Best's Insurance Law Podcast

What Insurers and Defense Counsel Should Know About E-Discovery - Episode #161

Posted: Tues., Feb 4, 2020

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources.*

We're pleased to have with us today Attorney Jim Boyers from the law firm Wooden McLaughlin in Indianapolis, Indiana. Jim Boyers is a partner and trial lawyer who represents clients in complex matters involving multiple parties arising from product liability, construction, and environmental claims.

Jim's work has included multiple multidistrict litigation, or MDL, matters in federal court. Jim works on eDiscovery strategy and claims, including the negotiation of and court documents about search terms, the handling of data from complex databases, and standing orders for production of such discovery.

Jim, thank you so much for joining us again this morning.

Jim Boyers: Thank you for inviting me to this discussion today.

John: Today's discussion is what insurers and defense counsels should know about e-discovery. For our first question today, Jim, when does the duty to preserve potential evidence begin?

Jim: Your expectation should be that the obligation to preserve begins when a party reasonably anticipates litigation or should. The obligation can arise based on the significance of the claims and injury, publicity associated with the event, statements made by the claimant or by the claimant's retention of an attorney.

This obligation cuts both ways. For insureds, insurers, and claimants. Oftentimes, the claimant's attorney will send a preservation letter demanding that all relevant documents and data be preserved, from texts, to emails, to photos, to surveillance video and the car event data recorders.

Of course, claimants have the same obligations to preserve their evidence. That may often include texts and social media.

John: Jim, what does the duty preserve require?

Jim: Well, not to sound like a lawyer, but it really depends on many variables. At the most fundamental level, the duty involves taking reasonable steps to preserve all documents and data that are reasonably likely to contain relevant information to the claim.

In federal court and in many state courts around the country, the concept of proportionality applies to limit the scope of preservation when sources may be duplicative, they may be cost prohibitive to deal with, or so voluminous as to make their use in the case overly burdensome.

If we set aside the issue of potential breadth of scope of the duty to preserve, it simply requires all parties involved to take steps early on in the case to identify potential data sources and to determine whether they can or should be preserved.

For example, in an auto collision case, the data sources could include event data recorders from the vehicle, smartphones, digital cameras, and social media accounts, especially on injury issues.

In premises liability cases, we'll see many of the same or similar sources, but other things like surveillance video or maintenance records, incident reports, guest records, or customer transaction records. These all can be helpful in putting together the whole picture and potentially identifying witnesses.

Some may think that printing a photo or taking a screenshot of a text or converting them to a PDF satisfies the duty to preserve but that isn't always the case. If opposing counsel agrees to that, it may be acceptable, but it eliminates metadata, which may be determined to be relevant, metadata that would be in the native form of the evidence.

For example, a printed photo loses metadata that, for most digital cameras, would include date, time, and potentially location of the photo. Metadata can also help to verify the presentation of the image at trial.

Finally, the best practice is to issue formal litigation data and document preservation holds to clients and to send a preservation letter to the opposing party.

John: Jim, what could happen when duty is not met?

Jim: This depends, as well, oftentimes, based on the jurisdiction, the venue, and the specific circumstances. I would say that federal court typically takes the most aggressive approach.

In most circumstances, though, courts will assess what data was lost, and what prejudice was created by the loss, and importantly, whether good faith efforts were taken to avoid losing relevant data.

Sometimes, you may lose data in one form but be able to find it from other sources. This can help avoid sanctions for the party that lost the data. Where a party can demonstrate the good faith efforts to preserve or that the lost data had limited evidentiary value, courts typically will limit the level of sanction or leave it to the jury to assess whether or not the lost evidence would have been prejudicial to that party.

I'll give you a couple of examples of how courts handled situations where the opposing party in one of my cases failed, in the court's opinion, to meet its duty to preserve and how it can impact the valuation of cases.

The first example that I want to talk about was a state court trial a little over a year ago where we dealt with a situation where the plaintiff filed suit not long after the event at issue took place. It was a medical malpractice case involving the treatment of an infection or an alleged infection in a toe.

The timing and appearance of the toe in the pictures was essential to assessing their relevance to the case and to determining the material issues. The plaintiff, instead of giving us digital images at the outset of the case provided print copies.

During the course of discovery, we requested the original digital images and they were not produced. The court, prior to the initial trial date, upon our motion agreed to issue a spoliation instruction. A spoliation instruction tells the jury that images or evidence was lost and that they're entitled to conclude that that lost evidence would have been harmful to the party who lost the photos case.

That was a very positive thing, but in this instance, the plaintiff, at the last minute, identified digital images and provided them to us. As a result, the case was continued.

We were able to show that the print images that we were given distorted the appearance of the digital images, that certain images had never been provided to us (those new images happened to have dates that coincided with our client's medical records), and that they actually lost some digital images.

The court limited what the plaintiff could use in terms of the images that it had (they ultimately only presented one photo in their case) and issued a spoliation instruction, as well. We think it significantly undermined the plaintiff's credibility at trial and ultimately the jury ruled our way.

In a federal matter that we recently handled, the opposing party lost text messages and emails after the duty to preserve had been triggered. The federal magistrate issued a report and recommendation to sanction those defendants with a default judgment on liability.

This is an extreme remedy and an extreme sanction, but the court found that the loss of data from the employee's personal devices and work computers demonstrated insufficient preservation efforts and supported a finding of bad faith.

In the report, the magistrate said that when the defendants denied that they could access or control certain data, he believed the characterization was wildly false, and concluded, also, that that lost data likely would have had a material impact on the case.

Now, the case was resolved before the district court judge adopted that report, but we are convinced that it had a significant impact, an adverse impact, on the defendant's position heading into the resolution of the case.

That magistrate, Magistrate Dinsmore from the Southern District of Indiana, has a recently published case called *Senior Lifestyle Corporation v. Key Benefit Administrators, Inc*. The Westlaw site is 2019 Westlaw 3281637.

We suggest, if you have the chance, to review that because it gives a really nice analysis of spoliation issues.

Finally, I want to talk about another federal court matter that we handled involving a commercial dispute, including the theft of trade secrets.

When we did our 30(b)(6) deposition (or corporate representative deposition) in that case, the representative testified that he had destroyed his smartphone after he had been put on notice of potential violation of his employment agreement. We never got to the point where we filed a motion for sanctions based upon that clear act of spoliation, but we are certain that it helped us in presenting our position in mediation, which also led to resolution.

John: Jim, what steps should be taken to avoid spoliation issues in cases?

Jim: I think insurers, when claims come in, need to consider creating procedures for identifying and preserving sources of relevant data when claims appear likely to end up in litigation.

Those procedures might include having a data questionnaire for insureds with liability claims, ensuring that the insured has also received a preservation notice from retained counsel and verifying that they've acted on the preservation notice.

In some cases, having regional or national relationships with forensic collection vendors can be helpful. In cases where there's significant exposure and a large amount of electronic discovery, consider retaining discovery counsel to handle those on a broad basis.

John: Jim, finally, what steps should be taken to ensure that plaintiff preserves evidence?

Jim: I think that there should be a procedure in place to put claimants on notice of their obligation to preserve and that it can pay dividends because the duty arises before they receive a preservation letter and regardless of whether you ever send one.

The benefit to sending it is that it establishes a point by which the claimant cannot argue it failed to anticipate litigation.

It also helps frame the scope of the preservation, which is important to make sure that their good faith arguments go away if they're efforts are too narrow, or at least they have to come up with a good reason for why their preservation was more narrow than what was requested.

Finally, I think having relationships with e-discovery vendors and e-discovery counsel can maximize the insured's ability to avoid spoliation issues and also obtain essential evidence in a cost effective way.

John: Jim, thanks very much for joining us today. That was Jim Boyers from the law firm of Wooden McLaughlin LLP. Special thanks to today's producer, Scott Richards.

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I'm John Czuba, and now this message.

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