



Managing Electronically Stored Information (ESI) in Arbitration

Paul E. Risner, Paul E. Risner PA, Jacksonville, FL
perisner@gmail.com

AMERICAN HEALTH LAW ASSOCIATION

1

What is Electronically Stored Information (ESI)?

Executable Files	E-mail Messages	Driver Files
Document Files	E-mail Archived Files	Free Space text
Spreadsheet Files	E-mail Attachments	Files with Bad Extensions
Database Files	Photos, drawings	Text Files
Graphics Files	Operating System Files	Internet History Files
Partial Files	System Files	Internet Favorites Files
Deleted Files	Application Files	Instant Messages (IM)
Damages Files	OLE Sub items	Voice Mail
Recycle Bin Files	Unallocated Space	KFF Alert Files
File Slack	Voice Operated Internet Protocol (VOIP)	

There are approximately 180,000 files on an average 40GB hard drive

2

1

Distinctive Features of ESI

Information is dispersed and stored in a number of media and locations:

- Desktop computers
- Network servers
- Backup and archival media
- Laptop computers
- Handheld devices
- Removable media
- Relational databases
- Personal devices

Distinctive Features of ESI

Information may have no paper equivalent:

- Metadata
- Embedded data
- Deleted data

Information is dynamic and may be altered or destroyed without the operator's knowledge or conscious effort:

- Turning on a computer can alter data
- Routine overwriting can destroy data
- Routine computer processes can delete, alter, or destroy data

Terminology

Metadata – data that provides information about other data, that is, they tell the history of a document, including changes to it and accesses (connections or inquiries) to or about it.

Counsel may find that the number of times a document has been changed or accessed is as informative as the text of the document.

eDiscovery requests frequently will seek production of both the document and the related metadata.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Gattis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Metadata

Title	Category
Subject	Keywords
Author	Templates
Comments	Revision
Last author	Last print date
Application name	Last save time
Creation date	Number of pages
Total editing time	Number of words
Number of characters	
Security	

Metadata

Format	Number of paragraphs
Company bytes	Number of characters
Number of lines	
Number of slides notes	
Number of hidden multimedia slides	

Native Format

Native Format — the format in which the material was originally created and stored.

Potential Issue - the native format may not be readily readable and understood by others who have not used and been exposed to that type of format.

Example - an accounting report produced in a company's legacy software format might be unreadable on a computer that does not have access to that software. In that circumstance, the party requesting discovery will be at a disadvantage in not being readily able to sort and otherwise manipulate the data in order to analyze the stored information, which might contain, for example, the producing party's damage calculations.

Document Retention Policies

- Do the parties have documents retention policies and practices?
- Have the parties suspended all electronic document deletion and media recycling policies?

Legal Hold Process

Key Elements of a Sound Legal Hold Process:

- Issue timely, written legal hold directives
- Ensure custodians understand what's required and how to comply
- Follow up
- Provide for periodic updates and reminders
- Account for employee mobility and turnover
- Consider third-party custodians
- Thoroughly document actions and the bases for decisions
- Develop procedures, recordkeeping and training materials that leverage past preservation efforts
- Legal hold is a process, not simply a document

Legal Hold Process

Spoliation Occurs Even When You Do Your Best

In her *Pension Committee* opinion, Judge Scheindlin observed:

“Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party.”

Implementing a legal hold is not about scooping up all of the ESI and locking it in a vault. It is about taking reasonable steps to assure the data will be there when needed.

Understanding Parties' Computer Systems and Cost Control

- Do not agree to the scope of discovery until you have a detailed understanding of the producing parties' computer systems and available ESI.
- Does counsel anticipate the need to notice any depositions to obtain further information about the opposing party's computer systems or electronic records management procedures?
- In order to reduce e-discovery cost and time, focus on negotiating limitations as to the temporal scope of e-discovery.
- Can cost savings be realized using shared vendors, repositories, or neutral experts?

Search Techniques and Protocol

- Will there be agreement as to the search protocol?
- Will there be subject matter expert/litigator interactive input allowing for supplementary search terms to be permitted?
- Will self-selection of ESI by those involved in the case be prohibited or supervised?
- Will different combinations of search technologies and techniques be employed?
- Will there be testing of the search technology to determine if it is able to retrieve different data types?

Search Techniques and Protocol (cont'd)

- By what date will the parties negotiate search parameters (keyword, concept, etc.) and search strings?
- Who will search and collect the ESI from all those who have involvement with the case?
- Have the parties agreed to “certify” the search protocol and methodology used to obtain responsive ESI?

Protection of Privileged ESI

- Will the parties be entering into a non-waiver or protective agreement for inadvertently disclosed ESI to avoid costs of intensive privilege review?
- Will the agreement be converted to a protective order?
- Do parties understand the search/production protocol necessary to ensure the non-waiver of privileged ESI?
- Do regulatory prohibitions on disclosure, foreign privacy laws, or export restrictions apply?

Establishing ground rules for ESI production requests and the actual production of ESI

Status Conference

At the Preliminary Status Conference, encourage counsel to work with their clients' senior IT personnel and outside eDiscovery consultants (if any), and try to reach agreement on:

- Preliminary search terms (relevant words, names, phrases, and topics)
- Software tools and methodology for data sampling (the retrieval and review of a small selection of ESI)
- Test runs of the preliminary search terms on sub batches of ESI to assess whether, in light of the quality of the data received, the benefits of further production justify its costs and burdens.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition),
Author: James M. Gaitis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors,
(Dec. 2013)

Other Early-Stage Issues

It is important that the parties also agree at an early stage on issues concerning the format and manner of production of ESI:

- Whether the produced data should be searchable by the requesting party
- How to identify each document produced
- Whether the requesting party is able to view the metadata on the produced documents

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition),
Author: James M. Gaitis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors,
(Dec. 2013)

AHLA Rule 5.5

To promote speed and efficiency, the arbitrator, in his or her discretion, should permit discovery that is **relevant** to the claims and defenses at issue **and is necessary for the fair resolution of a claim.** ...

Approaches to Consider

- Limit the number and type of storage devices to be searched.
- The bulk of relevant ESI often resides on the hard drive most frequently used by the key witnesses.
- Multiple copies of the same electronic document also may be found in redundant storage locations, such as laptops; tablets, smartphones, personal digital assistants, thumb drives, and home computers.
- One management tool is to eliminate some storage devices from the search.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Galtis, Editor in Chief; Editors: Carl F. Ingwalson, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Approaches to Consider (cont'd)

- Limit discovery to electronic documents that are relevant and material to issues in the case and not merely likely to lead to relevant evidence.
- Limit discovery to particular custodians of data.
- Limit discovery to the electronic documents on which each side intends to rely at the hearing.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Gaitis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Approaches to Consider (cont'd)

- Limit the number of requests or search terms.
- Limit the date range of documents that must be searched.
- Limit the number of custodians whose storage devices must be searched.
- In appropriate cases, shift all or some of the cost of furnishing ESI to the requesting party.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Gaitis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Requests for Extensive Searches – Factors That May Be Relevant

- Whether the responding party can make a persuasive showing of undue burden and cost
- Whether a showing of undue burden can be overcome by a showing of good cause (consistent with Section 26(b)(2)(C) of the Federal Rules of Civil Procedure)

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Galtis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Continued . . .

- The specificity of the discovery request
- The general idea is that the requesting party should be required to narrow and tailor a specific set of discovery requests
- The amount of information available from more easily accessed sources (in other words, the parties should examine readily available information first)

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Galtis, Editor in Chief; Editors: Carl F. Ingwolson, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Continued . . .

- Whether the responding party has failed to produce relevant information that is likely to have existed but is no longer available on more easily accessed sources, or at all
- The likelihood of finding relevant, responsive information that cannot be obtained from more easily accessed sources. (The parties can conduct sampling to determine the costs and burdens of production and the likelihood of finding responsive, highly useful information.)

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Gaitis, Editor in Chief; Editors: Carl F. Ingwalsen, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

Continued . . .

- Predictions as to the importance and usefulness of further information considered in light of the amount in controversy; and
- Importance to the issues at stake in the litigation.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (3rd Edition), Author: James M. Gaitis, Editor in Chief; Editors: Carl F. Ingwalsen, Jr. & Vivien B. Shelanski, Editors, (Dec. 2013)

The courts continue to emphasize proportionality – and Rule 26 is the embodiment of this trend. Rule 26(b)(2)(1) now lists specific proportionality factors, including:

- The importance of the issues at stake
- The amount in controversy
- Access to relevant information by the parties
- Resources
- The importance of discovery in resolving the conflict
- Burden or expense versus benefit

All of these factors encourage opposing counsel to be reasonable, proportional, and willing to cooperate.

AHLA Rule 5.5

To promote speed and efficiency, the arbitrator, in his or her discretion, should permit discovery that is **relevant** to the claims and defenses at issue **and is necessary for the fair resolution of a claim.** ...

Sanctions

AHLA Rule 4.1 (a)(3): An arbitrator has the power to “*sanction parties for failing to comply with any orders of the arbitrator or any obligations under the Rules. If a party willfully fails to comply, an arbitrator may draw adverse inferences, exclude evidence and other submissions, and/or assess costs resulting from the refusal to comply.*”

Sanctions

Compare with: Federal Rule of Civil Procedure 37(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

