THE CASE FOR MEDIATION OF DISCOVERY DISPUTES

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Mediation is a viable tool for resolving traditional and e-discovery disputes; the process offers litigants a cost effective alternative to protracted and contentious hearings and relieves burdens, such as sanctions, that Courts can impose. Parties can either agree or a Court can order meditaion. F.S. 44.102(2)(b) provides that a Court, "May refer to mediation all **or any part of** a filed action…" FRCP 1.700 reiterates this authority.

Because it has proven successful for substantive matters, mediation should be equally successful for discovery disputes. Mediation is a confidential forum to exchange information on the production of information the parties need to develop their cases. It also fosters cooperation that promotes settlement in the control and mutual acceptance of the parties.

Cooperation in discovery is paradoxically old and new at the same time. Prior to 1938, when the first Federal Rules on discovery were promulgated, a complaint and answer were commonly followed by what we now term "trial by ambush". Pre-trial discovery was designed to ameliorate trial by ambush, but the unintended consequence was that it took on a life of its own; attorneys demanded, "all relevant information that might lead to the discovery of admissible evidence" and courts were overwhelmed in motions to compel or to protect.

Litigation began to last years rather than months, trials all but disappeared, and discovery became the focus of litigation. Attorneys waging these discovery battles justified their conduct by claiming they were zealously representing their clients, which largely ignored the economic impact on their clients.

Times have changed.

In reaction, the Preamble to the Florida Rules of Professional Conduct deleted the word "zealously". The committee comment the FRPC 4.1.3 provides, "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect".

Thus, FRPC 4-3.4(d) imposes an obligation not to engage in wasteful or frivolous discovery. Recently, in *Life Care Centers of America v. Reese* 984 So2d 830,833 (Fla. 5th DCA 2007), the Fifth DCA cited this duty and advised that, "parties should fulfill their respective ethical obligations by meeting and working together to reasonably narrow the disputed issues before bringing discovery issues before the court".

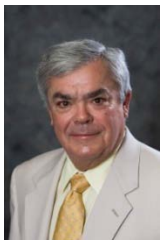
Cooperation in the discovery process is now becoming the overarching theme. Cooperation in discovery allows attorneys to increase efficiency and lower costs, thereby acting in the best interests of their client. In practical application, cooperation in discovery allows parties to produce less at lower costs and to obtain meaningful information without the expense of motion

practice. Thus, cooperation in discovery harmonizes the combined duties of zeal in advocacy with the goals of ethics and professionalism.

E-discovery is now impacting litigants and has its own unique issues distinct from traditioanl discovery. The new Florida e-discovery rules do not mandate a "meet and confer" as do their Federal counterparts, however, nothing prohibits the parites from engaging in such a productive discussion. In e-discovery, a structured and mediated agreement on production can resolve and define the topics, time periods, sources, form, preservation, and protocols for handling privileged data to allow parties and their counsel to satisfy the obligations imposed by law. Further, engaging a mediator knowledeable about the e-discovery process and applicable laws, helps the parties to efficiently resolve potentially costly future e-discovery disputes at an early stage, to control the process, to alleviate burdens on the Courts and costs, and fosters a climate of cooperation that can only benefit the parties later in the process.

Mediation is the forum for cooperation in discovery and e-discovery. The courtroom is the forum for an imposed decision that may even include an order to mediate the discovery dispute. Parties and their attorneys are wise to consider mediation in discovery and particularly e-discovery for the benefit of their clients in meeting their goals or zealously advocating for them.

About the Authors



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