CLE: Resolving E-Discovery Disputes Efficiently in Arbitration and in Court

By Christie McGuinness

On January 28, 2019, at the offices of Kramer Levin Naftalis & Frankel, the Commercial and Federal Litigation Section, co-sponsored by JAMS, put on a CLE regarding e-discovery and the potential disputes that may arise in either arbitration or litigation. This was the second time the Section had presented this program, and it was well attended by approximately 40 attorneys.

The first part of the CLE was entitled "E-Discovery Issues in Arbitration." The panel was moderated by the Honorable Frank Maas (Ret.) and included panelists Prof. Michael Fox, J.D., Kerri Ann Law, Esq., and Roger Maldonado, Esq. The panel discussed the importance of understanding the considerations that go into choosing whether to go to arbitration, which arbitration forum the litigants choose, and the parties to the arbitration. Arbitration is meant to be more streamlined than litigation, having matters come to a resolution in a shorter time. However, in the modern era, where increasingly parties are dealing with complex e-discovery disputes, how are those resolved in arbitration? The panel first discussed the importance of taking care in choosing where parties go to arbitration, as each forum has its own discovery rules and procedures, and that while clients may be willing to go to arbitration for the cost savings, they may not be willing to go if the particular arbitration will significantly limit their ability to conduct discovery. Attorneys must be practical when conducting discovery in arbitration, and attempt to work out as many issues among the parties themselves. For example, two sophisticated companies battling in arbitration will be more equipped to work out e-discovery issues, and will not need to involve the arbitrator. The rules of the particular arbitration forum will also help dictate and educate where parties will go. For example, if an IT expert will be required to be deposed to establish that a thorough search was conducted for responsive documents, parties should consider going to a forum that will enable more depositions. The panelists also discussed that typically, if parties agree to a discovery schedule, the neutrals will not disturb the schedule.

The overall conclusion was that the name of the game is reasonableness. The parties in arbitration need to act reasonably to maintain the benefits of going to arbitration rather than going through litigation. For example, conferencing discovery issues by telephone, after submitting letter briefs, instead of formal motion practice can still leave parties with both an opportunity to succinctly voice their position on a discovery issue and an opportunity for the neutral to make a decision. Ultimately, the panelists concluded that overall the neutrals will be looking for which party is being the most reasonable and who has presented the most reasonable position.

The second part of the program addressed the use of special masters and e-discovery mediators in connection with court litigation. The panel was mediated by Mark Berman, Esq. and included panelist Jeremy R. Feinberg, Esq., Maura R. Grossman, Esq., Hon. Shirley Werner Kornreich (Ret.), and Hon. Frank Maas (Ret.).

This panel spoke on the practical considerations of using special masters in cases involving complex discovery issues. Special masters are appointed by the court to resolve discovery issues and can be very effective in minimizing costs for litigants in cases involving either complex issues or where the litigants themselves would be unable to come to the resolution on the issue. For example, one case involved a dispute between two companies and the alleged stealing of code. As the case involved highly technical, extremely complex issues requiring knowledge of code, a special master was appointed to resolve discovery disputes involving the allowing of each side to review the other side's code in the least invasive way possible. Another example where a special master was effectively used was in a case involving thousands of pages of discovery where there were issues of privilege and discovery issues would take up too much of the court's time to resolve.

The panel also discussed how special magistrates and/or referees can be effective in cases involving technological disputes where the parties would be unable to come to a resolution among themselves and a decision made by a neutral would be required. The example discussed involved two parties disagreeing over "search terms" for technologically assisted review, where a special magistrate/referee was used, as the dispute among the parties would take up too much of the court's time. Both parties early on in the litigation agreeing to the special magistrate/referee and agreeing to the scope of the assignment offers an effective tool. Practical considerations also arise when discussing the appointment of a special magistrate/referee, including price sharing among the parties, the standard of review for the special magistrate/referee's decision, and a timeline for the special magistrate/referee's decision.

In all, the CLE provided effective tools for litigants to consider when attempting to streamline discovery in cases where discovery disputes will inevitably arise. In litigation, the largest expense that parties undergo is discovery, and clients look for ways to complete discovery in the most efficient way possible. Whether submitting a case for arbitration or utilizing a special magistrate/referee in lieu of extensive motion practice, parties have at their disposal options to go through discovery in the most cost-effective way possible.