Mediation:

An Effective Tool for Resolving E-Discovery Disputes

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In practically all litigation, the process known as "discovery" is a large and crucial part of preparing a case for trial. Under both state and federal procedural law, each party is authorized to obtain documents and testimony from the opposing side, as well as from third-parties who may possess relevant evidence. As the use of computers has exploded over the last two decades, this process has evolved ~ and is evolving ~ to enable parties to obtain electronically stored information (ESI) for trial preparation. Anyone who uses a computer to any extent upon reflection, can readily imagine the immense, and potentially complex, task involved in obtaining e-mails, electronically stored documents and drafts of letters. Unlike paper documents kept in a file, ESI is often deleted on a regular basis. Consequently, discovery disputes may arise regarding the scope of ESI, as well as the burden of the production and which party bears the cost of such production. Such disputes can delay the litigation process and increase litigation costs. The following article offers an alternative to resolve unpredictable and costly ESI disputes by utilizing the benefits of self-directed mediation.

Most corporate information is stored on the computer and is subject to discovery in a lawsuit. The Federal Rules of Civil Procedure allow for the discovery of ESI. Almost half of the states have already either adopted similar state rules or are considering adopting them. Clients need to become familiar with all the different types of ESI, as well as the places where ESI can be found. No type of case is immune from discovery of ESI. The world of electronic discovery is exploding exponentially.

Mediation is a creative tool for effectively managing potentially expensive and burdensome e-discovery disputes.

Advantages

Mediation is no longer just for settlement purposes. This self-determination process can be enormously helpful in handling the potentially uncontrollable, unlimited nature of ESI discovery. Mediating e-discovery allows for creative, mutual solutions among the parties 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, your attorney must be prepared in the meet-and-confer with opposing counsel to talk about what ESI is reasonably available from the client and in what format it will be produced. Since the meet-and-confer must occur early in the case, your attorney must know what ESI is "reasonably accessible" at the outset of the litigation. Although you as a client may not be prepared to respond to ESI requests at that early juncture, it is important that you understand the importance and potential impact of the requests and the responses. A stoplight illustration helps describe data and whether a court could consider such data as "reasonably accessible."

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.

The "Yellow Light" data is the old or deleted data. The Court will weigh factors to determine whether this type of data is discoverable or not.

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

But just like a car wreck at the intersection case, whether the light is green, yellow or red can be the source of dispute. If so, the parties can choose to mediate their discovery disputes. Parties who successfully mediate their discovery are in control of the outcome of what is being requested and what is being produced and how. A mediation can be issue specific or request specific on a particular discovery matter. As such, a mediation eliminates the time and cost associated with seeking the Court's intervention. In the end, the parties 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 identify the key disputes to be presented to the Court.

Under Rule 11 of the Alabama Civil Court Mediation Rules, "all information disclosed in the course of a mediation, including oral, documentary or electronic information, shall be deemed confidential." A confidential exchange of proposals on how to create a workable discovery plan increases the chances of reaching mutual solutions.

How to help your attorney prepare for mediating the ESI dispute

Be prepared to be specific about a particular request. Often a request reads "produce any and all" of a particular type of information, which 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. Working out an acceptable level of specificity of a request is particularly important when dealing with 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.

Help your attorney be prepared to articulate the importance of the requested information. Although ESI is 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 for a cost-shifting provision when information is not reasonably accessible, a 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. A requesting party may, in those instances, argue whether the cost-shifting provision should or should not apply,

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depending upon the circumstances.

Consult with your counsel about the various formats in which your ESI may be provided in response to discovery requests. Parties may produce information in a different form from the original source if the parties agree. 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, *i.e*., 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.

Help your attorney in being prepared to describe your technological capabilities. Typically, the plaintiff is requesting ESI from a company. The attorneys for both sides need to appreciate the client's 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 and its attorney must understand what information is maintained in the ordinary course of business, how it is stored, how it can be retrieved and how much such production will cost. 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 per discovery request:

- **Request number**
- **Type of data**
- **Accessible ability**
- **Format**
- **Search parameters**
- **Method of production**
- **Preservation, privilege issue**
- **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, thus allowing the court to concentrate on other, substantive aspects of the case instead of spending an enormous amount of time hearing the attorneys argue over the specifics of the initial 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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Alabama Law Employment Report

Sirote attorney Daniel J. Burnick recently launched Alabama's first blog on labor and employment law. Topics include the American with Disabilities Act, military leave, Title VII, workers compensation and others.

www.AlabamaEmploymentLawBlog.com