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ESI in discovery and at trial....ready for it?

BECOME A MASTERMIND OF METADATA AND OTHER ELECTRONICALLY STORED INFORMATION

As technology advances and our lives become increasingly controlled and monitored by digital systems, so does the landscape of discoverable evidence in litigation. Defendants, particularly corporations such as insurance companies, have gone digital, which has substantially increased the amount of information that is electronically created and stored, and later becomes relevant in litigation. Every litigated case involves some form of ESI. Conducting some form of ESI discovery is required. Insurance companies, for example, rely on sophisticated computer software programs, and more recently, AI technology, to manage and adjust claims. As a result, critical claim information often exists solely in electronic form. With this change in file management comes new challenges for attorneys attempting to prove an insurance company acted unreasonably in handling their client's claim. Fortunately, the emergence of claims-management software also offers new evidence to prove bad-faith liability.

In the pre-digital age, the "claim file" was a collection of paper documents organized according to applicable coverages or claims processes, often with file folders or jackets, assuming it was organized at all. There might be a separate file with its own set of documents in another division of the claims department, such as the Special Investigations Unit, or separate files maintained at different branch locations. This file organization, or lack thereof, created significant challenges when the claim ended up in litigation and a document request was made for the "claim file." The insured's attorney then faced the daunting tasks of reconstructing claim events and verifying that the file received contained all documents that were or should have been in the file. More often than not, there were significant and inexplicable gaps in the claim history because the adjuster did not properly notate or paper the file, or only one version of the claim file was produced.

The electronic claim file

The proliferation of claims-management software gave rise to a new version of the "claim file," the parameters of which are difficult to define. Although the new electronic claim file still contains the same documents as the paper file, albeit in an electronic file format, it also includes a tremendous amount of data that cannot be manipulated or misplaced. This data includes the date documents were uploaded to the program, the date a particular user accessed the claim file, and the information and documents available or known to the insurance company on a particular date. When obtained and used correctly, this treasure trove of information can prove claim-specific bad-faith conduct. It can also prove company-wide, systemic shortcomings and failures, i.e., institutional bad faith, thereby opening the door to punitive damages.

In email-heavy cases such as bad-faith litigation, it is important to get not just the emails themselves, but all the ESI

associated with the emails, commonly referred to as metadata. I will often receive an email string in a document production that contains several emails exchanged back and forth between my client and the adjuster. Somewhere in the middle, there is reference to an attachment, but the attachment is nowhere to be found. By getting the email file (i.e., native file), I am getting not only the text of the email, but all the links and attachments that are part of each email. I am also getting the data I need to authenticate every part of the email.

Of course, ESI's importance is not limited to insurance litigation – it is a part of every case, such as information stored in an event data recorder (EDR) used in an auto accident case, photographs and videos in a premise liability case, and electronic communications (e.g., emails and text messages) in any case. The import of ESI varies from case to case but you never want to find yourself saying "I forgot you existed." Learning what ESI exists at the outset of your case, how to get it, and how to use it, is critical so you can dive into your case with eyes open and fearless, survive the great war of discovery, and prevail at trial without a glitch.

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The Electronic Discovery Act (EDA)

Discussions about ESI can be as infinite as ESI itself, but there is no need to get caught in a technological labyrinth. On June 29, 2009, California enacted the Electronic Discovery Act (EDA) which took immediate effect as an urgency measure because of growing uncertainty and confusion regarding the discovery of electronically stored information.

California law provides for the discovery of ESI in civil proceedings. Electronically stored information is defined as "information that is stored in an electronic medium." (Code Civ. Proc., § 2016.020, subd. (e).) In this digital age, "information that is stored in an electronic medium" can be infinite when it comes to discovery. Think about it. Under this definition, it includes every single file stored on your computer, tablet, and phone *and* all the associated metadata, i.e., data that provides information about other data.

Electronic files, such as emails and digital photos, have associated metadata. Put simply, metadata is ESI about ESI. Metadata can be created automatically or manually, although automatic metadata is most useful in litigation. There are three common types of metadata: descriptive, system, and administrative. Descriptive metadata includes information about creation of a file, such as the author, date of creation, and where the file was created. This type of metadata drives the ability to search, browse, sort, and filter information. System metadata is data about the structure of an object, including its contents and how they are organized. It is similar to a book's table of contents or the chapters of a movie on DVD. Administrative metadata is data needed to manage and use information resources. It includes information like the file type, and when and how it was created.

How to identify and locate ESI

To effectively use electronically stored information to advance your case, you must know what to ask for. This requires you to identify potential ESI early in your case. Recognizing this need, shortly after EDA was enacted, the California Judicial Council amended California Rules of Court Rule 3.724, and required counsel to meet and confer regarding the discovery of ESI no less than 30 days before the first Case Management Conference. Among other things, counsel must discuss preservation of ESI, form(s) of production, the scope of discoverable ESI, the cost of producing ESI, and claims of privilege or confidentiality. (Cal. Rules of Court, rule 3.724, subd. (8).) Attorneys often overlook this discussion because it is early in the case and issues regarding ESI discovery have not presented themselves, or the need for ESI is unknown. Do not let it be a missed opportunity to educate both yourself and opposing counsel about the relevant ESI.

Defense attorneys often lack sufficient knowledge about their client's systems and operations, and only ask for this information when pressed by plaintiff's counsel. Thus, the early meet-and-confer required by Rule 3.724 is an opportunity to put opposing counsel on notice about the need for ESI in discovery and the duty to preserve same (assuming you did not previously send a preservation letter).

You also want to use the meet-and-confer to begin obtaining the information needed to craft detailed discovery requests that are more likely to yield meaningful discovery responses. Otherwise, you are likely to receive only objections or incorrect statements of an inability to comply. The first discussion will be preliminary and you can expect responses like, "I'm really not sure," and "I'll have to ask my client about that," so it is very important that you continue the meet and confer in the days leading up to the Case Management Conference and beyond. It is also important to note in your Case Management Statement, specifically in Paragraphs 16.c. and 19.b., what your plan is for ESI and whether you anticipate any issues. Insist that defense counsel be knowledgeable enough to generally describe the defendant's IT systems and programs, what types of ESI might exist, and who the custodians of ESI are. No one ever admits up front there will be resistance to producing ESI, but those disputes inevitably follow. Ideally, putting in the effort at the outset of the case will save time later in discovery because the defendant cannot claim it needs more time to conduct the diligent search and reasonable inquiry required for responding to discovery requests.

Defendant's PMQ for information technology

A frequently underutilized discovery method is taking the deposition of the person most qualified to testify about the defendant's information technology. Code of Civil Procedure section 2025.230 permits a party to notice the deposition of a business entity, requiring that that entity designate the person "most qualified to testify on its behalf" as to matters specifically described in the deposition notice. Section 2025.230 requires the designated "Person Most Qualified" or "PMQ" to testify based upon information "known or reasonably available to" the business entity.

The PMQ regarding ESI-related categories is likely to be an employee or contractor who handles the company's IT system and has very little, if any, prior deposition experience. Use this deposition to educate yourself regarding the IT infrastructure, where potentially relevant ESI is located or stored, the defendant's retention policies, and the systems and programs used to create, transmit, and store electronic data and files.

Do not worry if you do not "speak the language." Because the PMQ is unlikely to have been involved in any of the events which gave rise to the lawsuit, they are often friendlier than other adverse witnesses and can be more than happy to give an ESI tutorial for those who consider themselves to be technologically challenged. The best practice is to treat the deposition like an informative discussion rather than a cross-examination, and let the witness do most

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of the talking. The witness will often use IT jargon that is confusing and difficult to understand. Because it is important that you understand what they are saying, both for discovery and if necessary, to explain it to a jury, ask them to rephrase their explanation in layperson's terms. This is the one deposition where it is acceptable to ask open questions and learn new information as you go.

Deciding when to take the PMQ deposition is just as critical as knowing what to ask for. Generally, you should depose the PMQ after you receive the initial round of discovery responses and document production. Having the initial round of discovery allows you to ask more focused questions, such as what metadata is associated with a particular document, how a particular piece of information is created and stored, and what the process is for accessing and producing the information. This testimony can be used in later meet-and-confer efforts and, if necessary, motions to compel.

What you can demand with ESI

The Code of Civil Procedure contains several provisions that address the discovery of ESI. Section 2031.010 allows any party to obtain discovery by inspecting, copying, testing, or sampling ESI in the possession, custody, or control of any other party. Section 2031.280 specifies the form in which ESI should be produced, and the timing of production. The requirement that the responding party mark responsive documents according to each request applies to ESI, just like any other document.

The demanding party may "specify the form or forms in which each type of electronically stored information is to be produced." (Code Civ. Proc., § 2031.030, subd. (a)(2).) In order to obtain the metadata, you usually must request that files be produced in their native format. However, be mindful of what kind of ESI you are asking to be produced in its native format when crafting discovery requests. ESI cannot be viewed on its own – you need the correct program to open files containing ESI. For example, .msg files are unique to Outlook and require Outlook to open and view the metadata. Another example is an .ESX file which is unique to Xactimate, a proprietary software used in the insurance industry to create repair estimates. ESI is pointless if you cannot read and interpret the data. If your discovery requests do not specify the format in which ESI must be produced, the responding party "shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable." (Code Civ. Proc., § 2031.280, subd. (d)(1).) The production is likely to be a single PDF with no useable metadata.

One approach is to include the following in the "Definitions" section: "The definition of 'DOCUMENTS' specifically includes any "electronically stored information" as defined by Code of Civil Procedure section 2016.020, subdivision (e). The following file types shall be produced in their native format: .tiff, .jpeg, .msg and other email communication file types, .mp3, .mp4, and .mov. All other electronically stored information may be produced in a reasonably usable format, subject to Plaintiff's right to request said electronically stored information be produced in its native format." You can then serve additional discovery requesting ESI for specific items, if needed.

Be ready for discovery disputes

Inevitably, the defense will refuse to produce some form of ESI, if not all of it. Whether it is because of ignorance or stonewalling, it is nothing new and you must be prepared to fight for what you want. This will require you to meet and confer and bring discovery motions. Assuming you have sent your preservation letter at the beginning of the case, addressed the ESI issues prior to the CMC, and taken the PMQ deposition regarding ESI, the meet and confer and law and motion practice should be straightforward.

Courts have the authority to compel the production of ESI, just like any other type of discoverable information. (See Code Civ. Proc., §§ 2025.480 (ESI requests with depositions) and 2031.310 (requests for production).) The same standards for discoverability apply. Code of Civil Procedure section 2017.010 provides that "[u]nless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020.) However, "[t]he court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).)

When a defendant objects to producing ESI as unduly burdensome, it bears the burden of proof to demonstrate that the information is from a source that is not reasonably accessible because of undue burden or expense. (Code Civ. Proc., § 2031.310, subd. (d).) Because there is no bright-line rule on how much burden or expense is too much to justify the discovery, it is a case-by-case determination. The court may, however, still order discovery notwithstanding the burden and expense if the demanding party shows good cause. (Code Civ. Proc., § 2031.310, subd. (e)-(g).)

To streamline the analysis, you should address the factors set forth in section 2031.310, subdivision (g), in your meet-and-confer before filing the motion and discuss them in your motion. For example, ask opposing counsel if it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive, and if so, to identify where, who, etc., and ask them to make that source available immediately. The court will weigh these factors in ruling on the motion, and having a favorable record

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showing your exhaustive efforts to meet and confer in good faith increases your chances for recovering sanctions.

Preserving ESI

The duty to preserve evidence arises when the party in possession and/or control of the electronically stored information was objectively aware the evidence was relevant to reasonably foreseeable future litigation, meaning the future litigation was probable or likely to arise from an event, and not merely when litigation was a remote possibility. Section 2023.030 subdivision (f) insulates a party from discovery sanctions for the material alteration or destruction of electronically stored information if the evidence was lost before the party had a duty to preserve it.

This so-called "safe harbor rule" is the subject of much debate and there is little California case law on the subject. This is why sending an ESI preservation letter immediately upon retention is so critical – it eliminates any wiggle room for the defense to argue inadvertent destruction of evidence. In addition (or as an alternative) to monetary and evidentiary sanctions, you can request the jury be instructed on CACI No. 204 – Willful Suppression of Evidence. This instruction is appropriate where there is evidence of destroying evidence, as well as a refusal to produce it. You should also consider CACI No. 203 – Party Having Power to Produce Better Evidence.

Using ESI in insurance-bad-faith cases

Uses for ESI in deposition and at trial vary enough that they can be the subject of their own article. However, all ESI serves the same purpose: discovering the truth. It is generally accepted that unlike people, certain ESI, particularly metadata, does not lie. The following are examples where ESI was instrumental in establishing facts no witness would admit to.

In insurance bad-faith cases, it is critical to identify what the insurer knew or should have known and when. (See, e.g., *Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [Insurer acts unreasonably if it ignores available evidence which supports the claim and focuses only on those which justify denial].) When used correctly, claims-management software data can provide indisputable evidence of unreasonable conduct in the claims process. If a supervisor or other decision-maker testifies he or she authorized denial of a claim after reviewing all relevant information available, the software data will show whether a key report or other document was uploaded to the file and available for review as of the date of the denial. Similarly, data showing the dates an employee accessed the claim file and the particular files reviewed will corroborate or refute the same testimony.

ESI can also be used to show an adjuster's failure to properly document the file. Insurance companies are required by law to properly notate the file so that all pertinent events and actions taken by the company can be determined. This includes noting in the file the date the company received, processed, transmitted, or mailed every relevant claim document. Insurers rarely comply with this requirement in every instance, thereby forcing attorneys to speculate as to the insurer's actions and the dates of claim events. Software data showing the date an insurer received claim documents can be used to determine whether the insurer acted reasonably promptly upon receipt of a document. This is especially critical when the file is silent as to the receipt or processing of documents from an outside consultant, because an insured is usually not privy to communications between insurance companies and its consultants.

The available features and functions for a particular software program can be used to show the insurance company had tools available to it to ensure prompt handling of claims but failed to use them. ClaimCenter has a feature called "Workplan" which allows an adjuster or supervisor to create and track all tasks necessary to investigate, process, and settle a claim. The obvious benefit of this feature is to ensure thorough and prompt claims handling. If an insurer has ClaimCenter but does not use the "Workplan" feature, there is a legitimate argument that the company failed to adopt and implement reasonable standards for the prompt handling of claims. This is particularly useful when trying to prove institutional bad faith and obtain punitive damages.

If the insurer does use the "Workplan" feature, the program will record what activities or tasks were created, the deadline assigned, if and when they were completed, and by whom. This data can be used to prove an adjuster failed to create tasks for critical activities or complete them by the assigned deadline, if at all.

Another example is a case where the insured submitted information supporting his claim for Additional Living Expenses (ALE) to an adjuster in an email with receipts attached. The adjuster only uploaded the attached receipts, even though the email contained information necessary to processing the claim. As a result, there was a delay in paying benefits. The same information was again provided by the insured several months later, but the adjuster again failed to upload the email to the file. When claim documents were produced in litigation, there was no indication of when or how the receipts were received. However, claim-management software data obtained later in the case showed the date the receipts were uploaded to the file.

This independently confirmed an 18-month delay in paying ALE benefits. The adjuster could have claimed he did not receive the original email and that the receipts were provided at a later date. Because of the irrefutable data, the adjuster had no choice but to admit to an unreasonable delay in paying policy benefits. He also admitted the payment was delayed because he failed to upload the full email to the file and forgot that he was provided the information needed to process the claim.

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Using ESI at trial is trickier than in depositions and requires considerable planning. But this is what you came for, so be sure you can use it. As you get closer to trial, if you need additional testimony to either lay the foundation for ESI or interpret the data at trial, consider taking another PMQ deposition. Be sure to make the categories of examination as specific as possible to avoid objections of duplicative discovery. Elicit testimony that you can present verbatim to the jury, using the defendant's own words, to explain the significance of the ESI. Consider using an expert to interpret and explain data that a defendant cannot. Metadata from cell phones (including GPS data) and EDR can be key to discrediting defense theories, but it requires special knowledge to interpret and explain what the data shows.

Conclusion

The recent explosion of AI-driven programs confirms that the digitization of our daily lives will only continue to grow. So too, then, lawyers must stay abreast of the developments and understand how they impact litigation. Indeed, our obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. But while it may seem that everything has changed, ESI can fill in that blank space between the defendant's conduct and our client's injuries, and be an invaluable tool in discovery and at trial.

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