



Improving E-Discovery Outcomes with ESI Special Masters

E-discovery and digital evidence pose technical challenges that few litigants are equipped to handle and fewer attorneys have been trained to address. A special master for electronically stored information (ESI) can ease the pain of e-discovery by ensuring the process is carried out fairly, efficiently, effectively, and in proportion to each side's needs and rights.



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Attorneys and judges alike often lack the resources and experience necessary to navigate the digital realm and achieve optimum e-discovery outcomes. ESI special masters can assist with challenging matters relating to e-discovery, computer forensics and digital evidence, yet few attorneys appreciate the many benefits these appointed experts provide and the various roles they play.

An ESI special master, most often an attorney, is an amalgam of a judge and an expert. The special master does the sorts of things that the judge assigned to a case would do if the judge had more time and technical expertise, and that a neutral information technology (IT) expert would do if the expert were an experienced trial attorney. Technical expertise equips a special master to delve deeply into the digital realm, while legal training equips the special master to know what discovery is important and when enough is enough.

Special masters promote transparency, consensus and cooperation between parties where possible, and provide prompt, practical direction and resolution when parties cannot

agree. As a neutral investigator, a special master affords the parties protections that are difficult to secure by other means, allowing the parties to focus on the merits and the attorneys to be more confident and competent in the e-discovery process. Indeed, until attorney competence in IT becomes commonplace, the need for ESI special masters will continue to grow.

Against this background, this article examines:

- The benefits of appointing a special master.
- How special masters promote cooperation between litigants.
- Best practices for working with a special master.
- The logistics for having a special master appointed.
- The basic requirements of an order appointing a special master.

BENEFITS OF A SPECIAL MASTER

A neutral ESI special master is almost always more effective and less costly than a partisan e-discovery consultant. Still, many attorneys never consider this option or are doubtful that they can persuade the other side to consent to the appointment.

The principal objection to using a special master is cost. Going before a court on e-discovery disputes often feels “free” to attorneys because the judge does not charge by the hour and is paid from public coffers. In fact, bringing discovery disputes to the court is very costly and time-consuming. Issues must be briefed in formal submissions, counsel and witnesses must attend court hearings and the delay pending a ruling invites still more costs, such as idling a large review team. But the biggest expense flows from the potential that the judge, hampered by a lack of technical insight, will decide the issues in ways that seem equitable in theory but prove unjust, ineffective or unduly expensive in practice.

The appointment of a neutral special master who possesses the legal and technical expertise to craft workable ESI protocols can avoid these concerns and typically benefits both sides. For example, a special master can achieve significant savings as an independent investigator. In matters where the evidence on digital media is commingled with privileged, proprietary or confidential information, the use of a qualified neutral examiner obviates the need for separate but redundant examinations by opposing experts. Instead, the partisan experts work with the special master to frame a suitable examination protocol and then flesh out particular areas of concern. The result is that both parties enjoy substantially reduced costs and trusted outcomes.

A special master also enjoys greater access to the producing parties’ systems and data, helping to ensure that responsive, non-privileged material will come to light. By doing what the special master directs, producing parties are insulated from criticism for doing too much or too little. While most producing parties recognize that they will have to devote resources to e-discovery, what they despise most is expending those resources only to later find they are vulnerable to sanctions or must start over again because something was mishandled.

A skilled special master is better able to “right size” e-discovery, striking the optimum balance between avoiding unnecessary

expense and the right to receive information. A careful special master has no incentive to spend more or find less. Further, a special master’s ability to see information withheld on claims of privilege or confidentiality without triggering a waiver is a powerful hedge against abuse.

An effective special master finds consensus. When these efforts fail, however, the special master must possess the technical skill to fashion a sensible protocol and the legal ability to memorialize and enforce it. It is crucial that the special master serve as a catalyst to speedier and less-costly resolutions and not offer another venue for endless argument or a means of delay. A special master’s overarching goal should be to do away with any enduring need for a special master in the case.

FOSTERING COOPERATION

Resolving e-discovery disputes demands a mix of technical initiatives, information exchange and behavioral modification. Often, problems stem from a breakdown in communication, so parties must be steered to more effective communication strategies concerning ESI. Otherwise, as in ugly divorces, conflict can become an end in itself. Reasonable requests are refused just to be obstreperous. Unreasonable demands for marginally relevant information are served simply to cause hardship or expense. Each side refuses to give concessions, and perceives cooperation as complicity and weakness.

The first thing a skilled ESI special master will do is instill in the parties a clear understanding of what behaviors and activities must stop. Data destruction, posturing, sniping at opponents and gross speculation are forbidden. A successful special master helps the parties separate advocacy from discovery and works to end peripheral battles over ESI, refocusing the parties on the merits.

Further, where feasible, each side must designate a technical liaison equipped to answer questions about systems, applications and capabilities. Introducing players without a history of animosity and shifting the focus to technical issues helps establish a culture of cooperation.

Fostering cooperation may seem misguided in an adversarial system, especially to those who see cooperation as affording aid and comfort to the opposition. But a savvy attorney understands that the biggest beneficiary of cooperation is his own client. E-discovery efforts characterized by cooperation cost the parties less and serve as a safeguard against waste and sanctions.



Search [Learning to Cooperate](#) and [How to Be Your Client’s Best Advocate? Cooperate.](#) for more on the importance of cooperation in e-discovery.

WORKING WITH A SPECIAL MASTER

An ESI special master might be called on to perform a number of tasks as facilitator, adjudicator or investigator. On one day, the special master may preside over hearings on e-discovery disputes and issue directives geared to effective and proportionate e-discovery. On another, the special master may

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6. The Special Master shall regularly file a written report, in such format as the Special Master deems most helpful, identifying the Special Master's activities and the status of matters within the Special Master's purview. The report should identify outstanding issues, with particular reference to matters requiring Court action. The Special Master shall maintain a record of materials and communications that form the basis for such reporting by a suitable means determined at the Special Master's discretion.

7. Each side is ordered to designate a lead attorney and a lead technical individual as contacts for the Special Master. These designees shall have sufficient authority and knowledge to make commitments and carry them out to allow the Special Master to accomplish the Special Master's duties. The parties are directed to give the Special Master their full cooperation and to promptly provide the Special Master access to any and all facilities, files, documents, media, systems, databases and personnel (including technical staff and vendors) which the Special Master deems necessary to complete the Special Master's duties.

8. Disclosure of privileged or protected information connected with the litigation to the Special Master shall not be a waiver of privilege or a right of protection in this cause and is also not a waiver in any other Federal or State proceeding. Accordingly, a claim of privilege or protection may not be raised as a basis to resist such disclosure.

9. The Court will decide *de novo* all objections to findings of fact or conclusions of law made by the Special Master. Any order, report or recommendation of the Special Master, unless it involves a finding of fact or conclusion of law, will be deemed a ruling on a procedural matter. The Court will set aside a ruling on a procedural matter only where it is clearly erroneous or contrary to law.

10. The Special Master's compensation, as well as reasonable and necessary expenses, will be paid by [the Plaintiff / the Defendant / the parties in equal shares / [OTHER ARRANGEMENT]]. The Special Master shall be compensated at [his/her] usual and customary rate of \$[HOURLY RATE] per hour, including time spent in transit or otherwise in connection with this appointment[, provided however that travel time will be paid at one-half (50%) of the usual and customary rate unless substantive work, research or discussions in support of the engagement are performed while traveling, in which case such activities will be paid at the usual and customary rate]. The Special Master shall submit to both parties invoices for services performed according to [his/her] normal billing cycle [and [the Plaintiff / the Defendant / the parties in equal shares / [OTHER ARRANGEMENT]] shall pay such invoices within thirty (30) days of receipt].

11. In making this appointment, the Court has determined that the matters within the purview of the Special Master necessitate highly specialized technical knowledge and cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

SO ORDERED.

Dated: [DATE]
[CITY], [STATE]

[JUDGE'S NAME]
United States [District/Magistrate] Judge

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act as the court's neutral forensic examiner poring over vast data volumes to uncover the facts while protecting each side's privileged and proprietary information.

Regardless of the specific task at issue, litigants can aid the special master's process and further their standing with the special master by following the guidelines set out below.

FOCUS ON THE FACTS

Because few attorneys are well-versed in IT matters, it is unsurprising that assumptions made with respect to the costs, burdens and risks of e-discovery are frequently off the mark. Requesting parties tend to think collecting, reviewing and producing ESI is easy, where responding parties make these same processes seem improbably hard.

An important duty of the ESI special master is having the parties examine the bases for their assumptions and secure reliable metrics. Posing the right questions to the right persons often reveals that matters thought arduous are simple and vice versa. When working with a special master, counsel should prepare the persons with knowledge of the client's IT infrastructure to identify solid metrics on file types, data volumes and other essential facts.



Search [Budget Template: Document Production](#) and [Budget Template: Reviewing an Opposing Party's Documents](#) for sample budget templates counsel may use to estimate the costs associated with document productions.

DESIGNATE A TECHNICAL LIAISON

It is understandable that attorneys often seek to insert themselves between technicians and the court, but much is lost in translation. An ESI special master "speaks geek" and may prefer to deal directly with technical liaisons who are fluent in the particulars of the implicated systems and ESI.

One of the most effective steps a special master can take to resolve an e-discovery dispute is to facilitate productive communications between technically-astute counterparts. These liaisons grasp both the technical challenges and the range of possible solutions. Additionally, having this dialogue can save time and money by eliminating much of the "let us get back to you on that" discourse typical of ESI disputes.

COME ARMED WITH A PLAN

Attorneys often approach e-discovery disputes with nothing more than a naked demand or an intransigent refusal. But forcing the special master to construct a solution from scratch runs the risk that the results will be unfavorable to a client's interests. Instead, counsel should come armed with a sound e-discovery plan and clear blueprints. Often, the exercise of making a plan leads attorneys to discover that there are fewer areas in dispute than initially thought.



Search [E-Discovery Project Management Checklist](#) and [Document Discovery Planning Tree](#) for information on developing an e-discovery plan.

BE CANDID ABOUT POTENTIAL DEFECTS

Counsel should promptly advise the ESI special master of any known problems in the case, such as spoliation issues or processing defects. A skilled special master may be able to resolve defects before they become grounds for sanctions. Moreover, courts are hesitant to sanction when advised that the parties are working with the special master to fix the problems.



Search [Spoliation Sanctions by US Circuit Court Chart](#) for information on spoliation sanctions imposed within each federal circuit court.

MECHANICS OF APPOINTMENT

In federal practice, the appointment of a special master is governed by Federal Rule of Civil Procedure (FRCP) 53, which permits a court to appoint a special master:

- Where both parties consent (*FRCP 53(a)(1)(A)*).
- Where the appointment is warranted by "some exceptional condition" (*FRCP 53(a)(1)(B)(i)*).
- To address pretrial matters that cannot be effectively and timely addressed by an available judge (*FRCP 53(a)(1)(C)*).

Each state has its own regime for appointment of a special master. For example, Rule 171 of the Texas Rules of Civil Procedure grants judges the authority to appoint a special master in exceptional cases and for good cause. Additionally, Chapter 154 of the Texas Civil Practice and Remedies Code provides the court with authority to refer a case to an impartial third party.

DRAFTING AN APPOINTMENT ORDER

The federal rule governing appointment of an ESI special master sets out the requirements for service and the requisites of the appointment order. The order should clearly define the role and powers of the special master and identify specifically when the special master's work is concluded to avoid running up unnecessary fees (*FRCP 53(b)*).

In particular, appointment orders should specify:

- The duties, powers and limits placed on the special master, including the special master's obligations to make a record and periodically report to the court.
- Whether and how the special master may engage in *ex parte* contact with the parties.
- The special master's compensation, including the parties' payment responsibilities and whether the special master's fees may be taxed as costs.
- Whether the special master may be deposed or subject to a trial subpoena.
- The standard of review for particular actions taken by the special master.

Parties should consider the special master's experience if seeking broad discretion in an appointment order. For an example of an appointment order affording wide leeway, see *Box, Sample Appointment Order*.