ARTICLES

MEDIATION AS A MEANS TO IMPROVE COOPERATION IN E-DISCOVERY

*Steven C. Bennett**

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I. INTRODUCTION

The modern "information age" has reached (at least) its third decade.[1] The civil litigation process, in turn, has

* The author is a partner at Park Jensen Bennett LLP in New York City. The views expressed should not be attributed to the author's firm, or its clients.

[1] Commercial use of the internet began in the late 1980s. *See generally* PAUL E. CERUZZI, A HISTORY OF MODERN COMPUTING (Bernard Cohen & William Aspray eds., 2d ed. 2003) (discussing the commercial use of computers, and (in particular) development of personal computer systems; Barry M. Leiner

increasingly focused on discovery of electronic information.[2] In addition to huge matters involving large corporations and institutions,[3] today even relatively modest-sized disputes include e-discovery components.[4] Despite repeated attempts at reform,[5] cost control and efficiency in discovery remain elusive.[6]

et al., *A Brief History Of The Internet*, INTERNET SOCIETY (1997), http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet. The Federal Rules of Civil Procedure first made reference to "electronic data compilations" in the 1970 Advisory Committee Notes, FED. R. CIV. P. 34. (noting "changing technology" and potential need to make "computer data" available).

[2] In the early days of the internet (and e-mail), counsel and clients often held off on demanding electronic information, on the theory that both sides could overwhelm the other with such requests. That era has ended. *See* Ralph E. Losey, *Top Trends in e-Discovery Noted at ILTA Conference*, E-DISCOVERY GROUP (Nov. 2007), http://www.depo.com/E-letters/TheDiscoveryUpdate/1107/PrinterFriendly/TopTrendsSF.html.

[3] *See* John M. Barkett, *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review*, DUKE LAW CENTER FOR JUDICIAL STUDIES (2012), https://law.duke.edu/sites/default/files/centers/judicialstudies/TAR_conference/Panel_5-Original_Paper.pdf ("Large numbers here are not hundreds or thousands of documents, but hundreds of thousands and millions of documents."); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 563 (2010) ("The volume and costs of discovery in the electronic age amount in some cases to billions of pages and millions of dollars.").

[4] *See* Deborah Jillson, *Harnessing the Beast: Litigation Readiness for Big Data*, LAW TECH. NEWS (Dec. 17, 2013), http://mobile.www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202632455434&Harnessing_the_Beast_Litigation_Readiness_for_Big_Data ("[P]aper-based litigation practices and discovery have disappeared and electronic discovery is here to stay."); Megan Zavieh, *Luddite Lawyers Are Ethical Violations Waiting to Happen*, LAWYERIST (Dec. 2, 2013), http://lawyerist.com/luddite-lawyers-ethical-violations-waiting-happen (noting that, today, "[E]ven litigation between individuals represented by solo attorneys is likely to involve electronic discovery.").

[5] *Compare* LAWYERS FOR CIVIL JUSTICE ET AL., THE TIME IS NOW: THE URGENT NEED FOR DISCOVERY RULE REFORMS 2 (2011), *available at* http://www.nldhlaw.com/content/uploads/2012/07/LCJ-Comment-The-Time-is-Now-The-Urgent-Need-for-E-Discovery-Rule-Reforms-103111.pdf (stating that "undue cost and burden make a mockery" of fair resolution of disputes), *with* Milberg LLP & Hausfeld LLP, *E-discovery Today: The Fault Lies Not in Our Rules*, 4 FED. CTS. L. REV. 131, 159 (2011) (suggesting that the current rules "provide the authority and flexibility for courts to effectively manage and resolve e-discovery disputes"). The effect of recently proposed changes to the Federal Rules, moreover, has yet to be determined. *See* Kevin F. Meade & Arielle Gordon, *Questions Raised by Proposed Amendments to Federal Rules*, N.Y.L.J. (Dec. 2, 2013), http://www.newyorklawjournal.com/id=1202629954493/Questions-Raised-by-Proposed-Amendments-to-Federal-Rules?slreturn=20140121153945 (suggesting that the "true impact" of proposed changes may not be felt until the rules are interpreted by courts). True change in e-discovery practices may require a change in the legal culture. *See* David Horrigan, *Kroll Ontrack Recaps E-Discovery 2013 with a Google+ Hangout*, LAW

Many commentators and courts suggest that cooperative approaches to e-discovery planning hold the key to lower-cost, higher-quality e-discovery processes.[7] Yet, admonitions to cooperate hardly suffice to motivate self-interested parties.[8] Some system to foster cooperation, beyond the parties themselves, appears essential.[9]

This article addresses one suggestion for such an external

TECH. NEWS (Dec. 12, 2013), http://mobile.www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202632092502&Kroll_Ontrack_Recaps_EDiscovery_2013_With_a_Google_Hangout (finding that e-discovery experts agree that "rule changes would accomplish little without fundamental changes in the legal traditions that govern e-discovery just as much as the rules do"); *see* Mitchell Dembin & Philip Favro, *Changing Discovery Culture One Step at a Time*, LAW TECH. NEWS (Dec. 5, 2013), http://mobile.www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202630168239&Changing_Discovery_Culture_One_Step_at_a_Time (rejecting the "Pollyannaish view" that proposed Rules changes will "cure the present ills afflicting discovery").

[6] *See* Stuart Gasner, *The Litigation Settlement Machine*, CORPORATE COUNSEL (Dec. 4, 2013), http://www.kvn.com/Templates/media/files/Articles/GEN_Inside%20the%20Litigation%20Settlement%20Machine_Corp%20Counsel_SLG_2013.pdf (suggesting the need for a "drastic rewrite" of rules to permit "deciding cases in a reasonable amount of time at reasonable expense"); David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J. L. & TECH. 8 (2012) (noting a consensus that "civil litigation takes too long and costs too much"); *see also* Robert Levy et al., *The Proposed Rules: Light at the End of the E-Discovery Tunnel,* THE METROPOLITAN CORPORATE COUNSEL (Sept. 26, 2013), http://www.metrocorpcounsel.com/articles/25558/proposed-rules-light-end-e-discovery-tunnel (stating that representatives of Lawyers for Civil Justice feel that the current e-discovery system is "tremendously inefficient").

[7] *See* JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND 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, *Forward to* EDISCOVERY FOR CORPORATE COUNSEL (2013) (noting a "paradigm shift" in e-discovery process, toward cooperation); Nora Barry Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, THE FED. LAWYER 37 (2011), http://www.fedbar.org/Image-Library/webinar-files/Creating-the-Criteria.pdf (stating that, where not addressed early, ESI issues "often come up later in the proceedings, causing unnecessary delays and expensive e-discovery motions").

[8] *See* Waxse, *supra* note 6 (indicating that, despite the Sedona Cooperation Proclamation and "numerous [judicial] opinions," it appears that "cooperation is not being used enough").

[9] *See* Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) (stating that 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, 633 (1989) (discussing the need to make attorneys aware that a "cooperative discovery strategy" can be adopted and would be beneficial to both the attorneys and the clients involved).

influence, the use of e-discovery mediators. The article outlines the value of cooperation in e-discovery, summarizes some of the potential roles that e-mediators can play, reviews potential limits on the use of mediation, and suggests some methods for encouraging the use of e-discovery mediation in court proceedings.

II. NEED FOR COOPERATION IN DISCOVERY

The American system of civil justice depends upon a party-driven pre-trial process.[10] Courts assume that parties are in the best position to understand their own information storage and retrieval systems,[11] and thus required (in the first instance) to take responsibility for the conduct of discovery.[12] Courts expect genuine efforts to formulate a discovery plan,[13] rather than simply dumping the matter in a judge's lap.[14] Even if the

[10] *See* Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 162 (2012) ("We are willing to allow wide attorney discretion in conducting pretrial activities because such discretion is the best mechanism we have to promote the ultimate goals (the core values) of a predictable, efficient, and fair resolution on the merits.").

[11] *See* Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. 2012 Sept. 28, 2012) ("[R]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information."); *see also* THE SEDONA CONFERENCE WORKING GRP., BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 47 (2d ed. 2007) (stating that the producing party is generally in the best position to select the most appropriate methods for reviewing and producing ESI).

[12] *See* Ruiz-Bueno v. Scott, No. 2:12-CV-0809, 2013 WL 6055402 at *4 (S.D. Ohio Nov. 15, 2013) ("What should have occurred here is that, either as part of the Rule 26(f) planning process, or once it became apparent that a dispute was brewing over ESI, counsel should have engaged in a collaborative effort to solve the problem.").

[13] *See, e.g.,* Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) (expressing that "counsel must design an appropriate process, including use of available technology, with appropriate quality control testing"); William A. Gross Constr. Assocs., Inc. v. American Mfg. Mut. Ins. Co., 256 F.R.D. 134, 135–36 (S.D.N.Y. 2009) (noting the "need for careful thought, quality control, testing, and cooperation").

[14] *See* Romero v. Allstate Ins. Co., 271 F.R.D. 96, 109 (E.D. Pa. 2010) (finding that a court "expects counsel to 'reach practical agreement' without the court having to micro-manage e-discovery," including agreement on "search terms, date ranges, key players" and "any other essential details about the search methodology"); SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. 2009) (noting that, had a discovery plan been created, the Court might not have had to intervene); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 262

discovery plan is incomplete, or meant to evolve over time,[15] courts greatly appreciate efforts to structure the discovery process,[16] and sharpen any issues that require judicial resolution.[17]

The discovery process assumes the good faith of parties and their counsel,[18] including good faith efforts at negotiated solutions to discovery problems.[19] The good faith obligation applies in both directions.[20] Overbroad discovery requests,[21] followed by refusal to recognize priorities in

(D. Md. 2008) ("Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology.").

[15] *See In re* Facebook PPC Advert. Litig., No. C09-03043 JF HRL, 2011 WL 1324516 at *1 (N.D. Cal. Apr. 6, 2011) ("The argument that an ESI Protocol cannot address every single issue that may arise is not an argument to have no ESI Protocol at all").

[16] *See* FED. R. CIV. P. 26 advisory committee's notes (noting that it is "desirable that . . . proposals regarding discovery be developed through a process where [parties] meet in person, informally exploring the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.").

[17] *See* Terry Ahearn & Wendy Axelrod, *E-Discovery: Cooperation and Proportionality, The Past, Present and Future*, INSIDE COUNSEL (Sept. 24, 2013), http://www.insidecounsel.com/2013/09/24/e-discovery-cooperation-and-proportionality-the-pa (suggesting the desirability of a "jointly submitted document production or ESI protocol," which will "clearly define . . . mutual discovery obligations" and "frame the issues upfront").

[18] *See* Smith v. Life Investors Ins. Co. of Am., No. 2:07-CV-681, 2009 WL 2045197 at *5 (W.D. Pa. July 9, 2009) ("At bottom, the discovery process relies upon the good faith and professional obligations of counsel to reasonably and diligently search for and produce responsive documents.").

[19] *See* FED. R. CIV. P. 16(f)(1) (stating sanctions available for party or counsel who "does not participate in good faith" in pretrial conference, or is "substantially unprepared to participate"); FED. R. CIV. P. 26(c)(1) (requiring the party moving for a protective order to certify a "good faith" effort to confer "in an effort to resolve the dispute without court action"); FED. R. CIV. P. 26(f)(2) (explaining counsel and unrepresented parties responsible for "attempting in good faith to agree on the proposed discovery plan"); FED. R. CIV. P. 37(a)(1) (requiring a party moving to compel to certify "good faith" effort to confer "in an effort to obtain [disclosure] without court action.").

[20] *See* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 982–83 (E.D. Pa. 1973) (finding "grossly improper" for plaintiff to "set out a dragnet" against a large number of parties "to the inconvenience, expense and possible anxiety of being sued," without "reasonable investigation" in advance of filing).

[21] *See* Woodward v. Emulex Corp., 714 F.3d 632, 636 (1st Cir. 2013) (holding that the trial court did not abuse its discretion by limiting discovery to specifically named employees, thereby preventing "a fishing expedition into possibly barren waters"); *see also* Georgacarakos v. Wiley, No. 07-CV-01712-MSK-MEH, 2011 WL 940803 at *5 (D. Colo. Mar. 16, 2011) (finding that the Magistrate Judge properly exercised his authority to "overlook matters of form

discovery,[22] may fail the bad faith standard for requesting parties.[23] Similarly, "halfhearted and ineffective" efforts at discovery search and production are clearly inadequate.[24] Judges, often referencing The Sedona Conference Cooperation Proclamation,[25] have suggested a need for "transparency" (or at least "translucency") in the e-discovery process, aimed at party-agreed protocols for the conduct of e-discovery.[26]

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and cut to the heart of a discovery dispute" by modifying an overbroad document request); Craig Ball, *Modern E-Discovery Requests*, LAW TECH. NEWS (Dec. 1, 2013), http://www.lawtechnologynews.com/id=1202630112765/Modern-E-Discovery-Requests?slreturn=20140118190038 (suggesting that "[s]lipshod requests for production of electronically stored information sow the seeds for failed discovery" and suggesting the need to overcome "challenges" in requesting information by "ditch[ing] the boilerplate" and "focusing on what we really are seeking—information in utile and complete forms").

[22] *See* Cartel Asset Mgmt. v. Ocwen Fin. Corp., No. 01-CV-01644-REB-CBS, 2010 WL 502721 at *13 (D. Colo. Feb. 8, 2010) ("The court is left with the impression that counsel are searching for discovery disputes, rather than working cooperatively to avoid or defuse those disagreements.").

[23] *See* Gen. Steel Domestic Sales, LLC v. Chumley, No.10-CV-01398-PAB-KLM, 2011 WL 2415715 at *2 (D. Colo. June 15, 2011) (rejecting the defendants' request for production of every recorded sales call in database, where review of calls would require four years to identify potentially responsive information); *see also* Willnerd v. Sybase, No. 1:09-CV-500-BLW, 2010 WL 473629 at *3 (S.D. Idaho Nov. 16, 2010) (explaining that searching employee emails would amount to a "proverbial fishing expedition—an exploration of a sea of information with scarcely more than a hope that it will yield evidence to support a plausible claim;" in employing "proportionality standard," court must balance requesting party's interest against "not-inconsequential burden of searching for and producing documents"); Murray v. Geithner, No. M8-85(LAK), 2010 WL 125732 at *3 (S.D.N.Y. Mar. 25, 2010) (indicating that "[i]t is not the Court's task to do [a party's] job for him by redrafting his manifestly overbroad discovery requests").

[24] *See* Robinson v. City of Arkansas City, No. 10-1431-JAR-GLR, 2012 WL 603576 at *4 (D. Kan. Feb. 24, 2012) (quoting Bratka v. Anheuser–Busch Co., 164 F.R.D. 448, 461 (S.D. Ohio 1995); *see also* Maggette v. BL Dev. Corp., No. CIV.A. 2:07CV181-M-A, 2009 WL 4346062 at *3 n.1 (N.D. Miss. Nov. 24, 2009) (stating that sanctions are appropriate for a "casual, if not arrogant, rebuff to plaintiffs' repeated efforts to obtain information which is ordinarily easily produced in litigation").

[25] *See* THE SEDONA CONFERENCE, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 333 (2009). For a list of judges (and citations to numerous judicial opinions) adopting the Sedona Conference Cooperation Proclamation, *see* THE SEDONA CONFERENCE, *The Sedona Conference Cooperation Proclamation*, www.thesedonaconference.org/cooperation-proclamation (last visited Feb 19, 2014).

[26] *See, e.g.*, Saliga v. Chemtura Corp., No. 3:12CV832 RNC, 2013 WL 6182227, at *1–2, 10 (D. Conn. Nov. 25, 2013) (indicating that "the best solution in the entire area of electronic discovery is cooperation among counsel."); *see also* Mancia v. Mayflower, Inc., 253 F.R.D. 354, 357–58 (D. Md. 2008) (indicating that "compliance with the 'spirit and purposes' of these discovery

Early engagement on every conceivable e-discovery issue may be neither possible nor desirable;[27] yet, counsel surely cannot avoid their "meet and confer" obligations merely as a matter of gamesmanship,[28] and surely cannot ignore court directions regarding cooperation.[29]

The discovery process assumes that attorneys will educate themselves about the fundamentals of e-discovery technology, sufficient to engage in informed negotiation with an adversary.[30] Yet, one common phenomenon is the "drive by" Rule

rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake . . . .").

[27] *See* H. Christopher Boehning & Daniel J. Toal, *Are Meet, Confer Efforts Doing More Harm Than Good?*, N.Y.L.J. (July 31, 2012), http://www.newyorklawjournal.com/id=1202564932130/Are+Meet+Confer+Efforts+Doing+More+Harm+Than+Good%3Fmcode=0&curindex=0&curpage=ALL# ("Ideally, parties will engage on key e-discovery and preservation issues when and if the need arises."); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery after December 1, 2006*, 116 YALE L.J. POCKET PART 167, 175–76 (2006) ("Every item on this daunting [Rule 26(f)] list may not apply or be important in every case").

[28] *See* Branhaven, LLC v. Beeftek, Inc., 288 F.R.D. 386 at 389, 392–93 (D. Md. 2013) (imposing sanctions for wrongful Rule 26(g) certification where counsel "essentially admitted" that discovery response was "meaningless" and intended to "buy time" and noting that "[i]f all counsel operated at this level of disinterest as to discovery obligations, chaos would ensue"); *see also* Lane v. Page, No. CIV 06-1071-JG-ACT, 2011 WL 1004825 at *4 (D. N.M. Feb. 10, 2011) (stating that "[t]he Federal Rules of Civil Procedure . . . exhibit little patience for gamesmanship"); Jimena v. UBS AG Bank, Inc., No. 1:07-CV-00367-OWW, 2010 WL 4320471 at *4 (E.D. Cal. Oct. 25, 2010) (explaining that the Federal Rules are "meant to encourage fairness and to avoid obstructionism, gamesmanship, and tactical maneuvering").

[29] *See* Equal Emp't Opportunity Comm'n v. The Original Honeybaked Ham Co. of Ga., Inc., No. 11-CV-02560-MSK-MEH, 2013 WL 752912 at *1, 3–4 (D. Colo. Feb. 27, 2013) (noting the court's "broad discretion . . . to ensure not only that lawyers and parties refrain from contumacious behavior . . . but that they fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial . . ." and imposing sanctions for the party "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the . . . court.").

[30] *See* Mikki Tomlinson, *Attacking eDiscovery Ignorance in 2013*, EDISCOVERY JOURNAL (Nov. 29, 2012, 9:22 AM), http://old.ediscoveryjournal.com/2012/11/attacking-ediscovery-ignorance-in-2013 (suggesting that poor cooperation efforts in e-discovery "oftentimes boils down to eDiscovery ignorance"); *see also* Thomas Y. Allman, *E-Discovery Standards in Federal and State Courts after the 2006 Federal Amendments*, ELEC. DISCOVERY LAW 1,7 (May 3, 2012), http://www.ediscoverylaw.com/files/2013/11/2012FedStateEDiscoveryRulesMay3.pdf ("Counsel has an ethical obligation to acquire the requisite skills and knowledge to advise on e-discovery, confidentiality of client information and privilege reviews, and the maintenance of an appropriate relationship with courts and counsel while balancing cooperation and advocacy."). The ABA's

26(f) conference, where counsel "meet and confer" in name only.[31] "Sand-bagging" exchanges of information (in hopes that the opposing party will somehow stumble) also typically produce significant inefficiency, cost and delay.[32] Mediation may improve the e-discovery process in many of these areas.

III. POTENTIAL BENEFITS OF MEDIATION

Mediation is typically an informal, flexible process, meant to respond to the needs of the parties and the circumstances of the dispute.[33] Mediation can work at virtually any stage of a dispute.[34] The potential benefits of mediation, outlined

recent modifications to its Model Rules of Professional Conduct emphasize the point. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2012) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]").

[31] *See* Craig Ball, *Musings On Meet And Confer*, CRAIGBALL.COM (2007), http://www.craigball.com/Musings_on_Meet_and_Confer.pdf (noting the phenomenon of "a drive-by event with no substantive exchange of information."); *see also* 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 (stating that many attorneys participate "without a detailed understanding of their client's ESI or a specific plan for discovery"); *see* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 15–16 (2009) (indicating 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).

[32] *See In re* National Ass'n of Music Merchants, Musical Instruments & Equip. Antitrust Litig., No. MDL 2121, 2011 WL 6372826 at *3–4 (S.D. Cal. Dec. 19, 2011) (denying a request to re-search a database, where plaintiff had "ample opportunity to obtain" the information through prior discovery, but failed to take advantage of the "meet and confer" process; but permitting additional, limited search to the extent that the requesting party was willing to pay the cost); *see also* Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147, 149 (D.D.C. 2008) (finding that the failure of a party to respond to an invitation to propose search terms is not the kind of "collaboration and cooperation" expected by courts).

[33] *See* Simeon H. Baum, *Mediation And Discovery*, *in* DISPUTE RESOLUTION AND E-DISCOVERY 49, 51 (Daniel B. Garrie & Yoav M. Griver eds., 2012) (explaining unique features of mediation include "freedom and creativity that infuses [the process]."); *see also What Are The Benefits Of An E-Mediation?*, THE AM. COLL. OF E-NEUTRALS (2011), http://acesin.com/index.php?q=faq (noting the ability to "self-direct workable solutions. . . define scope parameters," and other benefits).

[34] *See What Is An E-Mediation?,* THE AM. COLL. OF E-NEUTRALS (2011), http://acesin.com/index.php?q=faq (stating that "[e]-mediation can be held at

below, depend upon the circumstances of the individual case, the ability and willingness of the parties and their counsel, and the skills of the mediator.[35]

A. Facilitating Discussion

Mediation, at its core,[36] is a form of facilitated dialogue and negotiation,[37] meant to improve understanding between parties[38] (rather than the pure "shuttle diplomacy" of settlement negotiations).[39] A mediator often can foster dialogue by asking

whatever stage a dispute arises").

[35] Examples of discovery-related mediation appear (although obliquely) in case law. *See, e.g.,* Harris v. Koenig, 271 F.R.D. 356, 367, (D.D.C. 2010) (explaining that a mediator was appointed "to assist the parties with efficient discovery."); Secs. Exch, Comm'n v. Found. Hai, 736 F. Supp. 465, 467–68 (S.D.N.Y. 1990) (noting that a mediator was appointed to "assist the parties in formulating a discovery plan and to mediate any discovery disputes."); Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuwirth, LLC v. Comprehensive Mental Assessment & Med. Care, P.C., 896 N.Y.S.2d 805, 806–07 (N.Y. Sup. Ct. 2010); Lu v. Superior Court, 64 Cal. Rptr.2d 561, 563 (Cal. App. 4th Dist. 1997) (explaining the appointment of a "discovery referee" with authority as a mediator); State v. Metz, 654 N.Y.S.2d 989, 992–93 (N.Y. Sup. Ct. 1997); Leys v. Reynolds, No. C14-91-00786-CV, 1993 WL 1628 at *1 (Tex. Ct. App. Jan. 7, 1993).

[36] Systems of mediation may combine "evaluative and facilitative practices, to get the best results." 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); *see also id* at 48–49 (explaining that mediation assumes participation of the parties in "identifying and agreeing upon mutually satisfactory, and often creative, solution[s]" guided by the neutral); *see also* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 8 (1996) (noting "a bewildering variety of activities [that] fall within the broad generally-accepted definition of mediation").

[37] *See* JOSEPH B. STULBERG & LELA P. LOVE, THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY 5 (2013) ("Mediation is a process in which a neutral intervener helps people in a dispute improve their understanding of their situation and one another and then develop solutions that are acceptable to them."); *see also* Daniel B. Garrie, *Redefining The Discovery Terrain: The Need for Mediation in E-Discovery (3 Of 3)*, LAW & FORENSICS (Nov. 28, 2013), http://www.lawandforensics.com/redefining-discovery-terrain-need-mediation-e-discovery-3 (noting function of mediator to "facilitate cooperation and open dialogue between the parties.").

[38] Wayne D. Brazil, *Should Court-Sponsored ADR Survive?,* 21 OHIO ST. J. ON DISP. RESOL. 241, 269 (2005) ("The core of the mediation process focuses on enhancing understanding across party lines—by . . . inviting parties to temporarily replace their perspective on and their understanding of the dispute with their opponent's perspective and understanding.").

[39] Patricia Kutza, *New San Francisco Forum Promotes E-Discovery Mediation*, LAW.COM (Oct. 23, 2013), http://mobile.www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202624724121&New_San_Francisc

questions, permitting parties to consider alternative views of a problem.[40] At a minimum, a mediator can help set the tone for party discussions,[41] and agreement to appear for mediation generally shows good faith on each side.[42] Experience with mediated e-discovery discussions, moreover, may educate parties on cooperative processes for resolving further disputes.[43]

o_Forum_Promotes_EDiscovery_Mediation (indicating that "mediators [can] primarily work on getting the dialogue going" versus the "shuttle diplomacy" of conventional settlement negotiations).

[40] *See* Allison Skinner, *The Evolving Role of E-Discovery Neutrals*, LAW.COM (Dec. 16, 2013), http://mobile.www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202632945386&The_Evolving_Role_of_EDiscovery_Neutrals (suggesting that the mediator can facilitate negotiation by asking "many questions" of counsel and clients; discussing alternative ways to resolve issues, and establishing test procedures to "focus on more significant aspects of the problem"); Daniel B. Garrie & Salvatore Scibetta, *We Need Mediation in E-Discovery*, LAW360 (June 5, 2013), http://www.law360.com/articles/445869/we-need-mediation-in-e-discovery ("The mediator has a dual role as listener and translator. It is critical that the mediator listen to the parties' concerns and questions with an open mind. The mediator must also translate the technical underpinnings of each party's systems into actionable discovery efforts that both parties can comprehend.").

[41] *See Report of the Special Committee on Discovery and Case Management in Federal Litigation*, 53 (June 23, 2012) *available at* http://www.nysba.org/discoveryreport ("While it does not guarantee a cooperative, professional attitude among counsel, compelling face-to-face engagement early in the litigation can set the right tone and help to create the kind of cooperation that will facilitate swift and just resolution of disputes."); *see* Craig Ball, *E-Discovery: A Special Master's Perspective,* CRAIGBALL.COM (2010), http://www.craigball.com/EDD_SM_PERSP.pdf ("Often, problems stem from a failure to communicate, so parties must be steered to more effective communication strategies concerning ESI. It's like marriage counseling, but without happier times to hearken back to.").

[42] *See* Mary Mack, *Litigation Prenups, E-Discovery ADR and the Campaign for Proportionality*, THE METRO. CORPORATE COUNSEL (May 3, 2010), http://www.metrocorpcounsel.com/articles/12510/mary-mack-litigation-prenups-e-discovery-adr-and-campaign-proportionality ("The parties' decision to use an e-mediator demonstrates good faith in solving matters . . . ."); *see also* Peter N. Thompson, *Codifying Mediation 2.0: Good Faith Mediation In The Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 363 (2011) (good faith participation in mediation requires "leaving behind adversarial instincts and tactics and cooperating, or at least playing along, with the demands of the mediator").

[43] *See* Garrie, *supra* note 37 (private caucus may assist where "an information disparity" exists; the mediator may help "educate each party about the reality of their demands"); Daniel Garrie, *How to Save Time and Money by Mediating E-Discovery*, LEGAL SOLUTIONS BLOG (May 14, 2013), http://blog.legalsolutions.thomsonreuters.com/law-and-techology/how-to-save-time-and-money-by-mediating-ediscovery ("While some discovery disputes mandate the use of a discovery Special Master, they often arise out of information inequity, not a burning desire by counsel to engage in costly and protracted discovery disputes to the detriment of the core issues."); *see also*

Particularly valuable in fostering cooperative dialogue is the confidentiality protection that typically attends to mediation sessions.[44] Private discussions between the mediator and individual parties, meant to explore alternatives, need not (absent agreement) be shared with other parties.[45] The parties, moreover, can (in joint sessions) share ideas for potential solutions without the risk that their tentative proposals will later become evidence in some proceeding.[46] Open discussions between IT specialists may be particularly valuable.[47] Typically, the

Fischer & Lettieri, *supra* note 7, at 40 ("After attending several Rule 26(f) 'meet and confer' conferences facilitated by a knowledgeable e-discovery expert, counsel may be expected to satisfactorily resolve ESI issues in future cases without facilitation.").

[44] *See* Part III, *infra*, for discussion on the limitations of mediation confidentiality.

[45] *See* Peter Vogel, *Use eMediation to Save Time and Money*, 29 TEXAS LAWYER 10, 11 (2013) ("[D]iscussion[s] between the Mediator and parties are confidential and as a result the private caucuses with the Mediator gives each party the opportunity to discuss eDiscovery candidly."); Garrie & Scibetta, *supra* note 40 ("Mediations are confidential, with any settlement being inadmissible in court. In addition, the mediator cannot be called to testify about the details of the settlement or negotiations. These benefits of mediation are critical for all parties to come to the table with an open mind about the potential efficiencies of mediation."); *What Is the Difference Between an E-Mediator and a Special Master?*, THE AM. COLL. OF E-NEUTRALS (2011), http://www.acesin.com/index.php?q=node/114 (discussing the confidentiality rules to which mediators are bound).

[46] *See* Simeon H. Baum, *Developing Information in Mediation, Dispute Resolution and e-Discovery in* MEDIATION AND DISCOVERY, § 3.8 (2012) (discussing the confidentiality of the mediation process); *What Is the Difference Between an E-Mediator and a Special Master?, supra* note 45.

[47] *See* Kenneth J. Withers, *E-Discovery In Commercial Litigation: Finding a Way Out of Purgatory*, 2 J. OF 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"); *see also* Allison Skinner & Peter Vogel, *E-Mediation Can Simplify E-Discovery Disputes*, LAW TECH. NEWS (Sept. 23, 2013), http://www.lawtechnologynews.com/id=1202620012101/E-Mediation-Can-Simplify-E-Discovery-Disputes?slreturn=20140126204452 (suggesting that, "[d]uring . . . confidential discussions, IT [specialists] may disclose e-evidence information without fear that they will later be deposed on the e-mediation issues."); Richard N. Lettieri, *What Is E-Mediation, and Why Might I Want to Recommend It to My Client?*, MEDIATION TODAY 1 (Sept. 2010), http://www.lettierilaw.com/documents/eMediationSeptember-2010-Newsletter.pdf ("Because all mediation discussions are confidential, the IT people at the [mediation] session can speak openly because they are not 'on the record'"); Mack, *supra* note 42 ("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.").

mediator need not report to the court,[48] and the parties need not worry about "making a record" (which, in conventional proceedings, often takes the form of inflammatory communications that can stifle any urge to cooperate).[49]

B. Solving the "Prisoner's Dilemma"

In its classically-stated form, the "prisoner's dilemma" involves a situation where a participant may be incentivized to act selfishly, even though cooperative behavior might produce a better result for all.[50] Many commentators suggest that modern discovery presents such a situation, where parties and counsel may be tempted to avoid acting forthrightly and cooperatively, out of fear that the opposing party will exploit such behavior.[51] A

[48] *See* Michael P. Carbone, *Managing eDiscovery With ADR*, MICHAEL P. CARBONE ESQ. (2011), http://www.mpcdisputeresolution.com/pg46.cfm (noting that mediators, unlike a special master, need not report to a court; the resulting confidentiality encourages parties to be "candid" with each other). A limited report, in the form of an agreement confirmed by the parties, may be submitted to the court; Allison O. Skinner, *The Role Of Mediation for ESI Disputes*, 70:6 THE ALA. LAW. 425, 427 (2009) ("The outcome of mediation may be memorialized in a mediator's report signed by the parties . . . [which] should confirm the parties' agreements.").

[49] Skinner, *supra* note 48, at 426 ("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."); *cf,*. Ron Kilgard, *Discovery Masters: When They Help—And When They Don't*, 40 ARIZ. ATT'Y, 30, 34 (2004) ("[T]he 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").

[50] Charles B. Parselle, *No Way Out: Negotiation and the Prisoner's Dilemma*, MEDIATE.COM (Apr. 2007), http://www.mediate.com/articles/parselle19.cfm ("Any situation in which you can cut an immediate deal for yourself, and yet if you know everyone else is going to cooperate that it would be better, is a prisoner's dilemma. Another way of experiencing it is to realize that if everyone acts for herself, the results will be very much worse than if people cooperated, and yet there is still the temptation to be one of the (few) winners rather than one of the (many) suckers.").

[51] *See* Paul W. Grimm & Heather Leigh Williams, "*The [Judicial] Beatings Will Continue Until Morale Improves": The Prisoner's Dilemma of Cooperative Discovery and Proposals for Improved Morale*, 43 U. BALT. L.F. 107, 107 (2013) ("Despite the fact that it is in the best interest of parties and their counsel to cooperate in the discovery process, they largely fail to do so."); Jason Krause, *The Sedona Conference's Sneaky Plan to Make Lawyers Play Nice*, DISCOVERY CLOUD BLOG (Oct. 25, 2012), http://www.discoverycloud.nextpoint.com/2012/10/25/the-sedona-conferences-slow-relentless-campaign-to-make-lawyers-play-nice/#more-3567 ("[N]o lawyer is going to willingly offer cooperation to opposing counsel without knowing that the other parties are going to follow the same rules."); *see also* Ralph Losey, *E-Discovery Gamers: Join Me in Stopping*

mediator can help the parties recognize the value of cooperation,[52] and develop a positive cycle of agreement, leading to greater cooperation.[53]

C. Screening Issues

In its ideal form, mediation in e-discovery would commence at the outset of every case,[54] and aim at formulation (and

Them, E-DISCOVERY TEAM (June 3, 2012), http://e-discoveryteam.com/2012/06/03/e-discovery-gamers-join-me-in-stopping-them ("Whether or not e-discovery truly is a prisoner's dilemma, the belief that it is may be self-fulfilling–with the effect of incentivizing counsel for either party to engage in bad behavior, in the belief that it is the rational choice under the circumstances."); Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 147 (2009) ("As is the case in the prisoner's dilemma, neither party [to a lawsuit] is able to verify whether its opponent has cooperated or abused until it's too late.").

[52] Baum, *supra* note 46, at § 3.11("Consideration of the [best alternative to no agreement] in the discovery dispute can range from asking about the costs of litigating the discovery battle, the costs of discovery itself, the way the trial judge or magistrate might be predicted to rule, the impact on the judge of being presented with this problem, risk of sanctions, and the consequences of getting more or less of the discovery sought."); *see* Maura R. Grossman & Gordon V. Cormack, *Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Search Technology in E-Discovery*, 12 SEDONA CONF. J. 89, 96–97 (2011) ("Prisoner's dilemma . . . [may be avoided] . . . in e-discovery where consultation and negotiation are possible; . . . bad behavior on the part of one party [may not serve] any prophylactic effect against the other party's possible bad behavior; . . . [discovery matters] . . . may involve several phases . . . frequently transposing the roles of requesting and responding party; . . . [and] . . . poor behavior is not a rational strategy, because what goes around comes around."); 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.'").

[53] *See* Allison O. Skinner, *How to Prepare an E-Mediation Statement for Resolving E-Discovery Disputes*, SMU-ECOMMERCE (2011), http://smu-ecommerce.gardere.com/allison%20skinner%20preparing%20for%20e-mediation%20discovery.pdf (preparation for mediation includes "candid and confidential disclosure to the mediator . . . [in order to] . . . expedite [identification] of areas of mutuality that can be readily disposed of . . . [to thereafter focus on solutions] to more challenging issues."); *see also* THE SEDONA CONFERENCE, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 361–62 (2009) ("Prisoner's Dilemma may . . . break down where actors involved can communicate with each other to develop and exchange enforceable, reciprocal commitments . . .").

[54] *See* Richard N. Lettieri & Hon. Joy Flowers Conti, *E-Discovery And Pretrial Conferences: A Primer For Lawyers And Judges*, JUDGES' JOURNAL 34, 36 (2007) (discovery decisions reached at early planning meetings ". . . will affect all electronic discovery activities going forward." the more work lawyers do during that process ". . . the easier it will be for the court to understand and resolve the parties' positions . . ." thereafter).

implementation) of a discovery plan.[55] Yet, mediation can also assist in circumstances where parties and counsel are not fully prepared to formulate a comprehensive plan.[56] A mediator may identify gaps in knowledge that, if corrected, could lead to enhanced cooperation[57] and creative solutions.[58] Mediator assistance may be especially helpful in cases where understanding of e-discovery issues appears mismatched between the parties.[59] A mediator may also offer the parties' assistance in preparing forms (such as "clawback" agreements

[55] *See* Allison Skinner & Peter Vogel, *E-Mediation Can Simplify E-Discovery Disputes*, LAW TECH. NEWS (Sept. 23, 2013), http://www.lawtechnologynews.com/id=1202620012101/E-Mediation-Can-Simplify-E-Discovery-Disputes (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 (Apr. 26, 2012), http://www.aceds.org/neutrals-may-ease-anxiety-over-floridas-new-e-discovery-rules-says-mediator-lawrence-kolin (". . . 'neutrals' can help shape discovery plans.") (quoting Lawrence Kolin, mediator); Peter S. Vogel, *Use E-Mediation and Special Masters in E-Discovery Matters*, 26 TEXAS LAWYER 15 (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.").

[56] *See* Zachary Parkins, *Why the Appointment of Special Masters in All Large Electronic Discovery Disputes is Vital to the Process of American Civil Justice*, 5 AM. J. OF MEDIATION 97, 104–05 (2011) (suggesting role for mediator where parties do not prepare for Rule 26(f) conference "in an effective way").

[57] Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct In E-Discovery*, 60 MERCER L. REV. 983, 1002 (2009) ("Discovery abuses often happen because "attorneys do not understand the complex technologies involved . . . [and] acting out of ignorance and fear, they do not cooperate . . . .").

[58] *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-that-legal-teams-should-utilize (neutrals can ". . . provide the necessary skill and expertise to help expedite the e-discovery process by quickly identifying practical and fair solutions."); Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation and the Art of Keyword Search*, 13 CARDOZO J. CONFLICT RESOL. 467, 474 (2012) (neutral may assist where parties have failed to ". . . secur[e] legal counsel with the requisite technological acumen . . . .").

[59] *See* Baum, *supra* note 33, at 77 (stating that mediation can help overcome "informational asymmetry" between parties); Fischer & Lettieri, *supra* note 7, at 36 (explaining that Rule 26(f) conferences have "generally remained ineffective [where] . . . counsel lack[s] the technical skill and experience necessary to facilitate effective resolution" of ESI issues); *see also* Richard N. Lettieri, *Mid-to-Small Law Firm Alert: Overcoming the Growing E-Discovery "Skill Gap,"* 2012 THE ADVOC. 12 (suggesting that a "skill gap" may be "growing rapidly" between law firms); Lettieri, *supra* note 47, at 1 (stating that counsel "unfamiliar with ESI" may benefit from use of a mediator).

and confidentiality stipulations)[60] that can improve efficiency in discovery.[61]

Even where no comprehensive discovery planning seems possible, moreover, a mediator may help "screen" issues for decision. A court might, for example, refer specific matters for "meet and confer" discussion, with the assistance of a mediator.[62] A mediator might also serve as a form of "dispute review board," periodically updated on developments in the case, and available at the request of the parties to aid in dispute resolution.[63] Such a

[60] Rule 502 of the Federal Rules of Evidence now explicitly authorizes "clawback" agreements (and court orders) in federal proceedings. *See generally* John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Age*, 81 FORDHAM L. REV. 1589, 1590 (2013); Nathan M. Crystal, *Inadvertent Production Of Privileged Information in Discovery in Federal Court: The Need for Well-Drafted Clawback Agreements*, 64 S.C. L. REV. 581 (2013). Similar issues arise regarding confidentiality protection for trade secrets and personal information in litigation. *See generally* William Lynch Schaller, *Secrets of the Trade: Tactical and Legal Considerations from the Trade Secret Plaintiff's Perspective*, 29 REV. LITIG. 729 (2010); Steven C. Bennett, *The United States Approach to Privacy Protection in Litigation*, 12 SEDONA CONF. J. 173 (2011).

[61] *See* Mack, *supra* note 42, at 10 ("Where an e-mediation is set up as part of [the] initial 26(f) meet and confer, the mediator can lay the groundwork to get agreement with sample documents.").

[62] *See* Peter S. Vogel, *The Role of e-Mediation in Resolving ESI Disputes*, KARL BAYER'S DISPUTING BLOG (Oct. 29, 2012), http://www.disputingblog.com/guest-post-the-role-of-e-mediation-in-resolving-esi-disputes-in-federal-court-interview-with-allison-skinner (noting that "most meet and confers are ineffective; . . . [mediator, perhaps with] . . . court sanctioned checklist . . ." of issues to discuss may assist); Ronald J. Hedges, *The Sedona Conference Points The Way Toward Control Of The Costs And Burden Of E-Discovery*, 59 FED. LAW. 46, 47–48 (2012) (suggesting use of mediators and court-appointed experts to assist in "good faith" process of "meet and confer"); *see* Baum, *supra* note 33, at 86 (". . . nothing prevents parties or a mediator from being able to mediate a narrow set of issues, such as a discovery dispute;" "[m]ediators can be used to help resolve discovery disputes at any juncture.").

[63] *See* Robert Hilson, *Mediation Counters "Chest Beating" in Gridlocked Cases*, ACEDS (Feb. 8, 2012), http://www.aceds.org/mediation-counters-chest-beating-in-gridlocked-cases-says-john-upchurch-a-veteran-neutral (quoting John Upchurch of Upchurch Watson White & Max) (explaining that a mediator may act similar to a "dispute review board in construction projects . . . called in early in the case and retained as needed" to formulate a discovery plan and resolve disputes); 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, 127 (2011) ("Using an e-mediator on an 'issue-by-issue' basis 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."); *see also* Carbone, *supra* note 48 (stating that "parties can begin the meet and confer on their own and then call on the mediator to help with any unresolved issues.").

process could, at a minimum, help sharpen issues for presentation to the court (or a special master).[64] Courts forced to address e-discovery issues, moreover, may take confidence that the "meet and confer" process has truly run its course, and that the issues presented truly require judicial intervention.[65]

IV. LIMITS OF MEDIATION

Alternative dispute resolution in general, and mediation in particular, cannot solve all problems associated with modern e-discovery practice.[66] Most obviously, a mediator lacks the power

[64] *See* W. Royal Furgeson, Jr., Karl Bayer & Elizabeth L. Graham, *E-Discovery and the Use of Special Masters*, KARLBAYER.COM (2011), *available at* http://karlbayer.com/pdf/publications/2011-01-20_KarlBayer_E-Discovery-and-the-Use-of-Special-Masters.pdf (explaining that, even if not all disputes are resolved, the mediation process "provides parties with a better understanding of the key disputes which must be presented to the court"); *see* Losey, *supra* note 57, at 997 (stating that 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."); Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1271 (2005) (noting that a neutral can "meet and confer with lawyers and parties regarding issues in a way judges cannot" and a neutral can help "filter in an unbiased way what lawyers submit" to the court); *see* Skinner, *supra* note 63, at 131 ("In some circumstances, the parties may mediate first to determine which issues a special master should address."); 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 mediation may "dramatically reduce the time and costs associated with protracted litigation over [e-discovery] motions."); *see* Mack, *supra* note 42, at 10 (referencing mediation where "hundreds" of "contentious" discovery requests were reduced to a "handful," and judicial intervention required "only on that handful of important issues.").

[65] *See* Skinner, *supra* note 63, at 128 ("[A]n e-mediation conducted in good faith demonstrates [that] the parties have met their Rule 26 obligations."); *see* Vogel, *supra* note 62 (explaining that a mediator could "certify to the court that the parties met and conferred in good faith on the enumerated ESI issues"); *see* Mack, *supra* note 42, at 10 (suggesting that the 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.").

[66] *See* Baum, *supra* note 33, at 72 ("Mediation is no panacea."); Michael Heise, *Why ADR Programs Aren't More Appealing: An Empirical Perspective*, (Cornell Law Faculty Working Papers, Paper 51, 2008) *available at* http://scholarship.law.cornell.edu/clsops_papers/51 (noting "mixed efficacy" of ADR programs, and the fact that "not all litigants perceive" benefits of ADR).

to compel agreement.[67] Mediators must operate through persuasion, and there is no persuading some parties and their counsel.[68] Where the "stick" of enforced decision-making is required,[69] a special master (or the court itself) must operate.[70]

A mediator typically cannot compel parties to share information, and cannot compel testimony in support of dispute resolution.[71] The suggestion of such compulsion could conceivably destroy the confidentiality premise of mediation, and hinder any mediated resolution.[72] Indeed, given varying authority on the scope of mediation confidentiality,[73] and given the risk of a

[67] *See* Peter S. Vogel, *E-Neutrals, E-Mediation and Special Masters: An Introductory Guide*, LEXOLOGY.COM (2012), http://www.lexology.com/library/detail.aspx?g=e5fcfc29-86b6-40df-92c0-9ef088102ecc (contrastingthe role of the mediator with the special master's role; the goal of the mediator is to "help guide the litigants and the courts through the complexities of ESI").

[68] *See* William J. McLean, *Beware Masters in E-Discovery*, LAW.COM (2008), http://www.law.com/jsp/article.jsp?id=1202423953864 (noting the "dangers" of mediation in matters 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?*, THE AM. COLL. OF E-NEUTRALS (2011), http://www.acesin.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'"); *cf.* Glover v. Udren, No. CIV. 08-990, 2013 WL 23155 (W.D. Pa. Jan. 2, 2013) (noting "protracted history of . . . litigation," including "vehement[]" opposition to appointment of special master to handle discovery matters, unsuccessful appeal of master appointment order, and counsel's statement that he would not "proceed before" the master).

[69] *See* Alison Skinner, *Expanding Your ADR Practice: What Is an "E-Neutral?"*, GA. COMM'N ON DISP. RESOL. (2012), http://www.digitalsmarttools.com/eGODR/What_is_and_E-Neutral.htm ("E-neutrals may serve as e-mediators or special masters depending on whether the parties need the proverbial carrot or stick to resolve pre-trial disputes.").

[70] *See* Fischer & Lettieri, *supra* note 7, at 37 (stating that a special master may "monitor and compel e-discovery compliance . . . [by] . . . hearing and ruling on discovery disputes and issuing reports and recommendations" to the court).

[71] *See FAQ: What Is The Difference Between An E-Mediator And A Special Master?*, THE AM. COLL. OF E-NEUTRALS (2011), http://www.acesin.com/index.php?q=node/114 (noting that special master process, which includes "taking testimony" is "more formal" than e-mediation).

[72] *See id.* ("The parties should not expect an e-Mediator to evolve into the role of a special master, and a special master should be cautioned about the appropriateness of acting as an e-mediator if confidential communications might be divulged."); *see also* Garrie, *supra* note 37 (stating that the "key component" is "trust" established between mediator and parties).

[73] *See* Susan Oberman, *Confidentiality In Mediation: An Application of the Right to Privacy*, 27 OHIO ST. J. ON DISP. RESOL. 539, 541 (2012) ("There is no uniformity in confidentiality protections between state and federal laws, among the states, or even among localities within states."); *see also id.* at 546–47 ("Some statutes offer legal protections of confidentiality [in mediation] even

mediator straying from the strict bounds of confidentiality,[74] the parties may desire a specific form of agreement or stipulated order, restricting the mediator's use of information, and confirming the confidentiality of all mediation proceedings.[75]

Finally, although general mediation skills are essential, mediation of e-discovery disputes may require specific technical education and experience.[76] Lack of familiarity with technology issues may hinder the mediation process and increase cost.[77] Thus, some form of mediator qualification process may be

more far-reaching than those given for settlement conferences.").

[74] *See* Vogel, *supra* note 62 (explaining that "parties need to be aware of which 'hat' the []neutral [is wearing], and if the []neutral 'switched hats,' . . . [parties would have to consent] . . . for strategic reasons, parties may be cautioned [against] going back and forth"); *see* Carbone, *supra* note 48 (stating that it may be possible for one neutral to act as both mediator and special master, but ". . . neutral must make it clear when he or she is acting in one capacity or the other."); *see* Skinner, *supra* note 63, at 131 ("[S]pecial masters should avoid acting as an e-mediator if confidential communications are divulged, unless the parties provide informed consent."); *but see* Daniel B. Garrie, *How to Save Time and Money by Mediating EDiscovery*, LEGAL SOLUTIONS BLOG (MAY 14, 2013), http://blog.legalsolutions.thomsonreuters.com/law-and-techology/how-to-save-time-and-money-by-mediating-ediscovery.

[75] *See* Fred Carr, *What's Said in Mediation Stays in Mediation, Right?*, PLAINTIFF MAG., Sept., 2013, at 1, 5 (stating that given "paucity of guidance" regarding mediation behavior, "advisable" for mediation participants to enter into an express "Mediation Confidentiality Agreement"); *cf.* Charles W. Ehrhart, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 92 (1999) (noting that mediator's promise of confidentiality alone "does not create an evidentiary privilege or other protection . . . ."); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S33 (1989) (noting that confidentiality agreement may be useful as a "deterrent to the disclosure of information by the parties to the agreement" and in influencing court discretion when confronted with an attempt to compel testimony by the mediator or gain access to mediation materials).

[76] *See* Craig Ball, *The Art and Science of EDD Special Masters*, LAW TECHNOLOGY NEWS (May 27, 2009), www.lawjobs.com (neutral must be "tech-savvy," "people-savvy," and "cost conscious"); *see also* Fischer & Lettieri, *supra* note 7, at 38 (adjudicating technical disputes may require "specialized skills" of a "computer forensic examiner"); Marian Riedy et. al., *Mediated Investigative E-Discovery*, 4 FED. CTS. L. REV. 77, 79, 91 (2010) (outlining process for neutral with "skills of . . . a 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").

[77] *See* Daniel B. Garrie & Yoav M. Griver, *Tips on Keyword E-Discovery Choose Your Search Terms Carefully-They Are the Keys to Ensuring Useful and Cost-Effective Discovery of Voluminous Electronic Records*, 48 TR. 46, 47 (2012) (cautioning that the neutral must have a "firm grasp" of e-discovery technology, or litigants may have to provide independent expert reports, which could "outweigh the benefits" of neutral assistance).

essential.[78]

V. CREATING AN E-DISCOVERY MEDIATION SYSTEM

Although parties are always free to design their own ADR process,[79] a court-sponsored program should do more than simply remind parties of the option to use mediation.[80] Ideally, court-sponsored mediation should be available (from the outset) in every case with a significant e-discovery component.[81] A court might develop its own staff of e-discovery neutrals, or create a roster of qualified mediators.[82] Courts might offer attorneys e-

[78] *See* Peter S. Vogel, *Mediating eDiscovery Disputes,* KARL BAYER'S DISPUTING (2009), http://www.disputingblog.com/guest-post-mediating-ediscovery-disputes-%E2%80%93-allison-skinner%E2%80%99s-brilliant-idea ("Before Judges appoint Mediators (and lawyers who volunteer names of Mediators) a determination should be made if the proposed Mediator has sufficient IT technical skills and eDiscovery experience to make eMediation a successful effort.").

[79] Such systems may be created before or after a dispute arises, although often negotiation regarding the form of dispute resolution becomes more difficult after a dispute has arisen. *See* Jay Brudz & Jonathan M. Redgrave, *Using Contract Terms to Get Ahead of Prospective E-Discovery Costs and Burdens in Commercial Litigation*, 18 RICH. J. L. & TECH. 1, 12 (2012).

[80] *See* Brazil, *supra* note 38, at 271 (criticizing programs that "consist of little more than [the court] requiring or permitting parties, in some circumstances, to hire private mediators.").

[81] *Cf.* Matthew W. Prewitt, *E-Discovery: Consider Retaining a Special Master* INSIDE COUNSEL (June 26, 2012), http://www.insidecounsel.com/2012/06/26/e-discovery-consider-retaining-a-special-master ("Once both parties have formulated their e-discovery strategy, it is probably far too late for the parties to reach agreement on appointing a special master because gamesmanship—or the perception of gamesmanship—will impede any consensus."); Parkins,*supra* note 56, at 100 (suggesting that special master appointed after problems have already arisen may be "far too reactive"); *but see* David A. Garcia, *Musings By a Retired Judge on Discovery References* MEDIATE.COM (Jan. 2011), http://www.mediate.com/articles/Garcia1.cfm.

[82] *See* Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation And Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 273–75 (2011) (courts generally either hire court staff as mediators or develop rosters of qualified mediators to whom judges refer cases; referral to private mediation organizations "used infrequently"); *see also* Report to the Chief Judge and Chief Administrative Judge, *Electronic Discovery in the New York State Courts*, NEW YORK STATE UNIFIED COURT SYSTEM 23 (Feb. 2010), *available at* http://www.cybercontrols.net/common/downloaddoc.asp?docid=1679&id=8035, ("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."); Ken Withers, *When E-Mail Explodes,* SAN DIEGO LAW. at 39 (Nov./Dec. 2008), www.sdcba.org (suggesting the need for "creation of a network of trained volunteer e-discovery mediators available pro

discovery training programs and certification, in exchange for some form of voluntary service as a mediator.[83]

Significantly, unlike special masters, which require specific judicial appointments,[84] a cadre of e-discovery mediators could exist as a permanent court resource,[85] offering a more flexible, lower-cost alternative to special master appointments.[86] Although limited, experience with the Seventh Circuit e-discovery pilot program,[87] and a somewhat similar program in the Western

bono or at low cost to litigants in state and federal courthouses across the country.").

[83] Brazil, *supra* note 38, at276 (suggesting that courts can "offer valuable training and certification to provide providers for free or at below market prices—perhaps in return for commitments to serve pro bono in a few of the court's cases per year."); *see also* Sarah Haines, *Daniel Garrie Instructs 7th Circuit's Pilot e-Mediation Program* LAW & FORENSICS (May 14, 2013), http://www.lawandforensics.com/daniel-garrie-instructs-7th-circuits ("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.").

[84] *See* FED. R. CIV. P. 53(a)(1)(A) (authorizing appointment of special master); FED. R. CIV. P. 53(b)(1) (requiring notice and opportunity to be heard prior to appointment of special master); FED. R. CIV. P. 53(b)(2) (special master appointment order must state scope of appointment); *see also* Fischer & Lettieri, *supra* note 7, at 39 (appointment order may reflect specificity of duties, availability of ex parte contact, requirement for record of activities, compensation arrangements, confidentiality terms, time limits, and names of primary contacts with master); Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 347 (2008).

[85] Federal courts have been developing ADR programs for years, under the express authority of Congress. *See* Civil Justice Reform Act, 28 U.S.C.A. § 471–482 (West 1990) (requiring that all district courts explore use of ADR); Alternative Dispute Resolution Act, 28 U.S.C. § 651–58 (West 1998) (directing district courts to devise and implement ADR programs, including mandate for party participation in mediation or neutral evaluation).

[86] Lettieri, *supra* note 47, at 1 (noting that the use of mediator can be "less costly and a quicker alternative" to court-appointed special master).

[87] The Seventh Circuit program aims at "early resolution" of e-discovery disputes, "without Court intervention," through "cooperation," attention to "proportionality," and "early case assessment." The program calls for the appointment of an "e-discovery liaison" for each party, in "most cases." *See Principles Relating to the Discovery of Electronically Stored Information*, DISCOVERY PILOT: 7th CIRCUIT ELECTRONIC DISCOVERY COMMITTEE (Aug. 1, 2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf. The program's Mediation Subcommittee, formed in 2012, has selected and trained a group of volunteer mediators, "intended to provide assistance in smaller cases involving limited amounts" of ESI. *See E-Mediation Program*, DISCOVERY PILOT: 7TH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE (2010), http://www.discoverypilot.com/content/e-mediation-program (The Mediation Subcommittee is meant to ". . . become an active participant in resolving e-discovery issues and disputes without the necessity of judicial assistance."); *see Seventh Circuit Electronic Discovery Pilot Program, Interim*

District of Pennsylvania,[88] suggest that development of a neutrals program for resolution of e-discovery disputes may prove effective in other courts.[89]

Expanded use of mediation in e-discovery might follow from further study of these programs, and extension of similar systems to other courts.[90] In addition to replicating these model

Report On Phase Three, DISCOVERY PILOT: 7TH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE (2013), *available at* http://www.discoverypilot.com/sites/default/files/phase_three_interim_report.pdf; *see also Seventh Circuit Electronic Discovery Pilot Program*, IAALS (2013), http://iaals.du.edu/library/publications/seventh-circuit-electronic-discovery-pilot-program (survey results from first phases of program suggest that e-discovery principles ". . . are perceived to result in more cooperation . . . .").

[88] The Western District of Pennsylvania program involves creation of a "list of qualified attorneys" to serve as e-discovery special masters. *See Electronic Discovery Special Masters*, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF PENNSYLVANIA, *available at* http://www.pawd.uscourts.gov/pages/ediscovorey.htm (last visited Mar. 22, 2014) (Western District program intended to confront "critical challenge" of ESI problems "threatening to overshadow the substantive issues" in a dispute). The program developed selection criteria, including ". . . active bar admission, demonstrated litigation experience, particularly with electronic discovery; demonstrated training and experience with computers and technology; and mediation training and experience." *Id.* The program has included training on "mediation techniques for the evolving electronic age." *See Mediation Techniques for the Evolving Electronic Age*, THE FEDERAL BAR ASSOCIATION, WESTERN PENNSYLVANIA CHAPTER (June 22, 2011), http://www.pawd.uscourts.gov/Applications/pawd_adr/Documents/MediationTechniquesFlyerW0087932.PDF. To date, however, special masters have been used "sparingly" in the district. *See E-Discovery Special Master Program: Progress And Perspectives*, THE FEDERAL BAR ASSOCIATION, WESTERN PENNSYLVANIA CHAPTER (Sept. 12, 2013), *available at* http://www.fedbar.org/Image-Library/Chapters/WDPA-Chapter/13-fba-discovery.aspx?FT=.pdf (noting that, "[t]hus far, [special masters] have been used sparingly . . . .").

[89] *See* David Cohen & Claire Covington, *E-Discovery: Liaisons Are Key to Discovery Success*, INSIDE COUNSEL (Aug. 7, 2012), http://www.insidecounsel.com/2012/08/07/e-discovery-liaisons-are-key-to-discovery-success (noting results from 7th Circuit Discovery Pilot Program and Western District of Pennsylvania Special Master Program, suggesting that systems can yield "a more efficient discovery process" and help parties ". . . identify cost saving alternatives and quickly resolv[e] most remaining issues without the need for extensive briefing . . . .").

[90] One interesting extension might involve use of mediation for discovery issues in bankruptcy. Bankruptcy courts already use mediation quite frequently. *See* Leslie Ann Berkoff, *Mediation In Bankruptcy*, RESOLUTION ROUNDTABLE (Apr. 29, 2013, 12:10 PM), http://nysbar.com/blogs/ResolutionRoundtable/2013/04/mediation_in_bankruptcy.html ("Over the past few years, in response to the burgeoning legal costs associated with bankruptcy cases, many bankruptcy courts have adopted mediation programs, recognizing this as a viable alternative to more traditional litigation."). At the same time, familiarity with e-discovery issues may lag within the bankruptcy profession.

programs, a number of other features (outlined below) might be considered as a means to improve the reach and effectiveness of mediation.

(1) Shared Lists of Neutrals: Although the general assumption of court-connected ADR programs is that each court will maintain its own list of qualified neutrals,[91] that assumption may not necessarily apply in e-discovery matters. Familiarity with the norms of e-discovery project management may transcend jurisdictions and local rules.[92] Thus, development of national panels of neutrals, and sharing of local lists, may benefit the development of mediation programs.[93]

(2) Shared Training of Neutrals (and Advocates): Education of neutrals and advocates may serve as an essential support for

See Susan M. Usatine, *Electronically Stored Information In The Bankruptcy Context*, 27 AIRA JOURNAL 7 (2013) *available at* https://www.aira.org/pdf/journal/april-june-2013.pdf (noting that "[m]any bankruptcy professionals . . . are not particularly 'e-savvy,'" and "[i]t is common for a debtor, Trustee, or committee to encounter an information system that is compromised, obsolete or fragmented; . . . preservation, collection and review can be daunting and costs are always a consideration."); ABA ELECTRONIC DISCOVERY IN BANKRUPTCY WORKING GROUP, *Best Practices Report On Electronic Discovery (ESI) Issues In Bankruptcy Cases*, 68 BUS. LAW. 1113 (2013) (noting "only very limited study" and authority on methods for e-discovery in bankruptcy cases). The confluence of these two factors suggests the possibility of fruitful experimentation with e-discovery mediation in bankruptcy cases.

[91] *See* Garrie, *supra* note 37 (suggesting that each court could " . . . be host to a small group of discovery mediators whose role would be to advise on the legal and technical implications of a discovery protocol.").

[92] *See* 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), www.apps.americanbar.org/litigation/litigationnews (noting possibility of using certification programs to ensure access to court e-discovery specialist on staff of larger districts, or through Federal Judicial Center).

[93] *See*, e.g., Mara Weinstein, *Featured Panel: CPR's E-Discovery Neutrals* (Jan. 2013), http://www.cpradr.org/Portals/0/File%20a%20Case/Featured%20Panels/January%202013,%20Featured%20Panel%20-%20E-disco.pdf (CPR Institute has created "e-discovery panel" of neutrals); *E-Discovery Committee Meeting Minutes* (Jan. 24, 2007) http://www.cpradr.org/Portals/0/Committees/Industry%20Committees/E-Discovery%20Committee/Minutes%20Archive/01-24-07%20E-Discovery%20Committee%20Meeting%20Minutes.pdf (discussing need for "cadre of neutrals" to whom judges could refer e-discovery disputes; neutrals should function as "mediators," not "special masters"); *see also* Robert Hilson, *"E-Neutrals" Join Special Masters And Other Auxiliaries To Help Courts Cope With Growing E-Discovery Burdens,* ACEDS (July 7, 2011), http://www.aceds.org/e-neutrals-join-special-masters-and-other-auxiliaries-to-help-courts-cope-with-growing-e-discovery-burdens (noting launch of American College of e-Neutrals, meant to "compile a directory" of e-discovery neutrals, to serve needs of judges and litigants).

effective mediation.[94] Education can increase awareness about the existence of mediation programs, improve acceptance of the programs, and enhance the usefulness of mediation when employed. Experience with e-discovery mediation can (and should be) shared on a national basis.[95] Mediator mentoring and "shadowing" programs may also contribute to the development of necessary expertise.[96] Feedback on the effectiveness of individual programs, and specific neutrals, may also help improve mediation systems.[97]

(3) Good Faith Mediation Efforts: Although widely used,

[94] *See* Barkett, *supra* note 92, at 23 ("Without better education, e-discovery may not be managed fairly or frugally, and certainly not quickly.").

[95] *See* Robert A. Cole*, A Perfect Storm: The Need for E-Discovery Mediation in Florida*, TRIAL ADVOC. Q., Fall 2013, at 15, 16 (noting efforts at University of Florida to create programs on e-discovery and use of the ADR process); Univ. of Cal., Hastings Coll. Of Law, *Negotiating Solutions to Your eDiscovery Problems*, U.C. HASTINGS C. LAW, (May 16, 2013) http://events.uchastings.edu/EventList.aspx?fromdate=9/1/2012&todate=6/28/2013&display=Month&type=public&eventidn=552&view=EventDetails&information_id=1647 (describing a training program offered to those who wish to learn about eDiscovery); *see also Ediscovery Dispute Resolution Program for Special Masters & Mediators*, SEDONA CONF. (2010), https://thesedonaconference.org/conference/2010/ediscovery-dispute-resolution-program-special-masters-mediators (describing an eDiscovery training program and identifying desired attendees); *see also* Barkett, *supra* note 92, at 25 (indicating that a pilot project may generate "video productions of problem-solving tools" [used] by lawyers and judges . . . [which] can be shared with the bench and bar nationally"); Ariana J. Tadler & Kenneth J. Withers, *Toward A Less Hostile Discovery Process*, 46 TR. 30, 34 (March 2010) (noting Sedona Conference development of "toolkits" to aid e-discovery training).

[96] *See* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 873 (2008) ("Some courts and . . . 'ADR' providers offer continuing education programs or reflective practice sessions for their mediators . . . ."); Antonia Potter, *We The Women, Why Conflict Mediation Is Not Just a Job for Men*, CENTRE FOR HUMANITARIAN DIALOGUE1, 17 (2005) (suggesting mentoring and master classes as a means to teach mediation skills). At least one court system expressly includes a mentoring and shadowing component for mediators. *See Becoming a Neutral*, U.S. DISTRICT COURT N.D.CAL., http://www.cand.uscourts.gov/becomeaneutral (last visited Mar. 22, 2013) (outlining mediator qualifications, and addressing the requirements for new mediators to observe mediation sessions and establish mentoring relationships).

[97] *See* Tracy Walters McCormack et al., *Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators and Lawyers*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 150, 155–56 (2011) (suggesting the need for reporting requirements for lawyers and mediators to ensure fairness within mediation process); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 427 (2005) (indicating that courts need easily accessible grievance procedures for mediation).

"mandatory" (court-ordered) mediation programs have engendered some controversy.[98] Yet, absent a mandate from the courts, mediation may be substantially under-utilized.[99] The range of "mandatoriness" in court-ordered mediation can vary greatly.[100] Typically, court-connected programs require only "good faith" participation in mediation, rather than forcing any party to settle, and permit parties to "opt out" in the case of obviously useless (or redundant) mediation.[101] Objective factors, such as

[98] *See* McCormack et al., *supra* note 97, at 153, 158 (questioning the legitimacy of mandatory mediation systems); Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D. L. REV. 705, 705 (2008) (noting that acceptance and use of mediation has grown steadily over the last several decades, even as serious criticism has arisen from mediation scholars); *see also* Ralph Peeples, Catherine Harris & Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J. DISP. RESOL. 101, 118 ("[C]ourt-ordered mediation programs are in wide use in both state and federal court. They do not cost the courts very much to operate, and they are likely to remain a part of the dispute resolution landscape.").

[99] *See* Suevon Lee, *Will Litigators Embrace Proposed Pilot Mandatory Mediation Program?*, NEW YORK COMMERCIAL LITIGATION INSIDER (Dec. 12, 2013), http://www.litinsider.com/PubArticleCLI.jsp?id=1202632036077&rss=rss_cli_mostviewed (noting that, absent mandatory mediation, "parties may be reluctant to raise the option of mediation for fear of giving the wrong signal to the other side"); REPORT & RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF N.Y., THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY 26 (2012), *available at* https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf (stating that due to "the inherent adversarial nature of litigation and because there is a broad disparity in the degree to which judges refer matters to mediation . . . mediation is substantially underutilized in New York"); Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 483 (2010) ("Where the parties' reticence towards mediation is due to unfamiliarity with or ignorance of the process, court-mandated mediation may be instrumental in helping them overcome their prejudices or lack of understanding. Studies show that parties who have entered mediation reluctantly still benefited from the process . . . ."); Don Peters, *Understanding Why Lawyers Resist Mediation*, ASIAN MEDIATION ASSOCIATION (Feb. 24, 2011), http://barcouncil.org.my/conference1/pdf/8.LAWYERSRESISTANCETOMEDIATIONASCOTTISHPERSPECTIVE.pdf ("Early experiences with [mediation] programs showed that simply encouraging mediation did not work because lawyers resisted these invitations . . . .").

[100] *See* Quek, *supra* note 99, at 488 (outlining "continuum of mandatoriness" in mediation, from referral with no sanctions for refusal to categorical referral with sanctions for non-compliance).

[101] *See e.g.*, Unfair Claims Settlement Practices and Claim Cost Control Measures, N.Y. COMP. CODES, R. & REGS. tit. 11,§ 216.8 (2004) (providing that an insurer must participate in good faith in scheduled sessions, and send a representative who is knowledgeable and who has authority to settle); *see also N.J., N.Y. to Offer Mediation Program for Sandy Claims Dispute*, INSURANCE

failure to attend (without cause) and failure to designate a representative with authority to negotiate and settle, generally suggest bad faith.[102] Where appropriate, in e-discovery related mediation, a court might also require that IT experts (if available) attend mediation sessions.[103]

(4) Pre-Motion Mediation Requirements: Litigants are generally required to certify, before bringing discovery related motions, that they have "met and conferred" in good faith regarding the motion.[104] The "meet and confer" obligation, however, may be as subject to abuse as any other element of the e-discovery process.[105] Thus, judges might use a mediation reference system as a confirmation that parties truly have met

JOURNAL (Feb. 26, 2013) http://www.insurancejournal.com/news/east/2013/02/26/282732.htm (noting that other states have successfully operated similar mediation programs); Memorandum from John W. McConnell on the Proposed Creation Of A Pilot Mandatory Mediation Program In The Commercial Division Of The Supreme Court, New York County (Dec. 11, 2013) (on file with the State of New York Unified Court System) (explaining that the proposal gives parties "flexibility to select their own mediator or request one from [the court's] roster of neutrals").

102 *See* Quek, *supra* note 99, at 495–96 (explaining that a limited definition of good faith ensures that "the court only evaluates the parties' conduct *before* the mediation occurs; the court's interference with the substantive mediation process is avoided"); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 132, 140 (2002) (suggesting attendance requirements for limited and specified mediation time as a means to encourage productive use of mediation without satellite litigation over accusations of bad faith); Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPP. DISP. RESOL. L.J. 273, 274 (2008) (suggesting that to be productive, mediation requires participants with full authority to negotiate, who "refrain from invoking authority limits to postpone, delay, or thwart agreements").

103 *See* Vogel, *supra* note 55 (suggesting the need, at mediated planning conferences, for each side to bring in-house counsel, chief information officer or information technology director, plus "subject-matter experts"); Skinner, *supra* note 48, at 427 (suggesting that IT representatives "who can assist with navigating the technical issues" should participate in mediation); *see also* Ball *supra* note 41 ("Where feasible, each side must designate a technical liaison equipped to answer questions about systems, applications and capabilities.").

104 *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.").

105 *See* Nicola Faith Sharpe, *Corporate Cooperation through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 134–35 (2009) (suggesting that "the meet-and-confer requirement[s] 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").

their cooperation obligations.[106] Such a system might even impose costs on a party who, having failed to mediate in good faith, loses a subsequent discovery motion.[107]

(5) Alternative Billing Arrangements: Compensation for neutrals can become an impediment to effective implementation of a mediation program. Programs focused on small cases might effectively use *pro bono* neutrals,[108] but the fairness of such a system may create some controversy.[109] A hybrid system, requiring initial low-cost or no-cost sessions, with an option for paid additional sessions, if appropriate, may reduce concerns about fairness.[110] On a "pilot" program basis, some percentage of

[106] *See* Jason Krause, *Rockin' Out the E-Law*, ABAJOURNAL: LAW NEWS NOW (July 1, 2008, 7:05 AM), http://www.abajournal.com/magazine/article/rockin_out_the_e_law (stating that "[judges] are willing to give parties as many chances to work out discovery agreements as possible"); *see id*. (quoting Judge David Waxse, stating, "I approach it like [alternative dispute resolution] . . . I have them meet with a mediator and come to agreement if they can."); *see also* Jennifer H. Rearden & Farrah Pepper, *If the Sedona Conference Builds It, Will They Cooperate? Year in Review*, N.Y.L.J., Oct. 27, 2009, at 2, *available at* http://www.newyorklawjournal.com/id=1202434940855 (noting that "courts are increasingly sending parties back to work out their discovery differences among themselves" rather than proceeding with motions); J. Mark Coulson, *The Collaborative Model Of E-Discovery*, LAW360 (Mar. 11, 2009), *http://www.milesstockbridge.com/pdfuploads/283_TheCollaborativeModelOfE-Discovery.pdf* (indicating that courts are "most receptive to litigants who work it out among themselves, or at least work out as much as they can before asking for court intervention").

[107] *Cf.* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 587–88 (2010) (suggesting adoption of the English rule "in the limited context of discovery disputes, such that the losing party in any discovery dispute has to pay the attorneys' fees incurred by the other side in litigating that particular dispute.").

[108] *See E-Mediation Program*, *supra* note 87 (describing a program "intended to provide assistance in smaller cases involving limited amounts of Electronically Stored Information"); *see also Electronic Discovery in the New York State Courts*, *supra* note 82, at 21 n.18 ("Increasingly, . . . as e-discovery disputes reach cases with a lower amount in controversy, finding less expensive or free alternatives has become more important.").

[109] *See* Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 260 (2006) (suggesting that "[t]rying to restrict court provision of ADR programs to small cases or poor litigants risks would increase the risk of creating . . . a two-tiered system of 'ADR justice'"); *see also Electronic Discovery in the New York State Courts*, *supra* note 82, at 21 n.18, (stating that "in an appropriate case, with a high amount of money at stake," the court may make use of "paid outside special master").

[110] *See* Gary L. Sharpe, *Important Information for the Northern District Bar*, U.S. DIST. CT. N.Y. (Oct. 25, 2013), http://www.nynd.uscourts.gov/news/mandatory-mediation-program (announcing a pilot mediation program, requiring a two hour session for every case at cost of $300 for session, shared equally by parties; thereafter, the parties "may agree to continue the mediation

all cases (large or small) might be assigned for mediation by *pro bono* neutrals.[111]

VI. CONCLUSION

Given the increasing volume and complexity of electronic discovery, efforts to foster cooperative planning and dispute resolution are essential.[112] Lawyers already know how to mediate.[113] Expansion of existing court-connected mediation programs appears feasible and necessary. Initial success with such programs may yield additional insights, and additional enthusiasm, for e-discovery mediation.[114]

session" at rate established by the mediator); *Becoming A Neutral*, *supra* note 96 (stating that mediators primarily serve on pro bono basis, but may charge a fee after first four hours of service).

111 *See* Memorandum from John W. McConnell, *supra* note 101 (proposing a mandatory mediation program, to apply to one in five of all cases in commercial division court, on a pilot program basis).

112 *See* Tadler & Withers, *supra* note 95, at 31 ("The only way to deal effectively with the volume and complexity of today's discovery is cooperation."); *see also* Steven C. Bennett, *How Can Courts Encourage Cooperation in Discovery?,* 82 N.Y. ST. B.J. 27 (May 2010) (noting the need to develop systems to encourage cooperation).

113 *See* Jennifer W. Reynolds, *The Lawyer with the ADR Tattoo*, 14 CARDOZO J. CONFLICT RESOL. 395, 397 (2013) ("[E]ven 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,* 17 DISP. RESOL. MAG. 8 (2011) (citing a survey of litigators, 90% of whom "expressed a positive view of mediation").

114 *See* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. DISP. RESOL. 641, 695–96 (2002) ("Existing research and anecdotal evidence suggests that attorneys who had used mediation were more likely to recommend mediation to clients, that attorneys who were initially reluctant or suspicious of new mediation programs came to accept and even like mediation, and that attorneys who had used mandatory mediation were more likely to use mediation voluntarily in cases where it was not required.").