

Knowledge is Power

Early Informal Discovery in Managing Claims

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The known is key. This talk is about gaining information – when to do it; what to seek; where to obtain it; and how to save costs of the most expensive part of a lawsuit: formal discovery. (*Spoiler: early informal discovery can be extremely effective in resolving disputes and minimizing litigation expenses*).

The when is easy: early and often. Obtaining and preserving information can begin as soon as the first letter hits your desk.

The what is harder. Claims and potential claims vary wildly in terms of dollar amounts, issues, and key players. A sample checklist is attached to this article.

The where can be equally difficult. Information can exist in many locations and many forms, including electronically stored information (“ESI”). The data can take the form of letters, emails, notes, meeting minutes, pictures, videos, text messages, and social media. The data can exist in a “project file,” and may be scattered across multiple devices and multiple witnesses. It may be on live servers, legacy servers, or only on backup tapes. It may be on cell phones, iPads, notebook computers, or notebooks.

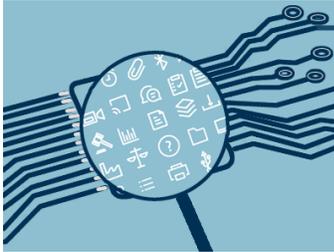
The how can be challenging, and more challenging as time goes on. During initial notice phase, collecting information is often a faster and easier process. As the parties get adversarial, collecting information becomes slow, cumbersome, and costlier. In other words, the best time to seek and preserve information (especially ESI) is before the shift from the informal (pre-litigation) to the formal (litigation).

This is where informal discovery comes in. Informal discovery is conducted outside of the rules of civil procedure; voluntary; and generally in a collaborative, rather than adversarial, posture.

As early as possible, consider requesting relevant documents in native format from the key players. In complex or high dollar amount claims, the claims manager may benefit greatly from hiring outside counsel experienced in eDiscovery and informal discovery.

Ensuring preservation of your own files is also important. The onset of the duty to preserve varies across jurisdictions, but in many jurisdictions preservation is required

when litigation is reasonably anticipated (which, some may argue, is when the first claim letter arrives). This preservation process is more complex in the electronic age, as



ESI is fragile, scattered, and often unorganized or unhelpfully named. Many systems and programs have auto-recycling, auto-archiving, or auto-deleting processes. Outlook, for example, has default settings that permanently delete Outlook items after an aging period between 2 and 6 months. Turning off these automatic procedures may be important in

complying with the duty to preserve ESI.

Conducting informal discovery during early stages pays dividends — both in solving the problem and in saving future costs. Informal discovery makes the claims resolution process speedy and inexpensive. It cannot be understated how helpful it is to get the information before it must be formally demanded in litigation. Formal discovery is slow and expensive, with overzealous attorneys often making it even slower and even more expensive, such as by wrongfully withholding or redacting documents; baselessly objecting; or needlessly causing court intervention.

It is often difficult to understand exactly what should be requested in informal discovery, and from whom it should be requested. Engaging counsel experienced in eDiscovery to assist with early informal discovery can be beneficial. Although the documents to informally request and preserve must be determined on a case-by-case basis, below is a sample form of some documents that may help you get on the right track towards early resolution and mitigating costs.

Sample Checklist of Documents to Informally Request (Early Stages)

- The project file (native format)
- A list of key players relevant to the dispute
- A list of devices where information relevant to the dispute may be stored
- Signed version of contract and any change orders
- Pay applications
- Inspection records
- Emails relevant to the dispute
- Text messages relevant to the dispute
- Photographs and videos relevant to the dispute
- Request documents to substantiate the allegations
- Send document preservation notice to key players