Joint Sessions and the use of E-Neutrals in ESI disputes – Lawrence Kolin

The theme for this year's ABA Mediation Week is "Mediation: Successes, Challenges, Trends and the Next Generation: Looking to the past, present and future." In looking at where we've been and what is to come in civil litigation, one can find a confluence in the growth of electronic information and the need for cooperation in gathering such evidence that it necessarily creates. Electronic Discovery is everywhere. Corporations and small businesses alike utilize computer systems to cut costs, improve production, enhance communication, store data and improve capabilities in this world of constant technological development. The prevalence of electronically stored information or ESI and its associated impact on litigation are readily apparent. E-Discovery has become vital to most cases. Virtually all business information and much private party information can be found only in ESI. Likewise, the costs of collecting, reviewing, and producing ESI reportedly have reached proportions that rival the amount in controversy, itself.

At the same time, there have been reports regarding the demise of the joint session in mediation. Recently, Kim Taylor, COO of JAMS, questioned the survival of the long-held practice of commencing mediation conferences with a joint session of all parties and their counsel. Usually, this provides an opportunity for each side of the case to be expressed to the other party, before breaking into individual caucuses. A majority of mediators surveyed earlier this year by JAMS commonly used such sessions twenty years ago, though a resistance to joint sessions seems gradually to have arisen since. Regionally, there is less use lately in the east and the joint session is now employed in merely a quarter of mediations on the west coast. However, joint sessions are actually perfect for the discussion of case management in ESI-laden cases and can be performed much like a regular "meet and confer" Rule 26(f) conference, but with an E-Neutral in a confidential mediation setting.

Proposed amendments to the federal rules likely coming into effect later this year represent the most sweeping changes civil rules since 2006 and directly impact electronic discovery. The more notable changes affect Rule 26(b), which defines the scope of discovery, Rule 37(e), which outlines the sanctions available to remedy the loss of electronically stored information, and Rule 34, which pertains to document production requests. All of these can be navigated with the assistance of a knowledgeable E-Neutral. E-neutrals are essentially mediators familiar with cases involving electronic evidence who can help shape discovery plans, allocate costs, suggest technological solutions and create efficiencies in this emerging area. E-Neutrals can get the parties to move from staring at one another around the proverbial punch bowl and onto the dance floor. This may often result in cooperation on E-Discovery and re-focus parties on the merits of their case.

Dealing with the amount of data that parties now possess, in even routine disputes, is likely to distract litigators from the merits. An early mediation with an E-Neutral may instead be focused into a confidential conference featuring a joint session solely on the process of managing ESI. Within this protected framework, a neutral may shape the discussion, reminding parties of the actual claims and defenses and dissuading them from merely using E-discovery as a sword or shield. Mediation by an E-Neutral beginning with a joint session provides practical avenues that can present parties with significant cost savings in cases containing ESI, especially if performed near the beginning of the litigation.

For example, under coming changes counsel will soon be expected to reach agreement through cooperation and proportionality espoused by the new federal rules on what must be preserved, though taking into account costs and burdens incurred by modifying or suspending document retention systems can be tough. Implementing even narrowly tailored litigation holds to preserve crucial ESI can be difficult without the assistance of an E-Neutral during such negotiations. Under the traditional safeguards of a confidential mediation, limited discovery from custodians or other key persons with special knowledge of a company's computer systems may be particularly useful. With these techniques, lawyers can then self-determine sources from which relevant information is to be obtained, while the neutral facilitates agreement on the time frame at issue, search protocols, accessibility of stored information or the cost and burden of restoring inaccessible information.

An E-neutral can also facilitate the electronic discovery process by helping parties to agree, while together in joint session, on the form in which they want information produced and the extent to which metadata will be produced. Mediation using E-Neutrals can then feature private caucuses with retained experts or information technology liaisons that may help conduct discovery proportionally, minimizing motion practice, and avoiding sanctions and unpredictable judicial outcomes. Cooperation under this alternative dispute resolution rubric may also encompass settling procedures to be followed when discovering privileged information that has been inadvertently produced in the course of discovery, including clawbacks or agreed confidentiality orders.

Finally, through E-Neutrals, parameters from these agreements can be incorporated into the formal case management order. In Florida, our state court rules include the voluntary exchange of ESI and stipulations for authenticity; considering the need for advance rulings from the court on admissibility; and discussing the possibility of agreements (whether by parties or by referral to a special magistrate, master, other neutral, or mediation) on preservation of evidence, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources. Case management strategies like these can be successfully employed by civil practitioners at the outset of most ESI matters in conjunction with alternative dispute resolution professionals to return resources to the merits of the case.

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