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### Arbitrators hold significant power over discovery

Robert B. Davidson and Margaret L. Shaw/Special to The National Law Journal  
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The dominant form of business communication is now, and has been for some time, electronic in nature. E-mail servers and hard drives now contain the vast majority of business correspondence and information. Judicial rules of disclosure, at least in the United States, recognized this reality long before U.S. District Judge Shira A. Scheindlin focused the bar's attention in her *Zubulake* decisions. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422.

Indeed, electronic discovery has been with us a long time. While Rule 34(a) of the Federal Rules of Civil Procedure quaintly describes "designated documents" as including such things as "phonorecords, and other data compilations from which information can be obtained," local court rules have long made it clear that Rule 34 encompasses electronic material.

In recognition of the need for the federal rules to reflect the reality of electronic communication, the Judicial Conference of the United States approved a number of proposed amendments relating to electronic discovery. In April, the U.S. Supreme Court approved of these proposed amendments without comment or dissent. The new amendments, which come into force on Dec. 1, contain revisions and additions to several of the federal rules. These amendments and revisions reflect changes to Fed. R. Civ. P. 16, 26, 34, 37 and 45 as well as Form 35.

Among other things, the amendments broaden the definition of discoverable material to "electronically stored information," require early discussion of electronic discovery issues, provide for production of this information, incorporate a procedure to deal with the inadvertent production of privileged documents and provide a "safe harbor" against sanctions when data are destroyed or lost. The changes in the federal rules, many of which have been (or are in the process of being) mirrored in state procedural rules as well, play a role in litigation that unfolds fairly predictably in a courtroom.

But what do these changes bode for alternative dispute resolution? How do arbitrators, and the rules under which they operate, deal with electronic disclosure in a less formal setting that lacks many of the sanctioning tools available to a court? How do issues regarding electronic discovery play out in the context of a consensual process like mediation, and to what extent does the specter of such discovery drive settlement?

There are three ways in which arbitrators and the institutional rules under which they often operate deal—deliberately or incidentally—with electronic discovery. First, there are rules for demanding documents. Second, there are procedures by which arbitrators can order the production of missing material, through the exercise of subpoena power or otherwise. Third, institutional rules often authorize arbitrators to order sanctions against parties that fail to comply with disclosure obligations.

Of course, there is the unique reality in arbitration that the person who has ordered the disclosure is

the ultimate decision-maker who, in the absence of grounds to vacate an award-grounds that do not include the commission of mere errors of fact or law-will have the final word on the merits of the dispute.

### **The institutional provider rules**

The rules of virtually all of the major arbitration providers in the United States attempt to assure, or at least permit, prehearing document discovery. The JAMS Comprehensive Arbitration Rules and Procedures, for example, require the parties to cooperate in good faith in the "voluntary, prompt and informal exchange of all non-privileged documents . . . relevant to the dispute immediately upon commencement of the Arbitration." JAMS Rule 17(a). The obligation to produce relevant documents is ongoing. *Id.*, Rule 17(d). The parties can demand, and the arbitrator can order, additional disclosure. *Id.*, Rule 17(e). JAMS also provides for one deposition for each side as of right. *Id.*, Rule 17(c).

American Arbitration Association (AAA) Commercial Arbitration Rule R-21 contains similar provisions permitting a party, at the arbitrator's discretion, "consistent with the expedited nature of arbitration," to obtain documents from the other side. The AAA rules do not provide for depositions, but arbitrators may permit them. See, e.g., Rule L-4(d) of the AAA's large complex case procedures, which says that "the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information."

While the International Institute for Conflict Prevention & Resolution (CPR) rules do not mention the word "document"-speaking only in terms of "discovery"-it is clear that they, too, envision a document exchange as part of the process. CPR rules 11 and 12.3.

Neither the JAMS rules, the AAA commercial rules nor the CPR rules contain specific provisions related to the disclosure of electronically stored information (ESI). This is not to say that ESI is unavailable in arbitration-only that it is not treated differently than any other disclosure. In that regard, JAMS Rule 17(e) expressly permits the arbitrator to decide a discovery dispute and, if necessary, to "appoint a special master to assist in resolving a discovery dispute." This provision, which effectively shields the decision-maker from privileged documents, also provides a tool for managing complex discovery issues, such as those raised by ESI discovery. AAA Rule R-21(c) authorizes the arbitrator "to resolve any disputes concerning the exchange of information." There is no provision, however, for appointment of a special master.

Both the JAMS and the AAA rules give the arbitrator the authority to subpoena documents on his or her own initiative. See AAA Rule R-31(d) and JAMS Rule 21. CPR Rule 12.3 allows the tribunal to "require the parties to produce evidence in addition to that initially offered."

### **Sanctions**

Here, of course, is where the rubber hits the road. Arbitrators are not judges and have no power of contempt. While the AAA rules do not provide expressly for sanctions, they permit an arbitrator to allocate specified costs in his or her award. AAA Rule R-43(c) permits the arbitrator to "assess [certain] fees, expenses and compensation" in that regard. JAMS Rule 24(f) permits an arbitrator to assess "Arbitrator fees, Arbitrator compensation and expenses [in the award] if provided by agreement of the Parties [or] allowed by applicable law." Both sets of rules limit the ability to award counsel fees. See, e.g., AAA Rule R-43(d)(ii).

Both JAMS and CPR explicitly provide for sanctions, including the default of a party for discovery or other abuses. JAMS Rule 29, entitled "Sanctions," provides that "The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include . . . in extreme cases ruling on an issue adversely to the Party who has failed to comply." CPR Rule 15, entitled "Failure To Comply With Rules," states in relevant part: "Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules . . . the Tribunal may impose a remedy it deems just, including an award on default." While the AAA rules have no explicit provision dealing with sanctions, at least one court in Massachusetts (two justices dissenting) recently found such authority in the AAA rules when coupled with a broad arbitration clause. *Superadio L.P. v. Winstar Radio Productions LLC*, 446 Mass. 330, 844 N.E.2d 246 (2006), holding that a broad arbitration clause combined with AAA Rule 45(a) (providing that the

arbitrator can "grant any relief or remedy that the arbitrator deems just and equitable"), and Rule 23(c) (which authorizes the arbitrator "to resolve any disputes concerning the exchange of documents"), permits an AAA arbitrator to impose monetary sanctions.

Thus, at least theoretically, where e-discovery is concerned, a party under the JAMS or the CPR rules can be defaulted for a discovery abuse involving spoliation or the failure to disclose e-mails or other ESI. At least in Massachusetts, all three providers have the power to impose monetary sanctions for discovery abuses. To date, there does not appear to have been a case of an arbitrator defaulting a party for e-discovery abuses.

The real issue is whether an arbitrator will use his or her power to assess costs or to default a party when confronted with spoliation or a refusal to produce. Although training programs for arbitrators now emphasize the need to manage proceedings efficiently, arbitrators traditionally were trained to tolerate behavior that most courts would not. Arbitrators were encouraged to hear all of the evidence—even rank hearsay for what it might be worth. (The AAA still encourages short-form awards, largely to streamline the process and make it less expensive, and to insulate an award from subsequent attack. By contrast, CPR and JAMS provide for a reasoned award unless the parties agree otherwise. CPR Rule 14.2; JAMS Rule 24(g).)

The real difference in arbitration is found in the people who act as arbitrators and the fear of vacatur if an arbitrator exercises his or her sanctioning authority. A number of arbitrators are not judges or litigators. They have all the insecurities that accompany that inexperience and are reluctant to order sanctions. It is a challenge to the provider organizations to teach neutrals about the technical aspects of e-discovery and to educate them to use their coercive powers under the rules to assure that all parties receive a full and fair hearing. All three providers offer ongoing training for their neutrals. CPR has, at this moment, a committee discussing discovery guidelines. It also has a committee charged with addressing the challenges of e-discovery in CPR arbitrations.

One thing is certain, however. ESI is here to stay, and arbitrators now regularly deal with e-discovery and with some parties' reluctance or refusal to spend the time or money to comply with legitimate document requests. It is only a matter of time before sanctions become more common and case law gives arbitrators more guidance on how to react to abusive discovery practices.

#### **Mediation**

Both the burdens of e-discovery and uncertainties as to how arbitrators will handle these issues provide incentives for parties to consider mediation as an alternative. In mediation, parties sometimes can avoid e-discovery altogether, or at least greatly limit the kind of production required. While the specter of e-discovery often can promote settlement in mediation, one also sees creative solutions to the burdens of e-discovery worked out consensually between non-settling parties in a mediation context.

The potential cost of complying with discovery orders regarding electronic material sometimes approaches or exceeds the amount of potential damages at issue. This is particularly true in class actions, but may also be so in business, commercial and some kinds of employment cases in which documentary proof can be massive or expert investigation of backup tapes may be called for.

In some cases, parties may be able to reach resolution with the help of a mediator and avoid such production altogether. In a recent hotly contested sex discrimination and harassment case, for example, while the parties disagreed strongly about the facts of the case and the merits of the issues, they were able to reach agreement after 1 1/2 days of mediation. One of the prime motivating factors was the cost of the ESI discovery that otherwise would have been required. The settlement saved the cost, delay and aggravation of producing years of e-mails among brokers in an office, as well as reams of documents related to account distributions and other financial information.

It might appear at first blush that the specter of e-discovery in litigation or arbitration provides a club for plaintiffs—not only to induce the use of mediation, but also to secure favorable settlements. Not only can the costs of e-discovery be prohibitive for defendants, especially for smaller companies and institutions, but some companies may employ different document-retention policies in different business locations. Spoliation may be an issue, given the difficulties of complying with preservation

demands and ensuring that all employees understand the need for them, leading defendants to settle on terms more favorable to plaintiffs than they might otherwise have considered.

Plaintiffs, however, are not free of the perils posed by e-discovery in mediation's alternative forum. Plaintiffs may face discovery-related cost-shifting if the case goes to trial or arbitration. This may shift the settlement dynamic in a dispute, such as an employment case in which the plaintiff has lost her job and has minimal resources, even though she is paying her attorney on a contingency basis.

The potential burdens of e-discovery also can be managed creatively in the context of mediation. In one large class action, for example, the cost of production would have been many times any potential settlement. The parties agreed to mediate the case and do informal, confidential discovery through data sampling. They engaged the services of a neutral to help them resolve issues related to the sampling. The neutral was asked to help the parties negotiate their respective sampling recommendations and, if they could not come to agreement, to arbitrate the issue so that limited discovery could proceed. The parties agreed that if the entire case could not be resolved in a mediation context, no conclusions reached by way of the sampling process could be used in a subsequent litigation in the absence of a judicial order.

Given that electronic communication is now the dominant form of business communication, counsel are advised to understand the ways electronic discovery may be handled not just in litigation, but also in alternative dispute resolution. Arbitrators will become increasingly comfortable in using their coercive powers in this context. Mediators will become more adept in helping the parties resolve these issues consensually.

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