



# The Evolving Effect of Technology in Litigation

## Using Discovery Special Masters, Technical Special Masters, and Forensic Neutrals

By **Daniel B. Garrie, Esq.**

The rise of technical issues in litigation is steadily increasing the time and cost of resolving lawsuits. The average civil litigation in federal court takes upwards of 24 months to reach a resolution on the merits.<sup>1</sup>

Thus, courts and attorneys are increasingly looking to alternative processes to address technical issues more efficiently, such as the appointment of special masters or neutrals. This article offers practical guidance on the nuts and bolts of selecting and working with special masters and neutrals in state and federal court to help reduce the time and cost of litigation.

### Appointing a Discovery Special Master to Resolve Technical Issues in Discovery

A discovery special master is an individual who works at the direction of the courts to oversee and manage technical issues in the discovery process. Discovery special masters are the most widely used type of special master and can be valuable in any case in which complex discovery issues exist that would most efficiently be managed by an individual with legal and technical expertise.

Appointing a discovery special master differs under state and federal law. For Washington courts, Superior Court Civil Rule (CR) 53.3 provides that an appointment “may be made, for good cause shown, upon the request of any party in pending litigation

or upon the court’s own motion.” In federal court, an appointment is made pursuant to Federal Rule of Civil Procedure (FRCP) 53, which provides that a court “may appoint a master only to: (A) perform duties consented to by the parties; [or] (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted.”

Under both state and federal rules, when a court appoints a special master, it provides an appointment order outlining the scope of the special master’s authority. However, the federal rules require a great deal more specificity in the appointment order than the state rules. In Washington, the rule defers to the court on the specifics of the appointment by stating that “the order ... may specify the duties of the master.” CR 53.3. Under the federal rules, the appointment order must detail several items, including: (1) the special master’s duties; (2) rules for *ex parte* communication; (3) procedures for documentation; (4) procedures and standards for reviewing the special master’s findings; and (5) the special master’s compensation. FRCP 53(b)(2). Broadly speaking, the state rules defer more to the court on when and how to appoint a special master than the federal rules.

While the specifics of appointing a special master may differ between federal and state court, in both cases, the intent is for a special master to adjudicate discovery disputes and, if appropriate, file a report

This article originally appeared on Northwest Lawyer.

[www.jamsadr.com/garrie](http://www.jamsadr.com/garrie)

Anne Lieu, Case Manager: 213.253.9706 or [alieu@jamsadr.com](mailto:alieu@jamsadr.com)



with findings of fact and law to resolve pending legal issues. This requires both a firm grasp of state and federal law specific to discovery and—just as important—technical expertise. The discovery special master’s technical experience is often a critical driver of meaningful cost-saving and effective resolution of discovery issues.

An example of time and cost-saving is as follows: One large company involved in an employment class action has been served with a broad discovery request. The large company seeks to narrow discovery, citing FRCP 26(b)(1) that “the burden or expense of the proposed discovery outweighs its likely benefit.” The court does not understand the enterprise IT of the large company and is not able to determine the strength of the corporation’s argument. The parties elect to appoint a discovery special master rather than use experts and discovery motions. The discovery special master, assuming technological and legal proficiency, can determine the veracity of the IT argument and resolve the dispute. As this example demonstrates, the right discovery special master can expedite the resolution of discovery issues.

### **Appointing a Technical Special Master to Oversee Technical Issues in Litigation**

A technical special master is a type of special master appointed by the court to oversee and manage technical issues beyond discovery. Technical special masters are typically appointed to advise the court on, establish protocols for, and ensure compliance with court mandates involving technical issues that may exceed the court’s expertise. The federal and state rules for appointing technical special masters are the same as those for appointing discovery special masters, as discussed above.

As an example of a technical special master appointment, consider a lawsuit over the ownership of a web-based application that both parties are using as part of their businesses. The judge grants a preliminary injunction giving both parties co-equal access to use the application in business,

pending the results of the litigation. As the example below illustrates, a technical special master can assist a court on technical aspects of an injunction, oversee the implementation of the injunction, ensure compliance with the injunction, and resolve technical disputes over the shared application as they arise. That the court issued an injunction does not end the matter. The parties (and the court if necessary) must still address the technical details involved in granting the parties “co-equal access” to the application. The technical special master’s job is to work with the parties and IT personnel to fill in the gaps of the injunction from a technical perspective, often resulting in a written protocol defining precisely how the parties are to implement the injunction. The technical special master then may be responsible for holding hearings and mediating disputes between the parties on technical issues within the scope of the injunction.

There is no standard set of circumstances in which to seek the aid of a technical special master; each case is unique. Frequently, technical special masters are appointed in fact-intensive disputes in which the nuances of the software and hardware at issue are critical to the case. When selecting a technical special master, the court and parties should seek a technically savvy and experienced individual with specific experience regarding the systems at the heart of the dispute and a firm grasp of the law.

### **Appointing a Forensic Neutral to Investigate and Analyze Digital Evidence**

Another type of court-appointed technical officer is the forensic neutral. Generally, courts and attorneys appoint forensic neutrals to perform technical tasks involving locating, extracting, handling, and/or analyzing digital evidence on behalf of the court or parties in situations in which neutrality is critical. The forensic neutral’s job can involve determining the existence or veracity of digital evidence; performing settlement-related or court-ordered purging of data from systems; validating the

*This article originally appeared on Northwest Lawyer.*

[www.jamsadr.com/garrie](http://www.jamsadr.com/garrie)

Anne Lieu, Case Manager: 213.253.9706 or [alieu@jamsadr.com](mailto:alieu@jamsadr.com)



removal of software or data from systems; forensically analyzing deleted or corrupted data for evidence of wrongdoing; and/or auditing systems to ensure compliance with a court order or regulatory mandate. Forensic neutrals are typically required to document their work in detail and deliver a report summarizing their methods and findings.

FRCP 53, discussed above with respect to special masters, also governs the appointment of forensic neutrals in federal court. RCW 4.48.010 governs the appointment of forensic neutrals in Washington. RCW 4.48.010 states that a “court shall order all or any of the issues in a civil action, whether of fact or law, or both, referred to a referee upon the written consent of the parties.” (The term referee in the Washington statute encompasses neutrals.) The Washington statute further specifies that unless an alternative process is agreed to by the parties, a referee must conduct his or her proceedings applying the rules of pleading, practice, procedure, and evidence used in the superior courts of this state. RCW 4.48.060.

The use of a forensic neutral is illustrated by the following example. In a trade secret case, a court awards an employer a preliminary injunction against its former employees, ordering the employees to turn over all employment-related information in their possession. How can the court ensure that the employees have complied with the order? The court can appoint a forensic neutral to conduct a forensic investigation to determine whether the employees have undisclosed data repositories, and whether any such repositories contain any information subject to the injunction. The forensic neutral can then ensure that the relevant information is transferred to the employer and properly deleted from the employees’ devices.

As shown, a forensic neutral can assist courts and attorneys when a dispute calls for the management, investigation, and/or analysis of digital evidence. It is essential that courts and attorneys consider a candidate’s technical qualifications and experience, as well as the candidate’s track record for neutrality, when appointing a forensic neutral.

## Conclusion

The demand for special masters and neutrals is likely to increase as disputes become more complex and interwoven with technology. To truly get the benefit of these alternative processes, parties and courts must ensure that the special master or neutral has the requisite technological and legal experience.

### NOTES

1. *Judicial Facts and Figures*. [www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures](http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures).

*Daniel Garrie is a neutral with JAMS, where he serves as an e-discovery special master, technical special master, forensic neutral and mediator/arbitrator with a focus on complex software and business litigation, e-discovery disputes, privacy and data breach matters, trade secret theft and intellectual property litigation. Garrie is also the senior partner and co-founder of Law & Forensics LLC, a technology consulting firm that focuses on e-discovery, software, computer forensics and cybersecurity. Garrie is also a cybersecurity partner at the law firm Zeichner Ellman & Krause LLP, concentrating on cybersecurity and e-discovery issues. He can be reached at [dgarrie@jamsadr.com](mailto:dgarrie@jamsadr.com).*

*This article originally appeared on Northwest Lawyer.*

[www.jamsadr.com/garrie](http://www.jamsadr.com/garrie)

Anne Lieu, Case Manager: 213.253.9706 or [alieu@jamsadr.com](mailto:alieu@jamsadr.com)

