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E-Discovery and Class Actions: Limiting Discovery Disputes with Special Masters

Class actions are often among the most explosive, costly, and challenging lawsuits faced by lawyers, courts, and litigants. This is certainly true when it comes to discovery and e-discovery issues. Managing e-discovery is a challenge when only two parties are involved. Confronted with a class or multiple classes of plaintiffs or defendants—ranging in numbers from tens to tens of thousands—constructing a cogent and competent discovery strategy becomes a significant challenge. When faced with such cases, courts and party attorneys should consider appointing a special master, a court-sanctioned referee of sorts, to power through discovery and e-discovery issues. The court's power to appoint a special master stems from Rule 53 of the Federal Rules of Civil Procedure. A special master can assist in reducing the discovery burdens on all parties by working to lower costs, assisting with cost allocation, and aiding the court to police and address discovery abuses. The parties can, therefore, focus on the legal and factual issues actually driving a case, rather than become sidetracked by discovery disputes. To be sure, the appointment of a special master alleviates the burdens of electronic discovery in very specific ways.

First, the special master provides expert oversight that ensures that fewer mistakes are made in discovery and that any mistakes that do occur are identified and resolved earlier in the process. In any litigation, but particularly in class actions requiring nationwide searches of hundreds of custodial sites, attorneys confront the very real and risky scenario that the client(s) might forget to disclose a particularly critical data source or that a critical data source, though disclosed, may slip through the necessarily diffuse production process. At its worst, such an event may be instrumental in costing the attorney the case.¹ Even in a best-case scenario, however, such an event will reduce the personal credibility the attorney has painstakingly developed with the court and client. So both parties should ensure that they have taken all appropriate and reasonable steps in discovery as the consequences of failing

to do so can be quite painful. By agreeing to the appointment of a special master to oversee the discovery process in a neutral manner, litigants demonstrate that they are committed to participating in discovery in good faith.

Second, the special master facilitates agreement and compromise between parties to mutual advantage. Because the stakes are so high in class-action litigation, most issues, no matter how minute, are typically bitterly contested. And there are often expensive world-class experts on both sides who issue opinions over the smallest details. Yet compromise is possible because the facts regarding e-discovery issues are often verifiable, that is, binary 1s and 0s simply do not lie. Either the data was deleted or it was not; either the court allowed the parties to encrypt the data or it did not; either a search costs a certain amount or it does not; either a search term exists in the dataset or it does not. Indeed, electronic discovery is largely a binary logic operation that is not subject to the factual vagaries of disputed wind speeds, weight levels, or pre-existing conditions. So in this respect, the special master can expeditiously resolve many issues so that time and money can be spent litigating the substance of the case. A simple fact is that without special masters, parties end up wasting vast amounts of resources. Put plainly, the discovery process need not be as burdensome as it has become. As discovery must be cooperative to succeed, the neutral special master helps to ensure that an adversarial posture (more suitable for the trial stage) benefits neither party in discovery. The special master thus provides parties an important opportunity to resolve disputes without either party compromising its litigation strategy.

Third, the special master assists with the creation of a logical discovery plan, such as the scope of preservation. In class actions, custodians often number in the thousands, with hundreds of thousands of computers, smart phones, and other devices in play. Under these circumstances, the special master can assist the parties, from the outset, to identify custodians and the likely sources

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of relevant electronically stored information, as well as the steps and costs required to access such information. Failing to employ these crucial measures is the legal equivalent of *seppuku* (ritual suicide). Not only will data likely be lost or deleted before it is eventually identified as relevant, but the parties may spend months litigating an issue for which they do not fully understand the universe of relevant information. Working alongside the parties, the special master is better able to grasp the universe of information within the parties' possession to develop preservation plans and litigation holds so that key documents do not go missing. This prevents costly battles over destroyed evidence that routinely distract from the substantive case. By having a special master involved throughout the discovery process, parties will not only save time and money, but will also better achieve their objectives.

Although desirable, special masters are not always essential to the e-discovery process. For instance, if from day one the parties have been reasonable and cooperative, then there would likely be no need for special masters to guard against discovery disputes. Similarly, hiring skilled, experienced e-discovery attorneys may obviate the need for special masters, since they would likely appropriately handle any complicated issues that arise. And for at least some cases, there may not be that much e-discovery at issue to warrant using a special master. Further, a proactive judge who can stave off clashes between the parties would not need the help of a special master. It should be noted that the court or a neutral party, such as an arbitrator, appoints special masters. But the parties typically have an opportunity to influence the process or raise objections to the appointment.² So even where essential, parties may oppose a special master's appointment for any number of reasons, including if the cost becomes prohibitive, if the parties each retain their own e-discovery experts, or if there is any perceived bias on the part of a proposed special master.

However, recent decisions in certain large class-action cases point to the dire need for special masters' expertise in streamlining the complexities of electronic discovery. For instance, in *In re Pradaxa Products Liability Litigation*, a class-action product liability case, a Seventh Circuit District Court imposed financial sanctions against a pharmaceutical company for, among other things, the failure to preserve certain records and to implement adequate litigation holds.³ The plaintiffs presented the court with a detailed list of the defendants' ongoing discovery violations, which included the failure to issue adequate litigation holds for certain employees and to produce relevant documents—in violation of the case management order.⁴ The court ruled in favor of the plaintiffs characterizing the defendants' litigation hold as "grossly inadequate for a litigation of [such] scope and size."⁵

As the court explained, the defendants' "bad faith" prejudiced the plaintiffs, as it resulted in "countless hours of chambers time and courtroom time discussing and advocating issues that did not need to occur."⁶ The court imposed financial sanctions as a means to curb the defendants' repeated violations.⁷ In *In re Pradaxa*, the appointment of a special master at the outset of the litigation could have facilitated cooperation among the parties. Specifically, a special master could have determined the proper scope of preservation, thereby reducing the burden on both plaintiffs and defendants while keeping the court informed of any discovery abuses. Although at various points, both parties requested, and the court granted, the appointment of a special master to address certain discrete issues, the special master should have been authorized to work with the parties from the start to avoid unnecessary disputes. By contrast, it was months into discovery before the plaintiffs requested the appointment of a special master to attend all corporate depositions, citing "improper instructions not to

answer questions and the recent loss of two months of deposition time as a result of the defendants' document production problems.⁹⁸ Similarly, the defendants later requested a special master to "mediate discovery disputes."⁹⁹

As noted, the appointment of a special master at the outset, was needed to mitigate these discovery abuses. The special master is able to work with both parties by offering creative solutions to problems that arise. And with the sheer breadth of Rule 53, special masters may be appointed for any number of reasons.¹⁰ In fact, special masters typically assist with four key areas: facilitating the electronic discovery process, monitoring discovery compliance, adjudicating legal disputes, and adjudicating technical disputes and compliance.¹¹ *In re Pradaxa* presents very starkly the costs of not fully utilizing a special master, who, unlike most litigants, is able to approach discovery in a fair and common-sense manner, eliminating both duplicative discovery and fishing expeditions, thereby saving the parties (and the court) time and money through increased efficiency and cooperation.

Similarly, another case, *Romero v. Allstate Ins. Co.*, points to the need for special masters to facilitate the electronic discovery process while addressing the parties' privacy concerns.¹² In *Romero*, defendant Allstate Insurance Company opposed a motion to compel, which would have required it to confer with the class-action plaintiffs over electronic search terms.¹³ *Romero*, an employment class action, involved defendants' alleged attempt to transmute employees' status to independent contractor, depriving them of their benefits.¹⁴ The plaintiffs' motion to compel sought to force the parties to cooperate and avoid an e-discovery trial.¹⁵ Allstate, however, was not keen on disclosing to the class-action plaintiffs keyword search terms used by Allstate in prior matters or how those prior searches were performed, and so refused to confer.¹⁶ Allstate contended its keyword search history constituted privileged attorney work-product and, therefore, was protected from disclosure.¹⁷ Allstate's argument fell on deaf judicial ear, and the *Romero* court ruled in large part against Allstate.¹⁸

The *Romero* court found that the Federal Rules of Civil Procedure, specifically Rule 26(f)'s meet and confer requirements, required Allstate to participate in the requested meet and confer and share the information sought.¹⁹ In this regard, while Rule 26(f) does not necessarily require the parties to adopt the most cost-effective or logical plan, it does require the parties to discuss "any issues about disclosure or discovery of [electronically stored information], including the form or forms in which it should be produced."²⁰ The *Romero* court held that the broad scope of Rule 26(f) made it reasonable to require Allstate to meet and confer on search terms, date ranges and methodology.²¹ Thus, in a class action, as with other federal actions, Rule 26(f) requires that the parties meet and confer to develop a discovery plan. As a result, if the parties cannot or will not "play nice" in the electronic discovery "sandbox," they will suffer the consequences.

Further, in a situation like that faced by the *Romero* parties, a special master appointed to oversee the document production may well have enabled the class-action plaintiffs to avoid the need for the motion to compel, while simultaneously allowing Allstate to protect its confidential information and avoid the court's scorn. Specifically, the addition of a special master to help the parties develop a joint discovery plan would have allowed Allstate to provide its confidential information *in camera* to the special master.

The special master could then incorporate the information in the joint plan, giving the class-action plaintiffs what they needed while helping Allstate avoid embarrassment and wasted time.

Finally, in the wake of *Wal-Mart Stores, Inc. v. Dukes*, a sex discrimination case involving a challenge to Wal-Mart's pay and promotion practices, class certification now poses new challenges to plaintiffs, which can be ameliorated by using a special master.²² In its decision, the U.S. Supreme Court called for a "rigorous analysis" to ensure that class certification is consistent with Federal Rule of Civil Procedure 23(a).²³ This requires a far more efficient discovery process—one in which a special master would be of tremendous value. To prevail, plaintiffs must now demonstrate via additional discovery that they meet each requirement of Rule 23. Here, a special master is uniquely positioned to reduce the plaintiffs' discovery burdens while being fair and balanced to both parties.

In complex matters, including class actions, the court or the parties should strongly consider placing the oversight and control of the litigation in the hands of a special master. The special master, having the required technical and legal expertise and experience, can look at the 1s, the 0s, and the legal arguments to separate fact from fiction in a more expedient manner without the need for costly hearings, additional experts, and other expenses. Overall, as a neutral party, the special master has more credibility to employ cost-effective and efficient strategies to reduce the discovery burdens of both the court and the litigants. ☉

Endnotes

¹See, e.g., *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (defendant sanctioned and ordered to pay discovery costs following a court finding of discovery abuses).

²Before appointing a special master, the court must give the parties notice and the opportunity to be heard. Fed. R. Civ. P. 53(b) (1). The order appointing the special master must include the following: (1) the special master's duties, such as any investigation or enforcement duties as well as any limits on the special master's authority; (2) circumstances in which the special master may communicate *ex-parte* with the court or parties to the case; (3) the nature of the materials to be preserved and filed as the special master's record; (4) procedures such as time limits, method of filing the record, etc.; and (5) the basis, terms and procedure as to the special master's compensation. Fed. R. Civ. P. 53(b)(2).

³*In re Pradaxa Prod. Liab. Litig.*, MDL No. 2385, 2013 U.S. Dist. LEXIS 173674, *46 (S.D. Ill. Dec. 9, 2013).

⁴*Id.*

⁵*Id.*

⁶*Id.* at 69-70.

⁷*Id.*

⁸*Id.* (Case Management Order 41, Appointment of Special Master).

⁹*Id.* (Case Management Order 43, Discovery Special Master).

¹⁰Specifically, Rule 53 allows a court to appoint a special master to (1) perform duties consented to by the parties; (2) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by either (i) some exceptional condition, or (ii) the need to



Sections and Divisions

BANKRUPTCY LAW SECTION

On June 6, the Bankruptcy Law Section cosponsored the event International Bankruptcy Law and Practice. The Center for American and International Law was pleased to again offer this innovative program. Topics included issues and dilemmas posed by cross-border and multinational cases, claims against the bankruptcy estate, and the jurisdictions of bankruptcy courts. Bankruptcy Judges Alan Trust, Leif Clark, Harlin Hale, Stacy Jernigan, and Richard Schmidt spoke on international bankruptcy practice

VETERANS AND MILITARY LAW SECTION

On June 6, the Veterans and Military Law Section co-sponsored the 6th Annual Veterans' Legal Assistance Conference and Training: An Opportunity to Serve Those Who

Served Our Country. The event was designed for lawyers, law students, veterans, policy makers and other service professionals and provided a forum for discussion of critical legal issues facing our veterans, changes in processing claims at the Department of Veterans Affairs nationally and locally, consumer issues affecting veterans, nuts and bolts of practice before the Board of Veterans Appeals, and tips every lawyer should know in handling common veterans legal issues from the Uniformed Services Employment and Re-employment Rights Act to family law matters. The conference also included training for lawyers interested in representing veterans *pro bono* in claims for service-connected disability benefits. Conference organizers included Homeless Persons Representation Project, Pro Bono Resource Center of Maryland, Uni-

versity of Baltimore School of Law, and the Veterans' Affairs and Military Law Committee of the Maryland State Bar Association.

SECTION ON TAXATION

On June 25, the Section on Taxation presented the Careers in Tax Law luncheon program at George Washington University as part of the 2014 FBA Summer Law Clerk Program. The program featured a panel discussion introducing students to the different career options and experiences through tax law. Speakers included Judge Mark V. Holmes, U.S. Tax Court; Adam Gropper, Legislation Counsel, Joint Committee on Taxation; Fred Murray, Managing Director, Grant Thornton LLP; and Marissa K. Rensen, Attorney, IRS Office of Chief Counsel. The panel was moderated by Mark C. Milton, Trial Attorney, DOJ Tax Division. ☉

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perform an accounting or resolve a difficult computation of damages; or (3) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district. Fed. R. Civ. P. 53(a)(1).

¹¹See The Honorable Shira A. Scheindlin and 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).

¹²See *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 106 (E.D. Pa. 2010).

¹³See *id.* at 109-10.

¹⁴*Id.* at 99.

¹⁵*Id.* at 100.

¹⁶*Id.* at 109.

¹⁷*Id.*

¹⁸*Id.* at 111.

¹⁹*Id.* at 109-10.

²⁰Fed. R. Civ. P. 26(f)(3)(C).

²¹*Romero*, 271 F.R.D. at 109-10.

²²See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

²³*Id.* at 2551.

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