

# DAILY REPORT

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## IN PRACTICE

# Staying ahead of the curve

**DISCOVERY OF ELECTRONICALLY STORED INFORMATION** can be as efficient, cost effective as paper

AS AN ALTERNATIVE to traditional litigation, arbitration should resolve disputes faster and more affordably than jury trials. It also should generate results that are at least as fair, if not fairer, than trials, which are constrained by the traditional rules of evidence as well as the rigidity and complexity of jury instructions and jury verdict forms. By choosing arbitration, the parties to a transaction have the opportunity to shape the procedural framework that will govern the resolution of a dispute.

An increasingly important question is how discovery of electronically stored information (ESI) can be addressed in arbitration. Arbitrators need less information than juries to understand and resolve disputes. In contrast, lawyers are often imbued with a “leave no stone unturned” mind-set, and they sometimes resist the very procedural features that make arbitration attractive to their clients. The majority of arbitrations involve contracts explicitly designating arbitration as the mechanism for dispute resolution. In a smaller number, the parties choose arbitration over litigation after a dispute has arisen. Under either scenario, the parties can and should take pre-emptive steps to reduce the negative impact ESI discovery can have on the arbitration process.

First, lawyers for the parties should carefully examine the arbitration clause that will govern the arbitration. What are the procedural rules that will be applied? The scope of ESI discovery will vary and perhaps vary significantly depending on the arbitration clause whose wording may have been cut and pasted from contracts drafted many years ago. Is the clause silent on the procedural rules that will govern the arbitration as is often the case? If so, the procedural rules of the organization administering the arbitration will normally apply. They do not consistently address ESI discovery issues. Other drafting variations in Georgia would be arbitration clauses adopting the discovery rules of the Georgia Civil Practice Act or the Federal Rules of Civil Procedure (FRCP). This approach, too, has shortcomings.

Arbitration is a party-controlled process. The parties are free to resolve procedural ambiguities or inadequacies in the arbitration clause as they see fit. This will present a challenge to Georgia lawyers. As far as ESI discovery is concerned, the waters are largely uncharted. Thus far, legal guidance for ESI discovery has been based primarily on case law. However, in 2006, the development of discovery rules relating specifically to ESI gained



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significant momentum with the adoption of a series of amendments to the FRCP. To date, a majority of states have modified their rules to conform to the federal approach. Georgia, however, is not on this list. The Georgia Civil Practice Act treats electronic records the same as the discovery of paper documents, but it otherwise offers no guidance for ESI discovery. It

is not a viable source of procedural rules for Georgia arbitrations. Thus, the default drafting position in Georgia would be to adopt the Federal Rules of Civil Procedure or use the FRCP to supplement the procedural rules of the organization administering the arbitration. The FRCP represents the most comprehensive rules for ESI discovery now available.

Second, if you represent clients regularly involved in arbitration, periodic review of their arbitration clauses is advisable. The technology and law relating to ESI discovery change rapidly. An arbitration clause drafted in 2000 will have very different ramifications in 2011. Your client may want to negotiate modifications of the arbitration clauses in existing contracts. If that is not a practical alternative, your client needs to understand the risks of flying blind before the threat of arbitration is on the horizon. ESI discovery can be expensive and time consuming. If the arbitration clause contains a fee and cost shifting provision, your client might end up funding ESI discovery for both sides if it is not the prevailing party. Both sides to an arbitration have an incentive to embrace ESI discovery procedures that will reduce this risk.

Third, because every arbitration involves some ESI discovery, planning is important. Lawyers who represent clients regularly involved in arbitration should stress the importance of maintaining an accurate inventory of all equipment or devices on which ESI might be stored. This would include cell phones, computers, hard drives, servers, backup tapes and other data storage equipment. Who used or had access to each? When? If equipment has been replaced, what happened to the obsolete or damaged equipment? If ESI is transferred to backup tapes, what access to this ESI does your client need and how does your client go about getting it? While this might seem to be an onerous process, it will prove helpful when the scope of ESI discovery arises in an actual arbitration. An arbitrator will want to know the time frame of the dispute and the identity of all persons who might have generated or

had access to relevant ESI. The arbitrator will expect the lawyers to cooperate in the timely exchange of this information. In most instances, this information will provide a more precise starting point for ESI discovery and ultimately may serve to limit its overall scope.

Fourth, the client needs to understand the nature of the ESI it possesses. If your client has a document retention policy, when was it instituted? What is the business purpose behind the policy? Under what circumstances is ESI permanently purged from your client's data system? If your client retains ESI on backup tapes, in what format and for how long does it keep the ESI before permanent purging? Finally, does your client have any program for scrubbing metadata embedded in its electronically generated documents? As some have learned to their chagrin, metadata shows the history, tracking or management of your client's document such as changes made in text, when, by whom and the sequence of the changes.

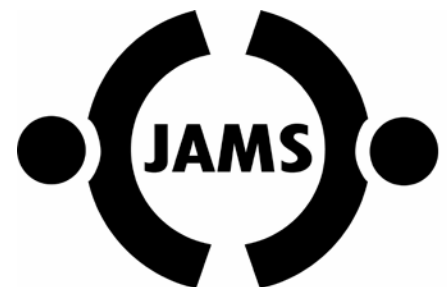
Even though metadata is not routinely subject to production, a lawyer advising a client in arbitration needs to know what is there. If the client's ESI is not regularly scrubbed, it cannot be scrubbed once litigation is reasonably anticipated and the duty to preserve ESI has attached. *Craig v. Bailey Brothers Realty Inc.*, 304 Ga.App. 794, 796-798, 697 S.E.2d 888, 891-892 (2010). If the client's ESI does include metadata, some of it may be subject to a claim of confidentiality or legal privilege. While Georgia case law provides strong protection against the loss of privilege by inadvertent disclosure, *Mincey v. Georgia Dept. of Community Affairs*, \_\_\_ Ga.App. \_\_\_, 2011 WL 1049292, \*4 (March 24, 2011), the client would surely prefer not to have to "unring the bell."

Fifth, the client should have a set procedure when litigation is reasonably anticipated or upon the receipt of a litigation hold letter. At that point, your client must preserve all potentially relevant evidence, including ESI, or face the prospect of sanctions. If your client has maintained an inventory of its ESI as previ-

ously discussed, that should ease the process of finding the documents and ESI that may be subject to discovery. In either instance, counsel for both sides will be expected to confer very early in the arbitration process concerning the existence and accessibility of ESI.

Once the respective ESI universes are understood, the arbitrator will be in a position to structure discovery so each side gets the information it needs. Individuals most likely to have generated or reviewed relevant ESI can be identified and ESI production can be placed on a coordinated schedule. The devices housing ESI can be located. The parties with the assistance of the arbitrator can formulate search terms and strategies. A judgment can be made about the technical accessibility of the ESI and production costs can be approximated. After review of the initial ESI production, previously unknown documents or document recipients may be identified. Targeted follow up is sometimes necessary to fill in information gaps. Properly administered, ESI discovery is an iterative process with the principal objective to narrow its scope. In that respect, ESI discovery has the potential to be as efficient and as cost effective as paper discovery—sometimes more so.

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