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**POTENTIALLY LETHAL BYTES: WHY E-DISCOVERY
IS CRUCIAL FOR EMPLOYEES IN ARBITRATION**

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ABSTRACT

More and more, employers are relying on mandatory arbitration clauses in employment contracts to save them the time, money, and public image they might risk in traditional litigation. In this tight economy, many employees are assenting to these mandatory arbitration clauses to land a job, but submitting to arbitration is not the same as waiving one's constitutional right to due process of the law. Despite enjoying the concession of mandatory arbitration, employers are often reluctant to submit to electronic discovery in arbitration, claiming either that the digital data no longer exist, or that it would be too costly to comply with the discovery requests of the employee. This article illustrates that most of the evidence necessary to provide the employee with a full and fair hearing at arbitration is now created and stored in digital form. Therefore, arbitrators must require reasonable discovery as a fundamental provision of due process, because so much of this critical evidence is likely to exist solely in electronically stored information, which typically exists, conveniently and exclusively, within the control of employers only. To better inform employees of their e-discovery rights, the authors have surveyed and summarized the developing legal authority regarding e-discovery, and they have provided three actual, nonunion arbitrations to illustrate the electronic information that may be requested prior to an arbitration hearing.

DISCOVERY AND E-DISCOVERY

When parties have a legal dispute that they are unable to work out on their own, the United States court system provides a public forum staffed by neutral judges to help facilitate resolution in accordance with the law through the utilization of the trial process. After the pleadings are filed, the parties are permitted to conduct discovery. *Discovery* is the legal term for efforts taken by the parties to search for, collect, and analyze as much evidence as possible to help “prove” their cases in court. The discovery stage of litigation typically involves the parties exchanging written requests for interviews with witnesses (called depositions), the production of documents, physical evidence, or answers to questions (called interrogatories), and rights to the examination of the scene where the dispute arose. The court rules governing discovery generally require both parties to provide access to any evidence that is relevant, reliable, and necessary to resolve the dispute before the court. In civil litigation, the plaintiff must present sufficient evidence of his or her case at trial, or else the complaint may be dismissed and his case will not be heard by the court. Discovery is also an important component of alternative dispute resolution systems such as mediation and arbitration, because the plaintiff still must present sufficient evidence to prove that a plausible claim for relief exists.

Over the last 10 years, the discovery process has been exponentially broadened with the development of electronically stored information (ESI). This new frontier for evidence, referred to as *e-discovery*, has substantially increased the complexity and expense of the discovery process in litigation, and it raises an even more vexing problem when considered within the context of alternative dispute resolution (ADR) processes, because it compromises the expedience and inexpensiveness that are the hallmarks of ADR.

EMPLOYERS MUST BEGIN TO COMPLY WITH E-DISCOVERY IN ARBITRATION, TOO

In the employment law field, employees must be keenly aware of the importance of identifying potentially relevant ESI and insisting upon e-discovery as a matter of right when engaging in a legal dispute with management. Nearly all of the information used by an employer today is created and stored electronically, so why do employers continue to get away with ignoring e-discovery when arbitrating employment disputes?

The rapid development of information technology has vastly changed the way we create and use information. Courts and arbitrators have been charged with understanding and accommodating for the effects of this digital revolution, particularly in the heat of courtroom litigation or hotly contested arbitration hearings (Sherwyn & Tracey, 1997). Until recently, a simple (almost standardized) list of discovery requests had been used to collect the lion’s share of relevant information in most matters. Many lawyers still use boilerplate language

in their requests. But today, with the trending preference for ESI over paper document storage, a new form of discovery is demanded. We are now forced to consider the whereabouts of evidence that may exist only in bits and bytes.

Unfortunately, our legal and arbitration system has mostly chosen to ignore the unique challenges that e-discovery creates. In employment disputes, employees are often contractually required to utilize arbitration as a condition of their employment. Arbitrators, employers, and their legal counsel, who are usually at best ill-informed about the e-discovery process, exploit this ignorance to avoid exposing their own; and claimants' access to critical evidence is denied as a matter of convenience. Arbitrators consistently claim to permit reasonable discovery to ensure accurate dispute resolution, yet great confusion and ignorance remain about what "reasonable discovery" is in regard to e-discovery. The result is often an ethically unsound process that results in unnecessary disputes, outrageous costs, and questionable jurisprudence.

Employers, their corporate lawyers, judges, and even arbitrators basically deny due process to claimants when they argue that expanding discovery in arbitration to include ESI unnecessarily complicates and protracts proceedings. While correct about the additional complexity, they are wrong to argue that permitting e-discovery in arbitration is unnecessary. The bottom line is undeniable: e-discovery is not a matter of choice. Our legal system cannot stand for justice without considering all sources of potentially relevant evidence, and in today's connected world, many of those sources are undoubtedly digital.

In this article, we will describe the rules governing e-discovery, explain employers' obligations to properly manage and preserve such data when notified of potential litigation, and show how claimants can most effectively preserve for their cases the abundant fruits of e-discovery. We will also explain the existing guideposts for arbitration and illustrate why employees and their legal counsel must educate themselves about the myriad of sources and forms of ESI. For the sake of brevity, we will focus on mandatory arbitration of nonunion employment disputes, because these disputes do not involve collective bargaining. The collective bargaining process provides a wide range of policies and guidelines for dispute resolution, dictated by particular circumstances, regional ideals, and industry norms (Sherwyn & Tracey, 2001). Yet those involved in collective bargaining grievance arbitration may find this article of interest, because their cases can benefit from important data in the hands of an employer who is refusing a union's reasonable request simply because the information requested is in electronic form.

THE NEW REQUIREMENTS OF E-DISCOVERY

Federal Rules

On December 1, 2006, amendments to the Federal Rules of Civil Procedure (FRCP) regarding e-discovery came into effect. The amendments dictate that

- ESI is now part of the list of required initial disclosures (FRCP 16(b)(5)).
- Parties must devote attention to e-discovery issues early in the discovery process, during an initial “meet and confer” discussion (FRCP 26(a)(1)(B)).
- The requesting party is authorized to specify the form in which ESI shall be produced (for example, in paper form or in some electronic format) (FRCP 34(b)).
- The producing party need not provide discovery of ESI that is not reasonably accessible unless the court orders such discovery for good cause (FRCP 26(b)(2)(B)), or the requesting party can show “[that] its need for the discovery outweighs the burdens and costs of locating, retrieving and producing the information” (committee note to FRCP 26(b)(2)(B)). The court will then make a determination based on the FRCP 26(b)(2)(C) proportionality standard and the widely recognized factors in *Zubulake v. UBS Warburg* (2003).
- A “safe harbor” exists to protect the parties, which states that “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system” (FRCP 37(e)).
- “Good-faith” operation requires the producing party to halt the destruction or modification of potentially responsive ESI (known as implementing “a litigation hold”) when litigation becomes reasonably foreseeable (committee note to FRCP 37). Possible sanctions for less-than-good-faith preservation or outright spoliation of evidence include delivery of adverse inference jury instructions, assessment of costs, and the ultimate sanction: judgment for the requesting party, as was held in the cases of *Ramirez-Baker v. Beazer Homes, Inc.* (2008) and *West v. Goodyear Tire & Rubber Co.* (1999). The new federal rules regarding e-discovery are also collected and neatly summarized as “the Sedona Principles” (Sedona Conference, 2003).

Please note that since undergoing these major changes, there have been additional, relatively minor amendments to the FRCP and the Federal Rules of Evidence (FRE). For the sake of brevity, we will not elaborate on those changes here.

State Rules

While the federal rules are not binding in state courts, they are typically persuasive, especially on developing fronts of procedure where states have not yet expanded their own rules. In fact, many states have followed the federal rules very closely in updating their own court rules. For example, the e-discovery-related language of Michigan Court Rules 2.302, 2.310, 2.313, 2.401, and 2.506 (as enacted on January 1, 2009) is nearly identical to that of the FRCP, and this treatment is fairly typical among the many state judiciaries (state rules and statutes are available from Kroll Ontrack, 2011).

HOW DOES ARBITRATION HANDLE E-DISCOVERY?

We spoke to several employment attorneys and arbitrators, all of whom preferred to remain anonymous, about the use of e-discovery in employment arbitration. They all said basically the same thing (note that one of the authors of this article was in charge of selecting and appointing arbitrators for the State of Michigan for 12 years):

We rarely use or even mention e-discovery.

It is not an issue in our cases. We avoid it completely.

You know how it goes. You certainly have tried enough arbitrations to know the game. We use a few witnesses, the discipline chain, and any notes we may have from an investigatory interview. Nothing has really changed.

The potential for seemingly limitless e-discovery in arbitration apparently threatens to eliminate the classic benefits of alternative dispute resolution (ADR), including lower costs, a shorter timeline, and more privacy. Certain questions logically follow: *Must arbitration include e-discovery? Is it possible to sift out the necessary and relevant evidence from a sea of ESI in a time- and cost-efficient manner?* The answer to both is almost certainly “yes.”

As we evolve into an increasingly paperless society, whether information relevant to a legal dispute can be collected, searched, and produced depends on how well prepared the parties are to address and conduct e-discovery in an effective and efficient manner so that due process can be adequately provided to both parties (Estrada, 2009). In the recent past, some defendants have managed to avoid the production of damaging ESI on the grounds that the time and expense involved in such efforts would undercut the very efficiency afforded by arbitration in the first place. However, while FRCP 26(b)(2)(C) provides that the producing party need not provide discovery of ESI that “is not reasonably accessible,” plaintiffs can and should insist on such production (using the *Zubulake* proportionality standard for a good-faith request) when it is necessary to present their cases and support their claims for relief. Defendant-employers should not be permitted to avoid accountability for their actions simply because they induced employees to sign their agreement to an arbitration clause, which already primarily benefited the employer by saving it the time, expense, and publicity of a public trial examining its employment practices. When compared with the likely costs of litigation (if the plaintiff was permitted to file his claim in court at the outset), accessing and producing electronic data stored on a computer, server, or back-up tape would almost certainly be inexpensive, and the data would be considered “reasonably accessible.”

Arbitration Guideposts

The Federal Arbitration Act (FAA) of 1925, 9 USC 1 (and its subsequent case law) generally provides that parties are free to fashion their own discovery rules, so long as the following due process standards are respected:

1. There must be adequate discovery. Even the FRCP do not require discovery of *all potentially relevant information*. Good faith and reasonableness have governed the application of the proportionality test outlined in Rule 26(b)(2) (Ragan & Copple, 2008). The Revised Uniform Arbitration Act (RUAA) of 2000 states that arbitrators “may permit such discovery as [they] decide . . . is appropriate in the circumstances, taking into account the needs of the parties . . . and the desirability of making the proceeding fair, expeditious and cost effective” (RUAA § 17(c)). Arbitrators have long had wide discretion in determining how much discovery is adequate in their proceedings, and reviewing courts very rarely disturb the arbitrator’s decisions (Bedikian, 2006). However, if the parties can agree prior to their hearing on the extent of discovery, particularly if it is according to a recognized standard for arbitration, the arbitrator may defer to the parties’ agreement.
2. “Both parties shall be able to present their case . . . with rules and procedures that are fair in form and provide due process.” This standard was developed in *Floss v. Ryan’s Family Steakhouses, Inc.* (2000). Due process is a constitutional guarantee to citizens that provides the assurance that all levels of American government must operate within the law and provide fair procedures (Strauss, 2011). Considering especially cases where there is a disparity in resources and/or control of relevant evidence, as in the mandatory arbitration of a nonunion employment dispute, the disadvantaged party (often the employee plaintiff) cannot be expected to put up even a prima facie showing of his or her claim or defense without adequate access to e-discovery (Swift, Jones-Rikkens, & Sanford, 2004). Therefore, as decided in *Ramirez-Baker v. Beazer Homes, Inc.* (2008), if much of the employee’s relevant evidence (e-documents, e-mail, voicemail, instant messaging logs, text messages, etc.) is located on employer-controlled information systems, the arbitrator will have to allow the employee some e-discovery in order to provide due process. We will discuss this issue in more detail below.
3. Interestingly, due to concerns about the inherent disparity in bargaining power between the parties, Congress is presently considering a bill to be called the Arbitration Fairness Act, which would prohibit employers from insisting upon the arbitration of consumer disputes and employment litigation (Olson, 2011).
4. The arbitrator shall have the authority to provide substantially the same remedies as a judicial forum, including attorney fees (*Circuit City, Inc., v.*

Adams, 2002). Presumably, this precedent reserves for the arbitrator the power to sanction recalcitrant parties who fail to comply with any facet of the arbitration process, including e-discovery. Sanctions as severe as adverse inferences have been upheld by reviewing courts (Mintz, 2009).

The trend appears to be toward permitting broader e-discovery rights in arbitration. Still, it is highly advisable that employees and their attorneys carefully craft language providing for e-discovery in any arbitration clause that they might sign (Swift & Chester, 2006). If the employment contract is silent as to the scope of discovery in arbitration, then plaintiffs should insist upon negotiating the scope, form, and procedures for e-discovery with the employer's counsel prior to meeting the arbitrator, to ensure that this important right is not considered waived by such contractual silence (Bennett, 2009).

ARBITRATION IN NONUNION EMPLOYMENT CASES

The three cases that follow are actual nonunion employment cases that were fully arbitrated and may be found on Grand Valley State University's Arbitration Web site at <http://www.gvsu.edu/arbitrations/>

Scenario 1: Sleeping on the Job (*Archer 2*)

A supervisor asked a store detective to follow and monitor an employee during her shift (from 10:00 pm to 6:00 am) to determine if she was sleeping while she was supposed to be doing her job. Later, at the employee's arbitration hearing on her charge of wrongful termination, the investigator explained how the employee had been observed shopping for herself, purchasing merchandise and taking it to her car, taking long bathroom breaks, making personal calls from the breakroom, and even resting her head in the store's learning center for a period, all while on the clock. The terminated employee did not dispute these facts.

The primary evidence used in the arbitration included testimony by witnesses including the store detective, the personnel records of the terminated employee (and of other employees who were terminated for sleeping), the arbitration manual for nonunion employees, and the employer's other rules and policies.

The arbitrator weighed the testimony of the witnesses and upheld the employee's discharge. He also denied the employee's discrimination claim because he found there was slim evidence to prove such motivations.

The same case arbitrated today would very likely involve a myriad of other sources of evidence. In a retail environment, digital security cameras monitor the store, electronic key cards control access to doors, electronic records are kept to track employee productivity and inventory levels, and much communication is generated and preserved by cell phones, e-mails, and text messaging providers. All of this information should be available to the arbitrator in a case like

this, even if its collection and review is expensive for the employer, because an arbitrator's decision will be more just where he or she has as much probative, objective evidence available.

For instance, digital camera data might reveal that many employees at a 24-hour retail store took time to nap at three or four in the morning when the store was virtually empty. A video clip might even show a supervisor or two walking past a sleeping employee and the supervisor ignoring the transgression. E-mails might reveal that a white supervisor had little tolerance for the mistakes and activities of nonwhite employees and made inappropriate comments on a regular basis in e-mails. Text messages might indicate that only certain employees were targeted for discipline and monitoring while others were never monitored. Such disparate treatment of employees, while not necessarily exonerating the employee who was fired for sleeping, could certainly be considered relevant to an arbitrator who is carefully weighing the reasonableness of an employer's disciplinary policy.

Scenario 2: Drag Racing and Race Discrimination (*Beckman 2*)

A store manager went outside with some of his employees during a break to drag race. The manager employee was later terminated for "poor judgment." The employee claimed during arbitration that he was not discharged for poor judgment but because he is African American, stating that the employer had exhibited "a pattern and practice of discrimination."

The evidence used at the arbitration was the testimony of several witnesses, the employee handbook, the employee's personnel records, and statistical evidence concerning the employer's hiring of nonwhite employees. After a hearing, the arbitrator found that the employer had just cause to terminate the employee because of his poor judgment in a supervisory role. The arbitrator further asserted that even though the employee was on break, he was a salaried employee who engaged in a dangerous activity during his scheduled work hours. The arbitrator also found no evidence of race discrimination.

In addition to the sources of evidence already mentioned previously, arbitrated today, this case might have also included electronic evidence from human resources management software (used to provide hiring statistics), traffic camera video footage that might show many white supervisors engaged in similar behavior, cell phone photos demonstrating that drag racing was a nightly event of which all store employees were aware, and data from GPS devices (including navigation systems, cell phones, and other wireless devices) inside vehicles that would pinpoint exactly which vehicles were used in racing. With technological advances occurring almost daily, the potential scope of discoverable information in the exclusive possession of the employer is perpetually expanding, and

claimants will have to know what to ask for, because the custodians of such ESI are not likely to produce it voluntarily.

Scenario 3: Employee Theft (*Grissom 4*)

In this case, an employee who had worked for the employer for 31 years was terminated for stealing a pack of cigarettes. The employee had no prior disciplinary action in her employment record. On the day in question, she was shopping in the store and was not working. She claimed she was afraid the cigarettes would fall out of the large shopping cart so she put them in her purse with the intention of pulling them out when she went to the register. The store detectives claimed that when she was apprehended she told conflicting stories that made it clear she intended to steal the cigarettes. The employee's daughter testified that her mother was taking care of her elderly parents in addition to working and was therefore under stress. The evidence at the arbitration hearing included the employee handbook, the testimony of the employer's witnesses, and the testimony of the employee and her daughter. There was also a video of the employee that simply showed her in the store on the day of the alleged theft. The employer's arbitration rules and procedures and the employee's personnel file were also introduced into evidence.

The arbitrator based his decision primarily on credibility when he decided that the former-employee witness was not credible, upholding the discharge. If this case were tried today, the employee would add at least the following requests to her discovery list to the employer prior to the arbitration:

- *All e-mail and text (SMS) messages in your possession:*
 - *regarding the grievant and any disciplinary or productivity problems for the last [reachback length of time];*
 - *sent from the grievant to her superiors regarding work-related problems for the last two years; and*
 - *regarding the grievant that had been sent by supervisors, coworkers, or others to the grievant during the last two years.*
- *All security video footage for the date of the alleged theft by the grievant. (In this case there was no visual, impartial proof that a theft occurred).*
- *All radio-frequency identification (RFID) tag data that are available for the date of the alleged theft by the grievant.*
- *All electronic keycard access data that are available for the date of the alleged theft by the grievant.*

As an experienced litigator knows, supervisors are often much more candid about their true feelings when writing a quick e-mail or text message. These messages may show the true motivations of a supervisor, which often have little to do with the disciplinary action in question, or which may at least call into question the supervisor's moral and ethical character.

MANAGING E-DISCOVERY AND PRESERVING THE ADVANTAGES OF ARBITRATION

Arbitration has become a popular alternative to litigation because its relaxed rules of procedure and evidence save substantial time and money for all involved. While legal disputes can be resolved privately and less expensively using arbitration, an important fact remains: in today's digital age, the majority of information about any legal matter is likely to be stored electronically. Therefore, as zealous custodians of their information, employers have an inherent advantage because they possess almost all of the relevant evidence in any employment dispute. Employees and their counsel must recognize this fact and be especially diligent and adamant about demanding access to such evidence, because failure to do so can reduce a meritorious case for relief to an unfounded allegation. Arbitrators who ignore ESI are ignoring due process and they take the risk of being overturned in a court of law (*Ramirez-Baker*, 2008), and employers who fail to maintain adequate electronic record-keeping procedures may face contempt or spoliation claims when they cannot produce ESI to which they at one time had access; employee-plaintiffs should tacitly remind employers and arbitrators of these risks from the beginning of the arbitration.

Several recent developments in case law have further broadened the realm of potentially discoverable ESI. While reversing and remanding the decision of the lower court in *City of Ontario v. Quon* (2010), the United States Supreme Court held that an officer's Fourth Amendment rights were not violated when his employer discharged him for improper use of an employer-provided mobile device, when it was discovered that he had been sending sexually explicit text messages to his mistress. The court held that as long as the monitoring of employee activities is reasonably conducted for a legitimate purpose, employees are not entitled to complete privacy in personal activities or communications conducted on an employer-provided device (*City of Ontario v. Quon*, 2010). This decision is not in the least surprising, given that in *People v. Kwame M. Kilpatrick* (2008), the State of Michigan famously relied upon illicit text-messaging evidence in prosecuting the former mayor of Detroit (Saulny & Bulkny, 2008) for a litany of illegal abuses of political power. The National Labor Relations Board successfully contested the discharge of an employee who posted critical comments about her supervisor on Facebook, arguing that the use of such statements—made outside of the workplace to third parties, and not dispositively false or defamatory—is an unlawful prohibition on the employee's right of free speech. The parties settled the case out of court when the employer agreed to broaden its restrictions on employee discourse in public media forums (Greenhouse, 2010). If such social networking activities are ruled to be discoverable, the amount of potentially discoverable ESI in nearly every case multiplies significantly, given the pervasiveness of such activity on mobile networks and the Internet today.

So it appears inevitable that e-discovery must be permitted in order to ensure due process in arbitration. The challenge, then, lies in providing reasonable e-discovery during arbitration without sacrificing the expedience and cost-containment that have always been its hallmarks. As our examples illustrate, organizations have many sources of potentially relevant ESI, and producing data from these sources can be expensive and complex. Unfortunately, companies are usually ill-prepared to preserve and produce ESI in response to a legal dispute, but in cases such as *Textron Fin. Corp. v. Eddy's Trailer Sales, Inc.* (2009), courts have consistently held that the high cost of e-discovery due to poor records management practices does not excuse employers from their preservation and production obligations.

Employees and their counsel have to be ready to respectfully yet assertively inform and guide the arbitrator about the proper scope of discovery. Losing access to critical ESI-evidence could fatally wound even the strongest claim; therefore, it may be a minimum standard of professional competence for an employee-plaintiff's attorney to be aware of the ever-broadening range of e-discovery prevailing even in arbitration today (Wang, 2008). Employees should also adhere to a few simple principles to preserve their e-discovery rights:

- **Identify and familiarize themselves with their employer's employment-dispute resolution protocol.** Ever since the Supreme Court mandated that employees submit to arbitration when they had agreed to do so in their employment contract, employers have been including mandatory arbitration clauses for any employment-related disputes as a matter of standard practice, and have had them upheld (*Morrison v. Circuit City Stores, Inc.*, 2003). If the employee has signed such an agreement as a condition of employment or otherwise, then it will be enforced (unless it is grossly unconscionable). If no such clause exists, then the employee can file his or her claim in court, where the federal rules will permit broad e-discovery.
- **Locate and document potential sources of ESI prior to asserting a claim.** While still employed or shortly after leaving, employees must pay close attention to the electronic data records systems in use by their employer. The preceding list of discovery requests describes many potential sources to look for, but the more thorough and specific the requests for e-discovery, the better. Consider the following common sources of ESI in the workplace: electronic word processing documents or spreadsheets, e-mail messages, text messages, digitally stored photos and videos, electronic keycard logs, computer and company network access logs, GPS-tracking data from cell phones and other mobile devices, radio frequency identification data (RFID) tracking logs (which may be embedded in inventory, equipment, assets, etc.), and data from specialty software applications, such as a time clock, personnel management system, customer relationship management (CRM) tool, Internet and intranet

sites, etc. Employees should also ask whether the employer has data retention obligations pursuant to various local, state, and federal laws (for example, Federal Trade Commission (FTC) “Red Flag” rules, Health Insurance Portability and Accountability Act (HIPAA), Gramm–Leach–Bliley Act (GLB), Sarbanes–Oxley, etc.) because this evidence is obtainable from the employer or by Freedom of Information Act (FOIA) request. They should ask coworkers for more sources.

- **Issue a litigation-hold letter identifying discoverable ESI to the employer as early as possible.** FRCP 37(e) requires the producing party to halt the destruction or modification of potentially responsive ESI (known as a “litigation hold”) when litigation becomes reasonably foreseeable (committee note to FRCP 37). Possible sanctions for less-than-good-faith preservation or outright spoliation of evidence include an adverse inference jury instruction, assessment of costs, and the ultimate sanction: judgment for the requesting party, as was held in the cases of *Ramirez-Baker v. Beazer Homes, Inc.* (2008) and *West v. Goodyear Tire & Rubber Co.* (1999). Employees should identify as many discoverable sources as possible in a litigation-hold letter to prevent normal-course destruction or deletion prior to discovery.
- **Seek a collaborative agreement regarding the reasonable scope of discovery prior to the first hearing.** Parties must work together to identify where relevant materials reside, what constitutes a reasonable scope of discovery, and how ESI will be searched and produced. Employees and their counsel cannot rest on this point if ESI is critical to the employee’s case. Electronic evidence is not the same as paper, and the traditional discovery paradigm is grossly ineffective when dealing with ESI. By nature, electronic evidence is much more fickle and complex, so it requires a different perspective. To ensure an effective strategy, employees and their counsel should find someone who is qualified to translate technical issues into practical advice. An attorney lacking a strong IT background is not the right person for this job. If employees cannot afford to hire an IT consultant or e-forensics expert, they should consider asking the arbitrator to appoint a special master to provide a neutral resource to help clarify disputed IT terminology or other technical issues (Scheidlin & Redgrave, 2008). Finally, they should document all communications with the opposing party to show good-faith efforts.
- **Do not surrender access to discovery easily.** Employees should insist upon the plaintiff’s right to adequate discovery as a matter of due process, and preserve an objection (for the record, otherwise informally) if requested discovery is denied. Employers will often claim that requested evidence is “not reasonably accessible,” but employees should be prepared for this objection with compelling “good cause” evidence showing that the important need for the evidence outweighs the employer’s burden of production under the aforementioned *Zubulake* proportionality factors.

SUMMARY

As arbitrators become more aware of the prevalence of ESI, they will begin to expect that certain minimum measures will have been taken by the custodians of such information. As more and more arbitration awards become available for review, it will become clearer just what “adequate discovery” in arbitration means with respect to e-discovery, and prospective litigants will be able to adopt new practices accordingly. Now more than ever, appellate judges, arbitrators, attorneys, and litigants share equal responsibility for making e-discovery reasonable and productive. Many large corporate employers and their counsel have exploited the simplicity and secrecy of mandatory arbitration to avoid exposure to full-blown public trials with broad and extensive discovery, but employees and their counsel can expose this covert subversion of justice by insisting on broad access to ESI as a matter of due process even in arbitration. The time has come for all employers and arbitrators to stop feigning ignorance to avoid e-discovery and begin to restore to everybody the constitutional right of due process.

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