

Proposed Protocol for Production of Electronically Stored Information (ESI) in Commercial Arbitration

By Michelle Leetham, Ogletree Deakins, Nash, Smoak & Stewart, PC. (San Francisco, CA) with much-appreciated input from James K. Lynch, Latham & Watkins, LLP (San Francisco, CA)

Introduction

- This protocol is for use in those cases in which disclosable documents are in electronic form.
- The costs and other burdens associated with production of ESI have become a major source of concern for parties in arbitration.
- Production of ESI should be handled in a manner that prevents unnecessary cost and delay, while ensuring that the parties receive a fair hearing.
- Placing reasonable limits on production of ESI is not inconsistent with the parties' right to a fair hearing.

General Principles

- Production of ESI should not create burdens for the parties that are disproportionate to the nature of the case and the amount in controversy.
- Each case is unique, and the determination of which steps are reasonable and proportionate to a particular matter is a fact specific inquiry that will vary from case to case.
- Counsel should address the proper procedures for production of ESI early in the case and revisit this topic periodically throughout the matter.
- The parties have a duty to cooperate with each other and not use production of ESI as a tactic to annoy, harass or burden the opposing side.

Meet & Confer Process

- Prior to the initial status conference with the Panel, counsel for the parties should meet and discuss the procedures to be used for the preservation, collection and production of ESI.
- In most cases, the meet and confer process will be aided by participation of e-discovery liaisons who are knowledgeable about the technical aspects of e-discovery, and are also knowledgeable about a party's e-discovery efforts and its electronic systems and capabilities. In the event of disputes regarding the preservation or production of ESI, each party shall designate an e-discovery liaison, who may be a third party consultant, an employee of the party, or an attorney (in-house or outside counsel) who has the requisite technical knowledge and experience to assist the parties in reaching agreement on how ESI will be handled in the case.
- Taking into consideration the principles outlined in this Protocol, the parties should jointly develop a proposal to the Panel that addresses the following subjects and any others that they jointly agree should be included or that are ordered by the Panel to be addressed:

- Identification of relevant and discoverable ESI;
- Scope of discoverable ESI to be preserved by the parties;
- Procedure for review and selection of ESI to be produced, including use of keyword searching and other culling techniques and technologies;
- Formats for preservation and production of ESI; and
- Procedures for handling inadvertent production of privileged information.

ESI Case Management Order

- At an early stage in the proceedings (usually shortly after the first status conference) the Panel should issue a comprehensive order that addresses the subjects outlined in this Protocol.
- In making determinations as to the proper procedures to be employed with respect to ESI, the Panel should be mindful of the cost and burden associated with preservation, collection and production of ESI, and should take steps to ensure that such cost and burden do not bear a disproportionate relationship to the nature of the dispute that is the subject matter of the arbitration.
- The party seeking disclosure of ESI has the burden to justify that the need for the information and that the cost and burden of producing it are not disproportionate to the nature of the dispute. To assist in this process, a party opposing production of ESI may be required to provide information regarding the cost and other burdens associated with production.

Preservation of ESI

- A party who contends that another party has a duty to preserve ESI should be required to specify at an early stage in the proceedings (normally within 2 weeks of filing the demand for arbitration or the response thereto) to identify any ESI the party contends must be preserved. The preservation notice should not be vague or overly broad, but rather should be specific and provide useful information that will support the parties' efforts to cooperate with respect to the production of ESI. Examples of the specific information that should be included in a preservation request are:
 - Names of custodians of ESI who can be reasonably anticipated to have relevant evidence.
 - Relevant time periods.
 - File extensions that should be preserved.
 - Specific search terms that are not overly broad, but rather are narrowly tailored to produce relevant evidence, the production of which is proportionate in terms of volume, cost and burden to the controversy that is the subject matter of the dispute.
- If the recipient of a preservation request disagrees with the requests, then the recipient should provide the requesting party with a response that provides useful information about the efforts being undertaken by the responding party. Examples of topics to be addressed in the response are:

- Identification of the information the responding party is willing to preserve and the steps being taken in response to the preservation request.
- Identification of the areas of disagreement with the request to preserve.
- Identification of any further preservation issues that were not raised.
- If in the meet and confer process, agreement cannot be reached on the preservation steps to be employed, then the party demanding preservation should bring the issue to the attention of the Panel and seek an order clarifying the matter. Any Party who either fails to make a preservation demand or fails to seek such an order will be deemed to have waived its objections based on failure to preserve and may not raise them at a later stage in the proceedings.

Avoidance of Duplicative Collection

- Due to the cost and burden associated with collection of ESI, the agreements of the parties and the orders of the Panel should be designed to avoid collection from any data source on more than one occasion. Hence, collection from individual custodians, company servers, electronic data storage facilities and the like will occur once and will not be collected from again during the matter, except in rare cases.

Categories of ESI Generally Not Discoverable

- The following categories of ESI generally are not discoverable:
 - Deleted, slack, fragmented or unallocated data on hard drives.
 - Random access memory (RAM) or other ephemeral data.
 - On-line access data such as temporary internet files, history, cache, cookies, etc.
 - Data in metadata fields that are frequently updated automatically, such as last-opened dates.
 - Backup data.
 - Other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.
- If a company's procedures include the routine destruction of back up data, it will generally not be appropriate to suspend such destruction, except in rare cases in which there is reason to believe that spoliation has or could occur. In the rare cases in which access to back up data is warranted, then it will generally suffice to retain backup data from a finite period of time, rather than to suspend a company's normal backup destruction procedures.
- If any party contends to request production of ESI that is generally not discoverable under these Protocols, then the intention to seek such data should be discussed at the initial meet and confer session or as soon thereafter as practicable.

Specific Designation of Custodians

- The custodians from whom ESI will be collected should be determined at an early stage of the proceedings. ESI will only be collected from custodians who it is reasonable to believe have electronic evidence that is material to the dispute, taking into account the burden and cost associated with preservation, collection, search, review and production of electronic evidence from the custodians. In this regard, the parties and Panel should be guided by the principles employed when determining whether an individual should be deposed. It is generally preferable to collect and produce from a limited group of individuals before determining whether more wide ranging discovery from a larger group of custodians is warranted.

Avoidance of Duplicative ESI and Use of Filtering Techniques

- Efforts should be undertaken to eliminate duplicative ESI. Topics for discussion in the meet and confer process and conference with the Panel should include whether elimination of such duplication will occur within each particular custodian's data set or whether it will occur across all custodians.
- In addition to filtering based on custodians as discussed in the prior Protocol, data should be filtered based on file type, date ranges, sender, receiver, search terms or other similar parameters.
- Use of keyword searching, mathematical or thesaurus-based topic or concept clustering or other advanced culling technologies should be employed where practical.

Production Format

- The parties should make a good faith effort to agree on the format(s) for production of ESI, whether native or in some other reasonably usable form. If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Panel.
- ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.
- Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information.