

# Daily Journal

www.dailyjournal.com

FRIDAY, JUNE 28, 2013

## Special masters in a transformative legal age

By Viggo Boserup

At both the state and federal levels, our judicial system has been impacted by three significant developments. First, for a number of reasons, most importantly economic, there is an inadequate number of sitting judges dealing with an ever-increasing caseload. Second, there is a vast increase of complex factual issues related to advancing technologies before the courts. Finally, the transformation of records from hard copy to digital format has altered the traditional notions of discovery.

The result of those forces has been a proliferation of issues that are beyond the scope of traditional courts, particularly in the following areas:

- a) complex issues of scientific fact in technology, healthcare and the natural sciences;
- b) massive amounts of data requiring accounting, statistical analysis, sampling and the like;
- c) electronic discovery; and
- d) administrative functions such as receiverships, coordination of multiple parties, and allocation and distribution of settlement proceeds.

In its search for an efficient, practical and just solution to those extra-judicial issues, many courts have turned to the special master. While special masters have been utilized since the 1980s, recent developments have made the need for the services of special masters even more acute including the accelerating impact of technology and the fiscal crisis in both the state and federal courts resulting in a loss of vital judicial resources.

**How does the special master address problems created by recent changes?**

Special masters are most often

attorneys or judges. They may be experts or seek the assistance of experts in resolving issues before the master. They are appointed to handle both pre-trial matters and post-trial matters. While their roles are relatively low-profile, they have been credited with increasing the functionality and efficiency of the judicial system as well as devising creative solutions to problems beyond the capacity of a court. Special masters may offer the narrow, but intense focus required to

While special masters have been utilized since the 1980s, recent developments have made the need for the services of special masters even more acute.

deal with complex technological or scientific issues for which sitting judges may not be qualified due to background or time limitations. They may also supervise settlement processes or implement settlements once they have been reached. In short, special masters are quasi-judges with specifically defined duties designed to relieve the court of functions beyond its core responsibilities so it can deal with issues that are within its normal scope: deciding who is right and who is wrong under the law.

**Where can the special master make the greatest impact?**

Special masters can make the most immediate and lasting impact with e-discovery issues. More than 90 percent of American business organizations will be involved in litigation. The discovery phase of that litigation can consume more than 50 percent of the litigation costs, and those costs may often exceed the amounts in dispute. It is, therefore, essential that discovery costs be managed effectively

throughout the litigation.

E-discovery requires substantial and significant prior planning by all parties. That planning is optimally done collaboratively, and it is here that the role of the special master is most important. The special master can facilitate dialogue and agreements among the parties with respect to the critical and threshold issue of the scope of proposed e-discovery, including agreement on sources, custodians, topics and filters. The special master also serves to facilitate implementation by resolving search and retrieval issues, setting protocols for identifying knowledgeable witnesses, identifying locations of documents and electronically stored information (ESI), and developing preservation protocols. In addition, the special master can assist in reaching agreement on the form of production (native, image or hybrid), and in developing protective orders to protect privilege and privacy concerns. In his or her adjudicative role, the special master can be particularly effective in the area of privilege and work product that arises frequently given the massive amounts of data often associated with ESI. Thus, the special master serves substantial roles in all aspects of e-discovery from the (1) setting the scope to (2) search and preservation to (3) production and protection of privilege and privacy.

Disputes in e-discovery often require a weighing of benefits and burdens. Preservation issues, motions to compel, or other legal disputes often require a factual determination of technical issues beyond the court's expertise. For example, the technical knowledge of the special master may be of particular significance in a case where some information may simply not

be retrievable on a particular hard drive.

Thus, through the appointment of a special master, the litigation process can accomplish in days what would take many months of litigation. If the special master has the knowledge and is afforded the appropriate level of authority, he or she can be instrumental in reducing the litigation costs normally associated with issues concerning the scope or e-discovery, the form of production, and a rational approach to search and retrieval.

Timing, however, is critical in the appointment of a special master. The issues need to be addressed early and often. The subject should be addressed early because at the very outset of litigation, neither side may have begun to formulate its e-discovery strategy. Once either side does, however, it may be too late, and gamesmanship, or the perception thereof, sets in, the battle lines are crystallized, and collaborative planning is off the table. It should be addressed often because the discovery process itself evolves as a case matures. It is for that reason that the special master, familiar with the case from the outset, be available to maintain the continuity of collaboration that allows the parties to function in a process that is efficient, practical and just.

**Viggo Boserup** is a special master, mediator and arbitrator with JAMS. He can be reached at [vboserup@jamsadr.com](mailto:vboserup@jamsadr.com).



VIGGO BOSERUP  
JAMS