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Feature Articles

The Role of Mediation for ESI Disputes

by Allison O. Skinner

Prior to and following the amendments to the Federal Rules of Civil Procedure regarding discovery of electronically stored information ("ESI"), e-discovery has been a frequent headline in courses, seminars, and articles. Almost half of the states have either already adopted similar rules or are considering adopting them. Like it or not, e-discovery is here and here to stay. By now, most litigators are familiar with the buzzwords: litigation hold, preservation, collection, processing, and archiving, to name a few. Litigators and their clients are also becoming familiar with all the different types of ESI, as well as the places where ESI can be found. Litigators are seeing the ESI request served in the most complex cases to the simple negligence case. The world of e-discovery is exploding exponentially.

How does the introduction of e-discovery translate into the day-to-day management of a case? As with other legal disputes, mediation is one of the best tools for handling a case efficiently and without the risk of an unpredictable judge or jury.

Advantages

Mediation is no longer just for settlement purposes. The self-determination process can be critical in handling the uncontrollable, unlimited nature of e-discovery. Mediating e-discovery disputes allows for creative, mutual solutions among litigants that most likely will save the parties time and money in the long run. The informal mediation process creates a forum for 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,
- manage protection of privileged information,
- maintain credibility with the court,
- avoid court-imposed sanctions, and
- allocate costs.

Revised Federal Rules of Civil Procedure 26 and 34 allow for the discovery of ESI that is "reasonably accessible." To comply with the Rules, the litigator must be prepared in the meet-and-confer meeting to talk intelligently about what ESI is reasonably available and in what format it will be produced. Since, under the Rules, the meet-and-confer must occur early in the case, the litigator must know what ESI his or her client has control over that is reasonably accessible at the *outset* of the litigation. The client may not be prepared to respond to ESI requests at that early juncture, but must be made

to understand the importance and potential impact of the requests and the responses.
The litigants must make a determination of what data is accessible. Data falls into three categories for this analysis. A stoplight illustration helps describe data and whether a court could consider the data reasonably accessible.

- The "Green Light" data is the data the court will find reasonably accessible because it is data that is accessed daily or frequently.

- The "Yellow Light" data is the old or deleted data. The court will weigh factors to determine whether this type of data is discoverable.

- The "Red Light" data is the legacy data or disaster back-up tapes. Typically, this data is not reasonably accessible and will not be discoverable.

However, just like the case of the car wreck at the intersection, whether the light is green, yellow, or red is the source of dispute. Courts look favorably upon parties who work together to determine practical solutions for production of ESI. *Self v. Equilon Enters., LLC*, No. 4:00CV1903 TIA, 2007 WL 427964 (E.D. Mo. Feb. 2, 2007); *Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 RMB MHD, 2006 WL 3851151 (S.D.N.Y. Dec. 22, 2006); *Flexsys Ams. LP v. Kuhmo Tire U.S.A., Inc.*, No. 1:05-CV-156, 2006 WL 3526794 (N.D. Ohio Dec. 6, 2006). During the discovery phase of the litigation, the parties can choose to mediate their discovery disputes. Parties who mediate their discovery disputes are in control of the outcome of what is being requested, what is being produced, and how it is being produced. A mediation eliminates the time and cost associated with seeking the court's intervention. In the end, the litigants that select mediation of discovery disputes build credibility with the court. Even if all discovery disputes are not reconciled at the mediation, the mediation affords the parties an opportunity to illuminate the key disputes to be presented to the court.

Often, discovery battles can result in an exchange of potentially inflammatory correspondence that may be used as exhibits to a motion to compel or motion for protective order. Such correspondence could be damaging to a litigant's credibility with the court. Mediating the e-discovery dispute allows the litigants to make proposals confidentially. A confidential exchange of proposals on how to create a workable discovery plan increases the chances of reaching mutual solutions.

How to Prepare for Mediating the ESI Dispute

Be prepared to be specific about a particular request.
Often a discovery request reads, "produce any and all" of a particular type of information. In fairness to the requesting party, the requestor does not know what the opposing party possesses so using the catch-all phrase "any and all" protects the requesting party from self-eliminating potentially discoverable documents. Notwithstanding this position, the requesting party needs to be able to articulate what type of information the requesting party is genuinely looking for at the mediation. On the other hand, the responding party should not be able to hide behind an "any and all" request. Often, the responding party objects that an "any and all" request is overly burdensome. After all, how could any person or entity attest that *all* information was provided? If the requesting party can provide general terms of the information requested, then the responding party must respond in good faith. Specificity of a request is particularly important when asking for ESI. Specificity allows for more accurate search parameters ensuring the requesting party is obtaining the appropriate material and the responding party is appropriately responding to

the request.

Be prepared to articulate the importance of the requested information. Although ESI is relatively new to the discovery scene, the issues of relevance and burden are not. In the old familiar way, relevance and burden must be balanced. A mediation allows the parties to strike this balance using workable solutions. Because the Federal Rules provide a cost-shifting provision when information is not reasonably accessible, mediation provides a forum for the requesting party to demonstrate the importance of the requested information and, in certain cases, that such information is not available by other means. The requesting party may argue the cost-shifting provision should not apply, particularly if the responding party has the resources to handle the requested production. On the other hand, the mediation allows the responding party to articulate other means for obtaining the requested information, if applicable. Or, the responding party may explain the onerous financial burden that a request entails.

Be prepared to request and respond in the appropriate format if the parties agree. Parties may produce information in a different form from the original source. A native format contains metadata embedded in the electronic file. Metadata may disclose pertinent information that the responding party did not realize it was disclosing, such as the history of the document showing who edited the document and when. Metadata may include privileged information that would not otherwise be discoverable. However, a converted format such as a .TIFF, .BMP, .JPEG or .PDF file does not readily contain metadata. This format is considered a digital image of the information. Either way, the requesting or responding parties must be prepared to provide a technical position for arguing why certain information should be produced in a particular format.

Be prepared to describe your client's, and possibly your firm's, technological capabilities. Typically, the plaintiff is requesting ESI from a company. The attorneys for both sides need to appreciate their own firms' document management capabilities and whether electronic service of discoverable information to one another is compatible. In other words, how is the attorney going to receive, review, categorize, evaluate, and present the ESI? In the same vein, the company's attorney must understand what information is maintained in the ordinary course of business, how it is stored, how it can be retrieved, how it can be produced, and how much it will cost. For both sides, an information technology representative should participate in the mediation. In some cases, the plaintiff will have already conducted an e-deposition—the deposition of a corporate representative designated to provide information about the company's active data, metadata, databases, system data, deleted data, ghost data, legacy data, and back up tapes. In those circumstances, both parties are more knowledgeable about their respective position regarding the ESI. However, in the cases where e-depositions have not been taken, it is imperative that both parties bring or have available a representative who can assist with navigating the technical issues. It is not the mediator's role to make such determinations.

The Result of the ESI Mediation

The outcome of the mediation will be memorialized in a mediator's report signed by the parties. Whether the ESI mediation involved one request or hundreds of requests, the mediator should confirm the parties' agreements. Broadly speaking, one or all of these issues can be addressed during the mediation for each discovery request:

- Request number,
- Type of data,
- Accessibility,
- Format,
- Search parameters,
- Method of production,
- Preservation,

- Privilege issues,
- Waiver,
- Timing of production,
- Cost burden, and
- Control method

Once these issues are determined, the parties will depart the mediation well-equipped with a discovery plan. Mediating the ESI dispute is an efficient, cost-saving method for managing litigation while preserving judicial economy and maintaining some degree of control over what data is actually produced.

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