Applying Electronic Discovery in an Arbitrational Setting | Litigation News | ABA Section of LitigationAmerican Bar Association

Alternative Dispute Resolution»

By Michael Swarz

For most attorneys, embarking into the world of electronic discovery (e-discovery) and confronting the costs associated with it represent the single biggest challenge—and headache—in conducting litigation or alternative dispute resolution. The recent proliferation of federal and state laws dealing with electronically stored information (ESI) has exacerbated these hurdles. Against this backdrop of growing legislation and case law, counsel engaged in arbitration are tasked with making sense of how ESI will be approached and harnessed to its most effective use and presentation in an alternative dispute resolution setting without imposing all the courtroom expectations and sensibilities inherent in the traditional litigation setting.

Common Hurdles
For the past decade, ESI has surfaced as the foremost and most popular medium for data communication and storage. Although ESI is perhaps most recognizably represented by electronic mail messages, it may be found in a myriad of other formats and comprises enormous amounts of digital data. Some experts estimate that as many as 161 billion gigabytes of digital data were created solely in the year 2007.[1] A paper document containing an equivalent amount of information would stretch over 92 million miles!

To make matters even more complex, the sheer size of ESI is not the sole issue that must be confronted. After all, digital data can just as easily be duplicated and moved across an array of network systems with a few simple commands. As a result, it has become increasingly complicated to pinpoint the sources and locations of particular pieces of ESI. Indeed, the ESI sleuth will need to navigate through complicated servers, email systems, detachable media, voicemail, and even iPhones, to name a few. Each of these resources may contain information that is pertinent to legal discovery.

In contemplating and integrating ESI into an admissible form with a proper evidentiary foundation, counsel begin to confront an additional series of hurdles—namely, increased expenses and added risk. The combination of these two, and the fear of the unknown that they engender for the uninitiated, has led numerous cases to mistakenly settle prematurely. The arbitration attorney must therefore ensure that expense and risk are eliminated or minimized in tackling these evidentiary legal issues outside the courtroom setting.

Whither Arbitration?
At its inception, arbitration was articulated as a relatively relaxed alternative to complex litigation. The concept was thus born of the idea of giving both sides a straightforward, swift, and cost-effective arena to sort out their differences. Although the myriad rules of evidence generally did not apply, the arbitrator was granted authority to demand production of data, both electronic and not. Parties, however, did not believe that the arbitrator's mandate was robust enough to accomplish complete discovery. This understanding has transformed arbitration into an expensive and lengthy expedition in which each side is left with the often unsatisfactory results of, at best, a partial discovery process.

Nonetheless, arbitration may be favored by parties because, if nothing else, it is still viewed as being less costly than traditional litigation. This perception is based on the greater latitude granted by state and federal courts for expansive and expensive discovery requests in response to motions to compel discovery. In litigation, this outcome is particularly discouraging when strict deadlines

must be confronted and enormous amounts of ESI must be accounted for as part of the discovery process. Thus, arbitration, as flawed as it may be, is preferable from a cost-savings perspective because it allows for additional limitations as to the scope of ESI that will be admitted into evidence.

There are other benefits as well. Arbitration offers a secure, proven forum for airing and managing controversial pre-hearing dilemmas. In addition, the traditional rules of evidence do not fully govern in an arbitrational setting, and the perceived procedural shackles of litigation are therefore less restrictive in arbitration. These advantages dovetail quite well when supervising large-scale and specific ESI requisites in an arbitrational setting.

When Worlds Collide

Many have been baffled as to how e-discovery should be conducted in practical terms once ESI becomes pertinent to an arbitration. This is perhaps due to the enormous amount of possibly discoverable ESI and the expenses associated with producing it to the other side. In these and other arbitrational settings, the arbitrator should take the lead by setting up a case management conference to be attended by both parties. The conference should be of substance in terms of time and content and be attended, preferably, by the parties in person. In addition, it is recommended that the parties' information technology representatives be present as well to review, explain, and query the ESI in question.

During the case management conference, the arbitrator should mandate a litigation hold on all pieces of relevant ESI. If the parties have previously agreed to a litigation hold, the terms of the litigation hold should be scrutinized at the case management conference for all permutations of ESI along with any pertinent retention or deletion timetables to ensure that no ESI is manipulated. In addition to a methodical march through the many ESI options that may exist, including third-party and legacy systems, it is recommended that the parties review at this time the production formats and search terms to be employed thereafter.

In intricate cases, arbitrators have become accustomed to ordering sampling as a form of search term verification. Sampling can be imposed by an arbitrator when the parties may be dealing with an enormous number of ESI search terms. In doing so, the arbitrator crafts less invasive and more limited ESI searches to evaluate the helpfulness of repeating the partial sample searches more extensively. While this method may not yield consistent results, it is a practical substitute to sanctioning an indiscriminate search, which would be likely to increase the time and costs associated with interrogating the ESI.

Conclusion

E-discovery and arbitration need not be incompatible. Indeed, the fact that arbitration is the forum for resolving the parties' dispute can play a vital role in determining a party's ESI interests in a manner that is both swift and equitable. Consequently, arbitrators must be familiar with the workings of ESI to better manage the e-discovery likely to appear in their next case, so that the perceived advantages of arbitration are not lost in the process of handling ESI in the arbitrational setting.

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End Notes

1. Brian Bergstein, *So Much Data, Relatively Little Space*, ASSOCIATED PRESS, www.msnbc.msn.com/id/17472946/