Best Practices as to Initial Steps to be Taken by Arbitrators with Respect to Discovery as to Electronically Stored Information (ESI)

Charles J. Moxley, Jr.

It appears to be a contemporary Best Practice to proactively address the issue of ESI at the preliminary hearing, in an effort to avoid the likelihood of having some aspect of ESI production coming back later as a problem area in the case.

Provisions along the following lines in the first scheduling order would also appear to be potentially useful, following discussion of such matters at the preliminary hearing:

Electronic Discovery

1. To the extent electronic documents are to be the subject of discovery in this case, such production, subject to agreement by the Parties to the contrary, should generally comply with the following:

- Electronic documents need only be produced from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
- Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the electronic documents and convenient and economical for the producing party. Absent a showing of compelling need, the Parties need not produce metadata, with the exception of header fields for email correspondence.
- Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrator will consider limiting or denying production of such materials or ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

2. The Parties' schedule with respect to electronic documents shall be the same as with respect to documents generally.

3. By _____, the Parties will discuss the parameters of electronic discovery, if any, in this case, addressing such matters as the following:

- potential search terms;

- the possible testing of search terms so as to assure that no more than a reasonable number of hits are obtained;
- custodians;
- time periods for searches;
- hit counts as to custodians and time periods;
- formatting in which such documents will be produced;
- the production, if any, of metadata; and
- where appropriate, cost considerations and issues as to proportionality.

* * * *

4. Counsel are directed to report back to the Tribunal by _____ as to any issues or concerns in this regard.

***

Another topic that is worth consideration in appropriate cases is computer assisted searches.

In appropriate cases, it will also make sense to make an “arbitration speech” at the beginning of the preliminary hearing in connection with ESI, as well as regular discovery, to the effect that discovery is supposed to be more limited in arbitration, etc., etc.