A New Approach to Managing E-Discovery

Enlisting a Mediator to Create a "Mediated Discovery Plan"

BY SARA RAVAS COOPER

Often overlooked, mediation remains an important, cost-effective method of resolving legal disputes. Indeed, mediation frequently serves as an attractive alternative to traditional methods of dispute resolution which may be both expensive and time-consuming. A qualified and skillful mediator can often increase settlement opportunities while saving on costs associated with litigation. More importantly, mediation is no longer just for settlement purposes — it is now a valuable tool for navigating the vast, highly technical, and often uncontrollable process of e-discovery.

With the evolution and widespread proliferation of technology, e-discovery has become one of the most contentious and costly aspects of litigation, and for good reason. Today, nearly every case has at least some form of electronic evidence — whether that be emails, text messages, social media postings, word documents, Excel spreadsheets, or countless other types of electronic information. Because electronically stored information (ESI) comes in so many formats and can be found on so many different electronic devices, litigators often execute a broad, catch-all approach in drafting discovery requests. In fact, such a tactic is not only employed in the most complex and issue-intensive claims, but also in simple tort cases.

Equally taxing is the significant problem litigators face in determining exactly what ESI to request (and likewise, what may be important in the case at hand). Assumedly, and somewhat counter-intuitively, it is sometimes thought of easier just to request everything or as much ESI as possible, and then begin sifting through what could likely be hundreds, or even thousands, of documents (or, in the technical terms, terabytes and petabytes of data). With that expansive task, litigators risk not only running up a client's bills, but also wasting limited time, energy and resources. In response to these ever-growing costs associated with e-discovery requests, attorneys must explore more cost and time-effective methods for accessing the requisite information in order to provide competent representation.

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One such method is the use of a mediator to develop a "mediated discovery plan" or "e-mediation." E-mediation is a confidential mediation process used for the purpose of resolving disputes arising from ESI or e-discovery. It utilizes traditional mediation techniques to resolve e-discovery disputes and focuses primarily on the relevant discovery issues. Although an e-mediation may be held at whatever stage a dispute arises, e-mediation may be most effective (and helpful) as part of the "meet-and-confer" process in order to create a discovery plan. E-mediation may also be beneficial on an issue-by-issue basis during the discovery process. Unlike traditional mediation, however, discovery disputes must be resolved *before* a case can proceed to trial. The goal of e-mediation, then, is to direct a mutually agreed upon mediated discovery plan for the discovery phase of litigation.

The issue-based focus of e-mediation tasks the mediator to facilitate discussion of discovery expectations between the parties and allow the resolution of discovery issues as they arise in the pre-trial phase. Taking a proactive approach to this process can help avoid any delay arising from confusion or animosity from motions to compel if one or both sides feel as if information is being withheld.

One of the major advantages to using a mediator to guide e-discovery is that it provides an efficient, organized structure that both parties can follow. By way of example, employing a mediator early in the case can help define the relevant search parameters. Similarly, a mediator can help parties decide on deadlines for meeting discovery requests; the key players whose data should be searched; what software programs, if any, should be used to conduct the e-discovery; what search terms to use; requirements for the privilege log; and guidelines for preservation of information throughout the process. This, in turn, allows both parties to control costs, as well as other aspects of their respective cases including, for example, the scope and volume of e-discovery. Perhaps as best articulated by Allison O. Skinner, a full-time mediator in Birmingham, Alabama, who focuses on complex litigation involving ESI discovery disputes, the e-mediation process can allow the parties to:

- Self-direct workable solutions;
- Define scope parameters;
- Determine relevancy;
- Create timelines for production or "e-depositions"
- Propose confidential compromises;
- Create efficiencies with a mutual discovery plan;
- Set guidelines for asserting violations of the plan;
- Create boundaries for preservation;
- Avoid spoliation pitfalls;

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- Manage protection of privileged information;
- Maintain credibility with the court;
- Avoid court-imposed sanctions; and
- Allocate costs.

Skinner, *The Role of Mediation for ESI* Disputes, The Alabama Lawyer (Nov. 2009), 425-427. Importantly, these benefits are not exhaustive. Rather, creative solutions to e-discovery obstacles are boundless and only ever-increasing as this highly technical and confusing universe becomes the litigation norm.

Because e-mediation is different than traditional mediation, it requires different preparation. When preparing to engage in e-mediation, it is important all parties be candid in their confidential disclosure of material information to the mediator. In an "e-mediation statement," all parties should strive to provide comprehensive position statements with detailed information such as: (1) who is available to participate in the e-mediation (it is highly recommended that an IT representative be one of the parties present on behalf of the client); (2) all applicable or relevant discovery requests, objections, responses, protective and discovery orders; (3) any identifiable issues with spoliation; (4) any cost and timing parameters or restrictions; (5) any accessibility issues; (6) any privilege issues or concerns; and (7) production format matters (including any applicable limitations, i.e., compatibility and/or capability issues). While the above is not meant to be an exhaustive list of what should go into an e-mediation statement, it provides a general idea of how comprehensive parties should be in preparing the e-mediation statement. In that regard, the key to a successful e-mediation — like any traditional mediation — is communication.

Additionally, while cost is always a consideration, the organized, structured, and mutually beneficial platform that e-mediation provides should prove invaluable in practice. In 2008, the Supreme Court of Ohio adopted several amendments to the Ohio Rules of Civil Procedure, including a number related specifically to electronic discovery. The Staff Notes to Civ.R. 26 recognize a court's inherent authority to control e-discovery in a pending proceeding. In addition, Civ.R. 37(F) provides a five-factor test for a court to consider in determining whether to impose sanctions upon a party who has lost potentially relevant ESI.

Similarly, the Cuyahoga County Court of Common Pleas recently implemented a local rule, effective January 1, 2013, defining the principles of e-discovery. Loc.R. 21.3 is designed to encourage parties to meet and confer to reach agreement on ESI issues, as well as address the production of ESI, the preservation of ESI, and privilege protection.

Without a doubt, the prevalence of e-discovery procedures at the federal and state levels means that e-discovery issues and consideration of e-mediation should be explored sooner rather than later, as parties may have to comply with unexpected discovery obligations based on local practice requirements. Moreover, it is clear that e-discovery is here to stay and one's obligations relevant to this aspect of litigation cannot be ignored lest sanctions — as well as other unintended and detrimental consequences (e.g., issue preclusion, evidence preclusion, an adverse inference jury instruction, or even dismissal) — may result.

Of course, there may be instances in which e-mediation is not possible. There are also instances in which all parties reject the use of e-mediation, preferring to handle e-discovery on their own. However, recognizing that mediation is no longer relegated to the settlement phase of litigation can prove crucial not only in providing zealous, competent and efficient representation to clients, but also in avoiding liability.

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