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The need for mediation in e-discovery – the way forward

By Daniel B. Garrie and Gail Andler

The internet, digital communication such as email and texting, and social media have evolved from a fad to a cornerstone of how business gets done and people interact globally. Given the rapid evolution of this technology and the proliferation of electronic data, the topic at hand necessitates a closer look. This article attempts to provide a concise understanding of why there is a need for mediation in e-discovery.

At the outset, e-discovery impact on litigation has driven up costs and protracted discovery disputes to the detriment of the core issues. Parties now feel obliged to settle actions rather than continue litigating, which at times may appear to be endlessly moving parameters of permissible discovery and depleted funds. The alternative situation that often confronts the courts is where the e-discovery requests are out of alignment with the amount in dispute. For example, a retaliation termination lawsuit might be worth $100,000, but the discovery technology and legal costs alone exceed the amount in controversy, forcing litigants to settle under threat of disproportionate costs.

The U.S. Supreme Court recognized in *Bell Atlantic Corp v. Twombly*, (550 U.S. 544, 559 S. Ct. 1955 (2007)), that the cost of discovery is an important element of litigation costs. It stated that "… the threat of discovery expense will push cost-conscious defendants to settle even anemic cases…." Likewise, the New York State Commercial Division courts have recently promulgated an amended Rule 11 on "Discovery" in the Uniform Rules of Practice for the Commercial Division. A new "Preamble to Rule 11," states, in the relevant part: "Acknowledging that discovery is one of the most expensive, time-consuming aspects of litigating a commercial case, the Commercial Division aims to provide practitioners with a mechanism for streamlining the discovery process to lessen the amount of time required to complete discovery and to reduce the cost of conducting discovery." The preamble then states that "it is important that counsel's discovery requests, including depositions, are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action."

Most attorneys have embraced mediation to assist in the settlement of cases after they have engaged in discovery and motion practice. They have, however, not been eager to utilize mediation in the earlier stages of the dispute – a stance they should reconsider. Through the mediation of e-discovery issues, litigants can help address outsized litigation costs, curtail the time and costs associated with seeking judicial solutions, monitor e-discovery costs, preserve confidentiality and avoid possible sanctions.

Discovery mediation can be most helpful in complicated or voluminous ESI cases. It is also very effective in jurisdictions where state judges have packed calendars or lack the necessary e-discovery expertise to determine cases in a mutually satisfying manner for the parties. Acrimonious cases between adversarial parties also benefit from mediation. Additionally, in the e-discovery field, one can use mediation to construct a mediated e-discovery plan or settle "hidden" disputes regarding ESI. Considering this, the legal community must evolve to meet the ever-growing needs of litigating in the digital world.

That being the case, an alternative solution is for the parties to retain a mediator specializing in e-discovery. The mediation itself has a different set of rules based on the premise that the mediation is not about the underlying issues, but issues relating to discovery. In all its ingenuity, the private sector has successfully created a class of lawyers/ technologists. Essentially, this individual is a neutral lawyer, a technology expert, and, more particularly, knowledgeable regarding information management systems and tools. The results of this new type of E-Mediator regarding e-discovery scope and keyword mediations have been tremendous, saving the parties money and time. Yet, they are only a tiny slice of the e-discovery pie. It stands to reason that the benefit will be even more significant if such mediation grew to encompass all e-discovery matters.

Where parties elect to mediate discovery, it removes the need for the parties to appear before the courts on discovery disputes. The parties in many discovery mediations can also get through discovery quickly. Another obvious benefit is that one saves money on

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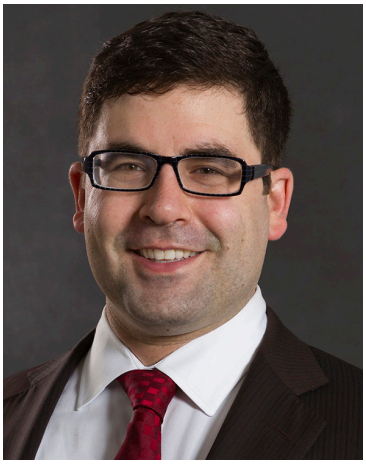

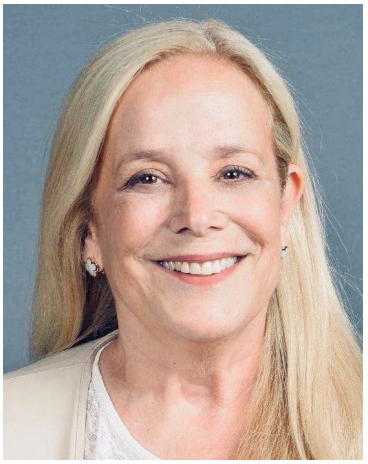

hiring one's experts and the time it will take for a counsel to gain experience on the clients' specific computer systems. Finally, and perhaps not so obvious, time can be saved in providing the discovery.

How can a mediator save parties money in providing discovery? A mediator who understands the fiscal repercussions of the discovery demands can translate "techy" talk into a language lawyers can readily digest. Furthermore, a mediator can allow counsel to re-consider the document request or dispute at issue in a new light, making a previously rejected discovery method more feasible. This new light may also subdue the voice in the clients' heads that scream, "if they don't want to give it to us how and when we want it, they must be hiding or destroying something."

It is prudent that the disputant and mediator respectively avoid mediating the underlying issues in e-mediation. If the mediator permits the attorneys to go to the issues, the mediation will go awry because the focus is on e-discovery. E-mediation is not the appropriate forum for fighting about the merits. By separating discovery arguments from the often bitter dispute that underlies the litigation, mediating e-discovery disputes is a positive factor that may help resolve the overall dispute.

As far as suggested protocols for an e-mediation, parties should prepare a confidential mediation statement that a mediator should receive before the mediation. The mediator must make the attorneys speak only about the discovery issues at the outset. This will include the keywords, the scope of discovery, and the information sought. The mediator must prevent the parties from laying out the underlying issues, even if this requires the mediator to interrupt the parties in their discussions. An effective e-discovery mediation will result in a written protocol, search terms, scope of discovery, and any other results that govern both parties' e-discovery obligations. The outcome will be recognized for two significant reasons: (1) it allows the parties to have a written record of their agreed-to obligations to present to the Court; and (2) it provides the parties with a roadmap to guide them competently in the resolution of the process. Chances are, your judge will be grateful you have obviated the addition of another discovery motion to their heavy docket.