USING SPECIAL MASTERS AND DISCOVERY MEDIATORS TO AVOID AND RESOLVE DISCOVERY DISPUTES

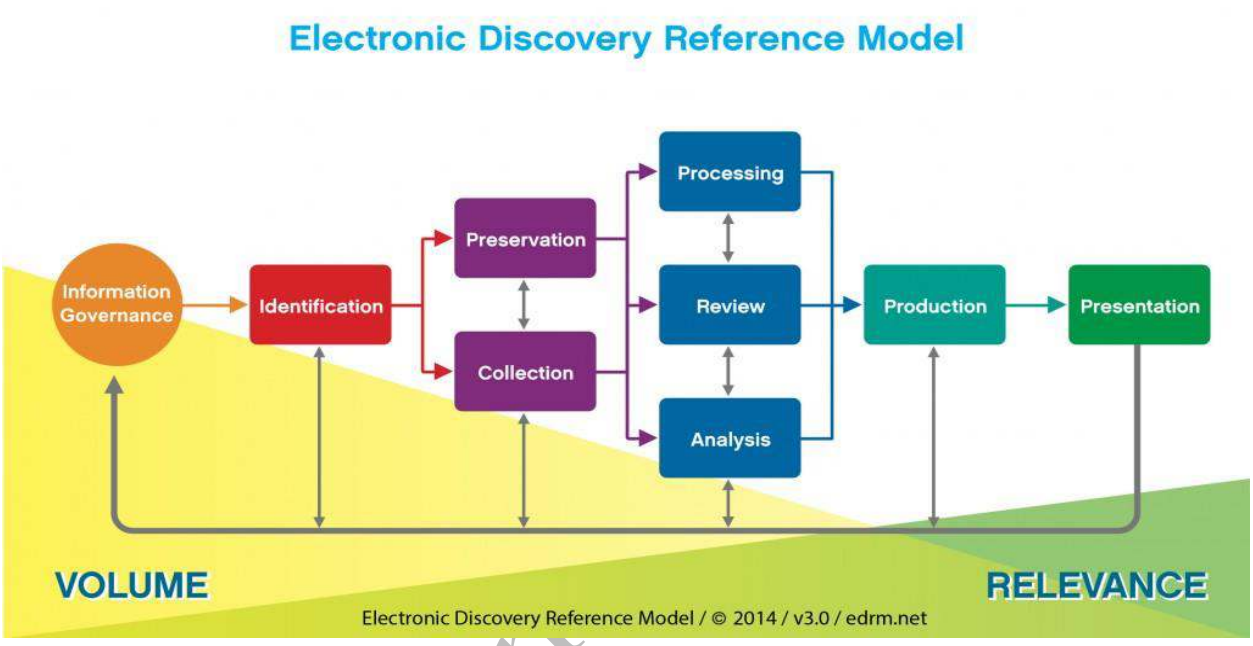
A BENCH BOOK FOR JUDGES AND ATTORNEYS

2022 EDITION

(Draft: 8/17/22)

BACKGROUND ABOUT EDRM

The Electronic Discovery Reference Model (EDRM) was created in 2005 to standardize the eDiscovery process. At the time, no formalized framework existed that clearly outlined the steps comprising the end-to-end eDiscovery process, and the EDRM was an attempt to address this gap. The legal and IT fields in the United States have accepted the EDRM as a broad outline of the stages of the eDiscovery lifecycle. The model consists of nine distinct phases that describe the eDiscovery activities that occur during litigation or a regulatory or internal investigation.



The EDRM subsequently developed into a community of eDiscovery and legal professionals who create practical resources to improve eDiscovery and information governance. As technology radically transforms litigation and the legal profession, EDRM participants collaboratively develop frameworks, standards, educational tools, and other resources to guide the adoption and use of eDiscovery technologies. The EDRM continues to deliver leadership, standards, tools, guides, and test datasets to strengthen best practices throughout the world. It has a global presence in 113 countries, spanning six continents. The EDRM has a non-governing global advisory council composed of contributors, lawyers, judges, in-house counsel, and other legal professionals to help guide the organization with ongoing projects including;

- Discovery Mediators & Masters
- Data Sets
- Data Processing Specifications
- EDRM Revision
- Information Governance Reference Model
- Artificial Intelligence
- Discovering and Protecting PII
- State eDiscovery Rules
- Data Mapping
- Pro Bono
- General Data Protection Regulation
- Privilege Logs
- Analytics and Machine Learning
- Dupeid Project (Data Hashing)

USING DISCOVERY MEDIATORS AND SPECIAL MASTERS TO AVOID AND RESOLVE DISCOVERY DISPUTES

A Bench Book for Judges and Attorneys

Table of Contents

Disclaimer: EDRM work product does not reflect the opinions or positions of the advisory council, project trustees or individual contributors

I. Executive Summary

Federal and state rules of civil procedure are intended to secure the just, speedy and inexpensive determination of every action.[1] However, one activity that can thwart that goal is discovery, because the discovery process is often the most lengthy and expensive stage of civil litigation. To assure that discovery occurs in a speedy and inexpensive manner, judges increasingly need to exercise their case management authority to create the appropriate incentives for the parties and their counsel to cooperate and move the case along. In fact, one of the primary reasons for amending the Federal Rules of Civil Procedure in 1983, 1993, 2000 and 2015 was to promote greater judicial involvement in the discovery process.[2]

With docket backlogs and diminishing court budgets, judges can benefit from the assistance of judicial adjuncts (e.g. discovery mediators and special masters).[3] This is increasingly true because while e-discovery was once associated only with large complex civil cases, the current reality is that electronic data is implicated in nearly every single case in every court.[4] As data volumes and sources continue to grow each year, and with most cases now requiring the preservation and production of myriad forms of electronic data (i.e., emails, text messages, photos, social media and videos), leveraging discovery mediation and special master services will become increasingly essential.

Discovery mediators and special masters can serve in numerous roles, including facilitative, adjudicative, management, advisory, information gathering or as a liaison.[5] In addition, courts and parties should consider using a mediator or master not only after particular discovery issues have developed, but at the outset of litigation when discovery planning occurs.[6] This Bench Book is intended to provide information to help federal and state court judges and attorneys determine when and how to best use discovery mediators and special masters to promote efficient and effective discovery. The goal is not to detract in any way from the role of judges, including magistrate judges; it is to assist them.

II. Special Masters and Discovery Mediators Serve Different Roles

As an initial step, it is important to understand the distinctions between participating in a discovery mediation and working with a special master. Because a discovery mediator is bound by confidentiality as defined by the applicable state mediation rules,[7] a discovery mediator is allowed to develop creative strategies based on confidential communications by the litigants. On the other hand, typically ex parte communications are not permitted with the special master, except by court order. Private caucuses in discovery mediation allow parties to include in-house counsel and/or IT/litigation support representatives in the decision-making process without the requirement of taking testimony. Traditionally, the concept of mediation has not involved evaluation of disputes, but rather facilitation of discussion to resolve disputes. However, the notion of non-binding evaluations as part of mediation process is increasingly utilized.[8]

On the other hand, a special master may conduct hearings, take testimony, issue orders and report to the court. The process of using a special master is more formal than using a discovery mediator because the special master is acting as an agent of the court. However, the most

significant difference between a discovery mediator and a special master is the special master "may by order impose on a party any non-contempt sanctions provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." Fed. R. Civ. P. 53(c)(2). In light of the increase in e-discovery sanction cases, special masters may be asked to make recommendations regarding the spoliation of evidence and the imposition of sanctions.

The parties need to be mindful of these distinctions when they are deciding which process to employ. Neither procedure is better than the other. Which procedure to select depends on the needs of the case, complexities of the issues and personalities of the parties involved, including counsel. Parties may want to consider using the less formal process – discovery mediation – first to determine what issues can be readily resolved as well as to identify which issues require adjudication.[9] However, keep in mind that under certain scenarios, the discovery mediator may be disqualified to become the special master in the same discovery dispute. The roles of the two types of neutrals have clear distinctions that attach different ethical considerations.

As one commentator explains: "Considering the needs of the case, the temperament of the attorneys, and the clients' behavior, the parties decide whether they need a carrot or a stick."[10] In other words, if the attorneys are engaging in obstructionist tactics in discovery, then the parties probably need the services of a special master. On the other hand, if the attorneys are trying to work together but have reached an impasse, then the services of a discovery mediator might be more appropriate. In some circumstances, the parties may mediate first to determine which issues a special master should address. Alternatively, the court determines which process to impose. The chart at Appendix A identifies the federal and state court rules and statutes that govern the use of discovery mediators and special masters.

III. When Might Courts and Attorneys Appoint or Recommend a Special Master or Discovery Mediator

In most jurisdictions when and how to use the services of a discovery mediator or special master is left to the parties' and/or court's discretion. The following are the most common situations that will benefit from the assistance of a discovery mediator or special master.

A. Failure to Develop an Adequate Joint Discovery Plan

In 1993, federal courts added Rule 26(f) requiring litigants to meet in person, plan for discovery and submit to the court their proposal for a discovery plan. This proposed discovery plan would assist the court in seeing that the timing and scope of initial disclosures and the limitations on the extent of discovery under the rules would be tailored to the circumstances of the particular case. The addition of this discovery conference requirement was considered one of the most successful changes made in the 1993 amendments.[11] Rule 26(f) was expanded in 2006 to provide litigants with a detailed list of topics to discuss and include in their proposed discovery plan.[12] Increasingly state court rules are requiring the litigants to meet as soon as practicable to develop a proposed discovery plan.[13]

Nevertheless, and for a wide range of reasons, many attorneys fail to take this requirement seriously and they submit an incomplete and/or impractical discovery plan. The Hon. Nora Barry

Fischer, District Judge, Western District of Pennsylvania, and Richard N. Lettieri, Esquire, point to three reasons why.

- First, the sad reality is that litigation, in general, and discovery disputes, specifically, are too contentious for the parties to exert the minimal cooperation required to share the information necessary to reach resolution of key electronically stored information ("ESI") issues.
- Second, due to strategy or leverage, a party may choose not to resolve ESI issues at the meet and confer stage.
- Finally, due to lack of skill or knowledge, counsel may be unable to address and resolve an ESI dispute.

See Creating the Criteria and the Process for Selection of EDiscovery Special Masters in Federal Court, The Federal Lawyer, Feb. 2011 at 36.

To the extent attorneys cannot communicate and cooperate for whatever reason, there is a need for an alternative dispute resolution process to facilitate what the purpose of the court rules seek – "to secure the just, speedy and inexpensive determination of every action." For example, a court can appoint or recommend the use of a discovery mediator to help the attorneys:

- identify discovery needs and reasonable timetables;
- create boundaries for data preservation;
- develop narrowly focused and proportional requests;
- craft collection protocols, including sampling and search techniques;
- evaluate options for leveraging technology to search, cull and review responsive discovery;[14]
- evaluate alternative strategies for protecting confidential, privilege and work-product;[15]
- agree on a process for resolving future discovery disputes;[16] and
- determine forms of production.

Technology savvy mediators can also provide an education function for counsel and parties.[17] For example, a discovery mediator can help attorneys and parties understand how the same data is typically located in over 10 places within an organization and that the ratio of discovered documents to documents used in trial has been estimated at 1000/1.[18]

Judges generally find this type of assistance early in the case to be invaluable. For example, Hon. Nora Barry Fischer, District Judge, Western District of Pennsylvania, explains:

> "By providing the necessary legal, technical, and facilitation skills needed to identify issues, offer an assessment of each, suggest options, and generally facilitate agreement, the court's expectation is that [e-neutrals] will help resolve ESI issues in a timely fashion and at a significant reduction in costs, because early resolution of these issues will help avoid a later and more costly war of e-discovery motions."

See Creating the Criteria and the Process for Selection of EDiscovery Special Masters in Federal Court, The Federal Lawyer, Feb. 2011 at 39.

Likewise, Hon. Michael Hluchaniuk, Magistrate Judge, Eastern District of Michigan, recently explained:

> "I think that eDiscovery mediators have the most value at the outset of the case in establishing a discovery plan (where e-discovery issues are anticipated) and where complex e-discovery issues need to be resolved in establishing the initial scheduling order. An e-discovery mediator can meet with the attorneys in the course of creating a discovery plan and identify problem areas and suggest solutions which avoid bigger problems down the road. It is important to set a good tone for resolving issues at that stage of the process."[19]

Hon. David McKeague, Circuit Judge, Sixth Circuit Court of Appeals, agrees:

> "With the explosion of ESI, the availability of trained and experienced mediators to assist lawyers with developing a discovery plan to obtain and review this electronically stored information at the beginning of a case and then assist the parties and the courts to resolve discovery disputes will become increasingly valuable."[20]

Also, if discovery mediation occurs early in a case, it provides the parties and their attorneys an opportunity to communicate and cooperate on topics unrelated to the merits of the case. It is generally acknowledged that even unsuccessful mediation of the dispute can have a significant, positive effect on shaping and ultimately resolving a case. Even when mediation does not immediately produce an agreement, it can give parties an enhanced understanding of the issues and the opportunity to narrow the scope of discovery.[21]

B. Failure to Comply with Duty to Confer Prior to Filing a Discovery Motion

Under most court rules, a party may file a motion to compel and/or for sanctions if the adverse party has failed to provide adequate answers to discovery requests. Likewise, most state and federal court rules allow a party or any person from whom discovery is sought to move for a protective order to protect themselves from annoyance, embarrassment, oppression or undue burden or expense. However, before doing so, the moving party has a duty to confer in good faith with the party failing to act in an effort to obtain an appropriate response without court intervention[22]. Unfortunately, some attorneys attempt to comply with this duty by sending an email to or leaving a voice mail message for opposing counsel.

In *Schubert v. Pfizer, Inc.*, No. 09-167, at 10-11 (S.D. Iowa June 4, 2010), Magistrate Judge Celeste Bremer explains the importance of attorneys taking the meet and confer process seriously.

> "The painful process of discovery in this case demonstrates the need for counsel to cooperate. It is the clients who suffer when the "meet and confer" requirements are bypassed, when hundreds of pages of motions are filed to resolve what could be addressed in a single phone call, when the Federal Rules of Civil Procedure are

used as a sword rather than a mechanism to ensure the just, speedy and inexpensive determination of the action. Stop the madness. Use cooperation and proportionality to save the clients both time and money."

Hon. Iain Johnston, District Judge, Northern District of Illinois, recently expressed a similar opinion:

> "Most discovery conferences are drive-bys and the requirement to meet and confer is honored in the breach. I think a discovery mediator or special master can be helpful, particularly if that person has some authority in some way. By providing the necessary legal, technical, and facilitation skills needed to identify issues, offer an assessment of each, suggest options, and generally facilitate agreement, the court's expectation is that discovery mediators and special masters will help resolve ESI issues in a timely fashion and at a significant reduction in costs, because early resolution of these issues will help avoid a later and more costly war of e-discovery motions."[23]

To prevent such situations from occurring, the court can appoint a discovery mediator or special master to assure that the parties discuss, understand, and hopefully narrow or resolve their disputes before proceeding with their discovery motion,[24] or the parties can consider using the services of a discovery mediator as a reflection of their good faith effort to comply with the court rule. This strategy works for Hon. Stephen Murphy, District Judge, Eastern District of Michigan. He recently explained:

> "In my chambers, we rarely lose patience with discovery matters that get out of control. That is because we appoint highly qualified discovery masters early on when disputes and motions begin to recur more than in a usual case. The service to the court of those masters is indispensable, and the cost savings to parties by their appointments is demonstrable. With more experience, good practice and sound procedure, discovery master appointments will continue to allow for better processes and judicial decision making that will also ensure the appointments are beneficial to efficient and fair dispute resolution."[25]

This strategy reduces the amount of the court's time needed to resolve discovery disputes, and reduces the amount of time and cost of litigation. As explained by Hon. Patricia Fresard, Circuit Court Judge, Wayne County Michigan:

> "Since inception of the program in August, 2017, discovery mediators have resolved discovery disputes in hundreds of cases; they sometimes even facilitate settlements when asked to do so by all participating attorneys. For 2019, 88% of participants were highly satisfied with the program. Judges and attorneys alike appreciate the program because it has streamlined motion calls."[26]

Likewise, about 75% of over 8,000 motions that have been referred to the Conciliation Program instituted by the Fairfax County Circuit Court and the Fairfax County Juvenile and Domestic

Relations General District Court over the past 15 years have been resolved or considerably narrowed by discovery mediators.[27]

C. Assistance with Privilege, Work-Product and Confidentiality Determinations

All state and federal court rules allow a party to withhold information that is otherwise discoverable on the basis that the information is privileged or subject to protection as trial preparation material.[28] Although procedural details can vary based on jurisdiction, most courts require the party making such a claim to describe the nature of the information not produced and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Courts have long recognized that protecting privilege and confidential information is expensive and time consuming. As reflected in the Notes of the Federal Court Advisory Committee on Rules:

> "The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery. These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming."[29]

Because this process is a common area of controversy between the parties, it often results in the court being requested to evaluate thousands of documents to determine which ones are entitled to protection in whole or in part. Many judges have noted that such reviews are an enormous burden on the court. For example, as Hon. Paul Grimm, District Judge, Maryland, explains:

> "The time it takes the court to review the extrinsic evidence on a document-by-document basis can be extensive, particularly given the tendency of lawyers to be over-inclusive in the assertion of privilege/protection in the first place."

See Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 265 (D. Md. 2008). Hon. Shira A. Scheindlin, Retired District Judge, Southern District New York, recently expressed a similar opinion:

> "[B]urdensome privilege reviews ... cannot reasonably be handled by a busy district judge or magistrate judge, and surely not by a judge sitting in the commercial divisions in state courts. A special master who is experience in the law of attorney-client privilege and work product protection is ideally suited to quickly conduct a sampling-type review, make some preliminary rulings by category and move the parties toward resolving the remaining claims of privilege or protection."[30]

In these situations, many courts have retained an experienced special master to assist with the review of privilege claims and to make recommendations or determinations on what information is or is not entitled to privilege protection. *See, e.g., Wachtel v. Health Net Inc.*, 482 F.3d 225, 228 (3d Cir. 2007); *In re Bausch & Lomb Contact Lens Solution Product Liability Litigation,* 932 N.Y.S.2d 18 (Sept. 15, 2011)(court appointed a special master to "review privilege logs, privilege redaction logs, redaction logs and any documents identified to him by plaintiffs" in order to resolve defendant's privilege claims); *In re Vioxx Products Liability Litigation,* 2006 WL 1726675, at 2 (5th Cir. May 26, 2006)(special master reviewed a sample of 2,000 documents claimed to be representative of all the withheld documents; court held that the special master's sample review process provided adequate procedural protections, and adopted the special master's recommendations for many documents).

D. Discovery Monitoring and/or Management is Needed

Although discovery in civil litigation is intended to be a collaborative, self-executing process, in some cases it becomes clear that parties and/or their attorneys are not communicating or cooperating sufficiently, and most if not every dispute results in motions practice. There is little deterrence to undertaking such a strategy, especially if delaying discovery or the trial as long as possible is considered an advantage. On the other hand, a discovery mediator or special master will often be more readily available and be able to devote more time to work through intractable discovery disputes. As recently explained by Hon. Elizabeth Stafford, Magistrate Judge, Eastern District Michigan:

> "Discovery mediation is a great way for parties to find solutions that satisfy their competing interests rather than engaging in costly, protracted, and unnecessary motion practice. I regard the appointment of a discovery mediator or special master with electronic discovery expertise as being a better option than having a judge micromanage the discovery process."[31]

Hon. Shira A. Scheindlin, Retired District Judge, Southern District New York, recently expressed a similar opinion:

> "I also appointed discovery special masters ... where discovery issues would recur with troubling frequency, or required a particular expertise. In these situations, a special master was particularly useful in being available on short notice, familiar with the case from prior disputes, and generally able to rule quickly because he or she was not burdened with other courtroom commitments."[32]

In these situations, many courts have retained an experienced special master to assist with discovery monitoring and/or management. *See, e.g., Wachtel v. Health Net, Inc*., 239 F.R.D. 81 (D.N.J. 2006)(court appointed a special master to facilitate the discovery process after defendants repeatedly failed to comply with discovery orders); *ORP Surgical, LLP v. Howmedica Osteonics Corp.*, No. 1:20-cv-01450 (Colo. May 10, 2022)(appointment of special master "proved to be extremely helpful to the Court" because of the "volume and antagonistic nature of the discovery disputes"); *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, No. 00 Civ. 1898 (S.D. N.Y. June 18, 2004)(appointing special master to resolve all e-discovery disputes, including questions of privilege, work product, relevancy, scope and burden); *United States v. Anthem/Cigna*,16-cv-1493 (D.D.C. Aug. 12, 2016)(appointing special master to rule on all disputes concerning discovery).

E. Court Seeks Technical or eDiscovery Assistance

Modern cases typically deal with issues related to the discovery of electronically stored information. Amendments to federal and state discovery rules contain provisions regarding how judges and attorneys can best resolve the challenges that arise. Those challenges include determining: (a) what information needs to be preserved, (b) what information is readily accessible or within the scope of discovery, (c) what is an appropriate form of production, including whether metadata needs to be disclosed, and (d) what should happen when privileged or otherwise protected information is inadvertently produced.

It has long been considered within a court's purview to engage the help of an expert advisor.[33] In cases involving complex technical or scientific issues, advisors with technical expertise can be helpful to the court. As explained by Hon. Kristen Mix, Magistrate Judge, Colorado:

> "Many kinds of civil litigation can benefit from appointment of a special master to handle complex electronic discovery issues or to provide special expertise to the court. For busy trial judges, appointment of a special master in cases where discovery issues are multiplied or exacerbated by attorney or party misconduct can make an important difference in your ability to efficiently, thoroughly and effectively manage your docket."[34]

Hon. Xavier Rodriguez, District Judge, Western District of Texas, expresses a similar opinion:

> "Depending upon the facts and law in each case the parties and the Court may wish to consider the appointment of a Special Master to expedite the case, reduce the burden of motion practice and resolve highly technical litigation. Especially as the Courts work through the anticipated backlog of cases caused by the COVID-19 closure of trials, parties and the courts may find Special Master and Technical Advisor appointments of benefit in helping to achieve the just, speedy and inexpensive determination of technical issues."[35]

Several courts have found the retention of a special master to handle complex or time intensive eDiscovery issues to be quite valuable. *See, e.g., Waymo LLC v. Uber Techs., Inc*., No. 17-cv-00939-WHA (N.D. Cal. Nov. 28, 2017)(special master handled multiple discovery disputes

including motion for sanctions); *Small v. University Medical Center*, No. 2:13-cv-0298-APG (D.C. Nev. Sept. 9, 2018)(judge commented: "the special master's extraordinary expertise and persistence resulted in restoration, remediation, and production of a great deal of relevant and discoverable electronically stored information.*"); Rio Tinto v. Vale*, No. 14 Civ. 3042, 2015 WL 4367250, at *1 (S.D.N.Y. July 15, 2015) (appointing special master "to assist with issues concerning Technology Assisted Review (TAR), also known as predictive coding"). Similarly, it is increasingly common for a special master experienced in both discovery procedures and computer systems and software to be retained as a consultant or expert for attorneys and their clients on technical issues.[36]

IV. Benefits and Costs

Historically there has been reluctance to appoint or retain a discovery mediator or special master because it adds an additional step and cost to an already long and expensive litigation process. However, there have been many changes over the last 10 to 20 years, which should reduce that reluctance. Here are some of the factors one should consider in evaluating the costs/benefits on when and how to utilize a discovery mediator or special master.

A. Faster Resolution of Disputes

There are numerous programs around the country that provide training for discovery mediators and special masters and most of those programs publish lists of approved candidates. Consequently, courts and attorneys can easily identify, retain and utilize a discovery mediator or special master within a week or two. This is especially true when the process can occur remotely via Zoom or other reliable video platform. On the other hand, because of crowded court dockets,[37] it often takes several weeks if not months to have a discovery motion or issue resolved by the court.

B. Confidentiality and Self Determination

When parties work with a discovery mediator, it creates an environment "allowing for creative and adaptable problem solving."[38] Stage one of most discovery mediations begin with a joint session where each party has an opportunity to explain its position to the mediator and to the opposing party. Stage two typically involves breakout sessions where the mediator meets with each side individually. However, what is key to that the whole process is that the communications are protected by confidentiality.[39] That fact often results in a better understanding of the discovery burdens and concerns, which empowers the mediator to explore creative solutions.

The parties can agree that the discovery mediator does not make any rulings. Instead, the mediator works with the parties to negotiate a mutually acceptable discovery plan or resolution. [40] On the other hand, when presenting discovery issues to a court, there is the potential cost of an adverse discovery ruling. According to an article in Inside Counsel, "[t]he risk that a misguided ruling on a discovery motion may impose undue burden, expense and business disruption on your company is an ever-present concern for most general counsel, and yet too many litigants make the 'penny-wise, pound foolish' decision to forego the relatively modest investment in a special master." [41] The risk, albeit perhaps on a smaller scale, is just as applicable to individual litigants as it is to corporate parties.

C. Ability to Select Relevant Level of eDiscovery Experience

Some judges have a high level of experience and interest in handling e-discovery issues. However, many judges have not yet had the time to develop that experience. Unfortunately, if your case has been assigned to a judge without that experience, you do not have the ability to select a different judge with the relevant experience to handle your particular discovery motion or issue. On the other hand, it is much easier to identify and select a discovery mediator or special master that has the relevant experience to be able to quickly and effectively resolve your particular dispute.

D. Fees Vary and are Typically Shared

The hourly fee for a discovery mediator or special master can vary significantly based on the level and type of experience required. It is important to remember that in most situations the fee will be split among the relevant parties. However, in some situations where one party is not acting in good faith, the court has the authority to order cost shifting of the fees to be borne by that particular party.

E. Cost Savings to the Parties

Discovery mediators and special masters can resolve e-discovery issues in a timely fashion and at a significant reduction in costs, because early resolution of these issues will help avoid a later and more costly "war of e-discovery motions."[42] In addition, it often takes much less attorney time to present a discovery motion or issue to a discovery mediator or special master than to a court. For example, in many situations, a discovery motion or issue can be presented with minimal or no legal briefs. Although no scientific study has empirically established that discovery mediators and special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.[43]

F. Reduce Court Backlogs

"Even in the best of times, the nation's courts consistently battle case backlogs for a variety of reasons; ... when you add a public health crisis into that equation, it is easy to see why the backlog situation may become much more difficult to manage."[37] The average case backlog for state and local courts across the United States increased by about one-third amid the COVID-19 pandemic, according to Thomson Reuters' report, titled *The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021*. The company's survey of more than 238 judges and other court professionals found that the average backlog in U.S. courts before the COVID-19 pandemic was 958 cases. The average backlog increased to 1,274 in the last year.[37] Moreover, many state courts will face these challenges with reduced budgets. "The pandemic has cost states tax revenue while increasing the demand for state services. Many states need to find money somewhere. Often 'somewhere' means everywhere – with cuts facing the judiciary along with other branches."[44] Identifying and resolving discovery disputes without court involvement should help reduce these backlogs.

V. Selection and Retention of a Special Master or Discovery Mediator

It is important to determine whether the cost of appointing a discovery mediator or special master is justified. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a discovery mediator or special master to deter, settle, or quickly dispose of issues when they arise.[45]

The choice of who is to serve as a discovery mediator or special master often relates to what function and role they will perform. For example, will the person be serving in a role where he or she will be: (a) facilitating resolution of disputes between or among co-parties,[46] (b) in a judicative role with respect discovery motions,[47] (c) providing technical advice, (d) providing discovery management, (e) conducting a privilege review or (f) possibly serving in more than one role? Which role(s) are relevant depends on the needs of the case, complexities of the issues and personalities of the parties involved, including counsel.

Parties may first want to consider using a less formal facilitating resolution role to determine what issues can be readily resolved as well as to identify which issues require adjudication. However, keep in mind that in this scenario, the discovery mediator may be disqualified to assume an adjudicative role as a special master in the same discovery dispute. The roles of these two types of neutrals have clear distinctions that attach different ethical considerations. [48]

Keep in mind that courts should afford the parties the opportunity to propose acceptable candidates.[49] Involving the parties in the selection process should minimize the parties' perception that a candidate was forced upon them by the court and should eliminate any possible concerns of bias. When evaluating candidates, the following factors may or may not be important to your particular circumstances and needs of the case:

- expertise on a broad range of eDiscovery topics;
- experience with large-scale, complex litigation matters;
- mediation training and experience;
- experience as a special master;
- personality and methodology;
- subject matter expertise (*e.g.* commercial, patent, antitrust, medical malpractice);
- legal issue expertise (*e.g.* privilege, spoliation, proportionality)
- member of the local bar (familiarity with local court rules and practices);
- familiarity with relevant technology;
- discovery management experience;
- court approvals and/or certifications;
- law degree and litigation experience;
- experience as an expert witness; and
- billing rate.

In light of the increased remote accessibility of discovery mediators and special masters, there is no shortage of resources to identify and select an appropriate candidate. There are a number of national and local directories that provide information about court-approved discovery mediators and special masters. Please visit the EDRM's WIKI at www.edrm.net for a list of such directories. As with most areas of the law, it is also wise to ask other attorneys and judges who to use and who to avoid, and delve into the professional literature to identify scholarship and leadership.

Once you have decided who you intend to retain as a discovery mediator or special master, it is important to describe the scope of the engagement. For special masters, Rule 53(b)(2) of the Federal Rules of Civil Procedure and similar state rules prescribe that the appointing order "direct the master to proceed with all reasonable diligence" and state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;
(C) the nature of the materials to be preserved and filed as the record of the master's activities;
(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

The court should consider adapting these terms (or adding others) consistent with the special master's role in the case. See Appendix B for a sample special master appointing order.

It is equally important to memorialize the scope of your engagement with a discovery master. However, often these engagements are set forth in an agreement between the parties and the mediator and does not involve court involvement or approval. See Appendix C for a sample discovery mediator retention agreement.

VI. Development of a Local Program

During the last 10 years a number of local discovery mediation and/or special master programs have been developed and several of them have been very successful. For example, several years ago California Superior Courts began adopting comprehensive Discovery Facilitator Programs.[50] For example, in Contra Costa County Superior Court (San Francisco Bay Area), any party wishing to file a discovery motion must first serve a Request for Assignment of Discovery Facilitator to the Alternative Dispute Resolution (ADR) Office. The ADR Office will identify a facilitator from the approved list at the Clerk's Office and the facilitation must occur within 30 days. The Discovery Facilitators are experienced attorneys who volunteer two to four hours of their time (per dispute) to assist in resolving these disputes. After that two to four hour time period, the parties can either (a) memorialize their resolution, (b) proceed to file a discovery motion, or (c) retain the Discovery Facilitator to continue conferring with them to resolve the dispute.

These California programs have been very successful. According to Marin County Superior Court: "The number of contested discovery and motion hearings has been dramatically reduced … and parties have reported a high degree of satisfaction from the program."[51] The Bar Association in Marin County California reports that, of the discovery disputes referred to mediation, 95% did not return to the court.[52]

It appears that such programs can be an important means for managing a court's docket. For example, Hon. Penny S. Azcarate, Chief Circuit Judge, Fairfax County, Virginia recently explained:

> "Our mediation program is pivotal to our Court. It is a lifesaver for the judges as it clears the docket of lengthy contested discovery motions allowing us to focus on substantive motions and cases. Mediation is also welcomed by our attorneys as it streamlines the issues and gets both sides talking. Without this program, our dockets would not be as efficient or timely. In addition, as Covid impacted our courts, the mediation program went virtual and continued to assist us daily with our growing caseload."[53]

Hon. James Alexander, Business Court Judge, Oakland County, Michigan confirmed that opinion when he recently stated:

> "Our discovery facilitator program is a tremendous success, both from the standpoint of getting volunteers and resolving disputes and the program is now being discussed with other state-wide Business Court Judges."[54]

Appendix D provides a summary of five local discovery mediation and/or special master programs from different jurisdictions throughout the country. To learn more about how your local bar can successfully develop and operate such a program, please visit the EDRM's WIKI at edrm.net.

VII. Educational Webinars, Articles, Resources, and Best Practices

EDRM provides periodic educational webinars for judges, lawyers and aspiring discovery mediators and special masters. Visit EDRM's WIKI at edrm.net to register for the live or on-demand webinars. In addition, the WIKI includes many articles, resources and best practices available to judges and attorneys who want to use the services of a discovery mediator or special master.

VIII. Acknowledgements

We would like to acknowledge and thank Mary Mack, Kaylee Walstad and all the members of the EDRM Global Advisory Council for their support and encouragement of this project. We would also like to give special thanks to the following team members and contributors to the Discovery Mediation and Special Master Project. Many of these individuals have served and continue to serve as discovery mediators and/or special masters and are good resources on this topic:

- Shannon Bales, Litigation Support Manager at Munger, Tolles & Olson (Costa Mesa, CA) shannonlexbales@gmail.com
- Craig Ball, Forensic Technologist and Adjunct Professor at University of Texas Law School (New Orleans, LA) craig@ball.net
- David Cohen, Partner at Reed Smith LLP (Pittsburgh, PA) drcohen@reedsmith.com
- Sonya Duchak, Coordinator at Fairfax Bar Association Conciliation Program (Fairfax, VA) sduchak@fairfaxbar.org
- Hon. Patricia Fresard, Circuit Judge, Wayne County Michigan, Patricia.fresard@3rdcc.org
- Maura R. Grossman, Research Professor at the University of Waterloo (Ontario, Canada) maura.grossman@uwaterloo.ca and Principal at Maura Grossman Law (Buffalo, NY) maura@mauragrossman.com
- Merril Hirsh, FCIArb, Executive Director Academy of Court-Appointed Masters, Law Office of Merril Hirsh PLLC merril@merrilhirsh.com
- Hon. Michael Hluchaniuk, Magistrate Judge, Eastern District of Michigan, mjhluch@gmail.com
- Hon. Iain Johnston, District Judge, Northern District of Illinois Iain_Johnston@ilnd.uscourts.gov
- Chris King, Partner at Redgrave, LLP (Chicago, IL) cking@redgravellp.com
- Ralph Losey, Partner at Losey PLLC (Orlando, FL) Ralph@Losey.law
- Bruce Markowitz, Vice President at Evolver Legal Services (Reston, VA) bmarkowitz@evolverinc.com
- Hon. David McKeague, Circuit Judge, Sixth Circuit Court of Appeals David_W_McKeague@ca6.uscourts.gov
- Hon. Kristen L. Mix, Magistrate Judge, Colorado Kristen_L_Mix@cod.uscourts.gov
- Hon. Stephen Murphy, District Judge, Eastern District of Michigan Stephen_Murphy@mied.uscourts.gov
- Andrew J. Peck (Ret.), Senior Counsel at DLA Piper (NY); United States Magistrate Judge (S.D. NY) (1995-2018). andrew.peck@dlapiper.com
- Jacqueline M. Pierce, Esq., Executive Director of Mandell Gisnet Center (Seaside, CA), jpierce@mandellgisnetcenter.org;
- Hon. Xavier Rodriguez, District Judge, Western District of Texas xavier_rodriguez@txwd.uscourts.gov
- George Socha, Senior Vice President at Reveal-Brainspace (St. Paul, MN) gsocha@revealdata.com
- Peter Vogel, Partner at Foley & Lardner (Dallas, TX) pvogel@foley.com
- Ira Warshawsky (Ret.), Of Counsel at Meyer, Suozzi, English & Klein, PC (NY) Iwarshawsky@msek.com; New York Supreme Court Justice (1997-2011) iwarshawsky@namadr.com;
- Paul Weiner, Shareholder at Littler Mendelson (Philadelphia, PA) pweiner@littler.com
- Jay Yelton, Of Counsel at Warner, Norcross + Judd (Michigan) jyelton@wnj.com

*Permission to reprint is granted to all lawyers, judges, and court personnel for professional use and to all accredited educational institutions for educational purposes. All other persons and entities may reprint only with written permission. Please contact info@edrm.net.

Appendix A: Federal and State Court Rules Governing Discovery Mediators and Special Masters*

State	Authorities
Alabama	ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53 • Adopts pre-2003 amended version of FRCP 53, but state rule does not apply to state district courts.
Alaska	ALASKA R. CIV. P. 53 ALASKA CT. R., CHILD IN NEED OF AID 4 ALASKA CT. R., DELINQUENCY 4
Arizona	16 PART 1, A.R.S. RULES OF F CIV. PROC., RULE 53 ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party). • Adopts pre-2003 amended version of FRCP 53.
Arkansas	ARK. R. CIV. P. 53 • Modeled after pre-2003 amended version of FRCP 53, but limited to non-jury actions.
California	CAL CIV. PROC. CODE §§ 638-639 (West 2004) • Requires agreement of the parties.
Colorado	COLO. C. C.P.R. 53 • Adopts pre-2003 amended version of FRCP 53.
Connecticut	CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53 • Limited scope—only applies to family law matters. Pilot program established for civil/family discovery masters and civil matter settlement conferences scheduled to end 12/31/2004.
Delaware	DEL. S. CT. R. 43(B)(V) DEL. CT. CH R. 135-47D7 DEL. FAM. CT. C.P.R. 53 DEL. SUPER. CT. CRIM. R. 5 • Limited to hearing issues of fact.
District of Columbia	D.C. SUPER. CT. R. CIV. P. 53 D.C. SUPER. CT. R. DOM. REL. 53 D.C. SUPER. CT. R. CRIM. P. 117 • Adopts pre-2003 amended version of FRCP 53.
Florida	FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005) Florida Family Law Rule 12.492 Florida Probate Rule 5.697 • All require consent with the possible exception of Probate Rule 5.697.
Georgia	GA. CODE ANN §§ 9-7-1 to -6 (1982 & Supp. 2004)
Hawaii	HAW. R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53.

State	Authorities
Idaho	IDAHO R. CIV. P. 53 IDAHO CRIM. R. 2.2 • Adopts pre-2003 amended version of FRCP 53.
Illinois	Illinois does not use fee officials. *Mullaney, Wells & Co. v. Savage*, 282 N.E.2d 536, 538 (Ill. App. Ct. 1972).
Indiana	IND. R. TRIAL P. 53 • Adopts pre-2003 amended version of FRCP 53.
Iowa	IOWA R. CIV. P. 1.935 • Adopts pre-2003 amended version of FRCP 53.
Kansas	KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002) • When parties consent, any issue can be referred to a special master. Contains language where without the parties' consent, the court can only refer a case to a master when justice will be measurably advanced, or to cases that will be tried to a jury when they involve examination of complex or voluminous accounts.
Kentucky	KY. R. CIV. P. 53.01 • When appointed to matters other than judicial sales, settlement, receivership, and bills of discovery assets of judgment debtors, appointment requires that the matter involve complex calculations, multiplicity of claims, or other exceptional circumstances.
Louisiana	LA. REV. STAT. ANN. § 13:4165 (West Supp. 2004) • Court can appoint in any civil action with parties' consent if there is a complicated issue or when exceptional circumstances exist.
Maine	ME. R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53.
Maryland	MD. CIR. CT. R. CIV. P. 2-541 • Limited to non-jury matters.
Massachusetts	MASS. R. CIV. P. 53 MASS. R. CRIM. P. 47 • Adopts pre-2003 amended version of FRCP 53, but also requires assent of all parties prior to special master appointment.
Michigan	MICH. CT. RULES PRAC. R. 3.913 • Applies to probate and juvenile court. Can conduct preliminary inquiries and can preside at hearings other than a jury trial or preliminary examination.
Minnesota	MINN. R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53.
Mississippi	MISS. R. CIV. P. 53 • Can refer any issue to a special master with the written consent of the parties, otherwise appointment requires an exceptional condition.
Missouri	MO. R. CIV. P. 68.01 • Adopts pre-2003 amended version of FRCP 53.

State	Authorities
Montana	MONT. CODE ANN. § 25-20-R. 53 (2003) • Adopts pre-2003 amended version of FRCP 53.
Nebraska	NEB. REV. STAT. §§ 25-1129 to -1137 (2004) • Appointment requires written consent of the parties.
Nevada	NEV. R. CIV. P. 53 NEV. 1ST JUD. DIST. CT. R. 5 • Adopts pre-2003 amended version of FRCP 53.
New Hampshire	N.H. R. SUPER. CT. 85-A • Appointment requires parties' written consent.
New Jersey	N.J. CONST. art. 11, § 4, ¶ 7 N.J. R. CIV. PRAC. 4:41 • Appointment requires parties' consent.
New Mexico	N.M. R. CIV. P. 1-053 • Adopts pre-2003 amended version of FRCP 53.
New York	N.Y. UNIF. TRIAL CT. R. § 202.14 • Chief Administrator of courts has power of appointment.
North Carolina	N.C. GEN. STAT. § IA-1, R. 53 (2003) • Modeled after pre-2003 amended version of FRCP 53. Certain actions require parties' consent prior to appointment.
North Dakota	N.D. R. CIV. P. 53 • Amendment effective March 2011, amended in response to the December 1, 2007 revision of the FRCP.
Ohio	OHIO REV. CODE ANN. CIV. R. 53 OHIO REV. CODE ANN. CRIM. R. 19 OHIO REV. CODE ANN. JUV. R. 40 • Modeled after pre-2003 amended version of FRCP 53. Does include pre-trial and post-trial matters, or matters where the parties consent.
Oklahoma	OKLA. STAT. ANN. tit. 12, §§ 612-619 (West 2000) • Can appoint to any civil action with the parties' written consent.
Oregon	OR. R. CIV. P. 65 • Appointment requires parties' written consent; without consent of the parties, appointment requires an exceptional condition.
Pennsylvania	42 PA. CONST. STAT. ANN. § 1126; PA. R. CIV. P. 1558, 1920.51 • Court can appoint at any time after the preliminary conference and master can hear any issue or the entire matter.
Rhode Island	R.I. R. CIV. P. 53 R.I. R. PROC. DOM. REL. 53 • Adopts pre-2003 amended version of FRCP 53, but also provides greater latitude in appointing a special master. Special master may be appointed to any issue where the parties agree.
South Carolina	S.C. R. CIV. P. 53 • Allows appointment when the parties' consent.
South Dakota	S.D. CODIFIED LAWS § 15-6-53 (West 2004) • Adopts pre-2003 amended version of FRCP 53.

State	Authorities
Tennessee	TENN. R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53.
Texas	TEX. R. CIV. P. 171 • Adopts pre-2003 amended version of FRCP 53, but requires parties' consent to appointment of a master. Other modifications include that the case must be an "exceptional one" and there must be "good cause" for appointment of a master. Texas also uses masters in tax cases.
Utah	UTAH R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53.
Vermont	VT. R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53 with minor modifications. State rule is narrower because for actions to be tried by a jury, appointment is only made when the action requires investigation of accounts or examination of vouchers.
Virginia	VA. S. CT. R. 3:23 • A court decree refers a matter to a "commissioner in chancery."
Washington	WASH. SUPER. CT. CIV. R. 53.3 • Adopts rule that is broader than the pre-2003 amended version of FRCP 53. State rule allows appointment for "good cause" and allows appointment of special master to discovery matters.
West Virginia	W. VA. R. CIV. P. 53
Wisconsin	WIS. STAT. § 805.06 (1994) • Adopts pre-2003 amended version of FRCP 53 with minor modifications, i.e., "referee" used in place of "special master."
Wyoming	WYO. R. CIV. P. 53 • Adopts pre-2003 amended version of FRCP 53.

* Please note that this chart is not exhaustive because (1) it is current only up to the date of publication of this Bench Book and (2) many courts have adopted local rules that likewise encourage the use of discovery masters and this chart does not attempt to include all such local rules.

Federal Rule 16(c)(2)(H) provides that "[a]t any pretrial conference, the court may consider and take appropriate action on ... referring matters to a magistrate judge or a master..." In addition, "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation." United States v. Black, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (citing Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) (quoting In re: Peterson, 253 U.S. 300, 311 (1920)); see also, e.g., Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power); Regents of the Univ. of Cal. v. Micro Therapeutics, Inc., No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect).

Appendix B: Special Master Appointing Order

The following provides an example of a model appointment order. It includes language to fit most cases. Of course, it needs to be tailored to meet the specific needs of each case. Other sample appointment orders can be found in the Academy of Court-Appointed Masters Benchbook and Resource Center at: courtappointedmasters.org.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

CASE NAME	**Case No.**
	ORDER APPOINTING E-DISCOVERY SPECIAL MASTER

This matter was submitted to the undersigned upon [choose one: the joint request of the parties / the consent of the parties / the motion of _____ / the Court's own initiative].

Counsel appearances were: _____
_____.

Based upon the [recite in some detail the basis of the Court's authority for appointment, such as:

- the consent of the parties under Rule 53(a)(1)(A);
- the unusual needs of the case including exceptional circumstances; such that consent of parties is not required under Rule 53(a)(1)(B)(i);
- to address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district, such that consent of parties is not required under Rule 53(a)(1)(C)],

and having given the parties notice and an opportunity to be heard, and after consideration of the fairness of imposing the likely expenses on the parties and the need to protect against unreasonable expense or delay:

IT IS HEREBY ORDERED:

1. **Authority for and Scope of the Appointment.** _____, is appointed pursuant to [insert appropriate Rule citation] as Master for the purpose of [specify scope of roles and duties in detail - options include the following]:

a. The Special Master shall have the sole discretion to determine the appropriate procedures for resolution of all assigned matters and shall have the authority to take all appropriate measures to perform the assigned duties. The master shall have all of the authority provided to masters set forth in Federal Rule 53 (c). The master may by order impose upon a party any sanction other than contempt and may recommend a contempt sanction against a party and contempt or any other sanction against a non-party.

b. The Special Master shall review with the parties ongoing discovery requests to determine where potentially responsive information is stored and how it can most effectively be identified, accessed, preserved, sampled, searched, reviewed, redacted and produced. To the extent the parties have disputes on these matters, the Special Master may initiate or participate in the parties' efforts to resolve same. The Special Master is authorized to resolve issues as to the scope and necessity of discovery of ESI, as well as search methods, terms and protocols, means, methods and forms of preservation, restoration, production and redaction, formatting and other technical matters.

c. Hearing evidence and legal argument on [specify issue(s)] and issuing [findings and recommendations / a final decision] (NOTE: The second 'final' option is available only with the consent of the parties. See section 5 below.)

d. The Special Master shall adjudicate the issues presented based upon the existing record, related motions and argument of counsel. An evidentiary hearing before the Special Master shall not be permitted. [Alternatively: The Special Master shall adjudicate the issues presented based upon the existing record, related motions, argument of counsel and, at the Special Master's discretion, new evidence presented by the parties at an evidentiary hearing.]

e. Directing, managing, and facilitating negotiations among the parties concerning ediscovery and related discovery plans. The mediation shall attempt to resolve any outstanding discovery disputes no later than _____.

f. Perform an *in camera* review of the following privileged or confidential materials: _____, to determine the legal status and factual nature of the information and make a report and recommendation accordingly. The special master may select and obtain the assistance of any ediscovery vendor services the master deems necessary for the prompt and efficient review. The costs incurred with the vendor selected by Special Master shall be passed on to the parties for payment according to the terms and allocations described below in paragraphs six and seven. 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.

g. Compiling and interpreting [specify the technical, voluminous, or complex evidence that is in need of review] and issuing findings and recommendations for the Court regarding _____.

The Master is directed to proceed with all reasonable diligence to complete the tasks assigned by this order.

2. **Master's Duties and Authority.** _____ shall have the sole discretion to determine the appropriate procedures for resolution of all assigned matters and shall have the authority to take all appropriate measures to perform the assigned duties. The master shall have all of the authority provided to masters set forth in Federal Rule 53 (c). The master may by order impose upon a party any sanction other than contempt and may recommend a contempt sanction against a party and contempt or any other sanction against a non-party.

3. **Identification of Point Persons and Cooperation**. 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.

4. ***Ex Parte* Communications.**

(a) **With the Court.** The master may have *ex parte* communications with the Court regarding [describe] [Examples - 1) whether or not a particular dispute or motion is subject to the scope of the master's duties; 2) assisting the Court with procedural matters, such as apprising the Court regarding logistics, the nature of the master's activities, and management of the litigation; 3) any matter upon which the parties or their counsel have consented; 4) the application of Rule 53; and 5) any matter, the subject of which is properly initiated by the Court.]

(b) **With the Parties and Counsel.** The master may have *ex parte* communications with the parties or counsel regarding [describe] [Examples - 1) purely procedural or scheduling matters; 2) resolution of privilege or similar questions, in connection with *in camera* inspections, upon notice to the other parties; and 3) any matter upon which the parties or their counsel have consented.] [Example - The master shall be allowed to engage in *ex parte* conversations with counsel for the parties relating to settlement efforts or conferences.]

5. **Materials to be Preserved and Filed as the Record of the Master's Activities.** [Example - The parties shall file with the Clerk all papers filed for consideration by the master. The master shall also file with the Clerk all reports or other communications with the undersigned. [Fed. R.

Civ. P. 53(b)(2)(C)]. [Example - All orders of the master shall be filed with the Court. It shall be the duty of the parties and counsel, not the master, to provide for any record of proceedings with the master, as approved by the master. The master shall not be responsible for maintaining any records of the master's activities other than billing records. In the event of any hearing where evidence is taken, it shall be the duty of the parties and counsel to preserve any exhibits tendered or rejected at the hearing.]

6. **Review of Master's Reports, Orders or Recommendations.** Any party seeking review of any ruling of the master shall timely file objections, or motions to modify, in accordance with Rule 53(f).

6a. **Alternative additional language:** All parties have consented to and agreed that review by the Court of findings of fact made by the master shall be reviewed for *clear error*, instead of *de novo* review.

6b. **Second alternative additional language.** All parties have consented to and agreed that there shall be no review by the Court of findings of fact made by the master and waived their right to file objections, motions to modify or otherwise seek review of such findings.

Rights to appeal conclusions of law made or recommended by a master shall in all circumstances remain subject to *de novo* review.

7. **Compensation.** The master shall be paid $ _____ per hour for work done pursuant to this Order, and shall be reimbursed for all reasonable expenses incurred. The master shall bill the parties on a monthly basis for fees and disbursements, and those bills shall be promptly paid [50% by the plaintiffs and 50% by the defendants / or identify an alternative arrangement]. As to any particular portion of the proceedings necessitated by the conduct of one party or group of parties, the master can assess the costs of that portion of the proceedings to the responsible party or parties. The Court will determine at the conclusion of this litigation whether the amounts paid to the master will be borne on the 50/50 basis or will be reallocated. Upon the failure of a party to timely pay the master's fees or costs, the Court may enter a judgment in favor of the master and against the non-paying party.

8. **The Master is authorized to hire an e-discovery or other vendor selected by the master to assist in completion of the matters referred by this Order.** The reasonable fees of the vendors shall be promptly paid by the parties in accord with the procedure and terms set forth in Paragraph 6, above.

9. **Master's Affidavit.** The master's affidavit required by F.R.C.P. 53(b)(3)(A) has been executed and has been filed. (See following form affidavit).

Dated this ____day of _____, 20___.

Judge_____.

Case Caption Here

DOUBLE CHECK THIS FORM TO CONFORM TO LOCAL PRACTICE

AFFIDAVIT OF _____

TENDERED PURSUANT TO RULE 53, FEDERAL RULES OF CIVIL PROCEDURE

STATE OF _____
COUNTY OF _____

_____, being first duly sworn according to law, states the following:

1. I am an attorney at law and have been duly licensed to practice law in the State of _____ from ____ to present. My _____ Bar number is _____.

2. I have thoroughly familiarized myself with the issues involved in this case. As a result of my knowledge of the case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Master in this matter.

_____
[Name]

Sworn to before me and subscribed in my presence this __ day of _____, 20___.

Notary Public

AFFIDAVIT DECLARATION OF _____
STATE OF _____
COUNTY OF _____

Date_____ Name_____

Appendix C: Discovery Mediator Retention Agreement

Matter:

Thank you for the opportunity to help you develop a discovery plan and/or to resolve your discovery dispute. Here is some important information about the mediation process and my role as the mediator, a confidentiality agreement and some disclosures required by ethical rules. The parties, their attorneys/representatives and all other participants should read and sign this agreement.

1. **Voluntary process:**

Mediation is a voluntary process. Any resolution or partial resolution of the dispute in mediation will be by voluntary agreement of the parties. I have no authority to and will not impose any resolution against the will of any party. Any party to the mediation may withdraw at any time, in which case the mediation will terminate unless the remaining parties agree to continue.

The mediation will start with a general session. Usually I invite the parties' representatives to make brief opening statements regarding the outstanding discovery issues. I will also invite the parties and other participants to make any statements they choose to make.

After the general session, I usually separate the parties and meet separately with them.

During the mediation I may offer a personal evaluation of the facts as presented, state my personal opinion of what the law is and discuss a range of possible solutions for the outstanding discovery issues.

The parties and other participants should be as candid with me regarding their views, concerns and expectations as is comfortable.

2. **Scope of Services**:

The parties have agreed that the mediator has been requested to provide the following services:

- identify discovery needs and reasonable timetables: ___
- create boundaries for data preservation: ___
- develop narrowly focused and proportional discovery requests: ___
- craft data collection protocols, including sampling and search techniques: ___

- evaluate options for leveraging technology to search, cull and review responsive discovery: ___
- evaluate alternative strategies for protecting confidential, privilege and work-product: ___
- resolve outstanding discovery disputes: ___
- determine forms of production: ___

3. **No legal services:**

The parties and all signatories hereto understand and agree that the mediator is not practicing law, and owes no legal duty to them in connection with any acts or omissions made in his capacity as mediator. The mediator is acting as a neutral, not an advocate, and the mediator is not and cannot "represent" anyone's interests in this mediation. The parties understand and agree that even if the mediator gives his opinion, or makes statements concerning the law or legal matters, or assists in drafting a discovery plan, that does not constitute "legal advice" or "legal services," and they agree to rely solely upon their own judgment or advice from an attorney who is representing their interests, and not upon anything the mediator says or does.

4. **Confidentiality:**

All communications, negotiations and discussions in the course of the mediation shall be kept confidential, except that a signed, written agreement or discovery plan that provides that it is binding or enforceable shall be admissible for enforcement purposes.

The attorney-client and work product privileges are not waived by disclosure of information or documents to me.

No evidence of anything said in the course of the mediation shall be admissible or subject to discovery. No writing prepared for the purpose of, in the course of or pursuant to the mediation shall be admissible or subject to discovery.

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure and confidential before the mediation ends shall remain so to the same extent after the mediation ends.

Information revealed to me in confidence in separate communications with a party will not be disclosed to anyone else if that party requests that I not reveal the information. The parties and signatories hereto understand and agree that the confidentiality protections normally afforded by engaging in mediation may become inapplicable in the event and to the extent the mediator or any participant herein becomes aware of the commission or likely commission of a crime of violence.

5. **Disclosures:**

I retired from _____ in ____ and I am neither a shareholder nor employee. Instead, I remain of counsel and _____ gives me free use of its conference rooms. _____ currently is representing or has represented:

_____

- Prior service as a mediator in another mediation involving any of the participants:

_____

- Current/currently expected service as a mediator in another mediation involving any of the parties, their attorney or representative: _____
- Personal knowledge of disputed evidentiary facts:_____ .
- Service as a lawyer in this disputed matter: _____ .
- Financial interest in the subject matter of the mediation or in a party to the mediation:____ _____
- Relatives of mine who are a party to the mediation or an officer, director or trustee of a party to the mediation: _____
- Relatives of mine who are lawyers for parties in the mediation or are associated in the private practice of law with a lawyer in the mediation: _____

6. **Compensation.**

The parties agree that the fees of the mediator to be shared as follows: (50% by the plaintiffs and 50% by the defendants / or identify an alternative arrangement). The clients shall each be jointly and severally liable for their respective share of the mediator's reasonable fee for this mediation. The mediator's fee rate is $_____ an hour for all services preparing for and time spent conducting the mediation. Each side hereto shall deposit the sum of $_____ with the mediator by no later than the start of the first mediation session, which in this case is scheduled for _____ at _____.
Any unused portion of this deposit will be promptly refunded. All further sums due and owing for the mediator's services hereunder shall be paid in full within five (5) business days after submission of an invoice from the mediator. Checks should be made payable to _____ (Federal Tax I.D. No. _____).

Counterparts: This agreement may be signed in counterpart.

_____, Mediator Date: _____

Parties:

_____ _____

_____ _____

_____ _____

Attorneys/Representatives:

_____ _____

_____ _____

_____ _____

Other Participants:

_____ _____

_____ _____

_____ _____

Appendix D: Local Programs Promoting Discovery Mediation

A. Fairfax County, Virginia Discovery Motion Conciliation Program www.fairfaxlawfoundation.org/

- The Conciliation Program is a service that the Fairfax Bar Association has been offering since 1997 to provide services with respect to the motions docket of the Fairfax County Circuit Court. In 2002, the program began offering motion conciliators in the Juvenile and Domestic Relations General District Court. In 2005, it coordinated with the Division of Dispute Resolution Services, Office of the Executive Secretary, Supreme Court of Virginia to provide continual conciliation services to both the Circuit Court and the Juvenile and Domestic Relations District Court.
- The program's conciliators are experienced litigators, with expertise in both civil litigation and family law. They volunteer their services to help resolve motions and other preliminary disputes without charge to the parties in the case.
- The types of disputes which the Conciliation Program can help resolve include motions and petitions: (1) in all civil discovery disputes; (2) for visitation and emergency visitation orders; (3) to modify scheduling orders (except continuances); (4) seeking pendente lite relief; and in other matters, at the discretion of the court.
- A case may be designated for early conciliation by the judge assigned to hear the case on motions day. Typically, these designations occur on Monday of the week the motion is set to be heard. If a motion is designated for conciliation, the judge's law clerk will provide preliminary information to the Conciliation Coordinator while also contacting the parties on the motion to inform them that their motion has been sent to conciliation. A conciliator will be assigned to the motion who will then contact counsel and/or pro se parties to initiate conciliation. The Conciliation Coordinator uses a list of about 150 volunteer conciliators.
- A party may request conciliation, either by contacting the Conciliation Coordinator directly, or by requesting the court to refer the matter for conciliation. Also, on the day of the hearing, the court may recommend that the parties meet with a conciliator before the case is heard. The Conciliation Coordinator, along with a volunteer coordinator for law cases, and a volunteer for family law cases, is available at every Friday Motions Docket in Circuit Court. A conciliator is available at every Wednesday Motions Docket in Juvenile and Domestic Relations District Court.
- When conciliation is requested, trained conciliators meet with the interested parties. All proceedings are informal and confidential. The conciliator's recommendations or suggestions are not binding upon the parties and are not disclosed to the court.
- Since 2005, over 8,000 motions have been conciliated, with an average of about 500 per year. On average, over 75% of the motions have been resolved through conciliation. The program has received very positive support from the court, the Fairfax Bar Association and practicing attorneys. It has received funding for its coordinator since 2005 through a grant awarded by the Virginia Supreme Court.

B. Marin County (CA) Superior Court's Discovery Facilitator Program
www.marincourt.org/data/PDFs/ULRules.pdf

- For discovery disputes in a civil case that the parties cannot resolve informally as a result of the meet and confer process, it is the policy of the Marin County Superior Court to require use of the Discovery Facilitator Program. Reasonable and good faith participation in the Program before the filing of a discovery motion satisfies a party's meet and confer obligation.
- The Court maintains a list of qualified Discovery Facilitators. Each panelist on the list must be an active member of the State Bar licensed for at least ten years or a retired judge. The ADR Coordinator shall select, at random, a number of names from the panel of qualified Facilitators equal to the number of sides plus one, and shall prepare a list of the names of the randomly selected Facilitators. The ADR Coordinator shall provide this list to the parties upon the filing of a discovery motion or referral stipulation. If the parties agree on the selection of a Facilitator from the list, they shall notify the ADR Coordinator within ten days following the filing date of the discovery motion or referral stipulation. If the parties cannot agree on a Facilitator, then within ten days, each side shall submit to the ADR Coordinator a written rejection identifying no more than one name on the list of potential Facilitators that it does not accept. Promptly upon expiration of the ten days, the ADR Coordinator shall appoint one of the persons on the list who was either agreed upon or whose name was not rejected to serve as Facilitator. The ADR Coordinator shall promptly assign the case to the Facilitator and shall serve the "Notice of Appointment of Discovery Facilitator" on all parties and on the Facilitator. Upon receipt of the "Notice of Appointment of Discovery Facilitator," the parties shall promptly deliver to the Facilitator copies of the pleadings and discovery necessary to facilitate resolution of the dispute.
- From the point at which the Facilitator receives notice of an appointment, the Facilitator shall devote up to two hours, without charge to any of the parties, in an attempt to facilitate resolution of the discovery dispute. If the matter has not resolved after two hours, the parties may continue working with the Facilitator if they agree regarding the Facilitator's compensation.
- If a pending discovery motion is resolved, then no later than five days before the motion hearing date, the moving party shall withdraw the motion. If a discovery dispute is not resolved, each party files and serves a pleading entitled "Declaration of NonResolution." The Declaration shall not exceed three pages and shall briefly summarize the remaining disputed issues and each party's contentions. The Facilitator may at his or her option, serve on all parties and file with the Court, a report containing a brief summary of the dispute and the parties' contentions, and any legal or factual analysis made by the Facilitator regarding the dispute.
- The Bar Association in Marin County California reports that, of the discovery disputes referred to mediation, 95% did not return to the court. Louis S. Franecke, *Marin's Discovery Facilitator Program Will Cure Your Dispute*, 45 Marin Law. 2 (2014) ("The discovery disputes were resolved, the motions settled, the cases settled, etc.").

C. Western District of Pennsylvania eDiscovery Special Master and Mediator Program www.pawd.uscourts.gov/ed-special-masters

- On November 16, 2010, the Board of Judges approved the establishment of a list of attorneys with expertise in electronic discovery to serve as Special Masters upon appointment by the court. The criteria for appointment as an eDiscovery Special Master included: (1) active bar admission, (2) demonstrated litigation experience, (3) demonstrated eDiscovery knowledge, training, and experience and (4) mediation and/or ADR training and/or experience. Attorneys attend a four-hour orientation and technical training program. Currently there are approximately 60 approved attorneys on the Special Master list.
- This Program has been successful in that more than 25 cases have been referred to Special Masters since 2011. Judge Joy Flowers Conti and Susan Ardisson have written a Chapter about this Program describing several of the cases that have referred to Special Masters and some of the more than 30 reports and recommendations that have been issued by them. They explain that this Program "has saved clients thousands of dollars—and hundreds of thousands—in unproductive ESI efforts." See eDiscovery, 4th Edition, Pennsylvania Bar Institute Press Book (2017).
- On December 16, 2015, the Board of Judges determined that there exists a need for a panel of mediators, skilled in eDiscovery, to help resolve discovery disputes. The court approved the establishment of a list of qualified attorneys approved to serve as "ED-Mediators" in disputes involving eDiscovery. ED-Mediators applications must satisfy the criteria for appointment as both an eDiscovery Special Master and an ADR neutral prior to approval.
- An electronic discovery dispute may be submitted to ED Mediation either by motion to the Court or by agreement of all parties to the discovery dispute (which may be less than all parties to the action). Judges also may order that parties submit a discovery dispute to ED Mediation. Upon referral by the court, or by agreement of the parties, counsel shall consult this District's ED Mediation panel and select the individual all parties to the dispute agree upon to serve as the ED mediator.

D. Monterey County (CA) Superior Court Discovery Facilitator Program www.monterey.courts.ca.gov/mediation/discovery-facilitation

- Participation in Monterey County's Program is not a prerequisite to filing a discovery motion, but: (1) good faith participation shall be considered by the Court in determining if the "meet and confer" requirement has been met; and (2) the Court may consider non-participation as a ground to deny sanctions that otherwise might be awarded. In addition, if the judge considers a motion appropriate for referral to the Program, he or she may continue the motion hearing date and order the parties to participate in the Program before the continued hearing date.
- Parties to a discovery dispute may stipulate to use the program either before or after a formal motion is filed. The stipulation is sent to the Mandel-Gisnet Center for assignment to a Facilitator. The Center supplies the parties with a list of attorneys with at least 15 years of full-time civil litigation experience. The Facilitator donates preparation time and up to two hours of conference time, following which the parties and the Facilitator may negotiate compensation for additional time.

- The Facilitator attempts to resolve the dispute by telephone or in person after a review of the discovery requests and responses in dispute, and any written "meet and confer" communications. If a resolution is reached, it is memorialized in a stipulation that is filed with the Court. If a resolution is not reached, the Facilitator serves each party with a Notice of Termination of Facilitation. The Notice certifies that the parties met and conferred in good faith, if that is the case.
- The Monterey County's dispute resolution program receives funding via California's Dispute Resolution Programs Act of 1986 (DRPA) which provides for the local establishment and funding of informal dispute resolution programs. The goal of DRPA is the creation of a state-wide system of locally funded programs that provide dispute resolution services to county residents. Counties that choose to offer these services to their residents allocate up to $8 from filing fees to generate revenues for these programs. The state oversight agency is the Department of Consumer Affairs and its responsibilities include reviewing and modifying the rules and regulations, providing technical assistance to counties and programs, monitoring local government and program compliance and evaluating the services of the program and their impact on the state justice system.
- Monterey's dispute resolution program expanded in 2005 when it received a seven-figure grant from two individuals as a result of their personal challenges related to the legal system. That grant created The Mandell Gisnet Center for Conflict Management at the Monterey College of Law. The Center is the administrator for The Neighborhood Project (pre-litigation property line disputes, TROs and evictions), Court Mediations, and Court Discovery Facilitations.
- This Program, which includes 20 members of the local bar as facilitators, has been very successful. 185 referrals were made in 2020 and the typical referral is a five-figure case. It is rare that a referral does not either resolve the dispute or at least narrow its scope.

E. Detroit Bar Association Discovery Mediation Program
www.detroitlawyer.org/discovery-mediators/

- Three years ago, Wayne County Circuit Court Judge Fresard led the effort to create a Discovery Mediation Program with the Detroit Bar Association. It is offered every Friday (motion day). The program includes a handful of retired judges who are paid for their involvement. The program is funded by a grant from the DBA and administered by Lisa Simmons, the Executive Director of the Mediation Tribunal Association. As motions are presented, the Wayne County judges often encourage the parties to walk down the hall to meet with a mediator for up to 30 minutes (there is no cost to the parties for this service).
- An important component of this program is the fact that after every mediation, the attorneys complete and submit evaluation forms. Those evaluations are subsequently shared with the mediator. In addition, Judge Fresard regularly follows up with the Wayne County judges to make sure that they are satisfied with the program.
- Judge Fresard regularly discusses and promotes the program to the local bar via bench/bar meetings. The program expanded recently so that attorneys now can send an email to the Discovery Mediation Portal requesting a mediation. In addition, mediations are now being conducted via Zoom

ENDNOTES

[1] *See, e.g*., FED. R. CIV. P. 1; MICH. CT. RULES PRAC. R. 1.105 ("These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action.").

[2] *See* FED. R. CIV. P. 26 Notes of Advisory Committee on Rules - 1983 Amendment ("Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems....The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always work on a self-regulating basis."); FED. R. CIV. P. 26 Notes of Advisory Committee on Rules - 1993 Amendment ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."); FED. R. CIV. P. 26 Committee Note on Rules – 2000 Amendment ("The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery"); FED. R. CIV. P. 26 Committee Note on Rules – 2015 Amendment ("The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.").

[3] In January 2019, the American Bar Association adopted Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation which encourage courts to make greater and more systematic use of judicial adjuncts to assist in civil litigation. ABA Guideline No.1 states that the use of special masters should be an accepted part of judicial administration in complex litigation and in other cases that have particular discovery needs.

[4] The vast majority of Americans – 97% – now own a cellphone of some kind. The share of Americans that own a smartphone is now 85%. Along with mobile phones, Americans own a range of other information devices. About three-quarters of U.S. adults now own a desktop or laptop computer, while roughly half own a tablet computer. *See https://www.pewresearch.org/internet/fact-sheet/mobile/*

[5] According to ABA Guideline No. 2, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform. ABA Guideline No. 4 describes the various functions including but not limited to: (a) discovery oversight and management, (b) coordination of cases in multiple jurisdictions; (c) facilitating resolution of disputes between or among co-parties; (d) pre-trial case management; (e) advice and assistance requiring technical expertise; and (f) conducting privilege reviews and protecting the court from exposure to privileged material.

[6] *A Revolution That Doesn't Offend Anyone, The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation*, Merril Hirsh, Judges' Journal, Vol. 58 No. 4, p. 30, 31 (Fall 2019)("Don't appoint a special master merely ad hoc or post hoc at the point of frustration, but instead generally at the outset of litigation as part of a systematic plan to evaluate how a special master might help.").

[7] See ABA, Model Standards of Conduct for Mediators, Preamble, AMERICANBAR.ORG (2005), available at www.americanbar,org/content/dam/aba/migrated/2011_build/dispute_r esolution/model_standards_conduct_april2007.authcheckdam.pdf. (mediation is "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decisionmaking by the parties;" mediation "serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements").

[8] *See Models for use in Mediation of E-Discovery*, Tennessee Journal of Law and Policy, Stephen C. Bennett, Volume 9, Issue 4 (Spring 2014) at p. 14-15.

[9] There are situations where one can mix the roles of discovery mediator and special master. For example, in such a case, the parties can start out discussing the discovery issues and the mediator will try to get the parties to agree on a resolution. If that fails, the mediator can become a special master to make a ruling on the issue. The parties can agree that only if one of parties want to take that issue back to the judge would the special master write a decision to explain the ruling. However, it is important to note that in this situation (unlike a typical discovery mediation process), the mediator should not have ex parte discussions with any counsel.

[10] *Alternative Dispute Resolution Expands Into Pre-Trial Practice: An Introduction To The Role of E-Neutrals,* Allison Skinner Esq., 13 Cardoza J. of Conflict Resolution 113, 130 (2012).

[11] *See* FED. R. CIV. P. 26 Committee Note on Rules – 2000 Amendment.

[12]Federal Rule of Civil Procedure 26(f)(3) requires the parties' discovery plan to state the parties' views and proposals on: (a) what changes should be made in the timing, form or requirement for disclosures under Rule 26(a), (b) the subjects on which discovery may be needed, (b) when discovery should be completed, (c) whether discovery should be conducted in phases or be limited to or focused on particular issues; (d) any issues about the preservation or production of electronically stored information (including production formats); and (e) any issues about the claims of privilege.

[13] States are increasingly adopting similar court rules requiring parties to participate in good faith to create and file a comprehensive joint discovery plan. *See, e.g*., MICH. CT. RULES PRAC. R. 2.401(C); N.Y. UNIF. TRIAL CT. R. Sec. 202.11 and 202.12; OHIO REV. CODE ANN. CIV. R. 26(F)(3); W. VA. R. CIV. P. 26(f).

[14] *See* FED. R. CIV. P. 26 Committee Note on Rules – 2015 Amendment ("Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information becomes available.").
[15] *See* FED. R. CIV. P. 26 Committee Notes on Rules – 2006 Amendment ("Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver ... such as quick peek and clawback agreements").
[16] Bennett, *supra* note 8, at p. 13.
[17] Bennett, *supra* note 8, at p. 4.
[18] LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 3 (2010).
[19] Email from retired Magistrate Judge Michael Hluchaniuk for the Eastern District of Michigan (November 15, 2021).
[20] Email from Federal Court of Appeals Judge David McKeague for the 6th Circuit (November 1, 2021).
[21] David Burt, The DuPont Company's Development of ADR Usage: From Theory to Practice, Dispute Resol. Mag. 5 (Spring 2014), p. 6
[22] *See* Federal Rules of Civil Procedure 37(a)(1) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."). *See* also, Federal Rules of Civil Procedure 26(c) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action."). States have enacted similar meet and confer requirements. *See, e.g.*, MICH. CT. RULES PRAC. R. 2.313(A)(5); N.Y. UNIF. TRIAL CT. R. Sec. 202.7; OHIO REV. CODE ANN. CIV. R. 37(A)(1); W. VA. R. CIV. P. 37(a)(2); FLA. STAT. ANN. R.C.P. RULE 1.380(a)(4); A.R.S. RULES OF CIV. PROC., RULE 26(i).
[23] Email from District Judge Iain Johnston in the Northern District of Illinois (November 17, 2021).
[24] For example, in a situation where the parties have failed to demonstrate they conferred in good faith to negotiate the scope of a protective order, the court might consider appointing or recommending a discovery mediator or special master. Protective orders can take time and effort to finalize because they can cover several issues, including but not limited to: (a) specifying terms, including time and place or the allocation of expenses; (b) restricting inquiry into certain matters; (c) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and/or (d) evaluating different discovery methods other than the one selected by the party seeking discovery. Resolving protective order issues promptly is important because until the protective order has been finalized, discovery is often stymied.
[25] Email from Judge Stephen Murphy in the Eastern District of Michigan (October 25, 2021).
[26] Email from Circuit Court Judge Patricia Fresard in Wayne County Michigan (February 20, 2020).
[27] Email from Sonya M. Duchak, Coordinator of Fairfax County Virginia Conciliation Program (December 17, 2020).
[28] *See* Federal Rules of Civil Procedure 26(b)(5) which sets forth the details of how parties should claim privilege or seek protection of trial-preparation materials. States have enacted similar requirements for protecting such information. *See, e.g.*, MICH. CT. RULES PRAC. R. 2.302(B); N.Y. UNIF. TRIAL CT. R. Sec. 202.20-a; OHIO REV. CODE ANN. CIV. R. 26(B)(8); W. VA. R. CIV. P. 26(b)(3); FLA. STAT. ANN. R.C.P. RULE 1.280(b)(6); A.R.S. RULES OF CIV. PROC., RULE 26(b)(6).
[29] FED. R. CIV. P. 26 Committee Notes on Rules – 2006 Amendment.
[30] *How Courts And Litigants Can Benefit From Special Masters*, LAW360, Shira Scheindlin, p. 3 (Jan. 8, 2020).
[31] Email from Magistrate Judge Elizabeth Stafford in the Eastern District of Michigan (November 23, 2021).
[32] *How Courts And Litigants Can Benefit From Special Masters*, LAW360, Shira Scheindlin, p. 3 (Jan. 8, 2020).
[33] Federal Rules of Evidence 706(a) ("The court may appoint any expert that the parties agree on and any of its own choosing."). States have enacted similar requirements for permitting courts to appoint their own experts. *See, e.g.*, Michigan Rule of Evidence 706(a).
[34] Email from Magistrate Judge Kristen Mix in Colorado (October 28, 2021).
[35] Email from District Judge Xavier Rodriguez in the Western District of Texas (November 2, 2020).
[36] In fact, court rules are increasingly encouraging attorneys to seek eDiscovery assistance when needed. For example, Michigan Court Rule 2.401(J)(3) states: "Attorneys who participate in an ESI Conference or who appear at a conference addressing ESI issues must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues; counsel may bring a client representative or outside expert to assist in such discussions." *See also* N.Y. UNIF. TRIAL CT. R. Sec. 202.12(b)("counsel may bring a client representative or outside expert to assist in e-discovery discussions"). Likewise, according to the State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193, attorneys handling eDiscovery should be able to perform all the relevant tasks (either by themselves or in association with competent co-counsel or expert consultants).
[37] *Court backlogs have increased by an average of one-third during the pandemic, new report finds,* ABA Journal, Lyle Moran (Aug. 31, 2021); *See also Long after the courts shut down for covid, the pain of delayed justice lingers,* The Washington Post, Griff Witte and Mark Berman (Dec. 19, 2021). ("District attorneys face some of the longest case backlogs in living memory. Defendants languish in jails that have become breeding grounds for the coronavirus. Others are set free — and, some prosecutors say, may be contributing to a spike in violent crime that is only compounding the pileup.").

[38] *See* Report of the American Bar Association Special Master Guidelines Working Group, p. 6 (Jan. 2019).
[39] The scope of mediation confidentiality is often defined in a state's court rules. For example, Michigan Court Rule 2.412(C) states: "Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subrule (D)."
[40] *See* Jacqueline Nolan-Haley, Lawyers, Clients And Mediation, 73 NOTRE DAME L. REV. 1369, 1371 (1998) ("[Mediation] is an informal process based on principles of individual sovereignty and sef-determination."); *See also* Simeon H. Baum, Mediation And Discovery, in DISPUTE RESOLUTION AND E-DISCOVERY § 3.1 at 51 (Daniel B. Garrie & Yoav M. Griver eds. 2012) (unique features of mediation include "freedom and creativity that infuses" the process).
[41] *E-discovery: Consider retaining a special master*, Inside Counsel, Matthew Prewitt (June 26, 2012), available at http://www.insidecounsel.com/2012/06/26/e-discovery-consider-retaining-a-special-master.
[42] *Creating The Criteria and the Process for Selection of E-Discovery Special Masters in Federal Courts*, The Federal Lawyer, Hon. Nora Barry Fischer and Richard N. Lettieri, 36, 39 (Feb. 2011).
[43] *See The Votes Are In: Focus on Preventing and Limiting Conflicts,* DISPUTE RESOLUTION, Thomas D. Barton and James P. Groton, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors, academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. See also http://globalpound.org/wp-content/uploads/2017/11/2017- 09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf at 42.
[44] *Necessity and Invention: Seven Steps for Using Special Masters to Help Courts with the Pandemic Caseload*, Merril Hirsh, Judges' Journal, Vol. 60 No. 3 (Summer 2021).
[45] *See* Report of the American Bar Association Special Master Guidelines Working Group, p. 8 (Jan. 2019).
[46] In this role, the discovery mediator is typically bound by confidentiality as defined by the applicable state mediation rules. As a consequence, the discovery mediator is allowed to develop creative strategies based on confidential communications by the litigants. Private caucuses in this discovery mediation process allow parties to include in-house counsel and/or IT/litigation support representatives in the decision-making process without the requirement of taking testimony.
[47] In this adjudicative role, the special master is often able to conduct hearings, take testimony, issue orders and report to the court. In addition, in light of the increase in e-discovery sanction cases, special masters might be asked to make recommendations regarding the spoliation of evidence and the imposition of sanctions.
[48] *Supra* footnote 7.
[49] American Bar Association Guideline No. 5 for the Appointment and Use of Special Masters in Federal and State Civil Litigation (January 2019).
[50] *See* Marin County Superior Court Local Rule 1.13; Contra Costa County Superior Court Local Rule 3.301; Sonoma County Superior Court Local Rule 4.13; and Monterey County Superior Court Discovery Facilitator Program, https://www.monterey.courts. ca.gov/mediation/discovery-facilitation.
[51] California Courts, Discovery Facilitator Program – Sonoma Superior Court, https://www.courts.ca. gov/27575.htm (accessed February 20, 2020).
[52] *Marin's Discovery Facilitator Program Will Cure Your Dispute*, Louis S. Franecke, 45 Marin Law. 2 (2014) ("The discovery disputes were resolved, the motions settled, the cases settled, etc.").
[53] Email from Chief Circuit Court Judge Penny S. Azcarate in Fairfax County, Virginia (April 20, 2021).
[54] Email from Business Court Judge James Alexander in Oakland County, Michigan (February 16, 2020).

26105168