E-mining for Evidence

Best Practices for Cost Effective and Compliant E-Discovery in Runoff

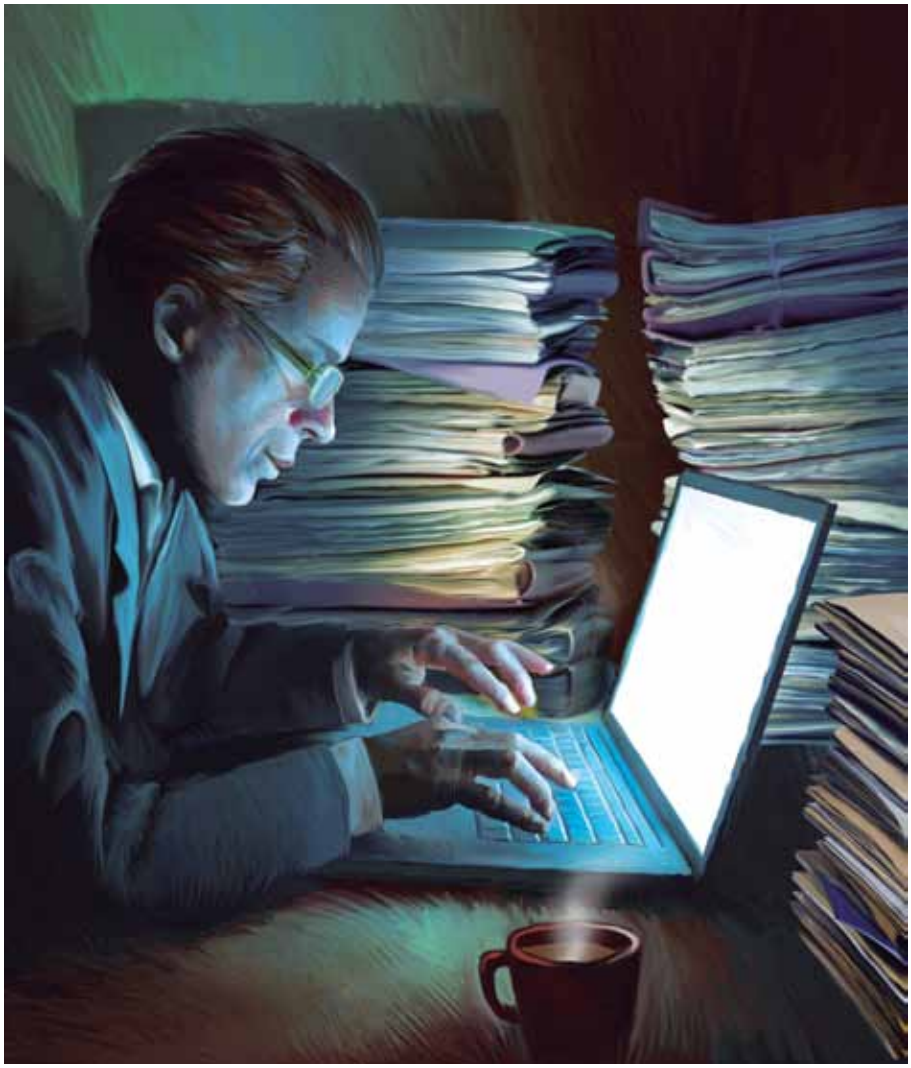

illustration / Rafael Edwards

Electronic discovery, or "e-discovery," refers to the manner in which a company or individual's electronically stored information ("ESI") is collected and produced as part of a discovery obligation. E-discovery has been a major focus in litigation since 2006 when the U.S. Supreme Court and the U.S. Congress first extended the reach of discovery in the federal courts to include electronic information. The state courts generally follow the case law interpreting the e-discovery provisions of the Federal Rules of Civil Procedure ("Federal Rules"). Nearly all fifty states have adopted similar e-discovery rules of their own.

Out of those e-discovery rules has emerged an entire industry devoted to e-discovery. There are countless seminars and books on e-discovery and e-discovery experts. Generally, every bar association, law firm, and court system has committees, rules and procedures addressing the subject. The litigation around and the industry focus on e-discovery is sure to intensify in the coming few years due to extensive amendments to the Federal Rules designed to cut costs, make discovery proportional to the issues in the case, and an increase cooperation among the parties is expected to go into effect in December 2015.

How E-discovery Impacts Companies in the Runoff Space

The federal and state e-discovery rules govern insurance and reinsurance legacy business disputes that are litigated in court the same way any other business dispute is governed. The e-discovery rules may also apply in certain arbitration proceedings if the parties elect to follow a state's procedural law or adopt the Federal Rules for discovery. The insurance and reinsurance industry, including the runoff industry, must be mindful of these e-discovery rules even outside of pending litigation or arbitration. This is because all companies have and continue to expend substantial costs to develop the appropriate data storage infrastructure and privacy and compliance procedures. Without that infrastructure and process, the monetary and business interruption costs to companies once in litigation or arbitration are often enormous.

For example, companies managing legacy insurance and reinsurance business use e-mail, software applications, mobile devices and other technology to access documents and communicate with existing

counterparties. These companies are moving away from storing information in paper files because the cost of storing data electronically is increasingly cheap, and because those companies want to be able to reach their data through the internet from smartphones, tablets, and laptops. As a result, nearly every case now involves ESI.

In addition, disputes arising from decades-old insurance and reinsurance contracts often implicate underwriting, placing, contracting, claims and other records. While discovery requests may seek records from active companies, runoff companies and legacy or discontinued business units of live companies also must preserve relevant or potentially relevant evidence under the federal and state discovery rules. This means that runoff or legacy businesses must timely suspend their often-robust records preservation and destruction policies or face sanctions for spoliation of evidence.

Best Practices for Effective (and Cost Effective) E-discovery

When it comes to discovery obligations, all companies and individuals—not just their lawyers or information technology professionals—have an obligation to understand and oversee the preservation, collection, review and production of their electronic information. Federal and state courts have established guidelines for parties and non-parties in discovery, but none of the courts have agreed upon an exact method or process for meeting e-discovery obligations. As a result, the guidelines are broad enough to leave room for the frequent (monthly, even weekly) advances in search and storage technology, but also means that courts are busy with motion practice from parties seeking to more specifically define their e-discovery obligations.

Arguably, the most important is to act early and often where discoverable electronic information is concerned.

Best practices in e-discovery differ depending on whether a company is in litigation. Before and after litigation (or arbitration), the focus should generally be on trimming the volume and types of data stored by the company, creating a records management process, and implementing good internal document retention and destruction policies and practices. Once litigation is anticipated or the company is in litigation (or arbitration), however, the focus should be on understanding the company's electronic information systems and where the relevant data "lives," establishing an appropriate legal hold for preservation of documents and a forensically sound collection process, and on building a communication network between the company's lawyers and key employees likely to be involved in the litigation (or arbitration).

Certain best practices are essential, however, no matter the stage of a case. Arguably, the most important is to act early and often where discoverable electronic information is concerned. The focus of the federal and state e-discovery rules is on that very principle, all of which place a premium on instituting early preservation safeguards and on alerting other counsel and the courts as soon as an ESI problem arises.

For example, one of the most common complaints among parties is that another party or non-party failed to preserve ESI. Though not a new issue in discovery generally, the immense volume and spread of ESI over different types of devices (in so many different and often-outdated formats) makes it challenging to preserve and collect potentially relevant electronic information for discovery. Court rules and case law require parties with potentially relevant information to institute a "litigation hold" as soon as the company becomes aware of the potential for litigation; this means that runoff and legacy business units of companies must implement a plan to immediately stop the destruction of all ESI potentially relevant to the case and further, to monitor *over the life of the entire case* the company's employees and electronic systems to prevent any destruction or modification of potentially relevant information. Best practices suggest that this scenario applies to arbitration as well.

Complicating this process is the fact that computers are typically set to automatically overwrite or delete information, hard drives may crash, new versions of software applications are issued and data must be migrated. Individuals often save copies of company emails or documents in many different places—on the hard drives of their office or home computers, portable storage drives and handheld devices. As a result, the company must act quickly to educate employees, independent contractors, Boards of Directors, and other service providers (such as outside accountants) about the need to preserve that ESI.

In addition, the company must implement a comprehensive plan to copy, store or otherwise collect that information for safekeeping and eventual use in discovery. Under the best of circumstances, implementing a preservation and collection plan is time consuming and expensive. We recommend forming a "litigation hold" team comprising representatives of at least the IT Department, Human Resources, and the Legal Department, which can oversee the litigation hold process with outside counsel. This is particularly important because parties frequently dispute when and how

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the litigation hold was implemented and whether there was negligence or misconduct in doing so. This is beginning to happen, albeit with much less intensity, in reinsurance disputes. Courts have extensive discretion to impose monetary and non-monetary sanctions for failure to properly carry out the litigation hold, even despite limited "safe harbor" protection in the federal and state rules. The broad scope of an arbitration panel's authority to manage the proceeding provides arbitrators with similar powers.

We also recommend that companies have a litigation hold plan in place before litigation arises, which will inevitably make the preservation and collection process cheaper and more efficient. For example, a company with no litigation hold plan or internal policies about discovery obligations is more likely to save all of its email and other data out of an abundance of caution (to avoid later claims of spoliation), vastly increasing the costs to store, access and review the data in discovery. Even using the most innovative technology to search for just the "potentially relevant" data, this *commonly* means the difference *between spending hundreds of thousands of dollars in discovery*, and a process that costs a fraction of that amount.

Although the American legal system generally requires the parties to pay their own expenses, courts now recognize that the cost of ESI discovery can be enormous—sometimes unfairly so. Arbitrators also need to be cognizant of the volume and associated costs of collecting, storing, and searching ESI before granting discovery requests. Indeed, the exorbitant cost of electronic discovery is a focus of the 2015 amendments to the Federal Rules. Going forward, the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy and *inexpensive* determination of every action and proceeding."[1]

Parties are expected to work together to coordinate searches and production of ESI, a time-consuming and often contentious process.

In the meantime, many jurisdictions now will shift discovery costs to the *requesting party* where the ESI cannot be easily obtained. For example, some ESI is not "reasonably accessible" in a party's computer systems; in the runoff context, relevant financial or claims data may be housed on legacy computer systems that require special software programs or equipment to extract and convert the data. The parties should consider cost-sharing agreements when there is a significant amount of ESI in one party's systems that both parties need to review.

In addition to saving costs, resolving e-discovery issues *early and often* with opposing counsel and the court (or arbitration panel) is the best way to avoid unnecessary delay and motion practice—another key goal of the 2015 amendments to the Federal Rules. Parties are expected to work together to coordinate searches and production of ESI, a time-consuming and often contentious process.

In the state and federal courts, the parties are required to conduct early case conferences among counsel, and to file reports with and appear before the court to discuss the volume, time constraints and cost associated with the ESI portion of discovery. In a reinsurance arbitration, counsel should confer before the organizational meeting or at least at the organizational meeting. Arbitrators should inquire whether e-discovery issues are anticipated and encourage the parties to meet and resolve those issues. At a minimum, the best time and place to resolve questions concerning production of ESI is at the arbitration organizational meeting and not after document requests are served.

In the best scenario, parties to a legacy reinsurance dispute will have no difficulty exchanging e-mails, relevant claim, underwriting or contract files, and other ESI relevant to the case. Most runoff companies and discontinued business operations should have long since moved data and files to accessible systems. Although, claims and other issues may still arise from contracts not previously identified. As runoff companies become more educated about the rules and procedures involved, we expect that courts and arbitrators will need to become involved in e-discovery in only the most complex cases. ●

Endnotes

[1] Fed. R. Civ. P. 1 (proposed amendment) (emphasis added).

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