

Getting ahead of (and preventing) ESI Discovery disputes in Construction Arbitration

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HAVE A PLAN



Differences with esi—the challenges

Volume of data

Mobile-all over the place-texts

Dynamic and mutable

Proprietary program problems/version access

Who has what

Pricing model: by gb or license?



The client conversation:



First steps TO DEFINE:

- Identify the key issues
- Identify the key custodians
 - Lock data sources down
 - Get a liaison

RELEVANCE MATERIALITY PROPORTIONALITY



01

DEFINE

02

PRESERVE

03

COLLECT AND
PROCESS

04

PROTOCOL AND
IMPLEMENTATION

ESI : step 1

Relevance, materiality and proportionality

Data mapping: what types. Locations, accessibility, key control personnel a/k/a “custodians”

Emails, e-documents, databases, social media, cloud storage, software apps

Scope – specific project, timeframe

Custodians: internal and external stakeholders: in-house and outside counsel, experts, project managers, IT

Get everyone on the same page: same tags, folder structure, codes



Emails-texts-messaging apps like whats app or slack-social media-websites and servers-voicemail-communication platforms, Zoom, Teams-cloud based storage and apps-backup systems-legacy systems-archival systems-personal computers and laptops-mobile devices, smartphones, tablets-external drives, flash media, network storage-home computers used for work-document management systems-databases used-drawings (BIM, CAD) and 3D modeling programs-estimating software-schedule files (Primavera, MS project)-job cost control software-project management software (Autodesk, Procore)-production tracking (trades, mep) material management systems-photography (cameras, phone cameras, video, drones, Go-pro)-wearables-machine or device generated data-machinery telematics



ESI step 2: preservation

- Litigation holds, document preservation including metadata
 - Accessing the data: vendor product version issues/out of date
- The basics: de-duping, email chains, matching
- Scott schedules: unresolved multiple change order issues
- Redfern schedules: tying documents issue to the claims

THE PRELIMINARY HEARING



- Scope

- Timing and deadlines



- Focus on key issues



- Isolating project data in multiproject settings



- The standard to which everyone will be held accountable



ESI step 3: planning the protocol

Party meeting. MEET

Avoid the litigation sinkhole—not state court

Plan:

- What's relevant

- Timeframe/rolling

- Exchange methodology

- Privilege plan: privilege logs, clawbacks, confidentiality order

Metadata requirements

Threading and de-duping



ESI step 4: implementation

- Form of production
- Security of exchange, security protocols
- Confirm ethical standards-CONFIDENTIALITY AGREEMENTS
- Privacy concerns-PRIVILEGE
- Confirm compliance-AUDIT

You are on the hook for your vendor

The view from under the bus



Know your forum

Different arbitral forums have different rules

Different cultures on discovery

Different panels on discovery

Read the rules

Be Aware of what statutory scheme you are under



COMPARISON OF RULES

Forum	ESI Rule	Discovery Philosophy	Typical Practice
AAA Commercial	General authority over exchange of information; no detailed ESI rule	Limited, proportional discovery	Narrow document production; ESI only if justified
ICDR	Express emphasis on efficient, economical information exchange	Civil-law influenced, proportional	Limited ESI, often guided by IBA Rules or tribunal orders
JAMS	Arbitrator controls all discovery	Flexible	Can resemble federal discovery if parties request
CPR	Detailed Protocol on Disclosure of Documents and ESI	Strong proportionality	One of the most developed ESI frameworks
ICC	No formal ESI rules	Tribunal discretion	Frequently uses IBA Rules and Redfern Schedules
LCIA	Tribunal discretion with efficiency mandate	Restrictive	Targeted electronic discovery only
SIAC	Minimal rules	Tribunal discretion	Limited production; ESI uncommon absent need