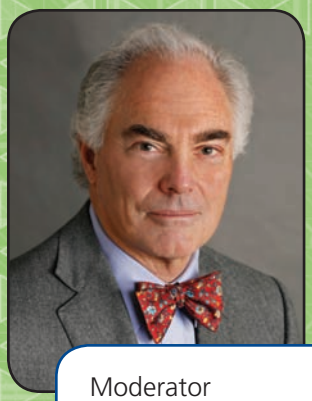
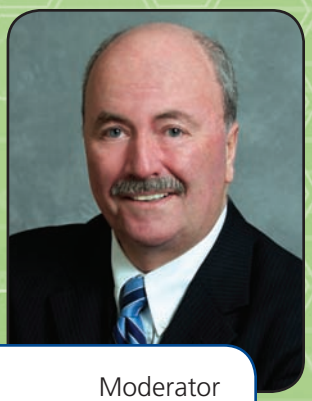


VIRTUAL ROUNDTABLE: e-discovery



Moderator
MARTIN QUINN
JAMS Mediator/Arbitrator, Northern California

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Moderator
HON. JOHN J. HUGHES (RET.)
JAMS Mediator/Arbitrator, Philadelphia

AUGUST 2009

PANELISTS

- **Harold A. Barza, Esq.**
  Quinn Emanuel Urquhart Oliver & Hedges, LLP
- **Allen Burton, Esq.**
  O'Melveny & Myers LLP
- **Wendy Butler Curtis, Esq.**
  Orrick, Herrington & Sutcliffe LLP
- **Colleen M. Kenney, Esq.**
  Sidley Austin LLP
- **Gilbert S. Keteltas, Esq.**
  Howrey LLP

QUINN: A court recently observed that "[i]dentifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take." Do you find that counsel and parties today are dealing with e-discovery issues as a "cooperative undertaking?"

CURTIS: I have yet to see parties approach e-discovery issues as a collaboration. That said, with FRE 502 and the ever growing costs of preservation and production, I do see more and more parties trying to reach some level of agreement on preservation and production in their scheduling or case management order.

KETELTAS: Cooperation and proportionality are emerging themes in e-discovery. In part, it is of necessity. Discovery rules – and in particular the amended rules relating to electronically-stored information (ESI) – demand an early focus on a range of issues, from scope of preservation and production, to form of production, to privilege – that are best dealt with in a collaborative fashion early in the litigation process.

Courts are sending a clear message that they do not want to resolve e-discovery disputes where the parties have not taken a thoughtful approach to resolving those disputes themselves.

> **Any neutral** who gets involved in the early stages of e-discovery needs to bring about increased structure and efficiency to the process that saves the parties more money than they pay the neutral.
> *– Martin Quinn*

BURTON: I agree there is still heavy reluctance to working together in the discovery process, but I think there is a significant self-preservation incentive that is pushing practitioners towards collaborating on e-discovery issues in ways we would have traditionally avoided. This is particularly true when dealing with large, complex organizations and matters with broad anticipated document discovery. Addressing any thorny electronic issues at the beginning of a case, to the extent possible, is almost always better than waiting for them to blow up down the line and worrying about them getting in the way of the merits.

HAROLD A. BARZA, ESQ.
Quinn Emanuel Urquhart Oliver & Hedges, LLP
www.quinnemanuel.com

quinn emanuel urquhart oliver & hedges, llp
quinn emanuel trial lawyers
los angeles | new york | san francisco | silicon valley | chicago | tokyo | london

BARZA: I have had mixed experiences. I find that some counsel are willing to cooperate on e-discovery because they are professionals. Others are willing to do it because it is a two-way street and they need that cooperation reciprocated and/or because the judges are generally requiring some level of cooperation, as Wendy and Gil note.

But I have also encountered, as recently as this week, counsel who have sought to use the burdens of e-discovery as a weapon, demanding overly inclusive searches in terms of the sources searched and the search terms.

KENNEY: One of the latest prescriptions to resolve the problems created by the increase of electronically stored information is cooperation between parties. The message from courts is clear: consider yourselves warned – cooperation is required. In practice, I have been pleasantly surprised by the increase in the amount of cooperation at the processing and production phase of litigation that I have recently encountered. Cooperation needs to begin at the preservation stage and work its way through the entire litigation.

JUDGE HUGHES: Counsel should confer early about e-discovery issues and incorporate any specific agreements in case management orders or separate written protocols to avoid later misunderstandings. One common aspect that I see in the worst of the sanction cases is a failure of counsel to talk with each other, or to talk past each other, about these issues. This actually sounds encouraging; most of you are beginning to experience meaningful cooperation and candor from sophisticated counsel, most courts now expect and insist that all counsel cooperate, and self-preservation is driving the foot-draggers toward cooperation.

> There is always a certain tension in that the client needs to limit the burden and cost, and counsel needs to make sure the effort is proper and sufficient.
> *– Harold Barza*

QUINN: Have you been able to engage in meaningful discussions of ESI issues during Rule 26(f) meetings? If so, what has contributed to making the meetings productive? If not, what has prevented them from being useful? Would the presence of a mediator or special master add materially to the usefulness of these meetings? If so, would a "technical" neutral (e.g., a non-lawyer consultant) or a "legal" neutral with expertise in ESI issues be more helpful?

CURTIS: The most productive 26(f) meetings occur when counsel come to the table educated on the issues, familiar with the specifics of their client and their case, and willing to roll up their sleeves. If the parties could agree to tiered mediation or access to a special master in conjunction with tiered discovery, trust could be enhanced and risk reduced because when confusion or disputes arise, the parties would be guaranteed an opportunity to address the issue in an informal and yet potentially binding setting rather than expensive motions practice requiring burdensome showing of proof.

KETELTAS: In my experience, meaningful 26(f) conferences happen when each side is willing to engage in a candid discussion of the likely sources of relevant electronic information, the burden of accessing those sources, and reasonable approaches to obtain what is really needed in the litigation rather than every last bit of possibly relevant (but unimportant) electronic information. The same candor is necessary in trying to negotiate overly burdensome preservation and collection out of scope. Early collaboration on an agenda for the 26(f) conference, as well as on the right participants (e.g., including an IT representative or someone who understands enough to speak knowledgeably about the IT environment) can help make the Rule 26 meeting productive for all parties.

As far as inclusion of legal and technical neutrals, it would be useful where: (1) one party refuses to participate in a meaningful discus-

sion; (2) the parties and their clients are inexperienced in the e-discovery process (and need assistance focusing on the right questions); or (3) the preservation and collection of ESI is a potentially enormous undertaking given the complexity of the case or the environments in which ESI is stored and managed.

BARZA: Regarding a neutral, one may be helpful if one party is not intending to act in good faith in the process or lacks an understanding of the tasks. But in general, I would try to avoid using one, at least in the initial phases of the process. If all else fails though, I think it may make a lot of sense.

KENNEY: While I have not used a true neutral or ESI master in any case in which I have been responsible for the e-discovery elements of the case, I could see where one could potentially be very helpful. We would need to balance the additional cost involved (not only the cost of retaining a neutral or special master, but also the additional legal cost that may be involved in terms of the time the attorneys spend meeting, briefing, arguing, and possibly appealing) against the added utility. When cooperation exists and both sides are fairly sophisticated, the need for a neutral may be much less. One area in which a neutral may be very helpful is with the contours of preservation.

QUINN: Any neutral who gets involved in the early stages of e-discovery needs to bring about increased structure and efficiency to the process that saves the parties more money than they pay the neutral. Adding an extra layer of decision-making without reducing overall transaction costs is useless. Few district or magistrate judges have the time, inclination, or knowledge to jump into the trench of ESI warfare. A master can require reports from the Rule 26(f) conference, require that the conference be videotaped, be present at the conference, convene a meeting of technical experts, reconcile competing protocols, or engage a neutral technical consultant to reconcile differences. All of this can be done with sensitivity to allowing counsel to run the case, but do it with greater focus and lower cost.

> **Addressing** any thorny electronic issues at the beginning of a case…is almost always better than waiting for them to blow up down the line and worrying about them getting in the way of the merits.
> *– Allen Burton*

JUDGE HUGHES: I can see the wisdom of having a neutral third person present at a Rule 26(f) to facilitate agreement. Many times as a judge, I was able to help a lawyer not only with the adversary but also with the lawyer's own client. At these "discovery mediations," I would envision (of course, with the parties' agreement) the presence of a lawyer, IT representative, and a business person/client for each party, so that a reasonable plan could be crafted with a minimum of unexpected e-happenings down the road. I also believe that e-discovery cases are case-sensitive, lawyer-sensitive, and the 26(f) meeting should give you a good idea of which way the wind is blowing.

QUINN: Have you encountered difficulties and conflicts between yourself as outside counsel and your client in addressing ESI obligations? If so, would the participation of a neutral mediator or master help you obtain full client cooperation?

CURTIS: Clients are often in a Catch-22 situation when it comes to e-discovery. They should and must reduce cost and often do so by bringing e-discovery costs in-house. At the same time, in some situations internal IT departments are over-worked or under-trained and the short term cost reduction gained by self collection is offset by discovery on discovery costs or worse, orders to "do it over" with a forensic vendor.

In early case assessment, clients must also be strategic in how much money to devote to preservation and collection prior to class certification or a decision on a strong motion to dismiss. In these situa-

ALLEN BURTON, ESQ.
O'Melveny & Myers LLP
www.omm.com
O'MELVENY & MYERS LLP

WENDY BUTLER CURTIS
Orrick, Herrington & Sutcliffe LLP
www.orrick.com

tions, if a mediator or master could obtain an agreement between the parties regarding what is reasonable and required in the particular case, counsel and clients could reduce risk and make educated decisions about resource allocation.

KETELTAS: Our clients range from those who are very sophisticated in electronic discovery to those who have little understanding of the rules or process. The primary difficulties and conflicts arise in the latter circumstance where clients have trouble understanding that they must do what the rules say they must do. The presence of a neutral could be of benefit in that circumstance if the neutral helped both parties focus on meaningful limits to the process so that the burdens of preservation and collection could be limited (and so the client knows that the goal of the process is resolution of the merits, not protracted electronic discovery). Of course, the presence of a neutral will be less beneficial where counsel makes these points directly to the client and backs them up with strong e-discovery advocacy early in the case.

BURTON: As with all discovery issues, finding the appropriate middle road between preserving everything and incurring unreasonable costs on the one hand, and avoiding the problem in a risky way on the other, requires active communication between outside lawyers and clients and a clear understanding of the limits of one's obligations under applicable rules (to the extent they exist). While I think the bulk of this work needs to be done between lawyer and client, a neutral could be helpful if there are particularized issues teed up for dispute, such as with the scope of preservation. In those cases, the client could benefit from the reaction of an independent third party to proposed courses of action.

BARZA: I would not want to use a neutral in dealing with our clients in this regard. In general, our clients are large and sophisticated entities with skilled in-house counsel who are by now becoming very knowledgeable about these issues. There is always a certain tension in that the client needs to limit the burden and cost, and counsel needs to make sure the effort is proper and sufficient. But we find a proper solution; I don't see that being helped by a neutral.

> **Collection**, processing, and review generally drive the cost of e-discovery. Counsel, courts, and special masters can reduce cost by changing the model.
> *– Wendy Butler Curtis*

KENNEY: Perhaps I have been fortunate in this regard, but I have not had difficulties with my clients that could not be addressed with discussions of the case law. It is very true that clients have a definite tension in handling ESI. Preservation is a good example. The answer to what should be preserved lies somewhere between everything and nothing. Interposing a neutral between counsel and his or her client may be of some help, but frankly, if the client is unwilling to take the advice of its outside law firm ESI experts, it does not seem to me that they would be willing to take the advice of yet another outside expert.

QUINN: It is encouraging to hear that clients – at least larger, sophisticated companies – are getting the ESI message. We know from Qualcomm and other cases what trouble counsel can get into as a result of client actions. I have found as a master that I can help clients understand the need to preserve and produce ESI if I act firmly but with empathy for the clients' costs and burdens.

JUDGE HUGHES: Perhaps because of the recession or otherwise, I am hearing that there is increasing tension between in-house counsel and outside counsel, between business people and their own IT representatives, etc. Frankly, where such tension exists in a case and the forecast is a stormy e-discovery future, judges may not have time to sit down and help the parties come up with a reasonable (and enforceable) discovery plan and address all

the surprises that inevitably arise. An objective third party, who has the time and is reasonably conversant in e-discovery, may help prevent the case from blowing up six months or a year down the road.

QUINN: In motion practice involving ESI, do you find that judges and magistrate judges are equipped to deal effectively with the legal and technical issues? If not, in what ways have you seen that courts are not up to the task? Is there a difference in this regard between federal and state courts?

CURTIS: The federal judiciary, in particular, has been very successful in educating judges on the importance and complexity of issues of e-discovery. In fact, in many cases the bench is much more sophisticated than the bar. The challenge lies in the sheer volume of cases before the courts. If resources allowed judges and magistrates to take an active role in e-discovery in each and every case, e-discovery costs would be dramatically reduced because scope of discovery would more closely reflect the value of the case and detailed discovery plans would prevent most discovery disputes.

BARZA: I, too, find that the federal courts have become quite expert in these issues. In the state courts, however, although things are improving, the state of affairs is far less advanced.

KENNEY: Both Federal and State judges are becoming more learned and more experienced in dealing with ESI issues. There are certainly some judges and magistrate judges that have become "experts" in ESI issues. But even those judges who are not experts now know enough to know that they aren't experts.

> I have been pleasantly surprised by the increase in the amount of cooperation…that I have recently encountered. Cooperation needs to begin at the preservation stage and work its way through the entire litigation.
> – *Colleen Kenney*

JUDGE HUGHES: Every good trial lawyer knows that every judge is different. I think a "discovery mediator" or special master could be helpful in overseeing direct conversations (with lawyers present, of course) between IT representatives to discuss systems in a confidential setting, or business people to more accurately assess discovery costs. Use of a third party may also let the judge, who may neither have the time or knowledge, off the hook.

QUINN: Do you find that courts are dealing effectively with demands to shift the cost of producing ESI in some fair way from the producing party to the requesting party?

CURTIS: Parties, more than the courts, are an obstacle to cost shifting. Parties are hesitant to move for cost shifting or do not consider the request until after cost is incurred and the relief unavailable, and they must do a better job of putting this issue before the courts with detailed explanations of costs and the cumulative nature of various sources.

Courts should, when ruling on these issues, include in the analysis the total value of the case, the complexity of the issues, and the likely length of trial.

JUDGE HUGHES: Ever since the Supreme Court expressed concern over the escalating costs of discovery in *Twombly*, federal courts are increasingly aware of this problem. Courts are concerned that they are pricing themselves out of the market if they don't somehow control the huge costs of litigation. So, I would think that from the court's perspective, the trick is not to incur the cost in the first place rather than allocate the cost.

KENNEY: Courts are really between the proverbial rock and a hard place here. While they may want to shift costs, the old standard of each party bearing its own burden of discovery is still in play. For example, while the biggest cost is often preservation and attorney review, I have seen little evidence of courts ordering the opposing side to pay the costs of attorney review. If all parties were required to share in preservation costs, the amount of data to be preserved would likely become narrower.

COLLEEN M. KENNEY
Sidley Austin LLP
www.sidley.com

GILBERT S. KETELTAS
Howrey LLP
www.howrey.com

JUDGE HUGHES: What aspect of e-discovery drives the most costs? E.g., preservation requirements, scope of collection, form of production, relevance, and privilege review? In the end, clients want lawyers to find ways to reduce the cost of e-discovery. How can counsel, courts, and special masters help reduce costs?

CURTIS: Collection, processing, and review generally drive the cost of e-discovery. Counsel, courts, and special masters can reduce cost by changing the model. Courts and special masters must bless review approaches that rely primarily on computer rather than human relevance review.

KETELTAS: Review (including privilege review) is the largest component of cost in the e-discovery process, but since it often comes much later in the process, parties obsessively focus on the costs of preservation and collection (which are typically a much smaller portion of overall costs). The cost of processing data so that it can be reviewed can also be a significant (and unexpected) cost for parties. Both processing and review costs are reduced by reducing the volume of information that goes into the process.

Parties must make difficult decisions about what will be reviewed early in the process. Given that parties live in fear of having to defend those decisions after the fact, courts and special masters should be willing to entertain early resolution of those issues that allow a party to take actions proportional to what is at stake in the litigation.

BURTON: Given how much ESI is created on a daily basis and, thus, how many "documents" are potentially included in the universe of information for processing and reviewing, I agree that those steps are often the most dramatic drivers of cost. I also agree that it is critical to draw reasonable lines early on, particularly in deciding which data gets processed.

> The presence of a neutral could be of benefit…if the neutral helped both parties focus on meaningful limits…so that the burdens of preservation and collection could be limited (and so the client knows that the goal of the process is resolution of the merits, not protracted electronic discovery).
> *– Gilbert Keteltas*

BARZA: In my experience, the largest cost is the cost of relevance and privilege review.

KENNEY: The costs of preservation can be prohibitive if the preservation request is not appropriately tailored to the needs of the litigation.

QUINN: Counsel are reluctant to agree to limit volume, both because they fear missing favorable evidence and because they fear malpractice exposure. Both fears can be reduced by a master dedicated to the case who can issue orders limiting the scope of preservation and production and insisting on computer review where appropriate, thus letting counsel off the hook, and by being there to revisit the situation if counsel learn that early limits on production omitted a source of important evidence.

JUDGE HUGHES: When I was on the bench I observed that the major cost in e-discovery by far is relevance and privilege review. As a lawyer I think I'd have a tough sell saying, "Let's allow the other side to look at all our stuff and if they see something that's 'secret,' they'll give it back and we can trust them to erase it from their minds!" Perhaps the reasonable approach should be to limit the scope of the document discovery in the first place, thereby limiting the necessary review.

QUINN: When you consider asking a court to appoint an e-discovery master, what qualities are you looking for in the master? Would it be helpful to counsel if the master had a tried-and-true written protocol for working through e-discovery problems with counsel?

CURTIS: An effective e-discovery master must understand both the ever growing body of e-discovery law as well as the law governing the matter at issue. To effectively mediate, the master must be able to apply both areas of law to evaluate what evidence is needed to prove the case and how can the parties work to preserve, collect, and produce the most probative evidence and not gigabytes of immaterial email. Technical competency is important but vendors, experts, and client IT representatives can help inform counsel and the master on highly technical issues. The master must, however, be sophisticated enough to appreciate the business disruptions e-discovery obligations have on clients and the complexities associated with collection from emerging and legacy technologies.

Because each case and each client are unique, I resist uniform and mandatory application of "tried-and-true" protocols. A good master will not require the party to go through a protocol for the sake of checking the box but rather focus on the challenges specific to the case before her. I strongly believe there is no one-size-fits-all solution to e-discovery and would distrust a master who advocated otherwise.

BARZA: We want someone who understands the underlying issues and who will resolve them in a fair and balanced way. I do think the advance presence of a written protocol would be meaningful.

KENNEY: Neutrality, experience, technical competence, creativity, and an open mind are the factors that a good mediator or special master would possess. The special master must be neutral to be effective. The special master must also have real world experience with e-discovery, particularly from a massive production side and must have technical competence and an ability to know what is and was available in the market at the time the litigation began and throughout its life. Creativity is important as well. The ability to see a problem the parties are having and using his or her experience and knowledge, propose creative but effective alternatives to get the issue resolved or at least get the parties thinking. Finally, an open mind is needed.

> At these "discovery mediations," I would envision (of course, with the parties' agreement) the presence of a lawyer, IT representative, business person/client for each party, so that a reasonable plan could be crafted with a minimum of unexpected e-happenings down the road.
> *– Judge John Hughes*

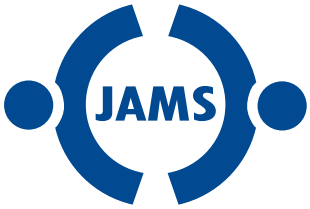
JUDGE HUGHES: E-discovery is becoming more prevalent in JAMS arbitrations. How should a conscientious arbitrator square the enormous expense and time necessary to conduct e-discovery with the objective of keeping arbitration an efficient, streamlined process? Would a set of JAMS e-discovery rules/protocols be helpful?

CURTIS: Arbitration seems an ideal setting to perfect proportionality standards. If JAMS could develop proportionality equations accounting for the value of the case, the probative value of the information, the complexity of the issues, and the expected duration of the arbitration, these rules could be used in traditional litigation.

KETELTAS: One of the reasons parties agree to arbitration is to reduce the expense and time of dispute resolution. JAMS should have a stated position concerning the role and scope of discovery in arbitration and that position should embrace proportionality in thought and in action.

BURTON: I also agree with Gil and Wendy that arbitration is an excellent context for dealing with proportionality issues. The nature of arbitration – non-public and outside the ambit of formal rules of civil procedure – may permit parties to look for cooperative and creative approaches along the lines that Wendy suggests. JAMS should look for ways to encourage those efforts through a combination of stated positions and procedural guidelines.

KENNEY: A well thought out set of ESI protocols would be enormously helpful in arbitration. The often conflicting but twin goals of giving the parties appropriate discovery with keeping the costs low need careful balancing and thought. Incorporating concepts such as proportionality, cost shifting or sharing, production protocols, and the like would make such a set of rules more useful. Having different options with the ability for the parties to pick and choose may also work. ■



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