

The Journal of the Dispute Resolution Section of
the International Bar Association

Dispute Resolution International

Vol 1 No 2 pp 129–236 ISSN 1817 5694 **December 2007**

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E-Discovery for Arbitrators

John M Barkett*

Introduction

No citation is required to establish the principle that throughout the world today most information is stored electronically. It is no surprise, therefore, that everyone involved with dispute resolution – whether within a judicial system or arbitration – has an interest in rules governing the production of electronically stored information to comply with production obligations or orders of the tribunal.

In the United States, ‘e-discovery’ had been addressed ad hoc in the federal courts until the Civil Rules Advisory Committee of the United States Judicial Conference¹ adopted new rules for discovery of ‘electronically stored information’. They became effective on 1 December 2006.² According to the Advisory Committee, the new rules are intended ‘to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments’. What I will call the ‘e-discovery

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1 See www.uscourts.gov/rules/proceduresum.htm for a description of the rule-making procedure.

2 The Advisory Committee report, dated 5 May 2005, can be found at www.uscourts.gov/rules/Reports/CV5-2005.pdf. The rules are applicable in the federal courts. State courts in the United States must develop their own rules, state by state, although the Conference of Chief Judges of the State Supreme Courts has issued guidelines on e-discovery which, for the most part, mirror the federal e-discovery rules. See Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (August 2006) which can be found at www.ncsconline.org/WC/Publications/CS_EIDiscCCJGuidelines.pdf. The Federal Rules of Civil Procedure were ‘restyled’ effective 1 December 2007. In some cases, rules have been renumbered. See www.uscourts.gov/rules/congress0407.htm to find the text of the new rules and supporting documentation. All cites below are to the restyled rules except, in some cases, for quotations from decisions.

rules' address, among other things, the obligations of lawyers to meet and confer to establish ground rules for the production of electronically stored information, the difference between 'accessible data' and data that are not accessible because of 'undue burden or cost', conditions for obtaining data that are not reasonably accessible because of undue burden or cost, forms of production of electronically stored information, sampling of inaccessible data to determine relevance, and devices for addressing attorney-client privileged information contained within electronically stored information.³

Many international arbitrators use Article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) to address the production of documents.⁴ The preamble to the IBA Rules states that the rules are 'intended to govern in an efficient and economical manner' the taking of evidence in international arbitrations which 'shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other parties rely'.

The IBA Rules were adopted on 1 June 1999. Their authors anticipated electronic document production. Article 1 to the IBA Rules defines 'document' as a 'writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information'. Beyond this reference, the IBA Rules offer no guidance on 'electronic documents'.

I first describe the IBA Rules. Then I describe the difference between the paper world and the electronic world and how the federal courts in the United States responded to those differences with the e-discovery rules. I next outline the 'duty to preserve' as interpreted by US courts because it takes on greater significance in the electronic world for reasons explained below. I then return to the IBA Rules to test their scope in relation to electronic document production and make suggestions for possible changes to the IBA Rules to account for electronically stored information or, at a minimum, research that could be conducted to evaluate the need for such changes.

The IBA Rules

Article 3.1 of the IBA Rules begins by stating that each party 'shall submit' to the tribunal and the other parties 'all documents available to it on which it relies'. Under Article 3.2, within the time provided by the tribunal, a party may also submit a request to produce. Under Article 3.3, the request 'shall contain':

³ See, generally, Barkett, *The Battle for Bytes: New Rule 26 and the Return of the Judges* (Shook Hardy & Bacon, 2007) available at www.shb.com/FileUploads/newrule26_1737.pdf.

⁴ See www.camera-arbitrale.com/upload/file/1234/617497/FILENAME/IBA%20Rules%20on%20Taking%20of%20Evidence%201999.pdf.

- a description of 'a requested document sufficient to identify it', or a description 'in sufficient detail (including subject matter) of a narrow and specific requested category of documents' that are 'reasonably believed to exist';
- a description of how the documents requested 'are relevant and material to the outcome of the case'; and
- a statement that the documents requested are not in the possession, custody or control of the requesting party, and the reason why the requesting party assumes the documents requested are in the possession, custody or control of the producing party.

Article 3.4 provides that within the time ordered by the tribunal, the producing party 'shall produce' to the tribunal and the other parties 'all the documents requested in its possession, custody, or control as to which no objection is made'.

If the producing party has objections, the objections are to be made in writing and within the time ordered by the tribunal. Article 3.5 provides that the 'reasons for such objections shall be any of those set forth in Article 9.2'.

Article 9.2 states in pertinent part that the tribunal shall exclude 'from evidence or production' any document 'for any of the following reasons':

- '(a) lack of sufficient relevance or materiality;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the document that has been reasonably shown to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling'.

After receipt of objections, under Article 3.6, the tribunal 'in consultation with the parties and in timely fashion', then considers the request and the objections. The tribunal 'may order' the producing party to produce the requested documents in its possession, custody or control 'as to which the tribunal determines' that (i) the issues that the requesting party 'wishes to prove are relevant and material to the outcome of the case', and (ii) 'none of the reasons for objections set forth in Article 9.2 apply'.

Under Article 3.7, in 'exceptional circumstances', if the 'propriety of an

objection' can only be determined by review of the document, the tribunal may determine that it should not review the document and instead may, after consultation with the parties, appoint an impartial expert 'bound to confidentiality' to review the document and report on the objection. If the objection is upheld, the expert 'shall not disclose' to the tribunal and the other parties 'the contents of the document reviewed'.

Article 3.8 provides that, to obtain documents from third parties, a requesting party may, within the time ordered by the tribunal, ask the tribunal 'to take whatever steps are legally available to obtain the requested documents'. The requesting party has to identify the documents 'in sufficient detail and state why such documents are relevant and material to the outcome of the case'. The tribunal then decides the request and 'shall take the necessary steps if in its discretion it determines that the documents would be relevant and material'.

Under Article 3.9, the tribunal has the right to ask a party to produce 'any documents that it believes to be relevant and material to the outcome of the case'. A producing party may object based on any of the reasons set forth in Article 9.2. The tribunal then must decide whether to order production for the reasons set forth in Article 3.6 using, if the tribunal considers it appropriate, the procedures set forth in Article 3.7.

Article 3.10 allows parties to submit additional documents 'which they believe have become relevant and material' as a consequence of the issues raised in documents, witness statements, or expert reports or in other submissions of the parties.

If copies are submitted or produced, under Article 3.11, 'they must conform fully to the originals'. In addition, the tribunal may request that 'any original must be presented for inspection'.

Article 9.4 addresses the adverse inference. If a party 'fails without satisfactory explanation to produce any document requested' in a request for production 'to which it has not objected in due time', or if a party 'fails to produce any document ordered to be produced' by the tribunal, the tribunal 'may infer that such document would be adverse to the interest of that party'.⁵

⁵ Article 9.5 parallels Article 9.4, but it applies to failures by a party without satisfactory explanation to make available 'any other relevant evidence, including testimony' requested by another party or ordered by the tribunal to be produced where there are no objections in due time. I do not discuss Article 9.5 separately because I have assumed that electronically stored information would be covered by the use of 'document' in Article 9.4 or the result would be the same under Article 9.5 if electronically stored information qualifies as 'any other relevant evidence'.

Electronically stored information versus paper

The digital world materially differs from the paper world.

Everyone is a file keeper

In the paper world, documents usually are given to members of staff for filing. In the digital world, every computer user who sends or receives e-mail, creates word-processed documents, prepares spreadsheets or information slides, or maintains databases decides whether to store files and has the ability to modify or delete a file. Even if the digital file keeper takes no action, eventually e-mail will likely move to backup tape and usually that backup tape will be overwritten after a period of time and the file may be lost for ever.⁶

In the paper world, when an employee leaves employment, the employee's documents, already archived, may remain in that state until record-retention schedules call for their destruction. In the digital world, when an employee leaves employment, the employee's desktop or laptop hard drive (or both) may be reformatted destroying all data on the drive(s) unless someone decides that there are litigation or business reasons to maintain that employee's digital status quo.⁷

In the paper world, when, say, a major construction project was completed, the paper associated with the project might be boxed and stored in a warehouse. In the digital world, the desktop and laptop computers used by everyone in the field will be moved to the next job and file management will be a function of project organisation or perhaps serendipity depending upon the individual file-keeping habits of each person on the job.

6 An individual user can archive an e-mail in local storage media and that may be the only place to find a document. See *Hynix Semiconductor Inc et al. v Rambus Inc*, 2006 US Dist LEXIS 30690, *27-8 (ND Calif 5 January 2006) (explaining that Rambus changed to a backup recycling schedule of three months and that employees should create their own archive copies of documents; for e-mail that meant printing them or keeping them 'on your hard drive').

7 See, eg, *Cache La Poudre Feeds, LLC v Land O'Lakes, Inc et al.*, 2007 US Dist LEXIS 15277 (D Colo 2 March 2007) (wiping clean the computer hard drives of former employees, among other conduct, was sanctionable in the circumstances, but since the prejudice was not substantial, sanctions were limited to US\$5,000 and reimbursement of certain court-reporting costs).

Metadata

A second key difference is the existence of 'metadata'. The Sedona Glossary⁸ defines metadata as 'information about a particular data set or document which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted'. A pocket guide provided to federal judges in the United States by the US Judicial Conference gives this definition of metadata:

'Metadata, which most computer users never see, provide information about an electronic file, such as the date it was created, its author, when and by whom it was edited, what edits were made, and, in the case of e-mail, the history of its transmission.'⁹

Yet another description appears in *Williams v Sprint/United Mgmt Comp*, 230 FRD 640, 646 (D Kan 2005) (footnotes omitted):

'Some examples of metadata for electronic documents include: a file's name, a file's location (eg, directory structure or pathname), file format or file type, file size, file dates (eg, creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (eg, who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.'

Deleted data that do not die

A third key difference is that digital data can survive deletion, while paper that is discarded is not likely to be found again. The Sedona Glossary (p 14) gives this definition of 'deleted data':

8 This definition comes from *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, p 33 (December 2007) available at www.sedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf (Sedona Glossary). The Sedona Glossary continues by explaining that metadata can be 'altered intentionally or inadvertently'. It can be 'extracted when native files are converted to image'. Some metadata, such as file dates and sizes, 'can easily be seen by users'; other metadata 'can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed'. The Sedona Conference working group series 'is a series of think-tanks consisting of leading jurists, lawyers, experts and consultants brought together by a desire to address various "tipping point" issues in each area under consideration'. See www.thesedonaconference.org/. The Sedona Conference Working Group on Electronic Document Retention and Production has also published the second edition of *Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007). The document can be downloaded by going to the Sedona Conference website. See www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf.

9 *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center, 2007), p 3. The document is available at www.uscourts.gov/rules/eldscpkt.pdf.

'Deleted Data is data that existed on the computer as live data and which have been deleted by the computer system or end-user activity. Deleted data may remain on storage media in whole or in part until they are overwritten or "wiped." Even after the data itself has been wiped, directory entries, pointers or other information relating to the deleted data may remain on the computer. "Soft deletions" are data marked as deleted (and not generally available to the end-user after such marking), but not yet physically removed or overwritten. Soft-deleted data can be restored with complete integrity.'

So, for example, a computer user moves data to 'trash' or the 'recycle bin'. Until the trash or bin is emptied, the data remain fully restorable. Once the trash or bin is emptied, the data may be restored by forensic experts who may be able to reconstruct data fragments to recreate the deleted file, unless the storage media in question has been 'wiped', typically by software designed to achieve this aim.¹⁰

Multiple sources of data

A fourth key difference is the proliferation of data sources over paper. A 'key player' in a particular dispute may have information stored in a number of places. Consider these possibilities:

- Office desktop storage media
- Office backup storage media
- Office laptop storage media
- Optical discs like CDs (compact discs) or DVDs (digital video disc or digital

¹⁰ See, eg, *Kucala Enterprises, Ltd v Auto Wax Co, Inc*, 2003 US Dist LEXIS 8833 (ND Ill 2003). In the course of this patent infringement case, Kucala installed and used Evidence Eliminator™ software on a computer, just hours before it was to be examined by Auto Wax's computer specialist. The magistrate judge explained that 'Evidence Eliminator' is a program designed to clean computer hard drives of data that may have been deleted by the user but still remain on the hard drive. Kucala also threw two other computers away during the litigation. He did so, he said, because they had crashed and were of no use to him. Kucala also admitted destroying documents, contrary to his attorney's advice, because he was afraid the defendant would not honour a protective order that was in place. Auto Wax's computer specialist inspected the computer on which Kucala had installed Evidence Eliminator and confirmed that the software had been used to delete and overwrite more than 14,000 files. Auto Wax filed a motion for sanctions alleging prejudice as a result of Kucala's destruction of one computer and deletion of relevant discovery from two others. Auto Wax sought a default judgment, attorneys' fees, expert fees and costs. The magistrate judge found that Kucala had acted unreasonably, with gross negligence, and in flagrant disregard of the district court's order by deleting files just hours before Auto Wax's computer specialist was to inspect his computer. The magistrate judge recommended that the district court dismiss the action and require Kucala to pay the costs and attorney fees incurred by Auto Wax from the time Kucala deleted the files until the hearing.

