E-Discovery Demystified for Arbitrators—Tips for How to Manage e-Discovery for Efficient Proceedings

By Sherman Kahn

The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process. The process of obtaining documentary evidence stored electronically has come to be referred to as "e-discovery."[1]

The prospect of e-discovery has caused great trepidation in the arbitration community. While there is some merit to that trepidation, particularly where increased costs are concerned, the nervousness associated with e-discovery can be substantially reduced with the realization that e-discovery is nothing more than discovery of documents created and stored in electronic form.

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Indeed, e-discovery is really not that different from old-fashioned paper-based discovery. And dealing with it is a necessity. Parties do not retain documentary evidence in hard copy form the way they used to and reference to electronically stored documents may be the only way to reach evidence relevant to a transaction. For example, the revision history of the contract at issue in the arbitration may be obtainable only from electronic documents. Likewise all communications during the negotiation of the contract may have been by email.

What does make e-discovery different from old-fashioned document discovery is that parties are retaining much more material now that may have to be reviewed and produced. The proliferation of electronic media has enabled parties to store massive amounts of information that previously would not have been stored. In addition, the change from communication that would previously have occurred over the telephone or in person to communication by email has created a documentary record of even the most casual of conversations; and often that record is repeated multiple times in multiple places due to extensive lists of recipients and copies.

As a result, production and review of such material can be far more expensive than the economics of even a reasonably large arbitration justify. Costs are further increased if the parties need to go to "vendors" to process and prepare electronic data for production, not to mention attorney review of the material to be produced.

The problem is how to reduce the volume of material to a manageable level without increasing costs and the burden on the parties to unacceptable levels. This article makes some suggestions regarding how to manage the process to minimize costs and avoid disputes.[2]

To be able appropriately to address issues pertaining to the mechanics of e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the electronic format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.

A short glossary of some important e-discovery terms follows:

- **Native Form**—Electronic documents in native form are documents in the form in which they are created (*i.e.*, Microsoft Word or Lotus Notes).
- **Imaged Documents**—Imaged documents are documents converted from native form to an image of the content of the document (often accompanied by a file (called a load-file or text-file) containing the text of the imaged document so that it can be searched.
    - **TIFF Images**—TIFF (which means "Tagged Image File Format") is an imaging format that is compatible with many litigation support software products.
    - **PDF Images**—PDF (Portable Document Format) is an imaging format proprietary to Adobe Systems. PDF has a number of advantages over TIFF imaging but PDF images are incompatible with a number of document management systems.
- **Metadata**—metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most meta-

data is completely uninteresting to human readers. Some metadata can be helpful, of interest, or even critical to resolving certain issues.

- For example, an Outlook email can have more than 150 associated metadata fields. Only a few of those fields are usually useful (*i.e.*, "from" "to" "cc" "bcc" and "subject" can help with searching and categorizing).
- Word processing documents may store previous changes in metadata fields.
- Spreadsheets often store formulas in metadata fields.
- More often than not, however, the pursuit of metadata is an expensive and useless diversion.

- **Custodian**—Custodian is a term that has developed in the e-discovery field to describe a person who (or in some cases a computer server or system that) may have relevant documents.
  - Limiting the number of "custodians" searched is a key cost-control tool.
- **Keywords or Search Terms**—Another way of reducing the volume of production of electronic documents is for the parties to review only those documents the text of which contains a specified set of keywords which can be agreed upon by the parties.
- **Forensic Preservation**—Electronic documents are easily modified and often are subject to automatic destruction (*e.g.*, autodeletion of email over a certain age). In court litigation parties are obliged to preserve documents from change or destruction. This can be extremely expensive.
- **Backups**—Often companies keep backups of data on tape or in secondary servers. This data, which is kept for emergencies, can be very expensive to recover.

Once an arbitrator understands the above terms, it becomes less of a burden to help the parties implement a manageable e-discovery program appropriate to the size and complexity of a given arbitration.

One important consideration is whether the parties will produce documents in native or imaged format. Production of electronic documents in native format can be faster, simpler and less expensive. However, there are significant disadvantages to production in native format. Documents produced in native format are difficult to manage both for the producing and for the receiving party and the receiving party may not have necessary software. Documents produced in native format will change every time they are used and there is no easy way to control against improper modifications. Documents produced in native format will contain all metadata and that metadata is likely to be unintentionally altered by the recipient of the document during the arbitration. Documents produced in native format are difficult to authenticate. Documents produced in native format are not readily searched across a production database. Email produced in native format is difficult to use.

Advantages of production in imaged form include that imaged documents can be easily used by commercial document management systems; imaged documents cannot easily be modified and are readily authenticated; imaged documents can be searched across an entire production database; and imaged documents can be produced with only necessary metadata attached. Disadvantages of production of electronic documents in imaged form include that imaging may require a third party document vendor and can be very expensive; and imaging can deprive certain documents (especially spreadsheets) of necessary or useful data.

Generally, parties will prefer to produce electronic documents in imaged form. Nonetheless and notwithstanding the long list of possible disadvantages of document production in native form, such production might be appropriate under the circumstances in a given arbitration, particularly with respect to reducing costs. Arbitrators should discuss with the parties, preferably at the initial scheduling conference, whether production in native form is advantageous under the circumstances.

Before the initial scheduling conference an arbitrator may wish to ask the parties to jointly prepare an e-discovery plan consistent with the parties' arbitration agreement while keeping the following considerations in mind:

- Arbitration is not litigation and scorched earth discovery should not be tolerated
- The parties should discuss whether to produce documents in imaged or native form
- The presumption will be, assuming the parties decide to produce documents in imaged format that metadata (other than basic email metadata) will not be produced unless a party makes a showing of need as to a particular document
- Document custodians should be limited to those persons most likely to have relevant documents
- Searches of custodians should be limited to files or folders that are reasonably likely to contain relevant documents
- The parties should consider whether it is appropriate to agree on a set of keywords to reduce the volume of documents

- Data from backups need not be produced without a showing of a particularized need

One advantage of arbitration is that the parties can easily agree to more flexible rules to avoid cost and burden. If the parties are cooperative, the arbitrator may wish to consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules. Such an arrangement, under appropriate circumstances, can enable the parties to achieve their goals in arbitration at a considerably reduced cost.

One of the main drivers of increased e-discovery cost in litigation is fear by parties and their counsel that they will be accused of spoliation. Parties must begin litigation with elaborate, and often very expensive, measures to preserve massive amounts of electronic documentation. In arbitration, fears of spoliation accusations can be minimized through an agreement between the parties. The arbitrator can explore at the preliminary hearing whether the parties to agree on reasonable measures for document preservation that are not exceedingly expensive and that can be agreed to by both sides.[3]

Endnotes

1. This article discusses "e-discovery" in the context of United States domestic arbitration. The same issues arise in international arbitration although, of course, the amount of document disclosure available in international arbitration is often significantly lower than the amount available in United States domestic arbitration. Arbitrators must be careful to adjust their approach based on the context of the arbitration and the parties' expectations.
2. This article can only present certain practical advice for the arbitrator. For a discussion of e-discovery far beyond the scope of this article, *see* "The Sedona Principles: Second Edition, Best Practice Recommendations & Principles for Addressing Electronic Document Production," Sedona Conference 2007.
3. For additional guidance, please see the New York State Bar Association's Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations and Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

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