Mediate ESI Issues Early and Get Back to the Merits of your Case

By Lawrence H. Kolin

Now that E-Discovery rules have been effective in federal courts for years and more recently in the majority of state courts, disputes over electronically stored information (ESI) are more commonly, albeit slowly, being addressed in state court litigation. Knowledgeable dispute resolvers, E-neutrals, or mediators familiar with cases involving electronic evidence can help shape discovery plans, allocate costs, suggest technological solutions and create efficiencies in this emerging area.

The traditional early mediation process may instead be focused into a confidential conference solely on managing ESI. Within this protected framework, a neutral may shape the discussion, reminding parties of the merits and dissuading them from merely using E-discovery as a sword or shield. Mediation provides practical avenues that can present parties with significant cost savings in cases containing ESI, if performed near the beginning of the litigation.

For example, though counsel are often expected to reach a rational agreement on what must be preserved, taking into account costs and burdens incurred by modifying or suspending document retention systems can be tough. Implementing even narrowly tailored litigation holds to preserve crucial ESI can be difficult without the assistance of a neutral during such negotiations. Under the safeguards of a confidential mediation, limited discovery from custodians or other key persons with special knowledge of a company's computer systems may be particularly useful. Lawyers can then self-determine sources from which relevant information is to be obtained, while the neutral facilitates agreement on the time frame at issue, search protocols, accessibility of stored information or the cost and burden of restoring inaccessible information.

An E-neutral, mediator or perhaps even a court-appointed special master can also facilitate the electronic discovery process by helping parties to agree on the form in which they want information produced and the extent to which metadata will be produced. Mediation can feature private caucuses with retained experts or information technology liaisons that may help conduct discovery proportionally, minimizing motion practice, and avoiding sanctions and unpredictable judicial outcomes. Cooperation under this alternative dispute resolution rubric may also encompass settling procedures to be followed when discovering privileged information that has been inadvertently produced in the course of discovery, including clawbacks or agreed confidentiality orders.

When the parties reach an agreement, they may ask the court to include parameters from the agreement in their formal scheduling order. For example, Florida's Civil Procedure Rules 1.200 (Case Management) and 1.201 (Complex Litigation), provide the ability to address topics such as: considering the voluntary exchange of ESI and stipulations for authenticity; considering the need for advance rulings from the court on admissibility; and discussing the possibility of agreements (whether by parties or by referral to a special magistrate, master, other neutral, or mediation) on preservation of evidence, the form in

which such evidence should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources. Dealing with the amount of data that parties now possess in even routine disputes is likely to distract litigators from the merits. Rules like these can be regularly employed by civil practitioners at the outset of most cases in conjunction with alternative dispute resolution techniques to return resources to the heart of the litigation.

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