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Mediating E-Discovery Disputes Can Save Time And Money

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December 23, 2016, 11:11 AM EST


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Each year the cost of litigation increases. The primary driver of these cost increases is the discovery phase of litigation and the explosion of e-discovery in recent years. The cause of this explosion is clearly apparent: as a society, we are producing data at a remarkable rate.

Surprisingly, 90 percent of the world's data was created in the last two years, a fact that will also be true next year. Moreover, data is not only increasing in volume, it is also growing in complexity. For example, one of the fastest growing sources of data is "invisible data," i.e., data generated by computer systems for purposes of dealing with other systems. This data is rarely, if ever, directly used by end-users.

This rapid rise in the volume and complexity of data, and concomitant rise in the cost of e-discovery, has led to the bench and bar undertaking several efforts to control the e-discovery process. One of the largest efforts was the 2015 amendments to the Federal Rules of Civil Procedure. These 2015 amendments attempted to refine the federal courts' approach to e-discovery in light of its increasing cost and volume.

While an excellent effort by the bar and bench, the Federal Rules of Civil Procedure, due to their nature as part of the litigation process, can fall victim to certain costly inefficiencies. One approach parties can look to in trying to remediate these expenses is using mediation to resolve some aspects of discovery disputes. E-discovery mediation carries the promise of beneficial outcomes for all parties in a cost-effective and timely manner.

How does mediation achieve this goal? First, it allows the parties to select their own mediator. Even if an underlying dispute has no complex technical elements, the e-discovery issues associated with that dispute may require some degree of technical competence.

Some law firms have specialized e-discovery counsel with experience in these issues. However, many firms, likely most, lack the technical know-how that is needed to work at a sufficiently granular level to help the parties determine the optimal procedures for preserving, collecting and producing electronically stored information.

This knowledge deficit can drive cost and time to resolve discovery issues. In this case, the parties may benefit by using a skilled mediator with the technical knowledge to overcome these gaps in experience and ability and to ensure that electronic discovery is robust and cost-effective.

The neutrality and focus of the mediator resolving e-discovery issues are key features of the process. In contrast to the substantive claims, the technical elements of e-discovery are not grounded in law, advocacy and persuasion, but rather in the ones and zeroes of the relevant computer systems.

The immutable nature of ones and zeroes allows a neutral third party to present those truths to the fact-finder in an efficient process, without the parties having to engage in lengthy and costly rounds of briefings and submission of expert opinions. If the parties select a technically competent neutral, the parties may not only save their clients a substantial sum in attorneys' fees, but also avoid having to hire their own technical consultants to deal with these e-discovery issues.

In summary, an e-discovery mediator helps guide the parties as they focus on technical issues, and presents the parties with possible technical solutions to the issues they are navigating through. The mediator should never take the role of decision-maker, legal fact finder, or technical expert imposing a specific solution.

The parties must be confident that the e-discovery mediator is both technically proficient and neutral, and that his/her presence promotes effective communication and voluntary decision-making between the parties. Otherwise, they risk making discovery costlier and more time consuming. Done properly, and with a mediator both sides trust, the parties will likely have the confidence to voluntarily limit discovery to the elements most likely to maximize benefits and minimize costs, once the mediator clarifies and communicates the scope and practicability of the e-discovery elements of the case.

Even if the parties have chosen an experienced technologist to be their e-discovery mediator, the assistance of the parties and their counsel remains crucial. The most effective and useful e-discovery mediation requires the parties to gather the information necessary for a mediator to successfully work with the parties to reach useful resolutions.

Examples of this information include: data maps; business use cases for data that is collected; and explanations for why each item of discovery is requested. Additionally, it can be useful to have the parties' IT resources available throughout the course of the mediation process in the event technical questions arise.

While e-discovery mediation can take many different forms depending on the scale and complexity of the discovery dispute, there are several common takeaways that are necessary to lead to successful mediation in most circumstances, including:

- retaining an experienced and technically knowledgeable mediator;
- focusing the mediation on e-discovery, not the underlying legal issues;
- ensuring that the parties, not the mediator, are generating possible solutions (the mediator can facilitate both parties understanding of the proposal, but should not evaluate its non-technical merits);
- identifying the e-discovery interests at stake, and encouraging a meaningful dialogue that recognizes and validates those interests; and
- having the flexibility to consider and implement alternative proposals that lead to appropriate and cost-effective electronic discovery.

Once a mediation is completed, it is important to always memorialize its results. A successful e-discovery mediation should result in a written protocol, search terms, scope of discovery or other result that governs both parties' e-discovery obligations. The result should be memorialized for at least two key reasons: (1) it allows the parties to have a written record of their agreed-to obligations that they can present to the court; and (2) it provides the parties with a roadmap that helps ensure they continue to comply with their agreed-to obligations.

In conclusion, as litigation becomes a costlier, more time-consuming process, parties should look for ways to save their clients time and money. One of the most straightforward ways to achieve this goal is to engage in e-discovery mediation, a process that has the potential to significantly reduce the time and money spent on discovery, the costliest step of litigation.

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The author would like to thank Masha Simonova and Benjamin Dynkin for contributing to this article.