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SPECIAL MASTERS

Ann Marie Gibbs and Benjamin D. Joffe, attorneys with Redgrave LLP, explore the technological innovations driving the need for, and three different uses of, eDiscovery special masters in civil discovery.

The Growing and Valuable Role of eDiscovery Special Masters in Civil Litigation

By ANN MARIE GIBBS AND BENJAMIN D. JOFFE

As the second half of 2015 unfolds, a unique convergence of circumstances makes the role of special masters in eDiscovery increasingly important.¹

First, new Federal Rules of Civil Procedure addressing electronically stored information (“ESI”) in litigation are poised for adoption on December 1, 2015.²

Second, technology is evolving at a pace that eclipses the ability of most courts and counsel to keep abreast of new developments and their impact on the preservation, identification, collection and production of ESI.

Third, even though courts may not be able to keep up with all of the changes in technologies, judicial expecta-

tations regarding competence³, transparency and cooperation in discovery continue to grow.

Fourth, ESI is ubiquitous and eDiscovery is likely to be a part of your case, whether it is a high stakes anti-trust matter or a routine breach of contract dispute.

Using an ESI special master who has an appropriate combination of technical, legal, facilitation and business skills to qualify as an eDiscovery expert can be a highly effective way to ensure the “just, speedy and inexpensive” resolution of your matter.⁴ The courts’ increased reliance on them reflects their growing importance in facilitating timely, proportional and fair discovery in matters of all types and sizes.

Why Use a Special Master?

Courts and counsel who were able to familiarize themselves with the data preservation, collection, and privacy issues presented by Facebook,⁵ Twitter, LinkedIn and Snapchat may be overwhelmed as new communication platforms appear fast on their heels. In addition to grappling with Ello, Quora, Pheed and Hip-

¹ See The Honorable Shira A. Scheindlin, 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 (2008) for a discussion of the historical use of special masters. See generally, Fed. R. Civ. P. 53 regarding the mechanics of a special master appointment.

² Absent Congressional legislation to reject, modify or defer the rules, the proposed amendments will become effective December 1, 2015.

³ Courts increasingly emphasize Rule 1.1 of the American Bar Association Model Rules of Professional Conduct requiring a lawyer to provide competent representation to its clients. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See, for e.g., State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193, at 1, available at <http://ethics.calbar.ca.gov/Ethics/Opinions/2009176toPresent.aspx>

⁴ The rule changes will make FRCP 1 applicable to the parties as well as the courts.

⁵ In 2006, Facebook was 2 years old and had 12 million users. By March 31, 2015, the user community had exploded to 1.44 billion active monthly users.

Chat, the courts and parties are starting to face how they should handle the growing mass of data associated with the Internet of Things⁶ (“IoT”).

The IoT refers to physical objects or “things” embedded with electronics, software, sensors and connectivity that enable the exchange of data with a manufacturer, operator and/or other connected devices.⁷ Each thing is uniquely identifiable through its embedded computing system but interoperates within the existing internet infrastructure.

Experts estimate that the IoT will consist of almost 50 billion objects by 2020.⁸ Whether it is a pacemaker generating data about a vital organ or a Fitbit reporting on your activity level or sleep patterns, these “things” will simply be one more discoverable data source in future litigation.

More technology means more data and the concomitant development of increasingly powerful and complex analytical tools to address the production of large volumes of data in litigation. Understanding when and how to use these tools introduces another level of complexity into the already Daedalian world of ESI.

A skilled eDiscovery special master facilitates the dialogue regarding preservation accords, production agreements, and search and retrieval protocols . . .

In these circumstances, a good eDiscovery special master can positively affect the progress of discovery by helping the parties and the court to come to grips more quickly with new technologies and tools.

Mediative Special Master

A special master with eDiscovery expertise can be used to cut through the fog of discovery to bring about consensus on typical meet and confer issues. By helping to bring about agreement on the fundamental and far-reaching issue of the scope of discovery, the eDiscovery special master plays a critical role in setting a proportional course of action that fairly serves all parties.

A skilled eDiscovery special master facilitates the dialogue regarding preservation accords, production agreements and search and retrieval protocols to help ensure that parties do not inadvertently engage in sanctionable conduct through an eDiscovery blunder.

Technology Assisted Review. One area of significant value for an eDiscovery special master with meditative skills is the realm of search methodologies. For example, with the growth of data volumes and technology assisted review (“TAR”)⁹ in eDiscovery there will also

be an increase in the need for special masters who understand TAR.

A special master was recently appointed expressly for the purpose of resolving “such disputes that may arise in relation to the use of technology assisted review (aka, predictive coding)” in a matter well known for its TAR issues.¹⁰

Although beginning in January 2015 the court repeatedly suggested the parties retain a special master, it took more than six months and an application from one of the party’s seeking the appointment before the order of appointment was entered. That was six months of time during which the parties were not able to resolve their TAR issues independently, thus hindering the progress of discovery and the ultimate resolution of the matter.

An eDiscovery special master knowledgeable about search methodologies can minimize the time and resources that might otherwise be needlessly devoted to debates about technicalities that are beyond the understanding of many courts and counsel.

With such a special master at the helm, the litigants can readily resolve technical issues regarding seed sets, sampling protocols and precision and recall standards while simultaneously protecting confidential or sensitive information that is inevitably the subject of disclosure in this process.

Using a special master to mediate the decision-making process related to TAR, rather than having separate technical consultants debate the merits of their selected technologies in front of the court, will save the courts and parties time and money by eliminating costly motions practice.

Proportionality Issues. The need for special masters is not limited to collaborating with the parties to develop agreed upon protocols, whether it is how to use TAR for document review or how to search databases for relevant documents. The forthcoming changes to Rule 26 will limit discovery to information “relevant to any party’s claim or defense and proportional to the needs of the case.”

In the future, courts will routinely be called upon to apply proportionality principles to determine whether it is reasonable to even produce from a particular data source.¹¹

passive learning (SPL), or simple active learning (SAL) to identify relevant documents for production in litigation.

¹⁰ See *Rio Tinto v. Vale*, No. 14 CIV. 3042 RMB AJP (S.D.N.Y. July 15, 2015).

¹¹ The new Federal Rule of Civil Procedure 26(b)(1) reads as follows:

“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.” Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, Rules App. B-36 (Sept. 2014)

⁶ Wikipedia, Internet of Things, available at https://en.wikipedia.org/wiki/Internet_of_Things.

⁷ *Id.*

⁸ *Id.* (internal citations omitted).

⁹ Defined herein to refer to tools using machine-learning technologies such as continuous active learning (CAL), simple

Special masters could prove especially helpful when applying the six-factor proportionality analysis articulated in the revised Rule 26. Their technical acumen can help define the scope of discovery under the new test, particularly with respect to certain factors such as “the parties’ relative access to relevant information” and “the burden or expense” of obtaining the information. And, of course, such specialized assistance could also help with determinations under Rule 26(b)(2)(B) regarding whether information is “not reasonably accessible.”

Given the large and broad nature of court dockets, courts cannot be expected to fully comprehend all technologies in order to properly apply the proportionality analysis. Reliance on a special master who has a sophisticated understanding about technology and the application of the Federal Rules of Civil Procedure and its state counterparts can improve the discovery process.

Investigative Special Master

Appointments in the investigative realm often result from a party’s repeated failure to produce ESI in compliance with court orders. Courts are “aware that litigants are frequently successful in concealing information from courts, largely because the power to conceal one’s own documents is far greater than a court’s power to uncover them.” *Maggette v. BL Dev. Corp.*, No. 2:07-CV-181-M-A, 2010 BL 204959 at *18 (N.D. Miss. Sept. 2, 2010).

When a court’s resources are consumed by unnecessary discovery motion practice and its integrity is undermined by misleading and deceptive tactics, appointing an investigative special master helps it “to reach the truth in any case before it.” *Maggette v. BL Dev. Corp.*, No. CIV.A. 2:07CV181-M-A, 2009 BL 380314 at *2 (N.D. Miss. Nov. 24, 2009).

For example, after allegations of improper conduct throughout discovery and five unsuccessful discovery status conferences following plaintiffs’ motion to compel ESI, the court appointed a special master in *Small v. Univ. Med. Ctr. of S. Nevada*, No. 2:13-CV-00298-APG, 2014 BL 57380 (D. Nev. Mar. 3, 2014). The appointment order instructed the special master to investigate issues that included the adequacy of the scope and execution of collection; whether ESI was deleted or lost; whether missing ESI could be recovered; the adequacy of preservation efforts; and the defendant’s role in any failure to preserve and maintain relevant evidence.

In a 72-page report, the special master described the extensive investigation required to provide answers to the court. *See generally Report and Recommendation, Small v. Univ. Med. Ctr. of S. Nevada*, No. 2:13-CV-00298-APG, 2014 BL 228669 (D. Nev. Aug. 18, 2014).

The special master determined whether the defendant properly preserved, collected and produced information from a myriad of data sources, including: network drives, employer issued and personal mobile devices, intranet and Blackberry servers and five sophisticated timekeeping systems. The special master brought to bear skills that one cannot reasonably expect a court to have.

Indeed, evaluating the adequacy of the collection efforts required a “line by line review of the collection script.” *Id.* at *2. Ultimately the special master uncovered a litany of ESI failures (*see generally Id.* at *5-29), including a failure to preserve that resulted in lost ESI to the prejudice of plaintiffs.

Additionally, the special master concluded that the defendant made multiple misrepresentations about the existence of relevant data sources.

After a careful analysis of the relevant law, the special master recommended case-dispositive sanctions (*see generally Id.* at *36-38), including a default judgment as to one class of plaintiffs. *Id.* at *36. Given the complexity of the technical issues presented, without the assistance of the special master, the court would have remained mired in the web of deceit and incompetence spun by the defendants.

Similarly, in *Maggette*, 2009 BL 380314 (Nov. 24, 2009), the court concluded it had no alternative but to appoint a special master after recognizing, in the context of a review of a motion for sanctions, that it could not “say with certainty whether the defendants ha[d] legitimately fulfilled their discovery obligations.” *Id.* at *2.

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Noting its suspicion “that [defendant] was not proceeding in good faith” and “had likely decided that the potential dollar value of a finding of vicarious liability in this case was so high that it could essentially write off the comparatively minor discovery sanctions which this court might issue as an acceptable cost of a strategy of obstruction and stonewalling,” the court declined to rule on the plaintiff’s motion. *Maggette*, 2009 BL 3522798 at *1 (Sept. 2, 2010). Instead, the special master was instructed “to determine the legitimacy of [defendants] searches to date or whether they ha[d] in good faith attempted to use preservation techniques reasonably available to them.” *Id.* at *2.

The value of the special master’s efforts was acknowledged by the court when it stated “[t]he special master’s reports confirmed the[] suspicions” as he “found in five minutes information that BL, a sophisticated corporation with very significant financial resources, had repeatedly and stridently insisted did not exist for close to five years.” *Id.* at *1.

In other cases, a special master may determine that a discovery failure was based primarily on ignorance rather than misrepresentation. In *PIC Grp., Inc. v. Land Coast Insulation, Inc.*, No. 1:09-CV-662-KS-MTP, 2011 BL 436328 (S.D. Miss. Mar. 4, 2011), a special master was appointed to “investigate and advise the Court as to the nature, extent, and sufficiency of the identification, preservation, collection, search, processing and production by [Defendant] of potentially responsive and relevant information. . . .” *Id.* at *1.

The special master observed that the defendant “simply had no idea what they had and exerted little effort to investigate;” conditions that do not insulate a party from sanctions. *PIC Grp., Inc. v. Land Coast Insulation, Inc.*, 2011 BL 178524, at *2 (S.D. Miss. July 7, 2011). The court’s conclusion illustrates the value of retaining an investigative special master:

“. . . the primary effects of Defendant’s failures to comply with its ESI obligations are: 1) the tremendous expense of time and other resources that they have occasioned, and 2) the potential threat to the judicial process posed by such casual disregard for discovery obligations. While these effects are arguably not as despicable as the intentional destruction of relevant evidence, they can not [sic] be dismissed as inconsequential. After all is said and done, the parties will have easily rung up over a half million dollars in combined attorney’s fees, expenses, and costs associated with this discovery dispute, and the Court will have expended far more of its resources than it should have over the production of a few documents of questionable worth. No one benefits from discovery disputes such as this one except for the attorneys collecting fees.” (Footnote omitted) *Id.* at *8.

Defendants were deemed grossly negligent in preserving and producing ESI. *Id.* This conclusion, combined with the Manager of Legal Affairs’ “suspicious and inexcusable disregard for the Court’s order to cooperate with the Special Master—merit sanctions, if for no other reason than to provide a lesson in what this Court expects from litigations.” *Id.*

Adjudicative Special Master

Adjudicative special masters are appointed to assist the court by making findings and recommendations to resolve legal and/or technical disputes related to ESI. In this capacity, a special master generates reports and recommendations, standing in, as it were, for the court.

A party may object to a special master finding of fact or conclusion of law under Fed. R. Civ. P. 53(f)(2). Objections are reviewed *de novo* by the court.¹²

Unlike a mediator, who works to build consensus in areas of dispute, an adjudicator works affirmatively to provide the court guidance on specific issues under its provenance as identified in the order of appointment defining the specific nature and extent of the special

¹² Fed. R. Civ. P. 53(f)(3).

master duties. This may require interviewing data custodians regarding data preservation, analyzing a hard drive to evaluate the authenticity of ESI, reviewing source code to investigate infringement or conducting an *in camera* review of privileged documents.

While the adjudication of privilege claims may have been the most common basis for the appointment of this type of special master historically, as more eDiscovery disputes overload court dockets, district court judges may turn to adjudicative special masters not only to “reduce friction,” but also “to facilitate forward progress” on a wide range of issues. See *Apantac, LLC v. Avitech Int’l Corp.*, No. 3:11-CV-01507-BR, 2014 BL 19202 (D. Or. Jan. 24, 2014) (affirming the special master’s report regarding the adequacy of Plaintiff’s document production).

We expect courts to use increasing discretion in their orders appointing special masters under Fed. R. Civ. P. 53(a)(C), permitting appointments to “address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”¹³

Conclusion

The dynamic and ubiquitous nature of ESI coupled with the upcoming changes to the Federal Rules of Civil Procedure signal a growing need for eDiscovery special masters now and for the foreseeable future. Although, in some cases the expense of having an eDiscovery special master in the short term can be significant, the costs incurred to resolve conflicts without one may far eclipse the special master fees.

Just as importantly, without the expert and timely guidance provided by the eDiscovery special master on contentious legal and technical issues, parties flounder.

Whether a Special Master is tasked with meditative, investigative, or adjudicative responsibilities, their legal knowledge and technical expertise can be strategically used to avoid endless court battles that turn litigation into a discovery war rather than a process for resolution on the merits.

¹³ See *Medcorp, Inc. v. Pinpoint Technologies, Inc.*, No. 1:08-cv-00867-WJM -KLM, 2010 BL 134535 (D. Colo. June 15, 2010) (Special master’s report addressing spoliation and suggested appropriate sanctions).

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