Best's Insurance Law Podcast

Managing the Expense of Electronically Stored Information (ESI) Discovery Claims - Episode #147

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys*.

We're very pleased to have with us today Atty. John J. Cloherty III, partner with the law firm of Pierce Davis & Perritano LLP in Boston, Massachusetts. John's law practice is focused on litigation and trial advocacy, and defense of individuals, corporations, and governmental subdivisions and agencies in federal court and in the state courts in Massachusetts and Rhode Island.

His practice areas include governmental, municipal, and school liability, employment law, insurance coverage, elevator liability, product liability, and workplace investigations. He's also a frequent lecturer for continuing legal education seminars for fellow lawyers, as well as for client seminars.

John, we're very pleased to have you with us again today.

John Cloherty: Thank you. Good morning.

John Czuba: Today's discussion is managing is the expense of ESI in claims. For our first question, John, can you tell our audience, what is ESI?

John Cloherty: Sure. ESI stands for **electronically stored information**. It's an umbrella term that describes many things. For federal cases, ESI is actually defined under the rules, Rule 34(a), which says its writings, drawings, graphs, charts, etc. or other data or data compilations which can be stored in any medium from which information can be attained.

This definition of ESI was drafted intentionally to be broad enough to cover all current types of computer based information, but also be flexible enough to encompass future changes and development. When we're talking about ESI, there's usually different types of ESI that are discussed.

There's traditional ESI which are computer files like email messages, word processing files, web pages. It's essentially the modern counterpart for paper documents. There's a type of ESI called metadata. Metadata is best understood as data about data, or it's hidden data about a particular dataset that describes things like how, when, or by whom the data was collected, created, accessed, or modified, and/or how it was formatted.

There's this other type of ESI called system ESI, which essentially is data that's automatically created by computer systems as a temporary byproduct of digital information processing. We don't see too much discovery concerning system ESI, but it can become important as litigation proceeds.

John Czuba: John, what types of cases typically involve ESI discovery? How are they impacting claims in particular?

John Cloherty: Civil lawsuits of all kinds can involve discovery of ESI. These can be cases like products liability claims, employment discrimination, breach of contract, bad faith insurance practices, and many others. Even regulatory investigators or criminal investigators routinely seek ESI when pursuing alleged wrongdoing.

From our view, the use of ESI on litigation is pervasive. It's because ESI evidence can be powerful proof in the proof or defense of claims. Witnesses can deny a knowledge of wrongdoing or lack of knowledge of the sequence of key events. ESI documents can be used to fill gaps in evidence or to contradict the witness' testimony or even impeach witness' character.

In our modern era with email communications and electronically created documents, there's a digital record of a lot of actions taken by parties and the evidence of the motivations behind their actions. ESI discovery can often make or break the outcome of litigation.

John Czuba: John, how do you plan for ESI discovery? Do courts require ESI discovery planning?

John Cloherty: Yes. Most courts now require litigants to address ESI discovery issues at the beginning of litigation. The federal rule specifically has several provisions like Rule 16(b) covering pretrial conferences that requires the parties to talk about electronic discovery at the initial Rule 16 scheduling conference, and also requires the court to address ESI when issuing a discovery order.

Rule 26(f) also specifies that the parties must plan for discovery. It includes topics to be addressed such as the issues relating to the preservation of discoverable information, the form of production of electronically stored information, and also whether the court should enter an order allowing for privilege to be asserted after production.

When planning for ESI discovery, the form of production is important. Counsel should discuss and attempt to reach an agreement on which forms of production a party should utilize and what metadata should be included. This can be a contested issue.

As a general rule, if counsel wants to receive searchable documents and data from the other side, then you should probably agree to produce searchable documents and data in your production.

If your client has an information technology director or a team, you need to use those individuals to educate yourself on the ideal forms of ESI production, so that you know what you can produce, and in response, you know what you receive can be effectively managed and easily searched.

When we're talking about forms of production, it's not just paper documents, but typically with ESI, its image files. They can be static image files that don't have searchability functions or indexing, or its image files and load files which we'd have the text within the load files that can be searched and indexed. Load files can also include metadata.

These are typically what's produced and requested, the image files and the load files, so that they can be searched and indexed. Another significant thing to consider in the discovery plan is any limits to the presumed discovery limits under the federal rules or local rules.

When discussing with opposing counsel, you can agree to serve more than 25 interrogatories for example. If there's a presumptive limit like in Massachusetts where the local rules limit parties to two sets of document requests, these should be adhered to if you're seeking to limit the amount of ESI discovery and help reduce cost.

John Czuba: Should you agree to an ESI protocol with opposing counsel? Should you have a written clawback agreement or stipulated protective order?

John Cloherty: In your discovery plan, it should include how the parties would deal with privileged documents. This would be impacted by any clawback agreement or protective order in place.

Privileges with ESI can be tricky, especially when documents are produced in native format, which can be very difficult to redact, mark, or label. To alleviate privileges, some attorneys enter in these clawback agreements which provide for the return of privileged information and might slip through the document review process.

Ordinarily, these agreements provide that if it's an inadvertently produced privileged data, it's supposed to be returned upon notification to receiving party and expressively will not be considered a waiver of the attorney client privilege. The rule of federal evidence, Rule 502, actually provides for such clawback agreement.

The ESI protocol piece as part of the discovery plan, counsel may consider developing their own ESI protocol which specifies precise formats for production and deduplication, etc. I advise caution when doing so.

You want to avoid agreeing to production formats which your client or the law firm doesn't have the capability to produce. Otherwise, you might be obliged to retain a vendor for production when you intend to do the ESI production with internal resources.

Alternatively, if there's going to be an ESI protocol, I would suggest insisting that it only applies to production being made through an ESI vendor so that the ESI you're producing using your client's or your law firm's internal resources doesn't have to be within those strict formats agreed upon in the protocol.

John Czuba: John, what are the duties for identification and preservation of client ESI?

John Cloherty: Obviously, you have to preserve ESI that may be relevant in the case. The rules, Rule 26(f) and Rule 16(b), and federal rules explicitly referenced preservation as a subject to be considered at the early stages of the litigation.

Given the potential volume, variety, and location of ESI, preservation is important to deal with early in the litigation. Preservation might actually impact the client's daily operations if they have to set aside large volumes of data for a litigation hold.

The things to be considered when talking about preservation are the time period of the preservation and the scope of the preservation. The time period is usually fairly obvious, straightforward as to things that should be preserved when the parties are aware of the litigation and/or the claims arising in the case.

The scope of preservation is a little more amorphous. Counsel needs to identify key personnel from whom the ESI data will be relevant, and put them on notice if they have to preserve. We will suggest doing so in writing at the initiation of litigation, and specify in broad terms the whole scope of ESI that the client should preserve.

This becomes problematic when there's ESI that might be of marginal relevance like dynamic ESI, such as an interactive website. We don't have to preserve all that content. Or ESI in possession of a third party such as a social media provider. You want to specify these in your initial plan to limit the scope of preservation to be consistent with the federal rules to have efficient discovery in a case.

One issue that does arise is the employee use of personal devices for business purposes, the old bring your own device or BYOD norm that's in place now. Case law is not well developed on this topic. Courts have discussed discovery disputes surrounding personal devices usually focus on two issues.

Is it the employer who's in possession or control of this personal mobile device? Should the custodian's expectation of privacy in ESI be considered? You can imagine if someone's using their phone for both business and personal purposes, they don't want that to be subject to discovery in a case.

Most courts look at these issues, just look at whether there's relevant documents at stake. If there are relevant documents on the personal devices, it's usually considered fair game for discovery.

Our firm, by way of example, has been obliged to retain an ESI vendor to meet with individual client employees, grab their phones, and download text message data from their personal cellphones for use in preservation, searching, and production in a case.

John Czuba: John, what infrastructure does your client and your law firm have for ESI discovery?

John Cloherty: Infrastructure is important when planning for ESI. There's usually three components: People, platform, and process. For people, your law firm needs to have sophistication.

The client should also have information technology personnel to assist in the compilation and identification of relevant ESI data. Your client should provide contact people who can tell you both who are the relevant custodians of the data and the IT people who can assist in compiling that data.

For the platform issue, a sophisticated client such as a Fortune 500 company likely has an IT platform that is going to allow outside counsel to access, search, and segregate ESI data. Smaller businesses or institutional clients aren't likely to have such resources.

Your law firm is going to need to have the capability to load the ESI data on to a computer system to conduct a search and a privilege screening. If you don't have that capability as a law firm, that's where third-party vendors come in. They can be retained to grab the client data and load it into review platform.

There's products such as Relativity or Clearwell, which are these ESI review platforms that are commonly used. Once that's done, then the process of ESI discovery takes place as part of the infrastructure. That's the preservation, collection, search, review, and production. These all have to work together to efficiently comply with our discovery obligations.

John Czuba: Should you handle ESI discovery in house or retain an ESI vendor to assist with it?

John Cloherty: Like with this discussion, this is part of the infrastructure issue. If the people, platform, and process are available, that's going to determine a necessity for retaining an ESI vendor.

It also depends on what opposing counsel will agree to. If they agree to a simple production of simple image files without load files or if the case just involves a small number of ESI custodians or short timeframe, then this can probably be handled in house and save on expenses.

If the client or law firm has the infrastructure in place, that can also determine whether there's a need for an outside vendor. If the ESI data volume is large and the infrastructure is not already in place, then retaining this third-party vendor to assist in responding to ESI discovery will be well worth the investment.

John Czuba: How much do ESI vendors typically charge? What methods do they use for charging for their services?

John Cloherty: Usually, there's four major tasks that the ESI discovery involves: Collection, processing, review, and production. The law firm's review for the privilege and relevance of the ESI data is often the bulk of ESI discovery costs, and that's not going to be affected by the vendor retained.

The ESI vendor's expenses usually arises from the task of collection, processing, and production. Most ESI vendors use a traditional billing model. That's the dominant billing system. It consists primarily of line item pricing for each activity provided for the collection, the processing, the coding, the hosting, the review, and the production.

Vendors will charge an ingestion fee for the discoverable content, a processing fee for the operations performed on the data such as character recognition, deduplication, and filtering, as well as hosting fees for holding the data and storing it.

Sometimes ESI vendors will use alternative billings such as fixed fees per matter or per custodian. Fixed fees arrangements we see are rare. Even though they provide predictable expenses, they're not typical because they can result in overpayment by the client in comparison to just using the traditional billing model.

In our experience, ESI vendors using the traditional model usually gauge their billing rates based on the size of the dataset, the number of gigabytes. Certainly, they'll have hourly rates for things like consulting fees and then maybe flat management fees. The bulk of the billing usually depends on a gigabyte size of the data being collected and processed.

These rates can obviously vary by ESI vendors. In our experience in the Northeast here, hourly rates for consulting services are going to be $200 an hour, while the rates for processing the gigabytes are usually a one-time charge for $25 to $30 per gigabyte. There's a monthly hosting fee, which is in range of another $25 per gigabyte for so long as the project is open and dataset is being hosted.

When there's a production set being created, that can be charged by a flat overall fee, a per page fee, or a combination of both. The per page fee is two cents a page usually depending on the page or the image generated in the production set.

There's also a number of other fees like user access fees to review the documents on the Clearwell or Relativity database, fees for storing devices used for the production set. The big ticket items are the processing fees and the hosting fees if the project is long term.

John Czuba: How can you limit the expense associated with ESI discovery? What are the important parameters for narrowing the scope of this discovery?

John Cloherty: As you can imagine, ESI vendor bills can accumulate rapidly based on the line items I just discussed. I can give you example. In an employment retaliation case that my firm recently defended, we are responding to a lawsuit alleging retaliation over the course of two years of an employee's employment.

We negotiated the scope of the ESI search to include 11 key employees who are the custodians of the email account. We limited time span to three years, and then did 65 search terms. The amount collected for these 11 custodians ended up being 186 gigabytes of data, which grew to 230 gigabytes of data when the images were included from these 11 employees.

Once we got through all the vendor's work for collecting, processing, hosting, and generating production set, it came to about $55,000 in fees for this ESI vendor. That didn't even include our law firm to work for review and privileged screening.

To narrow these expenses or the scope of review, you should look to conduct a search for the fewest email accounts and/or custodians in the shortest date ranges. You can get a cost estimate from the ESI vendor in advance of the work, and then consult your client about likely expenses.

If you're operating on a budget, you should put the ESI vendor on notice of the budget with instructions not to exceed the budget amount without approval. You can emphasize your client when collecting the data to get a firm dataset. You want to avoid a later need to conduct a secondary collection effort. We had a client who, when we instructed him to collect the dataset, they didn't include an accurate ending data range, and so a second search had to be done to expand the time limit.

If you want to limit hosting fees, have the ESI vendor conduct a pre search using agreed upon search terms. Only load the search results on to the data review software system like Relativity or Clearwell, not the entire dataset collected. This will greatly reduce the cost of paying to host the data, because you won't have irrelevant data on the review platform.

Another way to mitigate hosting fees is to bring down a project quickly once the production set is made to avoid continuing hosting and storage cost after production. Obviously, the data needs to be accessible to conduct follow up searches that might be sought by opposing counsel.

A good practice is to notify opposing counsel in advance that, "We're going to shut down this project at the end of the month. You let us know if you have any additional searches." That will mitigate expenses thus ensuring that opposing counsel has reasonable time to conduct follow up searches.

John Czuba: Will the court give you any relief if the ESI discovery expense is disproportionate to the value of the case?

John Cloherty: Unfortunately, it's been our experience that the courts are reluctant to put limits on the scope of ESI discovery based on proportionality grounds. The rules allow the court to do so if discovery is deemed disproportionate to the value of the case.

In our experience, courts aren't doing so. Especially when counsel has already negotiated search terms and date ranges, and custodians, the courts are going to be reluctant to impose further limits on expenses if the ESI results turn out to be much larger than anticipated.

We suggest the best course for seeking court intervention may be before undertaking the expense of the search when you're negotiating the scope of the search if opposing counsel is being unreasonable in requesting very broad ESI production. Such early motion practice is going to need to be supported by cost estimates from the ESI vendor. It's a catch 22.

Your collection efforts may have to be commenced in order to provide evidence of the data size and the company expense so that you can ask the court that reasonable limit should be imposed. If the case is low value, I think the courts will be more likely to intercede to impose limits. If it's a high value case, I think they're going to be reluctant to do so.

John Czuba: John, thank you so much for joining us today.

John Cloherty: Thank you.

John Czuba: That was John J. Cloherty III, partner with the law firm of Pierce Davis & Perritano LLP in Boston, Massachusetts. Special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for the *Insurance Law Podcast*.

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