

USE E-MEDIATION AND SPECIAL MASTERS IN E-DISCOVERY MATTERS

BY PETER S. VOGEL

Each general counsel and lawyer needs to understand electronically stored information (ESI). However, most lawyers studied law long before the world became electronic. Judges and lawyers were never trained in computer technology, yet they are confronted by legal issues surrounding ESI. This article will discuss the use of mediation conferences (known as e-mediation) to resolve ESI disputes and when a special master should be appointed.

Mediation conferences have enjoyed widespread adoption in state and federal courts in Texas. Mediation conferences generally have been only about resolving the underlying dispute. However, the mediation process is available not just for settlement but also for other disputes arising during the course of litigation.

E-mediation is most effective when initiated at the beginning of litigation, at the outset of discovery. Each side should bring in its in-house counsel, chief information officer or information technology director, and subject-matter experts.

During the e-mediation conference, each party will have a confidential caucus with the mediator to discuss the specific circumstances of its ESI and problems that it may have. Ultimately, after all the parties meet with the mediator, the result can be an agreed mediation e-discovery plan (MEP), which will shape discovery for the case. Obviously, if the parties can agree to the initial MEP, this will reduce the number of disputes presented to the trial court. By using e-mediation, the parties are less likely to engage in an expensive and time-consuming motion practice about ESI, which also forces judges to make decisions about ESI that may create new problems for litigants.

Once the parties reach an agreed MEP and start the discovery process, if they encounter problems, they can go back to the e-mediator to see if changes and/or refinements need to be made to the MEP. If the parties cannot resolve

their issues at the e-mediation, a special master may be able to assist.

SPECIAL MASTERS

Courts have appointed special masters in state and federal courts for some time, but the advent of ESI gives new value to Federal Rule of Civil Procedure 53 and Texas Rule of Civil Procedure 171. The special master can provide unique technical insight regarding ESI, hold hearings on ESI disputes and make recommendations to the judge. Of course, the special master has a unique role in litigation, since he represents the judge and can help interpret complex ESI issues.

Parties may ask a judge to appoint a special master to help with ESI, or a judge may recommend the appointment of a special master. Generally, a special master can help speed up the e-discovery process and reduce the motion practice presented to judges.

Special masters in Texas state and federal courts may set hearings to consider motions filed by the parties regarding e-discovery disputes or when a special master concludes that a hearing would be helpful to any issues confronting the parties. Also, the special master may issue orders for which appeals are made to the trial judge, much like a magistrate judge.

Normally the judge will order one or more of the parties to pay the special master's fees and expenses, which may include fees for ESI consultants who may assist the special master. Often the special master will attend and/or participate in hearings in court and then later advise the judge about specific details regarding ESI. The special master also may review motions filed with the court and make recommendations.

The special master represents the judge but may have certain ex-parte conversations with the parties if appropriate in the particular case. These parameters should be set out in the court's orders.

Using e-mediation to manage ESI should help in almost every suit, particularly given that the growth of ESI is inevitable. Also, judges likely will begin appointing more special masters to deal with ESI and to help manage complex technology litigation and ESI disputes.

MORE INFORMATION

I would recommend three sources for those interested in learning more.

A friend of mine, Allison Skinner, teaches e-discovery at the University of Alabama School of Law and is a full-time neutral with the Birmingham firm of Sirote & Permutt. She has written some papers on e-mediation that help explain its benefits, including "How to Prepare an eMediation Statement for Resolving eDiscovery Disputes" and "The Role of Mediation for ESI Disputes." In the fall of 2009 I posted a blog titled, "Mediating eDiscovery Disputes—Allison Skinner's Brilliant Idea." (<http://www.karlbayer.com/blog/?p=6105>.)

Additionally, she and I are interviewed in a free podcast about e-mediation and special masters recorded at ESIBytes. (<http://www.esibytes.com/?p=1120>.)

In 2008 in the *Cardozo Law Review*, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York and Jonathan Redgrave of Nixon Peabody wrote an excellent law review article titled "Special Masters and eDiscovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure." (www.cardozolawreview.com/content/30-2/SCHEINDLIN.30.2.pdf.) Redgrave requested permission for use of one of my orders as an exhibit in the law review article.

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