THE E-DISCOVERY PROMISED LAND: THE USE OF E-NEUTRALS TO AID THE COURT, COUNSEL, AND PARTIES

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I've done my best to live the right way
I get up every morning and go to work each day
But your eyes go blind and your blood runs cold
Sometimes I feel so weak I just want to explode[1]

Just across the New Jersey state line in 1978, Bruce Springsteen first sang the lyrics above. Both the song, "The Promised Land," and the album it is on, *Darkness on the Edge of Town*, epitomize the young Springsteen's angst. Even if it eluded him at the time, Springsteen believed there had to be a better way of living — a promised land.

In 2014, the same lyrics could very well represent the feelings among the judiciary, the bar, and parties when it comes to electronic discovery ("e-discovery"). Changes in recent years to both Federal and Delaware rules, along with default standards and helpful guidelines from the courts, have laid the groundwork for a better way to deal with electronically stored information ("ESI") in litigation. Still, discovery disputes and increasing volumes of ESI are enough to make our collective eyes go blind and blood run cold.

Before we explode and give up hope, the use of "e-neutrals" may be the path to the e-discovery promised land. Whether appointed by court order as special discovery masters, or by agreement of the parties as mediators, e-neutrals can aid in the just, speedy, and inexpensive determination of e-discovery issues in litigation. After describing the burdens that e-discovery imposes on judges, lawyers, and parties, this article addresses how e-neutrals can be utilized and the potential benefits of such use.

I. E-DISCOVERY IMPOSES BURDENS ON THE COURT, COUNSEL, AND PARTIES

A. Busy Dockets Of The Courts

It is no secret that the judiciary is dealing with bloated case loads. While well known, the actual numbers are staggering.

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The Delaware Supreme Court appointed Mr. Newell to the Commission on Law and Technology. He is the chair of the Commission's e-discovery working group. He is also on the executive committee of the Richard K. Herrmann Technology Inn of Court. In addition, he regularly speaks on issues concerning e-discovery, in particular at the Delaware Supreme Court's Pre-Admission Conference.

1. Bruce Springsteen, *The Promised Land*, *on* Darkness on the Edge of Town (Columbia 1978).

1. The U.S. District Court For The District Of Delaware

In 2013, the U.S. District Court for the District of Delaware had 2,374 filings — an increase of 16 percent from the prior year.[2] During that year, the District Court had 2,823 pending matters, up 10.9 percent from the year before.[3] On average, each District Court judge handled 706 pending cases, 19 trials, 549 civil filings, 38 criminal felony filings, and 7 supervised release hearings in 2013.[4] With a per judge average of 594 filings, each judge's already busy docket was further weighed down with nearly 100 more filings than had been handled on average by each judge in 2012.[5]

2. The Delaware State Trial Courts

Like their Federal Court counterparts, the Delaware state trial court judges are faced with a daunting case load. According to statistical information collected for the 2013 annual report for the Delaware judiciary: (1) the Delaware Court of Chancery had 1,064 civil case filings, 2,476 estates filings, and 615 miscellaneous matters filings; (2) the Delaware Superior Court had 11,726 civil case filings and 8,671 criminal case filings; (3) the Delaware Family Court had 40,511 civil case filings, 4,331 adult criminal case filings, and 5,522 juvenile delinquency case filings; and (4) the Delaware Court of Common Pleas had 9,748 civil case filings and 112,004 criminal case filings.[6] Aggregate filings per each court were down slightly in 2013 from 2012, except for the Delaware Court of Common Pleas, which had 11,916 more filings — representing a 10.8 percent increase.[7] With the boost in filings in the Delaware Court of Common Pleas, the combined filings in the foregoing four Delaware state courts saw a 5.6 percent increase year-over-year.

Even a slight decrease in filings in 2013 in three of these courts hardly alleviated the burden on Delaware state court judges. Based on 2013's data and broken down by judge (not including masters or commissioners), the approximate annual workload consists of: (1) 831 case filings per member of the Delaware Court of Chancery; (2) 971 case filings per Delaware Superior Court judge; (3) 2,963 case filings per Delaware Family Court judge; and (4) 13,528 case filings per Delaware Court of Common Pleas judge.

3. ESI Issues In Every Type Of Case

While e-discovery was once associated only with large complex civil cases, the current reality is that ESI is implicated in nearly every case in every court. For proof, we need to look no further than the Delaware Supreme Court's

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2. Federal Court Management Statistics, http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-december-2013.pdf&page=14 (last visited May 28, 2014).

3. *Id*.

4. *Id.*

5. *Id.*

6. *2013 Annual Report and Statistical Information For the Delaware Judiciary*, http://courts.delaware.gov/AOC/AnnualReports/fy13/2013-Statistical-Report.pdf (last visited May 28, 2014).

7. *Id.* Chief Judge Alex J. Smalls in his annual report on the Delaware Court of Common Pleas noted that "the complexity of the case load and the number of cases proceeding forward to trial continue to increase, placing an ever growing demand on Court and Judicial Resources." *Id.*

decision to form the Commission on Law and Technology ("the Commission"), the first of its kind in the country.[8] Among the issues the Commission will consider are best practices in e-discovery. The range of experience of the persons whom the Delaware Supreme Court chose to serve on the Commission suggests that the Court recognizes that ESI is an issue in every court and practice. The Commission is comprised of a judicial representative from the Delaware Supreme Court, the Delaware Court of Chancery, the Delaware Superior Court, the Delaware Family Court, and the Delaware Court of Common Pleas.[9] In addition, the Commission includes attorneys from large law firms (fifty or more attorneys), medium-sized law firms (twenty-five to forty-nine attorneys), small law firms (ten to twenty-four attorneys), very small law firms (one to nine attorneys), the Delaware Department of Justice, an in-house attorney from a Delaware corporation, and chief information officers from various law firms.[10] This diverse group will bring to bear its varied experiences as the Commission considers e-discovery best practices.

Other Delaware courts have also been leaders in recognizing the impact of e-discovery on litigation. The District Court has default standards for e-discovery and access to source code.[11] The Delaware Court of Chancery has issued comprehensive guidelines, which provide, among other things, guidance on preservation and collection of documents.[12] The Delaware Superior Court's Complex Commercial Litigation Division has sample e-Discovery Plan Guidelines for litigants.[13] And with portable electronic devices and home computers resulting in a proliferation of ESI in personal disputes, it is no surprise that the Delaware Family Court recently completed its third training session on ESI-related issues.[14]

With busy dockets and the expansion of e-discovery in all courts, the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York has identified several factors for judges to consider when deciding to appoint an e-neutral.[15]

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8. *Delaware Supreme Court Creates New Arm of Court — Commission on Law and Technology*, http://courts.delaware.gov/forms/download.aspx?id=69618 (last visited May 28, 2014).

9. *Id.*

10. *Id.*

11. *Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI")*, http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf (last visited May 28, 2014); *Default Standard for Access to Source Code*, http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/DefStdAccess.pdf (last visited May 28, 2014).

12. *Guidelines for Persons Litigating in the Court of Chancery*, http://courts.delaware.gov/Chancery/guidelines.stm (last visited May 28, 2014).

13. *E-Discovery Plan Guidelines*, http://courts.delaware.gov/Superior/pdf/ccld_appendix_b.pdf (last visited May 28, 2014).

14. *Family Court Hosts Prominent Faculty for Technology Training*, Delaware Docket, http://courts.delaware.gov/AOC/Docket/Fall2013/technology.stm (last visited May 28, 2014).

15. The Honorable Shira A. Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DePaul L. Rev. 479, 481-86 (2009). This article is an edited transcript of Judge Scheindlin's remarks at the DePaul University College of Law's Fourteenth Annual Clifford Symposium on Tort Law and Social Policy titled "The Challenge of 2020: Preparing a Civil Justice Reform Agenda for the Coming Decade." Judge Scheindlin is well-known for her e-discovery opinions, including the quintet of decisions in *Zubulake v. UBS Warburg* (S.D.N.Y.) and The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, *et al.*, No. 05 Civ. 9016 (SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). *See also Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake II*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV,* 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake V,* 229 F.R.D. 422 (S.D.N.Y. 2004).

One consideration is time commitment. [16] Even with support staff such as law clerks and interns, regularly occurring tasks such as the *in camera* review of large amounts of documents for privilege analysis can consume precious amounts of judicial resources. [17]

Another consideration is whether the e-discovery dispute requires specialized knowledge or expertise. [18] For example, issues concerning data storage — either in large multinational companies or in the deep recesses of the cell phone that rests in the palm of your hand — are often highly technical yet not legally complex. [19] An e-discovery neutral may have such expertise and, if not, may have ready access to the talent needed to sift through such issues.

Finally, a court may consider what resources it has at its disposal and where they are best utilized. [20] Some e-discovery matters are layered with issues concerning computer science, in general, and the specific implications concerning the subject matter or industry at hand. For example, discovery concerning financial institutions may entail both the complicated manner in which specific banks store documents and the regulations affecting preservation, collection, and disclosure of the same. Judge Scheindlin suggests an e-neutral can serve as a "general contractor" to marshal a "panoply of professionals … working together, or at least in a coordinated manner, to gather information in the hope of formulating the best possible outcome. On such occasions, the court's appointment of [an e-neutral] that can act as a general contractor and pull together the talents and resources of these various disciplines makes a lot of sense."[21]

B. Problems Facing Counsel And Parties

Like the judiciary, litigants and their counsel must grapple with various issues related to ESI. In addition to time constraints, four other issues pose challenges to attorneys and parties.

1. The Abundance Of ESI

The first issue is the sheer abundance of ESI — it is estimated that 95 percent of records are created or stored electronically, making e-discovery the primary form of discovery.[22] With every key stroke on a computer, every text message sent, every photocopy made, and with nearly every interaction involving an electronic device, the digital footprint each person creates every day is probably best described as a digital stampede.[23]

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16. Scheindlin, *supra* note 15, at 481.

17. *Id.* at 481-82.

18. *Id.* at 482.

19. *See id.* at 482-85.

20. *Id.* at 485.

21. *Id.* Judge Scheindlin also suggests neutrality as a fourth consideration. Because it is not the author's place to comment on the neutrality of the judiciary, readers are pointed to Judge Scheindlin's article for her thoughts on the issue.

22. The Honorable Shira A. Scheindlin and 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, 355 (2008).

23. It is not uncommon to hear practitioners speak of e-discovery as if it is distinct from "regular discovery." Once a novel development, given the proliferation of ESI, e-discovery is in reality a subset of "regular discovery" – a subset that dwarfs other forms of discovery in quantity.

2. Ineffectiveness Of Meet And Confers

Second, while parties are expected to meet and confer to resolve discovery disputes and craft a discovery plan, such conferences are frequently ineffective. The Honorable Nora Barry Fischer of the United States District Court for the Western District of Pennsylvania and Richard N. Lettieri, Esquire, point to three reasons why.[24] First, the sad reality is that litigation, in general, and discovery disputes, specifically, are "too contentious for the parties to exert the minimal cooperation required to share the information necessary to reach resolution of key ESI issues."[25] Second, due to strategy or leverage, a party may choose not to resolve ESI issues at the meet and confer stage.[26] Finally, due to lack of skill or knowledge,[27] counsel may be unable to address and resolve an ESI dispute.[28]

3. Cost Of E-Discovery Disputes

Third, discovery without dispute is already expensive — discovery disputes only add to the client's bill. As an initial matter, there are the costs spent getting a court up to speed in briefing on the nitty-gritty e-discovery disputes that

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24. The Honorable Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, The Federal Lawyer, Feb. 2011 at 36. Judge Fischer, a member of the United States District Court for the Western District of Pennsylvania, was instrumental in the Court's 2010 decision to approve the establishment of a list of attorneys to serve as "Electronic Discovery Special Masters." *In re: Establishment of a Panel of Special Masters for Electronic Discovery*, http://www.pawd.uscourts.gov/Applications/pawd_edsm/Documents/special_master_order.pdf (last visited May 28, 2014).

To be listed as an Electronic Discovery Special Master in the Western District of Pennsylvania, an attorney must have: (1) an active bar admission; (2) litigation experience; (3) experience with e-discovery; and (4) experience or training in mediation or other dispute resolution. *Id.* In 2011, the Court authorized the use of Electronic Discovery Special Masters in its bankruptcy court, which otherwise lacked authority to appoint special masters. *In re: Use of Special Masters for Electronic Discovery by United States Bankruptcy Judges*, http://www.pawd.uscourts.gov/Applications/pawd_edsm/Documents/UseOfSpecialMastersForElectronicDiscovery.pdf (last visited May 28, 2014).

In establishing the use of Electronic Discovery Special Masters, the Court stated, "[t]he mission of the United States District Court for the Western District of Pennsylvania is to preserve and enhance the rule of law while providing an impartial and accessible forum for the just, timely and economical resolution of legal proceedings within the court's jurisdiction, so as to protect individual rights and liberties, promote public trust and confidence in the judicial system, and to maintain judicial independence. One critical challenge to achieving this mission is posed by the need to effectively address issues presented by the preservation, collection and production of relevant Electronically Stored Information ('ESI') during the litigation process.

"In 2006, the discovery rules in the Federal Rules of Civil Procedure were revised. Although the revised Rules provide guidance, issues and disputes related to the preservation, collection and production of ESI have continued to confront litigants and the Court, sometimes threatening to overshadow the substantive issues in dispute. Based on this experience, this Court determined that litigants in this District may benefit from the appointment of Electronic Discovery Special Masters ('EDSMs') in appropriate cases, in order to assist in addressing ESI issues that may arise during the litigation. Accordingly, on November 16, 2010, the Board of Judges approved the establishment of a list of qualified attorneys to serve as EDSMs." *Electronic Discovery Special Masters*, http://www.pawd.uscourts.gov/Pages/ediscovorey.htm (last visited May 28, 2014).

25. Fischer and Lettieri, *supra* note 24, at 36.

26. *Id.*

27. *See, e.g.*, In re A&M Florida Props. II, Bankruptcy No. 09–15173 (AJG), 2010 WL 1418861, at *6-7 (Bankr. S.D.N.Y. Apr. 7, 2010) (awarding monetary sanctions for production deficiencies where counsel "simply did not understand the technical depths to which electronic discovery can sometimes go.").

28. Fischer and Lettieri, *supra* note 24, at 36.

have played out off the docket and beyond the court's radar. But, there is also the potential cost of an adverse discovery ruling.[29] According to an article in *Inside Counsel*, "[t]he risk that a misguided ruling on a discovery motion may impose undue burden, expense and business disruption on your company is an ever-present concern for most general counsel, and yet too many litigants make the 'penny-wise, pound foolish' decision to forego the relatively modest investment in a special master."[30] The risk, albeit perhaps on a smaller scale, is just as applicable to individual litigants as it is to corporate parties.

4. Fear Or Disinterest In ESI

Finally, it comes as no surprise that many lawyers and parties have an aversion to e-discovery. For some, it arises out of a lack of familiarity with technology — a problem compounded by the rate at which technology advances. For others, it arises out of disinterest. E-discovery is the parsley that cannot be discarded quickly enough before getting to the entrée. Regardless of the practice area, not many attorneys aspired as law students or currently aspire to litigate ESI issues. Instead, they want to get to the merits that are the cornerstone of their practice. As a result, ESI is often delegated to a younger or more technologically savvy colleague, or otherwise given a quick back of the hand — until the inevitable discovery dispute arises that throws a wrench into the litigation.

II. THE PATH TO THE E-DISCOVERY PROMISED LAND: THE E-NEUTRAL AS A REMEDY

A. Authority To Appoint E-Neutrals Exists In Court Rules, Statutes, And By Agreement

As a preliminary matter, the mechanism to appoint an e-neutral already exists. Under Rule 53 of the Federal Rules of Civil Procedure, District Courts may appoint an e-neutral when: (1) there is agreement by the parties; (2) when an exceptional condition or need warrants a special master to hold trial proceedings and make or recommend findings of fact on issues to be decided in the absence of a jury; or (3) to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[31]

Delaware state courts have similar flexibility. Pursuant to Delaware Court of Chancery Rule 135 and 10 *Del. C.* §372, the Delaware Court of Chancery may appoint and remove in any matter a master to serve at the pleasure of the Court.[32] Likewise, Delaware Superior Court Civil Rule 113 and 10 *Del. C.* §567 afford the Delaware Superior Court the

29. *See, e.g.*, Logtale Ltd.v. IKOR, Inc., No. C-11-05452 CW (DMR), 2013 WL 3967750, at *3-4 (N.D. Cal. July 31, 2013) (awarding monetary sanctions for failing to timely respond to discovery and putting defendants on notice "that if there are continuing problems with their document productions, the court will order them to retain the services of an e-discovery vendor and order the parties to submit sworn, detailed declarations regarding their document preservation and collection efforts."); Peerless Indus., Inc. v. Crimson AV, LLC, No. 1:11–cv–1768, 2013 WL 85378, at *3-4 (N.D. Ill. Jan. 8, 2013) (awarding monetary sanctions due to "hands-off approach" to document collection and production; "Defendants cannot place the burden of compliance on an outside vendor and have no knowledge, or claim no control, over the process.").

30. Matthew Prewitt, *E-discovery: Consider retaining a special master*, Inside Counsel, June 26, 2012, available at http://www.insidecounsel.com/2012/06/26/e-discovery-consider-retaining-a-special-master.

31. Fed. R. Civ. P. 53(a).

32. Del. Ct. Ch. R. 135; Del. Code Ann. Tit. 10 §372 (1999).

authority to appoint masters.[33] Delaware Family Court Civil Rule 53, Criminal Rule 49, and 10 *Del. C.* §913 give the Chief Judge of the Delaware Family Court the discretion to appoint masters to serve at the Chief Judge's pleasure.[34] The Delaware Family Court rules provide that masters may hear any matters directed from the Chief Judge and that such findings and recommendations represent the judgment of the Delaware Family Court.[35] Finally, the Delaware Court of Common Pleas through its Civil Rule 113 may appoint masters.[36]

Notwithstanding the authority of the courts, parties are able to stipulate to the use of e-neutrals. Of course, having the imprimatur of a court will help assure that the e-neutral is vested with the appropriate amount of authority and respect from the parties.

B. The Flexible Roles Of The E-Neutral

Where e-neutrals have been used, the scope of their appointment has varied from opining on discovery disputes to overseeing document production to reviewing documents for privilege.[37] Based on Judge Scheindlin and Jonathan M. Redgrave's research, e-neutrals serve in four basic roles.[38]

1. E-Discovery Facilitator

The first role is that of an e-discovery facilitator. Whether appointed to handle discovery matters, in general, or to resolve specific e-discovery issues, Judge Scheindlin and Mr. Redgrave identify seven ways in which e-neutrals have been used to facilitate the e-discovery process:

> (1) assisting with the [Federal] Rule 26(f) conference discussions; (2) developing preservation protocols; (3) developing processes to identify locations and sources of potentially relevant documents and ESI; (4) assisting the parties to develop protocols for the identification and depositions of knowledgeable witnesses regarding ESI issues (including guidelines for the scope of pre-trial examinations); (5) developing protective orders to address privilege and privacy protection concerns; (6) addressing search and retrieval issues (such as negotiating search terms); and (7) agreeing upon form of production issues.[39]

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33. Del. Super. Ct. Civ. R. 113; Del. Code Ann. Tit. 10 §567 (1999); *see, e.g.*, Mine Safety Appliances Co. v. AIU Insur. Co, C.A. No. N10C-07-241 (MMJ) (Del. Super. Ct. Dec. 5, 2012) (order of reference to special master appointing Matthew F. Boyer as Special Master and authorizing Special Master Boyer to employ the support of Ryan P. Newell, Esquire).

34. Del. Fam. Ct. Civ. R. 53(a); Del. Fam. Ct. Crim. R. 49(a); Del. Code Ann. Tit. 10 §913 (1999).

35. Del. Fam. Ct. Civ. R. 53(b)(1-2); Del. Fam. Ct. Crim. R. 49(b)(1-2).

36. Del. Ct. Com. Pl. Civ. R. 113; *see also* Del. Code Ann. Tit. 10 §1316(b)(2) (1999) ("A judge may also designate a Commissioner to serve as a special master or master pro hac vice pursuant to the applicable provisions of the Court of Common Pleas Civil Rules of Procedure.").

37. Scheindlin and Redgrave, *supra* note 22, at 350-51.

38. *Id.* at 374.

39. *Id.* at 374-76, 383-84.

Even though Rule 26(f) of the Federal Rules of Civil Procedure ("Rule 26(f)") has not been fully adopted by Delaware state courts, it nonetheless serves as a good benchmark for how parties should conduct meet and confers and how e-neutrals can improve that process. Under Rule 26, and because the meet and confer should occur more than 21 days before the Rule 16 scheduling conference, parties are expected to address a number of issues:

- The nature and basis of claims and defenses;
- The possibilities of resolving the case through settlement;
- Initial disclosures providing: (1) identification of individuals likely to have discoverable information and the subject matter of that information; (2) a copy or description by category and location of documents (including ESI) that support claims or defenses; (3) computation of damages and supporting documents; and (4) any insurance agreements that could be used to satisfy a judgment;
- Issues concerning the preservation of discoverable information; and
- A proposed discovery plan encompassing, among other things: (1) how initial disclosures will be made; (2) the subject matter of discovery; (3) timeline for discovery; (4) whether discovery should be phased; (5) form of production for ESI; (6) privilege and work product claims; and (7) any limitations on discovery.[40]

Depending on the case, counsel may have a difficult task in gathering enough information before a meet and confer to allow for a good faith discussion of the foregoing. Because a meet and confer should occur early in litigation, counsel often has not had much time to get the lay of the land as to all these issues. And rare is the client that wants to roll up its sleeves with counsel, expending time and money, to get to the bottom of such seemingly ancillary issues. Making matters worse, parties often serve discovery requests and responses before meeting and conferring, staking out positions from which they are reluctant to retreat. Instead of meeting and conferring to determine the scope of discoverable ESI, the parties open the proverbial barn door by prematurely engaging in discovery. As a result, meet and confers typically are given lip service with the parties willing to punt such issues to a later date via discovery motions.

But through the use of an e-neutral, the problems identified by Judge Fischer and Mr. Lettieri, *supra*, can be eradicated. An e-neutral can help achieve the objectives of the meet and confer and allow the litigation to commence in an efficient manner. If matters are too contentious, an e-neutral vested with the appropriate authority can cajole the parties to cooperate. For example, with the right authority, an e-neutral can require a pre-meet and confer report from each party,[41] can compel the attendance of an e-discovery liaison at the meet and confer, and can craft a discovery plan based on the information at the e-neutral's disposal after the meet and confer.[42] Likewise, an e-neutral can help break down any

40. Fed. R. Civ. P. 26(f); *see also* Fed. R. Civ. P. 26(a).

41. Prewitt, *supra* note 30.

42. *See, e.g.*, Allison O. Skinner, *The Role of Mediation for ESI Disputes*, The Alabama Lawyer, Nov. 2009, at 427 (recommending that in the context of ESI mediation, that the mediator issue a mediator's report describing the outcome of the mediation). For a helpful article on preparing for e-mediation, see Ms. Skinner's article *How to Prepare an E-Mediation Statement for Resolving E-Discovery Disputes*, *at* http://smu-ecommerce.gardere.com/allison%20skinner%20preparing%20for%20e-mediation%20discovery.pdf. Ms. Skinner is one of the co-founders of the American College of e-Neutrals. For more information, please see http://www.acesin.com/.

unwillingness to resolve issues because of strategy or leverage by assuring that the meet and confer process results in an effective discovery plan. Such a plan allows litigation to proceed in an orderly manner and help reduce the risk of unnecessary e-discovery motion practice. Finally, an e-neutral experienced in ESI issues can help identify at this early stage the critical issues that less experienced counsel may miss. For example, an e-neutral can help parties assess issues such as the accessibility of ESI, the need for mirror-imaging of hard drives, the benefits of sampling and phasing discovery, the use of search terms, and the costs associated with collection and production (and whether cost shifting should be employed).[43]

2. Discovery Compliance Monitor

A second use of e-neutrals has been to monitor compliance with discovery obligations.[44] In this capacity, an e-neutral could hold regular discovery conferences, review reports concerning the status of discovery, or examine discovery requests and responses.[45] Much like a referee in sports, the e-neutral could aid in the efficient progression of discovery through regular monitoring and, when necessary, opining on disputes.

3. Adjudicator Of ESI Disputes

In contrast to the regular monitoring of discovery, e-neutrals can be utilized in isolated instances to resolve disputes related to ESI.[46] The resolution of privilege disputes is perhaps the most common use of an e-neutral as an adjudicator of ESI disputes.[47] An e-neutral may also determine whether collection and production of ESI is unduly burdensome or costly.[48] Likewise, an e-neutral may be best suited to wade into the highly factual and, at times, speculative issues around spoliation claims, including the culpability of the responding party and any prejudice to the party requesting the documents.[49] Other ripe areas for the use of an e-neutral to rule on ESI issues include: (1) opining on the validity of discovery responses and objections; (2) determining the scope of discovery to nonparties; (3) ruling on form of production disputes (i.e., native versus image; what types of metadata, if any, need be produced); and (4) resolving disputes at depositions.[50]

4. Technical Aid

Finally, when cases entail highly technical ESI issues, an e-neutral can be called upon to provide the specialized knowledge needed to assist the court.[51] In patent litigation, an e-neutral may assist in source code review to help couch

43. Scheindlin and Redgrave, *supra* note 22, at 384.

44. *Id.* at 376-77, 384.

45. *Id.* at 384.

46. *Id.* at 377-79, 384-87.

47. *Id.* at 377.

48. *Id.* at 386.

49. *Id.*

50. *Id.* at 384-85.

51. *Id.* at 379-82, 387.

the outer bounds of discovery.[52] Where authentication is at issue, a qualified e-neutral could be called upon to forensically analyze legacy systems, discarded hard drives, or complicated server structures.[53] When large amounts of ESI exist that warrant the use of sampling, a court can defer to an e-neutral to test the statistical validity of such samples.[54]

C. Timing: Proactive Versus Reactive Use of E-Neutrals

As their many roles indicate, e-neutrals may utilize their skills and knowledge in a variety of ways. With that variety comes flexibility in terms of the best time to seek an e-neutral's aid.

In large cases with significant amounts of money at stake or in matters that are very likely to be highly contentious, the proactive approach is best. By retaining an e-neutral before discovery gets underway, via court order or agreement of the parties, the parties can be best positioned to avoid unnecessary discovery disputes. A vigilant e-neutral will shepherd the discovery process. When disputes arise, the e-neutral will be intimately familiar with the status of discovery, the substantive legal issues affecting discovery, and the parties' relative positions. The parties should be able to spend less time and money briefing the issues, the court will be spared the time catching up on discovery disputes and instead focus on the other issues on its plate, and the informed e-neutral will be in a position to render a ruling swiftly.[55]

Nonetheless, not every litigant can afford early and often involvement of an e-neutral. Still, where an e-discovery dispute has festered, parties can turn to an e-neutral on an ad hoc basis as an alternative to motion practice. In presenting the matter to an e-neutral, the parties may agree to a truncated briefing schedule. Likewise, the parties may choose to retain an e-neutral who agrees to issue a decision in a matter of days. Court orders may also provide for light briefing and expedited decisions from an e-neutral.[56] While not as ideal as the proactive model, the reactive model nonetheless gives the court and parties many of the same benefits and allows an e-neutral's role to be specially tailored to that particular litigation.

III. CONCLUSION: THE E-DISCOVERY PROMISED LAND THROUGH E-NEUTRALS

In "The Promised Land," Springsteen warns of a dark cloud rising, forming into a havoc-wreaking twister.[57] Recognizing the pending doom and wanting to find a better life in the promised land, he takes action, packs his bags, and heads into the storm en route to the promised land.

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52. *Id.* at 387.

53. *Id.*

54. *Id.*

55. Despite having players talented enough to win ten NCAA championships, the first lesson legendary UCLA basketball coach John Wooden would teach his team was the proper way to put on athletic socks. *See* George Vecsey, *Wooden as a Teacher: The First Lesson Was Shoelaces*, N.Y. Times, June 4, 2010, *available at* http://www.nytimes.com/2010/06/05/sports/ncaabasketball/05wizard.html?_r=0. In Wooden's estimation, not paying proper mind to this preliminary, but very important, task could result in blisters that hampered or even completely thwarted the player's performance. A proactive e-discovery approach, by analogy, encourages parties to be mindful of e-discovery issues as early as possible, as the manner in which e-discovery is conducted may have significant impact on litigation.

56. *See, e.g.*, *Mine Safety Appliances Co.*., C.A. No. N10C-07-241 (MMJ) (order requiring Special Master to issue written decision within ten business days of receipt of the transcript of oral argument on the motion at issue).

57. Bruce Springsteen, *The Promised Land*, *on* Darkness on the Edge of Town (Columbia 1978) ("The dogs on Main Street howl / 'Cause they understand / If I could take one moment into my hands / Mister, I ain't a boy, no I'm a man / And I believe in a promised land / There's a dark cloud rising from the desert floor / I packed my bags and I'm heading straight into the storm / Gonna be a twister to blow everything down / That ain't got the faith to stand it's ground").

In many ways, the dark cloud of e-discovery has already arrived. But there are no signs that the volume of ESI is doing anything except increasing exponentially. The use of an e-neutral may not always be advisable, but it should always be considered as a tool to be utilized by the courts, counsel, and parties for efficiently addressing e-discovery. As Judge Fischer and Mr. Lettieri note:

By providing the necessary legal, technical, and facilitation skills needed to identify issues, offer an assessment of each, suggest options, and generally facilitate agreement, the court's expectation is that [e-neutrals] will help resolve ESI issues in a timely fashion and at a significant reduction in costs, because early resolution of these issues will help avoid a later and more costly "war of e-discovery motions."[58]

Having seeped into every crevice of litigation, e-discovery and the problems it causes have surely caused judges, attorneys, and litigants alike to yearn for a better way despite the improvements seen through new rules, default standards, and guidelines. Perhaps the next time that the dark cloud of e-discovery comes twisting through town, those involved will not run from it but instead face the storm head-on and head to the e-discovery promised land through the use of an e-neutral.

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58. Fischer and Lettieri, *supra* note 24, at 39.