



CREATING THE CRITERIA AND THE PROCESS FOR SELECTION OF E-DISCOVERY SPECIAL MASTERS IN FEDERAL COURT

BY HON. NORA BARRY FISCHER AND RICHARD N. LETTIERI

AS ELECTRONICALLY STORED INFORMATION BECOMES MORE PREVALENT, FEDERAL JUDGES SEE THE NEED FOR ADDITIONAL HELP TO ASSIST THE PARTIES AND THE COURT ADDRESS AND RESOLVE COMPLEX, AND SOMETIMES THORNY, ESI ISSUES. AT LEAST ONE DISTRICT HAS TAKEN ACTION TO IDENTIFY AND REGISTER KNOWLEDGEABLE AND EXPERIENCED LAWYERS WITH E-DISCOVERY CREDENTIALS TO FILL THE IMPORTANT AND EMERGING ROLE OF E-DISCOVERY SPECIAL MASTER.

Many federal judges and lawyers who litigate in federal court are concerned that issues involving electronically stored information (ESI) are either causing or threatening to cause litigation in federal court to become a “war of e-discovery motions.” This war adds to the costs of litigation, threatens to delay the administration of justice, and, most importantly, diverts the case from its substantive merits to a motions practice dominated by technical concepts and precepts that are new to the legal profession.

Most attorneys and jurists who are experienced in issues related to ESI agree that the best way to prevent these problems is to resolve ESI issues early in the process. In fact, the revisions to the Federal Rules of Civil Procedure (FRCP), adopted in December 2006, attempt to address this issue through the creation of the Rule 26(f) “meet and confer” conference, which requires that counsel discuss and resolve ESI issues.¹ To date, these conferences have generally remained ineffective in achieving their primary purpose, usually because of one of these reasons:

- The dispute is too contentious for the parties to exert the minimal cooperation required to share the informa-

tion necessary to reach resolution of key ESI issues.

- One or both parties see an advantage in not resolving ESI issues at this point in the proceeding.
- Either or both counsel lack the technical skill and experience necessary to facilitate effective resolution of the ESI issues.

Because of the complex nature of ESI, experienced practitioners realize that cooperation in sharing relevant data between the parties is a prerequisite to resolving these complex issues. More than 100 federal judges have demonstrated their support of the need for cooperation in this process through their endorsement of the Sedona Conference Cooperation Proclamation.²

Some jurisdictions have attempted to make the Rule 26(f) conference more effective by developing additional “tools” designed to facilitate and improve the process of gathering the specific information required at the Rule 26(f) conference in order to help resolve the ESI issues at this early stage of the proceedings.³ Indeed, certain courts have become proactive in their efforts to thwart attempts by counsel to delay resolution of ESI issues beyond this

stage of the proceeding by ordering counsel to “meet and confer” repeatedly until these issues are resolved or by conducting periodic status conferences with counsel to address disputes related to ESI.

However, there is a growing realization that neither counsel nor the court may have the technical knowledge or experience to address the technical issues underlying ESI without outside assistance. There is also a growing realization that ESI, once associated only with complex litigation, is becoming more common in less sophisticated cases. These dual realizations have resulted in the growing use of e-discovery special masters in federal courts.

To address the need to facilitate resolution of ESI issues early in the process as well as the need to provide technical assistance to the court and the parties when ESI issues arise later in the proceedings, courts have increasingly responded by appointing e-discovery special masters to assist in this effort. This article reviews several aspects of this development. First, the article reviews the appointment of e-discovery special masters in federal court to date in order to understand the roles and responsibilities they have been given.⁴ Second, the article briefly reviews each role, with special emphasis on facilitation of e-discovery disputes at or before the Rule 26(f) “meet and confer” conference. Third, the article looks at actions recently taken by the Board of Judges in the U.S. District Court for the Western District of Pennsylvania to identify and register a number of knowledgeable and experienced lawyers with e-discovery credentials for consideration as e-discovery special masters. Specifically, the article outlines the prerequisite qualifications and experience that were considered critical for those applying to become a member of a panel of approved e-discovery special masters and the process created for their selection. Fourth and finally, the article suggests actions that the federal bar can take to encourage resolution of ESI issues without the assistance of e-discovery special masters.

Four Roles of the E-Discovery Special Master

E-discovery special masters have already been appointed in a number of federal cases. In two recent articles—one by Judge Shira Scheindlin from the Southern District of New York, “We Need Help: The Increasing Use of Special Masters in Federal Court” (published in 2009),⁵ and the other by Judge Shira Scheindlin and Jonathan Redgrave, “Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure” (published in 2008)⁶—outline cases in which e-discovery special masters were appointed and categorize the various roles and responsibilities given to them in those cases. These categorizations or “roles” of the e-discovery special masters provide a useful framework for discussion and identify issues and circumstances that may be factors in considering the appointment of e-discovery special masters in the future.

After establishing that the authority for the court to appoint special masters is found in Federal Rule of Civil Procedure 53 and the revised rule that permits their appointment on an “as needed” basis, in her article pub-

lished in the *DePaul Law Review* in 2009, Judge Scheindlin outlines four roles that e-discovery special masters have fulfilled in the past.⁷ As a result of her research, Judge Scheindlin determined that e-discovery special masters have been appointed because they bring special expertise to facilitate the judicial process in a number of key ways.

First and foremost, when these special masters are appointed to assist with the Rule 26(f) “meet and confer” conference, they lead the discussions on the key ESI issues that require resolution, including the following

- developing acceptable preservation protocols and procedures;
- identifying locations and sources of potentially relevant ESI and determining accessibility due to undue burden and cost;
- assisting the parties in making determinations regarding key custodians and/or witnesses and the timing and scope of their participation;
- developing methods to address privilege or privacy concerns;
- agreeing on a method of search and retrieval of data, including the selection of search terms; and
- agreeing on production formats.⁸

All these issues are encompassed in revised Federal Rule 26(f), and many local jurisdictions have created local rules (and tools) to assist in this facilitation effort.⁹ However, left alone, attorneys have been unable (because of their lack of knowledge and/or experience with ESI) or unwilling to resolve their ESI issues at the Rule 26(f) conference, as anticipated under the Federal Rules. Unresolved, these issues often come up later in the proceedings, causing unnecessary delays and expensive e-discovery motions that delay the proceedings and increase litigation costs.

As a facilitator, the e-discovery special master has the opportunity to resolve ESI issues early in the process at a lower cost to the parties and less disruption to the court. To achieve positive results, a certain level of cooperation between the parties is required. Cooperation has been the impetus behind the Sedona Conference’s Cooperation Proclamation mentioned earlier. In brief, the proclamation says that zealous advocacy by counsel is not surrendered by cooperation in e-discovery.¹⁰

The second major role of the e-discovery special master is to monitor and compel e-discovery compliance related to ESI. In instances when the court has already ruled on some element of discovery and a party has not complied, the court may require a third party to monitor and, if necessary, compel compliance. E-discovery special masters have been appointed to fulfill this role.

The special master’s role in adjudicating legal disputes involves hearing and ruling on discovery disputes and issuing reports and recommendations that are adopted or rejected by the court. In this role, e-discovery special masters have been asked to issue recommendations on the proposed scope of e-discovery, the form of production, and the claims of privilege or work product protection. It appears that the same ESI issues that could have been

resolved voluntarily, cooperatively, and less expensively at or before the Rule 26(f) “meet and confer” conference, become the basis for an e-discovery special master’s role as adjudicator later in the proceedings.

The final role of the e-discovery special master—adjudicating technical disputes—may require specialized skills on the part of the special master that go beyond those of a mere facilitator. For example, the services of a computer forensic examiner¹¹ may be required to investigate electronic evidence that may have been altered or to determine the authenticity of e-mail authorship. As another example, in complex patent litigation, a specialized technical skill may be required to investigate a program’s source code in order to determine if a party’s software infringes on the licensed software of another.¹² In such instances, unless the e-discovery special master has these skills, he or she may need to acquire these specialized technical services from within his or her own organization or professional network.

Our experience with the appointment of e-discovery special masters in the U.S. District Court for the Western District of Pennsylvania in some respects conforms to the categorizations created by Judge Scheindlin and Redgrave in their article published in the *Cardozo Law Review* in 2008. Three e-discovery special masters have been appointed in the Western District of Pennsylvania over the past three years. In the appointment of each of these individuals, the process began with the judge’s determination that the needs of the case required the assistance of specialized skills. Because information technology (IT) is a discipline with many subspecialties, it was essential to conduct a thorough assessment of the technical requirements of the case early in order to determine the specific skills required.

For example, one of the appointments of an e-discovery special master in the district involved a case¹³ in which the parties disagreed about the manner in which information within a medical database was represented. This was a critical issue in the case, because of the dispute over whether the data had been inadvertently misrepresented or fraudulently altered. Judge Joy Flowers Conti realized that, even though a solid IT background was a prerequisite, specialized skills in computer fraud (forensics) and knowledge of and experience with medical billing applications would be essential. Generalized ESI technical and legal skills were essential to perform e-discovery facilitation, but they were insufficient in this instance because of the more specialized requirements of this case.¹⁴

Another example of an appointment of an e-discovery special master in the Western District of Pennsylvania demonstrated a different need. The sheer scope of the matter, which involved several highly technical and complex litigation issues, spanned several years, and included millions of documents, required that the appointee be a seasoned litigator who could assemble a team of technical experts able to address a multitude of technical issues. The appointment order issued by Judge Joy Flowers Conti—which is included as an appendix to Judge Scheindlin’s article in the *DePaul Law Review*¹⁵—is a good example

of how comprehensive some e-discovery special master appointments can become.

However, not all cases involving the appointment of an e-discovery special master will be as complex as the cases cited above. Many cases involving ESI—and their number is expected to increase over the next several years—will require successful facilitation only during the early stages of the e-discovery process. These cases can be effectively managed by e-discovery special masters who have more generalized, yet substantial, legal and technical skills. However, because it may be necessary for these e-discovery special masters to seek unique specialized skills or to assemble a team of legal or technical experts during the course of the proceedings, in formalizing the appointment process, the judges in the Western District of Pennsylvania also sought information regarding a prospective applicant’s access to technical experts who are either part of the applicant’s organization or professional network.

Application and Selection in the Western District of Pennsylvania

As a result of an increase in the number of matters involving ESI that are brought to the district court, the Board of Judges in the U.S. District Court for the Western District of Pennsylvania decided to investigate the use, qualifications, and selection process of e-discovery special masters to assist the judiciary as required. After confirming that the use of e-discovery special masters was likely to continue to increase in the years ahead and that the use of these special masters would be necessary and beneficial, the judges referred the issue to their Alternate Dispute Resolution Implementation Committee (ADRIC). The committee immediately sought input from a subcommittee made up of knowledgeable and experienced e-discovery counsel, technical consultants, other lawyers experienced in complex litigation involving ESI, and the court’s ADR consultant.

The mission of the subcommittee was to investigate what actions other jurisdictions had taken on this issue, to research what articles and other materials were available on this topic (including contributions made on this subject by organizations like the Sedona Conference), and then report the subcommittee’s findings and recommendations to the ADRIC. In addition, the ADRIC asked the subcommittee to focus on suggestions in four key areas:

- selection criteria,
- process of selection,
- required and suggested content to be included in court orders appointing e-discovery special masters, and
- content of the application form to be submitted by potential candidates.

The final application form that the Board of Judges adopted in November 2010 may be reviewed at www.pawd.uscourts.gov. The form lists the four major criteria the judges asked the candidates to address: (1) knowledge of e-discovery, (2) experience with e-discovery, (3) relevant litigation experience, and (4) training and experi-

ence in mediation.

After reviewing several modifications to the application form and finalizing its selection criteria, the ADRIK addressed the process by which e-discovery special masters would be selected. From the beginning, the Board of Judges and the ADRIK made it clear that they wanted to create a pool of qualified candidates from which judges, counsel, and litigants could select the one they thought would be best for their specific needs. The Board of Judges and the ADRIK wanted the process to be inclusive, but they also wanted those admitted to the pool to meet certain minimum requirements related to knowledge and experience.¹⁶

General educational and legal training and experience are considered fundamental, as are litigation and ADR training and experience. Another primary requirement is specialized training and experience in computers and technology, including e-discovery. Specific experience in e-discovery matters over the past three years was also requested. In addition to these fundamental skills and experience, applicants were encouraged to include writing, speaking, and teaching experience in e-discovery in their applications, along with evidence of active participation in relevant associations and organizations, including memberships in relevant committees.¹⁷ Finally, the application requested information about practical considerations, such as hourly billing rates, alternative methods of billing, and access to additional technical and legal support personnel, in the event their support was required in a particular matter.

Once the application form and selection process were adopted by the Board of Judges in November 2010 and the supporting IT systems had been developed, the Western District of Pennsylvania accepted applications for appointment as e-discovery special masters from Nov. 30, 2010, through Jan. 14, 2011. During that time, applications were received and reviewed by the Board of Judges, and a portion of the applicants were accepted, creating the initial pool of qualified candidates.

In January 2011, selected candidates were asked to register as e-discovery special masters with the court and were required by the court to complete a four-hour training class. The training material was developed by computer forensic and e-discovery consultants to ensure that all those accepted as e-discovery special masters had received specialized training outlining their responsibilities as well as the court's expectations. It is worth mentioning that, for the past three years, the judges in the Western District of Pennsylvania have actively participated in the "E-Discovery Series," a luncheon sessions sponsored by the FBA's Western District of Pennsylvania Chapter that are held quarterly and designed to provide general e-discovery training for the local federal bar.

Based on a preliminary matching of qualifications and experience against specific case requirements using online screening, the judges and counsel are now able to select from these registered candidates if the court determines that an e-discovery special master is needed. The final stage of the process involves telephone or personal inter-

views conducted by the judge (and counsel for the parties, if the judge permits), as required prior to selecting the best candidate to serve in a particular case. Naturally, consensus on the best candidate is preferred, although the judge makes the final decision. Usually, the cost of the e-discovery special master is split between the litigants, but the judge may specify other arrangements.

Even though the district's initial pool of candidates has been created, additional candidates are encouraged to apply on a quarterly basis. Furthermore, the judges expect to monitor the process and adjust and improve it, as required.

Once e-discovery special masters have been selected, the court must clearly articulate their duties and responsibilities. (Several actual court orders appointing e-discovery special masters can be found in Appendixes A–E in Judge Scheindlin's *Cardozo Law Review* article.¹⁸) Analysis of these sample e-discovery special master appointments indicates that judges have considered up to eight factors when making these appointments:

- specificity of duties;
- the circumstances (if any) in which the special master may have ex parte contact;
- materials to be preserved and filed as a record of special master's activities;
- procedures for filing the record; reviewing the special master's orders, filings, and recommendations;
- the special master's compensation;
- confidentiality;
- time limits; and
- names of persons designated by both sides as primary contacts for the special master.

Voluntary or Involuntary?

From the judicial point of view, the Board of Judges in the Western District of Pennsylvania believes that, if the parties are unable to reach agreement regarding ESI issues on their own, the appointment of e-discovery special masters will help the parties achieve that agreement at the Rule 26(f) conference. 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-discovery special masters 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."

If any members of the federal bar remain unconvinced of the advantages of this approach, they have the option to resolve ESI issues voluntarily without the court's intervention. This resolution can be achieved by counsel or through the assistance of a knowledgeable e-discovery attorney or mediator (e-mediator) who can facilitate resolving Rule 26(f) ESI issues between the parties. This approach has the advantage of attempting to resolve the ESI issues in a voluntary and nonbinding environment. If successful, it offers the least expensive and most timely resolution of the ESI issues. Even if some ESI issues remain

unresolved, the parties should gain a better understanding and appreciation of the ESI issues in the specific case, gain experience in resolving some of the ESI issues, and identify the reasons why the remaining issues were unresolved. The parties can also gain a longer-term educational benefit that should help them address ESI issues in subsequent cases. After attending several Rule 26(f) “meet and confer” conferences facilitated by a knowledgeable e-discovery attorney, counsel may be expected to satisfactorily resolve ESI issues in future cases without facilitation.

Conclusion

If the appointment of an increased number of e-discovery special masters becomes a trend, we might also expect a corresponding increase in the number of e-discovery mediators (e-mediators) to emerge in federal courts as a way to control the process and the costs by resolving their ESI issues voluntarily. Attorneys will gain valuable ESI knowledge and experience in the process. In addition, judges may be compelled to instruct counsel to “meet and confer” until ESI issues are resolved with or without the help of an e-discovery mediator. These “practical” reasons for cooperation in e-discovery may have an appeal to a segment of the trial bar who have viewed the The Sedona Conference Cooperation Proclamation with some skepticism.

Some practitioners may view the use of e-discovery special masters or e-mediators as an unnecessary extra layer of cost and complexity. Unless counsel have a solid foundation in information technology and understand the nuances of the technical issues surrounding the revised Federal Rules of Civil Procedure, however, they would do well to consider the protection against professional and personal sanctions that is afforded by e-discovery attorneys serving as e-discovery special masters or e-mediators during this transition period into the ESI age. This transition period was emphasized recently in the Pension Committee case,¹⁹ in which Judge Scheindlin, among other things, “redefine[d]” gross negligence in the context of discovery misconduct and issued sanctions accordingly.

The challenge posed by production and discovery of electronically stored information is not likely to go away or recede in the next decade. Instead, cases involving ESI are expected to increase in amount and complexity. Both judges and lawyers need help navigating this new environment. E-discovery special masters and e-mediators offer help in addressing these issues in the short term as well as a means of providing valuable training and experience during a potentially difficult transition period for lawyers and judges. **TFL**



Hon. Nora Barry Fischer is a judge on the U.S. District Court for the Western District of Pennsylvania. She is a Fellow of the American College of Trial Lawyers and a past president of the Academy of Trial Lawyers of Allegheny County. Judge Fischer is a graduate of Notre Dame Law School, where she assists the law faculty as a visiting

National Institute of Trial Advocacy instructor from time to time. Richard N. Lettieri (www.lettierilaw.com) is an attorney who limits his practice to electronic evidence and e-discovery. He is also a technologist who spent over two decades in technical, management, and consulting positions at IBM, PWC, and Kroll Ontrack. He is a graduate of Lafayette College and the Duquesne University School of Law and is a frequent author, speaker, and lecturer on e-discovery. The authors would like to thank Judge Fischer's law clerk, Brian Kravetz, who was responsible for editing and proofreading. He is a graduate of Penn State University and the Duquesne University School of Law, where he was an Honors Graduate and served on the Law Review.



Endnotes

¹See FED.R.CIV.P. 26(f).

²The Sedona Conference, *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

³Hon. Joy Flowers Conti and Richard N. Lettieri, *In re ESI: Local Rules Enhance the Value of Rule 26(f) “Meet and Confer,”* 49 JUDGES’ J., no. 2, 29 (2010).

⁴Hon. Shira A. Scheindlin and Jonathan M. Redgrave, *The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347 (2008).

⁵Hon. Shira A. Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 486 (2009).

⁶Hon. Shira A. Scheindlin and Redgrave, *supra* note 4.

⁷Hon. Shira A. Scheindlin, *supra* note 5.

⁸Hon. Joy Flowers Conti and Richard N. Lettieri, *E-Discovery and Pretrial Conferences: A Primer for Lawyers and Judges*, 46 JUDGES’ J., no. 3, 34 (2007).

⁹Hon. Joy Flowers Conti and Lettieri, *supra* note 3.

¹⁰Sedona Conference, *supra* note 2.

¹¹A computer forensic examiner is proficient at onsite data captures, data recovery, and forensic analysis and is also called on to create court reports, complete affidavits, and provide deposition and court testimony.

¹²*Friskit Inc. v. RealNetworks Inc.*, 499 F. Supp. 2d 1145 (N.D. Ca. 2007).

¹³*Jefferson Regional Medical Center v. Vascular & Interventional Associates Inc. et al.*, No. 2:06-cv-00439-JFC (W.D. Pa. Aug. 28, 2006).

¹⁴*Id.* at Docket No. 77.

¹⁵Hon. Shira A. Scheindlin, *supra* note 5.

¹⁶Applicants were given the opportunity to augment their answers to specific, objective questions with supplemental materials outlining the training and experience that they considered relevant.

¹⁷They can also provide links to their website, publications they have authored, and the like.

¹⁸Hon. Shira A. Scheindlin and Redgrave, *supra* note 4.

¹⁹*Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec. LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).