

FRIDAY, JULY 14, 2023

PERSPECTIVE

## When to use a discovery special master

By Daniel B. Garrie  
and Gail A. Andler

As technology becomes more integrated into all aspects of society, litigants and courts find themselves spending more time managing and analyzing electronic data than ever before. This particularly affects the discovery phase of litigation, which has become increasingly more complex as parties are often required to preserve, identify, collect, review, and produce large volumes of data. This opens the door to a world of disputes and technical challenges that the parties and the court may not be ideally situated to handle. Discovery Special Masters can be useful tools for managing discovery and resolving disputes in such technical or complex cases. Special Masters, otherwise known as Court Appointed Neutrals, are independent third parties nominated by counsel or appointed through a court, arbitrator, or other decision-making body with a mandate to carry out some action on its behalf. Special Masters serve as “quasi-judges” who have specifically defined duties that relieve the court of some of its functions beyond its core responsibilities. Special Masters can be especially helpful in the context of discovery, as adjudicating or otherwise resolving highly technical discovery can strain the resources of already overly burdened courts.

So when is it the right time for counsel to consider suggesting that the Court bring in a Discovery Special Master? There is no hard and fast rule for this, and the facts

and circumstances of each case should be carefully considered. Often, counsel can anticipate at the outset of the case that extensive and expensive technical discovery may be sought. In such a situation,

technical and complex discovery, because they want to be intimately familiar with all aspects of the case as a base of their knowledge for rulings later in the litigation or in order to guide the parties toward

resolution. However, the size and complexity of court dockets may limit the ability of even a technically proficient judge to investigate and resolve complex, technical and large-scale e-discovery disputes.

**‘Special Masters, unlike judges, do not typically have a formal court docket, and as such, Special Masters can respond to requests made on short notice, attend hastily requested hearings, be more flexible with general scheduling, and have ex-parte conversations with attorneys (as permitted by the appointing order) to help reach resolutions more efficiently.’**

an early meet and confer may be in order so that the court can be alerted to the situation at the time of the initial Case Management Conference. A Discovery Special Master can be used at the beginning of the case before discovery disputes arise by playing a facilitative role, helping the parties to develop a discovery plan, as well as an e-discovery protocol to address at the outset issues such as format for production and terms for keyword searches or technology to assist in the review and production of voluminous discover.

Some judges are reluctant to appoint a Discovery Special Master at the outset in order to avoid the perception that they are “shifting work” to an adjunct where expenses are to be borne by the litigants. Other judges prefer to be directly involved with discovery, including

*Daniel B. Garrie, Esq. is the founder of Law & Forensics, a global legal engineering company, and a Nationwide neutral who specializes in discovery, business, forensics, cybersecurity, privacy, class actions, and cryptocurrency, and Hon. Gail A. Andler (Ret.) is a retired Orange County Superior Court judge and Southern California-based neutral who specializes in business, employment, class actions, and mass torts.*



Even technically proficient judges who can comprehend and address these types of disputes might simply not have the time to do so.

Additionally, a judge may acknowledge that technical proficiency is not their strongest suit. Under these circumstances, counsel might jointly propose a respectful “suggestion” that the court consider appointing a neutral to act as an adjunct, as a Special Master with specialized technical knowledge relevant to the case would be equipped to quickly and cost-effectively identify and resolve technical issues in discovery.

Flexibility is another significant advantage associated with appointing a Special Master. Special Masters, unlike judges, do not typically have a formal court docket, and as such, Special Masters can respond to requests made on short notice, attend hastily requested hearings, be more flexible with general scheduling, and have ex-parte conversations with attorneys (as permitted by the appointing order) to help reach resolutions more efficiently. It is worth noting that it is important to formalize any procedures for ex-parte communications, short notice hearings, and other issues that commonly arise

in a Special Master protocol to avoid potential disputes. Another advantage of using Special Masters is that this protocol can be tailored to address the specific issues and circumstances of the case.

Despite these advantages, litigants and their counsel may still be concerned about the additional expense incurred by the appointment of a Special Master, especially if counsel believe the disputes are caused by recalcitrant parties and/or their counsel, who may be operating in bad faith. However, the Federal Rules of Civil Procedure (FRCP) give judges broad discretion to address discovery abuses and apportion expenses to appoint a Special Master. FRCP Rule 53(a)(3) requires the court to consider the fairness of imposing costs on the parties and protect against unreasonable expenses or delays before appointing a Special Master. Rule 53(g)(2) specifies that compensation for the Special Master must be paid by the parties or “from a fund or subject matter of the action within the court’s control.” Significantly, Rule 53(g)(3) authorizes the court to allocate payment among the parties “considering the nature and amount of the controversy, the parties’ means,

and the extent to which any party is more responsible than other parties for the reference to a master.” This fee-shifting provision is an important and powerful tool in the court’s arsenal to ensure equitable allocation of the additional expense.

Further, FRCP Rule 53 notes that the appointment of a master may be voluntary or involuntary. Specifically,

Rule 53(a)(1) provides that the court is (A) allowed to appoint a master to “perform duties consented to by the parties”; (B) to “hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted; or (C) to address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” FRCP Rule 53 also outlines the conditions and requirements for using a Special Master and the scope of the Special Master’s authority and responsibilities. Per FRCP Rule 53(c)(1), a Special Master’s scope of authority is limited to what is defined in the rule unless the court’s appointing order specifies otherwise. FRCP Rules 53(f)(1) and (2) outline the parties’ rights to a hearing and their ability to object or move to adopt

or modify the Special Master’s order, report, or recommendations.

For litigation in state court in California, Code of Civil Procedure sections 638 and 639, as well as Rules 3.901-3.932 of the California Rules of Court address the parameters and procedures applicable to the appointment of a neutral, or Referee, to handle discovery as an adjunct to the court.

It bears repeating that the specific circumstances of each case should be carefully considered, and Special Masters are not right for every case. However, appointing a Discovery Special Master in the appropriate case is often the most cost and time-effective decision for everyone involved. In those appointments where the master’s order, report, or recommendations are not final, and parties have the option to object and/or request modifications to them, there is typically no downside to appointing a Special Master in cases where they could be of assistance. Instead, their value can be quite substantial.

***Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.***