

Demystifying eDiscovery for Arbitrators

June 20, 2016
Presented By
Sherman Kahn

MKW
MAURIEL KAPOUYTIAN WOODS LLP

eDiscovery Need Not be Terrifying

- Adding a small “e” before the word discovery has acquired the power to strike fear into the heart of even the most intrepid litigators.
- A bit of perspective on the problem and some technical knowledge can do much to dispel that fear and enable arbitrators to help the parties keep costs down while getting the information they really need

Perspective on the Problem

- eDiscovery is just discovery of documents created and stored in electronic form – its really not that different than old-fashioned paper-based discovery
- What is different is that parties are retaining much more material now which may have to be reviewed and produced
- Production and review of all this stuff can be far more expensive than the economics of the arbitration justify
- The problem is how to reduce the volume of material to a cost-effective level
- We will provide advice regarding how to manage the process to minimize costs and avert disputes

Basic Terminology

- **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

Basic Terminology

- **Metadata** – metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most metadata 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

Basic Terminology

- **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

Basic Terminology

- **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.

Basic Terminology

- **Predictive Coding** – Predictive coding refers to technology using which a computer sifts through documents to find relevant materials without human intervention
 - Useful and potentially more cost effective when there are very large volumes of documents
 - Typically based on a review of a sample set of documents by an experienced lawyer
 - Can be more accurate than human review

Form of Production

- One important consideration is whether the parties will produce documents in native or imaged format
- Advantages of Production in Native Format
 - Production can be faster, simpler and less expensive
- Disadvantages of Production in Native Format
 - Produced documents are difficult to manage for both the producing and receiving party and the receiving party may not have necessary software
 - Documents will change every time they are used and there is no easy way to control against improper modifications
 - Produced documents will contain all metadata and that metadata is likely to be altered by 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

Form of Production

- Advantages of production in imaged form
 - 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
 - Imaged documents can be produced with only necessary metadata attached
- Disadvantages of production in imaged form
 - Imaging may require a third party document vendor and can be very expensive
 - Imaging can deprive certain documents (especially spreadsheets) of necessary or useful data

Managing eDiscovery

- Before the initial scheduling conference ask the parties to jointly prepare a discovery plan consistent with the parties arbitration agreement while keeping the following considerations in mind:
 - Arbitration is not litigation and scorched earth discovery will 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 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

Managing eDiscovery

- If the parties are cooperative, consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules
- Ask the parties to agree on reasonable measures for document preservation
- Determine whether spoliation risk is a problem and, if it is not, seek agreement from the parties to eliminate steps that are designed only to address that risk
- Active management is a service to the parties and prevents mischief