

eDiscovery: It's All About the Information

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Over the last several years, there has been a great deal of noise and confusion surrounding electronic discovery, resulting in innumerable seminars, conferences, and committees, and the generation a whole new category of experts and consultants. What is odd about this flurry of activity is that it incorrectly leads to the conclusion that electronic data and documents represent an entirely new class of discoverable material. Even now, it is not unusual to hear attorneys asking questions such as, “When will I be required to begin producing electronic documents?”

The reality is that, at least since the 1970 amendments to the Federal Rules of Civil Procedure, it has been clear that electronically stored information (ESI) falls squarely within the scope of discoverable material. And, as a matter of practice, ESI, whether in the form of financial records, email, or environmental computer models, has routinely been requested, fought over, and produced for years. So then, why this persistent belief that eDiscovery is something new out there on the horizon?

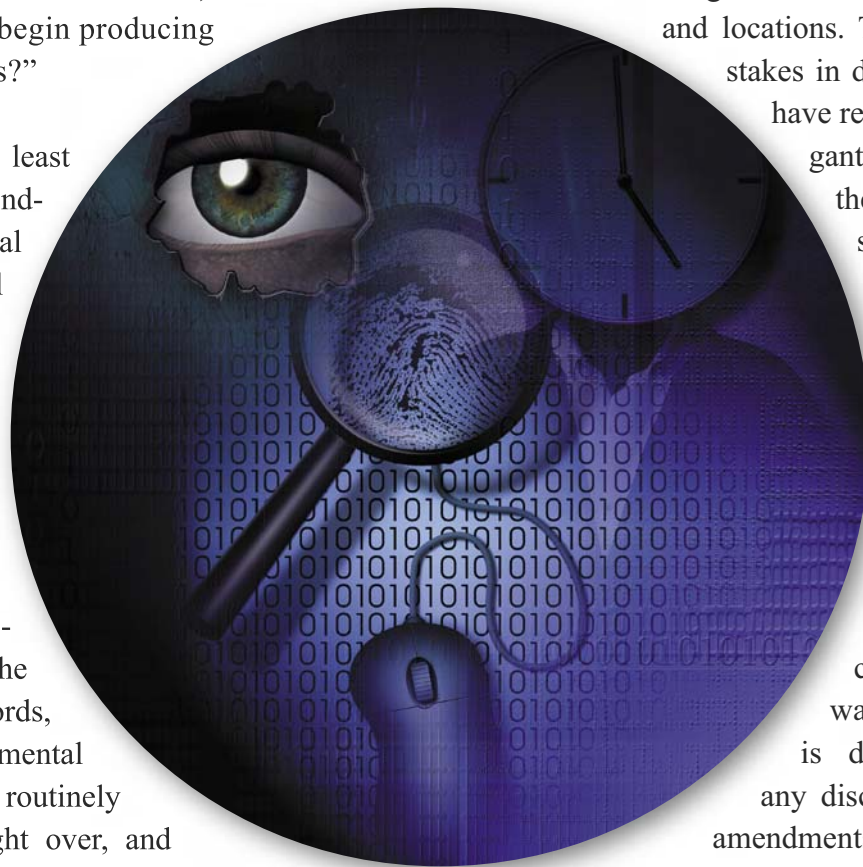
The answer is not that eDiscovery is new. Instead, the issues associated with eDiscovery are centered on the fact that, in the last 20 years, business and government have moved from a system of paper records, or “hard copy,” to the electronic creation and storage of these

same types of records. With the growth of electronic storage media, document warehouses have been replaced by mainframe computers, servers, desktop and laptop computers, hand held PDA's, thumbdrives, and even cell phones. What has changed is not the type of documents and data, but, instead, the immense capacity of the electronic storage media, the variety of forms in which electronic material may be stored, and the potential, or likelihood that discoverable information has migrated to a multitude of recipients

and locations. These factors raise the stakes in discovery standoffs and have resulted in numerous litigants either taking a hit in the form of sanctions or settling due to the now even higher discovery costs.

The much heralded eDiscovery amendments to the FRCP, as embodied in Rules 16, 26, 33, 34, 37, and 45, essentially clarify, if clarification was necessary, that ESI is discoverable. As with any discoverable material, the amendments require counsel to consider and include ESI in disclosures

and litigants to retain or preserve such information once litigation is foreseeable. In addition, the amendments allow the requesting party to request the form in which the information will be produced. The real pressure point for eDiscovery disputes is the Rule 34(b) distinction between accessible and inaccessible ESI based on the burden and costs of production.



So what does all this mean for the arbitrator? The answer is:

1. Assume the discoverability of ESI and treat such information as you would paper documents.
2. Ask questions early in the process, such as:
 - a. Will there be eDiscovery issues in this case?
 - b. Do the litigants have document/data management policies in place and have the parties taken appropriate steps to retain potentially relevant information?
 - c. Will disclosures address ESI?
 - d. In what form will the ESI be presented at the hearing?
3. Don't assume that ESI will not be discoverable because of burden or cost. The threshold should be high.
4. Don't worry that your understanding of computers and ESI may be limited. You are an arbitrator, not an IT professional. Ask counsel to explain. In a serious ESI case, consider appointing an expert to help you.

With a little thought and study, you will come to the conclusion that eDiscovery is not so ominous after all and is really just traditional discovery in another form. That realization will free your mind to do what you do best.

Copple & Associates, P.C. Mr. Copple is one of the founding members of the national eDiscovery Panel recently created by the CPR International Institute for Conflict Prevention & Resolution.