



# SEVEN TIPS FOR E-DISCOVERY COMPLIANCE FOR INSURERS

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The discovery process in insurance litigation has always meant reams upon reams of paper documents that needed to be sorted, Bates labeled, and reviewed. Not much has changed with the advent of new data storage technologies, except the fact that these mountains of information are now also encoded onto hard drives, software programs, and even the cloud. This means smart phones, tablets, computers, servers, flash drives, computer discs, GPS devices, and internet browsers can each play dual roles as repositories of discoverable data in insurance litigation.

The growth of the internet and the resulting interconnectedness of communication technology has created substantial changes in how insurers manage confidential information. One of these changes is

that digital data which is pertinent to insurance litigation is now discoverable through a process called e-discovery. As a result, insurers face a plethora of new considerations related to e-discovery while technology continues to evolve.

## **WHAT IS E-DISCOVERY?**

E-discovery is defined as the discovery process in litigation and legal proceedings where the sought information is in electronic format, generally defined as electronically stored information (ESI). As with normal discovery, it's subject to the rules of civil procedure and agreed upon practices.

Parties have always been permitted to request documents stored in an electronic format. However, amendments to the Federal Rules of Civil Procedure in 2006 af-

firmed that all information which meets its definition of ESI may be discoverable and may be used as evidence in court. It defines ESI as "Information that is stored in a medium from which it can be retrieved and examined...from reasonable accessible sources." These include, but are not limited to, information such as:

- **Email and attachments**
- **Website content**
- **Social media content**
- **SMS and text messages**
- **Voicemail**
- **Video, audio, and image files**
- **Computer RAM**
- **IoT data**
- **Big Data**
- **Metadata**

The e-discovery industry is expected to grow at an annual rate of 5.7 percent and reach a value of nearly \$1.9 billion by 2019 in the U.S. and \$11.6 billion by 2020 globally. In addition, most Fortune 1000 companies now spend between \$5 million and \$10 million on e-discovery annually, with some companies reporting that they spend more than \$30 million. Nearly 70 percent of those costs are tied to document review. Sanctions for e-discovery failure can be costly, as one company was ordered to pay a total of more than \$7.4 million for mishandling e-discovery record keeping processes. Despite this, only 38 percent to 50 percent of organizations stay up-to-date with e-discovery technologies.

### THE E-DISCOVERY PROCESS

The general procedure of the e-discovery process is as follows:

- **Identification** – A scope of data that pertains to relevant information is identified. This generally means all ESI associated with a given claim.
- **Preservation** – Relevant data is placed on legal hold so that it can't be destroyed or spoliated. The duty to preserve is triggered upon notice the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.
- **Collection** – Data is transferred from the insurer to legal counsel.
- **Processing** – Files are loaded into a document review platform.
- **Review** – Documents are reviewed by counsel for responsiveness to discovery requests. When a claim is received, the claim manager should review the loss notice or complaint along with the policy while also reviewing ESI with the insured and counsel.
- **Production** – Information that's relevant to the discovery request is provided to opposing counsel.

Spoilation has been defined as the intentional or negligent withholding, alteration, or destruction of evidence relevant to a legal proceeding. Some states have recognized the duty to preserve information and data and can even penalize litigants for failure to do so in certain circumstances.

Some states also recognize a duty to preserve potential evidence based on knowledge of litigation or imminent litigation but only if there is privity between the parties and the party is aware that the data could likely be material to potential litigation down the road. The failure to preserve potential evidence may result in the imposition of sanctions of an adverse evidentiary nature. This could include an adverse inference jury in-

struction in extreme situations where intentional spoliation is demonstrated.

Metadata can also be subject to e-discovery under certain circumstances. Metadata is simply data about data, for example, the date the original document was created, how many people received the document via email, whether revisions or edits were made to the document or replies created.

Space limitations do not allow an in-depth discussion of any of these considerations but the take away point should be that when litigation is threatened or likely, a litigation hold or notice to all potential generators of documents or custodians of records should be given so that potential e-discovery data and documents are not destroyed or altered. Case law is jurisdictionally specific so attention needs to be given to this issue where the matter is pending. Spoliation has really mushroomed as an issue since the advent of electronic communication.

### E-DISCOVERY BEST PRACTICES FOR INSURERS

E-discovery can help or hurt you in insurance litigation depending largely upon whether ESI has been stored and produced properly. To this end, here are 7 Tips to help insurers comply with the e-discovery process to reduce their liability and avoid penalties for noncompliance:

1. **Familiarize yourself with insurance e-discovery regulations in your region** – First, you should take the time to review relevant insurance industry e-discovery regulations that apply to your business locale. It's imperative that you have full comprehension of what's expected of you and your organization for data storage and production in the event of litigation.
2. **Consult with an attorney or e-discovery expert for clarification and further advice** – E-discovery regulations are likely to be fraught with legalese and terminology that's confusing and perhaps even seems contradictory. It's always a good idea to bring in an expert in insurance litigation to provide clarification as well as an extra pair of eyes to help you anticipate and account for potential e-discovery issues in the future.
3. **Establish, communicate, and enforce a company-wide definition of ESI** – The type of data that can and should be stored can vary widely throughout different insurance companies and industry niches. Your company should clearly define and communicate what ESI it needs to store because it could be relevant in litigation.
4. **Establish, communicate, and enforce a company-wide policy for the storage, preservation, and handling of ESI** – Your company

should create a policy regarding how ESI is stored, in which media, and for how long according to regulations and requirements.

5. **Utilize a service or program to automatically store ESI as it's generated** – Storing ESI can be difficult because of the wide variety of file types and media that may need to be stored. You can save your company a significant amount of time, energy, and money as well as protect against potential liability and sanctions from mismanaging data if you invest in a program that automatically stores ESI as it's generated according to your company policy.
6. **Delegate the responsibility of managing ESI to specific, trusted individuals** – You can't manage your company's e-discovery needs entirely by yourself. You need to identify responsible and reliable team members who can help you own the responsibility to provide support and assist where necessary. Also, you should consider specifically who takes recorded statements such as the adjuster or the retained legal counsel as this may affect Attorney-Client Privilege.
7. **Stay current with e-discovery technology** – As with internet and communications technology, e-discovery tech is also constantly evolving to provide new benefits to insurance companies and other industries. Remaining up-to-date with the latest developments in e-discovery technology will allow you to stay on the cutting edge and thus give you the greatest chance to maintain records in a way that gives you the best advantage in litigation.

Technology is intended to simplify our lives but often ends up making them more complicated. This is especially true regarding e-discovery for insurance litigation. You'll position your company to decrease its liability, avoid penalties, and protect its interests in the event of litigation by following the aforementioned best practices.



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