ALTERNATIVE DISPUTE RESOLUTION EXPANDS INTO PRE-TRIAL PRACTICE: AN INTRODUCTION TO THE ROLE OF E-NEUTRALS

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INTRODUCTION

Alternative dispute resolution is a viable tool for case management. The use of a third party neutral for resolving discovery disputes and related pre-trial issues offers litigants an alternative for managing the pre-trial phase of a lawsuit in an efficient manner. Alternative dispute resolution is expanding into pre-trial practice in response to two forces: 1) Judicial budgetary constraints; and 2) E-discovery. Both factors require litigants to approach discovery in a manner that meets Federal Rule of Civil Procedure 1—"just, speedy and inexpensive determination of every action and proceeding"—and Federal Rule of Civil Procedure 37—"Failure to Make Disclosures or to Cooperate in Discovery." Utilizing alternative dispute resolution for discovery disputes,[1] primarily disputes

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[1] With the seemingly endless increase of computer technology in every aspect of individual and corporate life, the "e" in e-discovery will no longer be necessary in the near future. Discovery of electronically stored information (ESI) will become commonplace so that no distinction between e-discovery and discovery will be required. Further, ESI disputes present themselves to the court through a procedural discovery mechanism, ie. Fed. R. Civ. Pro. 26 or 37. Recognizing these two points, this author uses the term "discovery" and "e-discovery" interchangeably in some places throughout this article, but emphasizes the reference to ESI disputes for clarification.

involving electronically stored information (ESI), requires the services of a third party referee referred to as an "e-neutral."[2]

An e-neutral may be called an e-mediator, special master, discovery arbitrator, discovery referee or another name specific to a particular jurisdiction for some other variation of this function.[3] The e-neutral is trained and experienced in both the disciplines of alternative dispute resolution and e-discovery.[4] The distinctive characteristics of each type of e-neutral fall into two categories—facilitation or decision-making. Recent private and public efforts to address e-discovery disputes around the country, discussed *infra*, indicate that the bench and bar recognize the need for a new approach to managing pre-trial practice. Recognizing the interplay of the different types of e-neutrals is helpful for developing local rules on this subject. Regardless of the jurisdictional approach, demand for alternative dispute resolution for procedural matters is increasing in light of the decrease in court funding and the increase in motion practices involving ESI. Alternative dispute resolution has proven successful for substantive matters;[5] therefore, alternative dispute resolution should be and is successful for procedural disputes. This paper discusses the underlying need for e-neutrals, the types of e-neutrals and their respective functions, and the current use of e-neutrals.

I. The Need for E-Neutrals: Economics and E-Discovery

A. *Judicial Budgetary Constraints*

The birth of alternative dispute resolution was a result of backlogged dockets in the 1970s,[6] but introduced in the name of

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2 *See* Am. C. of e-Neutrals, http://www.acesin.com (last visited Oct. 13, 2011).

3 *Id.*

4 *Id.*

5 *See, e.g.,* Report of the Mediation Comm. of the N.Y. St. B. Ass'n Disp. Resol. Section and Alternative Disp. Resol. Comm. of the N.Y.C. B. Ass'n, Mediation: Through the Eyes of New York Litigators (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=home&Template=/CM/ContentDisplay.cfm&ContentID=47291 (surveying 485 New York lawyers at the 2010 Annual Meeting of the State Bar, where ninety percent of the lawyers interviewed had a "positive view" of the mediation process).

6 Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211, 230 (1995).

case management by the court.[7] Prior to 1983, the decision whether or not to hold a pre-trial conference rested solely with the court. In 1983, Federal Rule of Civil Procedure 16 was amended to require the court to hold a pre-trial conference.[8] The 1983 Amendment also required the court to address "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute" during the pre-trial conference.[9] In 1993, Federal Rule of Civil Procedure 16 was amended to expand the court's managerial role over the pre-trial process and case settlement.[10] In 1993, the Federal Rules of Civil Procedure changed the description of alternative dispute resolution from "extrajudicial procedure" to "special procedures to assist in resolving the dispute when authorized by statute or local rule."[11] This made alternative dispute resolution a part of the mainstream judicial proceeding. The purposes of today's pre-trial conference include the following:

> (a) Purposes of a Pretrial Conference.
> In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:
> (1) expediting disposition of the action;
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
> (3) discouraging wasteful pretrial activities;
> (4) improving the quality of the trial through more thorough preparation, and;
> (5) facilitating settlement.[12]

Accordingly, over the decades, alternative dispute resolution has been used to reduce the total number of civil cases pending before the court, thereby improving overall case management. Today, the courts still find themselves overburdened. However, this problem is now further exacerbated by reduction in judicial resources resulting from the economic downturn from The Great Recession of 2008.[13] This author contends that alternative dispute resolution

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7 *Id.*

8 *Id.*

9 *Id*. *See also* FED. R. CIV. P. 16 as amended in 1983.

10 *Id. See also* FED. R. CIV. P. 16 as amended in 1993.

11 *Id.*

12 FED. R. CIV. P. 16(a).

13 According to Catherine Rampell, no one can be credited for coining the term "Great Recession." *See* Catherine Rampbell, "*Great Recession:" A Brief Etymology*, N.Y. TIMES (Mar. 11, 2009), http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology.

can again rescue courts by alleviating burdens on courts imposed by the proverbial discovery battles.

Today, courts—particularly state courts—face extraordinary budget cuts. For example, the court budget in California was reduced nine percent this year and expected to be reduced more than fifteen percent next year.[14] As of October 4, 2010, twenty-three states have implemented hiring freezes.[15] Twelve states have frozen court salaries.[16] Nine states have implemented pay cuts[17] either that are mandatory for court employees but voluntary for judges,[18] or unpaid leave for judges.[19] Fifteen states' court systems have instituted or plan to institute furloughs of court employees.[20] Arizona, California, Iowa, Kentucky, Michigan and Washington have experienced layoffs of court personnel, while Alabama, Connecticut, Massachusetts, New Hampshire, New Jersey and South Dakota have forced early retirement for court employees.[21] In the most dire of circumstances, California, Iowa, Massachusetts, Minnesota and Vermont have chosen to do the unthinkable—they have closed courthouses.[22]

In response, the American Bar Association established the Preservation of Justice Task Force for the 2010-2011 year, which is charged with addressing the "severe underfunding of our justice system, depletion of resources, and the courts' struggle to render their constitutional function and provide access to justice."[23] Clearly, underfunded judiciaries are at critical mass.[24]

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14 *Local Judge Questions State Court Budget Cuts*, SAN DIEGO NEWS 10 (July 12, 2011), http://www.10news.com/news/28528390/detail.html.

15 NATIONAL CENTER FOR STATE COURTS, LISTING OF CURRENT BUDGET IMPACTS (2010), *available at* http://www2.americanbar.org/calendar/ABAday/Documents/intercept/st_budget.pdf (describing Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah and Wisconsin).

16 *Id.* (describing Arizona, California, Georgia, Indiana, Kentucky, Massachusetts, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Wisconsin).

17 *Id.* (describing Florida, Kansas, Kentucky, Maine, and Washington).

18 *Id.* (describing Delaware, Idaho, North Carolina).

19 *Id.* (describing Iowa).

20 *Id.* (describing California, Connecticut, Iowa, Kansas, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, South Dakota, Vermont, Washington, Wisconsin).

21 *Id.*

22 *Id.*

23 *American Bar Association Task Force on Preservation of the Justice System*, A.B.A., http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system.html (last visited Nov. 20, 2011).

24 *Legal Heavyweights Decry Shrinking State Court*, ABA NOW (Feb. 10, 2011), http://www.abanow.org/2011/02/legal-heavyweights-decry-shrinking-state-court-budgets/.

Several state and federal justices have spoken out on this issue. Former Supreme Court Justice Sandra Day O'Connor while speaking at "Justice Is the Business of Government" Summit sponsored by the American Bar Association and the National Center for State Courts in Charlotte, North Carolina, on May 8, 2009, emphasized the problems state court systems are facing because of diminished funding.[25] To ABC Newspapers on March 18, 2011, Minnesota Supreme Court Chief Justice Lori Gildea explained that the budget cuts have led to postponements, backlog and congestion in her state judiciary.[26] Similarly, former Chief Justice Sue Bell Cobb of the Alabama Supreme Court emphasized that the judicial budget cuts requiring layoffs of court employees in her state would slow the judicial process.[27]

Clearly, judicial resources are being dramatically reduced in a majority of states. When the courts are backlogged, parties cannot set hearings to resolve pre-trial disputes, such as motions to compel, motions for protective order, requests for *in camera* inspection of privileged information, in a timely manner. When the parties cannot proceed with discovery in a case because of legitimate procedural disputes, the case is stalled. This situation inevitably delays the trial setting. Unaddressed or delayed discovery motions also impede the parties' ability to evaluate a case for settlement purposes (a primary purpose of the discovery rules), which worsens the overcrowded docket problem. "The reality is that a well-managed case progresses through discovery process more efficiently and cost-effectively."[28] Consequently, the impact of budget cuts requires both the judiciary and the litigants to re-think how to manage pre-trial practice.

The discovery rules are "designed to encourage extrajudicial discovery with a minimum of court intervention."[29] The time has come to use alternative dispute resolution for discovery disputes because the process promotes judicial economy in a time when

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25 *Sandra Day O'Connor Cites State Budget Crises as Most Pressing Problem Confronting State Courts*, ABA NOW (May 8, 2008), http://www.abanow.org/2009/05/sandra-day-oconnor-cites-state-budget-crises-as-most-pressing-problem-confronting-state-courts/.

26 T.W. Budig, *Court Budget Cuts Should Outrage Citizens*, ABC NEWSPAPERS (Mar. 18, 2011), *available at* http://abcnewspapers.com/2011/03/18/court-budget-cuts-should-outrage-citizens/.

27 *Alabama Chief Justice Sue Bell Cobb Says State Court System Layoffs Coming*, ASSOCIATED PRESS (Mar. 24, 2011), *available at* http://blog.al.com/wire/2011/03/alabama_chief_justice_sue_bell.html.

28 Home Design Servs., Inc. v. Trumble, No. 09-cv-00964-WYD-CBS, 2010 WL 1435382, at *10 (D. Colo. Apr. 9, 2010).

29 FED. R. CIV. P. 26 advisory committee's note.

both the courts and the parties need relief. Parties relieve overburdened courts and proceed with their cases efficiently by jointly agreeing to use a form of alternative dispute resolution for their discovery disputes without a court order. Simultaneously, courts relieve strain on their systems by providing a mechanism or program for utilizing a form of alternative dispute resolution for discovery disputes, particularly disputes involving ESI. Some courts are already implementing such programs, discussed *infra,* and other courts are encouraged to consider similar action.

B. *E-Discovery*

The advent of e-discovery in both the federal and state courts is another reason alternative dispute resolution is appropriate for resolving discovery disputes.[30] The sheer volume and complexities associated with electronically stored information demand a different approach to managing discovery. E-discovery has created new legal issues such as preservation, search methodologies, collection, processing, proportionality, accessibility, non-waiver agreements, metadata, forms of production, and spoliation pitfalls. These new procedural rules inevitably require parties to litigate disputes to develop case precedent.[31] Consequently, e-discovery motion practice is blamed for an increased cost in litigation in general. In Fulbright's 7th Annual Litigation Trend Report, 28% of the respondents reported an increase in spending for e-discovery, which is up 12% from last year's report.[32] In fact, the advent of the e-discovery rules created an exploding vendor industry, which is expected to become a $1.5 billion market by 2012.[33] To ease the burden and expense associated with e-discovery, some courts are giving attor-

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30 To date thirty-nine states have enacted e-discovery rules similar to the 2006 Amendments to the Federal Rules of Civil Procedure. *See Current Listing of States That Have Enacted E-Discovery Rules*, ELECTRONIC DISCOVERY L. (Oct. 10, 2008), http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/.

31 The number of e-discovery opinions has increased more than 50% each year since 2008. *See*, Greg Buckles, *Outtakes from the Gibson Dunn 2010 eDiscovery Update*, EDISCOVERY J. (Jan. 20, 2011), http://ediscoveryjournal.com/2011/01/outtakes-from-the-gibson-dunn-2010-ediscovery-update/.

32 FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 7TH ANNUAL LITIGATION TRENDS SURVEY REPORT 28 (2010), *available at* http://www.fulbright.com/images/publications/7thLitigationTrendsReport.pdf.

33 Monica Bay, *Gartner Predicts Big Bucks for E-Discovery*, LAW TECHNOLOGY NEWS (May 27, 2011), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202495507273&slreturn=1&hbxlogin=1.

neys a "wake-up call"[34] to "cooperate" in matters involving electronically stored information, often citing the Sedona Conference's[35] "Cooperation Proclamation."[36] Some examples of the court's directives to cooperate are set forth below.

In *Home Design Servs., Inc. v. Trumble*, *supra,* the court reasoned cooperation is important for case management:

> The importance of a well-considered case management plan has become even more apparent as the number of cases actually proceeding to trial continues to decrease. Counsel should have an interest in developing a discovery plan and managing the pretrial process with a view toward the most likely litigation outcomes, ie. [sic] settlement or disposition through motion.

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34 William A. Gross Const. Assoc., Inc. v. American Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. 2009). *See also* INDIVIDUAL PRACTICES OF MAGISTRATE JUDGE ANDREW J. PECK 4C (revised 3/1/11), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=538 (stating "I endorse the 'Sedona Conference Cooperation Proclamation'. . . .").

35 Schubert v. Pfizer, Inc., No. 09-167, 2010 WL 3672215, at n.2 (S.D. Iowa June 4, 2010) ("The Sedona Conference is a non-profit educational research institute.") *See also* THE SEDONA CONFERENCE, http://www.sedonaconference.org (last visited Nov. 20, 2011).

36 *The Sedona Conference Cooperation Proclamation*, THE SEDONA CONFERENCE, 2008, *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf. *See also* Lee v. Max Int'l, LLC, 638 F.3d 1318 (10th Cir. 2011); *In re* Facebook PPC Adver. Litig., No. C09–03043 JF (HRL), 2011 WL 1324516, at *1-2 (N.D. Cal. Apr. 6, 2011); Degeer v. Gillis, No. 09 C 6974, 2010 WL 5096563, at *8 (N.D. Ill. Dec. 8, 2010); Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc., No. 1:09-CV-2012, 2010 WL 4973317, at *13 (M.D. Pa. Dec. 1, 2010); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010); Romero v. Allstate Ins. Co., No. 01–3894, 2010 WL 4138693, at *10 (E.D. Pa. Oct. 21, 2010); *In re* Vioxx Prods. Liab. Litig., No. 1657, 2010 WL 5576193, at *81 (E.D. La. Oct. 19, 2010); Barrera v. Boughton, No. 3:07cv1436(RNC), 2010 WL 3926070, at *82 (D. Conn. Sept. 30, 2010); Schubert v. Pfizer, Inc., No. 09-167, 2010 WL 3672215, at *11 (S.D. Iowa June 4, 2010); Home Design Servs., Inc. v. Trumble, No. 09-cv-00964-WYD-CBS, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010); Cartel Asset Mgmt v. Ocwen Fin. Corp., No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *13-14 (D. Colo. Feb. 8, 2010); Bldg. Erection Servs. Co., L.C. v. Am. Bldgs. Co., No. 09-2104-CM-DJW, 2010 WL 135213, at *1 (D. Kan. Jan. 13, 2010); Oracle USA, Inc. v. SAP AG, No. C-07-01658 PJH (EDL), 2009 WL 3009059, at *2 (N.D. Cal, Sept. 17, 2009); Capitol Records, Inc. v. MP3tunes, LLC, No. 07 Civ. 9931(WHP)(FM), 2009 WL 2568431, at *2 (S.D.N.Y. Aug. 13, 2009); *In re* Direct Sw., Inc., Fair Labor Standards Act (FLSA) Litig., No. 08-1984-MLCF-SS, 2009 WL 2461716, at *1-2 (E.D. La. Aug. 7, 2009); Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n, No. 3:07-cv-449, 2009 WL 2243854, at *2 (S.D. Ohio July 24, 2009); Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc., No. CV 2007-4027(ENV)(MDG), 2009 WL 17500348, at *4 (E.D.N.Y. June 19, 2009); Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418, 424-25, 427 (D.N.J. May 19, 2009); Newman v. Borders, Inc., 257 F.R.D. 1, 3 (D.D.C. Apr. 6, 2009); William A. Gross Const. Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. Mar. 19, 2009); S.E.C. v. Collins & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. Jan. 13, 2009); Covad Commc'ns. Co. v. Revonet, Inc., 254 F.R.D. 147, 148,49 (D.D.C. Dec. 24, 2008); Gipson v. Sw. Bell Tel. Co., Civ. No. 08-2017, 2008 U.S. Dist. LEXIS 103822, at *4 (D. Kan. Dec. 23, 2008); Aquilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Sec., 255 F.R.D. 350, 353-56, 358-59, 362 (S.D.N.Y. Nov. 21, 2008); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359, 363 (D. Md. 2008).

> Counsel's case management responsibilities should not been seen as antithetical to their role as advocate. The reality is that a well-managed case progresses through the discovery process more efficiently and cost effectively.

(internal citations omitted). In *Schubert v. Pfizer, Inc.,* No. 09-167, at *10-11 (S.D. Iowa June 4, 2010) (order discussing preliminary discovery), the court made the case for the need of cooperation in discovery as follows:

> The painful process of discovery in this case demonstrates the need for counsel to cooperate. It is the clients who suffer when the "meet and confer" requirements are bypassed, when hundreds of pages of motions are filed to resolve what could be addressed in a single phone call, when the Federal Rules of Civil Procedure are used as a sword rather than a mechanism to ensure the just, speedy and inexpensive determination of the action.
>
> Stop the madness. Use cooperation and proportionality to save the clients both time and money . . .
>
> It is in the client's best interests, and absolutely necessary to avoid excessive or abusive discovery, for counsel to cooperate. It is not unrealistic for the court to expect 'cooperative, collaborative, transparent discovery."

(internal citations omitted). Another court stated the directive to cooperate this way: "The parties are ordered to actively engage in cooperative discussions to facilitate a logical discovery flow."[37] Yet another court cautioned "the failure to cooperate on defining the contours of appropriate discovery accordingly threatens the fair and cost-effective exchange of relevant discovery."[38]

Further, the Federal Rules of Civil Procedure 26 through 37 require cooperation.[39] The discovery rules were designed to promote cooperation by requiring the parties to attend a Rule 26(f) conference, identify claims and defenses in initial disclosures under Rule 26(a), determine proportionality in requests under Rule 26(g) and determine proportionality in production under Rule 26(b)(2)(C).[40] The "spirit and purposes of the rules require cooperation by counsel to identify and fulfill legitimate discovery needs,

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37 Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010).

38 Oracle USA, Inc. v. SAP AG, No. C-07-01658 PJH (EDL), 2009 WL 3009059, at *2 (N.D. Cal, Sept. 17, 2009).

39 Hickman v. Taylor, 329 U.S. 495, 594 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

40 *See* The Sedona Conference, *Case for Cooperation*, 10 SEDONA CONF. J. 339, 349-350 (2009).

yet avoid seeking discovery, the cost and burden of which is disproportionally large to what is at stake in the litigation."[41] Restated, the rules "require cooperation rather than contrariety, communication rather than confrontation."[42] Specifically for e-discovery, in *Romero v. Allstate Ins. Co*., No. 01–3894, 2010 WL 4138693, at *10 (E.D. Pa. Oct. 21, 2010), the court stated it "expects counsel to 'reach practical agreement' without the court having to micro-manage e-discovery [] 'search terms, date ranges, key players and the like.'"[43] The *Romero* court emphasized that "counsel are generally directed to meet and confer to work in a cooperative, rather than adversarial, manner, to resolve discovery issues,"[44] and directed the parties to this language:

> Cooperation . . . requires . . . that counsel adequately prepare prior to conferring with opposing counsel to identify custodians and likely sources of relevant ESI, and the steps and costs required to access that information. It requires disclosure and dialogue on the parameters of preservation. It also requires forgoing the short term tactical advantages afforded one party to information asymmetry so that, rather than evading their production obligations, parties communicate candidly enough to identify the appropriate boundaries of discovery. Last, it requires that opposing parties evaluate discovery demands relative [to] the amount in controversy. In short, it forbids making overbroad discovery requests for purely oppressive, tactical reasons, discovery objections for evasive rather than legitimate reasons, and 'document dumps' for obstructionist reasons. In place of gamesmanship, cooperation substitutes transparency and communication about the nature and reasons for discovery requests and objections, and the means of resolving disputes about them. *Trusz v. UBS Realty Investor LLC*, No. 3:09 CV 268(JBA), 2010 WL 3583064, at *4-5 (D. Conn. Sep. 7, 2010) (quoting The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 344-45 (2009) (footnote omitted)).[45]

In conclusion, "[t]he best solution in the entire area of electronic discovery is cooperation among counsel."[46] Despite these directives to cooperate, less than thirty percent of attorneys in fed-

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41 Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008).

42 *Id.*

43 *Romero*, 2010 WL 4138673, at *13 (citing Trusz v. UBS Realty Investors LLC, No. 3:09 CV 268(JBA), 2010 WL 3583064, at *4-5 (D. Conn. Sep. 7, 2010)).

44 *Id.* (citing SEC v. Collin & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. 2009)).

45 *Id*.

46 William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

eral court and two percent of attorneys in state courts are discussing ESI at the Rule 26(f) conference or its state's counterpart.[47] E-discovery related sanctions are at their highest levels,[48] including sanctions against counsel.[49] The imposition of sanction indicates a problem with attorneys meeting their ethical obligations with respect to ESI issues.[50] To the extent attorneys cannot effectuate cooperation for whatever reason (lack of desire, tactical decision, lack of understanding of ESI), attorneys need the ADR process to facilitate what the purpose of the discovery rules seek—"extrajudicial discovery with a minimum of court intervention."[51] Restated, parties need alternative dispute resolution when they cannot cooperate or communicate informally, particularly in disputes involving ESI and related technical issues.

When litigants reach a point in discovery where informal negotiations have either failed to occur or failed to be productive, litigants should apply a form of alternative dispute resolution to the discovery dispute. Using alternative dispute resolution to resolve discovery disputes in good faith, particularly e-discovery disputes, demonstrates cooperation. In fact, *The Cooperation Proclamation* supports the use of alternative dispute resolution as a method for demonstrating cooperation.[52] An e-neutral for the alternative dispute resolution process, discussed in detail below, assists the parties in defining "mutuality of interest,"[53] creating

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47 *See,* Videotape: Jason Baron and Ralph Losey, *E-Discovery: Did You Know?* 1:44-1:48 (2010), http://www.e-discoveryteam.com.

48 Dan H. Willoughby, Jr., Rose Hunter Jones, & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 792 (2010). *See also* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010) (attaching an exhibit that lists spoliation sanctions by circuit).

49 *Id*. at 816.

50 *See* The Sedona Conference, *Case for Cooperation*, 10 SEDONA CONF. J. 339, 351 (2009).

51 FED. R. CIV. P. 26 advisory committee's note.

52 *See* Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n, No. 3:07-cv-449, 2009 WL 2243854, at *4 (S.D. Ohio July 24, 2009) (quoting The Sedona Conference Proclamation, THE SEDONA CONF. (July 2008), *available at* http://thesedonaconference.org).

53 *See* Allison Skinner, *Putting the "E" in Neutral: Promoting Cooperation with E-Neutrals*, DRI (May 2011), *available at* http://www.dri.org/articles/EDiscovery/FTD-1105-Skinner.pdf. The article described "mutuality of interest" as follows:

> [M]utuality 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

"economic efficiencies"[54] and maintaining "credibility preservation"[55] of the parties, all of which effectuate cooperation. Once a litigant recognizes the services of an e-neutral are warranted, then the parties must determine what type of e-neutral meets the needs of the case. Should the e-neutral carry a "carrot or a stick"?

C. *Types of e-Neutrals*

E-neutrals serve as e-mediators, discovery special masters, discovery referees, discovery liaisons, discovery arbitrators or another name serving this function in a particular jurisdiction. However, e-neutrals generally fall into one of two categories depending on their authority: e-mediators or special masters. The e-neutral as an e-mediator carries the proverbial carrot and facilitates a mutual resolution. E-mediators are governed by the applicable state's rules regarding mediator conduct. An e-mediator does not decide disputes in favor of one party, but instead assists the parties to self-direct an agreement. In contrast, the e-neutral appointed under Federal Rule of Civil Procedure 53 and its state counterparts carries the proverbial stick because he is authorized to issue orders

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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.

54 *Id*. (internal quotations omitted). The article described "economic efficiencies" as follows:
[C]ooperation 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.

55 *Id.* The article describes "credibility preservation" as follows:
[C]ooperation 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.

and make recommendations to the court, including the imposition of sanctions. Restated, special masters determine, or at least recommend, a winner and a loser of an issue, whereas e-mediators enable the parties to determine their own outcomes. The distinctions between using an e-mediator and the special master are discussed *infra*. The other types of e-neutrals, such as a discovery referee, are also discussed *infra*.

1. The e-Mediator

Mediation is an appropriate form of alternative dispute resolution for e-discovery disputes.[56] When e-discovery is involved, the mediation is referred to as an e-mediation and the e-neutral is called an e-mediator.[57] An e-mediator is trained and experienced not only in dispute resolution, but electronically stored information. An e-mediation provides the following benefits:[58]

- Self-directed workable solutions
- Defining scope parameters
- Determining relevancy
- Determining reasonable accessibility of ESI
- Creating timelines for production and/or e-depositions
- Proposing confidential compromises
- Creating efficiencies with a mutual discovery plan
- Setting guidelines for asserting violations of the discovery plan
- Creating boundaries for preservation
- Avoiding spoliation pitfalls
- Defining proportionality
- Determining forms of production
- Identifying custodians/key players
- Managing protection of privileged information
- Maintaining credibility with the court
- Encouraging client participation and buy-in
- Avoiding court-imposed sanctions and cost allocation.

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56 Allison Skinner, *The Role of Mediation for ESI Disputes*, 70 ALA. LAW. 425 (2009). The concept of e-mediation is also referenced in the ALLISON SKINNER, TEACHER'S MANUAL 52 (West 2010), for SHIRA A. SCHEINDLIN, DANIEL J. CAPRA, AND THE SEDONA CONFERENCE®, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE CASES AND MATERIALS (West 2008), and is being taught in several e-discovery courses at various law schools.

57 Skinner, *The Role of Mediation, supra* note 56; Skinner, *Promoting Cooperation*, *supra* note 53, at 21.

58 Skinner, *The Role of Mediation*, *supra* note 56.

The parties prepare an "e-Mediation Statement"[59] and the outcome of the mediation is memorialized in a Mediated e-Discovery Plan, or an "MEP."[60]

Parties and their counsel should view an e-mediation differently from a typical mediation used to settle a case.[61] After all, the parties cannot reach trial without completing discovery. To prepare for an e-mediation, counsel should be prepared to address the following issues candidly and confidentially:[62]

> Who - 1. Counsel should identify who is available to participate in the e-mediation. Preferably, the in-house counsel or client representative with authority to make final decisions on behalf of the client should attend with outside counsel and an IT representative. Counsel should advise the mediator whether the IT representative is a company employee or a hired consultant. If the IT representative is a hired consultant, a brief background about the IT representative's experience with the client's business is helpful. Further, counsel should identify whether any corporate representative depositions have been taken addressing custodial issues of electronically stored information, which the author refers to commonly as "e-depositions." If portions of a deposition transcript would be helpful to the mediator to understand the types of electronically stored information the client maintains, then counsel should provide those relevant portions of the deposition transcript.
>
> What - 2. Counsel should provide all relevant or applicable discovery requests, objections, responses, motions to compel (with exhibits), motions for protective order (with exhibits), applicable discovery orders, and Rule 26 Scheduling Orders. In certain circumstances, the applicable litigation hold letter or preservation letter should be provided. Counsel should identify whether every request is in dispute or only certain groups of requests. Grouping requests by similar issues (which may not be in chronological order) facilitates the issue-based aspect of an e-mediation.
>
> Approach - 3. If requests can be grouped by issue, counsel should identify the issue and the position his client takes with respect to that issue. If the e-mediation will address every request in a set of discovery, then counsel should identify themes

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59 Allison Skinner, *How to Prepare and e-Mediation Statement*, 5 DRI E-DISCOVERY CONNECTION NEWSLETTER (2010), *available at* http://clients.criticalimpact.com/newsletter/newsletter contentshow1.cfm?contentid=1453&id=250.

60 *Id.*

61 *Id.*

62 *Id*.

or issues in which he anticipates the parties will share differences. Counsel should articulate the grounds that support his position for a particular theme or issue and whether any points of concession are available. This part of the position statement should also include issues or themes counsel anticipates the opposing side will have. For a requesting party, counsel should be able to provide why a particular issue is relevant.

Mapping - 4. Counsel should be prepared to discuss in confidence with the mediator a general overview of the client's data mapping. Data mapping traces the connection from the communicator and the methodology of the communication. This connection may run uni-directionally or bi-directionally. A data map should include storage devices, methodologies, technologies, systems, applications, custodians, communicators, and retention policies. A data map is like an organizational chart for the digital age. Counsel should be aware of and identify any virtualization or clouding. In other words, counsel should identity any entities that are not named parties but have connection to discoverable electronic information.

Spoliation - 5. Counsel should identify whether any spoliation pitfalls exist.

Costs - 6. Counsel should identify any known cost or burden concerns.

Timing - 7. Counsel should articulate any relevant timing issues. Production of e-discovery can be time-consuming and it is important to be aware of any timing issues that may run afoul of any agreement or order on production.

Privilege - 8. Counsel should identify any privilege concerns. Additionally, counsel should provide his position on how inadvertent disclosure of privileged information should be handled. Restated, counsel should articulate how his client would like to handle any issues falling under Federal Rule of Evidence 502.

Compatibility - 9. Counsel should discuss any issues relating to the compatibility and/or capability to produce electronic information from client, to law firm, to opposing party, or to the opposing law firm.

Inaccessibility - 10. If counsel is aware of any requested electronic information that counsel believes to be relevant and in existence, but that is reasonably inaccessible, counsel should identify the information and explain why the information is inaccessible.

Searches - 11. Searches must be conducted to identify and retrieve discoverable information. Most commonly, searches for e-mails and/or voicemails are requested, for example. For dif-

> ferent types of data, counsel should identify keywords or search terms his client believes are reasonably calculated to identify relevant information. Conversely, counsel should provide a list of keywords, if aware of any, that counsel believes are inappropriate and explain why. Further, if other search concepts are appropriate, like "fuzzy logic," then counsel needs to be prepared to discuss this alternative.
>
> E-Discovery Experience - 12. Counsel should confidentially communicate (in a manner counsel is comfortable with) his level of knowledge or expertise in handling e-discovery, as well as, counsel's level of knowledge regarding his client's particular technologies. The mediator recognizes the Bar in general, along with parties, has a learning curve. The mediator also recognizes that the mediation forum is an opportunity for counsel, in-house counsel and the IT representative to focus on the specific case and the related discovery issues at the same time together.

Providing this initial assessment of the e-discovery is no different from providing the facts and law in a mediation statement for a monetary settlement mediation.[63]

An e-mediation may be used at the outset of a case to develop the MEP; however, if the parties were able to develop a discovery plan without an e-neutral, but then later a dispute arises over a specific issue, i.e. a search protocol, then the parties might use an e-mediator to facilitate resolution of that particular issue. Using an e-mediator on an "issue-by-issue basis"[64] allows the parties to negotiate informally and to use the services of an e-mediator as needed. A level of efficiency is created when the parties, who otherwise have worked well together, have access to an e-mediator who is familiar with the pre-trial activities to address specific issues.[65] Additionally, the parties maintain civility, thus avoiding a breakdown in communication, by introducing an e-mediator. Maintaining a working relationship among counsel and their respective clients may be a prudent consideration depending on the parties' business relationship.

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63 *Id.*

64 *Id.*

65 An added benefit of using an e-mediator is, the neutral is educated on the facts of the case and may be appropriate to use as the settlement mediator for case disposition. This familiarity with the parties and the issues should enhance the neutral's ability to settle the case. However, the parties may not want to use the e-mediator for settlement purposes for strategic reasons, such as not wanting the settlement mediator to know confidential information that was divulged to the e-mediator, for example.

During an e-mediation, the parties may conduct the initial process in the same room with the e-mediator, "unless reasons have been articulated otherwise to begin in separate caucus rooms . . . At any time, the mediator or a party may request separate rooms.[66] Using an e-mediation allows the parties to have the benefit of both a client representative and an IT representative in the negotiations over the MEP, in a confidential environment, while also providing a forum to educate the stakeholders on the ESI issues.[67] Consequently, e-mediators are trained and experienced in both mediation and e-discovery.[68] The e-mediator facilitates mutual solutions among the parties. Thus, an e-mediation conducted in good faith demonstrates the parties have met their Rule 26 obligations.[69]

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66 Skinner, *How to Prepare an e-Mediation Statement*, *supra* note 59.

67 *Id.*

68 American College of e-Neutrals, http://www.acesin.com (last visited Jan. 29, 2012).

69 A special note should be made about the concept of the "mediated investigative e-discovery" espoused in Marian Riedy, Suman Beros, and Kim Sperduto, *Mediated Investigative e-discovery*, 4 FED. CT. L. REV. 79 (2010). The e-mediation process described in this article should not be confused with the theory of "mediated investigative e-discovery." The premise of the Riedy, Beros, Sperduto article is that a "mediator-investigator" has "unfettered access" to each side's ESI, which is then placed in "escrow." *Id*. at 92. The "mediator-investigator" then consults with plaintiff's counsel about the theories of the case to perform an investigation of the defendant's ESI to identify relevant information from the mediator-investigator's perspective. *Id*. at 94. Once the mediator-investigator retrieves the defendant's ESI, the defendant is allowed to produce it or object. *Id*. at 95. The process is duplicated with the defendant for the plaintiff's ESI by the same mediator-investigator. Claiming to be all-knowing, the theory hypothesizes that the mediator-investigator possesses the requisite information about the strengths and weaknesses of each party's positions and can use this information as bargaining chips to force discovery agreements. *Id*. at 96. Although the thesis asserts three advantages to the process, it overlooks a critical role of any mediator—neutrality. Once the mediator-investigator provides his own legal opinions and impressions on what ESI is relevant to the claims and defenses for purposes of production, this subjective act required by the described theory loses all neutrality, the cornerstone to the mediation process. Further, the paper indicates that the mediator-investigator would be a technical professional not a lawyer. If this author made a correct interpretation, then the theory asserts a non-lawyer should provide legal opinions and theories on relevancy, a legal term defined in Federal Rule of Evidence 401, which may be deemed in certain states as the unauthorized practice of law. Understandably, a non-lawyer may overlooked the significance of determining relevancy, when it asserts the technical professional should be making legal conclusions regarding relevancy. If the mediator-investigator is not neutral, which clearly he cannot be, then the theory described is not mediation. For these reasons an explanation of the differences between e-mediation and "mediated investigative e-discovery" is necessary to avoid confusion and protect the integrity of the mediative process. Restated, "mediated investigative e-discovery" is not mediation and is inconsistent with legal principles. Therefore, this author cannot "get over it" as the article tells attorneys to do when providing client representation. However, this author will concede that the theory may be more akin to the role of a special master.

2. Special Masters

The appointment of a special master under Federal Rule of Civil Procedure 53 is another viable method of alternative dispute resolution to resolve e-discovery disputes.[70] Under Federal Rule of Civil Procedure 53, the order appointing the special master is required to include provisions that address the scope of the appointment, the special master's duties and authority, provisions for *ex parte* communications, filing materials, standard of review, setting compensation, and issuing orders. The Scheindlin-Redgrave article[71] succinctly describes four roles the special master may serve for ESI disputes: 1) "Facilitative";[72] 2) "Compliance";[73] 3) "Adjudicative";[74] and 4) "Technical Assistance."[75] The facilitative role is similar to the role of an e-mediator. However, the special master has the authority to "break the tie," conduct hearings, and take testimony. The role of a special master who oversees compliance of a court order allows for efficient case management by monitoring the parties' progress. In the role of adjudicator, the special master decides such issues as preservation, form of production, accessibility, spoliation, and privilege, among others. A special master may also provide technical expertise, which may be particularly important in copyright or patent infringement cases, for example, which require a sophisticated level of technical knowledge relative to the subject matter. Regardless of the function of the special master, the needs of the case are addressed efficiently.

Most significantly, when e-neutrals address matters that would otherwise be pending before a court, they free the court's time for dispositive matters. For example, in *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*,[76] the court imposed sanctions against a handful of plaintiffs, but not all plaintiffs, for failing to meet preservation obligations with respect to ESI. The court noted in the opinion that drafting the decision required the judge and two law clerks to spend 300 hours.[77] This time is the equivalent of one person working almost two months, eight hours

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70 Hon. Shira A. Scheindlin and Jonathan Redgrave, *Special Masters & E-Discovery: The Intersection of Two Recent Revisions To the Federal Rules of Civil Procedure,* 30 CARDOZO L. REV. 383, 383-87 (2008).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 685 F. Supp. 2d. 456 (S.D.N.Y. 2010).

77 *Id*. at n.56.

per business day. The courts cannot function efficiently when they are over-burdened by motion practice. As discussed *supra*, this situation is aggravated by budgetary constraints. Using an e-neutral clearly benefits both the parties and the court.

D. *When to Use Which Type of e-Neutral*

Once the parties determine that they need help with resolving e-discovery disputes, the parties must decide which type of e-neutral is warranted. Considering the needs of the case, the temperament of the attorneys, and the clients' behavior, the parties decide whether they need a "carrot or a stick." The following excerpt from Allison Skinner, in "Promoting Cooperation with E-Neutrals," explains the distinctions between participating in an e-mediation and working with a special master:

> The e-Mediator is bound by confidentiality as defined by the applicable state mediation rules; therefore, the e-Mediator does not report to the court like a special master. 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 the special master, except by court order. Private caucuses in e-mediation allow parties to include in-house counsel and/or IT/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 the court.
>
> The process of using a special master is more formal than using an e-mediator because the special master is acting as an agent of the court and the parties are required to file pleadings. See http://www.acesin.com/index.php?q=faq listing the differences described above between e-mediators and special masters.
>
> However, the most significant difference between an e-mediator and a special master is 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, e-discovery special masters will be asked 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 (S.D.N.Y. 2010), *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d

> 598 (S.D. Tex. 2010), and *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010) for top 2010 sanction cases. The parties need to be mindful of this distinction when they are deciding which process to employ.
>
> Neither procedure is better than the other. Which procedure to select depends on the needs of the case, complexities of the issues and personalities of the parties involved, including counsel.
>
> . . .[T]he parties may want to consider using the less formal process – e-mediation – first to determine what issues can be readily resolved as well as to identify which issues require adjudication. However, in this scenario, the e-mediator may be disqualified to become the special master in the same discovery dispute. Some parties find it helpful to use an e-mediator to illuminate what issues are ripe for a special master to hear, thus 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 attach different ethical considerations. E-neutrals and parties are cautioned about confusing the two distinct roles. Therefore, parties must be clear about the needs of the case and their expectations of the role of the e-neutral.[78]

Bottom line: if the *attorneys* are engaging in obstructionist tactics in discovery, then the *parties* need the services of a special master. On the other hand, if the attorneys are trying to work together but have reached an impasse, then the services of an e-mediator are appropriate because the parties are well-represented. In some circumstances, the parties may mediate first to determine which issues a special master should address. Alternatively, the court determines which process to impose.

Parties are cautioned to object to the e-mediator, who is privy to confidential communications, being selected by the court to serve as the special master. Similarly, special masters should avoid acting as an e-mediator if confidential communications are divulged, unless the parties provide informed consent.[79] If the e-mediation is court-ordered, the e-mediator should confirm that the mediator's report, the MEP, will be filed with the Court, unless the court order directly orders such a filing. If the parties are participating in an e-mediation voluntarily, the e-mediator should determine in advance whether the parties intend to file the MEP with the court. Whether the MEP is filed with the court or not, the

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78 *See* Allison Skinner, *Putting the "E" in Neutral: Promoting Cooperation with E-Neutrals*, DRI (May 2011), *available at* http://www.dri.org/articles/EDiscovery/FTD-1105-Skinner.pdf.

79 This scenario is typically limited to a specific set of circumstances or a particular issue.

MEP can be used as an exhibit to a motion to compel/sanction in the event a party does not comply with the agreements contained within the MEP.

Special masters take testimony. In contrast, the e-mediation affords a company to provide custodial information without designating that person as corporate representative for deposition. This tactic may be important in situations where the appropriate corporate representative would make an unfavorable appearance in deposition for whatever reason. An e-mediation also allows the attorneys to maintain their credibility and their client's credibility with the court. Loss of credibility with the court is detrimental to a client's best interest. In the same vein, e-mediation affords the parties an opportunity to mitigate any exposure to sanction motions. In sum, the confidential nature of the e-mediation process makes this process a unique tool for litigants to use for resolving e-discovery disputes. Understanding the distinction between the two categories of e-neutrals assists the parties in selecting the right process for the case. In conclusion, whether the parties need a "carrot or a stick" to cooperate, the important criterion is recognizing the benefits of alternative dispute resolution for e-discovery disputes.

E. *Current Approaches for Managing E-Discovery*

1. Federal Courts

Several federal courts have implemented programs or local rules to address e-discovery issues. In March of 2011, the United States District Court of the Western District of Pennsylvania created the first "Panel of Special Masters for Electronic Discovery."[80] "The U.S. District Court for the Western District of Pennsylvania used four 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.'"[81] The selected panelists attended a mandatory training program.[82] Once a special master is selected in a case, preferably by

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[80] *See* In Re: Establishment of a Panel of Special Masters for Electronic Discovery, Misc. No. 10-MC-324 (W.D. PA) (Nov. 16, 2010), *available at* http://www.pawd.uscourts.gov/Documents/Forms/special_master_order.pdf.

[81] Skinner, *Promoting Cooperation, supra* note 53, at 75 (citing Hon. Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, THE FEDERAL LAWYER, Feb. 2011, at 38-39.

[82] *Id.*

the parties, the judge conducts an interview of the selected special master, and ultimately decides the appointment.[83] The program is in its infancy, but offers a model for other courts that recognize the need for assistance in the complex area of e-discovery.

The Seventh Circuit implemented an Electronic Discovery Pilot Program (EDPP) which utilizes "e-discovery liaisons." The EDPP Principle 2.02 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, conferring, and attending court hearings on the subject."[84] The e-discovery liaison must "be prepared to participate in e-discovery dispute resolution."[85] The discovery liaisons act as party representatives for addressing preservation and production of ESI; therefore they cannot be neutral like an e-mediator or special master. Yet, discovery liaisons, who presumably are well-versed in electronic information, will inevitably disagree. In these situations, the discovery liaisons should employ the services of an e-neutral to resolve the ESI dispute pursuant to EDPP Principle 2.02(a).

The United States District Court of Delaware uses "Default Standards for Discovery of Electronic Documents," which also requires the use of an "e-discovery liaison." If the parties cannot "cooperatively reach agreement on how to conduct e-discovery," then the default standard defines the role of the discovery liaison as follows:

> E-discovery liaison. In order to promote communication and cooperation between the parties, each party to a case shall designate a single individual through which all e-discovery requests and responses are made ("the e-discovery liaison"). Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:
>
> - Familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions.
>
> - Knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues.
>
> - Prepared to participate in e-discovery dispute resolutions.

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83 *Id.*

84 SEVENTH CIRCUIT, ELECTRONIC DISCOVERY PILOT PROGRAM 12 (2009), *available at* http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf.

85 *Id*.

> The court notes that, at all times, the attorneys of record shall be responsible for compliance with e-discovery requests. However, the e-discovery liaisons shall be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

Again, the discovery liaison must participate in e-discovery dispute resolutions, some of which inevitably require the use of an e-neutral. The United States District Court for the Eastern District of Pennsylvania's "Order Governing Electronic Discovery" is substantially similar to Delaware's order by also requiring a discovery liaison. Notably, the Seventh Circuit, Delaware and the Eastern District of Pennsylvania all recognize the benefits of the parties participating in "e-discovery dispute resolution;" however none of the orders define the process to be used for "e-discovery dispute resolution." Depending on the circumstances, e-mediation or an appointment of a special master meet this requirement to engage in "e-discovery dispute resolution," and discovery liaisons should be encouraged to engage the services of either category of e-neutral.

The local rule for the District of Alaska under "Discovery Plan" requires the parties to describe how they intend to handle discovery of ESI.[86] Open-ended allowance is an opportunity for parties to request a provision that allows the parties to seek e-mediation before seeking the court's invention. Such a safeguard helps parties preserve their credibility and mitigate the possibility of sanction motions. The District of New Hampshire offers the same mandate to identify e-discovery disputes in the discovery plan.[87] In the Southern District of Georgia, the standing Rule 26(f) requires the parties to identify ESI issues where the parties could not reach an agreement.[88] Litigants in these jurisdictions are encouraged to take the opportunity to propose the services of an e-neutral before filing a motion before the court, which realizes the benefits previously described.

Other courts have posted guidelines for handling e-discovery, but fall short of giving the parties guidelines for resolving e-discovery dispute without court intervention. In the District of Mary-

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86 Scheduling and Planning Conference Report (D.A.K. 2008), *available at* http://www.akd.uscourts.gov/reference/rules/lr/LCF%2026(f)%20(I).pdf

87 Civil Form 2: Sample Discovery Plan (D.N.H. Dec. 1, 2009), *available at* http://www.nhd.uscourts.gov/ru/Form-SampleDiscoveryPlan.asp

88 Rule 26(f) Report (D.G.A. 2000), *available at* http://www.gas.uscourts.gov/lr/pdf/RULE 26F.pdf, Item 9(b).

land, the court provides a "Suggested Protocol For Discovery of Electronically Stored Information."[89] The protocol invites the parties to have a "designated ESI coordinator." The District of North Carolina modeled its "Standing Order on Protocol for Discovery of Electronically Stored Information in Civil Cases Before the Honorable Frank D. Whitney" after Maryland's guidelines."[90] And in the Northern District of Illinois, the court requires the party seeking the e-discovery to "bring its IT specialist" to the discovery conference.[91] Although the protocols are silent on alternative dispute resolution, the parties are encouraged to cooperate and "resolve ESI issues informally without Court supervision whenever possible."[92] Parties who fail at resolving ESI issues informally have an opportunity to resolve the ESI dispute by using the services of an e-neutral, which should please the court.

2. State Courts

A few state courts have implemented or are considering implementing solutions for managing pre-trial practice. In California, by statute, a court may appoint a "discovery referee."[93] Specifically, California's code permits a court, "upon written motion of any party, or its own motion," to appoint a referee on the following basis:

> When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.[94]

With the advent of e-discovery, this statutory authority is particularly important for case management.

In New York, "A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State

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89 Suggested Protocol for Discovery of Electronically Stored Information (D.M.D. 2007), *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

90 Standing Order on Protocol for Discovery of Electronically Stored Information in Civil Cases Before the Hon. Frank D. Whitney, Misc. No. 3:07-MC-47, at n.1 (W.D.N.C. May 14, 2007), *available at* http://www.ncwd.uscourts.gov/Documents/Whitney/StandingOrderonProtocolforDiscoveryofElectronicallyStoredInformationinCivilCases.pdf.

91 N.D. Ill. CASE MANAGEMENT DISCOVERY PROCEDURES (2008), *available at* http://www.klgates.com/files/upload/eDAT_Rules_N_D_IL_Judge_Kendell_Discovery.pdf.

92 *Id*. at 2.

93 CAL. CODE CIV. PROC. §§ 638–645.2; CAL. R. CT. 3.9, et seq.

94 CAL. CODE CIV. PROC. § 639(a)(5).

Courts"[95] addresses the increasing problems associated with electronic information and its impact on the judicial system:

> Our society's ubiquitous reliance on the creation, transmission and storage of digital information has generated an exponential increase in the number of electronic records, such as e-mail messages, that are potentially relevant to a legal dispute. It frequently is costly and time-consuming to identify, preserve and produce what can often amount to thousands or even millions of electronic records.
>
> Moreover, the traditional adversarial approach to civil discovery only tends to foster additional delay and motion practice where electronically stored information ("ESI") is concerned, further contributing to excessive litigation costs. These problems are not limited to commercial litigation. They are increasingly evident in the full range of civil, family, and criminal cases that routinely involve the evidence contained in electronic records.
>
> Among lawyers and judges familiar with the current state of electronic discovery ("e-discovery") in New York, there is a strong consensus that the court system should act now to ensure that e-discovery is handled as expertly, expeditiously and inexpensively as possible. Meeting these challenges and strengthening judicial management of e-discovery is critical to the New York State court system's standing as a leading national and international litigation forum.

The report includes several recommendations for "fostering communication and cooperation among the parties, preventing avoidable disputes that escalate costs and delay, narrowing the scope of discovery; and, ultimately, ensuring that e-discovery costs remain proportionate to the matters in dispute."[96] One recommendation provides "the court system should designate court-attorney referees to serve as e-discovery specialist . . . to help supervise and resolve protracted e-discovery disputes."[97] The report recommends the judges make greater use of CPLR §3104 which authorizes judges to appoint referees to supervise discovery "in actions where the parties' claims or the information being sought is technical in nature."[98] The report recognizes a point emphasized in this article that the e-neutral, in the case of New York, the discovery referee,

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[95] THE N.Y. ST. UNIFIED CT. SYS., ELECTRONIC DISCOVERY IN THE NEW YORK STATE COURTS: A REPORT TO THE CHIEF JUDGE AND CHIEF ADMINISTRATIVE JUDGE (2010), *available at* http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf.

[96] *Id*. at 1.

[97] *Id.* at 3.

[98] *Id.* at 21.

"be trained and knowledgeable about the key legal and technical issues surrounding disclosure of ESI."[99]

Another recommendation in the report "to improve the quality of e-discovery practice" includes "the court system should also bring to bear its ADR programs: identifying and training volunteer attorney mediators who can help resolve court-referred e-discovery disputes."[100] Specifically, the report makes this recommendation:

> Alternative Dispute Resolution ("ADR") programs are another way in which the bench and bar can collaborate to improve case management. Many respondents who discussed the importance of cooperation pointed to New York's good fortune in having a strong network of court-annexed ADR programs. Mediation is a very effective mechanism for resolving e-discovery disputes, particularly for parties of limited means. The court system should take full advantage of its ADR programs by creating a network of trained volunteer e-discovery mediators who could help resolve disputes referred to them by courts with a high volume of e-discovery cases. Increased reliance on and use of ADR would be well-timed. With the April 1, 2009 passage of the New York Rules of Professional Conduct for lawyers, the Administrative Board of the Courts removed from the ethics rules any express mention of "zealous advocacy" of a lawyer's client – a common reason, from an ethics standpoint, why lawyers have resisted the concept of ADR (or cooperation generally) for resolution of e-discovery disputes. Absent that ethical constraint, the time may be ripe for more lawyers to act cooperatively in this setting, making the ADR process more efficient and effective.
>
> Toward this end, the court system's Office of ADR Programs should evaluate existing court-annexed ADR Programs and identify those neutrals who possess the appropriate skills and training to specialize in the resolution of e-discovery matters cutting across a wide range of disciplines. Where necessary, the ADR Office should partner with others to provide additional training tailored to the unique digital technology and other technical issues associated with e-discovery, including the issues involved in identifying, collecting, reviewing and producing ESI, so that trained mediators can be prepared to assist judges and law clerks, when needed, in appropriate cases.[101]

Clearly, New York recognizes that alternative dispute resolution plays an important role for managing pre-trial practice involving

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99 *Id.*

100 *Id.* at 4.

101 *Id*. at 23-24.

electronic information. Other states are encouraged to also embrace alternative dispute resolution using e-neutrals for case management.

3. Party Initiated

The examples of court-initiated programs or local rules evidence the growing need for practical solutions for managing electronic discovery. Parties may also initiate alternative dispute resolution whether the jurisdiction has a program or local rule addressing such a need. The primary question for parties who want to self-direct selecting an e-neutral to resolve their discovery disputes is "where do you find a qualified e-neutral?" To answer that question, the American College of e-Neutrals (ACESIN) was formed.[102] The American College of e-Neutrals provides the "world's only directory of qualified discovery neutrals for the digital age"[103] matching e-neutrals with parties.[104] The ACESIN Directory of e-Neutrals allows a judge or litigant to select an e-neutral by name, jurisdiction, and practice area[105] at no cost.[106] An e-neutral approved by ACESIN's national standards meets the requisite training and experience in alternative dispute resolution and electronic discovery that has been discussed earlier. Litigants are encouraged to select e-neutrals that meet such standards. Additionally, private alternate dispute resolution companies[107] and individual mediators are starting to offer e-neutral services.[108]

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102 The American College of e-Neutral was co-founded by Peter S. Vogel and Allison Skinner in the Spring of 2011. Peter S. Vogel is a partner at Gardere, Wynne & Sewell LLP in Dallas, Texas and serves as Chair of the Electronic Discovery, Co-Chair of the Internet and Computer Technology Practice Group and co-Chair of the Technology Industry Team for the firm. He has been involved in the computer industry and electronic data since 1967. He often serves as a special master, arbitrator and mediator for electronic evidence and computer technology matters. Peter also serves as adjunct law professor at SMU Dedman School of Law teaching eCommerce.

103 American College of e-Neutrals, http://www.acesin.com (last visited Nov. 20, 2011).

104 Evan Koblentz, *New Directory Matches E-Mediators With Litigants,* LAW TECHNOLOGY NEWS (June 8, 2011), *available at* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202496427305&New_Directory_Matches_EMediators_With_Litigants&slreturn=1&hbxlogin=1.

105 Maggettev. BL Development Corp., 2009 U.S. Dist. Lexis 116789 (N.D. Miss. Nov. 24, 2009) (directing parties to select a third party neutral with expertise in electronic discovery *and* the gaming industry).

106 American College of e-Neutrals, http://www.acesin.com (last visited Nov. 20, 2011).

107 *See* JAMS The Resolution Experts, http://www.jamsadr.com/adrspectrum/#COURT%20APPOINTED%20SPECIAL%20MASTERS/DISCOVERY%20MASTERS (last visited Jan. 23, 2012); and CPR (Conflict Prevention and Resolution), http://cpradr.org/Portals/0/Resources/2010%20CPR%20Continuum%20of%20Services%20Brochure.pdf (last visited Nov. 20, 2011).

108 *See* ACESIN's Directory of e-Neutrals, http://www.acesin.com (last visited Nov. 20, 2011).

Accordingly, alternative dispute resolution has expanded into pre-trial practice. With the advent of e-discovery, along with budget constraints, this trending approach to use e-neutrals will continue to grow and become an integral part of case management.[109]

Conclusions and Recommendations

E-neutrals are here to stay. E-discovery obligations mandate a new approach for case management. When the parties fail to informally cooperate and communicate to resolve discovery obligations and disputes, the services of an e-neutral are warranted. Because an e-neutral addresses a broad spectrum of issues to very specific issues, e-neutrals provide benefits to cases with varying amounts in controversy. To relieve pressure on the courts and promote judicial economy, courts are encouraged to (1) develop ADR programs to provide solutions for e-discovery practice, or (2) incorporate ADR provisions for discovery disputes in orders governing local rules. Simultaneously, parties are encouraged to re-think their approach to discovery disputes and use the services of e-neutrals to efficiently manage pre-trial practice. Corporate counsel are encouraged to demand their counsel to evaluate the use of e-neutrals as a method to control costs of amorphous discovery practices. Additionally, federal and state rule-making committees should consider providing commentary describing how parties effectuate cooperation using e-neutrals such as e-mediators and special masters.

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109 The author acknowledges a primary criticism of using ADR for discovery is adding a cost to a lawsuit. However, e-neutrals should streamline the discovery management and, ultimately, save litigants money.