INSIDE THE MINDS™

E-DISCOVERY IN ARBITRATION

LEADING LAWYERS ON RECOVERING ELECTRONIC EVIDENCE, MEETING NEW DISCLOSURE GUIDELINES, AND IMPLEMENTING MEASURES TO STREAMLINE THE PROCESS

ASPATORE

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Inside the Minds Project Manager, Kristen Skarupa; edited by Stephanie Villanova; proofread by Melanie Zimmerman

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The Discovery of Electronically Stored Information in Arbitration Proceedings

James K. Robertson Jr. and
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Decades ago, when the motto of the American Arbitration Association (AAA) was "*Speed, economy, justice*," arbitration was a generally efficient alternative to the courts. Hearings began promptly after the filing of a claim, frequently within a few months; the rules of evidence did not apply, and discovery, if conducted at all, was severely limited. For a case to continue for more than two or three days of hearings was unusual.

During the 1980s, when discovery in the courts expanded exponentially, it often became the most expensive part of the process; inevitably, discovery also increased in arbitration. Although speed and economy, as well as privacy, remained key attractions of the process, litigators in arbitration began to behave as if they were in the courts: efficiency suffered, and the AAA jettisoned its motto.

Arbitration now faces a new challenge: In 2009, computers are the primary medium for the development, maintenance, and communication of information throughout the world. The vast majority of all business records are generated and stored electronically, most never appearing in hard copy. Litigants in arbitration demand and expect the discovery of electronically stored information (ESI).

New and more sophisticated demands for electronically stored information have made discovery disputes in arbitration more daunting and complex. Electronic information exists in various forms, with varying degrees of accessibility ranging from "active" (and therefore cheaply reproduced) ESI to "inaccessible" data, which can be extraordinarily costly and labor-intensive to recover.

During the past several years, the courts and rulemaking authorities have focused on the unprecedented problems posed by the discovery of electronically stored information. The approaches and solutions they have fashioned are now being absorbed into the arbitration process.

Varieties of Electronically Stored Information

If a litigant in arbitration is not sufficiently familiar with the varieties and states of ESI, it is impossible for him or her to make an educated request for such information in discovery. Further, it is not possible to advise

clients as to its purgation or preservation or to address the arbitration panel on this topic as an advocate or, if necessary, even as an educator. Hence, the first responsibility of arbitration trial counsel is to become familiar with the various forms that ESI can take. The best and most accessible resources for trial counsel to educate themselves might well be within the four walls of their law own firms, through their information technology departments; alternatively, an afternoon session with an information technology consultant would be sufficient in most instances. ESI can fall into four broad categories: electronic communication, databases, spreadsheets, and metadata.

The Trouble with E-mails

The first and most familiar category of ESI is correspondence among individuals that is created, transmitted, and stored electronically. This category contains much more than e-mails: it includes voicemail messages, instant messages, text messages, data recorded on cell phones and iPods, and data contained on hand-held electronic communication devices. The category also includes records of cell phone calls sent and received.

E-mails are the most notorious source of e-disasters in the courts and in arbitration; therefore, they are typically the most sought after in e-discovery. The frequency with which the press reports "smoking gun" e-mails has highlighted the rewards of searching out this particular variety of electronic data.

E-mails are, in fact, a treasure-trove of candor. As such, they have generated colossal corporate headaches. For some unfathomable reason, individuals still frequently commit electronically to a message that they would never consider committing to paper. Despite warnings from their employers, many employees behave as if their electronic communications are private. Similarly, many employees assume that their e-mails disappear into a void when they push the "delete" button. However, not only is it impossible to shred an e-mail message, it is also impossible to delete it by pushing a button. See Marjorie A. Shields, J.D., *Discovery of Deleted E-mail and Other Deleted Electronic Records*, 27 A.L.R.6th 565 (2007).

E-mails are often sent on the fly, without proofreading and without tempering the emotional content of what is being communicated. They are

generally much more spontaneous than a formal letter and are often telegraphic in nature, leaving out information that it is assumed the recipient already knows. Such fragmentary communications are easily misinterpreted when taken out of context. Preventive instructions to employees must be given to avoid creating and preserving such "smoking guns" long before they reach the courthouse or the arbitration rooms.

Employees should be cautioned, for example, to look carefully and more than once at the "To:" line before sending their messages: When an employee types the first letter of an e-mail address, the computer will often automatically select as the recipient of that message an individual whose e-mail address begins with the same letter and, specifically, the individual who is the sender's most frequent correspondent among those whose e-mail addresses begin with the same letter. Hence, if your client's customer is "Davis" and your client's competitor is "Daniels," e-disaster can ensue.

The "Cc" line should also be double-checked. We have all been the unintended senders or recipients of e-mail messages; the consequences can be grave. Similarly, carelessly pushing the "Reply All" button can waive the attorney-client privilege in a single stroke of the keyboard by sharing confidential or inappropriate information with a large group of unintended recipients.

Corporations must instruct their employees to think before typing. They must emphasize that employees should not use e-mail for personal communications and, importantly, should double check the identity of the party to whom the communication is being sent before pushing the "Send" button. Finally, it must be re-emphasized that there is no such thing as "deleting" an e-mail, as this information is stored electronically no matter what appears to be deleted on the computer itself.

A second category of electronic information is databases, which can include critical corporate financial and employee records. Software database programs provide tables for the storage of information, each table containing different fields depicting varying factual categories. Provided the tables are correctly set up, queries employing prescribed nomenclature can be performed in order to extract particular data. Such databases, their use,

and their interpretation are often critical and at the center of complex business arbitration proceedings.

Unpleasant Spreadsheet Surprises: "Hidden Data"

A third category of ESI encompasses the entire world of electronically created commercial documents. The great majority of business documents and records worldwide are now in electronic form, and include, for example, employee and office calendars; reports; studies; analyses; correspondence; file notes; photographs; charts; statements; and spreadsheets.

Electronically created and maintained spreadsheets can present a particular problem, as it is easy to hide columns or fields of data with the toolbar. Those fields can reappear later at embarrassing moments. Hence, when examining a client's spreadsheets—and those of the opposition—it is important to obtain a full copy of the spreadsheet, including all hidden data. If the column numbers on the spreadsheet being examined are missing a number or a letter of the alphabet (for example, if the left hand column goes from "13" to "15"), that provides a clear tip-off that there is probably a hidden column "14." It is vital to understand this before producing that spreadsheet for a deposition of a client by the opposition.

Although it is possible to "protect" that hidden data from popping up at an unwelcome moment, the better practice by far is to warn clients in advance of any litigation that "hidden" data on their spreadsheets is just as discoverable in the courts and in arbitration as their visible data.

Metadata is another component of ESI that can pose a problem. When drafting or responding to discovery requests in arbitration or in the courts, counsel must pay careful attention to the format of the electronic documents at issue. Electronic documents often carry hidden information, called "metadata," which becomes visible only in certain versions. This information can be crucial in a particular matter, as it tells the reviewer the date the document was created and by whom. It also reveals all instances when it was opened for examination on the system, as well as who revised it and on what occasions.

In precisely this context, the timeliness of an objection to format has been critical. In *Ford Motor Co. v. Edgewood Properties Inc.*, 257 F.R.D. 418 (D. N.J. 2009), the defendant demanded in its initial document request, as permitted under the federal rules, that Ford produce electronic documents in "native" format, meaning that it should contain all metadata. Ford objected, indicating that it would produce the documents in tagged image file format (TIFF), with accompanying searchable text. The court refused to order production of metadata, finding that Edgewood had not objected within a reasonable period of time to Ford's production in TIFF format:

> "...The Court finds Edgewood's objection to be out of time. It is beyond cavil that this entire problem could have been avoided had there been an explicit agreement between the parties as to production, but as that ship has sailed, it is without question unduly burdensome to a party months after production to require that party to reconstitute their entire production to appease a late objection."

Tracing Employee Activities: Operational ESI Data

A fourth category of ESI consists of data that is related to the actual operation of a particular business or personal computer system, such as logs tracking computer activities and backup records. Such records can trace employee activities and can be important in assisting in the location of any residual electronic data following the deletion of active electronic information.

Electronic documents can be stored "online" and "offline." "Online" documents are stored within computers and are instantly available simply by pushing a button. This is by far the cheapest form of e-discovery. Locating and duplicating "offline" storage can be more involved and costly. Examples of offline storage devices include "floppy" or "compact disks."

Backup tapes contain information, stored electronically as a precaution against a catastrophic failure of the system. The data contained on backup tapes is categorized as "inaccessible," but this is a misnomer. Such information is not really inaccessible; rather, it is simply difficult and costly to access. This is because the data on backup tapes is not maintained in a

user-friendly format and is therefore tedious and labor-intensive to recover and restore. One backup tape can hold hundreds of thousands of pages of data, yet it can also cost hundreds of thousands of dollars, or even more, to restore. The threatened expense of restoring such electronically stored information has very often led litigating parties to settle their disputes.

"Residual data," which is generated when information is deleted or fragmented, is also sometimes referred to as "inaccessible." As indicated above, when an employee pushes a "delete" button, computers do not actually obliterate the contents of that deleted file. Rather, they change the internal status of the "deleted" information to "*not used*," which then allows the computer to write over the file and obliterate, in stages, the previous contents. It is therefore possible to access all or some of the "deleted" information before it is overwritten. Yet this too is expensive.

"Clone files," which are also referred to as "replicant" or "temporary" files, are copies that are generated by the computer to protect against loss if the entire system malfunctions. In the great majority of arbitration matters, it will not be cost or time effective to reconstruct "inaccessible" data. The process can easily take weeks or months and can cost more than the case is worth at full value. Arbitrators should therefore be extremely cautious in allowing the discovery of such information. If the arbitrators are persuaded that there is some serious potential to recover critical evidence by allowing such discovery, then "sampling" should first be performed. An examination of a piece of the data will give the panel some indication of the value, if any, of allowing further expense and further delay.

The Impact of ESI

With the widespread use of ESI, there is a vastly increased likelihood of inadvertent production of privileged communications. In e-discovery, the quantity of e-data to be reviewed can easily exceed by an exponential factor the quantity of hard copies for inspection. Lawyers have, in the past, protected against inadvertent production of privileged communications by inserting a paragraph into discovery and confidentiality agreements, but the importance of such understandings, known as "clawbacks," is significantly heightened in the world of electronically stored information. The quantity