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We Need Mediation In E-Discovery

Law360, New York (June 05, 2013, 12:46 PM ET) -- As a practicing attorney, I have heard the word "mediation" cautiously whispered in the courthouse hallways. Attorneys and clients alike are skeptical and resistant to entertain the thought of trying to settle any dispute lest it be before the judge. "Is this a therapist? An arbitrator? What's the point?" a client asks her attorney. "No-no," he responds, "it is different." And while different and change can be uneasy in the case of e-discovery, it may be necessary.

Chances are you are either reading this article on a computer or have one within arm's reach. If this is the case, I implore you to travel with me to the January 1994 episode of "The Today Show," coined on the Web as, "What is the Internet anyway?" and watch the correspondents grapple with the idea of email and the Internet. Like it or not, in the last 17 years the Internet, email and digital communication have evolved from a fad to a cornerstone of how business gets done and how many humans interact in the modern world. As this technology has rapidly evolved, the legal community must also evolve to meet the ever growing needs of litigating in the digital world.

Practitioner Point: E-mediation focuses on the issues of discovery, not the issues of the case. While the parties may be hesitant to allow a nonjudicial proceeding dictate their discovery needs, the level of expediency and cost-effective nature of mediation far outweigh any benefit to litigating these procedural components.

In a perfect world, where the United States legal system is not struggling with budget cuts, shorter hours and tremendous dockets, the answer to meeting the demands of e-discovery would be simple: adding more specialized judges, monthly training programs in e-discovery for all court staff, and perhaps, with unlimited funds we could acquire servers for court technicians, and platforms to upload and manage all e-discovery in any pending proceeding. While exciting, this is a concept that may challenge our education and job training budget, not to mention the patience of taxpayers.

The impact of e-discovery on litigation has driven up costs and protracted discovery disputes to the detriment of the core issues. Moreover, parties are being forced to settle actions, rather than continue to litigate what at times may appear to be endlessly moving parameters of permissible discovery and depleted funds. Another issue that often confronts the courts is the situation where the e-discovery requests are out of alignment with the amount in dispute. For example, a retaliation termination law suit might be worth $100,000, while the discovery and legal costs alone exceed the amount in dispute. Such circumstance will force litigants to settle unnecessarily.

While many nonattorneys immediately assume that all attorneys use discovery to bury the opposing side, or that attorneys and clients collude in smoky conference rooms, hiding and destroying evidence … this is not the reality in the legal community. Yet I venture to guess that in the back of the mind of many attorneys engaged in e-discovery, is the old adage "if

they don't want to give it to us how and when we want it, they must be hiding something."

Practitioner Point: Mediations are confidential, with any settlement being inadmissible in court. In addition, the mediator cannot be called to testify about the details of the settlement or negotiations. These benefits of mediation are critical for all parties to come to the table with an open mind about the potential efficiencies of mediation.

An alternative solution is for the parties to retain a mediator specialized in the field of e-discovery.

The private sector in all its ingenuity has effectively created a breed of lawyer/technologist: a neutral lawyer who is an expert in technology, and, more specifically, information management systems and tools. The results arising from this new breed of e-mediators when it comes to determining e-discovery scope and keyword mediations have been tremendous, saving the parties hundreds of thousands of dollars and time. However, e-discovery scope and keyword mediations are only a small slice of the e-discovery pie. It stands to logic, that the benefit would be even greater if such mediation transpired with respect to all e-discovery.

Where parties elect to mediate discovery, it removes the need for them to appear before the courts on discovery disputes. In addition, the parties in a large percentage of discovery mediations can get through e-discovery in a fraction of the time. Another obvious benefit of saving time is that you save money: money on hiring your own experts, on the time it would take for a lawyer to become an expert on her clients' specific computer system, on the time it takes for the lawyer to explain it, and finally and, maybe not so obviously, on the process of providing the discovery.

Practitioner Point: Ensure your mediator is skilled in technology and the law. As the mediation is focused strictly on the discovery issues and the technical systems of both parties, it is critical that the mediator know the right questions to ask and understand whether the answers given make sense.

How can a mediator save parties' money in providing discovery? A mediator who understands the fiscal repercussions of the demands of the discovery can translate technical jargon into a language that lawyers can digest and often allow counsel to reconsider the document request or dispute at issue in a new light. That new light may make a previously rejected discovery method more feasible. Perhaps that new light may also subdue the aforementioned voice in the client and litigates' head that screams "if they don't want to give it to us how and when we want it, they must be hiding something".

Practitioner Point: The mediator has a duel role of listener and translator. It is critical that the mediator listen to the parties' concerns and questions with an open mind. The mediator must also translate the technical underpinnings of each party's systems into actionable discovery efforts that both parties can comprehend.

An example e-mediation program has started in the Seventh Circuit,[1] where e-mediation is an active upstart leading the way for other programs around the country. But there is no need to wait for a program to start in your jurisdiction. Mediation, program or not, must be mutually agreed upon by the parties. After that, it is just a few short settlement hours away from moving on to the real issues of the case. A typical mediation work flow looks something like this:

- Pre-Mediation: This phase is an information gathering period. The mediator tells the parties what information is needed before hand and what information should be brought to the initial meeting.

- Opening Statements: At the first meeting of the parties, the mediator gives an opening statement to remind the parties that their meeting is voluntary, confidential, and the mediator is a neutral party.

- Caucus : The caucuses can be joint or private, depending on the requests of the parties. The caucus period can take place over the course of several meetings.

- Memorialization: The key document to come out of mediation is the one memorializing the settlement of the parties. Depending on the aggression levels of the parties involved, drafting the language for a discovery settlement agreement can take as long as the mediation itself.

Practitioner Point: Time Saved Equals Money Saved. In a smaller commercial case, mediation can take as little as 10 hours. While the client is still billed for their attorney's time during the mediation, many more hours could easily be spent drafting motions and making court appearances to litigate the discovery.

While traditional mediation may be viewed by some as a soft form of adjudication best left for family disputes and small matters, the format of mediation is suited for even the largest of commercial disputes. By combining confidentiality with an opportunity to separate the technical aspects of discovery from the real issues of the case, both parties benefit by saving time and money. As court dockets and budgets continue to tighten, counsel would be wise to consider the benefits of discovery mediation for their cases.

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[1] In full disclosure, Daniel Garrie was an instructor, along with Judge Nan Nolan, for this milestone training of mediators.