eDiscovery: From the Arbitrators' Perspective

By Deborah Rothman

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Typically, parties in litigation enjoy broad discovery rights that, to clients' occasional dismay, trump manageability of costs. Left unchecked, this emphasis on access to theoretically relevant documents could wreak disastrous pretrial economic results for litigants when superimposed on massive amounts of electronically stored information ("ESI"). In fact, in cases in which less than $500,000 or so is at stake, predicted litigation outcome might be replaced by anticipated attorneys' fees and ESI discovery and production costs in assessing the pros and cons of settlement. Arbitrators are in a unique position to approach this issue afresh because they are able to fashion more restrictive limits on ESI searches than many courts to date have done.

While arbitration has its proponents and its detractors, one clear advantage of that process is that the arbitrator has the ability to closely monitor and control potentially thorny prehearing issues. A related benefit is the freedom arbitration offers from unnecessarily restrictive or unsuitable procedural rules. Because discovery disputes relating to ESI are so situation-specific and involve such enormous quantities of material, they are ideally suited to leverage the case manage-

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ment opportunities and freedom from unsuitable procedural rules available in arbitration.

The purpose of this article is to review some of the current guides and rules that govern eDiscovery in various fora, and to encourage arbitrators and counsel to parties in arbitration to creatively utilize the various approaches and jointly and cooperatively fashion an eDiscovery plan that is tailored to the facts of the case and the interests of the parties. Certainly there are arbitrated matters in which it makes good sense to follow the courts' lead by permitting extensive searches for ESI and focusing decision-making mainly on who should bear the cost of such searches.

— E-mail Cases Abound —

E-mail is now the type of business record most-frequently requested by courts and regulators. "Corporations are evidence machines, generating terabytes of electronic documents, e-mails and digitally recorded phone calls each year." Daniel Fisher, *The Data Explosion* (Oct. 10, 2007) Forbes.com. Courts are loath to accept companies' excuses for non-compliance with legitimate discovery requests. In 2005, for example, in a commercial fraud case involving the sale of Sunbeam stock to Coleman (Parent) Holdings, Morgan Stanley repeatedly failed to comply with its eDiscovery obligations. As a sanction, the judge instructed the jury to assume that all allegations in the complaint were true, and to rule only on the issues of reliance and damages. The jury awarded the plaintiff $1.6 billion (which was later reversed).

In another widely-reported case, *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932,2008 US Dist LEXIS 16897 (SD Cal 2008), a patent infringement case, a magistrate judge found that Qualcomm's alleged failure to produce 46,000 e-mail documents was not inadvertent, and imposed sanctions in the amount of $8.5 million. He also referred six attorneys to the California State Bar for possible ethical violations. It is unlikely that arbitrators would show any more tolerance of willful violations of discovery orders, although it is also unlikely that they would refer counsel for discipline therefore.

The new Federal Rules of Civil Procedure ("FRCP") require lawyers to know enough about their clients' information systems to disclose all sources of electronic information relevant to a case. That includes sources where data is not "reasonably accessible" because it is costly or hard to produce, such as backup tapes containing data created by a program that is no longer available. This is an important standard that is currently difficult for many litigants to meet. One of the reasons is that many companies do not yet have protocols in place to address counsel's requests for this information. In recent surveys, roughly 60 percent of all companies and 50 percent of large companies did not have e-mail retention policies or e-mail archiving systems in place.

Another is that many attorneys who are still practicing today learned about computers after they graduated from law school. Thus situations arise wherein an attorney who may not be familiar with the various places in which ESI resides is charged with overseeing the ferreting out of such information with a client that is not in the business of archiving what it considers to be non-essential, outdated information.

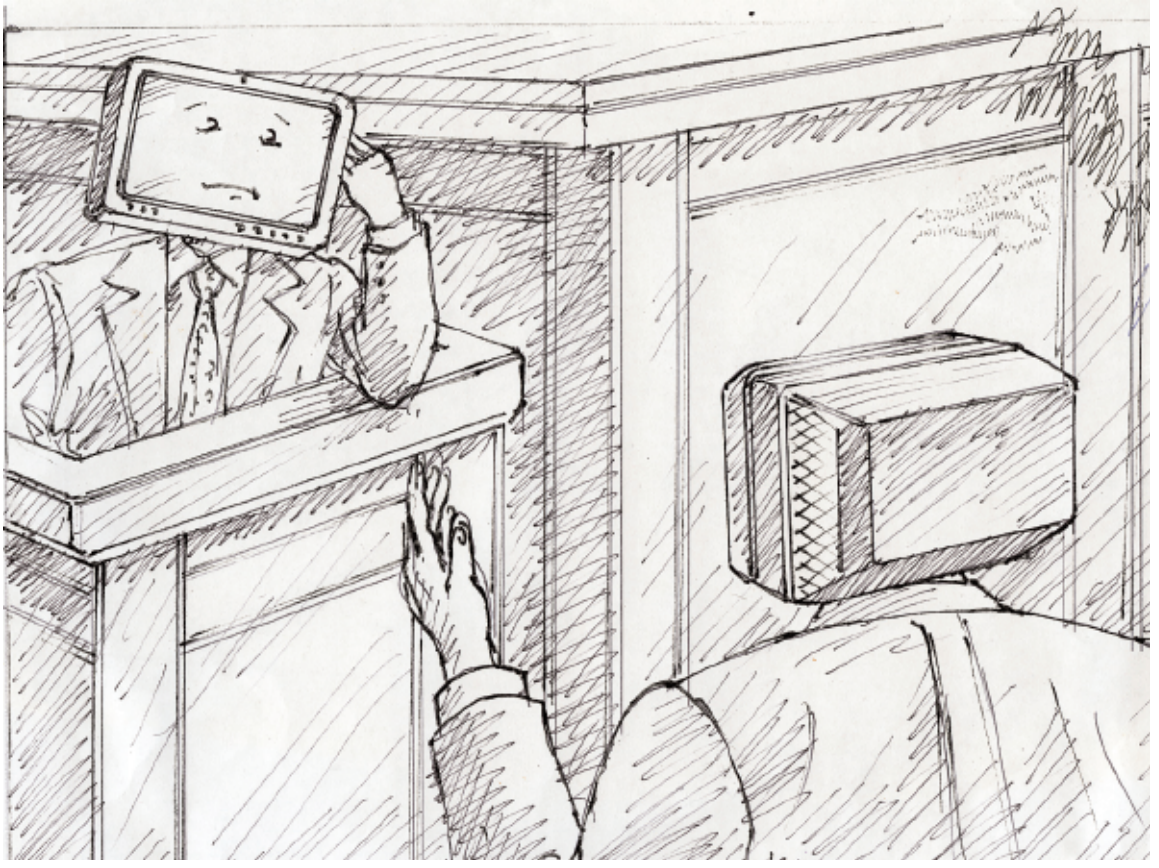
— Searching for ESI —

One of the disputes that arises most frequently is how extensive the search for ESI must be. Attorneys accustomed to paper discovery tend to think in terms of documents that are comprised of text, *e.g.*, letters and agreements created in WordPerfect or Microsoft Word, and/or numbers, e.g., Excel

spreadsheets, financial statements, budget proposals. The universe of ESI is infinitely larger than the world of paper discovery.

ESI, though primarily comprised of e-mail, is also comprised of many technical, and often invisible, data that are significantly smaller than most text documents. Yet this data sometimes contains outcome-determinative evidentiary pay dirt. For example, the former mayor of Detroit was forced out of office and sent to jail because of romantic phone text messages he sent to his married Chief of Staff. Though they both testified in depositions that they were not engaged in a romantic or sexual relationship, ESI investigators discovered text messages between them that contradicted their testimony.

A highly-probative form of ESI, and one that cannot be easily tampered with, although it can be "scrubbed" is "Metadata." Metadata is hidden data, or data about the data, that is not visible when the document is printed yet which contains information about the document's provenance, such as when it was created, when it was last modified or accessed, who created it and who else worked on it. It is thus critically important to establishing the authenticity of electronic documents. Metadata associated with e-mail documents includes headers, attachments, date and time, domain names and recipient lists. The latter metadata can play a role in attributing knowledge to individuals who claim ignorance of facts contained in the e-mail.



Metadata in file systems can provide information about revision lists, modification dates, file sizes and authors.

Although the bulk of ESI resides on the hard drive most frequently utilized by the party from whom discovery is sought, it is also found in multiple and possibly redundant storage locations, such as laptops, Blackberries, PDA's, cell phones, thumb drives and home computers, to name a few.

Besides residing in structured directories, ESI is also comprised of fragments of electronic documents, such as swap files and slack files, which can be found on unallocated (free) space on hard drives. Shadow data can also be found on hard drives; it is created when the hard disk head writes, reads, deletes or overwrites data. Simply moving a file from one folder to another or forwarding an e-mail message may change the information in a way that violates preservation requirements.

Courts often require the production of metadata in mega-cases, but in more routine cases, they vary tremendously in the amount of ESI discovery they will permit, ranging from relatively straightforward and limited searches of particular witnesses' computers, or servers, for relevant documents and emails, to wide-ranging and very expensive searches covering terabytes (one trillion bytes of data storage capacity). Courts decide whether the search must seek deleted files; whether the search should go beyond active data and cover backup tapes and other sources of ESI, such as fragmented, shadowed, or other residual ESI; whether search terms must be employed disjunctively or conjunctively; and whether forensic images of hard drives may be created to preserve the data for later searching and analysis. Responsive ESI must be accomplished without violating the producing party's attorney-client privilege.

In the fall of 2008, Tom Brewer, a Seattle arbitrator, and I conducted a modest and undoubtedly unscientific survey of members of the College of Commercial Arbitrators in order to ascertain their experience with eDiscovery. The general response was that, given that arbitration is meant to be quick and cost effective, an arbitrator should balance the potential importance of the information sought and the stakes in the arbitration against the cost and intrusiveness. One arbitrator emphasized the need for cooperation between the attorneys, often suggesting that the parties' IT people get together because they knew a lot more about the subject than he did.

Our survey identified a number of sub-issues here. For example: When may the requester require the responder to access back-up (secondary) rather than just easily accessible data bases? What sort of factual basis or showing should be required before ordering back-up searching? When may non-primary storage devices be required to be searched (*e.g.*, home computers, personal laptops, PDA's, flash drives, etc.)?

— "Clawback" Agreements Growing —

One recent author reports "an exponential increase of problems of inadvertent production of privileged material caused by e-discovery." *See* Irene C. Warshauer, "Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence," *Dispute Resolution Journal*, vol. 61, no. 4, (Nov. 2006/Jan. 2007) for an excellent discussion of these issues — and a prediction that arbitrators increasingly will be seeing "clawback" agreements presented to them for prior approval by the parties, *e.g.*, at the preliminary hearing, as part of counsel's efforts to anticipate and mitigate such problems.

According to Jonathan L. Frank and Julie Bedard in their article, "Electronic Discovery in International Arbitration:

Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough," *Dispute Resolution J.*, vol. 62, no. 4, (Nov. 2007-Jan. 2008), at 65-66, the federal judiciary has adopted a policy that reflects "the rule of proportionality:" This general principle — that courts may limit discovery where its costs do not justify its benefits — was made explicit in FRCP 26(b) (2)(C), adopted in 1980, and is also reflected in the late 2006 amendments to Rules 16, 26, 33, 34, 37 and 45 dealing with e-discovery.

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In practice, however, the use of this important principle "has been limited in view of the broad standard for discovery in federal litigation… [B]road discovery is the cornerstone of the U.S. litigation process, despite efforts of courts to balance the competing need for broad discovery and manageable costs." The principle of proportionality "could have taken center stage with the advent of e-discovery and its capacity to inflict enormous costs on litigants, but it did not. In fact, the debate about e-discovery in U.S. litigation has focused more on the allocation of its costs than on its scope." *Id.*, at 65 – 66.

The Sedona Principles: Best Practices Recommendations and Principles for addressing Electronic Document Production (2nd ed. June, 2007), available at www.thesedonaconference.org, comprise a helpful set of "best practices" approaches to help guide resolution of ESI disputes. In general, these principles counsel firm application of the "rule of proportionality" to require 'consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing [ESI], as well as the nature of the litigation and the amount in controversy." *See Id.*, Principle 2.

— "Sedona Principles" Lauded —

The Sedona Principles are an excellent guide for arbitrators. The principles recommend a pragmatic approach to the question of how much e-discovery should be permitted: "The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and budens of retrieving and processing the electronically stored information from such

sources, including the disruption of business and information management activities… Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented or residual electronically stored information." *See Id.*, Principles 8 and 9.

— The Sampling Tool —

In this regard, one management tool that has particular merit in such disputes, and is suggested by sophisticated arbitrators, is sampling. Before parties are exposed to wide-ranging searches of their ESI, it is often possible to fashion more limited, and less intrusive and expensive, searches to test the likely utility of replicating the limited sample searches more broadly. This approach may not, of course, always be useful or possible, but it can be a constructive alternative to authorizing a wholesale search.

This type of approach is encouraged by AAA's ICDR Guidelines for Arbitrators Concerning Exchanges of Information [2008] Int. A.L.R. 195. Guidelines 4 and 6(a) provide that arbitrators "may direct testing or other means of focusing and limiting any search" for ESI and also encourage arbitrators to be "receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process…"

Given the vast universe of potentially discoverable ESI, and the costs attendant upon discovering/producing it, in complex arbitrations in which the parties intend to conduct e-discovery, the arbitrator should consider scheduling a half-day in-person case management conference with the parties and their counsel, as well as each party's in-house Information Technology manager and any outside experts who will be involved in e-discovery, as soon as possible after the arbitrator's appointment has been confirmed. At that time, a litigation hold should be ordered on all conceivably relevant ESI. Even if the parties have already stipulated to such a hold, it is sometimes a good idea to review at this conference all sources of ESI, as well as automatic e-document destruction and/or overwriting schedules, to be certain that no ESI is inadvertently destroyed. Thorough disclosure of the universe of storage devices, legacy systems and current and former computer users is advised, as well as a discussion of the nature of ESI sought, the manner in which the requesting party would like it produced, and some guidelines for what search terms will be utilized in the search. As noted above, sometimes a preliminary sampling proves helpful in confirming or refining search terms.

Following the case management conference, unless done earlier, counsel should be certain the parties' IT staff understand and communicate the need to preserve data that may reside on departed employees' hard drives, for example, and to disengage the company's routine document retention policies. In this regard, client IT staff responsible for the preservation and collection of ESI must be well-trained in legal compliance, and must be responsible for communicating and enforcing these best practices throughout the company, including the need for documentation of all steps undertaken in the process of preserving, collecting, and producing ESI.

Arbitrators can play an important role in ascertaining and fulfilling parties' expectations, needs and interests with regard to the eDiscovery, consistent with their expectation that their proceeding will be both fair and expedited. Thus arbitrators, like the litigators who appear before them, would be well-advised to familiarize themselves with the technology of electronic storage devices, as well as with innovations in the management of ESI disputes.