LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, NOVEMBER 10, 2023

PERSPECTIVE

Mediating E-discovery can save time and money

By Daniel B. Garrie, Esq. and Hon. Gail A. Andler (Ret.)

The volume and complexity of data, and the corresponding rise in the cost of e-discovery, has led the bench and bar to undertake efforts in the last decade to control the e-discovery process. The 2015 amendments to the Federal Rules of Civil Procedure, which attempted to refine the federal courts' approach to e-discovery in light of its increasing cost and volume, were a significant part of these efforts. Due to their nature as part of the litigation process, however, the Federal Rules of Civil Procedure can fall victim to certain costly inefficiencies. Additionally, Counsel and parties often lament the time and resources spent in discovery related to electronically stored documents. One approach parties can look to in trying to remediate these expenses is using mediation to resolve some aspects of discovery disputes.

Mediation is an alternative dispute resolution process that has been instrumental in resolving countless disputes. It has seen a recent rise in its application to e-discovery disputes. E-discovery mediation carries the promise of beneficial outcomes for all parties in a cost-effective and timely manner. An experienced e-discovery mediator can save the parties from an inefficient, frustrating, and unnecessarily costly battle in the following ways. If e-discovery is likely to play a significant role in the exchange of information in a litigated or arbitrated matter, counsel should consider jointly engaging an experienced e-discovery mediator to assist on an "as needed" basis from the outset. For example, many courts require the parties to meet and confer about an e-discovery protocol. A neutral can facilitate the resolution of early disputes about the protocol and the use of keywords or technology-assisted review before the search begins.

Similarly, the parties may need assistance resolving disagreements about custodians or the temporal limits of the search. Following the production, disputes regarding sufficiency may arise. There are many steps along the way, from formulating the search to doing a responsiveness review to the evaluation of the production by opposing counsel where an e-discovery mediator can help on a selected issue.

The neutrality and focus of the mediator resolving e-discovery issues are key features of the process. In contrast to the substantive claims, the technical elements of e-discovery are not grounded in law, advocacy, and persuasion, but rather by the 1's and 0's of the relevant computer systems. The immutable nature of 1's and 0's allows a neutral third party to present those truths to the fact-finder in an efficient process, without the parties having to engage in lengthy and costly rounds of briefings and submission of expert opinions. If the parties select a technically competent neutral, the parties may not only save their clients a substantial sum in attorneys' fees but also avoid having to hire their own technical consultants to deal with these e-discovery issues. An e-discovery mediator helps guide the parties as they focus on technical issues and presents the parties with possible technical solutions to the issues they are navigating through. The mediator should never take the role of decision-maker, legal fact-finder, or technical expert imposing a specific solution.

The parties must be confident that the e-discovery mediator is both technically proficient and neutral and that his/her presence promotes effective communication and voluntary decision-making between the parties. Otherwise, they risk making discovery costlier and more time-consuming. Done properly, and with a neutral mediator that both sides trust, the parties will likely have the confidence to voluntarily limit discovery to the elements most likely to maximize benefits and minimize costs, once the mediator clarifies and communicates the scope and practicability of the e-discovery elements of the case. Even if the parties have chosen an experienced technologist to be their e-discovery mediator, the assistance of the parties and their counsel remains crucial. The most effective and useful e-discovery mediation requires the parties to gather the information necessary for a mediator to successfully work with the parties to reach useful resolutions. Examples of this information include: data maps; business use cases for data

Daniel B. Garrie, Esq. *is the founder of Law & Forensics and* **Hon. Gail A. Andler (Ret.)** *is a retired Orange County Superior Court judge and Southern California-based neutral who specializes in business, employment, class actions, and mass torts.*

that is collected; and explanations for why each item of discovery is requested. Additionally, it can be useful to have the parties' IT resources available throughout the course of the mediation process in the event technical questions arise.

While e-discovery mediation can take many different forms depending on the scale and complexity of the discovery dispute, there are several common takeaways that are necessary to lead to a successful mediation in most circumstances, including: (i) retaining an experienced and technically knowledgeable mediator; (ii) focusing the mediation on e-discovery, not the underlying legal issues; (iii) ensuring that the parties, not the mediator, are generating possible solutions (the mediator can facilitate both parties understanding of the proposal, but should not evaluate its non-technical merits); (iv) identifying the e-discovery interests at stake, and encouraging a meaningful dialogue that recognizes and validates those interests; and (v) having the flexibility to consider and implement alternative proposals that lead to appropriate and cost-effective electronic discovery.

Once a mediation is completed it is important to always memorialize its results. A successful e-discovery mediation should result in a written protocol, search terms, scope of discovery, or other result that governs both parties' e-discovery obligations. The result should be memorialized for at least two key reasons: (1) it allows the parties to have a written record of their agreed-to obligations that they can present to the Court, and (2) it provides the parties with a roadmap that helps ensure they continue to comply with their agreed-to obligations.

In conclusion, while e-discovery mediation is not necessarily right for every case, it is worth considering as it can save the parties time and money. Finding the right e-discovery mediator can help both sides get on the same "page" so that the process is less adversarial and more cooperative and efficient. As noted by the Cooperation Proclamation of The Sedona Conference, "Cooperation in Discovery is Consistent with Zealous Advocacy." Many judges are signatories endorsing the Cooperation Proclamation, and others are familiar with it and support the concept. An experienced discovery mediator can ease the pain of a costly battle on the path to a trial or arbitration on the merits. Accordingly, by adhering to the guidelines mentioned above, parties can optimize the benefits of using an e-discovery mediator and potentially make the entire legal process more efficient.

This content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.