NYSBA SPRING 2009 | Vol. 2 | No. 1

New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section
of the New York State Bar Association

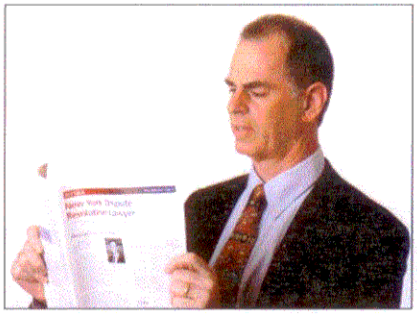
Message from the Chair

There are a host of reasons why the members of this Association chose to go to law school. Of course, we all want to make a good and honorable living; but at the core, one may wager that a healthy number of us hoped to *help others* through the practice of law and perhaps gain wisdom in the bargain. While not applying the medical arts to relieve physical suffering, we *juris* doctors also aim to relieve suffering through work on our social "mechanism." We repair breaches of faith, correct breaches of contract, and shift property or money to compensate wrongs and help those who have suffered from acts or omissions of others.

The more time one spends laboring in the vineyards of the law, however, the more one sees that life is messy and multi-variegated. Even with a refined understanding of this social mechanism, we not only find odd variations in the ladder of statute and *stare decisis* but also observe that the wants and circumstances of parties do not necessarily fit into neat classifications of right and wrong, tort or breach.

Faced with parties in dispute, we see the uniform objective mechanism called into question. We also see the human, subjective realm all too often overlooked. From hornbook black and white through case law grey, we find human life is in living color. And the most significant enterprise may be not developing the objective structure (which, of course, remains critical) but helping the people involved.

The manner in which we practice law also matters. For years we have called for civility in the law. NYSBA's 108th President, Vince Buzard, made it one of his watchwords. In 2006, civility was at the heart of a NYSBA program in Albany; and last April it was front and center in a Commercial and Federal Litigation Section presentation in Buffalo. The Association as a whole has adopted Guidelines on Civility in Litigation.



Simeon H. Baum

Beyond the tone between siblings at the Bar, there is also the question of consequences of litigating disputes. We come into law caring for all people. We seek to empower all; to foster creativity, compassion and justice. Law is a fascinating engagement, and like reinsurance, an honorable undertaking. We have long benefited from the adversarial system. But does what we seek always entail fighting oppression? Does the pursuit of justice require corpses on the floor?

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NYSBA

Protocol for E-Disclosure in Arbitration Issued by the Chartered Institute of Arbitrators

By Steven A. Certilman

Like a procedural soldier advancing on ever-higher ground, the process of e-disclosure in the United States has surmounted the point of commonplace in the litigation theater and stands poised to overtake a major hill—arbitration. The moral high ground of the resistance, if it may be thought of as such, arises directly from arbitration's mantra: *quicker, cheaper, better*—the attributes that are proudly viewed as its historical foundation. Whether this will be a quick or a bloody battle depends largely on the attitudes of the disputants or, more particularly, their counsel.

As we know, one of the great philosophical divides between litigation and arbitration, at least in the United States, can be found by looking at the way in which information gathering is conducted prior to the hearings. While parties in litigation have a virtually unfettered right of access to the discoverable matter of their adversaries ("reasonably calculated to lead to admissible evidence . . ."), their counterparts in arbitration may find that the governing rules place a great deal of discretion on the arbitrator, who will often bring a cost-benefit analysis into the equation.[1] In the international arbitration arena particularly, there is a broad consensus that there is no place for litigation-style discovery practices.

With much of the business world now conducting substantially all of its business communications by e-mail and other electronic means, discovery of evidence in electronic format can hardly be ignored. There is a great deal at stake for the arbitral process in the manner in which it comes to accept e-disclosure and fit its costly and demanding burdens, as well as its resulting evidence, into its processes. Can arbitration stand resolutely in opposition to e-disclosure? Not a chance. Should it allow e-disclosure to become e-discovery and, thus, blur, perhaps, the distinction between litigation and arbitration which is most advantageous to its users? Most would argue not. Arbitration must find a way to adapt. The debate is well under way.

Putting another log on the fire, The Chartered Institute of Arbitrators (CIArb)[2] has published a *Protocol for E-Disclosure in Arbitration* (the Protocol).[3] The October 2008 protocol, principally drafted by David J. Howell, was the work of the Arbitration Sub-committee of The Chartered Institute's Practice and Standards Committee, chaired by John Wright. It is presented to bring focus on many of the issues typically arising in e-disclosure requests and to aid arbitrators, counsel and parties in analyzing such requests. While effective management of e-disclosure requests is the ultimate goal of the Protocol, it is intended as both a recommended set of guidelines and, if deemed appropriate by the parties, a binding set of rules which the parties may adopt by agreement.

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From the outset, in cases in which issues relating to e-disclosure are likely to arise, the Protocol encourages parties to confer "at the earliest opportunity" to facilitate preservation and disclosure of electronic evidence. Pushing the issue front and center, arbitrators are also encouraged to inquire "no later than the preliminary meeting" whether e-disclosure is likely to play a role in the case.

To assist arbitrators, parties and counsel with their analysis of the e-disclosure process, the Protocol highlights some of the most important related concerns such as methods and media of storage, retention concerns, and governing law, rules and agreements. Suggestions are made for methods of reducing the burdens and cost of e-disclosure such as limitations on categories of documents, document date ranges and custodians, use of agreed-upon search terms, and software tools and output formatting.

The Protocol makes a real effort to encourage an application of e-disclosure principles that uses arbitration values in balancing the need for relevant evidence to be produced against the risk of excessive cost and burden in its production. Clearly, fishing expeditions are not welcome. This is consistent with the view of dispute resolvers throughout most of the world where such un-targeted disclosure requests are impermissible. This balanced approach becomes clearly evident in the section dealing with the requests for e-disclosure. Rather than endorse open-ended requests, the Protocol calls for a description of each requested document or a narrow and specific category of documents. Nevertheless, it would still appear permissible to request documents by referring to key words or phrases contained therein. Requests also must describe the relevance and materiality of the requested documents, recite that the requested documents are not in the possession and control of the requesting party, and give the reason why the requested documents are assumed to be in the possession and control of the produc-

ing party. Perhaps this final condition may fail a cost-benefit analysis, given the ability of a disclosing party to respond to requests for documents it does not actually possess or control by simply making a statement to that effect.

Guidance is offered to the arbitrators in issuing orders for e-disclosure. This guidance may, of course, become a control on the arbitrators if the parties have adopted the Protocol by agreement. Arbitrators are encouraged to apply the specific balancing considerations of reasonableness and proportionality and fairness and equality of treatment of the parties. Included in the balancing test is consideration of the costs and burdens of compliance with an e-disclosure order.

The Protocol discourages ordering e-disclosure of hidden metadata and other disclosure where the materials would come from inactive data such as backup tapes, erased data and archived data routinely deleted. Rather than incorporate a bar to such disclosure, however, the Protocol conditions such disclosure on a showing that the relevance and materiality of such production outweighs the costs and burdens of retrieving and producing the material requested.

In order to provide a baseline for e-disclosure production, the Protocol establishes that as a default, electronic documents are to be produced in their native format subject to agreement of the parties or the discretion of the arbitrators to order otherwise.

Although there is nothing about the CIArb's Protocol that makes it incompatible with all types of arbitration, domestic or international, it was drafted expressly for use in "those cases (not all) in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue." In this respect, its focus differs slightly from the protocols and guidelines of other major arbitral organizations such as the CPR (International Institute for Conflict Prevention and Resolution) and the ICDR (International Centre for Dispute Resolution), which are in various stages of development and adoption. Moreover, as it was envisioned to apply primarily in international arbitration cases, the Protocol appropriately references the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration,[4] a most important resource on the subject.

It has been suggested that the very existence of guidelines such as the Protocol will give rise to inappropriate demands for disclosure of electronic documents in arbitrations in which no such issues should arise.[5] There is certainly reason to be concerned about the inappropriate use of requests for e-disclosure. Such disclosure tends to be more costly, and although the arbitrator is empowered to re-allocate the costs, the requests themselves are often used more as a tactic of oppression than as a means of seeking evidence. Given that the preponderance of cases settle before award, in many cases there may never be an opportunity to have those costs reallocated. For this reason, the Protocol sensibly encourages arbitrators to allocate the costs of e-disclosure at the time of making such an order (rather than waiting for allocation upon the issuance of the award), a means of mitigating the potentially oppressive effect of an e-disclosure order. I would like to believe that the concerned commentators would agree that the deterrent to such tactical use of requests for e-disclosure is vigilance and assertiveness among arbitrators, not curtailment of the discussion and its resulting recommendations.

I have always believed that in both litigation and arbitration, 90% of the evidence is uncovered with 10% of the effort and expense. The growth of arbitration as a dispute resolution method, with its core values of speed and cost-effectiveness, reflects a widespread appreciation among parties of the value of the 90-10 Rule. This view is also reflected in the spirit of the Protocol.

Endnotes

1. Contrast Federal Rules of Civil Procedure Rule 26 and Civil Practice Law and Rules § 3101 with, e.g., Commercial Rules, American Arbitration Association, Rule R-21:

   > R-21. Exchange of Information
   >
   > (a) At the request of any party or at the discretion of the arbitrator, *consistent with the expedited nature of arbitration, the arbitrator* may direct
   >
   > i) the production of documents and other information, and
   >
   > ii) the identification of any witnesses to be called.
   >
   > (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
   >
   > (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information. (emphasis supplied)

   See also *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* at http://www.adr.org/si.asp?id=5288.
2. Founded in 1915 and now with 11,000 members across more than 100 countries, CIArb is a center of excellence for the global promotion, facilitation and development of all forms of dispute resolution (http://www.arbitrators.org).
3. The Chartered Institute of Arbitrators e-Disclosure Protocol may be downloaded at http://www.ciarb.org/Institute/EDisclosure.asp.
4. This may be downloaded at http://www.ibanet.org/Document/Default.aspx?DocumentUid=E9FE4F0E-E81B-4623-B26A-1D9808F2B450.
5. *See, e.g.*, Fulbright Alert, International Arbitration, *Protocol for e-Disclosure in Arbitration Issued by the Chartered Institute of Arbitrators*, October 3, 2008.

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