third party. Even if a court later states that the document is privileged, you cannot, as the saying goes, “unring the bell.” Additionally, if you produce documents, those documents may be able to be used against you in that case—or in other cases, you may have to produce all other documents related to that document, or your client may come after you for negligence if the client cannot retrieve the document. Assert any claim timely and invoke any rights that you may have under voluntary agreements. Additionally, make sure that the client is aware of the risks and decisions made so that the client is not surprised.

Courts may even impose sanctions for withholding or destroying e-data. *In Re Pacific Gateway Exchange, Inc.* 2001 WL 1334747 (N.D. Cal. Oct. 17, 2001) One way to avoid this is to send a preservation notice to all parties who may have e-data. Additionally, counsel should make sure that the insured/client has a document retention policy and that all data is not destroyed pending the outcome of litigation. Tampering with or deleting evidence may result in monetary sanctions. *Pennar Software Corp. v Fortune 500 Sys. Ltd.*, 51 Fed.R.Serv. 3d 279 (N.D.Cal. 2001) Paper records of electronic documents may not suffice and may still result in sanctions because the electronic data may have unique

evidentiary value. *Lombardo v Broadway Stores Inc.*, 2002 WL 86810 (Cal. Ct. App. Jan 22, 2002)

Remember that you should always examine the scope of the request to seek ways to limit the request—including limiting the time period or the places where the information is stored, i.e. certain computers, e-mail in-boxes, certain physical locations. All documents should be reviewed, and potentially privileged documents should be segregated for additional review. At the same time, you should also seek a protective order to protect the destruction of the other parties' electronic evidence.

How Does E-Discovery Affect the Adjuster's Job?

The attorney, and maybe more importantly, the adjuster, **must** advise the insured to suspend document retention policies that may, either intentionally or unintentionally, destroy data. Data destruction must stop immediately, and as the first line of defense, the adjuster is in the position to notify the insured immediately. When litigation has begun, or when it is pending, the adjuster must make sure the insured immediately halts all policies that result in the destruction of potentially relevant evidence. The adjuster should also recommend mirror-imaging technology to freeze the data in a “snapshot.” Adjusters should make sure that they are involved in monitoring compliance—as this may have a huge impact on the final result. If possible, the adjuster should direct counsel to obtain a stipulation on what should be preserved. This should result in cost savings.

The insurance carrier should prepare a list of neutrals who are acceptable to use in handling of the parties' electronic evidence. Inexperienced people conducting computer forensic investigations may increase the costs—not only in dollars, but also in evidence sanctions. The neutral may capture data, store data, provide data to the court for



in-camera review, and present the data to the parties at the conclusion of any discovery disputes. This is different due to the nature of electronic discovery. The neutral must extract and restore the evidence from its electronic form to a form more readable by the court. By using a central depository, as is sometimes done in construction defect litigation, the neutral can conduct searches, show results to both sides, and then, if necessary, conduct additional searches for the parties. This may also significantly reduce costs.

Adjusters need to make sure that counsel has an electronic discovery plan. Further, adjusters need to understand that deleting files does not delete them, as there is still an electronic fingerprint that will lead to file information. This is especially important in bad-faith cases. Adjusters need to make sure, on report of a claim, that they confirm the existence of the insured's backup policy and document retention policy. Adjusters need to ask for all e-mails that may be relevant, from anyone at the insured. Adjusters should not take this on alone—there must be a plan for the entire insurance carrier.

There are some further steps that the adjuster and counsel can work on

together. First, retain an expert in e-discovery, preferably someone who knows the industry of the insured. Second, demand e-discovery from the opposing side in writing, with a request that it preserves all data. Third, attend any conferences regarding e-discovery so the adjuster is in the loop on what is being requested. Fourth, make sure that any discovery that comes in is in a readable and searchable form. Fifth, find out who the knowledgeable representatives from the insured are regarding e-discovery so as to properly review any problems that may arise. Sixth, consider using a special master regarding e-discovery.

Conclusion

In this ever more technological world, the adjusters job is constantly changing. In addition to added demands of the job, the increase in e-discovery is going to affect how an adjuster interacts with the insured and the attorney. Violations of the e-discovery rules may result in an adverse result to the insured, thus increasing the pressure on adjusters. All adjusters who handle litigated cases must stay on top of local, state, and federal rules of e-discovery to adequately protect the insured. ■