

# AMERICAN ARBITRATION ASSOCIATION

## Arbitrator Rebecca Callahan's Guidelines for the Discovery of Electronically Stored Information

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### **Guideline 1 - Purpose**

Discoverable information today is largely electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize and target the ESI using the text and associated data. At the same time, the Arbitrator is aware that the discovery of ESI is a potential source of cost, burden and delay, especially if not planned and managed correctly.

These Guidelines are intended to guide the parties as they engage in any sort of discovery that includes ESI. The purpose of these Guidelines is to encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent, while ensuring that information subject to discovery is preserved and produced to allow for a fair adjudication on the merits. At all times, discovery in general, but most certainly discovery that includes ESI, should be handled so as to secure the just, speedy and inexpensive determination of every action and proceeding.

### **Guideline 2 - Cooperation**

The Arbitrator expects cooperation between and among counsel and the parties on issues relating to the preservation, collection, search, review, scheduling and production of all discovery, but especially that which includes ESI. The Arbitrator notes that an attorney's duty to zealously represent his/her client is not compromised by conducting discovery in a cooperative manner. Cooperation tends to reduce litigation costs and delay for the benefit of all.

### **Guideline 3 - Proportionality**

All discovery, but in particular discovery that includes ESI, should be proportional to the case and issues at hand and should weigh the costs – both monetary and non-monetary – as compared to the perceived benefits of the discovery, taking into consideration such things as the expense of the proposed discovery, the needs of the case, the amount in controversy, the parties' resources, the importance of the proposed discovery to the issues at stake in the action, and the importance of the proposed

discovery in resolving the particular issues in the case. The following are offered as matters for consideration:

- What is the cost of preservation, search, retrieval and production versus the potential value and uniqueness of the information when determining the appropriate scope of preservation?
- What is the most convenient, least burdensome and least expensive source?
- Who are the data custodians that need to be included and who can be excluded?
- What is the relevant time frame?
- What are the relevant subject matters?
- Are any technologies available that might reduce the cost of search, retrieval and/or production?

#### **Guideline 4 - Preservation**

At the outset of a case, counsel for the parties should discuss preservation. Such discussions should continue periodically as the case and issues evolve. The parties, through their counsel, should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive or burdensome. If a party prepares a preservation letter, the letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve.

If there is a dispute concerning the scope of a party's preservation duties or efforts, the parties, through their counsel, should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve the preservation issue, then the issue should be raised promptly with the Arbitrator.

## **Guideline 5 – Cooperation**

The Arbitrator strongly encourages an informal discussion and cooperation between/among counsel concerning all discovery matters, especially those involving ESI. As pertains to ESI, counsel or others knowledgeable about the parties' respective electronic systems, including how potentially relevant data is stored and retrieved, should be involved and made available as necessary. Such a discussion will help the parties be more efficient in framing and responding to ESI discovery, reduce costs, and assist both the parties and the Arbitrator in the event of a dispute involving ESI issues.

## **Guideline 6 – Checklist Items for ESI Discussions**

In cases where the discovery of ESI is likely to be involved, the Arbitrator encourages the parties to meet and confer and to use the following checklist to guide those discussions. *Note: The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter at hand.*

### **A. Preservation**

- The time frame of creation or receipt dates for any ESI to be preserved
- The manner of preservation
- The scope of preservation in terms of:
  - The data sources that a party believes could contain relevant information and should be preserved
  - The number of custodians for whom ESI will be preserved, and the names and/or general job titles and/or descriptions of said custodians (e.g., "President," "Marketing Manager," "HR Head," "Controller")
  - The topics to be subject to preservation
- The data sources that a party believes could contain relevant information, but has determined that under the proportionality factors should not be preserved
- The data sources that are not reasonably accessible and should not be subject to preservation or review
- Identify any issues related to the scope or manner of preservation

**B. Informal Discovery About Location and Types of Systems**

- Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems)
- Description of systems in which potentially discoverable information is stored
- Location of systems in which potentially discoverable information is stored
- Description of how potentially discoverable information is stored
- Description of how potentially discoverable information can be collected and the media in which it is stored

**C. Proportionality**

- The amount and nature of the claims being made by either party
- The nature and scope of burdens associated with the proposed preservation and discovery of ESI
- The perceived benefit of the proposed discovery
- The costs that will be incurred to preserve, search, retrieve and produce
- What costs can be shared in order to reduce the overall discovery expense (e.g., use of a common electronic discovery vendor or a shared document repository)?
- Limits on scope or other cost-saving measures

**D. Search**

- The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery
- The quality control method(s) that the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

**E. Phasing**

- Whether it is appropriate to conduct discovery of ESI in phases
- Time period during which discoverable information was most likely to have been created or received and to be prioritized
- Sources of ESI that are most likely to contain discoverable information and should be prioritized
- Sources of ESI that are less likely to contain discoverable information and should be postponed or avoided

- Custodian names and/or roles that are most likely to have discoverable information and should be prioritized
- Custodian names and/or roles that are less likely to have discoverable information and should be postponed or avoided
- Sources of ESI most likely to contain discoverable information

**F. Production**

- The formats in which structured ESI will be produced (e.g., database, collaboration sites)
- The formats in which unstructured ESI will be produced (e.g., native versus PDF or TIFF)
- Whether production will include hard copy or just electronic format
- Whether production items will be bates numbered
- How electronic production will be organized / described
- The extent to which any metadata will be produced and the fields of metadata to be produced
- The production format(s) that ensure that any inherent searchability of ESI is not degraded when produced.

**G. Privilege**

- How any inadvertent production of privileged or work product protected ESI will be handled (e.g., clawback agreement)
- How will privilege log be created and what will be the required fields of description