

Mediating E-Discovery Issues in Post-Merger & Acquisition and Distressed Company Disputes

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- Full Copies of Original and Supplementary Materials, Abstract and Panelists' Bios available at www.americanbar.org

Our Panel

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Speakers

- Hon. Mac R. McCoy, United States Magistrate Judge, United States District Court, Middle District of Florida, Ft. Myers, FL
- Professor William F. Hamilton, Legal Skills Professor and Executive Director, International Center for Automated Information Retrieval and the E-Discovery Project, University of Florida Levin College of Law, Gainesville, FL
- John G. Loughnane, Esq., Partner, Nutter McClennen & Fish LLP, Corporate and Transactions Department, Boston, MA
- Kathleen S. McLeroy, Esq., Shareholder, Carlton Fields, Business Litigation Department and Certified Mediator, Tampa, FL
- Moderator and Co-chair: John Levitske, Senior Managing Director, Ankura, Business Valuation Dispute Analysis, Chicago, IL
- Co-chair: Leslie Berkoff, Esq., Partner, Moritt Hock & Hamroff LLP, Litigation and Bankruptcy Group, New York, NY

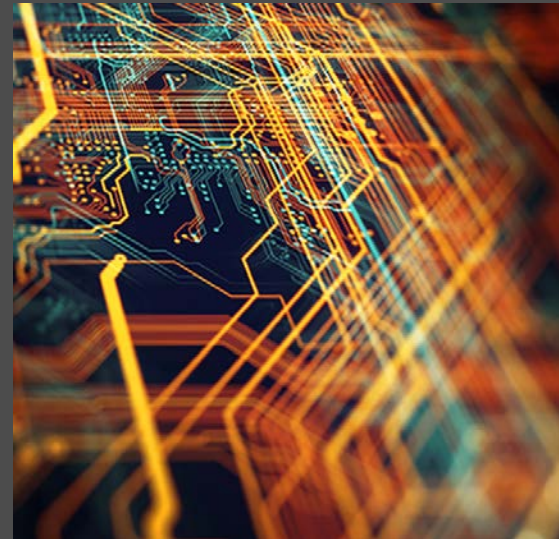
Hypothetical

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Hypothetical

- American Illness LLC (“AIL”) owns a regional nursing home chain. Up until two years ago, it also owned a medical device supply company focused on managing back pain. Throughout its history, AIL has faced stiff regulatory and competitive challenges. Employee turnover has been high, rent increases constant and sustained profits difficult to achieve.
- Facing acute cash flow challenges and pressure from its senior lender, AIL decided to spin out its medical device division in a transaction completed several months ago.
- The purchase agreement consisted of both an immediate cash payment to AIL as well as the delivery of a promissory note to AIL pursuant to which the buyer agreed to make payments over time. Despite that agreement, however, the buyer has not made any note payments. Recently, the buyer declared that no payments would ever be made. The buyer has determined that AIL made material misrepresentations about several issues regarding the medical device division including staff retention rates, Medicare reimbursement rates, patient claims, profitability, intellectual property ownership, and facility leasing costs under the purchase agreement and has invoked a right of setoff in connection with a demand for indemnification. AIL depends on payments from the buyer and, without those payments, its ability to fund nursing home operations is in jeopardy.

- AIL filed suit in federal district court seeking all amounts due under the note. The buyer answered and filed counterclaims seeking damages for breaches of representations and warranties under the agreement. Without an expedited and favorable resolution, AIL may be forced to seek bankruptcy relief for its remaining nursing home operations.....



Hypothetical, continued

- Pursuant to Fed. R. Civ. P. 26(d)(2), in order to "jump start" the Rule 26(f) conference process, the buyer served early Rule 34 requests for production of documents, which sought a wide range of electronically stored information ("ESI") from AIL related to the medical device division for the past 5 years. The request for production consists of over 100 categories of documents. AIL is composed of over one-hundred fifty management level employees performing operational, financial, HR, purchasing, advertising, and legal services that were related to the medical device division and who supervise five thousand employees in ten locations around Florida. AIL operates a Microsoft Exchange server and desktop clients. AIL maintains a centralized document management system consisting mostly of relational financial databases, regulatory reports, and patient medical records, but all desktops are equipped with the standard Microsoft office suite of applications and storage drives. All facilities are equipped with fifty mobile computers that nurses, attendants, and care givers use when visiting each patient room. Most employees maintain at least 20 gigabytes of data on their local machines. Company management employees are encouraged to work from home using a VPN connection and to use their own iPhones to stay in communication. To protect confidential communications the company has directed employees to use the app Signal that encrypts all data communications. AIL has an aggressive document management policy that provides that email is deleted in 2 months if not placed in a folder. AIL does not use the Microsoft Journaling feature.
- During the initial Fed. R. Civ. P. 26(f) conference, the buyer confirmed its desire to seek all relevant ESI from AIL. Essentially, the buyer is insisting that AIL gather the data stores from all employees and run comprehensive searches against the data which would consist of emails, text messages, social media posts, word processing documents, spreadsheets, and AIL databases regarding patient management and retention. The buyer has proposed over 250 search terms including such terms as financial, patient, trademarks, care, risk, and cost.
- AIL raised preliminary objections, citing concerns for patient privacy, the confidentiality of various regulatory investigations, the sensitivity of its true financial state, proportionality, the accessibility of certain data, and the overall costs of compliance. In an effort to expedite the litigation, AIL has requested that the parties bring the discovery issues before a mediator before seeking court intervention or, alternatively, seeking court approval to appoint a special master.

Panel Discussion Topics

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Panel Discussion Topics

- Hypothetical
- Pre-Litigation Strategies
 - Preservation Considerations
 - Informal Document Production to Facilitate Settlement Discussions
- Litigation Strategies
 - Pros and Cons of a Mediated Process from the Parties' Perspective
 - Controlling the Scope of Discovery
 - Setting Mutually Agreeable Limitations on the Discovery Process
 - Containing Costs
 - Establishing Reasonable Time Frames

- Judicial Perspectives and Concerns
 - Case Management Considerations
 - Potential for Sparing Scarce Judicial Resources
 - Buyer's Remorse
 - Alternative Special Master Procedures under FRCP 53
- Examples of Formal Court ADR Programs

Panel Discussion Topics, continued

- Timing-When Does the Potential for Mediation Arise?
 - FRCP 26(f) and Formulation of a Discovery Plan
 - Post-26(f) Disputes Concerning Methodologies or Accessibility
 - Disputes Re Cost-Shifting
 - Disputes Re Compliance with the Stipulated Discovery Plan
 - Spoliation Issues and Sanctions

- The Mediation Process
 - Selecting a Third-Party Neutral
 - Costs
 - Confidentiality of the Process
 - Confidentiality of Records and Information Exchanged
 - Specialized Expertise of the Mediator
 - Memorializing the Outcome

Panel Discussion Topics, continued

- Issues That Arise in Mediation (Illustrated by the Hypothetical)
 - ESI Issues Specific to M&A and Distressed Entities
 - Departing Employees / Custodians
 - BYOD and Mobile Devices
 - De-Commissioned or Recycled Technological Assets
 - Archives and External Storage Media
 - Regulatory Issues



Thank you!

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