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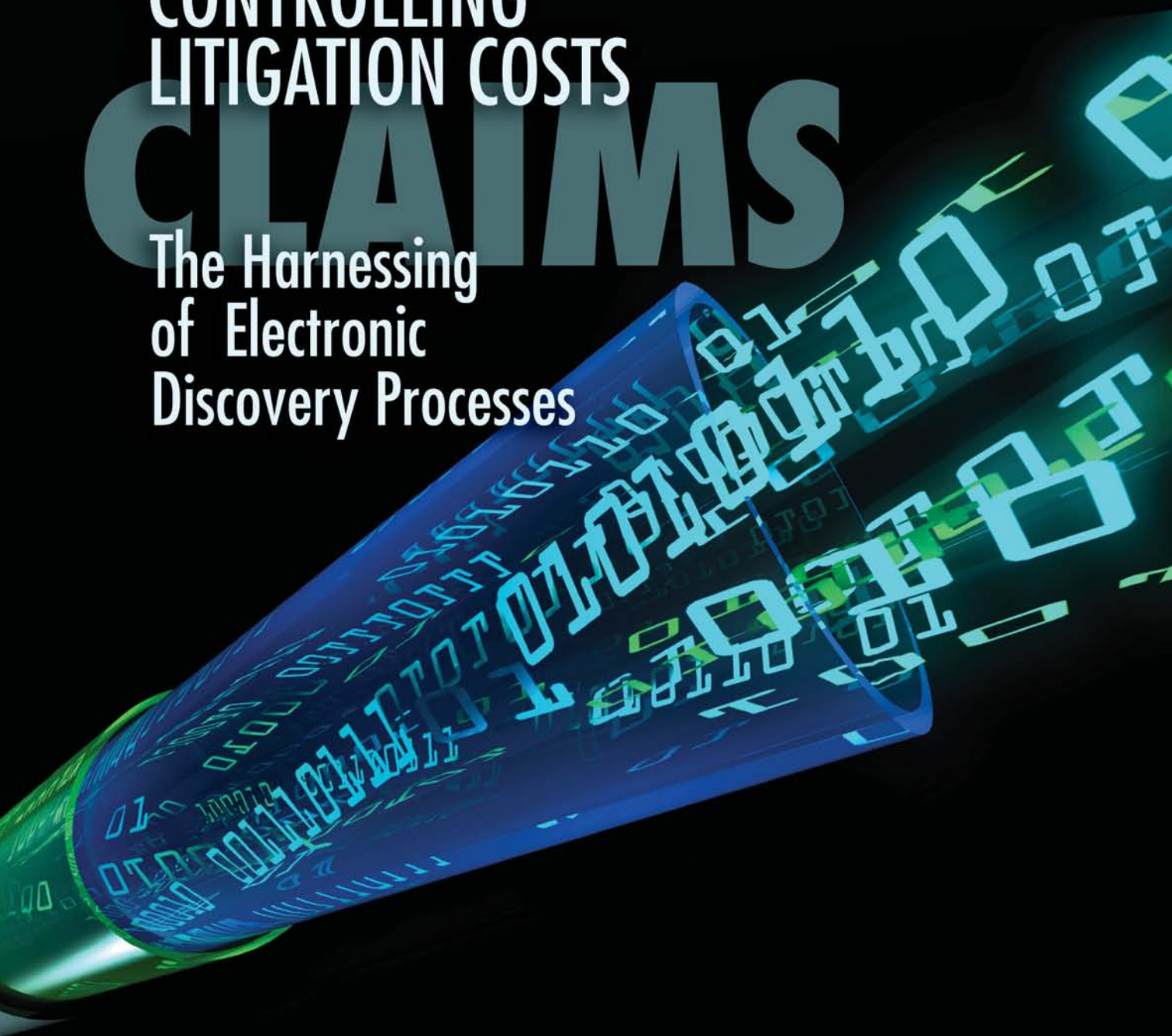
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## **CONTROLLING LITIGATION COSTS**

# **CLAIMS**

**The Harnessing  
of Electronic  
Discovery Processes**



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**The recent money market meltdowns mean more litigation.**

# CLAIMS: CONTROLLING *The Harnessing of Electronic*

**M**ore certain than loss of jobs and the reduction in tax receipts by governments, complex litigation that seeks to sort out the who-did-what-to whom in the collapse of our banking and investment banking systems looms large on the horizon. Since conditions started to decline more than a year ago, actions have been commenced in courts from coast to coast and the likelihood of this trend abating any time soon is slight.

For insurers who are asked to defend such cases and for the plaintiffs who bring them, the key to winning will be as much the management of the cases—and managing the costs of these matters—as the merits of them.

Of course, the importance of intelligent, careful case management is not limited to the burgeoning caseload involving mortgages and investments. The ever-increasing number and type of cost drivers in the litigation process threaten the ability of defense and plaintiff counsel to prevail on the basics of right and wrong: the cost of the process itself is changing outcomes.

One critical cost driver is electronic discovery used in all types of litigation. Frequently described as a necessary evil,

now made even more a part of our litigation system through recent amendments to the Federal Rules of Civil Procedure, electronic discovery can often prove to be extremely helpful in winning a case. With the amount of e-mail being created by companies growing at a rate of 30 percent annually, litigation counsel needs to be well-positioned to be at the forefront of driving down the costs of litigation directly associated with electronic discovery<sup>1</sup>.

Given that electronic discovery is the second highest cost in a litigation or governmental investigation, behind only that of outside counsel's fees, it is extremely important for counsel to gain a solid command and control over the electronic discovery process, as it can significantly lower the costs of claims. Many types of insurance policies have been used to cover the cost of electronic discovery as part of the reasonable costs to defend against a litigation.

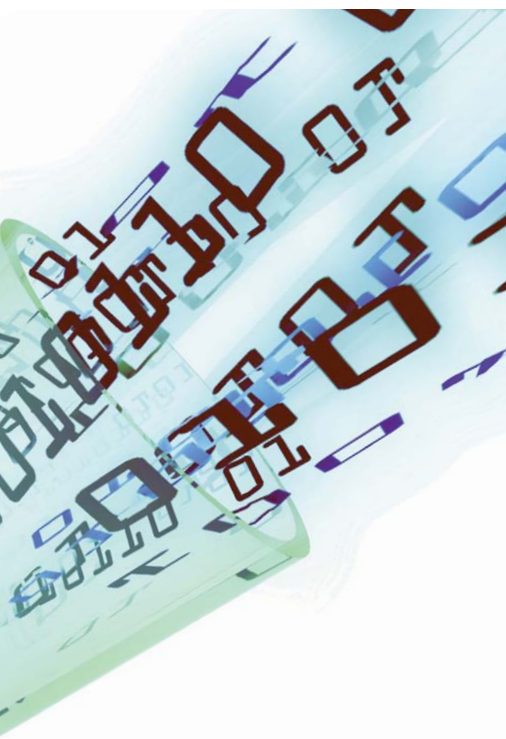
These policies have included D&O, E&O, EPL, crime, fiduciary, patent infringement, professional liability and media liability. The availability of insurance proceeds to pay for the costs of electronic discovery is expected to grow as the benefits of, and mandates for, electronic discovery become more evident.



**...a typical insurance matter, involving electronic discovery, has on average a document review load of 100 gigabytes of data, which equates to an attorney reviewing between 5 million and 7.5 million printed pages.**

# **LITIGATION COSTS**

## *Electronic Discovery Processes*



Insurers' coverage of electronic discovery will be crucial for one key reason: a typical insurance matter, involving electronic discovery, has on average a document review load of 100 gigabytes of data, which equates to an attorney reviewing between 5 million and 7.5 million printed pages.

Developing and maintaining a strong relationship with an electronic discovery service provider is an essential component to ensuring a positive outcome. The key to establishing a successful relationship is to partner with a firm that provides high caliber consulting and expert services. Selecting an electronic discovery provider that offers value-added services is critical to ensuring that complete transparency is maintained throughout the engagement. This includes how electronic discovery agreements are priced; who is actually performing the work; and most importantly if it is being done in the most efficient and cost effective manner possible.

Retaining a service provider that offers clients in-house technical experts and consultants is beneficial to the parties involved. Using qualified experts ensures that all work is done in accordance with industry best practices and in the insured's best interest. Using qualified providers will

assist insurance carriers and their clients in avoiding substantial and unnecessary costs.

In order to prevent being harmed by unscrupulous electronic discovery providers who provide poor quality work and/or are charging excessively high prices, it is imperative for counsel or litigation managers to conduct the appropriate due diligence prior to commencing work with a firm.

To help guarantee that the process is as effective and efficient as possible, insurance companies should present insureds with a short list of preferred electronic discovery service providers that have been vetted by the carrier and perform top quality work, at a reasonable cost. If an insurance carrier partners with the right provider on a series of matters, even greater cost savings could be realized through price arrangements that are mutually beneficial to both the insured and the carrier. The insurance carrier should inquire of the provider if they have such pricing arrangements available.

## Claim Counsel's Checklist for Selecting an Electronic Discovery Provider

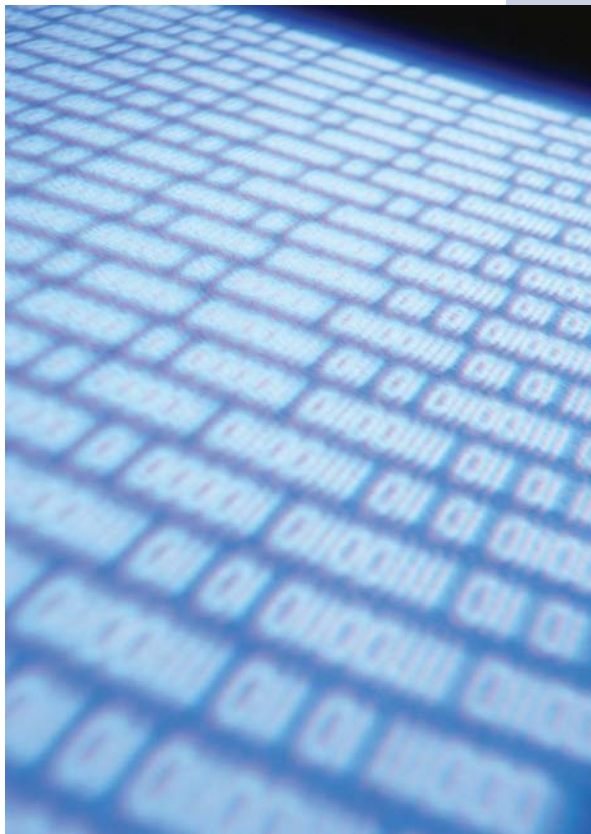
The checklist below is designed to assist counsel in their due diligence review of electronic discovery providers. Adherence to this review regimen will help counsel avoid difficult and costly mistakes that frequently occur in electronic discovery engagements. It is not intended to be an all-inclusive list, but rather a helpful guideline of the "Do's and Don'ts" of retaining a high quality provider.

1. Make sure that the provider handles all of the work in-house with their own experts and consultants and does not subcontract out the following work: (a) the forensic collection of data; (b) the processing of data; (c) the hosting of data or (d) the production of data. Prior to subcontracting any work, counsel should communicate that it is mandatory for the provider to receive express written approval from counsel before using subcontractors. This should be expressly stated in the engagement letter that is entered into with the service provider.
2. Avoid working with firms that play the "bait and switch" game. Perform your due diligence in a way to ensure that a potential firm does not use top experts to sell the work and then have junior-level associates manage and handle the engagement.
3. Prior to engaging a firm, make sure that you fully understand the vendor's pricing structure, as you do not want any unwanted surprises down the road.

Pricing should be completely transparent and there should never be any hidden costs such as charges for expedited services. Clients should never have to pay a firm any extra charges for receiving immediate services (e.g., within 24 hours, etc.), as this practice

is designed to significantly inflate bills and take advantage of clients.

4. Avoid working with firms that do not have in-house experts and consultants that provide value-added services to the insured and that can complete the engagement in a cost efficient manner. It is recommended to avoid working with providers that require that the insured ship the data to the service provider so that the provider can process it and simply turn it back over to counsel. This process does not provide clients with any value-added services and can actually leave the insured at a disadvantage. A strong service provider has in-house experts that work closely with counsel and the insured on-site to ensure that only the most relevant and meaningful data is collected, processed, hosted and produced.



5. Retain an electronic discovery firm that can provide expert and consulting services from the preplanning stage all the way to trial if needed. An experienced technical expert can provide counsel with solutions to complex issues and challenges that

**...the electronic discovery process...allows counsel to make educated decisions early in the electronic discovery process that may significantly impact the overall process, both from a time and cost perspective.**

could potentially occur. Use of an expert will help avoid collecting and processing irrelevant data, as well as costly do overs that happen when there is not close coordination and proper planning.

### Understanding Electronic Discovery: Four Phases

It is extremely beneficial for all lawyers to have a solid understanding of the electronic discovery process. This allows counsel to make educated decisions early in the electronic discovery process that may significantly impact the overall process, both from a time and cost perspective.

The electronic discovery process can be segmented into four major phases. The first stage involves the physical collection of data in a forensically sound manner that is deemed to be relevant to the initial discovery request. The second phase involves processing the requested data. At this stage counsel provides the service provider with keywords and date ranges for refined searching and where the duplication process occurs. In the third stage,

*continued on page 5*

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which relates to hosting, the data is presented to outside counsel through a web-based online hosting tool. This enables counsel to conduct document reviews to determine what data or information is ultimately responsive and what exactly will be turned over to opposing counsel or a third party. Claims counsel can monitor and better manage the entire process by gaining access to a web-based dashboard that the electronic discovery firm can provide. The fourth and final phase involves the production of the designated responsive documents from the online review, which is then physically turned over to the opposing party or a third party in a specified format.

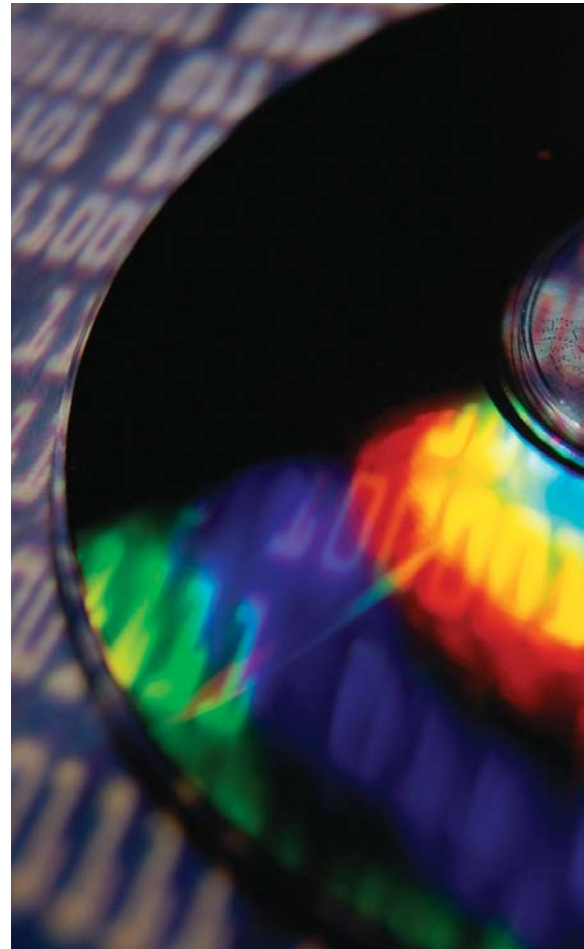
Given the amount of electronic data often related to a case, claims counsel face an enormous task in working with outside counsel in identifying what data is most relevant. It is not uncommon for the data in an electronic review to involve gigabytes or even terabytes of data. To put this in perspective, one gigabyte of data can yield approximately 75,000 pages. That would be the equivalent of approximately 30 banker boxes of paper documents. For this reason, it is extremely important to devel-

op a review strategy in the beginning of an electronic discovery project to ensure that an accurate data collection, an efficient processing and searching phase, and an effective review are achieved. Such preplanning is extremely important to avoid any issues relating to spoliation claims by opposing counsel.

Data spoliation is the intentional or negligent withholding, hiding or destruction of evidence relevant to a legal proceeding and can be extremely detrimental to a case. Spoliation can occur when the collected data is improperly handled. For example, since timeliness can play a critical role in a litigation, if a file's dates are either mishandled or unintentionally modified, it can have a major impact on the validity of data and significantly skew the search results. Almost any type of data including email, spreadsheets and memos can be inadvertently altered if the physical collection is not done in a forensically sound manner.

With electronic data spanning beyond typical documents such as email, spreadsheets and memos, it is imperative to select an electronic discovery partner that can properly advise on other data types that might potentially exist and be relevant to the matter at hand. One form of this data type can be contained in instant messaging logs stored on an individual's computer workstation. Instant messaging software such as Yahoo! Messenger, MSN Messenger, Google Talk and AOL Messenger are all widely used messaging software applications that allow for real-time communication between two or more parties. These types of communication can traverse a company network, as well as the Internet. An experienced and technical electronic discovery provider plays a critical role in helping identify if such data is present and if it can be acquired for attorney review.

Another technology that is becoming more common in today's digital world is Voice over Internet Protocol or VoIP. VoIP allows individuals to make voice telephone calls over a digital network. One of the artifacts that can be associated with this type of technology are voicemails that can be stored in a digital format on a company's network



or telephone server system. Frequently, these digital voicemail files exist in a proprietary system and require the expertise of a seasoned computer forensic specialist to acquire the file(s) for review.

### **Proper Planning Can Result in Lower Cost of Claims**

With electronic data playing a critical role in virtually every business, it is essentially impossible to avoid the electronic discovery process. Because of this, it is important for counsel to understand the manner in which data is stored and created so that an effective action plan can be created to properly and defensibly collect the identified data. Going through the preplanning process will enable counsel, as well as the electronic discovery partner, to identify any potential problems early in the project. In doing so, this will enable experts to address issues such as how to deal with a proprietary database or legacy data systems where data conversion is necessary early in the process.

Having knowledge of potential issues and properly planning for them at the

**Another technology that is becoming more common in today's digital world is Voice over Internet Protocol or VoIP.**

onset of a litigation or governmental investigation can save a tremendous amount of time and money. One of the costliest mistakes in an electronic discovery project results from the lack of planning. When electronic discovery projects are not mapped out in advance it can significantly impact a project's timeline. As a result, an exponential amount of resources may need to be utilized to overcome the impending issues at hand as counsel will still be required to meet any court imposed deadlines. Situations such as these can significantly drive up the cost of the project.

The foundation for any electronic discovery matter is the forensic collection of digital data. If this process is not properly conducted then data spoliation could occur, which might impact the rest of the project. Best practice dictates retaining an independent industry expert with computer forensic knowledge who possesses expert court testimony experience. Having a partner with these types of qualifications will reduce liability and other risks to the insured. A qualified expert will be able to assist counsel by providing testimony related to any challenged data issues that might potentially arise.

A very common presumption in an electronic discovery project is that data is simple to collect and process, and that the insured's data is "clean." However, as industry experience has illustrated, it is dangerous to make such presumptions because often times some of the data is in fact not "clean." Understanding how a company creates and stores their data in its environment can result in a more efficient collection and allow an electronic discovery expert to address any issues upfront.

One of the most complicated data collections occurs when insureds have vast amounts of legacy data. In those situations the data format may no longer be supported by current software applications. This presents a challenge to both outside counsel and the electronic discovery partner that might need to convert the data for processing and review. However, with proper preplanning and by taking advantage of data samples, efficiencies can be achieved which will reduce the project's overall cost.

Another issue that frequently arises is a direct result of the global nature of business. In today's world many more compa-

nies are doing business with international partners and expanding their own operations beyond their own country's borders. Although the benefits of globalization are great, with expansion comes the introduction of data created in foreign languages and privacy laws that differ from those in the United States. Data containing foreign language may need to be translated and certainly needs to be handled in the proper manner to ensure a defensible position for the insured. Counsel and electronic discovery experts must be closely coordinated to provide the insured with the best protections and client service.

The format of data has changed significantly over the past several years. Not only is the amount of electronic data being created today greater than ever before, but also due to advancements in technology, individual files can now be extremely voluminous. These issues need to be considered and addressed at the outset of a project to prevent slowdowns and stoppages. Initial keyword search sampling can help counsel make an informed decision with respect to the amount and nature of the keywords being utilized to reduce the data size. Through this process counsel is able to preview the amount of responsive documents before committing to processing all of the data. Through the refinement of search hits by keyword modification very positive results can be achieved by creating efficiencies and cost savings.

Although data is frequently extracted from well known sources such as computer hard drives, network storage, email servers and personal media such as CD-ROMs, during a forensic collection other non-standard data sources may be discovered such as accounting, human resources or sales and inventory databases. These types of databases can contain millions of records and may require the creation of a customized extraction methodology in order to collect the data in a consumable format for outside counsel to review.

With upfront strategic planning counsel can achieve a solid project workflow, which will increase efficiency throughout the project by addressing the issues that were raised within this article. If such issues are simply overlooked or are not dealt with at the project's onset, the potential timeline and budget can increase by a sizeable amount.

## **Data containing foreign language may need to be translated and certainly needs to be handled in the proper manner to ensure a defensible position for the insured.**

Retaining a full service electronic discovery-consulting firm can prevent many of the pitfalls that arise during these types of cases and result in cost overages. By understanding and gaining a mastery of electronic discovery, claims counsel will be able to plan better for the potential contingencies, which will result in effectively managing the costs - thus lowering the cost of claims. [A]

<sup>1</sup> Frank Chambers, "EDD Tips for Email from the Front Line," *Law Technology Today*, March 2007, referenced in Cynthia L. Jackson, *Business Guide to Compliance: Plan to Compliance: Plan Now for Managing Electronic Data & Avoid Tomorrow's Legal Risks*, Baker & McKenzie, 2007, 31.

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