E-DISCOVERY NEUTRALS – FOUR QUESTIONS

By Hon. Richard A. Levie (Ret.)

As electronic discovery issues permeate all kinds and sizes of litigation and arbitration, there are a minimum of four questions counsel should, and judicial officers might, consider in determining whether use of an e-discovery neutral is necessary and appropriate.

For context here, the term "e-discovery neutral" includes use of the neutral in a mediation or adjudicative function, or in a combination of both. The e-discovery neutral may act as a mediator facilitating discussion, an adjudicator deciding disputed issues or first as a mediator and, if unsuccessful at resolution, then as an adjudicator. If the neutral is operating in an adjudicative capacity, use of Federal Rule of Civil Procedure 53 (or a state analogue) and denomination as a special master probably are required. The particular role for any dispute is highly individualized, but the underlying questions are the same.

Question # 1 – Do I need an e-discovery neutral? Here are some issues to consider in determining your need.

- The size and complexity of the case;
- The number of documents and/or anticipated electronically stored information (ESI) disputes;
- The amount of monetary relief sought;
- Time-sensitivity;
- The benefit to parties in having the ability to pick the neutral and the opportunity to tailor the neutral's experience to the particular case;
- Whether easy and timely access to the neutral is important; and
- The anticipated cost of hiring a discovery neutral compared with the overall costs, importance and value of the case.

Question # 2 – How do I find an e-discovery neutral?

- The three most obvious categories of individuals qualified to serve are retired judicial officers, lawyers experienced in ESI matters and individuals whose business is ESI, such as vendors and expert witnesses.
- Likely the single best source is asking colleagues for recommendations.
- Some court systems, such as the U.S. District Court for the Western District of Pennsylvania, have created panels of e-discovery special masters based upon that court's evaluation of an applicant's qualifications and experience in litigation, ESI and mediation. This information is available to judges and lawyers.
- There also are national organizations for special masters, such as the Academy of Court-Appointed Masters, which is a group of lawyers, retired judicial officers and ESI experts, not affiliated with any particular ADR provider, who have served as special masters in state and federal courts.
- Working with a national or local ADR providers

While there is no ability to interview judicial officers about their experience with e-discovery matters, the opposite is true when looking for an e-discovery neutral. Counsel should not hesitate to conduct a joint interview of prospective neutrals to ascertain their experience,

This article was originally published by LAW.COM and is reprinted with their permission.

typical practices, costs and cancellation policies. For qualifications, counsel should consider the following:

- Someone with demonstrated mediation skills;
- Someone with a strong technical background; and
- Someone with a demonstrated ability to make decisions if adjudication is a possible role.

Here is an example of one potential caveat as to background: A colleague with superb and unquestionable experience and skill as a mediator was mediating a case without success. The parties decided that they wanted to bring in a mediator who was an expert in the subject matter at issue but had little experience as a mediator. Once they were working with the substitute mediator, it was quickly apparent to them that the "expert" wanted to impose his view of how the matter should be resolved. In short order, the expert was excused, and the original mediator returned and settled the case. The important lesson here is to use someone who possesses a demonstrated experience as a mediator.

Question # 3 – At what point in the case should an e-discovery neutral be engaged? As one might expect, there are no rules on timing; it depends on the specific case. It could be before the case is filed or when a preservation letter is issued. It could be upon filing of an action or before a court-ordered scheduling conference. It could be when counsel start to have ESI problems. Here are some factors that might be considered:

- Whether counsel make it a routine practice to reach out early to opposing counsel to suggest discussion of possible ESI issues;
- Whether there is a disparity between counsel in knowledge and experience in the world of ESI; and
- Whether counsel should raise the issue before there are any problems or wait until a dispute actually arises.

Question # 4 – How can an e-discovery neutral be utilized in the most efficient and cost-effective manner?

- Agree that motions to compel have word limits, except for the most significant motions, which can have higher word limits.
- Use preliminary findings rather than Rule 53 reports and recommendations (R&R) as the initial step. Preliminary findings set out the special master's evaluation and decision of the issues. Parties have a defined time to accept the findings and decision or ask for a formal R&R. Acceptance of preliminary findings eliminates the need for judicial intervention on that issue.
- Meet with the parties early *and often*. Frequent meetings permit anticipation and discussion of upcoming issues and serve as a forum to discuss and resolve issues without litigation.
- An e-discovery neutral trying to resolve disputes can create an excellent forum for a less adversarial discussion of issues. Indeed, such a forum is an excellent opportunity to work with parties to problem-solve. In a similar vein, rather than have dueling ESI experts oppose each other, an e-discovery neutral can provide a means for the experts to sit with each other and respective counsel and discuss the problem, looking toward a solution. ■

Hon. Richard A. Levie (Ret.) *is a full-time mediator, arbitrator, special master and case evaluator based in the Washington, DC, office of JAMS. Judge Levie has served as special master in many civil cases, including the federal tobacco lawsuit, five antitrust actions including the AT&T/T-Mobile and U.S. Airways/American Airlines merger cases and a multi-billion-dollar qui tam False Claims Act case. He is a past president and current board member of ACAM. Judge Levie can be reached at rlevie@jamsadr.com.*