Optimizing E-Discovery with Arbitration

By Daniel B. Garrie, Esq.

In the past two years, 90% of the world's data has been created, coming from a wide variety of sources. From automobile black boxes, cloud storage, and even wearable fitness trackers, data is being collected and processed in ways barely visible to the end user. With the rise of the Internet of Things, technology has and will continue to become more and more integrated, creating even more data. Understandably, the rise of big data has pushed traditional legal discovery practice to its limits. With such an abundance of data to preserve, organize, search, collect, and produce, discovery in litigation has become an extremely costly endeavor. However, there are ways to mitigate the challenges of e-discovery. Arbitration, for instance, when conducted with an eye towards streamlining e-discovery, can save the parties substantial time and money. This article provides recommendations on how to optimize e-discovery practices and procedures in the arbitration context.

The primary objective of arbitration is to resolve legal disputes quickly, efficiently, and privately. Arbitration is particularly useful where parties would otherwise incur substantial discovery costs, such as in cases requiring the production and examination of substantial amounts of electronic information. If properly constituted, an arbitration panel can greatly reduce the inefficiencies associated with the litigation of cases involving e-discovery.

One of the key aspects of arbitration is its flexibility. Arbitration panels are often relieved of judicial formalities and expressly authorized not to follow the strict rules of law or the strict rules of evidence that bind courts. Panels are usually given this leeway, either as part of the underlying arbitration agreement between the parties or as part of the rules of the arbitration institution itself, for two reasons. First, historically, arbitration has been used not solely as a means of enforcing strict legal obligations, but as an honorable engagement intended to effectuate the general purpose of the parties' agreement in a reasonable manner. Second, the members of the panel are occasionally not legal professionals. Rather, they may be lay people with knowledge or expertise in the relevant field that forms the backdrop to the dispute. For example, insurance contract arbitration provisions may require that all arbitrators be executive officers or former executive officers of insurance companies, or insurance brokers, not under the control of either party.

While the panel is usually relieved from following the formal judicial rules of evidence, the panel still must provide the parties with an appropriate

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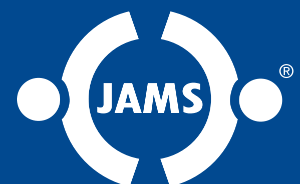
Visit www.jamsadr.com/garrie or contact Anne Lieu, Case Manager, at 213.253.9706 or alieu@jamsadr.com.



set of evidentiary and procedural rules that will govern the arbitration proceeding. In arbitrations involving the discovery of electronic information, determining the rules related to digital evidence can be overwhelming to an arbitration panel due to the complexity of information systems and the pervasiveness of digital evidence. However, if used properly, arbitration can be a significantly more efficient tool for streamlining e-discovery than litigation.

An arbitration panel must be able to adequately define the scope of the electronic disclosure and apply an appropriate procedural framework for the controversy considering the parties' needs and available resources. The problem is, of course, that while the panel is likely to contain experts in the relevant business field—*e.g.,* insurance, manufacturing, or finance—the arbitration panel may not include anyone with any detailed knowledge of the information systems where documentary evidence key to resolving the dispute may be located. In the absence of such information system expertise, the arbitration panel members will be challenged simply to accurately and reasonably define the scope of discovery, let alone properly apply the principle of proportionality to electronic disclosure or set rules related to meta-data. An arbitration panel lacking an electronic discovery expert is destined for lengthier hearings, pointless discovery disputes, and the waste of scarce financial resources.

A panel containing, or consulting with, an electronic discovery expert possessing both legal and technological expertise will be able to save the parties time and money by cutting to the heart of technical e-discovery issues. Accordingly, parties who agree to arbitrate their dispute should consider making arrangements for the inclusion of an e-discovery expert as part of the panel, or for consultation by the panel. Even if the underlying dispute is not particularly technologically complex, the e-discovery issues that may arise in connection with the dispute may require technical expertise to be resolved efficiently.

Consider the following example. During discovery in a breach of contract arbitration, the responding party produces what it has deemed to be all the responsive files from the repositories in its possession. The production is smaller than the requesting party anticipated and some emails that the requesting party knows existed are not in the production. The requesting party demands to inspect all repositories of potentially relevant electronically stored information (ESI) the responding party has, thinking that the responding party may have deleted ESI. The responding party argues that no relevant information was deleted, all of the responsive files were produced and that an inspection would expose privileged and confidential information. What may have started as a simple breach of contract case has now turned into a full-blown e-discovery battle, and the business experts on the arbitration panel do not have the technical expertise to manage the situation.

These kinds of scenarios occur frequently, as some lawyers go out of their way to bog down cases in discovery. Parties should consider selecting an arbitrator who is familiar with global legal e-discovery issues, is well-versed in technology systems, and understands the interplay of privacy concerns with electronic disclosure for any case in which e-discovery can potentially blow up.

While some law firms have specialized e-discovery counsel with experience in these matters, many firms lack the technical know-how needed to determine the optimal procedures for preserving, collecting, and producing electronically stored information. This knowledge deficit can substantially increase the cost and time to resolve discovery issues. Using a technically skilled arbitrator with knowledge of the relevant systems can overcome these gaps in experience and ability and make discovery more cost-effective for all parties. Arbitrators with technical expertise are a more efficient alternative to expert consultants hired by the parties for technical issues, as the neutrality and focus of arbitrators

allow them to handle technical disputes in way that guides the parties toward the resolution of the matter as a whole, rather than serving the interests of either side. In contrast to the substantive claims, the technical elements of e-discovery are not grounded in law, advocacy and persuasion, but rather in the ones and zeros of the relevant computer systems. By using the arbitrator to analyze this technical information, the parties avoid having to engage in lengthy and costly rounds of briefings and submission of expert opinions.

An e-discovery arbitrator's technical expertise can be used in a variety of ways that can save the parties time and money, including properly balancing the cost of discovery against its prospective benefits; assisting the parties in drafting an e-discovery protocol; assisting the parties in selecting search terms; guiding the parties through use of technology assisted review; and determining whether spoliation has taken place. Perhaps most importantly, an arbitration panel containing an electronic discovery expert will be able to work with the parties early in the proceedings to fashion a discovery plan tailored to the parties' information systems:

1. Defines the scope of discovery;
2. Defines the permissible set of accessible electronic data;
3. Defines the sources to be searched in the production;
4. Defines the manner in which parties will preserve electronically stored information;
5. Defines the format of data production;
6. Defines the procedures and protocols for electronic disclosure (*e.g.*, the role of meta-data);
7. Addresses privilege issues (*e.g.*, the scope of any claw-back provision governing inadvertently produced privileged documents); and
8. Defines party obligations and expectations.

It is imperative that an arbitration panel address such issues in detail early in an arbitration proceeding, preferably at the very first organizational meeting between the panel and the parties. Only by clearly defining the obligations of the parties at the outset can costs be kept in check and the arbitration process permitted to proceed quickly and smoothly. If these issues are ignored at this stage of arbitration, these issues will undoubtedly have to be revisited by the tribunal later in the dispute, after the parties already have begun incurring substantial costs due to unexpected e-discovery issues.

Ideally this initial meeting should result in a written document that governs both parties' e-discovery obligations. This can take the form of an e-discovery protocol, search terms, scope of discovery or whatever document is appropriate under the circumstances. The key is that it is written and tailored to the facts of the case and technical systems of the parties. The result should be memorialized for at least two key reasons: (1) it allows the parties to have a written record of their agreed-to obligations; and (2) it provides the parties with a roadmap that helps ensure they continue to comply with their agreed-to obligations. Furthermore, forcing the parties to condense into writing the parameters of the discovery process can help focus the parties and counsel on the precise information and systems they seek to discover and avoid overbroad requests. Setting a tone of reasoned discourse and not tolerating gamesmanship in discovery early on can go a long way towards an effective arbitration.

One of the keys, and at times one of the greatest challenges, of a successful e-discovery arbitration, is cooperation between the parties. While arbitration proceedings are generally adversarial in nature, it is critical attorneys understand that cooperation in discovery is consistent with zealous advocacy. Even if the parties have an experienced technologist as their e-discovery arbitrator, the parties are unlikely to realize the benefits without cooperation between the parties and their

counsel. To build a spirit of cooperation, it is important that the parties have confidence that the e-discovery arbitrator is both technically proficient and neutral, and that the arbitrator's presence promotes effective communication and voluntary decision-making between the parties. With a skilled arbitrator both sides trust, the parties will be more likely to voluntarily limit discovery to the elements most likely to maximize benefits and minimize costs, once the arbitrator clarifies and communicates the scope and practicability of the e-discovery elements of the case.

The most effective and useful e-discovery arbitration requires the parties to gather the information necessary for an arbitrator to successfully work with the parties to reach useful resolutions. Examples of this information include: data maps; business use cases for data that is collected; and explanations for why each item of discovery is requested. Additionally, it can be useful to have the parties' IT resources available throughout the course of the arbitration process in the event technical questions arise. One of the advantages of arbitrating is that the flexibility of the discovery rules and a shorter time frame make it easier to coordinate the necessary resources to resolve technical issues.

Sometimes, however, parties will abuse or misuse the discovery process. E-discovery arbitrators, the parties, and counsel should be mindful of the full panoply of penalties available to enforce good faith compliance with e-discovery procedures. The actions arbitrators take should accord with a party's actions, and whether they amount to negligence, gross negligence, or withholding/bad faith. In alignment with the gamut of actions, there are a range of penalties available to an arbitration panel, including (in increasing order of severity):

1. Granting a party's request for further discovery or motion to compel production;
2. Granting a party's request for shifting the cost of discovery or the cost of making the motion to compel;
3. Imposing fines in an amount appropriate to the violating party's behavior and the impact of the behavior upon the arbitration and its search for the true facts;
4. Granting a party's motion to preclude the testimony of a witness or barring testimony regarding a particular issue;
5. Drawing an adverse evidentiary inference, or
6. Dismissal of the claims or defenses. (see *JAMS Comprehensive Arbitration Rules and Procedures*, Rule 29; *AAA Commercial Arbitration Rules and Mediation Procedures*, Rule R-58).

While e-discovery arbitration can take many different forms depending on the scale and complexity of the dispute, there are several key takeaways necessary for a successful arbitration, including: (1) retaining an experienced and technically knowledgeable neutral expert and/or arbitrator; (2) identifying the e-discovery interests at stake and encouraging a meaningful dialogue that recognizes and validates those interests;

(3) working with the arbitrator to draft a written e-discovery protocol or plan; (4) cooperating with opposing parties and counsel throughout the e-discovery process; and (5) avoiding gamesmanship, abuse or misuse of the discovery process. Arbitrations that accomplish these goals are likely to save the parties substantial time and money.

Daniel B. Garrie, Esq. is an arbitrator, forensic neutral and technical special master at JAMS. He is executive managing partner of Law & Forensics LLC, and head of its computer forensics and cybersecurity practice groups. He can be reached at dgarrie@jamsadr.com.