



Managing Health Care Documents in Arbitration

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1

Any discussion of Electronically Stored Information (ESI) must start with an understanding of the key terms that are commonly used in connection with this subject.

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)

2

1

What is Electronically Stored Information (ESI)?

Executable Files E-mail Messages Unallocated Space
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 Driver Files Voice Mail
Recycle Bin Files OLE Sub items KFF Alert Files
File Slack Voice Operated Internet Protocol (VOIP)

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

Terminology

Intimate Devices — these are the personal smartphones and similar devices that people tend to always keep with them. Some organizations now permit people to bring their own device to work, and some require that employees and consultants use only company devices for company business.

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Some 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

Some 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 – these are data that provide 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 often find that the number of times a document has been changed or accessed is as informative as the text of the document. As a result, eDiscovery requests frequently will seek production of both the document and the related metadata.

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Metadata

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

Metadata

Format	Manager
Company bytes	Number of
Number of lines	Number of paragraphs
Number of slides notes	Number of
Number of hidden multimedia	Number of
slides	clips
Hyperlink base spaces	Number of characters with

Terminology

Native Format — this is the format in which the material was originally created and stored. The native format may not be readily readable and understood by others who have not used and been exposed to that type of format. For 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.

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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

Know That 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?

Document Retention Policies

- Have the parties provided a general description, named the person responsible for, and exchanged copies of their clients' documents retention policies and practices?
- Have the parties suspended all electronic document deletion and media recycling policies?

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? With 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?
- 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

The arbitrator must guide discussions regarding the production of ESI and when necessary and appropriate, impose a framework for eDiscovery.

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First Pre-Hearing Conference

At the first prehearing conference, the arbitrator should encourage counsel, in conjunction with their clients' senior information technology personnel and outside eDiscovery consultants (if any), to agree if they have not already done so upon:

- 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.

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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

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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.

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Approaches to Consider

- 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.

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Approaches to Consider

- 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.

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The advisory committee notes to the 2006 amendments to Rule 34 of the Federal Rules of Civil Procedure suggest a number of factors that may be relevant in determining whether to grant requests for extensive and invasive searches

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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;

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- The specificity of the discovery request (the general idea being 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);

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- 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.);

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- 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.

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The Law

The second step in the education phase is to learn how ESI is addressed by the courts, arbitration providers, and eDiscovery experts. The United States federal courts are the leaders in applying the US law to eDiscovery, and those rules and decisions are often relied upon in arbitration. The Federal Rules are often cited and discussed in reported case law and thus generally available to the bar, whereas arbitral decisions are confidential unless brought before the courts for vacatur or other purposes not usually related to ESI.

Proportionality

Proportionality is a concept that is embodied in federal practice, but its boundaries in eDiscovery have been unclear. Proposed Rule 26(b)(1) would require the following:

- Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Sanctions

Arbitrators have been unclear whether they could order sanctions at all and, if so, the nature and extent of appropriate sanctions. Arbitration rules now provide for sanctions (See, e.g., AAA Rules R-23(d) and R-58) but still lack the helpful, more detailed guidance of Proposed Rule 37(e), which specifically addresses sanctions:

If electronically stored information that should have been preserved in the anticipation of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon a finding of prejudice to another party from the loss of the information, order measures no greater than necessary to cure the prejudice;

(2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation,

(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.

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
- Resources
- The importance of discovery in resolving the conflict
- Burden versus benefit

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

Questions?



33

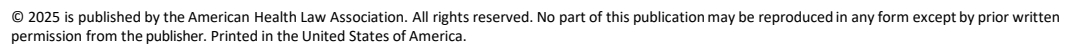


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34

17



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