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Mediation Matters

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Using Mediation to Resolve e-Discovery Issues Effectively

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Experienced restructuring professionals know that litigation is expensive, and each year it seems that the cost of litigating a dispute continues to grow. Discovery as a standalone component of litigation might be the single largest factor contributing to the full cost of litigation, due to the burgeoning need to include e-discovery with more traditional forms of discovery.

The nature and extent of data grows exponentially on a daily basis. Science and technology continue to develop, expanding the universe of devices holding data and information. It is often the cost of discovery that pushes the parties to settle a dispute. As the U.S. Supreme Court noted in *Bell Atlantic Corp. v. Twombly*,[1] "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases."

Recognizing this reality, some practitioners are turning to mediation as a means to limit or stem the costs that are involved. Furthermore, programs encouraging the use of mediation to resolve (or at least narrow) e-discovery issues are beginning to sprout up in various jurisdictions. The reason for this trend is clear: Mediation of e-discovery disputes, especially in distressed circumstances, can help parties satisfy their respective interests in a cost-effective manner and reach a value-maximizing result that is tailored to a permanent solution.

In 2015, the Federal Rules of Civil Procedure were amended to refine the courts' approach to e-discovery. To date, most, if not all, courts have implemented local rules to govern the handling of electronic discovery in order to address these issues and facilitate compliance with the changes in the federal and state court discovery rules. Those who have engaged in litigation involving e-discovery on even a small scale can agree that if e-discovery is not approached wisely and carefully, it can lead to a mountain of costs and wasted time and effort. With e-discovery, there is an additional layer of technicality, such as understanding the set-up and mechanics of various computers and portable devices for purposes of both seeking and reviewing information contained therein.

In order to effectively propound, respond to and conduct e-discovery, attorneys must have some understanding of the functionality and limitations of computers and electronic devices. Absent such knowledge (or access to and involvement of someone with such knowledge), it is quite difficult to develop and appropriately construct a discovery plan — not to mention evaluate and respond to any disputes that could arise. Disputes regarding e-discovery typically involve competing views on what information is relevant and accessible, as well as diverging views on key topics such as proportionality. Without requisite knowledge, parties could be hamstrung to appropriately identify and agree upon optimal procedures for parsing through information contained in electronically stored formats. This lack of knowledge may not only create impediments to the process, but could independently drive up costs further through inartful drafting of demands and/or awkward processing of data. This goes beyond the traditional arguments of relevance and responsiveness.

When considering the cost of mediation, it is important to remember that these costs can include "hard" costs (*e.g.*, the time and expense of obtaining documents/information, and reviewing and analyzing the same by experts, forensic analysts and/or attorneys) and "soft" costs (*e.g.*, lost business time for employees involved in the process). Although discovery has always been

1 550 U.S. 544, 559 (2007).

costly, in today's business world costs can quickly skyrocket due to the pervasiveness of data located on myriad devices. Data can be stored in many places and take many forms; this includes active and inactive data, data that has been deleted, data that might be maintained in archive forms, in the "cloud" or off site, and data maintained on back-up tapes or the like.

At the outset of a new litigation matter, many firms now bring technical experts to initial pretrial conferences to help advise on the parameters of any discovery orders or scheduling orders. By bringing an expert in early on, firms can ensure that they not only develop discovery plans that will capture the "relevant" and desired information, but also ensure that they are feasible and can be accomplished by their clients and team. To the extent that search terms or concepts are discussed, having the expert present can avoid significant delays and motion practice later down the road. Identifying all parties who could hold, possess and/or have access to key data is important, as is identifying all the potential devices; to that end, someone from a client's IT department should probably be involved in the discovery process and perhaps even discovery conferences.

While the parties will jockey to ensure that they are each appropriately situated at the outset, the court has to wrestle with deploying its own judicial resources efficiently in considering the ability to handle any disputes from the growing field of potential information. The more there is to seek and demand, the greater the likelihood for dispute. Some of the thornier issues that arise for a court to consider will include requests to access a company employee's personal mobile devices or laptops; requests to access decommissioned or recycled technological assets; archives and external storage media; and regulatory issues. This does not even begin to dip into other issues such as the Health Insurance Portability and Accountability Act, document-retention obligations, compliance or spoliation.

Unlike more traditional discovery disputes, such as the scope of interrogatories or document-production demands, e-discovery disputes could include some very technical constructs. Further, issues such as ongoing data preservation and potentially even spoliation (inadvertent or otherwise) must be addressed. Many judges are simply not familiar with technical issues (and, quite frankly, neither are many lawyers). However, this means that parties might need to educate the court in the event of a dispute so that the court can effectively and fully render a determination concerning any issues that might arise. It is this problem that has led attorneys to bring their expert document-management clerk, paralegals or service provider into the case from the outset in order to attempt to bridge the knowledge and communication gaps between the bench and bar. This is also important to assist in formulating the methodology for the discovery process. On a related note: Counsel should consider that sometimes those who are facile with computer issues may not be capable of explaining them to the layperson in plain English.

It is with this backdrop that some courts have started to consider utilizing mediators to resolve e-discovery disputes in certain circumstances. Bringing the construct of mediation into the forum of e-discovery allows the parties to potentially control, in part, the largest cost of their litigation. Unlike mediation of the entire dispute, mediation of e-discovery is a discrete process that can be carved out of the overall issues at hand.

For example, the Seventh Circuit Electronic Discovery Pilot Program Committee has created a voluntary e-mediation program,[2] and the U.S. District Court for the Western District of Pennsylvania has established an electronic discovery mediation program.[3] These programs recognize that e-discovery disputes warrant their own construct for potential resolution in order to attempt to control costs. A brief description of each program is instructive in understanding the potential for the advent of similar programs in other jurisdictions.

The Seventh Circuit Electronic Discovery Pilot Program Committee was formed in May 2009 to bring together a wide range of experts in that jurisdiction focused on promoting discovery procedures in support of resolving civil cases as efficiently and justly as possible. One project of the committee is a voluntary e-mediation program that provides volunteer mediators from among the members of the pilot program to mediate e-discovery disputes. The program is focused exclusively on smaller civil cases, and the mediators do not serve as special masters and are not court-appointed. Instead, mediators serve with the full consent of the parties for the purpose of attempting to resolve questions related to an e-discovery dispute component of the litigation.

The mediation program in the Western District of Pennsylvania was created by the E-Discovery Special Master Subcommittee as a supplement to the Electronic Discovery Special Master Program existing in that district. The program is intended as an alternative to the appointment of a special master and establishes a process for the use of mediation as a mechanism to help resolve electronic discovery disputes.

Each of these programs specifically provides that it is looking to create a pool of mediators skilled in e-discovery. These panels require the mediators to meet specific criteria for appointment to the panel, and their applications are specifically reviewed for this purpose. However, the requirement means that they must be capable of showing training both as a neutral party and as an expert in e-discovery.

The development of such panels recognizes that a mediator in this area needs to possess a grasp of technical issues such as proportionality and search term metrics. Disputes will arise over the propriety of search terms and whether they are overbroad and are "grabbing" irrelevant information. A mediator needs to understand that certain search terms will simply generate tremendous recall, but might lack precision. Thus, a mediator in these areas needs to be prepared to consider some form of sampling and/or document-ranking in order to allow a review of documents that are predicted to be important and ensure that what is being returned is relevant to the dispute at hand. The mediator will need to understand predictive coding and, if the return

2 *See* "E-Mediation Committee," Seventh Circuit Electronic Discovery Pilot Program, *available at* discoverypilot.com/content/e-mediation-committee (unless otherwise specified, all links in this article were last visited on July 24, 2018).

3 "Mediation of Electronic Discovery Disputes in the United States District Court for the Western District of Pennsylvania," *available at* www.pawd.uscourts.gov/ed-mediation.

of documents is too broad, how to work with the parties to narrow search terms.

Given the critical role of e-discovery and the abundance of data in today's world, the use of mediators to control costs is likely to grow in the future, with more courts adopting programs relying on special panels of mediators available to help parties resolve e-discovery issues. Further, even when litigation is pending in a jurisdiction without a formal program, parties to a dispute can always agree to seek to resolve the e-discovery component of their dispute with the assistance of a mediator. Doing so offers the prospect of real cost savings and increased focus on the actual merits of the dispute. abi

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