Fred Cohen & Associates - Analyst Report and Newsletter

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Mediated Investigative Electronic Discovery

A recent Federal Courts Law Review article titled “Mediated Investigative E-Discovery” (V4#1) asserts, in essence, that an improved approach to the discovery process would be to have a neutral expert perform the discovery processes for both sides in a legal case, and also mediate disputes between the sides. The apparent motivation is the limitations of keyword searches, but even the article itself largely dismisses this by identifying that a different process in in fact in use today. Indeed the article cites examples where judges are forced to identify specific search terms for technical discovery, an approach that defies rationality in the context of all of the things a judge has to do and the import of a judge in the justice system.

An examiner's perspective:

From the perspective of a digital forensic evidence examiner, the cited example case where 40,000 documents were discovered in a keyword search producing roughly 350,000 pages of hardcopy text, of which 20% were ultimately found relevant, seems like a walk in the park. These 350,000 pages might well take less than 1 gigabyte of storage, and will likely be easily stored on one DVD for production. Almost every case involving a modern computer involves sifting through millions of potentially probative items to identify those that are in fact probative. In most cases, the individuals or enterprises possessing or controlling the documents organize content by some method or methods, and that organization in the context of how the enterprise operates and the issues in the case, leads to reasonably confined searches. There can be little doubt that such discovery requires both an expert in digital forensics and expertise from the parties involved.

The Sedona Conference perspective:

But the cited “Sedona Conference” report and the notion of cooperation between counsel from opposing sides perhaps goes too far. While, no doubt, council should and often must meet and confer to resolve discovery issues without having to involve a judge in every step of the process, in most of the cases I have been involved in, strategy and tactics are key to the decision processes and interactions between the parties. The notion that true cooperation between the parties in a contentious high-valued legal matter seems unlikely to be realized.

The need for experts on each side:

There should be no doubt that each side will want and ultimately need their own experts involved in discovery. How else can council get truly confidential, independent, and honest advice for their client? While it is nice to say that an expert should be neutral and a fair broker, experts are people too. Just because we work in a technical field, that doesn't make us immune from influences and points of view. And the quality of any individual expert is necessarily limited by their actual experience, training, education, skills, and knowledge. No one person has enough of these things to be able to fairly deal with all of the possible situations in a major legal matter.

The special master approach:

The use of court appointed special masters is also potentially a problem. While I generally support the notion, I was in a legal matter some years ago where the special master was decidedly one-sided for the other side. Upon in-depth examination, it was determined that the conclusions he drew were just plain wrong, and that is something that I rarely say. In digital forensics, we don't know what may be relevant until we start looking for and at what is available. And yet there is finite time and clearly we cannot look at all of the records of a major enterprise in a short time with limited budgets. The oppositional system of justice is based on the notion that the truth comes out when the parties take opposing points of view. When we eliminate that, the opportunities for injustice and abuse increase. But at the same time, so do the costs.

The proposed notion of the mediator/discovery expert:

The proposal that arises is the notion of a combined digital forensics electronic discovery expert who is also a mediator between the parties. The claim is: “This approach—mediated investigative e-discovery—holds the potential for efficiently achieving full and fair discovery.” But I don't buy it. For example, they assert that: “The animating principle of mediated investigative e-discovery is that discovery can be more efficient and effective, and completed without the need for motions to compel and intervention by the court, when it is assisted by a neutral third party employing the skills of both a trained digital investigator and a mediator.” But the truth is, we don't have many people who are competent to do either of those functions today, and the notion that we will find people who can do both and in large numbers, is at best a fallacy.

In addition, the asserted approach puts the responsibility for assuring the preservation and chain of custody for all of the digital discovery on the mediator/expert, and this has the potential to introduce far more complexity into the process than allowing the parties to be directly responsible for the delivery of evidence. The mediator is then supposed to be provided with the various theories of the case by both parties and make the decisions about what to provide and withhold to and from each.

The claim: “The animating principle of mediated investigative e-discovery is that discovery can be more efficient and effective, and completed without the need for motions to compel and intervention by the court, when it is assisted by a neutral third party employing the skills of both a trained digital investigator and a mediator.” is good as a theory, but I don't think it will work in practice. The claims of minimized preservation issues, improved efficiency, and reduced costs seem to me to be without a sound basis. They are arguments and nothing more. Of course the mediator is immune from depositions, confidential to both parties, and ultimately trusted to excess.

Perception management in the document:

The asserted counters to mediated discovery are provided late in the document, given short shrift, asserted to be complete without basis, and followed by a summary that favors the point of view of the authors. This is classic argument using psychological factors designed to push the point of view of the authors – favorable to their approach. But I don't see a real case for the other side. As a law review piece, it seems to me to be severely lacking.

An alternative viewpoint:

Now comes the hard work, and this is where I like to quote a lot:

> *"The main criticism to the mediated investigative e-discovery approach would be the loss of control: litigants allow a third party to conduct their discovery, and give that third party unfettered access to their own data."*

I see no basis for asserting that this is or would be the one and only "main criticism" to this approach. Further, the notion that "loss of control" is more important than other things, like having a judge make legal decisions, confidential and independent representation by council, confidentiality of private data, the ability to face your accuser, confidentiality around legal strategies in a case, and similar things.

> *"The first concern can be readily eliminated, as it is simply a matter of perception. First, the mediator-investigator is at all times conducting the search as directed by counsel. Based on his or her expertise, the mediator-investigator will make informed recommendations about searching for ESI, but the final decision always rests with counsel."*

The authors seem to be saying that their own claim was a false claim and just a matter of the perception that they themselves put on it. So the most important assertion against them is one that they knowingly put forth as a blind.

But then they bury the lead. The notion that the mediator, who acts independently and whose actions are not and cannot be reviewed by either side, is always acting as directed by counsel, is ridiculous on its face. The claim is, essentially, "trust but don't verify". It sounds like something we would expect from a system of injustice.

And they also bury a second lead. The mediator/expert makes recommendations, but acts in a subservient role to counsel, who has the final say. But this again assumes that the mediator always acts under strict orders but, because of confidentiality, without any actual controls.

> "*Second, counsel has much more access to—and therefore more control over—the opposing party's ESI by having a trained investigator review that data than counsel would have by using the timeworn techniques of interrogatories and requests for production.*"

This is, of course, ridiculous on its face. Counsel has no access – unless granted by BOTH the opposing party and the mediated investigative discoverer. After all, if the discoverer comes in for data and the opponent conceals it, the mediator is only acting on what was already selected out. And the removal of depositions asserted as a benefit means that there is no way to determine whether or to what extent there is additional material information.

> "*...the entire process is heavily dependent on the skills, and in particular, the trustworthiness of the mediator-investigator.*"

So they bury this critique as well. Then we see:

> "*Another criticism may arise from the possibility that the mediator-investigator would identify evidence of crime during the investigation of ESI. If mere possession of that evidence is a crime (e.g., child pornography), the mediator-investigator is required to*

> *report such a finding to the proper authorities. This inherent risk, however, exists when utilizing a traditional e-discovery specialist or even internal IT staff. All bear the same responsibility to advise law enforcement of criminal possession.*"

Somehow, the notion of self-incrimination comes to mind. But even dismissing this, apparently minor, constitutional issue, there is the notion that the mediator-investigator would be a prime candidate to start extorting the parties. After all, you are looking at jail time here. And of course, not all crimes are so obvious. Are we really saying that searches deemed illegal today will become legal because we are using a new methodology? That's what it seems to imply.

> *A final objection may be counsel's uneasiness with relying so heavily on an IT professional. Get over it. With today's information universe so heavily dominated by ESI, the perfectly wrong response is to refuse the assistance of those who are conversant with the technologies of ESI.*

And the closing argument is... "if you think you can't trust these IT folks – tough!"

What if we simply changed the order?

The weakness of the position taken by this paper can be seen by simply changing the order of presentation. And that doesn't include adding other facts and points, such as the potential for violations of law and contract through disclosures to third parties (the mediator-investigator), international issues associated with the location of information in global enterprises and cloud computing environments, and the long list of other issues that this approach does not address and makes more difficult. Here's an example of simply taking the paper's position and changing the presentation order and emphasis:

Arguments against:

- Violation of constitutional rights like self-incrimination.
- Taking discovery discretion away from judges.
- Removing the right of parties to confidential and independent representation.
- Inability to find enough people with the required skill sets.
- Potential for abuse and lack of adequate controls against such abuse.
- Violation of laws and regulations.
- Forces counsel to reveal strategies and tactics to third parties.

Arguments for:

- It might cost less. (even though it might cost more)
- It's better than "keyword searches". (which are largely irrelevant today anyway)
- Discovery is too expensive and hard; this may improve it (at the cost of justice), or not.

Summary:

- Don't do it!

And that's using the arguments that the proponents put forth!

