

A PRACTICAL GUIDE TO UNDERSTANDING eDISCOVERY for Insurance Claims Professionals

eDiscovery Defined and its Relationship to an Insurance Claim

Simply put, eDiscovery (or Electronic Discovery) refers to discovery in civil proceedings or government investigations of electronically stored information (ESI).

ESI comes from many sources, including:

- Servers
- Desktops/laptops
- Personal computers
- Handheld devices/tablets

Types of ESI include:

- Emails/attachments
- Microsoft Office™ documents (Word™, Excel™, PowerPoint™)
- Databases
- Drawings
- Notes
- Voicemails
- Instant Messages

As a claims professional, you are closely tied to eDiscovery since most major corporations invest in insurance to support their litigation costs. With the amount of user-created data soaring, the cost of eDiscovery and review of that data now takes up a large part of any litigation budget. While outside counsel and eDiscovery service providers are the subject matter experts, their invoices for services will arrive on your desk for approval, and you will likely be called upon to review their budgets as well. A high-level understanding of eDiscovery will better prepare you for these responsibilities and empower your decision-making process.

Federal Rules of Civil Procedure and eDiscovery: How Decisions Could Impact Costs Against the Claim

The first thing to know about eDiscovery is that there are specific rules governing it within the Federal Rules of Civil Procedure (FRCP), specifically, Rule 26.

In December of 2006, the Federal Rules of Civil Procedure were updated to make disclosure and production of relevant, electronically stored information mandatory to all parties in federal courts. The amended laws and recent case law stress that all lawyers have a duty to communicate with their clients to ensure that all sources of relevant information are discovered. To this end, identification and preservation of eDiscovery becomes a crucial first step, including litigation hold notices and suspension of any automatic data deletions. Note that failure to preserve relevant data can equal sanctions by the court.

Under Rule 26(f) the FRCP also requires the parties to “meet and confer” regarding discovery and agree to specific aspects to the discovery, which could include:

- Scope of ESI to be retrieved and reviewed
- Search terms, date range limits or other tools used for culling (reducing the population)
- Production format of ESI and other materials
- Clawback agreement (and order under FRE 502) to preserve privilege in the face of inadvertent production
- Shifting costs from producing party to requesting party

As a claims professional, you should know that this meeting is not only required by the FRCP, but it also can serve as an opportunity to make cost-effective decisions about the scope of discovery. For example, if outside counsel can request a production format from the opposing party that provides them with searchable data from the extracted text of a file, there should be a cost savings to the claim versus a production format that provides TIFFs (or images of the original data) without any searchable text. The less effort the eDiscovery service provider has to expend to prepare the opposing production for outside counsel’s review, the lower the costs to the claim.

Qualified eDiscovery service providers can offer technical guidance in these meetings, often participating in the conference under outside counsel’s direction. Understanding this aspect to eDiscovery can guide you to engage the eDiscovery service provider prior to the 26(f) eDiscovery conference, which often gives you the best opportunity to lay the foundation for managing the eDiscovery costs from the beginning.

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eDiscovery Timeline

In general, the timeline for the actual eDiscovery data to go through the pipeline from the custodian’s desktop to the production DVD can be broken into the steps below:

Step 1. Identification and Preservation

In this first step, ESI that is “reasonably foreseeable” to be relevant to the matter is identified, and proper steps are taken to ensure that the data is not altered or deleted. Key terms for this step in the timeline include:

- **Litigation or Legal Hold** – This is a notice or communication from legal counsel to the corporation that temporarily halts the standard disposition of data, such as backup tape recycling, automatic deletions, etc. The legal hold is issued as a result of current or anticipated litigation, audit or government investigation for the purpose of avoiding evidence spoliation.

Step 2. Data Collection

Once ESI is identified and preserved, it needs to be collected (or gathered) from the existing locations (such as the insured’s server or desktops/laptops) and copied in a manner that preserves the integrity of the data, avoiding spoliation of the document metadata. Collection may be completed by the insured’s IT department (if qualified), and proper logs must be kept in case they are called to testify on their collection steps. However, case law suggests that self-collection by a custodian is never advised due to “trust” issues with the custodian as well as technical issues that could result in spoliation. In general, a forensic collection by a qualified eDiscovery service provider is advisable for maximum defensibility. Key terms for this step in the timeline include:

- **Metadata** – structural data about a data file. Example: Last Modified Date, Author.

Step 3. Data Processing

Once data has been collected, it needs to be processed by the eDiscovery service provider so that it can be searched and the population culled (or reduced) according to the agreed upon search/cull methodology from the Rule 26(f) Meet and Confer conference.

Below are different ways that the data may be culled, along with a brief explanation of each. In each case, reducing the size of the data population that enters the attorney review stage can have a positive impact on both the budget for the claim, as well as the timeline for the attorney review:

- **Deduplication** – Deduplication can significantly reduce the size of the data set loaded into the review database. Every ESI data file will possess a unique algorithm, called an “MD5 hash value.” Global deduplication reduces files that share this exact algorithm between custodians; custodian-level deduplication reduces files with this same algorithm from within a single custodian’s files, but not between custodians.
 - Note that when opting for global deduplication, it is important to ensure that the fileholder information is captured for every custodian who possessed the file. (In other words, you will need to know everyone who had possession of the file even if only one copy of the file is loaded into the review database.)
- **Date Restrictions** – Per the Rule 26(f) Meet and Confer, there may be date restrictions that the parties have agreed to, such as a start and end date for all potentially relevant email. The eDiscovery service provider can input criteria into its searching technology to search the appropriate metadata date fields and reduce from the population any emails that fall outside of this criteria.
- **Key Term Searching** – Again, per the Rule 26(f) Meet and Confer, if the parties agree that specific search terms or search strings (multiple terms) will be run against the collected data after being processed but prior to being loaded in the review database, then the eDiscovery service provider would perform this step utilizing its specific technology.

Files that matched a key term or search string (and typically its attachments or parent email depending upon the agreed upon criteria for the matter) would be loaded into the database for review. Any non-hits could be loaded into the database and separated from the search hits, or the non-hits could simply not be loaded at all.

- **File Type Exclusion** – Another type of culling methodology is file type exclusion. Within a file’s metadata are unique characteristics that intrinsically determine its file type, such as whether it is an executable file (.exe) versus a Microsoft PowerPoint™ file (.ppt). The metadata file type is different than the external extension that you see on the end of the file in that it cannot be manually reconfigured.

If approved under the Rule 26(f) Meet and Confer, a common practice for reducing the population of data is to use the file type to cull out any files that appear on the National Institute of Standards and Technology (NIST) list of files that are likely to have no evidentiary value (commonly referred to as “junk files”). This is an evolving list, but there are over 20 million file types on the NIST List. This culling process is commonly referred to as “De-Nisting.”

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Step 4. Data Hosting and Attorney Review in the eDiscovery Service Provider’s Database

Once the ESI has been processed and culled, the resulting set of culled data needs to be loaded into the eDiscovery service provider’s online review tool database (usually a cloud-based storage system that allows access via the Internet and unique licenses per attorney).

When the data becomes available to outside counsel, they will typically establish review criteria for determining whether a document is responsive and should be produced or if it should not be produced because it is either not relevant or it falls under a privilege, such as attorney-client, work product, trade secret, etc.

Depending upon the volume of data required to be reviewed and the deadlines for the matter, the attorney review can be completed by outside counsel, or with the assistance of contract review Attorneys in combination with outside counsel, which can provide cost savings against the claim due to the typically lower hourly rates for contract review attorneys.

Depending upon how robust the technology is for the database, there may be additional opportunities to narrow the population to be reviewed, with the corresponding reduction to the amount of attorney review and likely the costs against the claim. These potential solutions include the list below, which we will discuss in the next section regarding “Potential Cost Savings from Technology Driven eDiscovery Tools.”

- Preprocessing with Early Case Assessment tools
- Analytical tools
- Technology Assisted Review (aka Predictive Coding)

Step 5. Production

Based on the Rule 26(f) Meet and Confer agreement, production of data by the insured’s outside counsel to the opposing party could occur on a “rolling” basis, with multiple productions over a span of time, or it could be a single production. At the direction of outside counsel, the eDiscovery service provider will prepare the selected documents in the agreed-upon format.

Typically, this would be TIFF files (images of the native files) plus a load file that contains certain metadata fields that have been agreed to, such as “extracted text” or potentially other information such as the fileholder name, document date, etc. Standard practice would be for the TIFF files to be “Bates stamped” or “branded” with a unique production number. This number appears on the image itself, usually in the lower right-hand corner of the image. Also there may be other branding such as “for attorneys’ eyes only” or “confidential.”

Step 6. Opposing Counsel Production Review and Trial Preparation

The final part to the eDiscovery timeline involves receipt of the opposing party’s production, which will need to be loaded into the review database for attorney review and trial preparation. Again, the importance of the 26(f) Meet and Confer agreement can significantly impact the eDiscovery costs against the claim. For example, if both counsel parties do not agree to culling methodologies to reduce the population of data, not only will the costs be significant for the insured’s data hosting, attorney review and productions, but they will also be significant for each of these steps related to the opposing party’s production materials.

The format for the opposing party’s productions will also impact eDiscovery costs for the claim from a technical perspective. Whenever possible, it should be agreed upon at the Meet and Confer that the respective eDiscovery service providers deliver the productions in compatible load file formats for the specific review platform (hosted database) being utilized by each party. Agreeing to provide extracted text, which allows the data to be searchable, can also help to minimize additional costs incurred by the eDiscovery service provider (such as Optical Character Recognition or OCR). This will not only reduce the eDiscovery service provider’s fees, but will also contribute to outside counsel accessing the opposing production data more quickly.

Potential Cost Savings from Technology Driven eDiscovery Tools

A final consideration is to introduce you to four technology-driven approaches that have the potential to lower the budget for a litigation claim. All of these technology tools will vary by eDiscovery service provider and will require specific assessment prior to being implemented—not every matter will be a perfect fit. But it is helpful to have a basic understanding as you will likely see more and more of these technology solutions being proposed and budgeted by outside counsel and eDiscovery service providers.

Analytical Tools:

- **Clustering:** This tool analyzes data and groups together similar documents based on their conceptual relationships. For example, if a document mentions dogs, documents with references to “canines,” “man’s best friend,” “grooming,” and “leashes” will be grouped together. Grouping like documents together aids in the efficiency of the review.
- **Near Duplicate Analysis:** This tool groups “near duplicates” of documents together utilizing a percentage of how “near” or similar the documents need to be in order to be placed in a set. For example, choosing a threshold of 80 percent “near” enables that results to be grouped together and review once for efficiency and consistency.
- **Email Threading:** By grouping emails by the back-and-forth chain or thread versus by date or custodian, more consistent and efficient attorney review calls are possible as a single review attorney can consider the full conversation in one sitting.
- **Technology-Assisted Review (TAR):** This technology varies by eDiscovery service provider, but the basic premise is to train the review tool to identify relevant data based upon previous decisions made by a lead attorney on documents within the system. After multiple rounds of “training” between the lead attorney and the review tool, the tool is able to “predict” the appropriate coding for a file based upon previous review calls and the similarity of the record to other documents reviewed by the lead attorney.

Case law has supported the use of technology-assisted review, and it should be discussed and considered at the outset of a matter, especially for claims with a high volume of ESI. For matters with smaller volumes of data, technology-assisted review will likely not be the most efficient or cost-effective model.

Summary

The impact of eDiscovery costs on the budget for a claim can be significant, especially when combined with the related expenses for attorney review. With the amount of user-created data exponentially rising, it is almost guaranteed that eDiscovery-related services will be needed on a given claim. The goal is to appropriately engage a reputable service provider that can not only provide the needed services, but also offer the appropriate strategy and consulting at the onset of the claim. The more consideration and thought that can be given to efficient eDiscovery workflow and deliverables during the Rule 26 Meet and Confer, the better the chances for keeping the budget on track. Finally, the more you understand about eDiscovery, the more you can work with outside counsel to ensure they are using the most streamlined, yet defensible, approach to save money and win the case.

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