

Putting the “E” in Neutral

By Allison O. Skinner

e-neutral—“a person who serves as an extra-judicial referee to resolve disputes involving electronically stored information.

Synonyms: special master, e-mediator, discovery liaison, discovery referee, magistrate or judge.”

American College of e-Neutrals,
<http://www.acesin.com/> (last
visited Apr. 4, 2011).



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Promoting Cooperation with E-Neutrals

In the world of e-discovery, litigants continue to hear the word “cooperate” in the discovery stage. Let’s face it: cooperating is easier said than done for most lawyers. In fact, cooperating is unnatural for some attorneys. In *Accounting*

Principals, Inc. v. Solomon Edwards Group, LLC, the court characterized the discovery dispute as “the litigation equivalent of the cafeteria food fight scene in the infamous movie *Animal House*.” No. 09-2085-CM, 2010 WL 3199897, at *2 (D. Kan. Aug. 12, 2010).

However, in resolving discovery disputes courts contemplate whether litigants have cooperated in the “spirit and purposes” of Federal Rules of Civil Procedure 26 through 37. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (D. Md. 2008) (citing advisory committee notes to the 1983 amendments contained in Federal Rules of Civil Procedure 26 through 37). Litigants have a duty to balance “legitimate discovery needs” with “cost and burden” relative to “what is at stake.” *Id.* at 358. To strike this balance during discovery, counsel must practice “cooperation rather than contrariety, communication rather than confrontation.” *Id.* In fact, Federal Rule of Civil Procedure 37 specifies that

courts may impose sanctions if litigants fail to cooperate.

Despite this encouragement by the courts, the expense and burden of e-discovery continue to affect a party’s ability to engage the legal system and have cases decided on their merits. To address this problem, the Sedona Conference issued a “Cooperation Proclamation,” which had been endorsed by over 100 judges as of September of 2010. See Sedona Conference, Cooperation Proclamation (Sept. 2010), http://www.thosedonaconference.org/content/tsc_cooperation_proclamation/endorsements.pdf. Sixteen cases have cited the “Cooperation Proclamation.” *Id.* Yet, some lawyers still snicker when cooperation is mentioned. Perhaps, cooperation is only given “lip service” by some lawyers because they do not understand (1) what cooperation means in e-discovery, (2) how cooperation serves a client’s best interest in dealing with e-discovery, and (3) how to effectuate cooperation as an advocate.

The Meaning of Cooperation in E-Discovery: The Four "Cs" of Cooperation

Cooperation does not mean that a lawyer must stop advocating a client's interests. Cooperation does not mean that a lawyer should acquiesce to every demand of an opponent. Cooperation does not mean that a lawyer must "turn the keys over" to an op-

Cooperation serves a client's best interest in many ways, generally by achieving three beneficial conditions: (1) mutuality of interest; (2) economic efficiencies; and (3) credibility preservation.

ponent. This type of behavior violates the rules of professional conduct. However, "[c]ounsel's case management responsibilities should not be seen as antithetical to their role as advocate." See *Home Design Servs., Inc. v. Trumble*, No. 09-cv-0094, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010).

Cooperation does mean that a lawyer needs to be candid about electronically stored information (ESI) issues, such as preservation and forms of production. *Id.* Cooperation does mean that a lawyer needs to have competent understanding of a client's information systems, key players, search methodology, privilege issues, and accessibility of ESI, for example. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 458 (S.D.N.Y. 2010). Cooperation also means making compromises to develop a discovery plan in good faith as required under Federal Rule of Civil Procedure 26(f). Cooperation does mean that a lawyer needs to communicate about ESI issues not only with opposing counsel, but a client. One of the leading cases in e-discovery, *Zubulake v. UBS Warburg LLC*, concluded

that the problem with the discovery in that case was due to a "failure of communication." 229 F.R.D. 422, 436 (S.D.N.Y. 2004). "Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently." *Id.* at 424. In other words, cooperation requires competent lawyering skills that foster candid communications for making reasonable compromises to fulfill the parties' discovery obligations.

Cooperation Is in a Client's Best Interests

Cooperation serves a client's best interest in many ways, generally by achieving three beneficial conditions: (1) mutuality of interest; (2) economic efficiencies; and (3) credibility preservation. Allison Skinner, *Conflict Resolution in e-Discovery*, Birmingham ESI Roundtable CLE (Apr. 2010). The following is an excerpt from my paper explaining how cooperation achieves these three conditions, which, in turn, promotes a client's best interest.

First, 'mutuality of interest' is in the client's best interest. Both sides know the Federal Rules of Civil Procedure mandate discovery. Instead of trying to avoid discovery, parties should try to find mutuality of what both sides need to present their respective cases in a reasonable and proportional manner. A benefit of the discovery process is to allow the parties a method for evaluating the strengths and weaknesses of their case prior to going to trial. Armed with this knowledge, the parties may make an informed decision on whether to proceed to a trial. Early evaluation of a case offers the parties an opportunity to resolve the matter sooner rather than later, thus conserving time and expense. Further, under Rule 37(f), the court may impose the sanction of paying reasonable expenses, including attorney's fees, against the party that failed to cooperate in developing a discovery plan. Recognizing the mutuality of interest in resolving discovery serves the client's best interest.

Second, cooperation offers efficiencies that save the client's resources both from a financial and human resources perspective. Saving the client's resources so

that the client can focus on its business activities is in the client's best interest. For example, cooperation in developing a discovery plan, as required under the rules, allows the parties to better anticipate the expectations of the case, which allows the attorney and the client to budget resources. Cooperation facilitates timely prosecution and resolution of a case. Most clients would prefer a case resolve in a timely fashion than proceed unnecessarily for years (while racking up attorney's fees and expenses). Cooperation affords the parties the opportunity to self-direct boundaries for preservation and production, which again, saves time and money. Cooperation minimizes duplication of efforts, which again is cost-efficient.

Third, cooperation is also in the client's best interest because it preserves the credibility of both the client and the attorney with the court. Losing credibility with the court can be detrimental to a client's case. Litigants do not want to find themselves in the position where their statements and representations have no weight with the court. Sophisticated clients already recognize the advantages of cooperation. These clients are imposing budget restrictions or alternative fee arrangements to incentivize attorneys to embrace a cooperative approach. The attorneys who embrace cooperative skills and processes to promote these types of efficiencies will be recognized and trusted by their clients because they are promoting their clients' best interest.

Id.

Effectuating Cooperation and Saving Face Doing It

Since lawyers are comfortable with the proverbial "discovery food fight," lawyers need more than judicial encouragement and a proclamation to cooperate. Lawyers need a mechanism to effectuate cooperation and communication. The e-neutral is the answer.

E-neutrals are "third party referees—mediators, arbitrators, masters, judges, liaisons and magistrates—committed to resolving disputes arising from electronically stored information (ESI)." American

College of e-Neutrals, What Is the American College of e-Neutrals? <http://www.acesin.com/> (last visited Apr. 4, 2011); Allison Skinner, *How to Prepare an e-Mediation Statement*, DRI E-Discovery Connection Newsletter (Summer 2010). E-neutrals "assist litigants and the courts in resolving e-discovery disputes in an efficient and effective manner through the use of 'e-mediation' or court appointments." Skinner, *How to Prepare an e-Mediation Statement*, *supra*. E-neutrals are trained in alternative dispute resolution and e-discovery. American College of e-Neutrals, What Is the American College of e-Neutrals? *supra*. If parties cannot compromise informally on their own, then using an e-neutral is the best way parties can demonstrate to courts that they are acting reasonably and trying to cooperate in good faith. *Id.*


The E-Neutral Serving as an E-Mediator

A mediation that facilitates the resolution of a discovery dispute involving ESI is called an "e-mediation." The facilitator of this process is called an "e-mediator," and an e-mediator's conduct is currently governed by the same rules of professional conduct that govern mediators as dictated by the applicable jurisdiction. If a mediation reaches a resolution, an e-mediator prepares a report called a "mediated e-discovery plan," or "MEP," for the parties. Skinner, *How to Prepare an e-Mediation Statement*, *supra*. Whether an MEP is filed with a court depends on the parties' agreement and court expectations. E-mediation provides a confidential environment for the parties to do the following:

- Self-direct workable solutions
- Define scope parameters
- Determine search methodologies
- Determine forms of production
- 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 a court



- Avoid court-imposed sanctions
 - Allocate costs.
- Allison Skinner, *The Role of Mediation for ESI Disputes*, DRI E-Discovery Connection Newsletter (May 2009). The parties that

have participated in an e-mediation naturally often find themselves asking if they can come back as other issues arise. Parties quickly recognize the efficiencies and benefits of an MEP, which include not only the



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benefits discussed above, but also avoiding delays that result from requesting a hearing with a court. E-mediation promotes much needed cooperation by offering a process that litigants know how to use for their clients' best interests.

As written elsewhere, "E-mediation may be held at whatever stage a dispute arises as a result of a party's claim or lawsuit."

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An e-mediator is bound by confidentiality as defined by the applicable state mediation rules; therefore, an e-mediator does not report to a court the way that a special master does.

Allison Skinner & Peter Vogel, *Expanding Your ADR Practice: What Is an e-Neutral?* ABA Dispute Resolution Annual Conference (Denver Apr. 2011). "E-mediation may be appropriate when the duty to preserve attaches, but before a lawsuit has been filed." *Id.* Counsel can engage in e-mediation as part of a "meet and confer" to create a discovery plan. *Id.* Alternatively, parties can request that a court incorporate e-mediation in the Federal Rule of Civil Procedure 16 scheduling order, which would require the parties to attend an e-mediation before seeking the court's intervention. When parties do not use e-mediation to facilitate a discovery plan, they can use e-mediation on an "issue-by-issue basis" during the discovery phase. Skinner, *How to Prepare an e-Mediation Statement, supra.*

One primary benefit of an e-mediation is its veil of confidentiality. Confidentiality allows parties to make realistic compromise offers to find workable solutions without worrying that an opponent will use those offers against them later in litigations. Confidentiality provides an environment permitting an organization to provide facts about its information technol-

ogy systems and ESI without designating a corporate representative. *See, Skinner, The Role of Mediation for ESI Disputes, supra.* For some organizations, this benefit could be very important. For example, an appropriate corporate representative may have a naturally nervous mannerism that leaves an unfavorable impression in a deposition, which unfairly affects the witness' credibility. Confidentiality also protects the credibility of the lawyers and their clients with a court. *Id.* If a judge thinks that a lawyer's discovery conduct resembles *Animal House*-like conduct, then that lawyer will lose credibility with a court by the time of a trial—an unenviable position for any lawyer. E-mediation is a unique tool to resolve e-discovery disputes while maintaining confidentiality.

The E-Neutral Serving as a Special Master or a Discovery Referee

An e-mediation may not be the best process for cases with contentious parties or technical complexities. In those circumstances, the parties need an e-neutral to make decisions and direct the parties' conduct instead of an e-mediator who acts as a facilitator. These types of e-neutrals are typically court appointed. Most commonly, an e-neutral is called a "special master" and is appointed under Federal Rule of Civil Procedure 53. Under California Code of Civil Procedure §638, however, the appointee is called a "referee." For state court practice, attorneys should determine the applicable name used for this type of appointment.

In 2003, Federal Rule of Civil Procedure 53 was amended to allow litigating parties to consent to the appointment of a special master, among other provisions, relaxing the old rule's "exceptional" circumstances requirement. *See Fed. R. Civ. P. 53.* This reform is particularly important for resolving e-discovery disputes. *See Shira A. Scheindlin & Jonathan M. Redgrave, Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure, 30 Cardozo L. Rev. 347-60 (2008); Shira A. Scheindlin, We Need Help: The Increasing Use of Special Masters in Federal Court, 58 DePaul L. Rev. 479-90 (2009).* As noted by other writers, "To address the need to facilitate resolution of ESI issues early in the process as

well as the need to provide technical assistance to the court and the parties when ESI issues arise later in the proceedings, courts have increasingly responded by appointing e-discovery special masters to assist in this effort." Nora Barry Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court, The Fed. Lawyer, Feb. 2011, at 37.*

Recently, the U.S. District Court for the Western District of Pennsylvania established a panel of special masters for electronic discovery. *See U.S. District Court for the Western District of Penn., Order Establishing Panel of Special Masters for Electronic Discovery, Case # 2:10-mc-324, Nov. 16, 2010, http://www.pawd.uscourts.gov/Documents/Forms/special_master_order.pdf (last visited Apr. 4, 2011).* This effort by the U.S. District Court for the Western District of Pennsylvania exemplifies an anticipated trend: courts will appoint e-neutrals as special masters to manage the complexities and time-consuming issues related to e-discovery that currently burdens the resources of the courts. The U.S. District Court for the Western District of Pennsylvania used four major criteria for selecting panelists: "(1) knowledge of e-discovery; (2) experience with e-discovery; (3) relevant litigation experience; and (4) training and experience in mediation." Fischer & Lettieri, *supra*, at 38-39. The selected panelists were required to attend a four-hour training program and provide information about billing practices. *Id.* at 39. The initiative has been described as working this way: "Based on a preliminary matching of qualifications and experience against specific case requirements using online screening, the judges and counsel are now able to select from these registered candidates [panelists] if the court determines that an e-discovery special master is needed." *Id.* Before appointing a special master, a judge conducts interviews with select, potential candidates. Ideally, the court prefers that the litigating parties agree on the final selection, but in the end, the judge overseeing a case decides who will be appointed. *Id.* The order of appointment follows the requirements set forth in Federal Rule of Civil Procedure 53, which includes the scope of the duties, communication with the parties,

filings, and compensation, for example. For more information on preparing an order of appointment, see the Academy of Court-Appointed Masters "Bench Book," <http://www.courtappointedmasters.org/Benchbook.asp>, (last visited Apr. 4, 2011).

When to Use an E-Mediator Rather Than an E-Discovery Special Master

An e-mediator is bound by confidentiality as defined by the applicable state mediation rules; therefore, an e-mediator does not report to a court the way that a special master does. An e-mediator is allowed to develop creative strategies based on confidential communications by the litigants, while typically *ex parte* communications are not permitted with a special master, except by court order. Private caucuses in e-mediation allow parties to include in-house counsel and IT and litigation support representatives in the decision-making process without the requirement of "taking testimony." On the other hand, a special master may conduct hearings, take testimony, issue orders, and report to a court. A special master by virtue of the appointment may adjudicate disputes, while an e-mediator acts in a facilitative capacity. The process of using a special master is more formal than using an e-mediator because the special master acts as an agent of a court, and the parties are required to file pleadings. See American College of e-Neutrals, FAQs, What is the difference between an e-Mediator and a Special Master? <http://www.acesin.com/index.php?q=faq> (last visited Apr. 4, 2011).

However, the most significant difference between an e-mediator and a special master is that the special master "may by order impose on a party any noncontempt sanctions provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." Fed. R. Civ. P. 53(c)(2). In light of the uptick in e-discovery sanction cases, judges will ask e-discovery special masters to make recommendations regarding the spoliation of evidence and the imposition of sanctions. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456-91 (S.D.N.Y. 2010); *Rinkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598-605 (S.D. Tex. 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.*,

269 F.R.D. 497-515 (D. Md. 2010). Litigating parties need to heed this distinction between an e-mediator and an e-discovery special master when making decisions about which process to employ.

Neither procedure is better than the other. Which procedure to select depends on the needs of a case, the complexities of the issues, and personalities of the parties involved, including counsel. Ideally, the parties first should try to cooperate and communicate to resolve e-discovery disputes without using an e-neutral. If the parties fail on their own, depending on the nature and extent of disagreement, then the parties should seek the assistance of an e-mediator or an e-discovery special master before seeking court intervention. Because of the distinctions between an e-mediator and an e-discovery special master discussed above, parties may want to consider first using the less formal process—e-mediation—to determine which issues they can readily resolve, as well as to identify which issues require adjudication. However, in this scenario, a court may disqualify an e-mediator from becoming an e-discovery special master in the same discovery dispute. Some parties find it helpful to use an e-mediator to illuminate which issues are ripe for an e-discovery special master to hear, preserving credibility with the special master, which, in turn, preserves credibility with the court. The roles of the two types of e-neutrals have clear distinctions that have different ethical considerations. E-neutrals and parties will want to cautiously make decisions about using e-neutrals, making sure that they do not confuse the two distinct roles—the role of an e-mediator as opposed to an e-discovery special master. Therefore, parties must clearly understand the needs of a case and discuss their expectations about the e-neutral's role before agreeing to take one path or another.

As an aside, the Seventh Circuit has implemented an Electronic Discovery Pilot Program, which makes use of "e-discovery liaisons." The Seventh Circuit program incorporates several e-discovery principles, one of which reads, "In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, confer-

ring, and attending court hearings on the subject." Seventh Circuit Electronic Discovery Committee, Statement of Principles Relating to the Discovery of Electronically Stored Information Principle 2.02, (rev. Aug. 1, 2010) (E-Discovery Liaisons), http://www.7thcircuitbar.org/associations/1507/files/Principles8_10.pdf (last visited Apr. 4, 2011). The e-discovery liaison must "be

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prepared to participate in e-discovery dispute resolution." Statement of Principles Relating to the Discovery of Electronically Stored Information Principle 2.01(a) (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution). Although in the Seventh Circuit program discovery liaisons operate as party representatives instead of as e-neutrals, the program does not preclude representative discovery liaisons from using an e-mediator or an e-discovery special master when needed. To clarify, lawyers should not confuse the term "discovery liaison" as used in the context of the Seventh Circuit program with the term as it is used interchangeably to refer to a discovery referee or master as defined by e-neutrals and courts in other contexts.

Where Do Parties Find a Qualified E-Neutral?

As previously mentioned, the United States District Court of the Western District of

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Pennsylvania established the first federal panel of e-discovery special masters in February of 2011. At this time, whether other district courts will adopt e-discovery programs and if so, what kinds, is unknown.

The American College of e-Neutrals (ACESIN) was established to provide a resource to the judiciary and litigants for addressing conflict resolution in e-discovery. The ACESIN maintains the "ACESIN Directory of e-Neutrals," a listing of approved e-neutrals who have met the college's high standards for training and experience in

both the disciplines of alternative dispute resolution and e-discovery, accessible online at <http://www.acesin.com/>. Anyone may access the directory for free to locate an appropriate e-neutral—an e-mediator or a special master—for a particular case. Qualified e-neutrals are listed in the directory alphabetically, geographically, and by practice areas. I encourage attorneys to confirm that the e-neutrals that they ultimately wish to retain meet standards such as those established by the ACESIN.

In conclusion, the legal system is searching for methods to better manage discov-

ery, including e-discovery, in compliance with Federal Rule of Civil Procedure 1. E-neutrals stand ready to answer this call. When parties cannot develop a discovery plan on their own, parties demonstrate cooperation when they engage the services of an e-neutral to navigate and resolve ESI disputes. Cooperation mitigates the chances of needless discovery battles, helps control costs, minimizes exposure to sanctions, fosters judicial economy, and promotes disposition of cases on their merits. Putting the "e" in neutral has its advantages. **FD**