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Using Special Masters in Social Media Litigation to Streamline Discovery: Navigating the complexities of these cases

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There has been an explosion of litigation in recent years related to the potentially life-threatening effects of social media usage among adolescents. Hundreds of cases have been filed in state and federal courts, many of which have been consolidated into multidistrict litigations or otherwise consolidated within state court departments. One such example in California state court is, in which the court recently overruled Snap's demurrer on claims that Snap's conduct in designing and implementing its social media platform, Snapchat, resulted in the foreseeable deaths of plaintiffs' children, who overdosed on fentanyl.

Litigations involving social media can be complex and highly technical. Such cases often involve collecting and analyzing large amounts of data from social media websites and apps. This can present challenges for the lawyers and judges involved, as they may not be familiar with social media platforms and managing the unique types of data generated and stored on these platforms. Engaging a discovery special master can help streamline discovery in social media litigations to ensure that the right data is collected as efficiently as possible.

Social media repositories present unique issues for the discovery process. For instance, the repositories that hold a user's social media data are controlled by a third party (e.g., Meta, X, Snap, etc.). Obtaining a user's data typically requires the user to download their information using the application at issue. However, this download will only capture a snapshot of the user's data at the time of the download. This means that any subsequent changes to a user's social media data that occur after the download would not be captured by this snapshot.

While there should be a litigation hold in place to prevent users from deleting information on their



social media accounts, the fluidity of social media data opens the door for a variety of potential disputes regarding preservation or potentially underinclusive collection, depending on when the snapshot is taken. For example, even if a user stopped using their social media account and preserved the account pursuant to a litigation hold, it is possible that other users may comment or delete comments related to posts on the user's account. This would result in data related to a user's account being changed in a way that is out of their control and such changes might not be reflected in the collection used for production in the litigation.

Additionally, it is possible that a user continues to use their social media accounts or delete information from them, intentionally or unintentionally, despite there being a pending litigation. This can raise issues of spoliation and it might not be clear what relevant data, if any, has been lost. Social media presents

unique issues in the area of spoliation as it might not be clear to a user whether social media accounts are covered by a litigation hold, especially in cases that aren't directly related to social media.

A discovery special master can help manage the discovery process to avoid potential disputes such as these and resolve such disputes when they do arise. The role of a discovery special master is delineated under Rule 53 of the Federal Rules of Civil Procedure (FRCP). This rule stipulates that a court may appoint a master to “perform duties consented to by the parties” or to “hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury.” Selecting the right discovery special master requires careful consideration of their technical and legal skills as they relate to the issues of the case and technical systems involved. The ideal individual should have a deep understanding of the technical aspects of the social media platforms at issue as well as the discovery process and relevant legal issues. Additionally, they should also have excellent communication skills and be able to work collaboratively with the parties to find agreeable solutions.

A discovery special master can assist in developing comprehensive e-discovery plans that outline the process of identifying, preserving, collecting and producing electronically stored information (ESI) from social media platforms. This can streamline the e-discovery process and ensure that all parties are on the same page about what repositories are being collected and what the snapshots should capture and how to deal with the ever-changing nature of social media data. There is no one way to address these issues and having a special master with the requisite technical knowledge there to work with the parties can allow the e-discovery process to work more efficiently.

In the context of spoliation issues, a special master's technical skill can be valuable in assessing the arguments of the parties and educating the judge. At the direction of the court or parties, special masters can even be used to forensically examine historical versions of social media accounts to attempt to identify information that may have been deleted or modified.

A special master can also be useful in addressing potential privacy concerns related to collecting social media data. Social media repositories often hold intimately personal information that might not be related to the issues of the litigation. A social media account

may even include personal information belonging to third parties with no connection to the litigation. A special master can work with the parties to craft an e-discovery protocol that ensures limited exposure of irrelevant personal information. In some cases, the parties can agree to have the special master perform some or all of the social media data collection and analysis to limit the exposure of personal information as much as possible.

While the circumstances of each case are unique, litigators and courts should consider engaging a special master when dealing with cases involving social media data. Using a special master with the appropriate technical and legal abilities can save the parties time and money and resolve potentially tricky discovery disputes.

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[1] See, generally, “Families’ lawsuit against Snapchat alleging the platform enables drug dealers allowed to move forward,” ABC News, available at <https://abcnews.go.com/GMA/News/families-lawsuit-snapchat-alleging-platform-enables-drug-dealers/story?id=106076434>.

