CONNOLLY GALLAGHER LLP

New Year's E-Discovery Resolution: Minimize Discovery Disputes Through E-Neutrals

By: Ryan P. Newell, Esquire

This article originally appeared in the January 2016 issue of The Journal of the Delaware State Bar Association, a publication of the Delaware State Bar Association.

Newark Office
267 East Main Street
Newark, DE 19711
T 302-757-7300

Wilmington Office
1000 West Street; Suite 1400
Wilmington, DE 19802
F 302-757-7299

New Year's E-Discovery Resolution:

Minimize Discovery Disputes Through E-Neutrals

By Ryan P. Newell, Esquire

For most of us, the New Year is synonymous with resolutions. Despite being well-intentioned, they are often quickly cast aside because they are difficult to integrate into our lives.

In litigation, implementing good discovery practices is akin to getting to the gym every day or eschewing the snack machine during late evenings in the office. Notwithstanding Court guidelines and revised rules of civil procedure intended to establish best practices in discovery, in practice it is easier to revert to bad habits. But, for anyone involved in litigation — both from the Bench and Bar — there is a seldom-used practice that is not only easy to implement, but likely to be more cost effective and productive than the normal course.

In 2016, a resolution to use "e-neutrals" may help judges and litigators alike. The increasing volume of discovery and the corresponding spike in discovery disputes can be quelled. Discovery can be allowed to serve its intended role in litigation — to allow the case to progress to the merits on a well-developed, but efficiently created record — as opposed to being litigation-within-litigation.[1] Not knowing anyone who went to law school with a burning desire to litigate cases overflowing with discovery issues, this is a resolution worth considering.

1. For a full discussion of the use of e-neutrals, please see Ryan Newell, *The E-Discovery Promised Land: The Use of E-Neutrals To Aid The Court, Counsel, And Parties*, 15 DEL. L. REV. 43 (2014) *available at* http://media.dsba.org/Publications/DLR/PDFs/DLR.15-1.pdf

> *"An 'e-neutral' is a third party who can be tasked with facilitating discovery, including resolving disputes."*

Problems Posed by E-Discovery

E-discovery plagues judges and attorneys alike. For our judiciary, the case loads are tremendous even excluding criminal dockets. In 2014, civil case filings across the District Court, the Court of Chancery, the Superior Court, the Family Court, and the Court of Common Pleas ranged from over 1,000 to nearly 40,000 per court. Even without discovery disputes, the judiciary's plate is more than full with merits-related issues.

For litigators, the problems are equally vexing. First, electronically stored information ("ESI") has significantly expanded the volume of discoverable information. Approximately 95 percent of discovery is electronic. Second, the meet and confer process is frequently ineffective due to the adversarial nature of litigation and the ability to use discovery as leverage. Finally, developing and maintaining technical competence as an attorney is difficult.

In addition, for all involved, but most notably the clients, the costs of e-discovery and corresponding disputes are substantial. ESI productions consume time and funds. And, discovery disputes exacerbate an already bad situation.

A Potential Solution: The Use of E-Neutrals

An "e-neutral" is a third party who can be tasked with facilitating discovery, including resolving disputes. As with other forms of third party neutrals, an e-neutral can take a variety of forms to fit the needs of a particular case. The Courts mentioned above are all vested with authority through rules or statutes to appoint an e-neutral.[2] Likewise, parties can stipulate to appoint an e-neutral through the initial meet and confer process or when a dispute arises, just like they can agree to utilize forms of alternative dispute resolution for the merits of the case.

An e-neutral can serve four roles.[3] First, an e-neutral can serve as an "E-Discovery Facilitator." This role may consist of assisting the parties in the meet and confer process, helping the parties craft procedures for preserving and collecting ESI (including the negotiation of search terms or the use of advanced discovery analytics software like technology assisted review), and agreeing upon the terms of protective orders (including who can see highly confidential information, which can be a thorny issue in cases

2. *Id.* at 48-49.

3. These roles are more thoroughly set forth in the above-referenced *Law Review* article.

with business competitors alleging theft of trade secrets or patent infringement).

Second, e-neutrals can be used as "Discovery Compliance Monitors." Through regular discovery conferences, discovery can proceed efficiently. Regular monitoring of discovery and resolution of interim disputes will hold parties accountable and give them comfort that their adversaries will likewise be held accountable.

Third, e-neutrals can be employed when an e-discovery dispute arises as an "Adjudicator of ESI Disputes." From resolving privilege issues to addressing alleged discovery deficiencies, an e-neutral can relieve the judiciary of what is presumably a time-consuming and unpleasant task. Likewise, parties can resolve these important yet often hotly contested disputes without fear of tainting the judge's impression of the merits.

Finally, e-neutrals can be utilized as "Technical Aids." When an issue requires specialized technical knowledge, such as source code review or forensic authentications or statistical validity of document production samples, e-neutrals with the requisite background can efficiently assess issues that are beyond the ken of most.

Regardless of the form an e-neutral takes, they can be used effectively in all sizes and types of litigations, either at the outset of a litigation to proactively streamline discovery or on an *ad hoc* basis to resolve issues along the way.

• • •

In 2016, when old discovery habits threaten to plague a litigation you are involved with, consider resolving to employ better discovery practices. Not only may e-neutrals assist in the "just, speedy, and inexpensive determination" of litigation, but with fewer abuses and disputes they just might make the practice of law and administration of justice more enjoyable.

Ryan P. Newell, Esquire is a partner at Connolly Gallagher LLP, where he focuses on corporate and intellectual property litigation. He is the chair of the Commission on Law & Technology's E-Discovery Working Group.