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ADVANCED ARBITRATION ACADEMY

E-Discovery Segment

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USC Gould School of Law

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Dealing with E-Discovery Issues in Arbitration – Selected Topics:

1. What is E-Discovery?
2. 9 reasons why arbitrators should care about E-Discovery
3. Frames of reverence for understanding the E-Discovery process
4. Limitations on the discovery of ESI
5. The duty to preserve and the "litigation hold" notice
6. Sanctionable conduct and "safe harbors"
7. Overriding concepts re E-Discovery in arbitration
8. What can arbitrators do to manage E-Discovery?

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What is E-Discovery?

Generically Speaking

E-Discovery is short for "electronic discovery," and refers to the process of collecting, processing, producing and presenting evidence that exists in electronic / digitized formats – i.e., electronically stored information or ESI.

How ESI is collected, processed and handled at the front end of the dispute may create issues and become the subject of requests to exclude evidence, award sanctions and/or draw negative inferences at the back end of the process.

ESI includes "raw data" or "metadata," which is data about data that forensic investigators can review for hidden information to confirm that it is what it purports to be.

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ESI is something that has become part of our ordinary personal / professional / business lives. A few examples:

- Emails
- Accounting databases such as QuickBooks
- Interface programs that dump bank and credit card transaction data into accounting databases
- Databases such as Outlook, Excel, TimeMap
- Computer-generated "documents" created using programs such as Word, WordPerfect, PDF, Adobe and Microsoft Publisher
- Snap Chat, text messages and other instant messaging formats
- Cell phone digital photos and videos
- Websites and other internet based profiles
- CAD/CAM files and project management and design software

ESI is usually voluminous, difficult to locate, fragile, and something users / custodians routinely access, modify and delete.

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The rules, processes, practices and procedures that have developed concerning ESI in the litigation context are focused on *commerce*.

How do you capture and preserve what is on a computer or server that may be relevant to proving or disproving a disputed fact in a litigation matter, *and* - at the same time - allow the computer or server to stay online and be used for its daily business purpose?

Because ESI tends to be voluminous and is highly manipulatable, this is a challenge for parties, their attorneys and the courts!

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Legally Speaking

FRCP Rule 34 allows discovery / compelled production of "electronically stored information." However, it does not provide a specific definition for ESI beyond stating that it includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium…"

CCP § 2031.010(e) allows discovery of ESI in the form of a demand to "inspect, copy, test, or sample" such information.

CCP §2016.020 provides a definition of ESI, which is defined as "information that is stored in an electronic medium." "Electronic" is then defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." *Note:* By including the catch-all phrase "similar capabilities," presumably the legislature intended this definition to be open-ended enough to encompass newly developed technologies for storing information.

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8 reasons why arbitrators should care about E-Discovery

Reason #1

We now communicate by email – not post – so today's discovery about "communications" generally involves the retrieval and production of emails.

According to The Radicati Group's "*Email Statistics Report, 2013-2017*":

- Email remains the go-to form of communication in the business world with over 929 million business email accounts. This figure is expected to reach over 1.1 billion by the end of 2017.
- The majority of email traffic comes from business email which, in 2013, accounted for over 100 billion emails being sent and received per day.
- It is estimated that business email will account for over 132 billion emails sent and received per day by the end of 2017.

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Reason #2

Most of our personal and business transactions are conducted electronically, so disputes involving such matters will naturally involve ESI:

- purchases with credit and debit cards
- timekeeping
- payroll
- automatic deposit and bill pay
- financial record keeping (e.g., QuickBooks)
- tax reporting
- medical records and scheduling
- insurance records
- design services
- project management
- etc.*

**Can you think of anything that has not gone "paperless"?*

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Reason #4

What is quickly becoming a "paperless" society has rendered our "manual" / "paper" methods of search and review unsustainable.

ESI has also changed how we establish chain of custody, foundation and authenticity because so much information and data is (1) shared through networked and "cloud" servers, and (2) carried on portable equipment like cell phones, I-pads, and laptops.

It has also changed our frame of reference in terms of the size of the world of evidence we're dealing with. We no longer measure the size of a production by how many pieces of paper must be collected and reviewed – e.g., a redwell, a banker's box, 10 banker's boxes. We now measure in terms of gigabytes and how much server space will be needed.

Indeed, some law firms have whole servers dedicated to housing document productions only - their client's collected data and eventual production and the other side's production!

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Reason #5

Sometimes the parties' pre-dispute agreement provides / allows for such discovery in arbitration as is available as a matter of state or federal law – thereby bringing the FRCP or CCP into the arbitration.

Sometimes the parties agree – post-dispute - to modify their pre-dispute arbitration agreement to specifically include certain types of discovery as is available under state or federal law – thereby bringing the FRCP or CCP into the arbitration.

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Reason #6

It has become more common place for litigation-style discovery and motions to be utilized in arbitration – even when not specifically provided for in the parties' arbitration agreement - and for arbitrators to be asked to:

- include ESI in required voluntary exchanges
- allow formal document requests including ESI, requiring the other side to respond with a (1) production, and (2) attestation of completeness and disclosure of any documents / ESI withheld
- rule on inadvertent production / disclosure of privileged communications, including those contained in ESI

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- manage / stage the ESI discovery process by deciding (1) the relevance and utility of the ESI discovery being sought, and (2) the proportionality of the burden and expense of producing relevant ESI as compared to the parties' resources and relative access to the information, as well as the importance of the information to the parties' claims and defenses.
- shift or reallocate the costs associated with collection and production of ESI
- sanction parties and / or counsel for failure to comply with a discovery order or for the loss, destruction or alteration of ESI evidence through a failure to take affirmative steps to preserve (e.g., by turning off auto delete functions; by issuing a "litigation hold" memo internally; by issuing a "litigation hold" notice to third party vendors, affiliates or agents)

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Reason #7

Many provider rules include ESI within the scope of documents that must be exchanged as part of the voluntary exchange. E.g.,

- JAMS Rule 17 provides that the parties "shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI") relevant to the dispute or claim ."
- AAA Commercial Rules, Rule 22(b)(i) provides for a voluntary exchange of documents on which the parties intend to rely if the arbitrator so orders. Rule 22(b)(iv) provides that when documents to be exchanged or produced are maintained in electronic form, the arbitrator may require that such documents be made available in the form most convenient and economical for the producing party, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form.

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Reason #8

As of 2015, having a basic understanding of and facility with E-Discovery is considered to be among a California's attorney's core competencies and ethical duties.

E-Discovery and the handling of ESI in litigation has become such a big deal that in 2015, the State Bar of California adopted a formal opinion in 2015 [Opinion No. 2015-193] concluding that attorneys who handle litigation have an ethical duty of competence and must, at a minimum, have a basic understanding of, and facility with, E-Discovery – *presumably that same ethical duty would apply to attorneys who work in the arbitral field of civil dispute resolution as advocates and arbitrators!*

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The State Bar Opinion lists nine E-Discovery skills for lawyer competence :

- Assess E-Discovery needs and issues at the outset
- Analyze and understand the client's ESI systems and storage
- Identify custodians of potentially relevant ESI
- Implement ESI preservation procedures
- Advise the client on available options for collection and preservation of ESI
- Engage in "competent and meaningful" meet-and-confer with opposing counsel concerning an E-Discovery plan
- Direct the performance of data searches – for both relevant and privileged information
- Produce non-privileged ESI in a responsive and appropriate manner

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ABA Defending Liberty Pursuing Justice

ABA Model Rules of Professional Conduct, Comment to Rule 1.1 re an Attorney's Duty of Competence, takes a similar position, but not in the same degree of detail:

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

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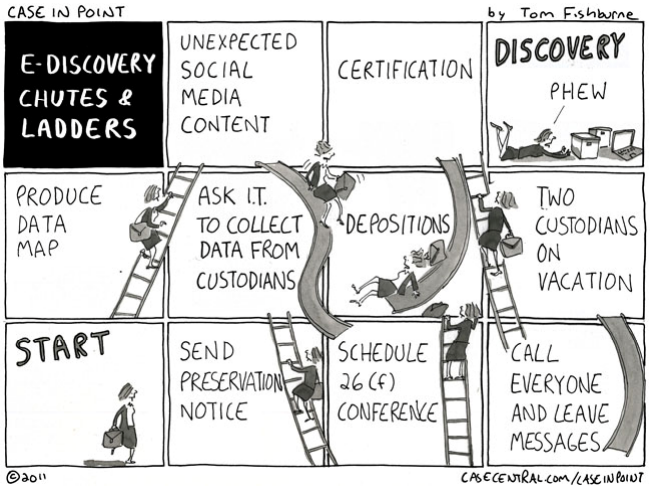
Frames of reference for understanding the E-Discovery process



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1. The Electronic Discovery Reference Model (EDRM)
2. The Sedona Principles of Proportionality
3. The federal rules governing E-Discovery contained in the Federal Rules of Civil Procedure – Rules 16(b), 26(b) and 34(b) , as amended in December 2015
4. The state rules governing E-discovery contained in the Electronic Discovery Act – CCP §§ 1985.4, 2016.020, 2017.020, 2023.030, 031.010, 2031.060, 2031.280, 2031.300, 2031.310 and 2031.320 and CRC 3.724 – as enacted in 2009 and amended in 2013.
5. The 7th Circuit E-Discovery Pilot Program

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Electronic Discovery Reference Model

- Identification of sources of ESI and their location(s)
- Preservation
- The arbitration / litigation "hold"
- Collection using defensible methods
- Process / Review / Analyze
- Production to the other side
- Presentation as evidence – need to be able to explain the ESI protocol (identification, preservation, collection, production), search terms and procedures used, list of ESI custodians collected from; chain of custody and activity log

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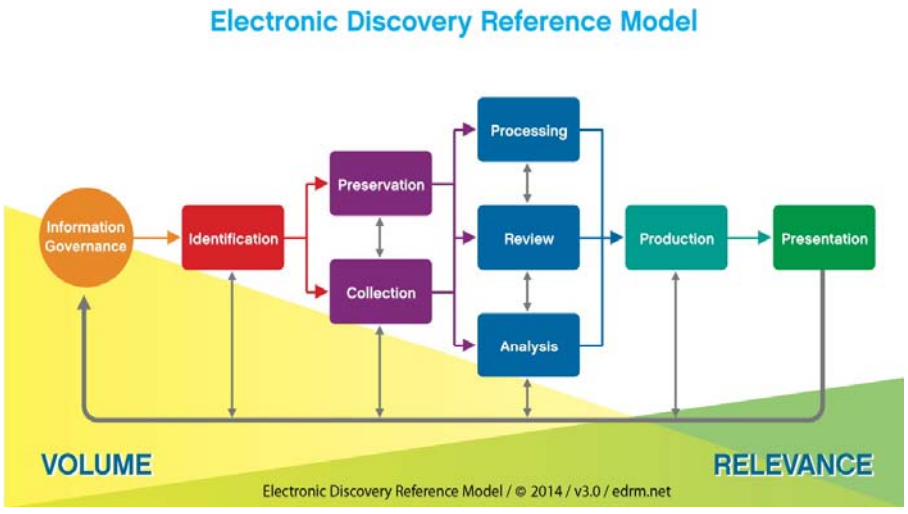

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Preservation:

As soon as a party reasonably anticipates litigation (or similar event, such as a governmental investigation) over a subject, that party has an immediate duty to preserve both hard copy materials and ESI relevant to that subject.

Courts pay attention to the form, substance and timing of this obligation, and the failure to satisfy it may invite and warrant the assessment of both monetary and non-monetary sanctions that could affect the outcome of the case.

Golden Rule: It is cheaper to preserve than to explain why you don't have and cannot produce material information.

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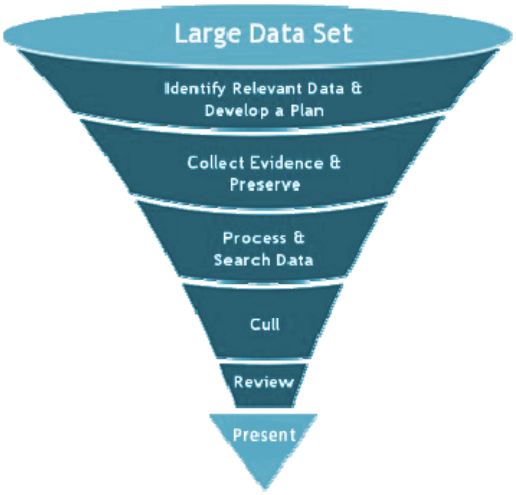
Not all PRESERVED information is PRODUCED – The duty to preserve is larger than the duty to produce.



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Preservation Drivers

- Reasonableness – judged by the circumstances presented
- Efficiency – look to reduce cumulative and duplicative effort
- Auditable – use special tools and practices so as to be able to show that that which was preserved is authentic and has not been manipulated or altered in any way
- Affordable – cost of collection and preservation must bear a proportional relationship to what is at stake
- Realistic – does the effort bear a reasonable relationship to the dispute resolution process, objectives and needs

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Types of Information Subject to Preservation

- Emails – #1 form of ESI
- Texts and instant messages
- Structured data, meaning data organized in a dynamic database – e.g., Outlook, Excel, QuickBooks
- Unstructured data, meaning data organized in a software application – e.g., Word, PDF, TIF and JPEG files
- Meta Data, meaning data about data – e.g., information about a document that describes how, when and by whom a document was created, accessed, modified, and collected; also information about its size and formatting

Again, just because you preserve it does not mean you collect, review, analyze and produce it!

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Places Where ESI is Stored

- Work computers / PC's
- Company servers
- Home computers / PC's
- Laptops
- External media hosted by third parties
- Cell phones
- PDA's
- Backup tapes and drives
- Cloud-based storage

Note: Need to distinguish between ACTIVE data – that which is in use and readily accessible – and INACTIVE, ARCHIVED, RESIDUAL and LEGACY data. Does any of the latter need to be preserved? Invites discussion re COST.

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Collection Methods

- Preserve in place – turn off auto delete
- Preserve by removal – e.g., a laptop, a particular employee's PC, a backup tape, a hard drive. *But active servers can't be taken out of service.*
- Preserve by copy – use a "write blocker," a physical device that goes between the computer and the jump drive to transfer the data. *Doesn't protect the data, just insures that what was collect is as it was on the source. If you copy and save a document directly, you just messed with the metadata.*
- Bulk collection by IT specialist (inhouse or outside vendor) – e.g., all of a custodian's email
- Self-collection –represents the minimum standard for preservation; definitely not a "best practice," not appropriate for a high-stakes case.

Note: Preservation and collection may be the same thing in a small case.

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The Sedona Principles of Proportionality

The Sedona Conference is a nonprofit research and educational institute dedicated to the study of law and policy for complex litigation. It look the lead in the area of E-Discovery by developing "the Sedona Principles of Proportionality," which make recommendations for "best practices" in electronic document discovery and production that have been widely accepted in a variety of contexts, but most importantly the courts.

There are *six* guiding principles. These principles and their commentary are frequently referred to by the federal courts when deciding and explaining what is or is not "proportional" discovery.

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Principle # 1: The burdens and costs of preserving relevant electronically stored information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

Principle #2: Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive resources.

Principle #3: Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

Principle #4: The application of proportionality should be based on information rather than speculation.

Principle #5: Nonmonetary factors should be considered in the proportionality analysis.

Principle #6: Technologies to reduce cost and burden should be considered in the proportionality analysis.

https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality

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FRCP

In December 2015, the Federal Rules of Civil Procedure were amended, and at the heart of the amendments were provisions directed specifically at E-Discovery practices – with a view towards containing costs and encouraging cooperation between / among the parties.

The long-standing "reasonably calculated" language was removed and "proportionality" was put in its place. New Rule 26(b)(1) sets forth *six factors* that are to be taken into account when defining the scope of permissible discovery:

- 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
- Whether the burden or expense of the proposed discovery outweighs its likely benefit

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At its core, proportionality is a *balancing test* that weighs the parties' need for information to prove up their claims and defenses against the time and expense associated with the proposed discovery endeavor.

As concerns E-Discovery, the new federal rules are just that – *new* – and the federal courts are grappling with the application of "proportionality" in a myriad of challenging contexts.

In 2016, there were so many decisions concerning the "proportionality" that some have dubbed 2016 as "the year of proportionality." Judge Grewal of the U.S. District Court / Northern District of California, offered the following perspective on new Rule 26(b)(1):

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> "Proportionality in discovery under the Federal Rules is nothing new. Old Rule 26(b)(2)(C)(iii) was clear that a court could limit discovery when burden outweighed benefit, and old Rule 26(g)(B)(iii) was clear that a lawyer was obligated to certify that discovery served was not unduly burdensome. New Rule 26(b)(1), … simply takes the factors explicit or implicit in these old requirements to fix the scope of all discovery demands in the first instance.
>
> What will changes – hopefully – is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case."

Gilead Sciences v. Merck & Co., 2016 WL 146574 (N.D. Cal., Jan. 13, 2016)

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CCP

California's Electronic Discovery Act is largely analogous to – but not identical with – the amendments to the FRCP, and addresses issues such as data accessibility, privilege "clawback", and proportionality.

The Rules of Court were amended in 2009 to provide a meet and confer requirement at Rule 3.724.

In 2013, "safe harbor" provisions were added that prevent sanctions for good-faith loss or damage to ESI, without waiving the obligation to preserve.

In 2015, California's State Bar's Standing Committee on Professional Responsibility issued Opinion 2015-193 (discussed above). This opinion led the nation in holding that being competent in E-Discovery is now an ethical issue for litigation attorneys that cannot be delegated to others.

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The 7th Circuit Electronic Discovery Pilot Program

The 7th Circuit Electronic Discovery Pilot Program was created in 2009 as a multi-year / multi-phase project. It is now in its third phase.

Borrowing from the "Sedona Principles," the 7th Circuit has a standing E-Discovery order and includes the following:

- That counsel shall cooperate in facilitating and reasonably limiting e-Discovery requests and responses;
- That requests for production of ESI and related responses shall be reasonably targeted, clear, and as specific as possible;
- That prior to the initial status conference with the court, counsel shall meet and confer in order to identify relevant and discoverable ESI, the scope of discoverable ESI to be preserved by the parties, the formats for preservation and production of ESI, the potential for conducting discovery in phases, and procedures for handling inadvertent production of privileged ESI;

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- That attorneys are expected to be knowledgeable about how their clients' ESI is stored and retrieved;
- That in most cases the parties should appoint an e-Discovery liaison to perform various tasks, including participation in the resolution of any e-Discovery disputes;
- That vague and overly broad preservation orders should not be sought or entered and that preservation request and responses should transmit specific and useful information; and
- That all parties and their counsel should take reasonable and proportionate steps to preserve relevant and discoverable ESI within their possession, custody or control.

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Limitations on the discovery of ESI

Self-Imposed Regulation

As a matter of both state and federal rules, the parties are expected to meet-and-confer early in the case to discuss and agree upon a discovery plan – with the California Rules of Court Rule 3.724 being quite a bit more detailed than FRCP Rule 26(f).

Rule 26(f) simply requires the parties to confer as soon as practicable, but no later than 21 days before the scheduling conference, and to develop a discovery plan stating the parties' views and proposals on any issues regarding discovery, including ESI.

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Rule 3.724 of the California Rules of Court requires parties to meet no later than 30 calendar days before the initial CMC and to specifically consider:

- issues relating to the preservation of ESI;
- the form or forms in which ESI will be produced;
- the time within which the information will be produced;
- the scope of discovery (e.g., the collection of data to be searched and search parameters);
- the method for asserting and preserving claims of privilege;
- the method for asserting and preserving confidentiality, trade secrets, etc.;
- how the cost of production of ESI is to be allocated / shared among the parties; and
- any other issues relating to the discovery of ESI.

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Inaccessible Information

Federal and state law differ markedly on this subject!

The FRCP explicitly acknowledges that no duty exists to produce information from an inaccessible source (e.g., legacy data no longer retrievable or retrievable only at great expense), providing that a party responding to requests for production need not produce ESI from sources that it identifies as not reasonably accessible because of undue burden or cost. Rule 26(b)(2)(B). The requesting party must bring a motion to compel if it wants the information, in which case the burden then shifts to the responding party to demonstrate that the information is not reasonably accessible.

Under the CCP, it is assumed that all ESI is accessible. It thus shifts the balance by not requiring the *requesting* party to bring a motion to compel and, instead, requires that the *responding* party formally object and bring a motion for a protective order. CCP §2031.060(c).

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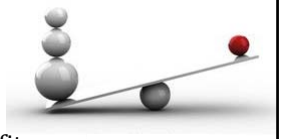
Proportionality

Federal and state law both permit the court to limit the frequency and extent of ESI discovery.

FRCP Rule 26(b)(1) provides that 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, giving consideration to:

- 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
- Whether the burden or expense of the proposed discovery outweighs its likely benefit



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CCP §2031.060(f) provides that the court shall limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist:

- the ESI is obtainable from another source that is less burdensome, expensive or more convenient;
- the ESI sought is unreasonably cumulative or duplicative;
- the requesting party has had ample time and opportunity to discover the information sought; or
- the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into consideration:
  - ✓ account the amount in controversy,
  - ✓ the resources of the parties,
  - ✓ the importance of the issues in the litigation, and
  - ✓ the importance of the requested ESI in resolving those issues.

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Closing Note re Proportionality

While the *concept* of proportionality seems simple enough, putting it into action in the context of E-Discovery has proven to be not so easy or clear-cut for parties or the courts.

The application of the "factor test" under both the FRCP and CCP is just starting to work its way through the courts in a myriad of contexts – with many of the reported decisions emanating from the Second Circuit. There is no "bright line" test, but the following do seem to have consistent support among the courts:

- It's not enough to beat the drum of relevancy to justify a discovery request. See, *Noble Roman's Inc. v. Hattenhauer Distrib. Co.*, 2016 WL 1162553 (S.D.Ind. Mar. 24, 2016). Relevance still matters, but it no longer stands alone. Courts are now more likely to say "no" to requests that are designed to burden parties and have relatively little value.

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- The courts are not taking "no" for "the" answer. In addition to explaining why discovery is disproportionate or burdensome or otherwise objectionable, courts expect the responding / objecting party to offer a suggestion as to how a request can be altered in some way. See, *Wagoner v. Lewis Gale Med. Ctr., LLC*, No. 7:15-cv-570 (W.D.Va. July 13, 2016).
- Towards the end of 2016, the courts were increasingly reminding parties that the court is a place of last resort – not first – when it comes to managing the scope of discovery, including E-Discovery. Parties, through their counsel, are expected to confer and to do so *meaningfully*. (*No reason for arbitration to operate any differently!*) See, *Venturedyne v. Carbonyx*, No. 2:14-cv-351 (N.D.Ind. Nov. 15, 2016). *Note: In this case, the defendant simply objected that a request was "burdensome." The court expected the parties to get their hands in the digital mud, actually run some searches and do some analysis, and explain why there was a "false positives" problem.*

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The duty to preserve and the "litigation hold" notice

As a matter of common law, all parties in a lawsuit have a duty to preserve evidence. The destruction - or spoliation - of evidence is often viewed prejudicially and invites the following assumption: *the only reason to destroy evidence is a belief it could be incriminating or exculpatory.*

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Surprisingly, neither the California Civil Discovery Act nor any case law specifically bars the intentional destruction of evidence prior to the filing of a lawsuit. There is authority in California suggesting the duty to preserve evidence does not arise until (1) a lawsuit has been filed, *and* (2) the party has been served with discovery demands. *New Albertsons Inc. v. Sup. Ct.*, 168 Cal.App.4th 1403, 1403-1431 (2008) (the Court rejected sanctions for the destruction of video recordings where there was no failure to obey an order compelling discovery). The Court relied on California Code of Civil Procedure Section 2031.310 (e) and 2031.320(c), which authorize sanctions only where a party "fails to obey an order compelling a further response or an order compelling an inspection." The Court found no such order in this case. Furthermore, the Court looked at the California Civil Discovery Act as authorizing sanctions only "to the extent authorized by the chapter governing any particular discovery method." *Note: There are no discovery methods authorized by the Civil Discovery Act which address destruction of evidence prior to service of a discovery demand.*

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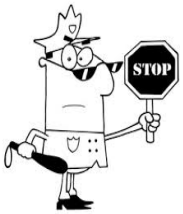
Federal law differs! The federal courts have found that a duty to preserve evidence arises once a party *reasonably anticipates litigation* or *contemplates filing a lawsuit*. This applies to both prospective plaintiffs and defendants.

In *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 218, the Court stated "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents."

This rule applies to both prospective plaintiffs and defendants in a federal lawsuit. "Would-be" plaintiffs' duty to preserve evidence is triggered at an even earlier point in time as plaintiffs dictate when litigation begins and are able to anticipate litigation before the lawsuit is filed (e.g., when the party meets with an attorney for the purpose of exploring the filing of a lawsuit).



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"Would-be" plaintiffs and defendants don't always know and frequently can't control where a lawsuit is filed or where it might end up (e.g., potential removal and venue changes). So, some might say that the more conservative federal standard should be the one adopted when trying to define the client's duty to preserve (e.g., turn off auto delete, at a minimum).

Not surprisingly, the failure of the duty to preserve – at the front end – can have serious consequences at the back-end in the form of sanctions.

Because ESI is highly manipulatable, easily transported, routinely changed or deleted in the normal course by multiple custodians, the "litigation hold" notice has taken on a special role in E-Discovery in terms of demonstrating a party's affirmative efforts to preserve evidence.

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Components of a "Hold" Notice:

- Should be in writing – *Handout*
- Sent to "custodians" – meaning people who are likely to have relevant evidence / ESI *and* who are under the control and direction of a party (employee) or under contract with a party (outside vendor)
- "Best practices" require there to be a receipt and acknowledgment from the custodian that the hold notice was
  - ✓ received
  - ✓ read
  - ✓ understood
  - ✓ will be complied with
- For a case of long duration, "best practices" suggests reminder notices with an acknowledgment of receipt

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Early Data Assessment / "EDA""

- Seeks to understand the data landscape before making any representations to a tribunal or opposing counsel – e.g., what data is potentially relevant; who has access to or control over that data; on what devices is the data stored, where are those devices located and who has access to them
- Prioritizes potential document custodians
- Estimates review and production costs to support argument for reduced scope

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- Answers questions about the overall IT system – e.g., how old is the ESI, is there "legacy" data and, if so, where and how stored, has there been any purging, deletion or overwriting, what is the native file format of the ESI, where is email stored, where are user's documents stored (Word, Excel, PPT, Visio, etc.), what are the party's backup policies and procedures, what is the company's policy re departing employees, etc.
- Has the client invested in the creation of a data map or data survey of its IT systems?
- Can be used in anticipation of litigation so as to have an "action plan" in place.

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Sanctionable conduct and "safe harbors"

Spoliation consists of:

- Destruction of evidence
- Material alteration of evidence
- Failure to preserve for another's use as evidence in pending or reasonably foreseeable litigation

and is generally sanctionable with regard to any type of evidence not just ESI.

E-Discovery raises the issue of sanctions when ESI is lost due to a failure to take affirmative action to preserve (e.g., turning off auto-delete) at the front end. While there are certainly extreme situations of purposeful spoliation, a lot of the cases deal with finding the line between "good faith" loss and actions that don't pass muster – i.e., this area of the law is clear as mud right now!

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The loss of data is not necessarily a sanctioning offense – both federal and state law provide for a "safe harbor."

Under recently amended FRCP 37(e), there must be a finding of 1. "prejudice resulting from the loss of information," or 2. "intent to deprive the other of information" before sanctions may be awarded. [Effective Dec. 2015]

In the first instance, the sanction "remedy" is such relief as may be necessary to cure the prejudice. In the second, it is a negative inference, dismissal, default or an instruction to the jury that it must presume that the lost information was unfavorable to the party who lost it.

The CCP provides that "absent exceptional circumstances," the court may not impose sanctions for failure to provide ESI that has been lost, damaged, altered or overwritten as the result of routine, good faith operation of an electronic information system. CCP §§2031.060(i)(1), 2031.300(d)(l), 2031.310(j)(1) and 3021.320(d)(1), but the statute is clear that this "good faith loss" exception does not alter any obligation to preserve. CCP §§2031.060(i)(2), 2031.300(d)(2), 2031.310(j)(2) and 3021.320(d)(2.)

Early data assessment, prompt "hold" notices, turning off auto delete and broad preservation / collection are all key to avoiding lost data and/or demonstrating no intent deprive the other of information.

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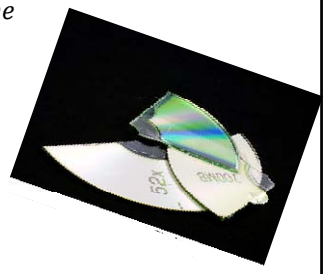
Do arbitrators have sanction authority for non-production, loss, alteration or destruction of ESI?

Generally speaking – yes!

Most courts recognize the inherent power of arbitrators to impose monetary sanctions and to draw negative inferences when their orders are violated or a party does not participate in the arbitration process in good faith. *The key here is the issuance of an order by the arbitrator and a request for sanctions by the other side.*



Rule R-58 of the 2013 AAA Commercial Rules and Rule 29 of the JAMS Comprehensive Arbitration Rules expressly provide the arbitrator with the authority to impose sanctions – in a broad sense, not just limited or tied to E-Discovery violations.

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AAA Rule 58

"(a) The arbitrator may, upon a party's request, order appropriate sanctions were a party fails to comply with its obligations under these rules or with an order of the arbitrator.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application."

Note: There is no "obligation" under the AAA Rules for a party to provide E-Discovery, so this sanctioning "power" is only available if (a) it is clear that the voluntary exchange obligation under Rule 22 includes E-Discovery, and/or (b) parties request and are granted the right to discovery that includes ESI, and (c) in either event, the obligation to produce ESI is set forth in an arbitrator order, AND (d) a party makes the sanctions request.

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JAMS Rule 29

"The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, assessment of any other costs occasioned by the actionable conduct, including reasonable attorney's fees, exclusion of certain evidence, drawing adverse inferences, or, in extreme cases, determining an issue submitted to Arbitration adversely to the Party that has failed to comply."

Note: Unlike the AAA Rule, an award of sanctions is not dependent on a party request, the scope of available sanctions is broader, and an order re E-Discovery is not necessary since the exchange of ESI is an obligation under the JAMS Rule 17.

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Is the exchange of ESI required in arbitration?

No easy / one size fits all answer. It depends …

1. on what the arbitral tribunal's rules provide
2. on what the parties' arbitration agreement provides (e.g., does it provide for discovery rights under the CCP or FRCP)
3. on what the parties, through their counsel, might agree to and request be ordered per their stipulation
4. on what the arbitrator orders

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Overriding Concept – Arbitration is NOT Litigation

- Is the production of ESI necessary in the particular case? If so, with respect to what disputed issues?
- If the exchange of ESI is allowed, how can it be controlled / limited? For example, does it make sense to start with a first level exchange of emails of a select group of key players and to use a limited date range?
- If the exchange of ESI is allowed, what search methods and criteria are going to be used and what are the estimated costs associated with those methods? What ESI discovery plan is cost-effective and proportional to the case?

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- No "fishing" expeditions – ESI requests need to be substantiated:
  - ✓ Why do you think the ESI sought exists?
  - ✓ Is the ESI reasonably accessible?*
  - ✓ How critical is the information and to what *disputed* issues?
  - ✓ What is the cost to collect and search – time, money and human resources? And who should be responsible for that cost?
  - ✓ What is the amount in controversy?
  - ✓ What are the resources of the parties?
  - ✓ Is the information available from other sources?
  - ✓ Should discovery be staged and, if so, in what order of priority?

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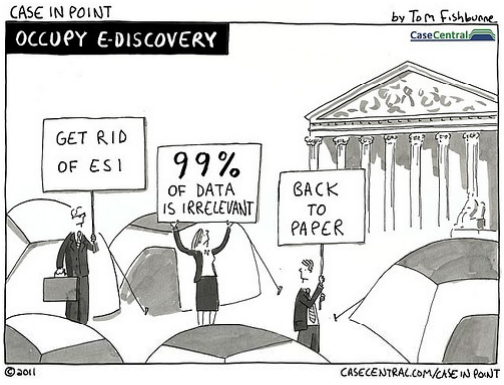

What are some things that Arbitrators can do to help manage E-Discovery?

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6 Topics to Put on the Preliminary Hearing Agenda

1. Have the parties' counsel discussed and defined the scope of preservation? Have they discussed "hold" and "preservation" notices? If not, put the discussion on the table – do these matters need to be discussed in this case?
2. If ESI is to be the subject of discovery and/or exchange, have the parties' counsel discussed and agreed on the scope and format of production?* If not, have them meet and confer and report back on a discovery plan they can agree to and a summary of what discovery they are in disagreement about and what their respective positions are and why.
3. How large or small is the proposed ESI request? If large, should collection / processing / review / analysis / production be done in stages?

E.g., are "documents" going to be bates numbered? Are "documents" going to be provided in electronic and hard copy format? Have the parties discussed and agreed upon the electronic format for production (e.g., native v. PDF or TIFF)?

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3. Have the parties' counsel discussed and agreed upon how to handle privileged information – e.g., a "clawback" agreement and non-waiver protocols for inadvertent production of attorney-client communications, work product and other privileged / protected information?
4. What search tools and methodologies are going to be used to collect and process the ESI? And what is the time and cost associated with that effort? Is that time and expense reasonable / warranted in relation to the amount at issue in the case? If not, what are the alternatives?
5. Is this a case that warrants an ESI liaison – i.e., someone tasked by each side as "the person" to discuss problems and explain issues and options to the Arbitrator?

Note: The point of including ESI on the PH agenda is to avoid unnecessary expense and delay and work towards party consensus and cooperation so as to keep the case on track and moving forward. In a large case, you may even want to suggest that the parties each appoint an ESI liaison.

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Additional Topics for the Preliminary Hearing Agenda:

1. Arbitrator can have E-Discovery guidelines and require counsel to meet-and-confer and develop a joint discovery plan for presentation and discussion at the preliminary hearing. *Handout sample arbitrator guidelines.*
2. Limitation on the number of requests, and the need for specific, targeted descriptions with the added requirement that requests relate to specific claims, defenses and/or disputed facts.
3. When substantial ESI, inaccessible data (i.e., restoration) and/or multiple storage sources are involved, require the parties to provide written cost and time estimates, especially when IT technicians and outside ESI consultants are expected to be needed for the job.
4. Objection protocols
5. Who pays for what, with mention of Arbitrator's power to allocate "costs" to the losing party at the end of the case?

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Checklist re common problems encountered with E-Discovery

- ❑ Defining proportionality and scope
- ❑ Understanding the technology and/or technical terms
- ❑ Use and qualification of ESI experts
- ❑ Amorphous "document" demands
- ❑ Lack of clarity re form of ESI sought and/or lack of understanding about what ESI is / is not accessible
- ❑ Lack of cooperation between/among counsel
- ❑ Not defining a clear purpose what ESI is needed and how it relates to a claim, defense or disputed fact
- ❑ Selecting the appropriate search tools and methodologies
- ❑ Cost burden and allocation of costs

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- Dealing with party preservation obligations
- Producing ESI in admissible / defensible / usable form
- Dealing with allegations of spoliation (loss, destruction and/or alteration)
- Dealing with duplicate information / data and lack of understanding re what technology is available to properly cull out identical duplicates from collection and processing
- Using overly broad search terms that result in producing an electronic haystack
- Dealing with inadvertent disclosures of attorney-client privilege and/or work product ESI
- Dealing with counsel and/or party inexperience with ESI

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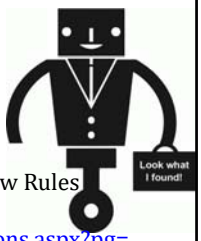
Reference Articles / Additional Reading:

Gibson Dunn Website Articles, including:

- E-Discovery Basics – 2011 – Why Care About E-Discovery
- E-Discovery Basics – 2011 – Discovery Life Cycle
- E-Discovery Basics – 2011 – Litigation Preparedness
- E-Discovery Basics – 2011 –Legal Holds
- E-Discovery Basics – 2011 – Preservation (Part 1)
- E-Discovery Basics – 2011 – Preservation (Part 2)
- E-Discovery Basics – 2011 – Collection
- E-Discovery Basics – 2011 – Processing
- E-Discovery Basics – 2011 – Production
- E-Discovery Basics – 2011 – Admissibility
- E-Discovery Basics – 2011 – Cross-Border
- E-Discovery Basics – 2015 – Spoliation Standards Under the New Rules



http://www.gibsondunn.com//practices/pages/PracticePublications.aspx?pg=%22Electronic%20Discovery%20and%20Information%20Law%22

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Reference Articles / Additional Reading:

Andres Hernandez, "*Common Problems with E-Discovery – and Their Solutions,*" The Federal Lawyer (September 2016)

Jennifer H. Rearden and Goutam U. Jois, "*Spoliation Standards Under the New Rule 37(e),*" Law 360 (October 28, 2015)

Giyoung Song, "*The Advantages of Early Data Assessment,*" E-Discovery Bulletin" (February/March 2015)

Monica McCarroll, "*E-Discovery: What Litigation Lawyers Need to Know,*" Risk Management Handouts of Lawyers Mutual (November 2011)

Gareth T. Evans, "*Access Granted,*" The Recorder (July 15, 2009)

Mark S. Sidoti and Renee L. Monteyne, "*The Effective Internal Litigation Hold Letter,*" In-House Defense Quarterly (Winter 2007)

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Q & A

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