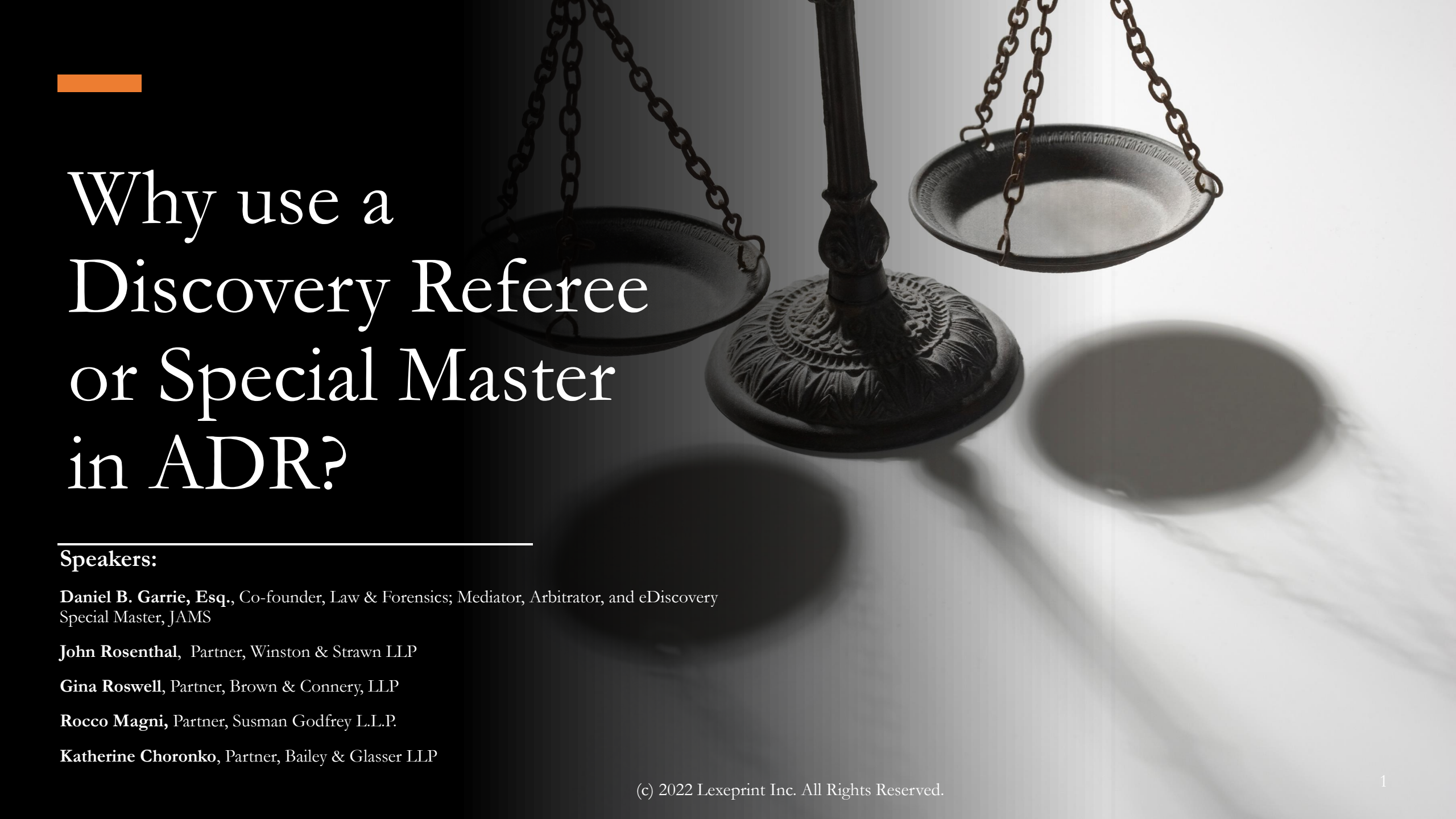


Why use a Discovery Referee or Special Master in ADR?

Speakers:

Daniel B. Garrie, Esq., Co-founder, Law & Forensics; Mediator, Arbitrator, and eDiscovery Special Master, JAMS

John Rosenthal, Partner, Winston & Strawn LLP

Gina Roswell, Partner, Brown & Connery, LLP

Rocco Magni, Partner, Susman Godfrey L.L.P.

Katherine Choronko, Partner, Bailey & Glasser LLP

(c) 2022 Lexeprint Inc. All Rights Reserved.

Disclaimer



This is not legal advice, nor should it be considered legal advice.



This presentation and the comments contained therein represent only the personal views of the participants, and do not reflect those of their employers or clients.



This presentation is offered for educational and informational uses only.

(c) 2022 Lexeprint Inc. All Rights Reserved.

Speakers



Daniel B. Garrie, Esq.
Co-founder, Law & Forensics
Mediator, Arbitrator, and eDiscovery
Special Master, JAMS



John Rosenthal
Partner
Winston & Strawn LLP



Gina Roswell
Partner
Brown & Connery, LLP



Rocco Magni
Partner
Susman Godfrey L.L.P.



Katherine Charonko
Partner
Bailey & Glasser LLP

(c) 2022 Lexeprint Inc. All Rights Reserved.

Agenda

- Introduction to Special Masters
- Types of Special Masters & What They Do
- Advantages of Appointing a Special Master
- Considerations when Selecting and Appointing Special Masters
- Special Masters in Federal Courts: The Applicable Rules
- 5 Commandments for Lawyers Working with Special Masters in Federal Court

(c) 2022 Lexeprint Inc. All Rights Reserved.



Introduction to Special Masters

(c) 2022 Lexeprint Inc. All Rights Reserved.



What is a Special Master?

- A special master is someone that is:
  - Appointed by a court, arbitrator, or other decision-making body, to carry out some sort of action on its behalf, typically to make factual determinations in complicated cases.
- They serve as "quasi-judges" with specifically defined duties which relieve the court of its functions beyond its core responsibilities.
  - Special Masters carry out direct actions on the part of the court
- A special master is also commonly known as a "master" or "referee".

(c) 2022 Lexeprint Inc. All Rights Reserved.


This Photo by Unknown author is licensed under CC BY-SA.

Why is a Special Master needed?

- Neutral expertise with knowledge of technology allows the Special Master to decide what information is readily accessible and what is beyond the scope of the request.
- A technologically adept Special Master knows the most cost-effective place and way to find relevant information.
- Changes in technology also changes what is readily available.

(c) 2022 Lexeprint Inc. All Rights Reserved.



Types of Special Masters & What They Do

(c) 2022 Lexeprint Inc. All Rights Reserved.



Mediative Special Master

- Facilitates the dialogue regarding preservation accords, production agreements, search and retrieval protocols, and other arrangements regarding the discovery of ESI.
- **Benefits:**
  - Minimize time and resources.
  - Resolve disputes over discovery issues.
  - Special knowledge of technology and discovery issues may allow the master to steer the conversation.
  - Help reveal what sources needed to be preserved and/or produced in relation to the newly revised Federal Rules of Civil Procedure and their focus on proportionality in discovery.

(c) 2022 Lexeprint Inc. All Rights Reserved.



Adjudicative Special Master

- May be appointed to assist the court by making findings and recommendations regarding disputes related to ESI.
- •**Benefit**
  - Helps keep dockets clear by keeping discovery disputes out of court
  - May uncover improper conduct that the court does not have the knowledge and/or skills to uncover.
  - Can address pretrial and post-trial matters
  - Parties may object to a Special Masters conclusions or findings of fact.
  - See Fed. R. Civ. P. 53(f)(2)
- **Case Law:**
  - *Apantac, LLC v. Avitech Int'l Corp.*
  - The court turned to an adjudicative special master to "reduce friction" in the proceedings and "facilitate forward progress".

(c) 2022 Lexeprint Inc. All Rights Reserved.



Advantages of Appointing a Special Master

(c) 2022 Lexeprint Inc. All Rights Reserved.


This Photo by Unknown Author is licensed under CC BY

Less Formality

- Special Masters, unlike judges, are not judicial officers with a formal court docket, they can:
  - respond to requests made on short notice
  - attend hastily requested hearings among lawyers,
  - be more flexible with their schedules, and
  - have one-party conversations with attorneys to help reach a resolution faster

(c) 2022 Lexeprint Inc. All Rights Reserved.



This Photo by Unknown Author is licensed under CC BY

Efficient

- Special Masters can help avoid unnecessary delays (such as those caused by the COVID-19 pandemic).
  - Judicial resources are limited; appointing a Special Master can help move your case along more effectively.
- Technology:
  - Knowledge of ESI repositories and their physical environments.
  - Includes mobile, social and cloud.

(c) 2022 Lexeprint Inc. All Rights Reserved.

How can a special master help?



Type of dispute or nature of dispute where specialized knowledge of eDiscovery issues would assist court in some fashion



Nature of case requires additional judicial resources to help resolve matters in a timely manner



Independent and knowledgeable master could provide guidance to parties informally resolve matters without formal court involvement

(c) 2022 Lexeprint Inc. All Rights Reserved.



Special Master's Authority

In General

- Regulate all proceedings;
- Take all appropriate measures to perform the assigned duties fairly and efficiently; and
- If conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

Sanctions

- The master may by order impose on a party any non contempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

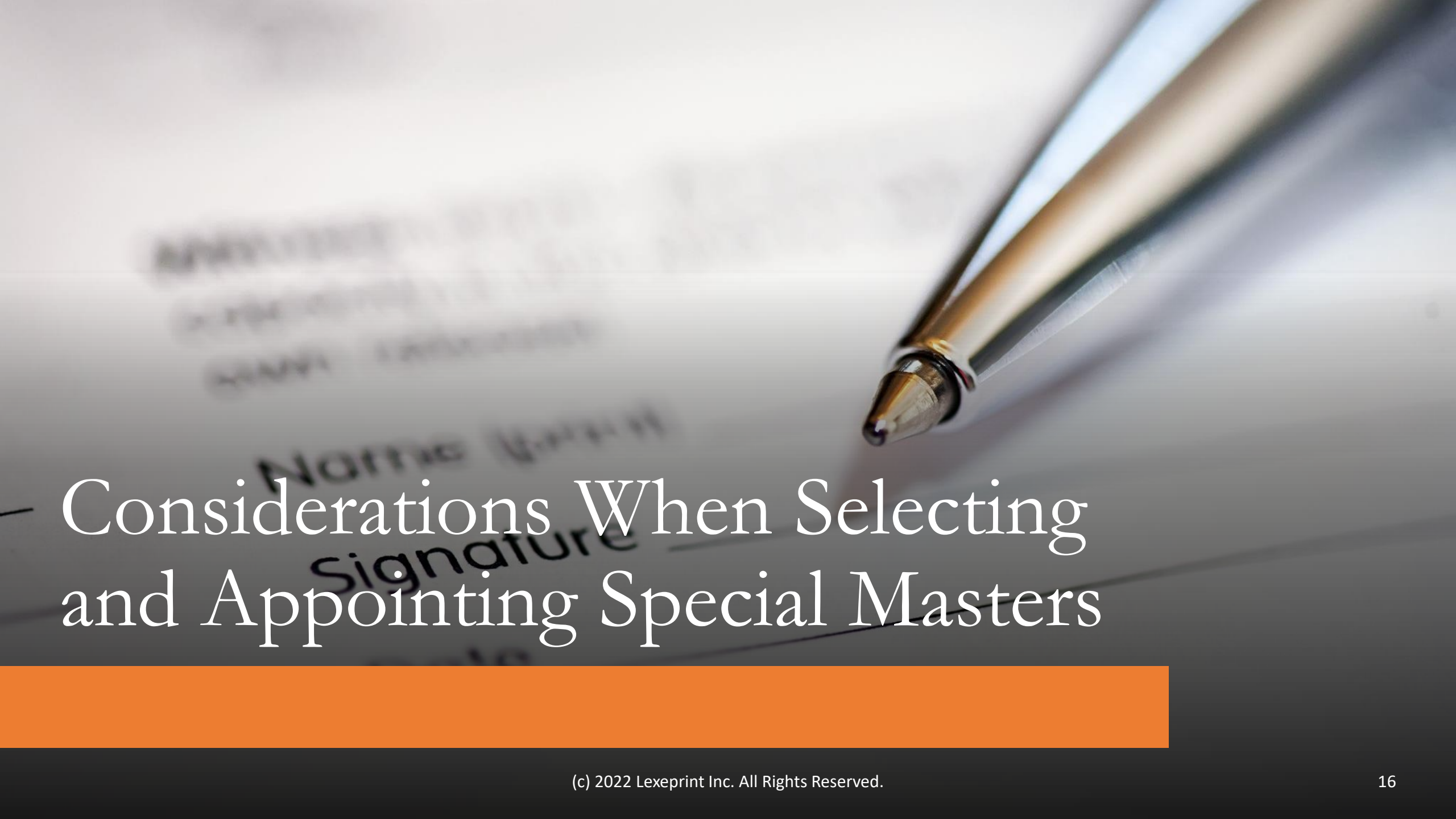
Master's Orders

- A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

Master's Reports

- A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(c) 2022 Lexeprint Inc. All Rights Reserved.



Considerations When Selecting and Appointing Special Masters

(c) 2022 Lexeprint Inc. All Rights Reserved.



Considerations When Selecting & Appointing Special Masters

- Is the need mediative, investigative or adjudicative in nature?
- What is more critical: knowledge of the law, knowledge of the technology, or both?
- Does the Master's experience match the criteria necessary to assist with the case at bar?

(c) 2022 Lexeprint Inc. All Rights Reserved.



Considerations When Selecting & Appointing Special Masters (cont.)

- Will the Special Master require additional support?
- Special Master's Availability
  - Confirm whether the Master would be available for the entire time they would be needed
- Check for conflicts and consider how your jurisdiction and court will address the issue of Special Master selection.
- Take time to carefully draft the Order of Reference or Order of Appointment.

(c) 2022 Lexeprint Inc. All Rights Reserved.


This Photo by Unknown Author is licensed under CC BY-SA-NC

Considerations When Selecting & Appointing Special Masters (cont.)

- Describe the procedure for issuing, correcting, and reviewing the Referee's orders.
- Authorize the Referee or Master to act flexibly and informally
  - Letter briefs
  - Telephonic hearings

(c) 2022 Lexeprint Inc. All Rights Reserved.



Considerations When Selecting & Appointing Special Masters (cont.)

- Accepting the Wrong Special Master:
  - Overly broad searches
  - Lengthy proceedings
  - Costs of expert testimony
  - Extra cost from the special master hiring additional experts to advise their decision

(c) 2022 Lexeprint Inc. All Rights Reserved.



Special Masters in Federal Courts: The Applicable Rules

(c) 2022 Lexeprint Inc. All Rights Reserved.



The Federal Rules of Civil Procedure

- **Rule 53** of the Federal Rules of Civil Procedure (FRCP) outlines:
  - The conditions and requirements for the use of a Special Master
  - Considerations for the cost of appointing a Special Master
  - The Special Master's authority and responsibilities
  - What parties may do once a Special Master submits their order, report, or recommendations to the court

(c) 2022 Lexeprint Inc. All Rights Reserved.



Rule 53: Appointment

- Appointment of a Master may be voluntary or involuntary.
- **Rule 53(a)(1)(A)** allows the court to appoint a Master to "perform duties consented to by the parties"
- **Rule 53(a)(1)(B)** provides that a court may appoint a Master to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
  - (i) some exceptional condition; or
  - (ii) the need to perform an accounting or resolve a difficult computation of damages"
- **Rule 53(a)(1)(C)** allows appointment of a Master to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district"

(c) 2022 Lexeprint Inc. All Rights Reserved.



Rule 53: Costs of Appointing a Special Master

- **Rule 53(g)(2)** requires compensation for the Special Master to be paid:
  - "by a party or parties; or"
  - "from a fund or subject matter of the action within the court's control."
- **Rule 53(a)(3)** requires the court to:
  - consider the fairness of imposing expenses on the parties, and
  - protect against unreasonable expenses or delay before appointing a Special Master
- **Rule 53 (g)(3)** authorizes the court to allocate payment among the parties "considering the nature and amount in controversy, the parties' means, and the extent to which any party is more responsible than other parties for reference to a master."
- Courts are required to consider the parties' ability to pay for a Special Master prior to appointment
- Compensation of the Master is fixed in the Order of Appointment

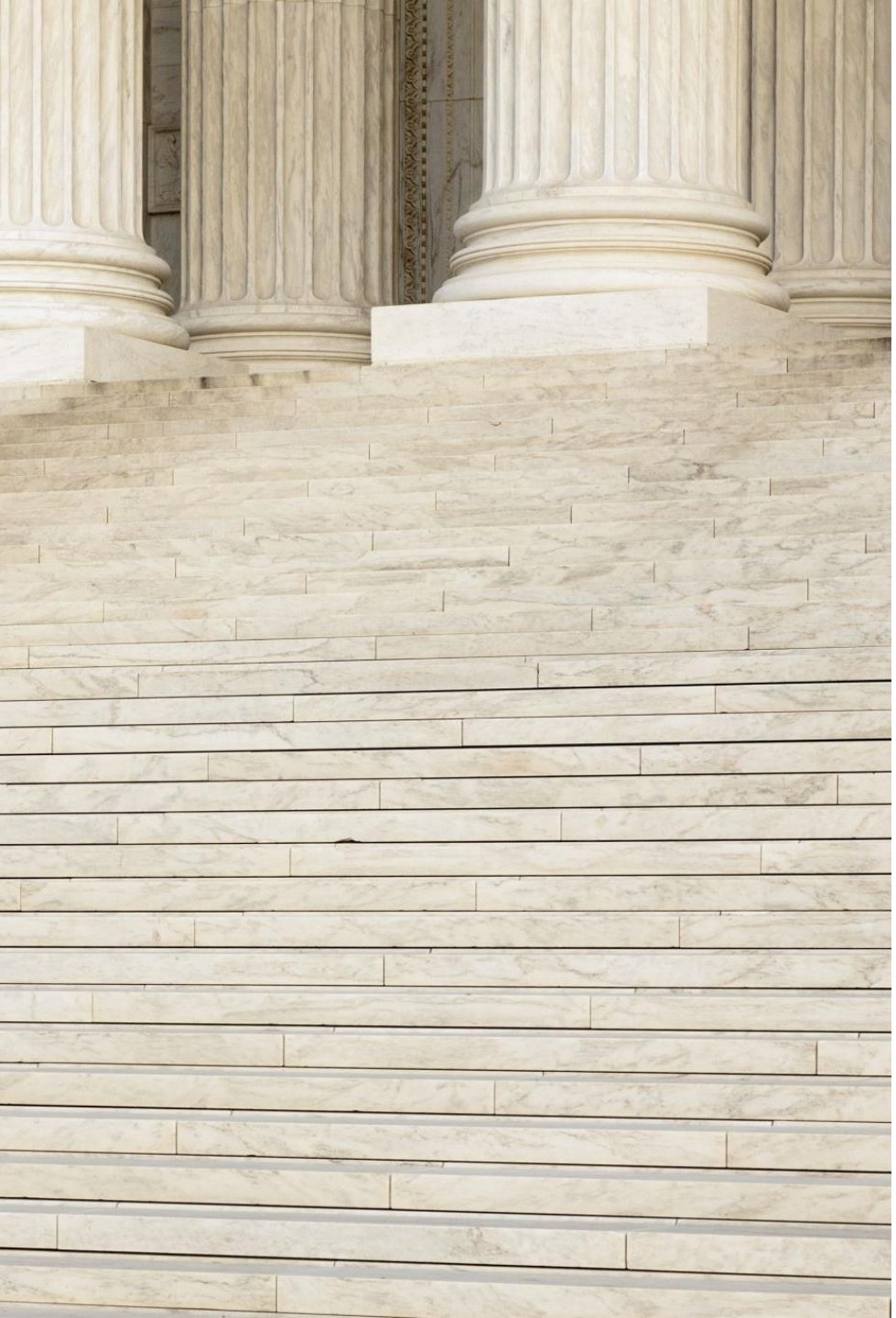
(c) 2022 Lexeprint Inc. All Rights Reserved.



Rule 53: Scope of the Special Master's Authority

- **Rule 53(c)(1)** specifies that unless a Master's appointing order specifies otherwise, the Master may:
  - "regulate all proceedings;
  - take all appropriate measures to perform the assigned duties fairly and efficiently; and
  - if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence."
- **Rule 53(c)(2)** enables Masters to impose noncontempt sanctions and to recommend contempt sanctions against parties, as well as sanctions against nonparties.

(c) 2022 Lexeprint Inc. All Rights Reserved.



Rule 53: Parties' Right to a Hearing & Ability to Object or Move to Adopt or Modify

- **Rule 53(f)(1):**
  - requires the court to "give the parties notice and an opportunity to be heard",
  - allows it to receive evidence, and
  - enables it to adopt or affirm, modify, wholly or partly reject or reverse, or resubmit the Master's order, report or recommendations to the Master with instructions

(c) 2022 Lexeprint Inc. All Rights Reserved.



This Photo by Unknown Author is licensed under CC BY-SA

Rule 53: Parties' Right to a Hearing & Ability to Object or Move to Adopt or Modify

- **Rule 53(f)(2)** authorizes parties to:
  - file objections, motions to adopt, or motions to modify the Master's order, report or recommendations
  - This must be done within 21 days of a copy being served onto the party, unless the court sets a different time

(c) 2022 Lexeprint Inc. All Rights Reserved.



5 Commandments for Lawyers Working with Special Masters in Federal Court

(c) 2022 Lexeprint Inc. All Rights Reserved.



1. Cooperation is crucial!

- Communicate effectively and cooperate with your special master and opposing parties.
- Effective cooperation prevents potential issues and tensions when working together.
- Building trust is one of the best ways to guarantee the case is concluded as smoothly as possible.

(c) 2022 Lexeprint Inc. All Rights Reserved.



This Photo by Unknown Author is licensed under CC BY-SA

2. Trust but Verify

- Confirm that there is an ESI protocol that you understand
  - i.e., how the protocol works, what it will cost, the role of the special master
- Make sure that there is protective order in place and review it with your special master
- Ensure your special master narrows their research to prevent additional case expenses and lengthy hearings

(c) 2022 Lexeprint Inc. All Rights Reserved.



3. Do not be Afraid of Seeking Help from Experts

- Certain technology can be difficult to understand, so it is crucial for counsel to be willing to hire experts who are familiar with the technology whenever necessary

(c) 2022 Lexeprint Inc. All Rights Reserved.



4. Always Ask Questions

- Attorneys are sometimes reluctant to ask questions and request clarification, but in the interest of saving time and money, remember that it is okay to ask questions for clarification if you're unsure what is being told to you by the special master.

(c) 2022 Lexeprint Inc. All Rights Reserved.



5. Be Aware of Your Communications

- Importantly, do not engage in any ex-parte communications with the special master
- Equally as important, double check all communications to ensure they are being sent to the correct people.

(c) 2022 Lexeprint Inc. All Rights Reserved.



(c) 2022 Lexeprint Inc. All Rights Reserved.

Contact Us



Daniel B. Garrie
Email: daniel@lawandforensics.com
URL: www.lawandforensics.com



John Rosenthal
Email: jrosenthal@winston.com
URL: https://www.winston.com



Rocco Magni
Email: rmagni@susmangodfrey.com
URL: https://www.susmangodfrey.com/attorneys/rocco-magni/



Gina Roswell
Email: groswell@brownconnery.com
URL: https://brownconnery.com/attorney/gina-roswell/



Katherine Charonko
Email: kcharonko@baileyglasser.com
URL: https://www.baileyglasser.com

(c) 2022 Lexeprint Inc. All Rights Reserved.



Daniel B. Garrie, Esq.
Law & Forensics LLC – Co-Founder
JAMS – Special Master, Neutral, Arbitrator
Contact:
W: (855) 529-2466
E: daniel@lawandforensics.com
URL: https://www.lawandforensics.com/

LAW & FORENSICS
A Global Legal Engineering Firm

B.A., Computer Science, Brandeis Uni.
M.A., Computer Science Brandies Uni.
J.D., Rutgers School of Law

Daniel Garrie, Esq. is the Co-Founder of Law & Forensics LLC, where he heads the Computer Forensics and digital discovery Cybersecurity teams. Daniel has been a dominant voice in the computer forensic and cybersecurity space for the past 20 years, as an attorney and technologist. He is an adjunct professor at Harvard for Computer Forensics and prior to Law & Forensics, he successfully built and sold several technology start-up companies.

Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. He is a mediator, arbitrator, and e-discovery special master for JAMS and is a partner and head of the Cybersecurity at Zeichner, Ellman & Krause LLP. Daniel has both a Bachelor's and a Master's degree in computer science from Brandeis University, as well as a J.D. from Rutgers Law School.

Daniel has led cyber and forensic teams in some of the most visible and sensitive cyber incidents in the United States. He and his team have worked for two of the top five banks in the globe, and dozens of the largest private and public companies in the world. In addition, Daniel has been awarded several patents for advanced cybersecurity and forensic platform he built with his team that is currently used in the industry, TableTop.AI, CustodyTrack.IO, and Forensic Scan.

Daniel is also well-published in the cybersecurity space and has authored more than 200 articles and books. His work is cited by Black's Law Dictionary 10th Ed. In defining the terms "software", "internet", and "algorithm." Lastly, he has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

(c) 2022 Lexeprint Inc. All Rights Reserved.



John Rosenthal
Winston & Strawn LLP – Partner
Contact:
W: (202) 282-5785
E: jrosenthal@winston.com
URL: https://www.winston.com

WINSTON & STRAWN LLP

John Rosenthal represents clients in an array of complex antitrust and litigation matters. His practice also involves counseling clients on a variety of trade regulation, trademark, and commercial issues. *Chambers USA* highlights his abilities as a "very strong litigator" whose "depth of intelligence about the market is unparalleled." He also acts as national e-discovery counsel for numerous corporations.

John is a former steering committee member of Working Group 1 of the Sedona Conference on Best Practices for Electronic Discovery and Records Management, a group of lawyers, judges, and vendors focusing on the development of the law regarding electronic discovery and retention issues. John is also a participant in Working Group 6 of the Sedona Conference International Electronic Information Management, Discovery and Disclosure, which focuses on international issues relating to disclosure, cross-border discovery, and privacy.

Experience:
- Antitrust Litigation
- Complex Commercial Litigation
- Compliance and Counseling
- eDiscovery and Information Governance
- Government Investigations
- Privacy and Data Security

(c) 2022 Lexeprint Inc. All Rights Reserved.



Gina Roswell
Brown & Connery, LLP – Partner
Contact:
W: 856-854-8900
E: groswell@brownconnery.com
URL: https://brownconnery.com/attorney/gina-roswell/

Gina M. Roswell is a partner with the firm and concentrates her practice in civil litigation on behalf of individuals, public entities, small businesses and large, international corporations. Her practice includes complex commercial and employment disputes, product liability claims, subrogation actions and personal injury matters.

Ms. Roswell has substantial litigation experience in both Federal and State courts in New Jersey and Pennsylvania, handling a variety of matters, including contract and insurance disputes, product liability defense, fraud and deceptive practices, personal injury defense, insurance defense and public entity subrogation and tort claims. Ms. Roswell also defends individuals and management in employment related matters, including claims of discrimination, harassment, hostile work environment, retaliation and whistleblower claims.

While in law school, Ms. Roswell served as the Research Editor for the 2005-2006 Hunter Moot Court Board.

Ms. Roswell is on the Board of Directors for NEST, International.

(c) 2022 Lexeprint Inc. All Rights Reserved.



Rocco Magni
Susman Godfrey L.L.P. – Partner
Contact:
W: (713) 653-7861
E: rmagni@susmangodfrey.com
URL: https://www.susmangodfrey.com/attorneys/rocco-magni/

Mr. Magni is an accomplished trial lawyer with judgment and skills well beyond his years. He has already achieved significant trial victories—over more than 100 days of trial time—with hundreds of millions of dollars at stake in each. Most recently, Mr. Magni helped secure a record $706.2 million verdict after a seven-week jury trial. Mr. Magni has also taken and defended depositions across the United States and abroad and argued hearings—including on dispositive motions—in state courts, federal courts, and in arbitration.

Mr. Magni achieves significant results by combining this experience with his creative thinking and ability to make even the most complex concepts easily understood by his audience.

The legal profession has recognized Mr. Magni's impact in the courtroom. He was recognized by Best Lawyers: Ones to Watch for Commercial Litigation, Intellectual Property Law, and Litigation-Intellectual Property (2021-2022.). In 2019, Mr. Magni was named a Rising Star in the Trials category by Law360, an honor bestowed upon only five lawyers in the country. And both the Texas Bar Foundation and American Bar Foundation have named Mr. Magni a Fellow, an honor reserved for the top 1/3rd of 1 percent of Lawyers in Texas and top 1 percent of lawyers in the nation, respectively. Prior to joining Susman Godfrey, Mr. Magni was ranked fourth in his class at the University of Texas School of Law and clerked for former Chief Judge of the Fifth Circuit Court of Appeals, the Honorable Edith H. Jones.

(c) 2022 Lexeprint Inc. All Rights Reserved.



Katherine Charonko
Bailey & Glasser LLP – Partner
Contact:
E: kcharonko@baileyglasser.com
W: (304) 345-6555
URL: https://www.baileyglasser.com

BAILEY & GLASSER LLP

Kate Charonko assists clients and attorneys implement structured and conceptual analytic functionality for numerous aspects of e-Discovery, including document review strategy, use of technology and technology assisted review (TAR), collection and preservation strategy, Electronically Stored Information (ESI) protocols, and training and implementation of e-Discovery practices.

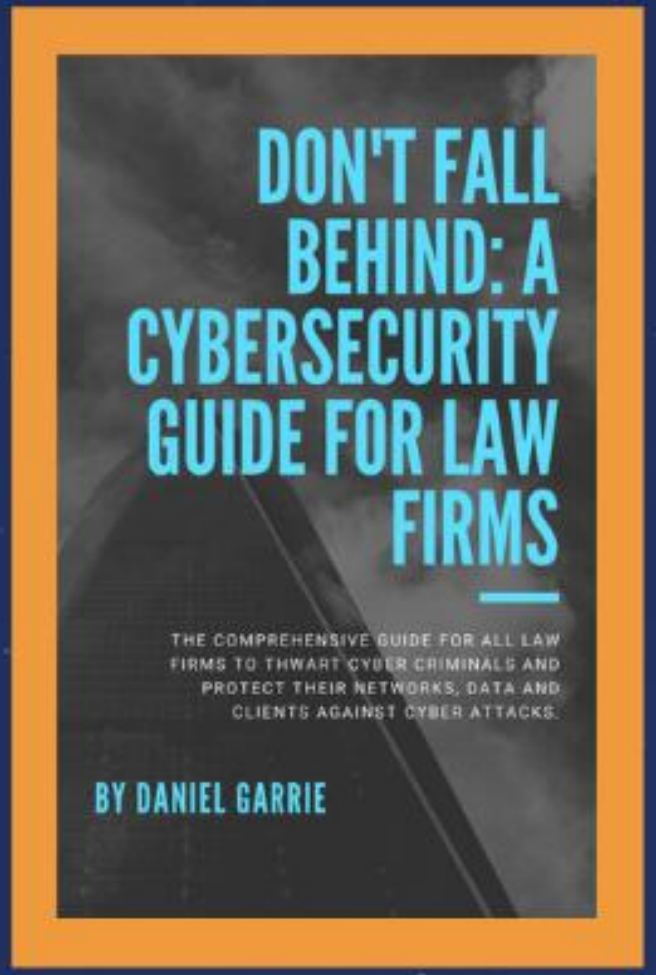
She provides consulting services for all Bailey Glasser e-Discovery case managers and attorney case teams to drive analytics adoption at the firm, resulting in significant time and cost savings to clients.

In addition to her e-Discovery practice, Kate serves as part of Bailey Glasser's multidistrict litigation (MDL) teams focusing on automotive and medical device product liability actions across the country. She was appointed to serve as liaison director of e-Discovery and ESI on several MDL leadership committees and creates case-specific document review workflows.

Kate frequently speaks on various e-Discovery topics, including ESI, TAR, and legal ethics. In 2019, she was invited to share her "lessons learned" about her path to becoming a lawyer in Nora Riva Bergman's book, "50 Lessons for Women Lawyers From Women Lawyers."

(c) 2022 Lexeprint Inc. All Rights Reserved.

A CYBERSECURITY GUIDE FOR LAW FIRMS



"NO ONE IS IMMUNE TO A CYBERSECURITY INCIDENT. EVERY INDUSTRY AND BUSINESS SECTOR—INCLUDING THE LEGAL PROFESSION—IS A TARGET FOR HACKERS AND CYBER CRIMINALS. AS EARLY AS 2009, THE FBI FLAGGED THE LEGAL INDUSTRY AS A GROUP THAT WAS VULNERABLE TO CYBER ATTACKS, ISSUING AN ADVISORY THAT HACKERS WERE INCREASINGLY TARGETING LAW FIRMS."



AVAILABLE ON:

amazonkindle AND PAPERBACK!

Buy Now

THE COST OF RULES, THE RULE OF COSTS: A PRACTICAL PRACTITIONER'S PERSPECTIVE

Sarah L. Cave†

TABLE OF CONTENTS

INTRODUCTION 177
I. THE WAY WE WERE: 1938 179
II. THE WAY WE ARE: 2018 179
III. THE WAY FORWARD: POTENTIAL REFORMS 180
A. *Reform Objectives* 180
B. *Reform Proposals* 181
1. Eliminate, or Limit, Certain Discovery Devices 181
2. The Judge Who Will Try the Case is the Judge Who Oversees Discovery 181
3. Increase Education About E-Discovery 182
4. Require In-Person Meet-and-Confer Sessions for Discovery Disputes 183
5. Streamline Dispositive Motion Practice 184
CONCLUSION 185

INTRODUCTION

From the perspective of courts, lawyers, and litigants in 1938, the new Federal Rules of Civil Procedure (Federal Rules) set out to advance the noble goal of "promot[ing] efficiency and lower[ing] litigation costs."[1] As Judge Marrero has noted, there were several means to this end:

(1) a "fuller factual record" would narrow "pretrial preparation to disputed material issues";

---

† Sarah L. Cave is a partner at Hughes Hubbard & Reed LLP based in New York City.

1 Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1602 (2016).

(2) transparency into each side's strengths and weaknesses would facilitate settlement; and

(3) the exchange of relevant materials would "curtail evidentiary disputes and expedite resolution of conflicts" by promoting cooperation among the litigants.[2] The result anticipated in 1938, then, was the elimination of "trial by ambush," and moving to a more fair and efficient resolution of disputes.[3]

Eighty years later, there can be no serious disagreement with Judge Marrero's statement that "the full promise of the Federal Rules as it relates to the efficiency and economy of justice is far from realized in federal courts."[4] As to the cause of this disappointment, Judge Marrero focuses primarily on the "responsibility for rising litigation excess produced by professional styles and actions of lawyers themselves."[5] Other commentators attribute the demise of the civil trial and the rise of inefficiency in federal court litigation to the significant changes in technology that the drafters of the Federal Rules in 1938 could not have anticipated.[6]

This Comment will not undertake the impossible task of balancing attribution between the various causes of the current inefficiencies of federal court litigation. Rather, from the perspective of a federal court litigator, the Comment offers, for consideration by greater minds with authority to effect change, modest reforms aimed at promoting efficiency and cooperation among the three constituencies in federal court litigation: the court, counsel, and the parties. These reforms are informed, in part, by the timely Fourth Annual Federal Judges Survey, which offers judicial perspectives on the state of e-discovery law and practice.[7]

This Comment first briefly describes the context in which the Federal Rules were enacted (Part I) in comparison to the current environment (Part II). The Comment then sets forth several proposals to reform litigation in federal court to achieve the efficiencies Judge Marrero has described (Part III). The Comment concludes with a sentiment of appreciation to Judge Marrero for his attention to these

---

2 *Id.*

3 George A. Davidson, *Who Killed the Civil Trial?*, N.Y. L.J., Sept. 4, 2007; Marrero, *supra* note 1, at 1601.

4 Marrero, *supra* note 1, at 1602.

5 *Id.* at 1609; *id.* at 1605 ("parties increase the cost and burden of discovery in federal court through delay and avoidance tactics") (quoting EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2, 28 (2009)).

6 Davidson, *supra* note 3.

7 EXTERRO, BDO CONSULTING & E.D.R.M/DUKE LAW, 4TH ANNUAL FEDERAL JUDGES SURVEY: JUDICIAL PERSPECTIVES ON THE STATE OF E-DISCOVERY LAW AND PRACTICE (2018) [hereinafter JUDGES' SURVEY].

issues and optimism for reform.

I. THE WAY WE WERE: 1938

As crafted in 1938, "the Federal Rules provided for a system of full discovery pursuant to which each party to a lawsuit was entitled, through demands for depositions and document production, to find out in advance of trial the facts known to the opposing party."[8] As my partner, George Davidson, has noted, this framework "was quite workable in the technology of the day," which involved the rather "primitive" duplication of documents through carbon-copying or commercial printing.[9] As a result of these technological limitations, the "document discovery process in litigation was not particularly taxing."[10] Law firms themselves were smaller and paralegals had not yet been invented.[11] Large cases were the exception rather than the rule.[12]

II. THE WAY WE ARE: 2018

Today, "discovery of electronic information has changed fundamentally the dynamics of the litigation process."[13] Discovery costs have skyrocketed and law firm staffing—along with that of satellite e-discovery vendors and consultants—has expanded to meet the demands of e-discovery.[14] With the advent of the "Internet of Things" and an array of data-creating devices, the volume of information that may need to be preserved, collected, processed, and produced in litigation has only grown and will continue to grow.[15]

The universe of electronic information is both a blessing and a curse. It is a blessing because disputed questions can be answered and the facts cannot be hidden. It is a curse because of the burden involved in collecting and reviewing giga-, tera-, or even peta-bytes of data.[16] The answer may exist, but prove elusive if there is not a means to sort through one quadrillion bytes of data.

---

8 Davidson, *supra* note 3.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *See, e.g.*, Antigone Peyton, *A Litigator's Guide to the Internet of Things*, 22 RICH. J.L. & TECH. 9, 25 (2016).

16 *See, e.g.*, Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M., No. Civ. 09-0885, 2010 WL 4928866, at *4 (D.N.M. Oct. 22, 2010) (finding that searching through over six terabytes of data would impose an undue burden on defendant).

Machines have created these problems. Humans now must solve or, at least, mitigate them.

III. THE WAY FORWARD: POTENTIAL REFORMS

A. *Reform Objectives*

Realistically, the volume of electronic information will only increase, and litigators will only continue to be adversarial and motivated, at least in part, by financial considerations.[17] Accepting these circumstances as a given, then, two practical objectives should form the basis of any attempt at reform.

First, to facilitate the efficient litigation of large complex cases. It is important for the federal courts to get the large, high profile cases right. It will instill confidence in the judicial system and make more room for the smaller, less difficult cases.

Second, to promote settlement opportunities. Realistically, less than 5% of federal civil cases proceed to a jury trial,[18] meaning that the system would grind to a halt if a trial occurred in every case. The Federal Rules and judges' individual practices should therefore concentrate on procedures that are more likely to bring the parties to the table for productive settlement negotiations at the earliest point possible in the litigation.

Fortunately, some of the recent amendments to the Federal Rules have already proven effective at advancing these objectives. First, Rule 26(b)(1)'s emphasis on proportionality links the scope of discovery to the necessity and burden of discovery.[19] The practical effect of the amendment is to impose an outer limitation on what must be produced. Second, Rule 37(e), which imposes a uniform approach to lost electronically stored information (ESI), "offers a framework that can assist parties to prosecute or defend against spoliation of ESI and guide judges in the resolution of spoliation allegations."[20] Third, the addition of "parties" in Rule 1 "make[s] express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation . . . [and] highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes."[21] Fourth, and finally, the cost-shifting mechanism in Rule

---

17 Marrero, *supra* note 1, at 1645.

18 JUDGES SURVEY, *supra* note 7, at 22 (Hon. Michelle Childs, U.S.D.J., D.S.C.).

19 JUDGES SURVEY, *supra* note 7, at 27 (Hon. Ronald Hedges, U.S.M.J., D.N.J. (Ret.)).

20 *Id.*

21 *Id.* (quoting U.S. SUPREME COURT, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY

37(a) is viewed as giving judges another tool to encourage cooperation.[22]

B. *Reform Proposals*

1. Eliminate, or Limit, Certain Discovery Devices

Judge Marrero makes the apt observation that "some practitioners conceive of litigation as if all or particular court proceedings that the rules permit are in fact essential—even obligatory—in every case."[23] The Federal Rules permit procedures that, eighty years ago, may have added to efficiency but, in the current age, principally provide more opportunities for adversaries to increase cost, add delay, and engage in mischief. These include interrogatories,[24] depositions by written questions,[25] and requests for admission.[26]

These three types of devices could be eliminated altogether and, in the future, be permitted only by leave of court on a showing of good cause and proportionality. At the risk of striking fear in the heart of many a federal court civil litigator, a similar approach could be taken as to depositions: allowing them only with court permission where it is necessary to preserve testimony from a witness who will be unavailable at trial. Finally, document requests could likewise be limited, to ten absent leave of court, down from the current limit of twenty-five.[27]

The purpose is to focus pre-trial procedures and resources on document discovery issues. The parties may concentrate their efforts on finding the best, or worst, document for their theory of the case, and facilitate settlement discussions. For that small minority of cases that will proceed to trial, this streamlining will have the added benefit of narrowing evidence to be presented to the fact-finder to two categories—documents and witnesses.

2. The Judge Who Will Try the Case is the Judge Who Oversees Discovery

Judge Marrero posits that "[j]udges can and should play a more vigorous role in case management."[28] In those districts where magistrate

(2015)).

22 *Id.* at 29 (Hon. Frank Maas, U.S.M.J., S.D.N.Y. (Ret.)).

23 Marrero, *supra* note 1, at 1646.

24 FED. R. CIV. P. 33.

25 FED. R. CIV. P. 31.

26 FED. R. CIV. P. 36.

27 FED. R. CIV. P. 33(a)(1).

28 Marrero, *supra* note 1, at 1642.

judges exclusively oversee discovery, circumstances are ripe for parties' ability to arbitrage judicial attention to discovery disputes. Magistrate judges may, understandably, be reluctant to limit discovery in cases where they will not be overseeing the trial. By having the presiding judge be involved from the commencement of the case, that judge will be able to develop familiarity with the parties, their legal theories, and the facts. The parties will benefit from continuity of rulings on key issues.[29] Having the trial judge involved throughout the litigation may also provide additional opportunities to facilitate resolution of discovery disputes, avoid unnecessary motion practice, and facilitate settlement negotiations between the parties.

3. Increase Education About E-Discovery

With minor exceptions, most federal judges and litigators would benefit from additional education concerning e-discovery issues. There are many organized publications and programs available for federal judges, such as the Federal Judicial Center's treatise entitled *Managing Discovery of Electronic Information*.[30] A recurring "special focus" program on the latest e-discovery issues and effective means of resolving e-discovery disputes would likely benefit district court and magistrate judges alike. The more judges know about e-discovery, the better they will be able to concentrate the parties' efforts and resolve disputes efficiently.

The need for greater e-discovery education of lawyers is equally prevalent. Despite the reality that many junior lawyers become involved in e-discovery from the earliest days of their practice, e-discovery is sparsely taught in law school and virtually absent from bar examinations.[31] District courts could consider adding regular e-discovery training as a continuing legal education (CLE) requirement for litigators to remain admitted in good standing.

More fundamentally, there are a variety of best practices that any federal litigator should employ to best represent their client in e-discovery matters. First and foremost, a litigator should have, from the beginning of the case, a detailed knowledge of the client's data management systems and the mechanisms required to preserve, store,

---

29 JUDGES SURVEY, *supra* note 7, at 9 (Hon. Ronald Hedges, U.S.M.J., D.N.J. (Ret.)).

30 *Id. See also* RONALD J. HEDGES, BARBARA J. ROTHSTEIN & ELIZABETH C. WIGGINS, MANAGING DISCOVERY OF ELECTRONIC INFORMATION (3d ed. 2017), *available at* https://www.fjc.gov/sites/default/files/2017/Managing_Discovery_of_Electronic_Information_3d_ed.pdf [https://perma.cc/EK9Y-MUWH].

31 *Cf.* JUDGES SURVEY, *supra* note 7, at 10 (noting that 10% of judges felt that e-discovery knowledge should be covered in law school or on the bar exam).

retrieve, process, and review potentially relevant ESI.[32] Consultation with key personnel associated with the case and with the client's information technology systems is key to the litigator's ability to gain and regularly update this knowledge throughout the litigation.[33]

Second, the litigator should have a firm understanding of the interrelationship between the relevance and proportionality standards contemplated by the Federal Rules.[34] From the framework that the Federal Rules provide, and armed with detailed knowledge of his or her client's ESI, the litigator will be better able to advance well-articulated and defensible positions in e-discovery disputes.[35]

Third, the litigator should be aware of assisted review tools or sampling techniques (technology-assisted review, or TAR) that may provide an efficient alternative to expedite review of large volumes of ESI. Courts are increasingly willing to allow parties to employ these tools.[36] Litigators should be prepared to describe the mechanics of these tools, as well as provide the court with meaningful metrics to enable it to evaluate their utility and effectiveness.[37]

4. Require In-Person Meet-and-Confer Sessions for Discovery Disputes

In the immortal words of Supreme Court Justice Louis Brandeis, "[s]unlight is said to be the best of disinfectants."[38] These words ring equally true for lawyers in discovery disputes. Letter-writing and telephone conference calls permit litigators to put up a visible shield against candor, flexibility, and reasonableness.

One potential remedy is to require, where the first round of dispute resolution has failed, an in-person meet-and-confer. Retired United States Magistrate Judge David Waxse employed this practice with the added requirement that the session be videotaped.[39] Following the session, the parties were required either to advise him of their resolution

---

32 *Id.* at 11 (Hon. Michelle Childs, U.S.D.J., D.S.C.).

33 *Id.*

34 *Id.*

35 *Id.*

36 *See* Winfield v. City of New York, No. 15-CV-05236 (LTS) (KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017) (approving use of TAR and ordering defendants to produce sample of documents deemed non-responsive through TAR); Rio Tinto PLC v. Vale S.A., No. 14 Civ. 3042 (RMB) (AJP), 2015 WL 4367250 (S.D.N.Y. July 15, 2015) (appointing special master to oversee parties' TAR); Moore v. Publicis Groupe & MSL Grp., 287 F.R.D. 182 (S.D.N.Y. 2012) (establishing protocol for parties' TAR and production of ESI).

37 JUDGES SURVEY, *supra* note 7, at 11 (Hon. Michelle Childs, U.S.D.J., D.S.C.).

38 Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

39 JUDGES SURVEY, *supra* note 7, at 14 (Hon. David Waxse, U.S.M.J., D. Kan.).

of the disputed issue, or provide a copy of the videotape for his review.[40] He later commented that he never once had to watch such a video, demonstrating the utility of this approach in resolving disputes.[41]

5. Streamline Dispositive Motion Practice

In Judge Marrero's view, dispositive motions—motions to dismiss or for summary judgment—are among the most consequential determinants in increasing the length and cost of federal court litigation.[42] Motions to dismiss are filed in more than one-third of federal cases but, of those filed, less than a third lead to complete victories.[43] For post-discovery summary judgment motions, the success rate is also only about one-third.[44] From the judicial perspective, given that there is a far less-than-even chance of success and given the resources the parties must expend in preparing and the court must expend in deciding these motions, it might appear that limiting these motions would lead to more efficient litigation.

From the parties' perspective, however, there are reasons to pursue these motions even if the chance of success is less than 50%. Even a partial victory will eliminate unnecessary defendants and claims, and streamline discovery as a result.

With a reconciliation of these two firmly-held perspectives unlikely, the question becomes how courts can best encourage and decide dispositive motions that are more likely to facilitate resolution of the litigation. One common practice is the requirement of pre-motion letters, to which the opposing party has an opportunity to respond.[45] In the particular case of a motion to dismiss, this practice enables the court to take into account whether the plaintiff, informed about the defect in its pleading, takes advantage of the opportunity to amend and minimize the likelihood of non-final dismissal and serial amendments.[46] Judge Marrero, himself, employs this type of rule.[47] His rule cautions a plaintiff that, where the court issues preliminary guidance that the motion to dismiss is likely to be granted and the plaintiff elects to stand

---

40 *Id.*

41 *Id.*

42 Marrero, *supra* note 1, at 1626 n.75, 1653.

43 *Id.* at 1633.

44 *Id.* at 1665 & n.129.

45 *See, e.g.*, Hon. P. Kevin Castel, *Individual Practices of Judge P. Kevin Castel*, S.D.N.Y. 2 (Feb. 27, 2017), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1374 [https://perma.cc/9TDZ-XX8Y] (Rule 4.A).

46 *Id.*

47 *See* Hon. Victor Marrero, *Individual Practices of United States District Judge Victor Marrero*, S.D.N.Y. 2–3 (Mar. 25, 2016), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1280 [http://perma.cc/Q4DT-Z9HZ] (Rule II.B.1).

on the original pleading without amendment, the court may consider those circumstances as grounds for sanctions against the plaintiff, including attorneys' fees and costs.[48] Other mechanisms for narrowing the scope of dispositive motions include limitations on the length of briefs and the number of exhibits submitted, absent a showing of good cause.

As a practical matter, dispositive motions continue to have an inherent value to the judicial system in reducing the number of cases and issues to be tried by the fact-finder. Through continued creative approaches by individual courts and judges, courts will undoubtedly continue to balance due process with efficient use of judicial resources.

CONCLUSION

Since its publication in 2016, courts and academics have recognized the importance of the issues that Judge Marrero raised in his Article.[49] That the Article engendered a panel discussion among the judges of the Southern District of New York is no less surprising. Judge Marrero's critiques will continue to provoke thought, discussion, and creativity to consider means, formal or informal, to reduce the cost of rules and promote more cost-effective litigation in federal court.

---

48 *See id.* at 3 (Rule II.B.4).

49 *See, e.g.*, Cruz v. Zucker, No. 14-cv-4456 (JSR), 2017 WL 1093285, at *3 n.6 (S.D.N.Y. Mar. 10, 2017); Andrew S. Pollis, *Busting up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2102 n.41, 2107 nn.81–82 (2017).



The role of Special Masters in resolving complex cases

Special Masters streamline the dispute resolution process, minimizing the costs, delays and risks of complex cases such as construction defects

By Steven Skikos & Anne Lawlor Goyette

The fire started just above the first floor ceiling. Workers renovating the seven-story historic hotel fled the smoke-filled stairway, stumbling and falling on the way. Aerosol paint cans exploded from the heat, and the fire grew to three alarms. Firefighters blasted the 100-year-old building with water and successfully extinguished the flames. Unfortunately, the hotel suffered extensive damage from the fire, smoke and suppression efforts. Rain later doused the interiors through the open roof and windows. Mold grew. Lead paint flaked and peeled off the walls.

The hotel owners performed millions in repairs. They resolved an insurance claim with their carrier and then sued the renovation contractor for remaining fire and breach of contract damages. The general contractor in turn sued the subcontractors suspected of starting the fire and their insurance carriers. Liability was hotly contested. The general placed a lien against the building, served stop notices and sued the hotel group for unpaid contract balances; the subcontractors also sued for sums due. Five actions for personal injuries and subrogation followed. Two years after the initial

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



filing, significant investigation and litigation costs had been incurred. Counsel disagreed on how to address "threshold" legal and factual issues. The parties anticipated taking roughly 70 percipient depositions and filing motions to bifurcate and/or motions for summary adjudication/judgment. The Superior Court consolidated the eight cases, set, and then vacated, a trial date.

The Superior Court subsequently appointed a Special Master. Shortly thereafter, the parties deposited more than 250,000 pages of documents, responded to initial insurance and scope of work interrogatories and deposed twelve key percipient witnesses. Within seven months, and before the trial-setting conference, the Special Master focused the parties on the key issues and successfully brokered a global settlement of the consolidated litigation and a related federal insurance coverage action.

Why a Special Master?

Complex cases involve multiple parties, difficult and time-consuming issues, large volumes of discovery, coordination with other pending actions or extensive post-judgment supervision. They require "exceptional judicial management to avoid placing unnecessary burdens on the court or litigants … ." (Cal. Rules of Court, rule 3.400(a)(b).) Special Masters support the court with the efficient and effective management and resolution of these cases. Special Masters streamline discovery and litigation, reduce delays often associated with complex cases, negotiate settlements and ultimately save the parties and court significant time and expense. The parties may stipulate to a Special Master or the court may appoint the Special Master on its own motion. (Code Civ. Proc., §§ 187, 638, 639.)

Multiparty construction defect cases and Judicial Council Coordination Proceedings provide additional examples of the effective use of Special Masters to successfully resolve complex cases.

Construction defect cases

Construction defect cases typically involve numerous parties, attorneys, insurance companies and experts. Each player has its own goals. The property owner wants maximum funds to repair defects and cover losses. The builder disputes plaintiff's repair scope and cost estimates, and seeks to pass plaintiff's claims, and often the builder's legal fees, onto subcontractors. The subcontractors concentrate on minimizing damages and shifting responsibility. The design professionals distinguish between construction errors and design issues. Attorneys challenge pleadings, decipher contracts, pursue claims and assert defenses. Insurers highlight policy language to define covered losses and involve other carriers to share the risk. Experts bring technical insight to all aspects of the discussions. Discovery and litigation costs soar.

In the 1980s, California experienced a population growth that more than doubled the national rate. The resulting high demand for housing ignited the construction industry and eventually caused a dramatic increase in construction defect litigation. With heavy caseloads, the Superior Courts simply could not invest sufficient time to conduct settlement negotiations to resolve these multiparty complex cases. The courts became backlogged. After studying the federal courts' successful use of Special Masters, the San Francisco and San Mateo Superior Courts worked with local lawyers to create Alternative Dispute Resolution programs to address complex construction defect cases. They drafted a pre-trial order that included the appointment of Special Master to manage discovery under the Court's supervision. John Griffiths was the first Special Master in California to successfully implement the order. He pioneered a process that streamlined the production of necessary information, narrowed the issues and engaged the parties in meaningful settlement discussions in multiparty construction cases. The process significantly shortened trial preparations at significant cost and time savings to the participants.

The legislature ultimately deemed constructive defect cases involving many parties or structures as provisionally complex. (Cal. Rules of Court, rule 3.400(c)(2).)

The process for resolving complex construction defect cases has evolved over the years. The use of Special Masters continues to be an effective and efficient means of organizing, managing and resolving complex construction defect cases.

As an example, in a recent case a large public university alleged more than $50 million in construction and design defects and economic loss at seven apartment buildings on the university campus. Three dozen defense parties included the builder, subcontractors, subsubcontractors, product manufacturers and design professionals. The case within the case involved battles between the primary carriers, the excess carriers and the additional insurers. The builder's prime insurer filed a complaint in intervention and a federal coverage action.

With multiple attorneys and experts representing each party, joint and defense-only expert meetings involved well over a hundred participants. It was standing room only for Case Management Conferences. The judge cautioned that the courthouse was physically too small to host the trial. However, offsite trial locations raised security issues and complications for the judge who had other cases that had to be conducted at the court during any construction trial. In short, the case was a logistical nightmare.

The Special Master worked with the Superior Court and all parties to streamline case management, resolve discovery disputes and address disagreements that arose during ongoing dormitory repairs and student move-outs. All parties' input was solicited for

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



pre-trial orders. Focused and structured communications provided real-time updates. Without service of formal individual discovery requests, the parties successfully produced voluminous project documents, shared document expenses, conducted site inspections and destructive testing, arranged biweekly site visits, exchanged confidential expert reports, generated a discoverable statement of claims, attended substantive expert meetings, disclosed and produced percipient and expert witnesses, and coordinated approximately 200 days of deposition testimony. The Special Master also partnered with the mediator to negotiate scores of settlements, winnowing the number of parties and issues until the case globally settled before trial.

Judicial council coordination proceedings and multi-district litigation

The California Judicial Council Coordination Proceeding (JCCP) Courts are recognized for their ability to manage national litigations in cooperation with other coordinated proceedings. Federal Multidistrict Litigations (MDLs), which are the federal equivalent to the JCCP, often overlap with coordinated proceedings in various state courts, including California. There are natural tensions between separate and independent jurisdictions, and Special Masters have successfully served to ease those tensions. More recent MDL/JCCP cases have served as cooperation models on issues that have been historically difficult to resolve, such as the conduct of liability discovery, document production, the sharing of work product, the use of a centralized case specific database, the coordination between counsel across many jurisdictions, trial setting, and consensual resolution.

In larger multi-venue complex cases, that perhaps include both state and federal jurisdictions outside of California, the use of Special Masters to foster communication between the parties and the JCCP court is now generally accepted. The Special Master assignments vary across litigations but have included all of the issues identified above. Currently, the federal courts are using Special Masters to oversee issues such as discovery, coordination with state courts, the selection of bellwethers, global settlement negotiations, etc.

In the early 2000s, in California Special Masters were granted JCCP assignments for aggregate settlement allocations. (Code Civ. Proc., § 638.) Because of the growing recognition of the success of JCCPs to resolve national cases on the merits, and the need for Special Masters to assist in that resolution, the role of Special Masters has increased.

In one recent JCCP, plaintiffs sought compensation for personal injuries and damages stemming from a prescription drug that was associated with a serious medical condition. The proceedings involved well over 5,000 plaintiffs and 18 different manufacturing defendants, with cases located in 16 different state and federal venues across the country and three coordinating jurisdictions. The role of the court-appointed Special Masters, in cooperation with coordinating courts and the parties, led to the successful resolution of this complex case. The Special Master created protocols and set a compensatory structure, along with case-specific criteria that was consensually adopted by the parties and the coordinating courts. These efforts resulted in both closure for the manufacturing defendants and participation for over 99 percent of the plaintiffs.

Special Masters working with the JCCP court are an integral part in resolving complex MDLs. There are certain limitations on a JCCP court and its ability to assign specific cases to a specific private mediator. However, in coordination with the federal MDL, Special Masters have had an increased role in the California system because of the complex state federal issues that are addressed in MDLs.

A clear and purposeful approach

Successful case management of complex litigation by Special Masters requires a clear and purposeful approach to effectively and efficiently streamline the entire dispute resolution.

As a first step, the Special Master convenes all counsel and leverages their significant talent and experience to establish common objectives. The group uses straightforward case goals to generate a clear and cost-efficient resolution strategy. The parties participate in setting realistic deadlines to bring the case at issue, conduct discovery, explore potential motions and recommend a trial date. At the same time, the Special Master identifies opportunities for meaningful settlement discussions and calendars productive mediations and settlement conferences.

The Special Master streamlines data-gathering to allow analyses of necessary information without voluminous written discovery demands. Generally, a central depository or database is established where the parties deposit all relevant documents, insurance information and factual information regarding the parties' roles in the dispute. The parties may agree to prepare factual declarations or limited interrogatories regarding claims or defenses. This minimizes expense and delay and prioritizes information needed for meaningful negotiations.

The Special Master encourages expert dialogue to simplify complex and technical issues, clarify defenses and risks, explore creative solutions and expand settlement options. Fairly candid expert exchanges frequently occur under the mediation privilege and before any formal expert disclosures and depositions.

With the parties' consent, the Special Master enhances individual settlement strategies through one-on-one calls with decision makers to discuss goals, address obstacles and explore available resources in advance

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



of mediation. Will plaintiff only consider a global settlement? Will lead parties allow peripheral party settlements? Who will or must attend the settlement discussions? Are there insurance coverage issues or other obstacles that may impede the negotiations? The Special Master advances the framework for meaningful negotiations, with settlements ultimately brokered by the Special Master and/or a mediator.

Importantly, throughout the resolution process, the Special Master conducts focused, ongoing regular group teleconferences to continuously provide real time updates on outstanding issues and opportunities and promote effective communication and timely execution of action plans. Detailed summaries follow each conference. Counsel preview all status reports and proposed orders before their submission to the court.

In short, a Special Master supports the court's efficient and effective management and resolution of all types of complex cases. Through a clear and purposeful approach to the entire dispute resolution process, she streamlines discovery and litigation, minimizes delays and creates meaningful opportunities for productive settlement negotiations. The use of Special Masters optimizes resolution outcomes, while minimizing the significant risks, delays and costs of complex litigation.


Skikos

Steven Skikos, a founding partner of Skikos, Crawford, Skikos & Joseph LLP, *has been a trial attorney since 1990. Skikos has tried multiple pharmaceutical and medical device cases, tried numerous employment law cases in state and federal court on behalf of plaintiffs and defendants, prosecuted and tried criminal cases. Since 1996, Skikos has focused on complex pharmaceutical drug and medical device litigation. He has been court-appointed lead and/or liaison counsel for California Judicial Counsel Coordinated Proceedings (JCCP) and/or for the federal Multidistrict Litigation (MDL) in more than a dozen cases. Skikos has been a lead negotiator responsible for settling more than $4 billion in cases for tens of thousands of plaintiffs and has served as strategic leader in several more national litigations.*


Goyette

Anne M. Lawlor Goyette, a principal of Griffiths•Goyette, *has resolved hundreds of complex civil disputes as a full time Special Master and Mediator since 1998. Through prepared and productive negotiations, Ms. Goyette has facilitated $300 million in settlements, from cost waivers to $35 million, primarily in cases involving construction, real estate, insurance and related issues. Ms. Goyette is an ADR panelist for numerous appellate, state and federal courts, serves as Special Master and Referee for more than two dozen California Superior Courts and acts as Special Master in national and statewide class actions. She enjoys the highest Top Rated Lawyer-AV® Preeminent™ Martindale Hubbell rating, Super Lawyers® distinction in Alternative Dispute Resolution and membership in National Academy of Distinguished Neutrals.*

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

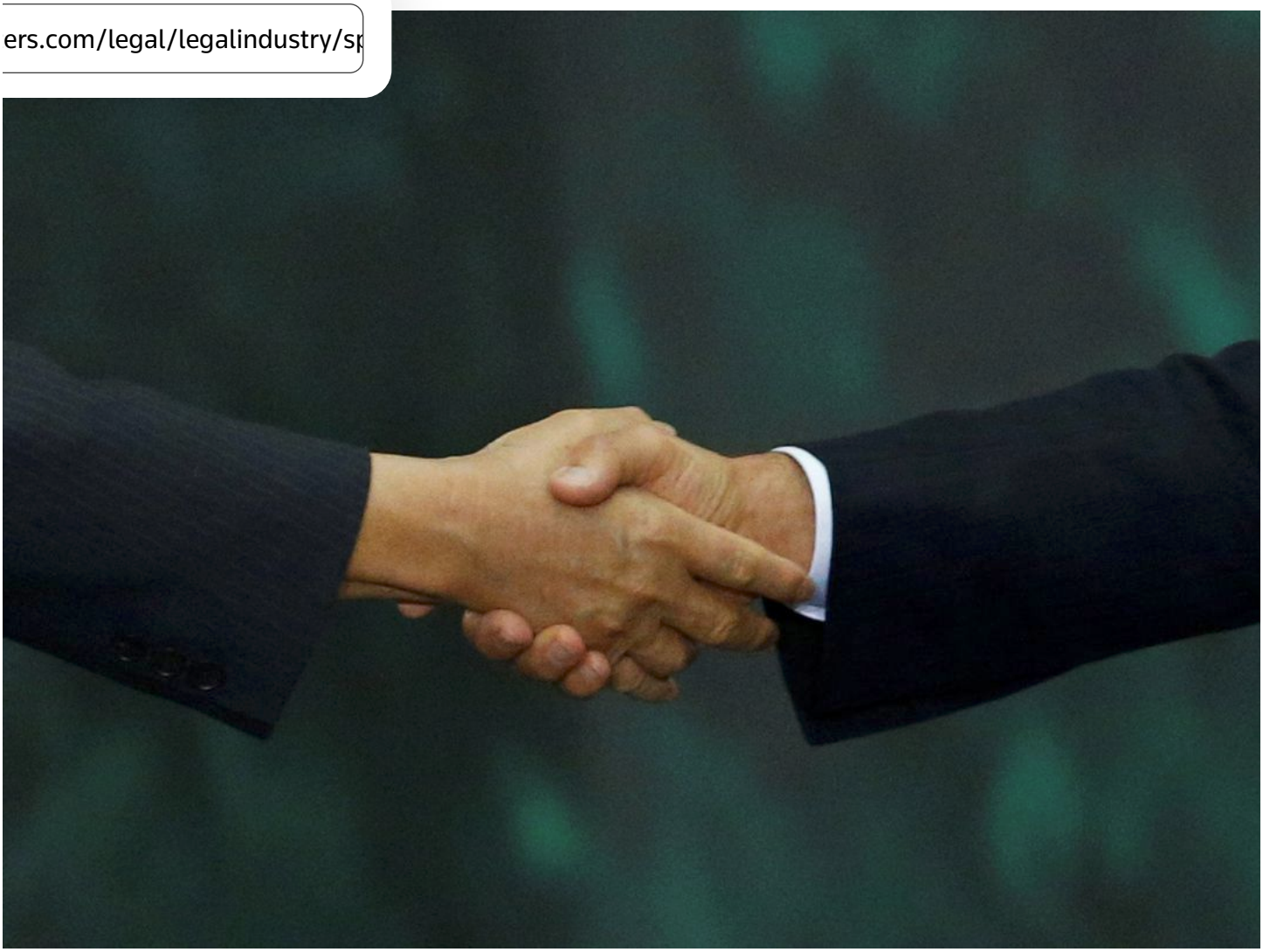
September 15, 2021 · 9:40 AM EDT
Last Updated a year ago

Special masters are another category of ADR

By Hon. Shira A. Scheindlin

6 minute read

ers.com/legal/legalindustry/sp



REUTERS/Henry Romero

September 15, 2021 - When we think of Alternative Dispute Resolution (ADR) we often think of arbitration and mediation, both of which provide alternatives to the classic litigation in court. But there are other categories of ADR that are gaining in popularity, and one of those is the use of Special Masters. These court appointments are made for the very purpose of resolving disputes that the court cannot resolve because of the lack of sufficient judicial resources or the lack of the required expertise or both.

I begin with the sensitive subject of lack of judicial resources. In our overburdened state courts around the country, it is not atypical for a judge to handle a docket of upwards of 1,000 cases. For those of us who served in the federal system, that is a staggering number. The typical federal judge caseload ranges from 250 civil cases at the low end to a high of 600. While this is a substantial caseload, it is not as daunting as what state court judges are tasked with managing.

The federal system also has the benefit of Magistrate Judges — who are available to supervise discovery and conduct settlement conferences. Many state courts do not have the benefit of these experienced and highly qualified court adjuncts. In addition, federal judges generally have two to four law clerks per judge, who are top law school graduates well qualified to conduct research, check citations submitted by the parties, review huge record evidence, and work with the judge to draft judicial opinions.

Register now for FREE unlimited access to Reuters.com

Register

In most state courts, a judge may have one dedicated law secretary — usually a career job — and perhaps access to a law clerk pool. The available resources are often not sufficient to permit the judge to really dig into the nitty gritty of discovery disputes,

settlement or the award of fees.

Most judges are generalists. Prior to joining the bench, they often practiced in a specialized area of the law and did not have familiarity with other areas that they now encounter for the first time. Because of that, they occasionally face technical issues as to which they lack sufficient familiarity or expertise. When that happens, they may seek the assistance of someone who has the expertise to assist the court in analyzing the problems presented by such issues.

Rule 53 of the Federal Rules of Civil Procedure, revised in 2003, provides a road map to federal judges for the appointment of Special Masters. It is a broad and flexible rule that now permits the appointment of a Special Master whenever the parties consent or when pretrial and/or post trial matters cannot be "effectively and timely addressed by an available district judge or magistrate judge."

It is plain that the governing rule allows for an appointment whenever the judge believes it will assist in the just and speedy resolution of a case. Rule 53 also requires that before making an appointment the court provide notice to the parties and an opportunity for them to be heard and to suggest candidates for the appointment. The selected Special Master must file an affidavit disclosing whether there are any grounds for disqualification prior to the court issuing an order of appointment. That order, once issued, should spell out the duties assigned to the Master, the scope of her assignment, and the powers she may exercise. The Rule also provides for the standard of judicial review of any order or recommendation issued by the Master.

Many state courts have adopted their own versions of Rule 53, some closely tracking the federal rule, others differing in significant respects. Not all state courts have promulgated a rule governing such appointments.

In January 2019, the American Bar Association adopted Guidelines for the Appointment and use of Special Masters in Federal and State Civil Litigation, consisting of nine guidelines. These guidelines provide a list of the many functions masters may perform; guidance for the selection of qualified, skilled and experienced masters; and guidance

for the content of orders appointing masters. The guidelines also call for education of the bar regarding special masters.

Other guidelines set forth approaches that courts, counsel, parties and legislatures should take when considering appointments:

•Courts should consider such appointments in all complex cases often at the outset;

•Courts, counsel, and the parties should consider the range of functions a master can perform;

•When considering an appointment, courts should weigh the benefits against the costs;

•Courts should adopt rules for such appointments;

•Courts and legislatures should ensure that the rules will effectuate these goals.

Special Master appointments in high-profile cases have recently been the subject of much media attention. For example, a Special Master was appointed to conduct a privilege review of documents seized by law enforcement from the home and office of former New York City Mayor Rudy Giuliani, and of Michael Cohen, Mr. Trump's former private lawyer.

Another Special Master was appointed just a few weeks ago to review document discovery produced, or not produced, by Endo Pharmaceuticals, a defendant in the New York state court trial against several opioid manufacturers. A third recent example was the appointment of a Special Master, to conduct a privilege review of materials seized from an attorney in lieu of a "taint team" from the Department of Justice, which typically has been permitted to conduct such a review.

There are many other examples of the effective uses of special masters. These include: (1) discovery oversight; (2) settlement and administration of settlements; (3) claims administration; (4) reviewing auditing or accounting; (5) determining counsel fees

administration; (4) reviewing auditing or accounting; (5) determining counsel fees particularly in class actions; (6) monitors of prisons, transportation, or businesses; (7) resolving highly technical e-discovery disputes; and (8) conducting Markman hearings in complex patent cases followed by a recommendation to the court.

Uses are not limited to this short list. Appointments can be made to cover any role that a court decides would expedite the litigation and help achieve a just and speedy resolution.

As a trial judge in the federal court, I appointed a number of Special Masters to serve in some of the capacities described above. Each time I did so, the assistance was invaluable to the court and the parties. As an ADR practitioner I have now been appointed several times to serve as a Special Master in many different roles including supervising discovery disputes, conducting privilege reviews, and recommending whether class certification should be granted and whether certain parties qualified as members of the class. Each appointment has been challenging and time-intensive, but I have no doubt that it assisted the court and the parties to reach a resolution that might otherwise have resulted in greater expense and delay.

I end by encouraging courts and counsel to consider when, and if, the appointment of a Special Master will help to achieve a speedier and more cost-effective resolution of a pending matter.

Register now for FREE unlimited access to Reuters.com

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias. Westlaw Today is owned by Thomson Reuters and operates independently of Reuters News.





Hon. Shira A. Scheindlin

Hon. Shira A. Scheindlin, a former U.S. District Judge for the Southern District of New York, is of counsel at Stroock & Stroock & Lavan LLP in New York City. She has arbitrated or mediated more than 60 complex civil cases since leaving the bench in 2016. She can be reached at sscheindlin@stroock.com.

ALM | LAW.COM

Page Printed From:
https://www.law.com/newyorklawjournal/2022/03/18/utilizing-a-special-masterreferee-in-complex-litigation-a-mediators-personal-account/

NOT FOR REPRINT

Utilizing a Special Master/Referee in Complex Litigation: A Mediator's Personal Account

A Special Master can help move cases forward and can reduce the burden on the Judge assigned to the case as well as saving time and money for t

March 18, 2022 at 02:10 PM

Alternative Dispute Resolution

By Larry S. Shachner

I was recently appointed Special Master (also known as a Special Referee) to supervise all pre-trial discovery in a matter pending in the New York State Supreme Court in the First Department pursuant to Civil Practice Law and Rules (CPLR) 3104(b). The litigation had been quite contentious prior to my appointment.

There had been several motions to the court related to discovery issues leading up to my assignment. The parties clearly were having difficulty agreeing on anything and were barely civil to one another. They simply could not agree on even basic issues. You could sense the animus—the exchanges between counsel were palpable. I now understood why the Presiding Justice felt the need to appoint a Special Master. He simply did not have the time or the resources that would be needed to move the case along to complete discovery and get the case on the trial calendar. As such, I was charged with ruling on all pending discovery issues, as well as all future applications regarding discovery as they arose.

Down to Business

Upon receiving my assignment pre-pandemic, I was tasked to review the Order of Appointment. I poured over the file and transcripts of the oral arguments, after which I conferred with the Presiding Justice to review any additional details and nuances about the matter that he may have been privy to.

With both sides clearly at odds, I embarked on getting the parties to agree upon the discovery issues, even though initial attempts had failed through innumerable teleconferences and face-to-face meetings. Then the pandemic struck, and all conferences went virtual.

Again, I attempted to broker a settlement, but quickly realized that it would not be feasible. I returned to my original mission with the goal of getting the parties to agree on some of the outstanding discovery. Many of these efforts resulted in an impasse whereby I issued rulings. Eventually, all of the document discovery was successfully completed.

Next, I supervised the virtual depositions of each side and made rulings during the examinations before trial (EBTs). There was some post-EBT discovery which the parties could not agree upon, and again I issued an order pertaining to the disputed post-EBT discovery. During the pendency of my appointment there was substantive motion practice which the Presiding Justice decided, as those issues were beyond the scope of my appointment. Once the Note of Issue was filed, my appointment essentially concluded.

Throughout the proceedings, I found it beneficial to confer with the assigned judge and keep him updated on the progress of the litigation. Also, in many instances, a Special Master may be asked to return post-Note of Issue, due to new discovery matters that might have surfaced or to manage other issues.

Experience Matters

Reflecting on my role as a Special Master, my experience as a former judge, and as a mediator, clearly were put to great use. My knowledge of the law, especially Article 31 of the CPLR, enabled me to make the necessary rulings. And despite the visible enmity between both sides, my mediation skills were essential in bringing the parties together, and getting them to agree on many items, where initially, they refused to do so. In fact, several of the sessions mirrored a mediation, but of course were limited to the items of discovery at issue. When the parties could not agree, and a compromise could not be reached, my judicial experience was utilized to draft the appropriate order.

State and Federal Rules

In state court, the appointment of a Special Master/Referee is guided by CPLR §3104(b). In federal court, the Referee may be appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure (FRCP). Under both statutes, the appointment can be on consent or by order of the court via motion or on the court's own initiative. Whether the appointment is in state court or federal court, the essential purpose of the appointment is for the Special Master to assist the court and the parties, in supervising and resolving all discovery matters and move a complex civil matter to trial. These broad powers may be modified through the order appointing the Referee.

Parties are also permitted to stipulate that a named attorney act as a Special Master. They are allowed to issue orders on document discovery, resolve claims of privilege, conduct in camera inspections, supervise depositions, and make rulings on objections raised at the EBTs. Obviously, the Referee appointed must have no conflict of interest with any party or attorney involved in the case, and both sides must include a provision for payment to the Referee.

Once chosen, the Special Master has all the powers of the court, with the exception of holding someone in contempt, relieving himself/herself of their duties, or naming a Successor Referee. There can be instances where the court or the parties have the Special Master/Referee handle other issues beyond discovery, but this must be specifically stated in the Order of Appointment. Finally, while a Judicial Hearing Officer (JHO) can also serve as a Referee, the court system has essentially cut back the JHO program.

Personal Takeaways

In my role as Special Master, I was exclusively devoted to the case. My schedule was flexible, and I was able to provide the time, energy, and attention to a complex matter, whereby a Supreme Court Judge could not. Additionally, counsel was able to reach me by phone, text, or email any time, day or evening. I was able to deal with issues as they arose, and if necessary, a videoconference could be arranged on the same day at their request.

We are all well aware of the effect the pandemic has had on the legal profession and the courts, and although some of the restrictions have abated, the courts are still "catching up" to the backlog of cases that has occurred over the past two years. A Special Master can help move those cases forward and can reduce the burden on the Judge assigned to the case as well as saving time and money for the litigants. And if the parties are in agreement, the role of the Special Master can be expanded to include fact finding, mediation of a settlement, or even a specific issue, such as insurance coverage. In essence, the use of a Special Master is a win-win situation for the court, counsel and all parties involved.

As for my experience, it was extremely gratifying knowing that I was able to assist the parties in cutting through the discovery clutter and helping them toward a mutually agreed upon resolution.

Larry S. Shachner *is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. He is a retired Justice of the Supreme Court, Bronx County, and served on the bench for nearly 20 years.*

NOT FOR REPRINT

Copyright © 2022 ALM Global, LLC. All Rights Reserved.

JAMS ADR Insights

Utilizing Discovery Referees in Complex Litigation

Judge Terry Friedman on using discovery referees to work around procedural roadblocks and a constrained judicial system



HON. TERRY B. FRIEDMAN (RET.)

JAMS Mediator, Arbitrator, Referee/Special Master, Hearing Officer
Published October 11, 2017

It's no secret that over the past several years the California judiciary has suffered deep budget cuts, especially to the state's civil courts.

According to California's Judicial Council, there are 189 fewer judges than needed to manage the state's current caseload. Due to constitutional imperatives, civil judgeships in many counties have been shifted to criminal assignments.

As a consequence, civil practitioners will continue to experience delays in trials and hearings, with a particularly severe impact on discovery disputes.

This represents a crisis not only for judges, court staff and attorneys, but also for civil justice. Access to the judicial system is vital for a healthy democracy.

Fortunately, existing statutes allow for parties to work around some procedural roadblocks that tightened budgets can't navigate.

Discovery references can help provide quicker resolution to discovery disputes when doing so in the courts would take up a large amount of time, such as when multiple motions must be considered or when the amount of documents to be reviewed would be severely time consuming.

California's Civil Code of Procedure grants parties to a dispute some flexibility in deciding the referees and whether their opinions are binding or not.

With explicit consent from the parties, a judge can designate a general reference that is able to make binding determinations.

More common are special references, which a court or parties can appoint to make nonbinding recommendations "when it is necessary for the information of the court in a special proceeding," according to California's Civil Code of Procedure.

Parties are able to submit written objections to the appointment of referees for a number of reasons, including prior legal or personal relationships with the other party, an interest in or bias towarda certain outcome of a matter, or a lack of qualifications to be a referee.

There are other advantages in using referees, who can often devote more time to matters than can a trial judge. Of course, attorneys should keep in mind that, as in the courtroom, succinct arguments tend to be more successful.

Referees can also be more flexible in scheduling hearings either in a private office or telephonically, though this informality should not be an invitation to engage in improper ex parte communications.

How and when the crisis affecting the courts will end remains to be seen.

But for now, taking advantage of discovery referees can help alleviate the added time and expense associated with a constrained judicial system.

Judge Terry Friedman (Ret.) is JAMS neutral who spent 15 years as a trial judge with the Los Angeles County Superior Court after serving as a member of the California State Assembly for eight years. He can be reached at tfriedman@jamsadr.com.

EXPLORE MORE ON THESE TOPICS

Discovery & Discovery Referees

Disclaimer:
This page is for general information purposes. JAMS makes no representations or warranties regarding its accuracy or completeness. Interested persons should conduct their own research regarding information on this website before deciding to use JAMS, including investigation and research of JAMS neutrals. See More