

Professional Perspective

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Jayli Miller, JAMS

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Signs Your Case Needs a Discovery Referee

Contributed by [Jayli Miller](#), JAMS

Most trial lawyers are familiar with court-appointed discovery referees or special masters. Courts often appoint referees when parties file multiple discovery motions that the court cannot resolve in a timely manner. However, in certain circumstances, experienced trial lawyers voluntarily initiate the appointment of a discovery referee.

When one side is obstructing discovery, when time and money are scarce, when electronic discovery issues (ESI) have stalled production, when discovery involves sensitive or privileged materials, or when a case requires the production of highly technical or complex materials, a discovery referee can be an invaluable tool.

This article will discuss the circumstances that indicate that your case will benefit from the use of a referee and will help you determine the right type of appointment for your case.

When to Seek a Referee Appointment

Reducing Costs

If multiple discovery disputes are causing attorneys' fees to accumulate and your client is concerned about costs, you should seek the appointment of a discovery referee. Discovery is one of the costliest phases of a lawsuit, second only to trial. Quick resolution of discovery disputes minimizes the need for formal motion practice, significantly reduces costs, and expedites cases toward settlement or trial.

Discovery referees reduce the cost of discovery in three ways:

- First, referees can address disputes as they emerge before attorneys have engaged in lengthy meet and confer negotiations. If you select a referee who employs informal dispute resolution, the savings can be significant. Guided meet-and-confer conferences between counsel and the referee (and possible ESI or other experts) can put disputes to rest without the need for motions to compel.

Formal motions may be required for the resolution of significant disputes, such as privilege, that the losing party will likely want reviewed by the judge or arbitrator, but a wide range of discovery disputes can be resolved effectively by a mediated discovery process. Referees can also oversee compliance and police deadlines, reducing the need for follow-up motions to compel.

- Second, informal discovery dispute resolution with a referee reduces conflict, irritation, and suspicion among counsel and their clients. By creating a more collaborative atmosphere during the discovery phase, the referee contributes to more productive settlement discussions and reduced pretrial disputes.
- Third, if you are arbitrating your case, you can reduce the costs of discovery by appointing a referee who charges a lower hourly rate than your arbitrator. JAMS Rule 17(d) allows arbitrators to appoint "special masters" to resolve discovery disputes.

Although clients pay the hourly rates of a referee, the goal of every good discovery referee is to save clients more money in attorneys' fees than is spent on referee fees.

Preserving the Decision-Maker's Neutrality

If your discovery dispute involves privileged materials, or if the discovery at issue casts your client in a negative light, you should consider using a referee to preserve the neutrality of the judge or arbitrator. Similarly, if the judge or arbitrator is expressing frustration with the number of discovery disputes generated by your case, it is probably time to seek appointment of a referee.

Parties frequently use discovery referees to resolve disputes over materials withheld as privileged. While some state courts prohibit judges from ordering parties to submit challenged materials for in camera review to determine whether the materials are protected (see, e.g., California Evidence Code §915(a)), parties often request that courts perform in camera

reviews to resolve withholding challenges. Courts that lack the resources to review large numbers of documents often resist, but may be amenable to the request if the parties suggest appointing a referee to conduct the review.

Referees can review and resolve withholding challenges quickly and efficiently. Additionally, since much of the challenged material is unlikely to be produced, having a referee perform the review prevents the judge or arbitrator from seeing inadmissible materials that could influence the final judgment or award.

A referee should also be considered if the volume of discovery disputes in your case has challenged the patience of your decision maker and your judge or arbitrator has expressed frustration or irritation with the parties or their attorneys. Although judges are trained to render impartial decisions, they are still human, and you don't want to risk poisoning the well.

Resolving Disputes Over Technical, Specialized, or Complex Discovery

If your case involves a highly technical or specialized practice area—e.g., trade secret disputes, tech industry cases, construction defect cases, or environmental cases—a discovery referee with experience in that practice area should be appointed to resolve discovery disputes. Referees with specialized experience understand the information at issue and can make more informed decisions regarding relevance and discoverability. The additional cost is warranted to ensure that your client will obtain the discovery needed to litigate the case.

ESI disputes often bring discovery to a full stop as the parties dispute the sources to search, the time frame for searches, the search terms to employ, the custodians subject to search, the format of the production and whether computer-assisted review should be used. If counsel is unfamiliar with ESI discovery, a referee experienced in ESI can facilitate meetings with consultants, counsel, and clients to formulate an effective ESI protocol.

Similarly, if your case is procedurally complex, such as a class action or a coordinated proceeding involving thousands of individual plaintiffs, a referee who has experience with such multi-party cases can very effectively manage the unique discovery issues that arise. Complex cases may involve sampling, testing protocols, investigation into similarly situated plaintiffs or class members, the development of bellwether cases, and discovery to facilitate unique motions practice.

Saving Time

Lastly, you should consider appointing a discovery referee if you need to expedite the discovery phase of your case. If you have a looming trial date that your judge will not extend, an upcoming deposition with a difficult witness, a pretrial hearing (e.g., preliminary injunction, class certification), or a filing deadline for a dispositive motion and you lack essential discovery—it is time to seek appointment of a referee. Referees can expedite the resolution of any discovery roadblocks by resolving motions on an expedited basis or agreeing to be on call during depositions to address objections. If you are seeking a referee to expedite the discovery process, specify your timing requirements when selecting the referee to ensure that your referee can accommodate your time frame.

Determining Appointment Type

If you have determined that a referee will benefit your case, your next step is to determine the best type of appointment. A discovery referee may be appointed voluntarily by stipulation of all parties or involuntarily by the court on its own motion. In some jurisdictions, a referee may be appointed at the request of one party and over the objection of the other party.

Stipulated Appointments

The most effective and efficient way to secure a discovery referee is for all parties to agree to the appointment. The stipulated appointment order should indicate whether the parties want the referee to make binding decisions that are not reviewed by the judge or arbitrator, or recommended rulings that are submitted to the court or arbitrator for final approval. If the appointment order fails to specify how the referee is to issue decisions, the order will have to be amended before the referee can proceed.

If your case is proceeding in a court, the best practice is to create a reference under which the referee issues recommended rulings that are subject to objection and are submitted to the court for final approval. The appointment order should also specify that the parties are allowed to first seek reconsideration from the referee prior to the filing of a recommended

ruling with the court. This approach allows the trial judge to avoid the drudgery of resolving numerous discovery disputes but remain informed and in ultimate control of discovery progress.

If your case is proceeding in arbitration and you want to reduce costs, save time, use the specialized knowledge of the referee, or shield the arbitrator from the materials at issue in discovery disputes, you may want to allow the referee to render binding decisions. However, use binding referee appointments sparingly as it is usually preferable to have a second review process.

If you have any questions regarding how to draft your proposed appointment order, consult with the referee that you intend to appoint. A skilled referee will provide pre-appointment advice on which type of appointment to select for a case and will guide you on how to properly effectuate that appointment.

Involuntary Appointment

Involuntary referee appointments are typically initiated by judges after parties file particularly burdensome motions. Counsel may stipulate to the appointment and participate in selecting a referee, or, absent agreement, the court will appoint a referee suggested by a party or chosen by the judge. Alternatively, a party that concludes that the case requires a referee for one of the reasons discussed above may file a motion requesting that the court order the appointment.

In arbitration proceedings, JAMS Rules require the written consent of all parties prior to the appointment of a Special Master for discovery. (See, e.g., JAMS Employment Arbitration Rules and Proceedings, Rule 17(c). However, opposition to referee appointment is often withdrawn when the parties are allowed to seek the arbitrator's review of any recommended rulings issued by the referee. Additionally, arbitrators may issue written orders appointing referees that are subject to the objection of any party. Failure to object to the order would constitute consent to the appointment.

Conclusion

Not every case needs a discovery referee. If your case involves little to no discovery, if the parties and their attorneys have voluntarily exchanged all materials, or if the court can resolve all discovery disputes in an accurate and timely manner, the additional costs of a referee are not warranted. If you are not in such a fortunate position, and are facing the circumstances discussed in this article, consider seeking the appointment of a discovery referee.