Tennessee Journal of Law and Policy

Volume 9
Issue 4 *Spring 2014*

Article 3

April 2014

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Spring 2014| Volume 9 | Issue 3
Tennessee Journal of Law and Policy 336

ARTICLE

MODELS FOR USE OF MEDIATION IN E-DISCOVERY

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Many commentators and courts suggest that cooperative approaches to e-discovery planning hold the key to lower-cost, higher-quality e-discovery processes.[1] Yet, admonitions to cooperate hardly suffice to motivate self-interested parties.[2] Some system to foster cooperation

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[1] *See* JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCLOSURE: E-DISCOVERY AND RECORDS § 4.19 (3d. ed. 2013) (noting that cooperative approaches represent a "significant attempt to do something about the rapidly escalating costs of civil litigation"); CAROLE BASRI & MARY MACK, EDISCOVERY FOR CORPORATE COUNSEL, Foreword (2013) (noting "paradigm shift" in e-discovery process, toward cooperation); Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation And The Art Of Keyword Search*, 13 CARDOZO J. CONFLICT RESOL. 467, 472 (2012) (effective e-discovery requires that "attorneys share their understanding of the case and the technology with opposing counsel"); *See also* The Sedona Conference Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009); The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 361 (2009) (prisoner's dilemma may break down where "actors involved must repeatedly face the same or similar decisions" and each side "must evaluate the risk of the other side responding with similar conduct during a subsequent 'round'").

[2] *See* Hon. David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH J.L. & TECH. 8, 15 (2012) (despite Sedona Cooperation Proclamation and "numerous [judicial] opinions," it appears that "cooperation is not being used enough"); Hon. Nora Barry Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, 58:2 THE FED. LAWYER 36, 37 (2011) (where not addressed early, ESI issues "often

beyond the parties themselves appears essential.[3] One system proposed as a means to promote e-discovery cooperation involves the use of mediation.[4] This Article outlines an array of mediation techniques that could be used for that purpose.

Mediation Alternatives

The term "mediation" encompasses a broad array of processes[5] and techniques.[6] In general, mediation is meant

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come up later in the proceedings, causing unnecessary delays and expensive e-discovery motions"); Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 756 (1994) (lack of cooperation "backs up already overloaded trial dockets," affecting the "efficiency of the entire judicial process," and leading to "a decline in public respect for the legal profession").

[3] *See generally* Hon. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) (judges can do little about discovery abuse when parties control the discovery process themselves); John Setear, *The Barrister and the Bomb: The Dynamics Of Cooperation, Nuclear Deterrence And Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

[4] *See generally* Steven C. Bennett, *Mediation As A Means To Improve E-Discovery Cooperation*, 23:2 ALB. L. J. OF SCI. & TECH. (forthcoming 2014).

[5] *See* Kyle Beardsley, *Using The Right Tool For the Job: Mediator Leverage And Conflict Resolution*, 2 PENN STATE J. L. & INT'L AFF. 57, 57-58 (2013) (noting that mediation may include functions such as "mere hosting of talks, substantive participation in the negotiations, shuttle diplomacy, or heavy-handed involvement;" mediators must "tailor the level of leverage" applied to "needs of the situation"). *See also* Thomas Stipanowich & J. Ryan Lamare, *Living With ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, Pepperdine Law Paper No. 2013/16, www.ssrn.com (2013) (noting "diverse array" of dispute resolution options, including mediation, mini-trial, fact-finding, court-annexed non-binding arbitration, and early neutral evaluation); Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371 (2009) (noting "dozens" of dispute resolution processes, including psycho-educational programs, collaborative law, mediation, judicially

to facilitate communication, promote party-created solutions, and help clarify issues—all with the assistance of a neutral third party.[7] Mediation as a set of tools may serve a variety of goals and adapt to a variety of circumstances.[8] What follows is a sampling of mediation-related techniques, generally arrayed from least intrusive (and least expensive), to more formal (and thus more resource and

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moderated settlement conferences, and high conflict interventions); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009) (suggesting use of multiple processes for dispute resolution, with ability of parties to "loop" back or forward, as necessary, to different systems).

[6] *See* Susan Nauss Exon, *The Effects That Mediator Styles Impose On Neutrality And Impartiality Requirements Of Mediation*, 42 U.S.F. L. REV. 577, 578 (2008) (most agree that mediation involves "a neutral and impartial third party who assists others in resolving a dispute," but mediation involves "varying styles, techniques, and orientations"); Kyle C. Beardsley, David M. Quinn, Bidisha Biswas & Jonathan Wilkenfeld, *Mediation Style And Crisis Outcomes*, 50 J. CONFLICT RESOL. 58, 69 (2006) (noting facilitation, formulation and manipulation as among alternative "styles" of mediator activity).

[7] *See* ABA, Model Standards of Conduct for Mediators, Preamble, AMERICANBAR.ORG (2005), *available at* www.americanbar,org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf. (mediation is "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties;" mediation "serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements").

[8] *See* Stephanie Smith & Janet Martinez, *An Analytic Framework For Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 129-30 (2009) (design of system depends on "goals," which may include efficiency, fairness, satisfaction and other factors); CATHY A. CONSTANTINO & CHRISTINA SICKLES-MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS, 41 (1996) (system design requires consideration of whether ADR is appropriate, choice of process appropriate to particular problem, and making sure participants have necessary knowledge and skill to use ADR system).

time intensive).[9] These techniques may also be arrayed on a continuum from "facilitative" to "evaluative" in nature.[10]

(1) Education: Despite the long period in which the Internet, e-mail and other technologies have become integrated into daily life, ignorance of best practices in e-discovery remains a problem for the legal profession.[11] Technology savvy mediators can provide an education function for counsel and parties, even without becoming

[9] This is not to suggest that the spectrum of processes necessarily must flow from "easiest" to "hardest" cases. Simple dispute resolution techniques often work well in some of the most complicated disputes; and the reverse is also true. *See* William Ury, *Getting Disputes Resolved: Designing Systems To Cut The Costs Of Conflict* (1988) (ease of dispute resolution depends on focus on interests, or rights, or power—in ascending order—to determine degree of difficulty in resolving dispute).

[10] *See* Dwight Golann, *Variations In Mediation: How—And Why—Legal Mediators Change Styles In The Course Of A Case*, 2000 J. OF DISP. RESOL. 41, 44 (2000) (presenting "grid" of mediation practices, from facilitative to evaluative). *See also* Leonard L. Riskin, *Decisionmaking In Mediation: The New Old Grid And The New New Grid System*, 79 NOTRE DAME L. REV. 1, 5 (2003) (noting various types of mediation, including evaluative, facilitative and transformative systems); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

[11] *See* Mikki Tomlinson, *Attacking eDiscovery Ignorance In 2013*, (Nov. 29, 2012), *available at* www.somansatech.com/2013/company/eng_news_view.php?idx. (suggesting that poor cooperation efforts in e-discovery "oftentimes boils down to eDiscovery ignorance"); John M. Barkett, *The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America*, ABA SECTION OF LITIGATION NEWS (Dec. 2011), *available at* www.apps.americanbar.org/litigation/litigationnews/mobile/docs/barkett.december11.pdf ("Without better education, e-discovery may not be managed fairly or frugally, and certainly not quickly.").

deeply involved in a matter.[12] For example, a court might establish a "hot-line" system with trained court staff or volunteer mediators who are available to answer basic questions about the court's rules and expectations regarding e-discovery and technology. The system might also provide information about essential forms, such as "clawback" agreements and confidentiality orders,[13] and

[12] *See* PATRICIA KUTZA, NEW SAN FRANCISCO FORUM PROMOTES E-DISCOVERY MEDIATION (Oct. 23, 2013), *available at* www.lawtechnologynews.com/id=1202624724121?slreturn=20140224132046 (mediators can serve as "an antidote for the lack of e-discovery training in law schools"); DANIEL B. GARRIE & SALVATORE SCIBETTA, WE NEED MEDIATION IN E-DISCOVERY (June 5, 2013), *available at* www.law360.com/articles/445869/we-need-mediation-in-e-discovery (mediator serves as "listener and translator;" to "translate the technical underpinnings of each party's systems into actionable discovery efforts that both parties can comprehend"); Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation And The Art Of Keyword Search*, 13 CARDOZO J. CONFLICT RESOL. 467, 469-70 (2012) ("technically proficient" neutral may be required where parties and courts are unfamiliar with "latest methods" of searching for and processing electronic information); David Cohen & Claire Covington, *E-Discovery: Liaisons Are Key to Discovery Success*, INSIDE COUNSEL (Aug. 7, 2012), www.insidecounsel.com/2012.com/2012/08/07/e-discovery-liasons-are-key-to-discovery-success (subject matter experts necessary "given that most lawyers and judges have little training in the technical issues surrounding ESI"); Hon. Nora Barry Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, 58:2 THE FED. LAW. 36 (2011) (Rule 26(f) conferences have "generally remained ineffective where counsel "lack the technical skill and experience necessary to facilitate effective resolution" of ESI issues). *See also* Richard N. Lettieri, WHAT IS E-MEDIATION, AND WHY MIGHT I WANT TO RECOMMEND IT TO MY CLIENT*?*, (2010), *available at* www.lettierilaw.com/documents/emediationseptember-2010-Newsletter.pdf. (counsel "unfamiliar with ESI" may benefit from use of mediator).

[13] *See* Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28:3 FAM. L.Q. 407, 415 (Fall 1994) (telephone hotline system can be used on "on-demand" basis to provide information not available from workshops and other public education). Similar systems are often set

information regarding court-connected mediation services.[14] A courthouse "ombudsman" might provide similar services.[15]

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up as ethics hotlines. *See* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 737 (2002) (noting bar ethics committees that "field questions over the telephone, including, in some cases, via an 'ethics hotline'"). *See also* Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation In A Non-Adversarial Approach To Problem-Solving*, 28 FORDHAM URB. L.J. 935, 950 (2001) (noting that "nearly every bar association has a committee or program focused on the civility of lawyers").

[14] *See* Jacqueline Nolan-Haley, *Lawyers, Clients And Mediation*, 73 NOTRE DAME L. REV. 1369, 1373 (1998) ("Many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible.").

[15] Traditionally in European systems, ombudsman programs have focused on government agencies, rather than courts. *See* Diana Douse, MEDIATION AND OTHER ALTERNATIVES TO COURT, www.parliament.uk (June 6, 2013) (noting use of ombudsman as "independent and impartial means of resolving certain disputes outside the courts;" the ombudsman may deal with "complaints" regarding "public bodies and private sector services"); Stephanie Smith & Janet Martinez, *An Analytic Framework For Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 1401, 1447 (2009) (ombudsman system involves "[a] third party within an organization who deals with conflicts on a confidential basis and gives disputants information on how to resolve the problem at issue"). Courts in the U.S., however, have begun to experiment with such programs. *See* Michele Bertran, *Judiciary Ombudsman: Solving Problems In The Courts*, 29 FORDHAM URBAN L.J. 2099, 2108 (2002) (New Jersey program offers public information, including "educational literature, videos and a website," and citizen assistance, including "investigation and resolution of complaints"); Robert B. Yegge, *Divorce Litigants Without Lawyers*, JUDGES JNL. 8, 10 (Spr. 1994) (noting use of courthouse ombudsmen, who "distribute self-help form packets," and conduct workshops to give instruction to groups of litigants). The mediation functions described here generally fit the concept of an ombudsman. *See* Martin A. Frey, Alternative Methods Of Dispute Resolution 5, 12 (2003) ("third party" assistance in dispute resolution may include "ombuds" system; such a system can help parties take "corrective action" before problems become "much more difficult to address"); KARL SLAIKEU & RALPH

(2) Needs Assessment: Cases vary, and so do e-discovery problems; the capacity of parties and counsel to resolve such problems varies as well. A system of assessment—not of the merits of the dispute, or even of the relative positions of the parties regarding e-discovery matters—aimed at determining whether the parties are well prepared to cooperate in the case,[16] and identifying the kinds of resources that would best serve the needs of the parties, might be offered as a form of "triage."[17] A

HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 94 (1998) (ombudsman provides a "neutral, confidential, readily available resource (usually available in person, by telephone, email, or some other direct means) to assist parties in self-help, troubleshooting (via coaching), informal shuttle diplomacy, and sometimes convening of the parties to help them select from options such as informal mediation or other higher resources"); Shirley A. Wiegand, *A Just And Lasting Peace: Supplanting Mediation With The Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95 (1996) (ombudsman system embodies mediation, with additional capabilities). As a neutral third party, moreover, an ombudsman could help reinforce a culture of civility within the e-discovery process. *Cf.* Michele Bertran, *Judiciary Ombudsman: Solving Problems In The Courts*, 29 FORDHAM URBAN L.J. 2099, 2103 (2002) (ombudsman investigations may include questions of "discourteous behavior or incivility").

[16] *See* John M. Lande, *The Movement Toward Early Case Handling In Courts And Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 82 (2008) ("parties may not feel ready to settle, or even work together, right away"); Phillip M. Armstrong, *Why We Still Litigate*, 8 PEPP. DISP. RESOL. L.J. 379, 380-81 (2008) (noting that culture, ego, emotion and other barriers may prevent parties from settling disputes outside court proceedings); Craig A. McEwen, *Employing The Law To Increase The Use Of Mediation And To Encourage Direct And Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998) (reviewing factors that may inhibit parties from using mediation early in litigation process); Robert A. Baruch Bush, *What Do We Need a Mediator for? Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 7-12 (1996) (noting barriers to negotiation that mediation can help manage).

[17] *See* Salem, *supra* note 5, at 372 (suggesting the use of "triage," where the "most appropriate" form of ADR service can be identified

mediator, for example, could help identify gaps in knowledge that, if corrected, could lead to enhanced cooperation[18] and creative solutions.[19] Such a system might require interviews or could be conducted through a written questionnaire, perhaps even an on-line service.[20] The system might also focus on helping parties identify reasonable timetables for discovery[21] and help identify cases with specific forms of e-discovery related case management problems.[22] The neutral might determine that

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"on the front end" of a case, to reduce burden, provide more effective services, and more efficiently use scarce court resources).

[18] *See* Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 1002 (2008) (that stating discovery abuses often happen because "attorneys do not understand the complex technologies involved," and "acting out of ignorance and fear, they do not cooperate").

[19] Garrie & Machuca, *supra* note 1, at 474 (neutral may assist where parties have failed to "secur[e] legal counsel with the requisite technological acumen"); *See* Mike Hamilton, *E-Discovery Court Pilot Programs: E-Discovery Templates That Legal Teams Should Utilize*, E. DISCOVERY BEAT (Feb. 23, 2012), http://www.exterro.com/e-discovery-beat/2012/02/23/e-discovery-court-pilot-programs-e-discovery-templates-tht-legal-teams-should-utilize/ (stating that neutral can "provide the necessary skill and expertise to help expedite the e-discovery process by quickly identifying practical and fair solutions").

[20] Bruce L. Mann, *Smoothing Some Wrinkles In Online Dispute Resolution*, 17 Int'l J. of Law & Info. Tech., no. 1 at 83 (2009) (introducing concept of "expert-peer online assessment" of disputes as means to resolve conflicts). *See* Salem, supra note 5, at 380 (stating that triage system would involve initial screening or interviews by neutral who could help identify the service that will "best meet the needs" of the parties).

[21] *See* Stephen F. Gates, *Ten Essential Elements Of An Effective Dispute Resolution Program*, 8 PEPP. DISP. RESOL. L.J. 397, 398 (2008) ("Much of the cost of litigation is a function of cycle time from case inception to final resolution, and all steps in the management process should be focused on reducing this cycle time.").

[22] *See* Lande, *supra* note 16, at 91 (noting use of systems for "early screening of cases" to provide "early warning of potential case management problems, even before developing a scheduling order") (quotation omitted). Such a system might also operate through a

no form of mediation would assist the parties in the case and direct the parties to the normal court processes.[23] As in all mediation, the needs assessment recommendation would be non-binding.[24]

(3) <u>Facilitating Discussion</u>: A mediator who concentrates on facilitating discussion between parties,[25] as opposed to evaluating a matter or helping parties structure a

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"differential" case management system, helping to designate cases as "expedited, standard, [or] complex," for example, *id*. at 94. *See also* Frank E. Sander & Lukasz Rozdeiczer, *Matching Cases And Dispute Resolution Procedures: Detailed Analysis Leading To A Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006) (proposing framework for matching cases to ADR processes); Frank E.A. Sander & Stephen B. Goldberg, *Fitting The Forum To The Fuss: A User-Friendly Guide To Selecting An ADR Procedure*, 10 NEGOT. J. 49 (1994).

[23] *See* William J. McLean, *Beware Masters In E-Discovery*, LAW.COM (Aug. 21, 2008) http://www.alm.law.com/jsp/article.jsp?id=1202423953864 (noting potential circumstances where "no amount of cajoling could stop the tactical flood of discovery motions"). *See also FAQ: How Do I Know When To Use E-Mediation Versus A Special Master?*, ACESIN.COM (2011) http://www.acezin.com/index.php?q=node/115 ("if there is such [a] breakdown in communication that the parties cannot even agree that the sky is blue, then more likely the parties need a special master to act as referee and 'make the calls'").

[24] *See* Nancy A. Welsh, *The Thinning Vision Of Self-Determination In Court-Connected Mediation: The Inevitable Price Of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 16 (2001) (noting importance of "self-determination" as central element of mediation).

[25] *See* Exon, *supra* note 6, at 591 (explaining that facilitator "encourages party attendance, facilitates communication, poses questions to uncover the parties' underlying needs and interests, helps educate the parties by assisting them to understand the other's needs and interests, and otherwise attempts to provide a comfortable forum in which the parties can develop their own creative solutions to a problem").

resolution, can serve an important purpose.[26] In the discovery context, merely ensuring that parties communicate about essential issues in a courteous manner can aid the process.[27] For example, a mediator whose role in a conference consists of helping with scheduling the conference and ensuring a professional tone in the discussion might require very little preparation regarding the substance of the dispute. [28] A mediator might also encourage parties to bring together their technical

[26] *See* Fischer, *supra* note 2, at 37 (suggesting use of "facilitator" to lead discussions on ESI issues, where attorneys are unable or unwilling to proceed with e-discovery conference).

[27] *See* Daniel B. Garrie, *Redefining The Discovery Terrain: The Need For Mediation In E-Discovery, Part III*, L & FORENSICS (Nov. 28, 2013) http://www.lawandforensics.com/redefining-discovery-terrain-need-mediation-e-discovery-3/ (function of mediator to "facilitate cooperation" and "open" dialogue); Kutza, *supra* note 12 (stating that mediators can "primarily work on getting the dialogue going," versus "shuttle diplomacy" of conventional settlement negotiations) (quoting Michael Carbone).

[28] *See* Ron Kilgard, *Discovery Masters: When They Help—And When They Don't*, ARIZ. ATT., Apr. 2004, at 30, 34 (Apr. 2004) ("the mere fact of having to discuss these issues in person with the master present, and not in angry faxes and e-mails written late at night, has a taming effect on the lawyers"); Allison O. Skinner, *The Role Of Mediation For ESI Disputes*, THE ALA. LAW, Nov. 20, at 425, 426, (Nov. 2009) ("Often, discovery battles can result in an exchange of potentially inflammatory correspondence that may be used as an exhibit to [a] motion to compel or motion for protective order. . . . Mediating the e-discovery dispute allows the litigants to make proposals confidentially."). *See also* Angela Garcia, *Dispute Resolution Without Disputing: How The Interactional Organization Of Mediation Hearings Minimizes Argument*, 56 SOC. REV. 818 (1991) (noting that mediation "constrains the presentation of accusations and denials" in negotiation); Lande, *supra* note 16, at 92 (facilitator may help with "reduction of partisan psychology; prevention of conflict escalation; and creation of a mandatory event that overcomes logistical barriers to negotiation").

personnel to address creative solutions to e-discovery problems in a case.[29]

(4) Structuring Negotiations: A mediator may aid parties by bringing an agenda for discussion to the process.[30] In the e-discovery context, at the outset of a

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[29] *See* Kenneth J. Withers, *E-Discovery In Commercial Litigation: Finding A Way Out Of Purgatory*, 2 J. CT. INNOV. 13, 22 (2009) (suggesting that, "if you can get the IT people from both parties together in a room, they will often solve problems that the lawyers thought were insurmountable"); Mary Mack, *Litigation Prenups, E-Discovery ADR And The Campaign For Proportionality*, METROPOLITAN CORP. COUNS. (May 3, 2010) http://www.metrocorpcounsel.com/weticles/12510/mary-mack-litigation-prenups-e-discovery-adr-and-campaign-proport+ionality ("There is a great advantage in having the 'meet and confer' take place under the cloak of mediation. It keeps the discussion and the written offers to compromise confidential. Mediation also provides a cloak of confidentiality for the IT people. This makes it possible for the IT people to talk more openly because they are not on the record."); Peter S. Vogel, *E-Neutrals, E-Mediation And Special Masters: An Introductory Guide*, LEXOLOGY.COM (July 2, 2012), http://www.lexology.com/library/detail.aspx?g=e5fcfc29-8666-40df-92c0-9ef088102ecc (suggesting that mediator require parties to indicate who will attend mediation sessions to provide "technical support" concerning ESI issues). The mediator may also remind parties that all mediation discussions are confidential; Allison Skinner & Peter Vogel, *E-Mediation Can Simplify E-Discovery Disputes*, AM. LAW. (Sept. 23, 2013) http://www.americanlawter,com/id=1202620012101/E-Mediation-Can-Simplify-E-Discovery-Disputes?slreturn=201401214201708 (stating that mediators may work with IT personnel to educate them about their role in the e-discovery process, and use "confidential caucus" to communicate ideas, without an inquiry being "misinterpreted as a weakness").

[30] *See* Allison O. Skinner, *How To Prepare An E-Mediation Statement For Resolving E-Discovery Disputes*, (2009) http://smu-ecommerce.gardere.com/allison%soskinner%20preparing%20for%20e-mediation%20discovery.prf (using pre-mediation submissions, mediator can identify "areas of mutuality" that can be "readily disposed of," so that parties may thereafter focus on solutions to "more challenging issues"). One very simple task for a mediator would consist

case, many basic issues (preservation of evidence, search techniques, and privilege protection, to name a few) constitute essential elements for negotiation.[31] Yet, one common phenomenon is the "drive by" Rule 26(f) conference, where counsel "meet and confer" in name only.[32] A mediator might insist on discussion of all essential topics[33] with the aim of creating a comprehensive

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of identifying immediate areas of agreement between the parties. Indeed, online systems have been developed to facilitate these kinds of basic agreements. *See* Noam Ebner, Bryan Hanson & Arthur Pearlstein, *ODR In North America*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 431, 447 (Mohamed S. Adbel Wahab, Ethan Katsh & Daniel Rainey eds. 2012) (describing online system where parties "inform the platform of their real preferences and priorities, beyond what they are willing to share with the opposite party," where software can "conduct an analysis of the agreement to see if it maximizes each party's gains" and one can imagine adaptation of such processes to the e-discovery field.)

[31] *See* Robert A. Cole, *E-Discovery Increases Possibility Of Mediated Resolutions*, DAILY BUS. REV. (Oct. 3, 2012) http://www.uww-adr.com/zgraph-content/uploads/2012/10/Bob-Cole.pdf (explaining that outlining an agenda for conducting e-discovery mediation may include crafting agreements on preservation and collection protocols, including sampling and search techniques).

[32] *See* Craig Ball, *Musings On Meet And Confer*, CRAIG D. BALL, P.C. (2007) http://www.craigball.com/Musings_on_Meet_and_Confer.pdf (noting phenomenon of "drive-by event with no substantive exchange of information"); Michael Collyard, *E-Discovery: Avoiding Drive By "Meet & Confers*," INSIDE COUNSEL (Sept. 13, 2011) http://www.insidecounsel.com/2011/09/13/e-discovery-avoiding-drive-by-meet-confers? *See also* Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 15 (2009) (FJC study indicates that only half of attorney respondents included discussion of ESI in Rule 26(f) conferences, and only one in five court-ordered discovery plans included provisions relating to ESI).

[33] *See* Peter S. Vogel, *The Role Of e-Mediation In Resolving ESI Disputes*, (Oct. 29, 2012) http://www.disputingblog.com/guest-post-the-role-of-e-mediation-in-resolving-esi-disputes-in-federal-court-

e-discovery plan for the case.[34] Where the parties have otherwise agreed on the e-discovery schedule and plan, the mediator might focus on more difficult issues, such as creating a search term protocol.[35] Parties might also agree on a process for resolving future e-discovery disputes.[36]

(5) Screening Motions: Litigants are generally must certify that they have "met and conferred" in good

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interview-with-allison-skinner/ (noting that "most meet and confers are ineffective;" mediator may act with "court sanctioned checklist" of issues to discuss); Ronald J. Hedges, *The Sedona Conference Points The Way Toward Control Of The Costs And Burden Of E-Discovery*, 59 FED. LAW. 46, 47 (2012) (suggesting use of mediators and court-appointed experts to assist in "good faith" process of "meet and confer"); Zachary Parkins, *Electronic Discovery: Why The Appointment Of Special Masters In All Large Electronic Discovery Disputes Is Vital To The Process Of American Civil Justice*, AM. J. MEIDATION 97, 104 (2011) (suggesting role for mediator where parties do not prepare for Rule 26(f) conference "in an effective way").

[34] *See* Allison O. Skinner, *Alternative Dispute Resolution Expands Into Pre-Trial Practice: An Introduction To The Role Of E-Neutrals*, 13 CARDOZO J. CONFLICT RESOL. 113, 125 (2011) (arguing goal of mediation to created a mediated e-discovery plan). *See also*, Skinner & Peter Vogel, *supra* note 29 (typically, litigants would agree to e-mediation at the outset of a case, to develop a discovery plan; with the mediator thereafter available to help "break any impasse that may arise"); Robert Hilson, *Neutrals May Ease Anxiety Over Florida's New E-Discovery Rules*, ACEDS.ORG (Apr. 26, 2012) (neutrals can help "shape discovery plans") (quoting Lawrence Kolin, mediator); Peter S. *Vogel, Use E-Mediation And Special Masters In E-Discovery Matters*, LAW.COM (July 5, 2010) ("E-mediation is most effective when initiated at the beginning of litigation, at the outset of discovery. . . . [I]f the parties can agree to the initial [mediated e-discovery plan], this will reduce the number of disputes presented to the trial court.").

[35] *See* Daniel B. Garrie & Siddartha Rao, *Using Technology Experts For Electronic Discovery*, 38 LITIG. 13 (2012) (mediator can "expedite" agreement on search terms, and avoid potential that parties might later "complain" about terms used)

[36] *See* Cole, *supra* note 31 at 10 (parties may "[c]reate a method for resolving any disputes that may arise over the mediated plan").

faith before bringing discovery related motions.[37] The "meet and confer" obligation, however, may be as subject to abuse as any other element of the e-discovery process.[38] Thus, a mediator might help confirm that parties truly have met their obligations to confer in good faith before seeking court assistance.[39] On more complicated, longer-lasting matters, a more permanent system of referral to mediation (akin to dispute resolution boards in construction matters)[40]

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[37] *See* FED. R. CIV. P. 26(c)(1) (requiring party moving for protective order to certify "good faith" effort to confer "in an effort to resolve the dispute without court action"); FED. R. CIV P. 37(a) (requiring party moving to compel to certify "good faith" effort to confer "in an effort to obtain [disclosure] without court action.").

[38] *See* Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 134-35 (2009) (suggesting that "meet-and-confer requirements will simply play out as the rest of the game does," unless "rules that support cooperation as a favorable strategy" include "penalties" that counter a "strategy of abuse").

[39] *See* Skinner, *supra* note 34, at 128. ("[A]n e-mediation conducted in good faith demonstrates [that] the parties have met their Rule 26 obligations."); Vogel, *supra* note 34 (mediator could "certify to the court that the parties met and conferred in good faith on the enumerated ESI issues"). *See also* Mack, *supra* note 29 (suggesting that court could "direct all e-discovery disputes to e-mediation before involving the judge," which would permit a party to "explain in a setting without the judge why the issue arose in the first place and what was being done to rectify it").

[40] A dispute review board (which could be a single individual) would aim to identify e-discovery problems as they arise and resolve them before they escalate. *See* Peter Vogel, *Use eMediation To Save Time And Money*, TEX. LAW. (Sept. 2, 2013) (suggesting that use of mediation "as early in the case as possible" permits mediator to "address eDiscovery matters when they first arise"). Construction-related dispute review boards serve similar purposes. *See* Ming-Lee Chong & Heap-Yih Chong, *Dispute Review Board: Concept And Introduction To Developing Countries*, 2 INTERSCI. MGMT. REV. 6, 6-7 (2010) (dispute resolution boards, first conceived in the 1950s, have been implemented in virtually all construction areas); *id.* at 7 (board typically created at outset of project, with periodic status meetings and site visits; if conflicts arise, the board can provide "informal" opinions

might be appropriate.[41] Discussions with a mediator may help sharpen the focus of the parties for presentation to the court of any unresolved issues.[42]

(6) Neutral Evaluation: Traditionally, the concept of mediation has not involved evaluation of disputes, but rather facilitation of discussion to resolve disputes.[43] Increasingly, however, the notion of non-

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to help resolve disputes); Smith, *supra* note 5, at 167 (dispute resolution board generally formed at start of construction project, and "meets regularly to follow work progress and to provide guidance to the parties on differences before they become disputes"). The purpose of a dispute review board is to "[create] an atmosphere of trust and cooperation," James Denning, *More Than An Underground Success*, 63 CIV. ENG. 42 (1993), with the aim of preventing disputes from escalating. *See* Colleen A. Libbey, *Working Together While "Waltzing In A Mine": Successful Government Construction Contract Dispute Resolution With Partnering And Dispute Review Boards*, 15 OHIO ST. J. ON DISP. RESOL. 825 (2000). *See also* Kathleen M.J. Harmon, *Effectiveness Of Dispute Review Boards*, 129 J. OF CONSTRUCTION ENG. & MGMT. 674, 676 (2003) (statistics suggesting high levels of success with dispute review boards, resolving disputes before project completion).

[41] *See* Skinner, *supra* note 34, at 127 (parties may use mediator on "issue-by-issue" basis, "as needed," where mediator is "familiar with pre-trial activities" in the case and able to address specific issues as they arise).

[42] *See* Losey, *supra* note 18, at 997 (cooperation means "refinement of disputes and avoidance when possible;" some discovery disputes "may still arise," but "the issues presented for adjudication will be much more focused and refined"); Hon. W. Royal Furgeson, Jr., Karl Bayer & Elizabeth L. Graham, *E-Discovery And The Use Of Special Masters*, DISPUTING BLOG (2011) (even if not all disputes are resolved, mediation process "provides parties with a better understanding of the key disputes which must be presented to the court"); Skinner, *supra* note 28, at 425 (even if not all conflicts are resolved, mediation permits parties to "illuminate the key disputes to be presented to the court," without "inflammatory" communications).

[43] *See* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is An Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not*

binding evaluations as a part of mediation[44] has taken hold.[45] The neutral evaluation process generally involves each side in litigation presenting a summary of its position, with the neutral evaluator offering an evaluation of the strengths and weaknesses of each party's case.[46] Such an

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Evaluate, 24 FLA. ST. U. L. REV. 937 (1997) (analyzing why evaluations do not comport with mediator's essential role).

[44] Some commentators suggest that some degree of evaluation is inherent in the mediation process. *See* Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying The False Dichotomy: Twenty-First Century Mediation In An Eclectic Regime*, 2000 J. DISP. RESOL. 371, 377 (2000) (noting "continuum," from facilitative to evaluative, for forms of mediation, based on "key determinants" of the needs of the parties, based on their past and current relations, and other factors.); Ellen A. Waldman, *The Evaluative-Facilitative Debate In Mediation: Applying The Lens Of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 157 (1998) ("much of what goes by the name of mediation today involves some evaluative activity by the mediator; to construct a definition that excludes most of what the practitioner and lay communities understand to be mediation would spawn needless confusion").

[45] *See* Robert B. Moberly, *Mediator Gag Rules: Is It Ethical For Mediators To Evaluate Or Advise?*, 38 S. TEX. L. REV. 669, 675 (1997) (suggesting that "mediator evaluation can assist the parties in their self-determination efforts"); Benjamin F. Tennille, Lee Applebaum & Anne Tucker Nees, *Getting To Yes In Specialized Courts: The Unique Role Of ADR In Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 48 (2010) (mediation may combine "evaluative and facilitative practices to get the best results"); Stipanowich & Lamare, *supra* note 5, at 44 (noting that, in "lawyered" cases, a mode of mediation where "sooner or later, there is some kind of evaluation by a mediator with [a] background as a legal advocate or judge—predominates").

[46] *See* Daniel B. Garrie, *supra* note 27, part II (mediator may help "educate each party about the reality of their demands"); Smith & Martinez, *supra* note 5, at 166 (neutral case evaluation generally involves a lawyer who "provides an advisory opinion to the parties as to their respective case strengths, weaknesses, and value"); Brian Jarren, *The Future Of Mediation: A Sociological Perspective*, 2009 J. OF DISPUTE RESOL. 49, 50 (2009) (mediator can serve as "agent of reality" when parties reach impasse); Frey, *supra* note 15, at 12 (neutral evaluation "provides the parties and their attorneys with the opportunity

evaluation may lead to resolution of the conflict or may simply assist with case planning[47] (helping the parties understand the nature of the issues, for example).[48]

(7) Mediator Facilitated Search: In some instances,[49] parties and counsel might agree to permit a mediator with substantial technology skills to conduct or supervise a search for responsive records.[50] The mediator's recommendations regarding production of materials to opposing parties, however, would not bind the producing

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to visualize the case from a third party's perspective;" by having "preview of what might happen," parties achieve a "clearer understanding" of settlement issues).

[47] *See* Gates, *supra* note 21, at 400 (evaluator may be "very helpful in eliminating the 'emotional attachment' that a party may develop in its case and lead to serious negotiations"); Julie Macfarlane, *Culture Change? A Tale Of Two Cities And Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 266 (2002) (mediator may provide parties with "reality check," useful in negotiation). *See also* Lande, *supra* note 16, at 99 The Wayne D. Brazil, *Early Neutral Evaluation Or Mediation? When Might ENE Deliver More Value?*, 14 DISP. RESOL. MAG. 10 (2007).

[48] *See* Riskin & Welsh, *supra* note 15, at 892 n. 44 (noting that, in some forms of mediation, it is "common" to have a separate stage [where] the mediator conducts a 'conflict analysis,' and "reports to the parties 'what the conflict is'") (quoting Interview with mediator Howard Bellman, in Dedham, Mass. (June 18, 2006)).

[49] *See* Garrie & Rao, *supra* note 35 (suggesting that, in some cases, "[c]ooperative efforts and the expeditious selection of keywords are hampered" by "adversarial zeal" of attorneys).

[50] *See* Garrie & Rao, *supra* note 35 (mediator may conduct search, or may simply "ensure that appropriate documents are produced at a reasonable price respective to the underlying issue"); Marian Riedy, Suman Beros & Kim Sperduto, *Mediated Investigative E-Discovery*, 2010 FED. CTS. L. REV. 79, 79-81 (2010) (outlining process for neutral with skills of "trained digital investigator" to "search and retrieve relevant information," in a manner similar to an "in-house expert," but with both parties sharing the expense).

party.[51] In essence, the mediator would simply come to learn more about the circumstances of the parties' data systems and records, which could improve the mediator's ability to make competent recommendations.[52] Whether this relatively intrusive process constitutes "mediation" is debatable.[53] Certainly, a specific agreed-upon protocol for the endeavor would be essential.[54]

Conclusion

Mediation constitutes a generally accepted mechanism for dispute resolution.[55] Mediation processes are regularly incorporated into court-annexed ADR systems[56] and are often chosen by parties as a means for

[51] *See* Marian Riedy, Suman Beros & Sperduto, *supra* note 50, at 98-99 (system proposed would prevent mediator from producing information if party does not agree to produce).

[52] *See* Marian Riedy, Suman Beros Sperduto, *supra* note 50, at 97 (suggesting that the "standard" mediation process does not suffice, "because the mediator is only aware of the information the parties voluntarily disclose").

[53] *See* Skinner, *supra* note 34, at 128 n. 69 (rejecting notion that "mediated investigative e-discovery" is actual mediation, given that mediator may lack neutrality after conducting investigation).

[54] *See* Nolan-Haley, *supra* note 14, at 1371 ("[Mediation] is an informal process based on principles of individual sovereignty and self-determination.").

[55] *See* Stipanowich & Lamare, *supra* note 5 (noting that in survey, 87% of respondents report some use of mediation); Jennifer Reynolds, *The Lawyer With The ADR Tattoo*, 14 CARDOZO J. CONFLICT RESOL. 395, 397 (2013) ("even the most traditional lawyers use ADR techniques and processes all the time, from client counseling to negotiation to mediation to arbitration"); Richard S. Weil, *Mediation In A Litigation Culture: The Surprising Growth Of Mediation In New York*, 17 DISP. RESOL. MAG. 8, 8 (2011) (in survey of litigators, 90% expressed a positive view of mediation).

[56] *See* Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation And Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISPUTE RESOL. 271, 272 (2011) (noting that judicial settlement conferences and court-connected mediation have become

resolving their disputes.[57] The mediation process is flexible, meant to adapt to the needs of the parties and the circumstances of the case.[58]

Courts continue to experiment with mediation forms,[59] however, and evidence on the relative effectiveness of various systems remains difficult to assess.[60] Cutting-edge systems of dispute resolution, such as online mediation,[61] offer interesting possibilities, but

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"commonplace" parts of court systems); Carrie Menkel-Meadow, *Ethics In ADR: The Many "Cs" Of Professional Responsibility And Dispute Resolution*, 28 FORDHAM URBAN L.J. 979, 990 (2001) ("Virtually every state and federal court requires some form of ADR at least to be considered by the lawyers in a litigation matter, and, increasingly, transactions and contracts contain ADR clauses.").

[57] *See* Stipanowich & Lamare, *supra* note 5, at 30 (noting extensive use of mediation in commercial, employment and personal injury disputes); Thomas J. Stipanowich, *ADR And The "Vanishing Trial": The Growth And Impact Of "Alternative Dispute Resolution,*" 1 J. OF EMPIRICAL LEG. STUDIES 843, 848-49 (2004) ("By far the predominant process choice [in ADR] is mediation, with its much-touted potential benefits of flexibility, party control, confidentiality, relatively low cost, and minor risk.").

[58] *See* Simeon H. Baum, *Mediation And Discovery*, in DISPUTE RESOLUTION AND E-DISCOVERY § 3.1 at 51 (Daniel B. Garrie & Yoav M. Griver eds. 2012) (unique features of mediation include "freedom and creativity that infuses" the process).

[59] *See* Brian Jarren, *supra* note 46, at 64 (courts still "experimenting" with mediation as an aspect of case management).

[60] *See* Michael Heise, Why ADR Programs Aren't More Appealing: An Empirical Perspective, SCHOLARSHIP@CORNELLLAW: A DIGITAL DEPOSITORY (2008) www.scholawship.law.cornell.edu (noting "mixed" evidence on effectiveness of ADR programs). *See also* Baum, *supra* note 58, at 72 ("Mediation is no panacea.").

[61] *See* Mann, *supra* note 20, at 89 (suggesting that online dispute resolution processes "can play various roles in consensus building"); Ethan *supra* note 30, (describing online system that allows software to "clarify and highlight both the parties' disagreements and their desired solutions;" suggesting that system can help by "assisting the parties to identify common interests"); Joseph W. Goodman, *The Pros And Cons Of Online Dispute Resolution: An Assessment Of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4 (2003) (noting potential for

have not yet received attention from court administrators.[62] The systems outlined in this Article, although grounded in well-recognized mediation techniques, certainly cannot be considered "tried and tested" in the e-discovery sphere.[63] The mediation process, moreover, can be abused in some instances.[64]

Nonetheless, judicial administrators and dispute resolution system designers must start somewhere.[65] The notion of multiple "doors" to dispute resolution is firmly embedded in our legal culture.[66] Courts can and should consider ways to open doors to expand the use of mediation-related techniques into the e-discovery process. Court-connected pilot projects and study programs, already

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use of "traditional" dispute resolution mechanisms, supplemented by online technologies, which may include "fully automated" systems or systems that include a human neutral).

[62] *See* Ebner, Hanson & Pearlstein, *supra* note 30 (no court-annexed online dispute resolution systems currently). *See also* Julio Cesar Betancourt & Elina Zlatanska, *Online Dispute Resolution (ODR): What Is It, And Is It The Way Forward?*, 79 ARBITRATION 256, 263 (2013) ("still too early to predict" future of online dispute resolution).

[63] One of the earliest references to mediation of e-discovery disputes is less than five years old. *See* Skinner, *supra* note 28, at 425.

[64] *See* John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation In Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 71 (2002) (noting that "some lawyers use mediation to make misleading statements, 'smoke the other side out,' gain leverage for later negotiations, drag out litigation, increase opponents' costs, and generally wear down the opposition"). *See also* Kimberlee K. Kovach, *The Vanishing Trial: Land Mine On The Mediation Landscape Or Opportunity For Evolution: Ruminations On The Future Of Mediation Practice*, 7 CARDOZO J. OF CONFLICT. RESOL. 27, 29 (2005) (noting that mediation can become a "curse" of "hoops to jump through" in litigation, rather than a "process expansion" leading to dispute resolution).

[65] *See generally* Slaikeu & Hasson, *supra* note 15.

[66] *See* Thomas J. Stipanowich, *The Multi-Door Contract And Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution And Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

underway in many jurisdictions,[67] should be encouraged in this area.[68]

[67] *See* Hamilton, *supra* note 19. *See also Daniel Garrie Instructs 7th Circuit's Pilot e-Mediation Program*, E-DISCOVERY BEAT (May 14, 2013) www.lawandforensics.com/e-discovery-beat/2012/02/23/e-discovery/court/pilot/programs-e-discovery-templates-that-legal-teams-should-utlize ("first of its kind" program to train mediators, who "agreed to volunteer their time for cases with heavy discovery loads, but comparatively small monetary returns"); Principles Relating To The Discovery Of Electronically Stored Information, www.ediscoverypilot.com (Aug. 1, 2010).

[68] *See* Wissler, *supra* note 56 at 274 (lawyers tend to view mediation with court staff mediators "more favorably than mediation with volunteer mediators").