
SPECIAL MASTERS AND E-DISCOVERY: THE INTERSECTION OF TWO RECENT REVISIONS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION

This article will address the fortuity of two recent revisions to the Federal Rules of Civil Procedure. The first, which occurred in 2003, was the much-needed update of Rule 53, governing the appointment of special masters. This rule revision was undoubtedly intended to expand the use of masters in new directions in order to assist courts in coping with ever-increasing caseloads and in addressing difficult issues that require disproportionate judicial attention and expertise not otherwise available to the court. The second revision, which took effect in late 2006, updated the discovery rules (Rules 26 through 37 and Rule 45) to take account of the digital revolution that has resulted in the overwhelming majority of records being created and maintained in an electronic format. These rule changes can and should have a synergistic effect. In this article, we will first address the revisions of both Rule 53 and the discovery rules, we will then survey the use of special masters in the burgeoning world of e-discovery, and we will conclude by suggesting the appropriate uses for such masters with particular reference to both legal and technical issues. We firmly believe that court adjuncts in this field are both necessary and desirable, particularly when used in thoughtful ways.

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I. REVISION OF RULE 53

A. *The Original Rule 53*

As originally drafted in 1938, Rule 53 envisioned a rather limited role and purpose for masters, focusing primarily on the use of trial masters who heard trial testimony and reported recommended findings of fact. The original rule stated that in the context of cases to be tried by a jury, “a reference shall be made only when the issues are complicated.”¹ The critical inquiry on review of such an appointment was whether the master would assist the jury in reaching a resolution.² The master had the authority to conduct hearings, require the production of evidence, rule upon the admissibility of evidence, examine witnesses,³ and submit a report setting forth findings of fact.⁴ The master’s report was then presented to the jury as admissible evidence that the jury could consider.⁵

In non-jury matters, Rule 53 provided that “save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.”⁶ In 1957, in *La Buy v. Howes Leather Co.*,⁷ the Supreme Court identified considerations that were *insufficient* to establish an exceptional condition, but failed to define what considerations constituted an exceptional condition. The lower court had based its order of reference to a special master on the congestion of its docket, the complex nature of antitrust litigation, and the length of the trial. The Court declared that “congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test,

¹ FED. R. CIV. P. 53(b) (1938) (amended 2003).

² See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) (stating that appointment of master to assist the jury was appropriate “where the legal issues are too complicated for the jury adequately to handle alone”); *United States v. Horton*, 622 F.2d 144, 148 (5th Cir. 1980) (holding that reference to a master of Medicare provider reimbursement case was appropriate when the “legal issues . . . were too complex for the jury of laymen to resolve without assistance”); *Burgess v. Williams*, 302 F.2d 91, 94 (4th Cir. 1962) (holding that use of master to aid jury in bankruptcy case was proper since the issues were complicated and fifteen hundred separate transactions had to be examined); *Board of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 655 (S.D.N.Y. 1987) (finding that master was necessary to determine complicated issues involving reasonable value of substantial legal services and defense costs that were too complicated for jury).

³ FED. R. CIV. P. 53(c).

⁴ FED. R. CIV. P. 53(e)(3) (1938) (amended 2003).

⁵ See *Jackson v. Local Union 542, Int’l Union of Operating Eng’rs*, 155 F. Supp. 2d 332, 338 (E.D. Pa. 2001) (“Master’s findings are simply admissible evidence to be considered by the jury, with the jury remaining the ultimate arbiter of the facts.”).

⁶ FED. R. CIV. P. 53(b) (1938) (amended 2003).

⁷ 352 U.S. 249 (1957).

present congestion would make references the rule rather than the exception.”⁸ The Court similarly rejected the district court’s reference based on the complexity of the issues. “[M]ost litigation in the antitrust field is complex. It does not follow[, however,] that antitrust litigants are not entitled to a trial before a court.”⁹ In fact, the Court found that the complexity of the issues raised in this antitrust lawsuit was “an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work.”¹⁰ Finally, the Court declared that the duration of a trial did not “offer exceptional grounds.”¹¹

The Supreme Court’s decision in *La Buy* significantly limited the use of special masters. The “exceptional condition” requirement was hard to meet,¹² especially where the parties did not consent to the appointment of a special master. Nonetheless, over time, the growing dockets of federal civil cases, and the changing nature of those cases, resulted in the increased use of masters at every stage of litigation.

By the end of the twentieth century, the use and practice of appointing special masters had outgrown the then-current version of Rule 53. The role of special master expanded to include the supervision of pre-trial discovery disputes,¹³ particularly in the area of reviewing allegedly privileged records, conducting settlement negotiations in

⁸ *Id.* at 259.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² “Exceptional conditions,” however, were not required for the appointment of masters in all proceedings. Rule 53 specifically provided that in cases of accounting and difficult computation of damages, reference to a special master was warranted. *See, e.g., Roy v. County of Lexington*, 141 F.3d 533, 549 (4th Cir. 1998) (affirming appointment of master to determine damages in Fair Labor Standards Act case); *Stable v. Warrob, Inc.*, 977 F.2d 690, 694 (1st Cir. 1992) (stating that “masters are most helpful where complex quantitative issues bearing on damages must be resolved”); *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 32-33 (8th Cir. 1966) (holding there was no abuse of discretion regarding appointment of special master to make an accounting analysis and compilation in suit for treble damages under antitrust statutes). A district court’s discretion was also considerably greater in referring matters of computation. *See, e.g., Southern Agency Co. v. LaSalle Cas. Co.*, 393 F.2d 907, 914 (8th Cir. 1968); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 218 (W.D. Mo. 1985). One well-known jurist wrote that the reference of computation matters to a special master is particularly appropriate because accounting and computation of damages requires “[n]o peculiar judicial talent or insight . . . and errors in accounting lend themselves to detection and correction on review.” Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 457 (1958). Nonetheless, even in referring accounting matters a court’s discretion was not unlimited, and reference was restricted to complicated matters. *See Bowen Motor Coaches, Inc. v. N.Y. Cas. Co.*, 139 F.2d 332, 334 (5th Cir. 1943) (stating that in matters of account, matters must be complex and time-consuming).

¹³ *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (appointing special master to supervise discovery in light of “the magnitude of the case, the complexity of the anticipated discovery problems, [and] the sheer volume of documents to be reviewed, many of which are subject to claims of privilege”).

complex cases,¹⁴ implementing and enforcing post-judgment orders and decrees,¹⁵ and administering and distributing funds in cases where many claimants were permitted a recovery from a limited settlement fund.¹⁶ Courts that appointed special masters to conduct these activities either assumed such appointments were permitted by Rule 53 or relied on the court's inherent authority to appoint court adjuncts to assist the court when needed.¹⁷

The diverse use of "discovery" masters became particularly prevalent because of the time-consuming nature of discovery disputes and the need for the prompt resolution of such disputes.¹⁸ Masters have been appointed to resolve discovery disputes, establish procedures and

¹⁴ See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 752-53 (E.D.N.Y. 1984) (discussing appointment of special masters to assist parties in settling the case).

¹⁵ See generally *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481-82 (1986) (permitting appointment of master to ensure union's compliance with court's order to establish an affirmative action program); *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988) (approving appointment of special master due to continued failure to comply with order); *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542-45 (9th Cir. 1987) (approving appointment of master to monitor compliance with injunction); *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 962-65 (2d Cir. 1983) (affirming reference to special master for monitoring defendant's compliance with consent decree entered in suit challenging conditions of institution for mentally retarded); *Hart v. Community Sch. Bd.*, 383 F. Supp. 699, 764-69 (E.D.N.Y. 1974) (appointing law professor specializing in urban renewal as special master in desegregation case). Special masters have also been appointed to analyze the continued validity of consent decrees. See, e.g., *In re Pearson*, 990 F.2d 653, 657-60 (1st Cir. 1993) (holding district court's sua sponte appointment of a special master to advise the court on the continuing viability of decades-old consent decrees was within its powers). But see *United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998) (holding non-consensual appointment of a special master to consider propriety of permanent injunction was not proper and amounted to a complete abdication of the district court's Article III responsibilities).

¹⁶ See MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.47 (1995). See also *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1465 (D. Haw. 1995) (appointing special master to supervise depositions of 137 randomly selected class members to distribute compensatory damages to victims of human rights violations); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1369 (E.D.N.Y. 1985) (adopting special master's proposed settlement distribution plan).

¹⁷ See, e.g., *Ex parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent . . . authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.") (citation omitted); *Stable*, 977 F.2d at 695 (stating, without discussion, that Rule 53 permits the appointment of special masters to oversee discovery issues); *Active Prods. Corp. v. A.H. Choitz & Co.*, 163 F.R.D. 274, 282 (N.D. Ind. 1995) (citing inherent authority of court to appoint special masters); *United States v. Int'l Bus. Machs. Corp.*, 76 F.R.D. 97, 98 (S.D.N.Y. 1977) (appointing an examiner pursuant to Rule 53 to supervise discovery and to conduct appropriate hearing); *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 118 (C.D. Cal. 1977) (relying on Rule 53 for authority to appoint master to supervise all discovery matters). But see *United States v. Hooker Chem. & Plastics Corp.*, 123 F.R.D. 62, 63 (W.D.N.Y. 1988) (holding that referral of all "routine" discovery and case management matters to a special master "present[ed] an unacceptable risk of having significant, potentially dispositive issues taken away from the court").

¹⁸ As early as 1917, Judge Learned Hand found such an appointment to be permissible. See *Pressed Steel Car Co. v. Union Pacific R.R. Co.*, 241 F. 964, 967 (S.D.N.Y. 1917) (stating that most convenient way to conduct discovery would be for the parties to agree upon a master); see also MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.14 (1995).

schedules, monitor document production, review documents claimed to be privileged¹⁹ and attend depositions and conferences.²⁰ Factors considered in these appointments included the volume of material to be produced and exchanged,²¹ the scientific and technical nature of the information subject to discovery,²² and the complexity of the underlying dispute.²³

¹⁹ See, e.g., *In re U.S. Dep't of Def.*, 848 F.2d 232, 236-37 (D.C. Cir. 1988) (affirming district court's order and stating that practical difficulties of reviewing documents amounted to an exceptional condition warranting the appointment of a master); *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) ("[I]t is within the discretion of a trial court to designate a special master to examine documents This special master would not act as an advocate; he would, however, assist . . . by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge."); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 380 (D.D.C. 1978) (adopting, in part, recommendations of special master appointed to review complicated privilege claims involving over seven hundred documents); *United States v. AT&T*, 461 F. Supp. 1314, 1346-49 (D.D.C. 1978) (appointing master to make preliminary rulings on all claims of work product and other privilege asserted during discovery).

²⁰ See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 967 (9th Cir. 1999) (permitting reference to special master of all pre-trial matters); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168-69 (D.C. Cir. 1991) (concluding that it is improper for district court to refer dispositive matters, but proper to refer pre-trial discovery matters); *Dep't of Def.*, 848 F.2d at 236-37 (permitting reference of pre-trial matters); *In re Armco, Inc.*, 770 F.2d 103, 104-05 (8th Cir. 1985) (holding that litigation did not present exceptional condition to warrant reference to master of trial on merits but that master's broad authority to supervise and guide pre-trial matters was permissible); *United States v. Philip Morris*, No. 99 Civ. 2496 (D.D.C. Dec. 22, 2000) (Order No. 41) (appointing special master to handle the facilitation and resolution of all pre-trial discovery disputes, as well as assist with establishing pre-trial and trial procedures and schedules); *Mercer v. Gerry Baby Prods. Co.*, 160 F.R.D. 576, 577-79 (S.D. Iowa 1995) (appointing master to supervise discovery because disagreement and accusations among lawyers created a chaotic atmosphere for discovery and misuse of discovery motions); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2605, at 664 (2d ed. 1994) (stating that the "use of a special master to supervise discovery still may be appropriate and useful in unusual cases"); *MANUAL FOR COMPLEX LITIGATION (THIRD)* §§ 21.424, 21.43 (1995).

²¹ See, e.g., *Mobil Oil Corp. v. Altech Indus., Inc.*, 117 F.R.D. 650, 652 (C.D. Cal. 1987) (appointing master in order to supervise discovery due to large number of documents and anticipated addition of new parties); *In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (appointing special master because discovery involved production of millions of documents). *But see Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1087 (3d Cir. 1993) (concluding that "[n]either the volume of work generated by a case nor the complexity of that work will suffice to meet the 'exceptional condition' standard promulgated by Rule 53").

²² See, e.g., *Omnium Lyonnais*, 73 F.R.D. at 117 (appointing master with technical and legal background to oversee discovery requiring individual review of hundreds of thousands of documents containing technical information); *Costello v. Wainwright*, 387 F. Supp. 324, 325 (M.D. Fla. 1973) (appointing special master because of highly technical nature of case and need for specialized medical knowledge).

²³ See, e.g., *In re Ampicillin Antitrust Litig.*, 81 F.R.D. at 380 (reference to special master to monitor production of over seven hundred documents and rule on complicated privilege claims); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973) (appointing master to supervise discovery in complex securities action).

B. *The Revised Rule 53*

The revised Rule 53 is far more flexible than the original rule. It now permits the use of special masters on an as-needed basis, with the parties' consent, or, when exceptional conditions require, by court order. In addition, the Rule encourages, if not requires, a new level of participation by the litigants. Finally, the Rule requires that an order of appointment explicitly address the duties of the special master, the cost of this service to the parties, communications between the court and the special master, and between the parties and the special master, and the standard of review for a special master's decisions.

There are five major changes to the Rule: (1) the limited use of special masters in most trials—but particularly jury trials; (2) the authorization to use special masters whenever the parties consent; (3) the authorization to use masters to assist with pre-trial and post-trial matters; (4) the adoption of specific procedures and standards for the appointment of special masters; and (5) imposing standards for reviewing the actions of the master.

For our purposes, the least relevant of these changes is the use of trial masters. Nonetheless, a sentence or two is warranted, if only to understand the significant changes made to Rule 53. The use of special masters in jury trials is eliminated unless the parties consent to a limited use that the court approves. With respect to non-jury trials, an appointment by the court is warranted only by "some exceptional condition."²⁴ As in the old rule, use of a master is appropriate in matters of accounting or difficult computation of damages regardless of whether exceptional conditions are present.²⁵

Of greater interest to the issues to be discussed here is that a master may now be appointed to fulfill any role so long as the parties consent to such an appointment.²⁶ The Judicial Conference Advisory Committee on Civil Rules ("Advisory Committee") in the Notes to the new Rule stated, however, that "[p]arty consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment."²⁷ Similarly, Rule 53 now explicitly provides that "pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge" may be

²⁴ FED. R. CIV. P. 53 (a)(1)(B)(i). According to the Advisory Committee Note, this phrase is intended to retain the meaning it had under *La Buy* and its progeny. See FED. R. CIV. P. 53 advisory committee's note (2003).

²⁵ See FED. R. CIV. P. 53(a)(1)(B)(ii).

²⁶ See FED. R. CIV. P. 53(a)(1)(A).

²⁷ FED. R. CIV. P. 53 advisory committee's note (2003).

referred to a special master.²⁸ While there is no longer a requirement of an exceptional condition, the Advisory Committee cautions that such appointments should remain the exception and not the rule.²⁹

In terms of pre- and post-trial duties, the Advisory Committee specifically included reviewing discovery documents for privilege, settlement negotiations, and the administration of an organization.³⁰ Reference to a special master to oversee complex decrees is also appropriate, particularly when a party has proved to be resistant or intransigent.³¹

The new Rule 53 also sets out best practices for the appointment and selection of special masters. Rule 53(a)(2) makes clear that the Code of Judicial Conduct is applicable to masters and that the standard of disqualification under 28 U.S.C. § 455 applies to masters absent consent of the parties. Rule 53(b)(1) requires that the parties be given notice and an opportunity to be heard before a master is appointed, and that the parties can suggest candidates. Rule 53(b)(3)(A) specifically requires the proposed master to file an affidavit addressing the potential grounds, if any, for disqualification before the court can make an appointment. The Advisory Committee also suggests further conditions on appointments, such as a prohibition on the master (or the master's firm) from appearing before the court in any matter during the pendency of the appointment.³²

The new rule also requires that an order appointing a master must specify the duties of the master, the circumstances (if any) in which the master may have ex parte contact with the court or a party, the nature of materials to be preserved and filed as the record of the master's activities, the time limits and procedural aspects of filing the record and reviewing the master's orders, findings and recommendations, and the procedures for setting the master's compensation.³³ The authority of a master (unless otherwise directed in the appointing order) is now set forth in Rule 53(c) and includes the ability to impose noncontempt sanctions upon a party under Rule 37 or 45 and to recommend contempt sanctions against a party and any noncontempt sanction against a nonparty.³⁴

Rule 53(d) and (e) dictate that the master's orders and reports must

²⁸ FED. R. CIV. P. 53(a)(1)(C).

²⁹ See generally FED. R. CIV. P. 53 advisory committee's note (2003). Even as to pre-trial functions, the Advisory Committee noted that cases involving important public issues or many parties may not be particularly appropriate for a master's involvement and recommended that in those situations, judicial functions should be controlled by the court. See *id.*

³⁰ See *id.*

³¹ See *id.* (citing *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481-82 (1986)).

³² See FED. R. CIV. P. 53 advisory committee's note (2003).

³³ See FED. R. CIV. P. 53(b)(2).

³⁴ See FED. R. CIV. P. 53(c).

be filed and served. Rule 53(f) prescribes the procedures following the filing of the order, report, or recommendation. In particular, the court must afford the parties an opportunity to be heard and may receive evidence.³⁵ A party may file objections to (or a motion to adopt or modify) an order, report, or recommendation no later than twenty days from service, unless the court sets a different time.³⁶ A court can affirm, modify, wholly or partially reject or reverse or resubmit to the master with instructions.³⁷

The standard of review varies depending on the duties of the master. The court must decide *de novo* all objections to findings of fact³⁸ unless the parties stipulate with the court's consent that (a) the master's findings will be reviewed for clear error³⁹ or (b) the findings of a master under Rule 53(a)(1)(A) or (C) will be final.⁴⁰ All objections to conclusions of law must be reviewed *de novo* by the district court.⁴¹ Finally, unless a different standard of review is established in the appointment order, procedural rulings of a master may be set aside only for an abuse of discretion.⁴² Different standards of review are possible where the parties consent to the appointment of a master and the court approves.⁴³

II. THE 2006 REVISIONS TO THE DISCOVERY RULES

A. *The Need for the New Rules*

The impetus for the revised discovery rules was a concern, expressed by both lawyers and judges, that the discovery of electronically stored information ("ESI") raised many new issues never before addressed in the Federal Rules of Civil Procedure. In justifying its decision to amend the rules governing discovery, the Advisory

³⁵ See FED. R. CIV. P. 53(f)(1).

³⁶ See FED. R. CIV. P. 53(f)(2).

³⁷ See FED. R. CIV. P. 53(f)(1).

³⁸ See FED. R. CIV. P. 53(f)(3).

³⁹ See FED. R. CIV. P. 53(f)(3)(A). In this regard the Advisory Committee noted that "[c]lear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request." FED. R. CIV. P. 53 advisory committee's note (2003).

⁴⁰ See FED. R. CIV. P. 53 (f)(3)(B). The Advisory Committee Note emphasizes that the court is free to decide the facts (as well as legal conclusions) *de novo* even absent an objection of the parties. See FED. R. CIV. P. 53 advisory committee's note (2003).

⁴¹ See FED. R. CIV. P. 53(f)(4).

⁴² See FED. R. CIV. P. 53(f)(5).

⁴³ It should be noted that the court can, *sua sponte*, withdraw its consent to a stipulation for finality or clear-error review and may reopen the opportunity to object. See FED. R. CIV. P. 53 advisory committee's note (2003).

Committee provided four reasons. First, the volume of ESI is exponentially greater than the volume of paper records.⁴⁴ Because only five percent of records are not created or stored electronically, e-discovery is the predominant form of document discovery. For example, a typical employee at a large company will write or receive at least fifty emails per day. If that company has one hundred thousand employees, the company could be sending and receiving over 1.5 billion emails annually. Similarly, a single CD-ROM is capable of storing many thousands of pages and a hard drive can easily store the equivalent of hundreds of CD-ROMs. Back-up data is measured in terabytes, and each terabyte is the equivalent of five hundred million typewritten pages.

The second reason provided by the Advisory Committee for amending the discovery rules is the dynamic nature of ESI. Computers automatically create information, often without the direction or the knowledge of the operator. Such information can change every time the computer is used. The most familiar category of this information is metadata.⁴⁵ In short, the routine operation of a computer system may alter or destroy metadata, which can have serious consequences in litigation.

The third reason provided by the Advisory Committee for amending the discovery rules is that ESI is difficult, although not impossible, to delete. The “delete” command often does not destroy the record but rather moves it to a less accessible location. Once moved, the ESI can still be discovered although it will now be more time consuming and expensive to locate and retrieve it.⁴⁶

The final reason provided by the Advisory Committee for amending the discovery rules is that ESI may need to be retrieved, restored, or translated before it can even be reviewed for relevance or

⁴⁴ See generally E-DISCOVERY AMENDMENTS AND COMMITTEE NOTES, AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (proposed Apr. 2006), http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

⁴⁵ There are many types of metadata, and it is important not to assume that all metadata is the same. While many experts in the field have offered various classifications of metadata, we offer the following: (1) Systems meta-data, which is data that is automatically generated by a computer system such as the author, date and time of creation or modification of a document; (2) Substantive metadata, which reflects substantive changes made to a document, such as earlier language that has now been dropped or revised; and (3) Embedded metadata, which is not typically visible to the user viewing a native file on the screen or in a printout but is necessary to unlocking a spreadsheet formula, viewing hidden columns, or obtaining linked files, hyperlinks, or database information such as a date field in a database. See generally THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY; E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (2d ed. 2007), http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf.

⁴⁶ See *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (holding that deleted records are discoverable); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 643-44 (S.D. Ind. 2000) (same).

privilege. ESI may be stored on outdated systems, or in an inaccessible or disorganized manner, such that it is impossible to review without incurring the expense of restoring data to a useable format.

These issues led to a new focus on preservation and on the consequences of failing to preserve discoverable information—namely the imposition of sanctions.⁴⁷ In addition to concerns about preservation, the advent of electronic records led to increased worries over the large volume of information that would have to be reviewed for privilege or work product protection prior to production in litigation. New issues have also arisen regarding the form of production. Parties need to determine whether records will be produced in hard copy (paper) or electronically in the first instance. If records are produced electronically, the next questions are whether they should be produced in native format or another form (such as pdf), and whether the format will be searchable and sortable.

B. *An Overview of the New Rules*

1. Rules 26(f) and 16(b)

The Rule 26(f) conference, which must be held “as soon as practicable” after the filing of the complaint,⁴⁸ is a key component in the parties’ effort to plan and execute a discovery strategy that will be effective, cost efficient, and avoid the need for court intervention.⁴⁹ This Rule is designed to force the parties to focus on the problems of preservation and document production on the front end, rather than facing sanctions motions on the back end for failure to preserve and/or produce information. Most importantly, parties must be prepared to disclose information about their computer systems, including where and for how long information is maintained.

The Rule requires the parties to discuss four new topics at their Rule 26(f) conference. The first is the preservation of evidence, with a

⁴⁷ See, e.g., *In re Grand Jury Investigation*, 445 F.3d 266, 275 (3d Cir. 2006) (holding that participation in a scheme to delete emails on computers, in connection with a grand jury investigation of business dealings, is an obstruction of justice); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 747 (8th Cir. 2004) (upholding an adverse inference instruction for failure to preserve certain ESI prior to either actual notice or the onset of litigation); cf. Sarbanes-Oxley Act § 802(a), 18 U.S.C. § 1519 (2002) (imposing criminal liability for intentionally destroying records material to a pending investigation).

⁴⁸ FED. R. CIV. P. 26(f)(1).

⁴⁹ The Advisory Committee Note points out that the parties need not discuss provisions for discovery or disclosure of ESI if the case does not involve e-discovery. See FED. R. CIV. P. 26(f) advisory committee’s note (2006). However, if the case does involve such records, the Committee Note states that a failure to have this discussion “increases uncertainty and raises a risk of disputes.” *Id.*

particular focus on ESI.⁵⁰ The parties are urged to reach a rational agreement on what must be preserved, taking into account the costs and burdens incurred by modifying or suspending whatever document retention system is in place in order to implement a litigation hold to preserve certain ESI.⁵¹ The Advisory Committee Note expressly discourages courts from entering blanket preservation orders and suggests that any preservation order be narrowly tailored.⁵²

The second new topic requires the parties to discuss any issues relating to the discovery or disclosure of ESI.⁵³ The Advisory Committee Note suggests that early discovery from persons with special knowledge of a company's computer systems, by way of deposition, interrogatory, or questionnaire, may be particularly useful.⁵⁴ The lawyers must identify the real issues in the litigation; the sources on which relevant information is stored; the time period at issue; the key players, also known as custodians;⁵⁵ a rational search protocol (agreeing on keyword search terms for example); the accessibility of information; and the cost and burden of restoring inaccessible information.

The third new topic requires the parties to discuss the form or forms in which they want information produced. Parties must agree on electronic or hard copy production. If production is electronic, parties must determine the formats (*e.g.* native, tiff, pdf, pst, etc.), whether or not the various types of metadata must be produced, and the extent to which the ESI is searchable or sortable.⁵⁶

The final new topic requires the parties to discuss either a possible agreement regarding a procedure for retrieving privileged information that has been inadvertently produced in the course of discovery (often known as a clawback provision), or to initially forgo any review without waiving the protection of any privileges (sometimes described as a quick peek).⁵⁷ If the parties reach an agreement, they may ask the court to include the agreement in the Rule 16 scheduling order.

Rule 16(b) adds two new topics to the court's initial scheduling

⁵⁰ See generally FED. R. CIV. P. 26(f)(2).

⁵¹ See generally FED. R. CIV. P. 26(f) advisory committee's note (2006).

⁵² See *id.*

⁵³ See FED. R. CIV. P. 26(f)(3)(c).

⁵⁴ See FED. R. CIV. P. 26(f) advisory committee's note (2006).

⁵⁵ See, *e.g.*, Consolidated Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (M.D. La. 2006) (Alcoa sent a demand letter to Conalco in 2002 for costs associated with environmental cleanup, and identified four key players. Three years later Conalco issued a request to produce, and Alcoa identified eleven more key players. By the time these additional custodians were identified, their emails were gone. Sanctions were awarded for the loss of their records.); E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005) (adopting and incorporating magistrate's report and recommendation and awarding adverse inference sanction where late identification of key players resulted in loss of ESI—namely email had not been saved, and back up tapes were destroyed after three years).

⁵⁶ See FED. R. CIV. P. 26(f)(3).

⁵⁷ See *id.*

order. Rule 16(b)(3) directs the court to provide for the “disclosure or discovery of electronically stored information” and to include “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced.”⁵⁸ The court’s order is based on the report prepared by the attorneys following their Rule 26(f) conference.⁵⁹

The new requirements for discussion topics at the Rule 26(f) conference raise a host of difficult and important questions. The question that may cause the greatest concern is when the duty to preserve attaches. Because the best answer is that the duty attaches when litigation is reasonably anticipated, the Rules could not address this issue as they only govern post-litigation conduct. Most of the appellate courts, however, have now defined (albeit in slightly different terms) when the duty attaches.⁶⁰ Another question raised by the duty to preserve relates to the scope of the duty—namely what information must be preserved.⁶¹ The scope issue includes: (a) the identification of

⁵⁸ FED. R. CIV. P. 16(b)(3)(B)(iii), 16(b)(3)(B)(iv). The Advisory Committee Note to Rule 16(b)(6) notes that the court may not enter an order with respect to privilege waiver absent a request from the parties. *See* FED. R. CIV. P. 16(b)(3) Advisory Committee Note (2006). *But see* FED. R. EVID. 502(d) (enacted September 19, 2008) (permitting a court to order sua sponte that a “privilege or protection is not waived by disclosure connected with the litigation pending before the court”).

⁵⁹ *See* Form 52 (“Report of Parties Planning Meeting”); *Liebel-Flarsheim Co. v. Medrad, Inc.*, No. 04 Civ. 607, 2006 WL 335846, at *8 (S.D. Ohio Feb. 14, 2006) (holding that the “meet and confer requirement” can be “satisfied only through direct dialogue and discussion—either a face to face meeting or in a telephone conversation,” not through written, electronic, or voicemail communication).

⁶⁰ Seven circuit courts have provided the following definition triggering the duty to preserve: (1) when a party has knowledge of “(a) the claim (that is, the litigation or the potential for litigation), and (b) the document’s potential relevance to that claim,” (2) when a party is “aware of circumstances that are likely to give rise to future litigation and yet destroy[] potentially relevant records without particularized inquiry,” (3) when a party “should have known that the evidence may be relevant to future litigation,” (4) when a party “reasonably should know that the evidence may be relevant to anticipated litigation,” (5) when it is “foreseeable” that information is “pertinent to litigation,” (6) when a party is “sensitive to the possibility of a suit,” it should not “destroy[] the very files that would be expected to contain the evidence most relevant to such a suit,” (7) if a party “knew or should have known that the documents would become material at some point in the future,” and (8) when “litigation is more than merely an abstract possibility or unwarranted fear. The underlying inquiry is whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly.” *Rowe v. Albertsons, Inc.*, No. 02-4186, 2004 WL 2252064 (10th Cir. Oct. 7, 2004) (internal citations and quotations omitted); *see also* THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS, Guidelines 1-5 (Public Comment Version Aug. 2007), http://www.thosedonaconference.org/content/miscFiles/Legal_holds.pdf, (2004) (describing assessment process to determine whether it is reasonable to anticipate litigation); SECTION ON LITIG., AM. BAR ASS’N, ABA CIVIL DISCOVERY STANDARDS, Standard No. 10 (2004), <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf> (“When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents.”).

⁶¹ In discussing the scope of preservation, the Advisory Committee Note recognizes that

relevant information that must be preserved based on the accessibility of the records;⁶² (b) the location of relevant information (*e.g.*, foreign or domestic, held offsite by an internet service provider or other non-party);⁶³ (c) the identification of relevant information based on the author and location of the data (*e.g.*, current employees' personal computer and email records;⁶⁴ former employees' data⁶⁵); and (d) the relevant time period. One court recently observed that "[i]dentifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take."⁶⁶

"[c]omplete or broad cessation of a party's routine computer operations could paralyze the party's activities," and directs parties to "take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps." FED. R. CIV. P. 26(f) advisory committee's note (2006) (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.422).

⁶² See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003):

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible back-up tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if back-up tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes would likely be subject to the litigation hold."

But see *E*Trade Secs. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 592 (D. Minn. 2005) (holding that because party "relied on its backup tapes to preserve evidence that was not preserved through a litigation hold, [it] should have retained a copy of relevant backup tapes because it was the sole source of relevant evidence").

⁶³ See, *e.g.*, *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007) (finding that documents were in the "possession, custody, or control" of a party even though they were held by the party's former affiliate that had migrated pursuant to bankruptcy proceedings). See also *United States v. Stein*, 488 F. Supp. 2d 350 (S.D.N.Y. 2007) (government records stored off-site by third party within the government's control); *Tomlinson v. El Paso Corp.*, No. 04 Civ. 2686, 2007 WL 2521806 (D. Colo. Aug. 31, 2007) (documents in possession of non-party deemed to be in defendant's control when it had a legal duty to maintain the records under ERISA). *But see* *Modern Eng'g, Inc. v. Peterson*, No. 07 Civ. 1055, 2007 WL 2680563 (C.D. Ill. July 16, 2007) (defendant not required to produce documents that defendant had sent to his new employer because they were not in his control); *Phillips v. Netblue, Inc.*, No. 05 Civ. 4401, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007) (images from websites accessed by clicking on links within party's email not in party's possession).

⁶⁴ See, *e.g.*, *Ameriwood Indus., Inc. v. Liberman*, No. 06 Civ. 524, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006), *amended on clarification*, 2007 WL 685623 (E.D. Mo. Feb. 23, 2007) (allowing inspection of personal computers of defendant-employees by neutral expert because company had failed to produce emails that were known to exist); *Easton Sports, Inc. v. Warrior LaCrosse, Inc.*, No. 05 Civ. 72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006) (sanctioning defendant-company for its employee's destruction of his personal email account in the context of trade secrets case where it was alleged that employee took customer lists and other proprietary information to defendant, his new employer, on the ground that defendant was negligent in its failure to preserve relevant evidence).

⁶⁵ See, *e.g.*, *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 630 (D. Colo. 2007) (holding that defendant had a duty to preserve computer hard drives of former employees).

⁶⁶ *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 660 (M.D. Fla. 2007) (finding that sanctions were warranted because defendant failed to make a "sincere effort" to facilitate an understanding of its database records despite being ordered to do so).

Another intriguing question is whether a party must produce its document retention protocol and/or its litigation hold notice. Although most courts are not requiring the notice itself to be produced, some courts are requiring discovery as to the scope of the notice and who received it.⁶⁷

Other questions have arisen regarding the number of Rule 26(f) conferences and the participants in the conferences. For example, parties must consider whether they should engage in a series of meetings where they continue to negotiate issues of preservation and production, rather than attempt to accomplish everything at a single meeting. Parties should also consider whether to bring technical consultants to the 26(f) conference so that the experts can communicate directly rather than through counsel.

A final question parties should consider is whether they can agree on the sampling of ESI. Sampling ESI may help parties make informed decisions regarding the accessibility of such information to help determine the costs and burdens of production.

2. Rules 26(a), 33, 34 and 45

Amended Rules 26(a) and 34(a)(1) designate ESI as a separate category of records and information, subject to both initial disclosure and production in response to a document request. Rule 34(a)(1) was also amended to include a right to “test, or sample . . . any designated documents or electronically stored information.”⁶⁸ The Advisory

⁶⁷ See *Capitano v. Ford Motor Co.*, 831 N.Y.S.2d 687 (Sup. Ct. Onondaga County 2007) (determining that a party’s document retention policy need not be produced because it is privileged); *Gibson v. Ford Motor Co.*, No. 06 Civ. 1237, 2007 WL 41954 (N.D. Ga. July 19, 2007) (defendant’s document retention policy constitutes attorney work product and is not reasonably calculated to lead to discovery of admissible evidence); *Turner v. Resort Condos. Int’l, LLC*, No. 03 Civ. 2025, 2006 WL 1990379 (S.D. Ind. July 13, 2006) (litigation hold document privileged); *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, No. 03 Civ. 5560, 2006 WL 1520227 (S.D.N.Y. June 1, 2006) (same); see also *In re Grand Jury Investigation*, 445 F.3d 266 (3d Cir. 2006) (allowing the government to review correspondence between attorney and client discussing document retention policy where a corporation failed to stop deleting email after receiving a subpoena); *In re eBay Seller Antitrust Lit.*, No. 07 Civ. 1882, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007) (permitting discovery of the names of all employees who received litigation hold notice and allowing discovery of facts regarding defendant’s retention and collection policies); *Wells v. Xpedx*, No. 05 Civ. 2193, 2007 WL 1200955 (M.D. Fla. Apr. 23, 2007) (permitting deposition of a company representative regarding the company’s document retention policy).

⁶⁸ FED. R. CIV. P. 34(a)(1). Many courts have ordered sampling of ESI for the purpose of determining whether there is a likelihood that responsive records will be found and for determining the cost of retrieving and producing such records. See Fed. R. Civ. P. 26(b)(2)(C); see also *Zurich Am. Ins. Co. v. Ace Am. Reinsurance Co.*, No. 05 Civ. 9170, 2006 WL 3771090 (S.D.N.Y. Dec. 22, 2006) (because the data accumulated by defendant was so voluminous the parties were directed to propose a protocol for sampling defendant’s claim files); *McPeck v.*

Committee Note points out that “[i]nspection or testing of certain types of electronically stored information or of a responding party’s electronic information system may raise issues of confidentiality or privacy.”⁶⁹ The Note also stresses that “[c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems.”⁷⁰

Rule 34(b) also creates a procedure for specifying the form or forms in which ESI should be produced. The requesting party “may” specify the preferred form or forms of production.⁷¹ The producing party then has the right to object to the requested form and to state the form in which it intends to produce the information.⁷² In the absence of an agreement, or a court order specifying the form, records must be produced either in the form or forms in which they are “ordinarily maintained” or in a form or forms that “are reasonably usable.”⁷³ In the

Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (ordering initial limited search of backup tapes within dates determined to be most relevant, as a “rational starting point” for ESI search). However, the Advisory Committee Note stresses that “[t]he addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.” FED. R. CIV. P. 34(a)(1) advisory committee’s note (2006).

⁶⁹ FED. R. CIV. P. 34(a)(1) advisory committee’s note (2006); *see also* John B. v. Goetz, No. 98 Civ. 168, 2007 WL 3012808, at *1 (M.D. Tenn. Oct. 10, 2007) (permitting plaintiff’s expert to inspect defendant’s computer system to determine “whether any changes have been made to hinder the ESI production” required by the Consent Decree and previous court orders, both of which defendant had violated), *vacated in part*, 531 F.3d 448 (6th Cir. 2008) (holding that mandamus relief was warranted for orders authorizing forensic imaging by plaintiffs’ computer expert of the hard drives of identified computers); *Cenveo Corp. v. Slater*, No. 06 Civ. 2632, 2007 WL 442387 (E.D. Pa. Jan. 31, 2007) (permitting plaintiff to use an expert to create a mirror image of defendant’s hard drive in a trade secrets case); *Frees, Inc. v. McMillian*, No. 05 Civ. 1979, 2007 WL 184889 (W.D. La. Jan. 22, 2007) (allowing inspection of defendant’s personal computer hard drive in trade secrets case); *Ameriwood*, 2006 WL 3825291 (permitting inspection of defendants’ hard drives in a trade secrets case); *Ukiah Auto. Invs. v. Mitsubishi Motors of N. Am., Inc.*, No. 04 Civ. 3932, 2006 WL 1348562, at *4 (N.D. Cal. May 17, 2006) (permitting a neutral inspector to examine plaintiff’s computer for missing financial records at plaintiff’s expense). *But see* *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 06 Civ. 899, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (holding that mere suspicion that a party is withholding discoverable information, without more, is insufficient to permit an intrusive on-site examination of a computer system); *Calyon v. Mizuho Sec. USA Inc.*, No. 07 Civ. 2241, 2007 WL 1468889 (S.D.N.Y. May 18, 2007) (denying plaintiff’s request to review a mirror image of defendant’s hard drive but requiring defendant’s expert to search the hard drive based on a search protocol agreed to by both parties); *Balfour Beatty Rail, Inc. v. Vaccarello*, No. 06 Civ. 551, 2007 WL 169628 (M.D. Fla. Jan. 18, 2007) (denying request for defendants’ hard drives and characterizing request as “fishing expedition”); *Hedenburg v. Aramark Am. Food Servs.*, No. 06 Civ. 5267, 2007 WL 162716, at *2 (W.D. Wash. Jan. 17, 2007) (denying inspection of plaintiff’s home computer in an employment discrimination case because the computer files did not “go to the heart of the case”); *Medical Billing Consultants, Inc. v. Intelligent Med. Objects*, No. 01 Civ. 9148, 2003 WL 1809465, at *2 (N. D. Ill. Apr. 4, 2003) (refusing to permit inspection of party’s computer equipment, stating that “[s]uch a physical inspection is likely to unduly burden defendants without leading to the discovery of . . . relevant evidence”).

⁷⁰ FED. R. CIV. P. 34(a)(1) advisory committee’s note (2006).

⁷¹ FED. R. CIV. P. 34(b)(1)(C).

⁷² *See* FED. R. CIV. P. 34(b)(2)(D).

⁷³ Rule 34(b)(2)(E)(ii); *see, e.g.*, *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No.

ordinary course of business, ESI if often maintained in a native format with all of the associated metadata. But what does it mean to produce documents in a reasonably useable form? To accomplish this, a responding party may need to provide “technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information.”⁷⁴ The option to produce in a reasonably usable form does not permit a party to degrade the information into a form that makes it less useful to the adversary.⁷⁵ The Rule also specifies that any ESI is only required to be produced in one form.⁷⁶

Rule 33 is amended to permit a party to reply to an interrogatory by specifying the ESI from which the answer can be gleaned and by allowing the requesting party to examine or inspect such ESI. If this method of responding to an interrogatory is selected, a producing party may be required to “provide some combination of technical support, information on application software, or other assistance.”⁷⁷ The Advisory Committee Note states that the producing party “may be required to provide direct access to its electronic information system.”⁷⁸

Rule 45, governing discovery from non-parties, is amended to conform with the changes to Rules 26, 33 and 34.

Several questions are raised by this new group of rules. With respect to the Rule 26(a) mandatory disclosure, a party need only

04 Civ. 3109, 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006) (holding that production of TIFF images was insufficient and requiring production in native format because the “TIFF documents [did] not contain all of the relevant, nonprivileged information contained in the designated electronic media” such as the “creation and modification of a document, email attachments and recipients, and metadata”).

⁷⁴ FED. R. CIV. P. 34(b)(2) advisory committee’s note (2006); *see also* Miller v. Int’l Bus. Machs., No. 02-2118, 2006 WL 995160, at *6 (N.D. Cal. Apr. 14, 2006) (ordering production of emails with attachments physically attached or requiring producing party to provide references enabling the requesting party to decipher which attachments belong to which emails); CP Solutions PTE, Ltd. v. General Elec. Co., No. 04-2150, 2006 WL 1272615, at *3-4 (D. Conn. Feb. 6, 2006) (ordering reproduction of emails in a readable and useable format and, if needed, requiring defendant to provide plaintiff with information, data, or software to facilitate discovery). *But see In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003) (denying “unrestricted, direct access to a respondent’s database compilations,” in the absence of some proof that responding party’s conduct was improper, instead, permitting the requesting party to inspect and copy the product resulting from the respondent’s translation of data into a reasonably usable form); Floeter v. City of Orlando, No. 05 Civ. 400, 2006 WL 1000306, at *3 (M.D. Fla. Apr. 14, 2006) (denying request by plaintiff to inspect adversary’s hard drives, stating that Rule 34 permits a party to request documents but ““does not give the requesting party the right to conduct the actual search”) (quoting *In re Ford Motor Co.*, 345 F.3d at 1317).

⁷⁵ *See* Treppel v. Biovail Corp., 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006) (finding that downgrading data “to a less accessible form—which systematically hinders future discovery by making the recovery of the information more costly and burdensome—is a violation of the preservation obligation”).

⁷⁶ *See* FED. R. CIV. P. 34(b)(2)(E).

⁷⁷ FED. R. CIV. P. 33(d) advisory committee’s note (2006).

⁷⁸ *Id.*

identify those documents that it intends to use to support its claims or defenses. This implies that a party need not identify the sources of ESI or ESI that it deems to be not reasonably accessible because it does not intend to use such information to support its claims or defenses. With respect to form of production, parties must determine when production of hard copies will be acceptable,⁷⁹ agree upon a reasonably useable form of production,⁸⁰ and decide whether the production of some or all metadata will be required.⁸¹ Another interesting question is what type of electronic data are included in ESI?⁸² Courts have also recently addressed the question of when to allow on-site inspection or mirror-imaging of hard drives.⁸³

⁷⁹ See, e.g., *Auto Club Family Ins. Co. v. Ahner*, No. 05 Civ. 5723, 2007 WL 2480322 (E.D. La. Aug. 29, 2007) (holding that a non-party must produce its electronic records in electronic form and rejecting production in hard copy); *3M Co. v. Kanbar*, No. 06 Civ. 1225, 2007 WL 1725448 (N.D. Cal. June 14, 2007) (same for party records); *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 06 Civ. 899, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (same for party records).

⁸⁰ See, e.g., *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 05 Civ. 657, 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007) (finding that email attachments were not produced in a reasonably usable form because they were produced separately from their associated emails).

⁸¹ See, e.g., *Autotech Techs. LP v. Automationdirect.com Inc.*, No. 05 Civ. 5488, 2008 WL 902957 (N.D. Ill. Apr. 2, 2008) (denying party's request to compel production of metadata regarding a document, when the document was already produced in other forms and party had not originally requested metadata); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 476 F. Supp. 2d 1159, 1164 (N.D. Cal. 2007) (requiring defendant to produce "metadata which would reflect these earlier drafts [of counsel's opinion in patent infringement case]"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05 MD 1720, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007) (holding that parties should not strip metadata from electronic documents before production); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005) (discussing disclosure of metadata in the context of spreadsheets). *But see* *Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing*, No. 05 Civ. 138, 2006 U.S. Dist. LEXIS 92028, at *23-24 (E.D. Ky. Dec. 18, 2006) (holding that plaintiff had not shown a "particularized need" for metadata and that the metadata was not necessarily relevant to the case); *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (finding that because defendant had not made a "particularized showing of need," collection of data in native format would be "overly burdensome").

⁸² See, e.g., *Columbia Pictures Indus. v. Bunnell*, No. 06 Civ. 1093, 2007 WL 2080419 (C.D. Cal. May 29, 2007), *aff'd*, 245 F.R.D. 443 (C.D. Cal. 2007) (requiring defendant to preserve and produce records that were normally stored only temporarily in random access memory—a short-term electronic memory); *Phillips v. Netblue, Inc.*, No. 05 Civ. 4401, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007) (plaintiff not required to preserve or produce the images from websites that could be accessed by clicking a link in an email); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 641 (E.D. Pa. 2007) (party not required to preserve temporary cache files of websites it visited); *Louis Vuitton Malletier v. Dooney & Burke*, No. 04 Civ. 5316, 2006 WL 3851151 (S.D.N.Y. Dec. 22, 2006) (logs of chats on party's website not included in ESI when no technology existed to preserve them); *Quotient, Inc. v. Toon*, No. 13-C-05-64087, 2005 WL 4006493 (Md. Cir. Ct. Dec. 23, 2005) (permitting plaintiff's expert to make a forensic image of defendant's personal computer hard drive because instant messages could only be found on the hard drive and would be overwritten automatically); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (defendant not required to preserve all iterations of continually changing "wave forms" created by technology at issue but not saved by computer).

⁸³ See, e.g., *John B. v. Goetz*, No. 3:98-0168, 2007 WL 3012808, at *1 (M.D. Tenn. Oct. 10, 2007) (permitting plaintiff's expert to inspect defendant's computer system to determine "whether any changes have been made to hinder the ESI production" required by the Consent Decree and

3. Rule 26(b)(5)(B)

Rule 26(b)(5)(B) creates a procedure for seeking the return of privileged or protected information that has been viewed by an adversary. The new procedure permits a party to give notice that it is seeking the return of such information from an adversary and requires a party receiving such notice to stop the dissemination or use of the identified information, take reasonable steps to retrieve it, and either return it, sequester it, destroy it, or seek a ruling from a court as to whether the information is indeed protected, and, if so, whether that protection has been waived. It is important to note that this new Rule is merely procedural and does not create a substantive rule regarding waiver.⁸⁴ This Rule raises some unanswered questions. Is it ever too late in the course of a litigation to send such a notice? What efforts will be considered “reasonable” to retrieve such information?

4. Rule 26(b)(2)(B)

Rule 26(b)(2)(B) creates two tiers of relevant information, that which is located on accessible sources and that which is located on sources that are not reasonably accessible—the former being presumptively discoverable, and the latter presumptively not discoverable. The rule uses the term “sources,” as opposed to “documents” or “information,” that a party deems to be not reasonably

previous court orders, both of which defendant had violated)), *vacated in part*, 531 F.3d 448 (6th Cir. 2008) (holding that mandamus relief was warranted for orders authorizing forensic imaging by plaintiffs’ computer expert of the hard drives of identified computers); *Cenveo Corp. v. Slater*, No. 06 Civ. 2632, 2007 WL 442387 (E.D. Pa. Jan. 31, 2007) (permitting plaintiff to use an expert to create a mirror image of defendant’s hard drive in a trade secrets case); *Frees, Inc. v. McMillian*, No. 05 Civ. 1979, 2007 WL 184889 (W.D. La. Jan. 22, 2007) (allowing inspection of defendant’s personal computer hard drive in trade secrets case); *Ameriwood Indus., Inc. v. Liberman*, No. 06 Civ. 524, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006), *amended on clarification*, 2007 WL 685623 (E.D. Mo. Feb. 23, 2007) (permitting inspection of defendants’ hard drives in a trade secrets case). *But see* *Calyon v. Mizuho Sec. USA Inc.*, No. 07 Civ. 2241, 2007 WL 1468889 (S.D.N.Y. May 18, 2007) (denying plaintiff’s request to review a mirror image of defendant’s hard drive but requiring defendant’s expert to search the hard drive based on a search protocol agreed to by both parties); *Hedenburg v. Aramark Am. Food Servs.*, No. 06 Civ. 5267, 2007 WL 162716, at *2 (W.D. Wash. Jan. 17, 2007) (denying inspection of plaintiff’s home computer in an employment discrimination case because the computer files did not “go to the heart of the case”); *Scotts Co.*, 2007 WL 1723509 (holding that mere suspicion that a party is withholding discoverable information, without more, is insufficient to permit an intrusive on-site examination of a computer system).

⁸⁴ Newly-enacted Federal Rule of Evidence 502 states that inadvertent production of privileged information will not constitute a waiver if the producing party took reasonable precautions to prevent disclosure and made reasonable and prompt efforts to rectify the error.

accessible.⁸⁵ “Not reasonably accessible” is defined as that which would require a party to incur an undue burden or cost in order to produce relevant non-privileged information.⁸⁶ There appears to be an emerging consensus that the following information is considered not reasonably accessible: (1) information on backup media not susceptible to searches, (2) information contained on databases not programmed to produce that type of information, (3) transitory or ephemeral information automatically stored only in cache or temporary files and automatically deleted, and (4) deleted information whose fragments are still available on a hard drive. There are, however, exceptions to this general consensus. For instance, a number of courts have ordered searches of back-up tapes upon a showing of good cause.⁸⁷

The Rule permits a party to decide what sources are not reasonably accessible. Such sources need not be searched but may need to be preserved.⁸⁸ The Advisory Committee Note states that in most cases production from the reasonably accessible sources “will fully satisfy the parties’ discovery needs.”⁸⁹ The important point to note is that for the first time a party must identify the sources it is *not* searching. The identification should “to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”⁹⁰

⁸⁵ See FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”). Sources might include: databases, networks, computer systems (including legacy systems—both hardware and software), servers, archives, back-up tapes, discs, drives, cartridges, laptops, PCs, personal digital assistants, instant messaging, weblogs, internet and intranet sites, cellphones, pagers, and voicemail systems.

⁸⁶ See *id.*; see also *Ameriwood*, 2006 WL 3825291 (determining that disclosure was not required where communications and documents were not reasonably accessible).

⁸⁷ See, e.g., *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. 07 Civ. 532, 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008) (high cost of producing back-up tapes not sufficient to show that the tapes were not reasonably accessible); *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 443 (Fed. Cl. 2007) (“Defendant’s decision to transfer the e-mails to back-up tapes does not exempt Defendant from its responsibility to produce relevant e-mails.”); *Disability Rights Council of Greater Wash. v. Washington Metro. Transit*, 242 F.R.D. 139 (D.D.C. 2007) (ordering production of inaccessible backup tapes because defendant had not stopped the automatic purge feature of its email system once the duty to preserve attached); *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 Civ. 1695, 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007); *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006) (cost of searching single backup tape not high enough to make tape not reasonably accessible). *But see* *Petcou v. C.H. Robinson Worldwide, Inc.*, No. 06 Civ. 2157, 2008 WL 542684 (N.D. Ga. Feb. 25, 2008) (defendant established through high cost of restoring back-up tapes that emails stored on those tapes were not reasonably accessible).

⁸⁸ See FED. R. CIV. P. 26(b)(2)(B) advisory committee’s note (2006) (“A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case.”).

⁸⁹ *Id.*

⁹⁰ *Id.*

If there is a dispute as to reasonable accessibility, any party may bring the issue to the court. Regardless of who moves, it is the producing party that bears the burden of demonstrating that the sources from which information is sought are not reasonably accessible.⁹¹ A requesting party may need discovery to challenge the producing party's claim that certain sources are not reasonably accessible. Such discovery might include sampling of the data contained on such sources,⁹² "some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems."⁹³ Even if the producing party carries its burden, the court may order discovery from such sources if the requesting party demonstrates good cause.⁹⁴ The Advisory Committee Note lists seven factors a court should consider in determining whether good cause has been shown.⁹⁵ Finally, if discovery is ordered from such sources, a court may "specify conditions for the discovery" which is an oblique reference to cost-

⁹¹ See *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, No. A. 04-84, 2006 WL 897218, at *4 (E.D. Ky. Apr. 5, 2006) (holding that a peculiar computer system is no excuse for not producing information and that production must be made in a reasonably usable form).

⁹² See, e.g., *J.C. Assocs. v. Fidelity & Guar. Ins. Co.*, No. 01 Civ. 2437, 2006 WL 1445173, at *2 (D.D.C. May 25, 2006) (ordering sampling to determine "whether any further discovery is warranted and who should bear the cost of that discovery"); *Thompson v. Jiffy Lube Int'l, Inc.*, No. 05 Civ. 1203, 2006 WL 1174040, at *2, 4 (D. Kan. May 1, 2006) (ordering parties to confer and agree upon a data sampling protocol and production format, where a request for production was overly broad); *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (requiring responding party to restore and produce responsive documents from a small sample of requested back-up tapes); *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (ordering a sample from the restoration of back-up emails for the relevant time period instead of granting a back-up system search); *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. June 16, 1999) (ordering the production of a portion of back-up tapes to explore the possibility that they contain relevant material).

⁹³ FED. R. CIV. P. 26(b)(2)(B) advisory committee's note (2006); see also *Fischer v. United Parcel Serv.*, No. 05 Civ. 70366, 2006 WL 1046973, at *4 (E.D. Mich. Apr. 19, 2006) (ordering the production of a person familiar with the responding party's document retrieval efforts to testify in a deposition); *Bob Barker Co. v. Ferguson Safety Prods., Inc.*, No. 04-04813, 2006 WL 648674, at *4 (N.D. Cal. Mar. 9, 2006) (explaining that access to a database may be permissible "upon an adequate showing of need, and with adequate procedural safeguards in place to minimize business disruption and to restrict disclosure of irrelevant or proprietary material").

⁹⁴ See, e.g., *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 Civ. 1695, 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007) (finding good cause); *W.E. Aubuchon Co. v. Benefirst, LLC*, No. 05-40159-FDS, 2007 WL 1765610 (D. Mass. Feb. 6, 2007) (same). But see *Best Buy Stores, L.P. v. Developers Diversified Realty Corp., DDR GLH, LLC*, 247 F.R.D. 567 (D. Minn. 2007) (database not reasonably accessible and requesting party failed to establish good cause for production where there was no showing that the information was uniquely available on the database).

⁹⁵ FED. R. CIV. P. 26(b)(2) advisory committee's note (2006):

(1) [T]he specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

shifting or cost sharing.⁹⁶

The new Rule does not prevent a party from objecting to the production of first tier information—namely that which is accessible.⁹⁷ The proportionality rule set forth in Rule 26(b)(2)(C) still governs objections to producing such information.⁹⁸

5. Rule 37(e)

Rule 37(e) has been described as a safe harbor, but it is a very shallow harbor. The Rule is very simple and states that “absent exceptional circumstances a court may not impose sanctions under these rules on a party for failing to provide electronically stored information as a result of the routine, good-faith operation of an electronic information system.”⁹⁹ This Rule was designed to afford some protection to parties who operate their electronic information systems in good faith. The Rule has several new terms that need to be defined.

An “electronic information system” may include document retention protocols, the handling of back up data (tape retention schedule), archival and legacy data, and any retention/destruction/overwrite policies. “Routine operation” implies a documented system for creating and maintaining electronic information and records.¹⁰⁰ “Good faith” requires a party to respond appropriately

⁹⁶ FED. R. CIV. P. 26(b)(2)(B); *see also* FED R. CIV. P. 26(b)(2) advisory committee’s note (2006) (noting that even with cost shifting “the producing party’s burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery”); *Guy Chem. Co. v. Romaco AG*, 243 F.R.D. 310 (N.D. Ind. 2007) (ordering production of inaccessible information from a non-party on the condition that the requesting party pay the non-party’s costs of production); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 289-91 (S.D.N.Y. 2003) (ordering requesting party to pay twenty-five percent of costs associated with restoring and searching electronic information from back-up tapes, but not attorney review time).

⁹⁷ *See Haka v. Lincoln County*, 246 F.R.D. 577, 579 (W.D. Wis. 2007) (responding to plaintiff’s request for defendant to perform expensive searches of a vast amount of data by requiring narrowed search parameters and instructing the parties to divide the costs equally, but not making a finding with respect to accessibility). *But see Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007) (“[C]ost-shifting does not even become a possibility unless there is first a showing of inaccessibility.”); *Metro Wastewater Reclamation Dist. v. Alfa Laval, Inc.*, No. 05 Civ. 02171, 2007 WL 1160012 (D. Colo. Apr. 19, 2007) (ordering production of archived and backup email because it was both relevant and discoverable, without addressing whether this information was reasonably accessible).

⁹⁸ *See Hopson v. Mayor and City Council of Balt.*, 232 F.R.D. 228, 244 (D. Md. 2005) (noting that the permissible amount of discovery of ESI “will be a function of the issues in the litigation, the resources of the parties, whether the discovery sought is available from alternative sources that are less burdensome, and the importance of the evidence sought to be discovered by the requesting party to its ability to prove its claims”).

⁹⁹ FED. R. CIV. P. 37(e).

¹⁰⁰ *See Doe v. Norwalk Cmty. Coll.*, No. 04 Civ. 1976, 2007 WL 2066497, at *4 (D. Conn. July 16, 2007) (stating that Rule 37(e) [formerly Rule 37(f)] “appears to require a routine *system* in order to take advantage of the good faith exception”) (emphasis in original); *see also Oxford*

when litigation is reasonably anticipated or at the very latest when it begins.¹⁰¹ A party must institute some kind of litigation hold at that point to preserve information needed in the litigation if the information is not already being preserved and it surely must obey court orders directing it to preserve, search and/or produce certain information. A “litigation hold” typically has three components: (1) the identification and preservation of relevant information when litigation is reasonably anticipated;¹⁰² (2) the distribution of a written notice of the hold to the appropriate employees, clearly defining the information to be preserved and how it will be maintained; and (3) the monitoring of compliance with the terms of the hold.¹⁰³

In interpreting this new Rule, courts will likely assess the intent of a producing party (culpable state of mind) that is unable to produce relevant information because it was not maintained, as well as the prejudice to the requesting party resulting from the inability to obtain such data. The Rule only precludes a court from ordering sanctions for such destruction “under these rules,”¹⁰⁴ but there appears to be little consensus on the culpable state of mind that courts require. Some courts do not require a showing of purposeful conduct but rather require only a showing of fault ranging from mere negligence to bad faith.¹⁰⁵

House, Inc. v. City of Topeka, No. 06 Civ. 4004-RDR, 2007 WL 1246200, at *4 (D. Kan. Apr. 27, 2007) (holding that safe harbor applied because emails lost pursuant to the routine operation of a computer system before the duty to preserve had attached).

¹⁰¹ See *Doe*, 2007 WL 2066497 (awarding an adverse inference instruction against defendant because it had failed to preserve the hard drives of a departing employee and of an employee receiving a new computer and because it failed to halt the routine destruction of backup tapes); see also *In re Krause*, 367 B.R. 740, 768 (Bankr. D. Kan. 2007) (declining to allow defendant-debtor the safe harbor protection because it had failed to disable the running of a wiping feature as soon as the preservation duty attached), *appeal dismissed*, *In re Krause*, No. 07-1246, 2007 WL 2591201 (D. Kan. Sept. 5, 2007).

¹⁰² See *School-Link Techs., Inc. v. Applied Res., Inc.*, No. 05-2088, 2007 WL 677647, at *4 (D. Kan. Feb. 28, 2007) (“The Court finds that Defendant breached [the duty to preserve documents and information] by failing to instruct [a custodian] to gather and preserve any documents or information relating to the lawsuit.”).

¹⁰³ See *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 630 (D. Colo. 2007) (imposing sanctions for failure to monitor compliance with litigation hold and instead relying on custodians to exercise discretion in determining what information to save); *In re NTL*, 244 F.R.D. 179 (faulting counsel for failure to monitor compliance with legal hold order). See generally THE SEDONA CONFERENCE, *supra* note 60, Guidelines 4-5 (setting forth factors for determining whether to impose a litigation hold and the scope of such a hold).

¹⁰⁴ FED. R. CIV. P. 37(e); see also *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263 (2007) (imposing sanctions under both Rule 37 and inherent powers stating that the court maintains an “inherent power to control the judicial process and litigation”).

¹⁰⁵ See *Residential Funding v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (stating that the “culpable state of mind” factor is satisfied with a showing that the evidence was destroyed knowingly or negligently); *In re Kmart Corp.*, 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007) (“With respect to the sanction of default judgment (or a dismissal with prejudice), courts recognize that because it deprives a party of a hearing on the merits of its claim, it is a harsh remedy that should be reserved for the most egregious situations.”); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1074, 1078 (N.D. Cal. 2006) (declining to award a default judgment

Other courts, by contrast, appear to require a finding of bad faith by the party—not counsel—before imposing a sanction for the violation of a discovery order.¹⁰⁶ The trend seems to be that severe sanctions—such as a default judgment or an adverse inference—require a finding of bad faith.¹⁰⁷ Other sanctions can be imposed based solely on fault.

The new Rule raises a number of unanswered questions. Here are some we consider to be particularly important: (1) Should parties maintain their electronic information from the time of creation or receipt in new ways to make collection and production easier? (2) Should companies create litigation response teams to coordinate their efforts at document collection, search and production and, if so, who should be on such a team? (3) Should companies develop a system for evaluating the threat of litigation and what should be the criteria for such an evaluation? (4) What does it mean to modify or suspend the routine operation of an electronic information system?

III. COURT APPOINTMENT OF SPECIAL MASTERS TO SUPERVISE E-DISCOVERY

Courts are appointing special masters to address electronic discovery issues with increasing frequency, although the number of reported appointments is still relatively small. Examination of reported and unreported cases regarding the appointment of special masters for

as a sanction absent a showing of “willfulness, fault or bad faith,” but awarding an adverse inference instruction and monetary sanctions based on a showing of gross negligence); *DaimlerChrysler Motors v. Bill Davis Racing, Inc.*, No. 03 Civ. 72265, 2005 WL 3502172, at *2 (E.D. Mich. Dec. 22, 2005) (“Even the negligent destruction of evidence is prejudicial to an opposing party, and undermines the litigation process.”); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 337-38 (D.N.J. 2004) (holding that proof of bad faith is not required for a spoliation inference).

¹⁰⁶ See *Arista Records, L.L.C. v. Tschirhart*, 241 F.R.D. 462, 465 (W.D. Tex. 2006) (determining that in addition to a finding of bad faith, the violation of the discovery order must be attributed to the client, not the attorney); *Morgan v. U.S. Xpress, Inc.*, No. 4:03-CV-88, 2006 WL 1548029, at *4 (M.D. Ga. June 2, 2006) (“In the Eleventh Circuit, when a defendant destroys critical evidence, an adverse inference may be drawn from his failure to preserve the evidence if the absence of that evidence is predicated on bad faith.”).

¹⁰⁷ See *Qualcomm v. Broadcom*, No. 05cv1958-B, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (finding that Qualcomm’s counsel participated in an “organized program of litigation misconduct and concealment throughout discovery, trial and post-trial,” by intentionally withholding documents, failing to look in the correct locations for the relevant documents, wrongly accepting the unsubstantiated assurances of its client that its search was sufficient, ignoring warning signs that the document production was inadequate, and failing to press its client to find the relevant documents, and the court awarded more than \$9 million in attorneys’ fees and costs to Broadcom), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (affirming the sanction against Qualcomm but vacating the sanction against the attorneys because they had not been able to reveal privileged information to defend themselves and therefore ordering further proceedings).

such matters (including cases reflecting a decision declining to appoint a Rule 53 master) illuminates the considerations governing such appointments. We will examine three illustrative cases, and then discuss trends gleaned from a review of cases as well as other sources of anecdotal information.

A. *Three Case Reviews*

1. *Hohider v. United Parcel Service, Inc.*

In *Hohider v. United Parcel Service, Inc.*, a special master was appointed as a result of plaintiffs' allegations that the defendant had failed to preserve and produce relevant ESI.¹⁰⁸ *Hohider* is a consolidated employee class action alleging violations of the Americans with Disabilities Act ("ADA"). Plaintiffs claimed that UPS had failed to preserve relevant evidence and filed a motion seeking a preservation order and sanctions against UPS.¹⁰⁹ The court directed the Special Master to investigate plaintiffs' allegations and to prepare a report and recommendation documenting his investigation and presenting proposed findings and remedies, if any, within ninety days of the order.¹¹⁰

The court's order of appointment described the Special Master's duties and obligations in detail. The Special Master was first instructed to investigate UPS's computer systems and create a "detailed description" of specific computer hardware, systems, networks, applications, and software used by UPS since May of 2000. The order identified sixteen particular areas of investigation, including identification of all hardware, application software, email applications, office and database applications, and server-side applications, and identification of all persons responsible for any of the items. The court also requested extensive investigation of UPS's backup protocols, asking for identification of all backup procedures, devices used (by brand name), schedules, physical locations, any suspension or alteration of the protocols, and any backup media that had been erased or destroyed since the beginning of the litigation.¹¹¹

Next, the Special Master was directed to make specific findings of

¹⁰⁸ No. 04-363 (W.D. Pa. filed Mar. 3, 2004).

¹⁰⁹ See No. 04-363 (W.D. Pa. Dec. 19, 2007) (order appointing Special Master).

¹¹⁰ See *id.* The order does not indicate whether a hearing was held on the issue of the appointment of the Special Master, but does state that the parties were given notice and the opportunity to be heard. See *id.* at 1. The Special Master ultimately selected was identified by the court, not the parties.

¹¹¹ See *id.* at 2-3.

fact as to whether UPS “withheld, deleted, destroyed or permitted to be destroyed” information, documents, or ESI that it was legally required to preserve, and if so, whether any of that information or ESI could be recovered.¹¹² After completing the factual investigation of UPS’s ESI retention, the Special Master was directed to make specific findings about UPS’s efforts to preserve ESI, including UPS’s document retention policies and the adequacy and timing of any legal hold notices.

The order also required the Special Master to determine whether the plaintiffs’ actions contributed in any way to the alleged failures of UPS to maintain relevant evidence. In particular, the order identified the following areas of investigation: plaintiffs’ pre-litigation communication about the scope of their claims, the date the plaintiffs first became aware of potential preservation issues, the plaintiffs’ decision to withdraw an earlier motion to compel, and any delay by the plaintiffs in seeking a preservation order.¹¹³

2. *In re Seroquel Products Liability Litigation*

In *In re Seroquel Products Liability Litigation*, a Special Master was appointed to supervise the discovery and production of voluminous ESI in a complex, multi-district litigation involving an allegedly defective pharmaceutical product.¹¹⁴ The appointment encompassed both “past and future technical issues arising in the discovery process.”¹¹⁵ Although the appointment was not made in response to any particular alleged misconduct by any party, it was made shortly after the court imposed sanctions on the defendant for “purposeful sluggishness” in its production of ESI, as well as failure to consult with plaintiffs on key words for its searches of electronic databases.¹¹⁶

Both parties submitted motions to appoint particular candidates to act as the Special Master, and each opposed the appointment of the other party’s candidate. The Magistrate Judge suggested two additional candidates in an attempt to reach agreement, but the parties were again split between the two candidates. The court noted that both candidates were “more than suitable,” as both had considerable technical

¹¹² *Id.* at 3.

¹¹³ *See id.* at 4. The court entered an amended order appointing the special master in August of 2008, No. 04-363 (W.D. Pa. filed Aug. 26, 2008). In addition, the court initially entered an order establishing protocols describing the special master’s authority in February of 2008, No. 04-363 (W.D. Pa. filed Feb. 5, 2008), and reissued that guidance in August of 2008, No. 04-363 (W.D. Pa. filed Aug. 26, 2008).

¹¹⁴ *See* No. 6:06-md-1769-Orl-22DAB (M.D. Fla. Sept. 27, 2007) (order appointing Special Master) [hereinafter *Seroquel* Order of Appointment].

¹¹⁵ *Id.* at 1.

¹¹⁶ *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662-65 (M.D. Fla. 2007).

knowledge and expertise, as well as familiarity with *The Sedona Principles*, but decided to appoint the candidate who had more “personal, hands-on experience regarding electronic discovery issues” that were “more pertinent” to the issues in the case.¹¹⁷ Each party was instructed to designate one lawyer and one technical representative as contacts for the Special Master.

The order appointing the Special Master stated that his duties were to “assist and, when necessary, *direct* the parties in completing required discovery of electronically stored information with reasonable dispatch and efficiency.”¹¹⁸ However, the court recognized that the parties did not agree on the appropriate scope of the Special Master’s duties. Accordingly, the court ordered the parties to submit brief, proposed “job descriptions,” and subsequently issued an order further specifying the Special Master’s authority and duties.¹¹⁹

In that order, the court explained that the Special Master was “appointed to provide services and expertise necessary for proper completion of discovery of electronically stored information (“ESI”) in this litigation.”¹²⁰ While the court retained responsibility for contested scope and subject matter issues, the Special Master was responsible for the “means and methods for efficiently obtaining discoverable ESI.”¹²¹ As an initial matter, the order required the Special Master to hold a telephone conference with the party representatives to discuss how to accomplish the Special Master’s tasks, and required the parties to confer on these issues.

The order instructed the Special Master to review the history of the case and to gather information from the parties as to procedures used and problems that had arisen in the discovery process, in order to determine whether discovery was reasonably complete. If it was not, the Special Master was directed to determine what steps would be required to assist the parties to complete discovery in a cost-effective manner. Unlike cases where a special master is appointed to address discrete ESI or discovery issues, the Special Master here was assigned to review all pending discovery requests to determine “where information is stored and how it can most effectively be accessed and made available.”¹²² As part of that responsibility, the Special Master was authorized to resolve technical issues such as search terms, protocols and formatting, and to participate in the parties’ meet-and-confer sessions. All of the Special Master’s activities were to be

¹¹⁷ *Seroquel* Order of Appointment, at 2.

¹¹⁸ *Id.* (emphasis in original).

¹¹⁹ *In re Seroquel Prods. Liab. Litig.*, No. 06 MD 1769 (M.D. Fla. Oct. 5, 2007) (order describing duties of Special Master).

¹²⁰ *Id.* at 1.

¹²¹ *Id.*

¹²² *Id.* at 2.

recorded in regular written reports to the court.

3. *Medtronic Sofamor Danek, Inc. v. Michelson*

Medtronic Sofamor Danek, Inc. v. Michelson involved the appointment of a special master where the parties had “not been able to agree on a protocol for production [of ESI], on the scope of production, or, most importantly, on who should bear the cost of production.”¹²³ Although the court decided these issues itself, concluding among other things that cost shifting was warranted and that the producing party must pay a portion of the costs of production of the large number of back-up tapes, it nevertheless appointed a special master to supervise the discovery process.

The *Medtronic* litigation involved intellectual property claims by a manufacturer of medical devices against an inventor, Michelson, and his company, Karlin Technology. The case had generated discovery disputes, primarily over the production of Medtronic’s email messages and electronic data. Michelson requested appointment of a special master in connection with his motion to compel production and restoration of approximately 996 network backup tapes from Medtronic.¹²⁴ The tapes contained email and other ESI in backup format, which would need to be restored to a readable format and searched for duplication. Michelson claimed that the backup tapes contained information that was potentially responsive to his discovery requests and argued that the plaintiff should bear all of the costs of production.

The Magistrate Judge decided to appoint a technology and computer expert as special master due to the amount of electronic data at issue. The parties were directed to agree on an expert or to submit names of potential experts for the court’s selection.¹²⁵ The Special Master’s duties, outlined in the initial order, included “making decisions with regard to search terms; overseeing the design of searches and the scheduling of searches and production; coordinating deliveries between the parties and their vendors; and advising both parties, at either’s request, on cost estimates and technical issues.”¹²⁶

The Special Master was appointed approximately two weeks after the initial order, and the parties made a rolling production of the ESI over the next five months with the assistance of the Special Master.¹²⁷

¹²³ *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 552 (W.D. Tenn. 2003).

¹²⁴ *See id.*

¹²⁵ *See id.* at 559.

¹²⁶ *Id.*

¹²⁷ *See Medtronic Sofamor Danek, Inc. v. Michelson*, Nos. 01-2373, 03-2055, 2004 WL

After the close of discovery, Michelson moved to compel production of any responsive ESI that had been deleted from Medtronic's computer system, based on his experts' conclusion that the hard drives produced by Medtronic did not contain any deleted files. The Special Master denied Michelson's request, and Michelson sought review from the court. The court concluded that the Special Master went beyond his authority in making the ruling, because the Special Master "was never assigned the duty of making determinations as to whether Medtronic could be compelled to produce deleted files and e-mails."¹²⁸ The court ultimately concluded that the defendant's motion was untimely and speculative, and denied relief after a de novo review of the Special Master's order.

B. *Trends in the Appointment of Special Masters to Supervise E-Discovery*

Our research has revealed four different roles of Rule 53 masters in the context of electronic discovery: (1) facilitating the electronic discovery process; (2) monitoring discovery compliance related to ESI; (3) adjudicating legal disputes related to ESI; and (4) adjudicating technical disputes and assisting with compliance on technical matters, such as conducting computer/system inspections.

1. *Facilitation of the Electronic Discovery Process*

A number of courts have employed special masters to facilitate dialogue and agreements among the parties with respect to electronic discovery issues. In some cases this function has been part of a general discovery appointment. In others, the appointment has been specific to electronic discovery. The types of facilitation include: (1) assisting with the Rule 26(f) conference discussions; (2) developing preservation protocols; (3) developing processes to identify locations and sources of potentially relevant documents and ESI; (4) assisting the parties to develop protocols for the identification and depositions of knowledgeable witnesses regarding ESI issues (including guidelines for the scope of pre-trial examinations); (5) developing protective orders to address privilege and privacy protection concerns; (6) addressing search and retrieval issues (such as negotiating search terms); and (7) agreeing upon form of production issues.

2905399 (W.D. Tenn. May 3, 2004) (Order Overruling Defendants' Objections to Special Master Balaran's March 26, 2004 Order).

¹²⁸ *Id.* at *2.

The duties assigned to the Special Master in *Medtronic*, such as choosing appropriate search terms and overseeing the design of searches, are a good example of the ways in which a technical expert can facilitate electronic discovery.¹²⁹ Search terms and ESI preservation are often disputed,¹³⁰ and development of protocols by a neutral party can prevent such disputes or resolve them before they reach the court.

Other courts have made similar appointments. In *Chaset v. The Upper Deck Company*, a class action alleging that sports trading card companies engaged in unfair business practices, a California state court appointed a special master to develop electronic search protocols and recommend the scope of the electronic documents responsive to identified document requests.¹³¹ Another example is *United States v. Philip Morris*, an action brought by the federal government alleging that various tobacco companies had engaged in a conspiracy to commit fraudulent conduct with respect to sales of cigarettes. In that case, prior to the amendment of Rule 53, the court appointed a Rule 53 Special Master to handle discovery disputes despite the government's opposition, in light of the magnitude and complexity of the allegations, the volume of anticipated discovery and privilege issues, and the inability of the parties to agree on basic scheduling matters.¹³² In the course of that appointment, the Special Master facilitated inquiries related to government and company databases and facilitated negotiations between the parties regarding key word searches to be run by the Department of Justice and the National Archives.¹³³

In the *Katrina Canal Breach* consolidated litigation, the court appointed a special master to address a single issue—the selection of an ESI repository vendor from among competing candidates proffered by the parties.¹³⁴ Similarly, the court appointed a technology firm in *In re World Trade Center Disaster Site Litigation* to build a database to store and organize discovery materials in a complex consolidated litigation.¹³⁵ The appointment was warranted, despite the plaintiffs' concerns about the cost of the database construction and maintenance, “[b]ecause of the

¹²⁹ See *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 552 (W.D. Tenn. 2003).

¹³⁰ See *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006) (discussing how discovery disputes, including defendant's failure to consult with plaintiffs on search terms, had disproportionately consumed the court's resources); *Palgut v. City of Colorado Springs*, No. 06 Civ. 1142, 2007 WL 4277564 (D. Colo. Dec. 3, 2007) (discussing multiple motions by plaintiffs regarding preservation issues).

¹³¹ *Chaset v. The Upper Deck Company*, 2002 WL 33966731 (Cal. Super. Ct. Nov. 7, 2002).

¹³² See *United States v. Philip Morris*, No. 99 Civ. 2496 (D.D.C. Dec. 22, 2000) (appointing special master); No. 99 Civ. 2496 (D.D.C. Dec. 22, 2000) (Memorandum Opinion) (on file with the authors).

¹³³ See *United States v. Philip Morris*, No. 99 Civ. 2496 (D.D.C. Oct. 1, 2002).

¹³⁴ See *In re Katrina Canal Breaches Consolidated Litigation*, No. 05 Civ. 4182, E.D. La. (filed *sub nom. Berthelot v. Boh Bros. Constr.* Sept. 19, 2006).

¹³⁵ See *In re World Trade Center Disaster Site Litig.*, No. 21 MC 100, 2008 WL 793578 (S.D.N.Y. Mar. 24, 2008).

volume of information that will be produced, and the intense time pressures governing production.”¹³⁶

Special masters appointed to facilitate discovery may also have limited authority to resolve disputes. In *Board of Commissioners of the Port of New Orleans v. Lexington Insurance Co.*, a suit seeking insurance coverage for damages arising out of the destruction of a dock during Hurricane Katrina, the court appointed a special master for ESI whose primary duty was to assist—and when necessary, to direct—the parties to complete discovery of ESI in an efficient manner.¹³⁷ The court authorized the Special Master to “resolve issues as to search terms and protocols, means, methods and forms of preservation, production and redaction, formatting, and other technical matters.”¹³⁸ The order specified that “issues as to the scope and subject matters for discovery” were to be determined by the court, while issues regarding “means and methods” of obtaining discoverable ESI were for the Special Master.¹³⁹

Importantly, the use of special masters is not limited to high-stakes, multi-district litigation or class actions. When the task is discrete and targeted (*e.g.*, facilitating a process for authenticating ESI, agreeing on keyword searches, or creating a sampling methodology), appointment of a special master under Rule 53 can be helpful in all types of cases. One obvious advantage is that all parties share the cost of one expert, rather than the duplicative costs associated with competing experts. In addition, a negotiated solution or a definitive ruling by the special master will resolve issues that would otherwise be costly and time-consuming to litigate.

2. Monitoring Discovery Compliance

There are several reported cases where courts have had to expend an extraordinary amount of judicial resources resolving discovery disputes involving ESI.¹⁴⁰ These circumstances have led courts to appoint a special master to monitor or compel compliance with court orders and discovery rules.

For instance, in *Wachtel v. Health Net, Inc.*,¹⁴¹ an action against plaintiffs’ health insurance providers under the Employee Retirement

¹³⁶ *Id.* at *1.

¹³⁷ No. 06 Civ. 8101 (E.D. La. Feb. 19, 2008) (Order Appointing Special Master for Electronically Stored Information).

¹³⁸ *Id.* at 1.

¹³⁹ *Id.* at 2.

¹⁴⁰ *See, e.g.*, *AV Media, Pte., Ltd. v. Omnimount Systems, Inc.*, No. 06 Civ. 2412, 2008 WL 410627, at *1 (D. Ariz. Feb. 13, 2008) (finding it necessary to appoint a special master because a “plethora” of discovery issues continued to arise in the case).

¹⁴¹ 239 F.R.D. 81 (D.N.J. 2006).

Income Security Act (“ERISA”), the court appointed a special master to facilitate the discovery process only after there had been many disputes between the parties and the defendants had repeatedly failed to comply with discovery orders.¹⁴² The court directed the Special Master to monitor the defendants’ compliance with orders to preserve and search emails requested by plaintiffs in discovery. The court found that defendants’ actions had placed an “extraordinary drain on the Court’s resources,” in light of which “the need is clear for help in the form of a separate Special Master to monitor discovery compliance to ensure that *all* documents ordered to be produced have been produced and that *all* of the Court’s discovery Orders have been complied with.”¹⁴³ Because defendants’ failure to comply with discovery orders occasioned the need for a Special Master, the court ordered the defendants to pay the Special Master’s fees in full.¹⁴⁴

3. Adjudicating Legal Disputes

Special masters have often been used in an adjudicative role to hear and rule upon discovery disputes, issuing reports and recommendations that are adopted or rejected by the district court. Special masters have been called upon to issue recommendations on the scope of the proposed discovery of ESI, the form of production and claims of privileges or work-product protection.

The adjudication of privilege claims may be the most common basis for the appointment of a special master. The Federal Judicial Center’s *Managing Discovery of Electronic Information: A Pocket Guide for Judges* suggests that the resolution of privilege issues in large cases may require the use of a special master:

Any assertion of privilege raises the question of how that assertion is to be tested. The accepted practice is, of course, in camera inspection of the material by the court. In cases involving ESI, however, the judge may have to grapple with whether the sheer volume of information requires new methods of review, such as sampling or, in the most difficult cases, the use of a special master.¹⁴⁵

Recent cases show that courts have appointed special masters to review claims of privilege where the number of documents or log entries to be reviewed was substantial. In *Wachtel v. Guardian Life*

¹⁴² The case involved over one hundred and sixty opinions and orders resolving discovery disputes, mostly due to the fact that defendants “repeatedly violated Court orders for discovery.” *Id.* at 111-12.

¹⁴³ *Id.* at 112.

¹⁴⁴ *See id.* at 113.

¹⁴⁵ BARBARA J. ROTHSTEIN, RONALD J. HEDGES, & ELIZABETH C. WIGGINS, *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES* 9 (2007).

Insurance, an ERISA action associated with *Wachtel v. Health Net*, for example, the plaintiffs asserted that the crime-fraud exception applied to defendant's claim of attorney-client privilege as it related to electronic documents.¹⁴⁶ The court referred the issue to a special master to limit the universe of electronic documents that must be examined to determine whether the crime-fraud exception applied. The court adopted a process suggested by the Special Master for examining the documents: first, the court would determine whether plaintiffs had established a prima facie showing that the crime-fraud exception applied; second, the Special Master would review the documents for which plaintiffs made such a showing; and third, he would make recommendations to the court.¹⁴⁷ The Special Master's role thus encompassed both facilitating the process of reviewing large numbers of documents and adjudicating legal issues with respect to those documents.

In three recent multi-district litigations, courts have also used special masters to conduct privilege reviews. In *In re Bausch & Lomb Contact Lens Solution Product Liability Litigation*, the 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.¹⁴⁸ Similarly, the court presiding over *In re Vioxx Products Liability Litigation* appointed a Special Master after the Fifth Circuit held that the court's review of approximately 30,000 documents withheld by defendant Merck for privilege "proved to be inadequate."¹⁴⁹ The Special Master reviewed a sample of 2,000 documents claimed to be representative of all the withheld documents. The district court held that the Special Master's sample review process provided adequate procedural protections, and adopted the Special Master's recommendations for many documents but modified the rulings on a number of other documents.¹⁵⁰

The Special Master for *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, on the other hand, was appointed to supervise the entire discovery process and, upon referral by the court, to resolve all disputes that may arise, including "electronic discovery disputes, questions of privilege, work product, relevancy, scope, and

¹⁴⁶ Nos. 01-4183, 03-1801, 2007 WL 1752036 (D.N.J. June 18, 2007).

¹⁴⁷ See *id.* at *1. The Special Master ultimately reviewed over four thousand documents in defendant's privilege logs. See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 228 (3d Cir. 2007).

¹⁴⁸ No. 06 MN 77777, MDL No. 1785 (D.S.C. Nov. 26, 2007) (on file with the authors). The Special Master was, by the same order, appointed as a Referee in the New York state court consolidated litigation on the same subject pursuant to New York Civil Practice Law and Rules § 3104(a).

¹⁴⁹ *In re Vioxx Prods. Liab. Litig.*, Nos. 06-30378, 06-30379, 2006 WL 1726675, at *2 (5th Cir. May 26, 2006).

¹⁵⁰ *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

burden.”¹⁵¹ Complex privilege issues were later referred to the Special Master, including review of privilege logs containing over ninety-six thousand entries (later reduced to about forty-four thousand) and in camera review of approximately four thousand documents.¹⁵² The Special Master concluded that where a defendant’s privilege log was deficient because it did not permit plaintiffs to assess the applicability of the privilege, then privilege was waived.¹⁵³

4. Adjudicating Technical Disputes and Assisting with Discovery Compliance

By contrast, some masters are appointed primarily because of technical knowledge and/or skills. The assignments often require the master to use those skills to report on specific technical issues, such as whether data on a hard drive is retrievable. In a well-known treatise on discovery practice the authors note that “[a]nother not-infrequent consequence when a case involves substantial electronic discovery is the appointment of a special master or other court-appointed neutral to assist in resolving technical discovery disputes.”¹⁵⁴ The Manual for Complex Litigation also refers to the use of “technical advisors” in a similar role.¹⁵⁵ As opposed to masters who simply facilitate the process of electronic discovery, these special masters are appointed to assist the court with technical issues necessary to resolve pending and anticipated discovery disputes.

There appears to be an increasing use of special masters to resolve technical disputes.¹⁵⁶ In some cases, preservation issues, motions to compel, or other legal disputes cannot be determined without a factual investigation involving technical issues beyond the expertise of the court. For example, in *Inventory Locator Service LLC v. Partsbase, Inc.*,¹⁵⁷ an action alleging violations of the Electronic Communications Privacy Act, the court granted the plaintiff’s motion to appoint a special master with particular expertise in the computer field to review claims

¹⁵¹ No. 00 Civ. 1898 (S.D.N.Y. June 18, 2004) (Order Appointing Special Discovery Master).

¹⁵² See Nos. 00 Civ. 1898, 04 Civ. 5424, 04 Civ. 2399 (S.D.N.Y. Oct. 29, 2007) (Special Master’s Pre-Trial Order #38).

¹⁵³ See *id.* at 3.

¹⁵⁴ ROGER S. HAYDOCK AND DAVID F. HERR, *DISCOVERY PRACTICE* § 27.03 (Aspen Publishers, Inc. 2006) (citing *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550 (W.D. Tenn. 2003)).

¹⁵⁵ *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 11.51 (2004).

¹⁵⁶ One recognized expert in this area states on his website that he has been appointed as a neutral expert and special master on numerous occasions over the past fifteen years. Notably, the frequency of reported appointments has increased significantly since 2003. See <http://www.probitas.com/neutral.htm> (last visited Feb. 1, 2008).

¹⁵⁷ No. 02 Civ. 2695, 2006 WL 1646091 (W.D. Tenn. June 14, 2006).

of fabricated computer-related evidence, finding that the serious nature of the charges, the enormous amount of data to be reviewed, and the technical knowledge required to evaluate the charges required such an appointment.

In *Friskit v. RealNetworks, Inc.*, a patent infringement action, the court appointed an independent expert to recommend whether the defendant should be required to produce its entire source code and whether plaintiff's responses to interrogatories requesting descriptions of its product for patent applications were adequate.¹⁵⁸ In *RGIS, LLC v. A.S.T., Inc.*, a case involving the copyright to certain computer software, the court similarly appointed a special master with expert knowledge in reading source codes.¹⁵⁹ With respect to discovery, the court found that "[u]se of a neutral Master can be undertaken in a manner preserving the confidentiality of Defendants' source codes until a colorable finding can be made of sufficient similarity that full discovery may be warranted."¹⁶⁰ The court directed the parties to meet and confer regarding the terms and conditions of the master's appointment.

Special masters appointed to facilitate electronic discovery, as discussed above, may later be directed to resolve or investigate particular technical issues in discovery disputes that come before the court. In *Eastman Kodak Co. v. Sony Corp.*, a patent infringement action, a special master was appointed to handle discovery issues.¹⁶¹ To resolve a dispute in which Sony sought to compel Kodak to more specifically correlate ESI production to its discovery requests, the Special Master "actually used the disputed server to conduct searches for information, and found that the information 'seemed to be arranged in a useable manner.'"¹⁶² The Special Master issued a Report and Recommendation, later adopted by the court, finding that the documents were produced in the manner in which Kodak maintained them, and that Kodak was no better equipped at organizing the documents than Sony.¹⁶³

In *Padgett v. City of Monte Sereno*, the plaintiff alleged, inter alia, that the city had sent him a threatening letter, and sought to inspect city employees' hard drives and the city's backup tapes for evidence of the letter's authorship.¹⁶⁴ The court appointed a special master to "manage

¹⁵⁸ See *Friskit, Inc. v. RealNetworks, Inc.*, No. 03 Civ. 5085 (N.D. Cal. Dec. 23, 2005) (order appointing an independent neutral expert).

¹⁵⁹ See No. 07 Civ. 10975, 2008 WL 186349 (E.D. Mich. Jan. 22, 2008) (citing FED. R. CIV. P. 53 advisory committee's note (2003); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2601)).

¹⁶⁰ *Id.* at *4.

¹⁶¹ Nos. 04 Civ. 6095T, 04 Civ. 6547T, 2006 WL 2039968 (W.D.N.Y. July 20, 2006).

¹⁶² *Id.* at *1.

¹⁶³ See *id.*

¹⁶⁴ See No. 04 Civ. 03946, 2007 WL 878575, at *1 (N.D. Cal. Mar. 20, 2007).

the discovery process with respect to the examination of computers and servers,” and empowered him to “resolve any disputes arising out of the examination.”¹⁶⁵ In *John B. v. Goetz*, the government of Tennessee entered into a consent decree settling claims that the government was neglecting the health care needs of children. The court later found that the government was violating the consent decree and appointed a special master to develop a plan to bring it into compliance.¹⁶⁶ In response to concerns regarding the government’s preservation of ESI under a 2006 litigation hold,¹⁶⁷ a court monitor was directed to inspect the defendant’s computer system “to assess whether any production of information required by the Consent Decree or previous Order of the Court . . . has been impaired or compromised or removed.”¹⁶⁸ The Sixth Circuit reversed the portion of the court’s order that called for mirror imaging of defendant’s hard drives, however, holding that copying a party’s computer system for the purpose of preservation was a highly unusual step that was not warranted in this case because there was no indication in the record that defendants were unwilling to preserve and produce relevant ESI in the future.¹⁶⁹

In a slightly different context, the court in *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.* appointed a special master to assist in the implementation of a permanent injunction in a copyright infringement case.¹⁷⁰ The injunction required the defendant to install filtering technology on its peer-to-peer file sharing software, which would prevent unauthorized distribution of plaintiff’s copyrighted audio and video works.¹⁷¹ Several filtering technologies existed at widely different costs, and the parties disagreed about the type of technology defendant was required to install under the terms of the injunction.¹⁷² The Special Master was directed to recommend the type of filtering technology that would most effectively prevent further infringement of plaintiff’s copyright while preserving the noninfringing uses of defendant’s product.¹⁷³ The court stated that it would benefit from the recommendations of a special master regarding the complex technical

¹⁶⁵ *Id.* at *4.

¹⁶⁶ See *John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001).

¹⁶⁷ See *John B. v. Goetz*, No. 98 Civ. 168, 2007 WL 4014015 (M.D. Tenn. Nov. 15, 2007), *vacated in part*, 531 F.3d 448 (6th Cir. 2008).

¹⁶⁸ *John B. v. Goetz*, No. 98 Civ. 168 (M.D. Tenn. Nov. 14, 2007) (on file with the authors); see also *John B. v. Goetz*, No. 98 Civ. 168, 2007 WL 4014015 (M.D. Tenn. Nov. 15, 2007) (Memorandum setting forth reasons for Nov. 14 Order), *vacated in part*, 531 F.3d 448 (6th Cir. 2008).

¹⁶⁹ See *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008).

¹⁷⁰ See 518 F. Supp. 2d 1197 (C.D. Cal. 2007).

¹⁷¹ See *id.* at 1235-36.

¹⁷² See *id.* at 1237.

¹⁷³ See Nos. 01 Civ. 8541, 01 Civ. 9923 (C.D. Cal. Nov. 28, 2007) (Order Re Appointment of Special Master) (on file with the authors). The court directed the Special Master to consider cost only as a secondary concern. See *id.*

issues the injunction addressed.¹⁷⁴

C. *Limits to the Appointment of Special Masters to Supervise E-Discovery*

Despite the increase in the appointments of special masters to address e-discovery issues, a number of courts have declined to make such appointments concluding that the matters can be handled by the parties' experts or by the court itself. For example, in *Palgut v. City of Colorado Springs*, a case alleging age and gender discrimination, the court declined to appoint a special master, finding that "Plaintiff has failed to meet her burden of proof for a third party computer forensic expert to be appointed by the court to examine the Defendant City of Colorado Springs' computer system."¹⁷⁵ In *Koninklijke Philips Electronics N.V. v. KXD Technology*, a trademark infringement action, the court declined to appoint a special master but ordered one of the parties to submit a report from a forensic computer expert explaining the circumstances surrounding the destruction of data, warning that the court might appoint a neutral forensic computer expert to determine the veracity of the defendant's claim.¹⁷⁶

In other cases courts have declined to appoint a special master to oversee a search of computer systems. In *Hedenburg v. Aramark American Food Services*, the court declined to appoint a special master to search the personal hard drive of a plaintiff claiming employment discrimination, finding that such an intrusive search was only necessary when the contents of the computer may go to the "heart of the case," and not when the party is simply looking for "impeachment" material.¹⁷⁷ In another employment discrimination case, *Williams v. Massachusetts Mutual Life Ins. Co.*, the court declined to appoint a neutral expert in computer forensics to search defendants' hard drives for a single email message, because plaintiff could not substantiate his claim that the message existed.¹⁷⁸ The court also refused to allow plaintiff to conduct such a search at his own expense, noting that defendants had already searched their own hard drives and there was no indication that the search was inadequate or that their representations that they had not found the email message were misleading.¹⁷⁹

¹⁷⁴ *See id.*

¹⁷⁵ No. 06 Civ. 1142, 2007 WL 4277564, at *3 (D. Colo. Dec. 3, 2007) (citing *Scotts*, 2007 WL 1723509; *Williams v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 144 (D. Mass. 2005); and *Bethea v. Comcast*, 218 F.R.D. 328 (D.D.C. 2003)).

¹⁷⁶ No. 05 Civ. 01532, 2007 WL 879683 (D. Nev. Mar. 20, 2007).

¹⁷⁷ No. 06 Civ. 5267, 2007 WL 162716, at *2 (W.D. Wash. Jan. 17, 2007).

¹⁷⁸ *See* 226 F.R.D. 144, 146 (D. Mass. 2005).

¹⁷⁹ *See id.* The court did order defendants to "preserve all documents, hard drives and e-mail

These cases demonstrate that the appointment of a master lies within the sound discretion of the district court. Thus, if the parties believe it is advantageous to seek appointment of a special master, they may need to provide some justification for that appointment. Our review indicates that the appointment of a special master is more likely where: (1) the proposed special master's tasks are clearly identified and (2) a good case has been made that the special master's role will reduce the burden on the judicial officer and expedite the proceedings for the parties.

IV. EXPANDED USE OF SPECIAL MASTERS TO ADDRESS E-DISCOVERY ISSUES

As the survey of cases in Part III reveals, courts have appointed masters/forensic experts in many areas of pre-trial practice. In this final Part of the Article, we consider the need for and legitimacy of appointing masters to fulfill various pre-trial functions involving e-discovery.

A. *Facilitative Role*

We have found that masters are being used in a facilitative role to assist the parties in implementing the Rules that require them to engage in a collaborative process of discovery management. These collaborative tasks include preparing for the Rule 26(f) conference, negotiating preservation protocols, discovery procedures and confidentiality orders, agreeing on the form in which various types of ESI will be produced, and developing effective and efficient electronic search protocols. We expect to see an expanding role for special masters that facilitate ESI discovery. Such a role will have both legal and technical components. The legal component largely applies the procedural rules to the world of ESI. Lawyers with a good background in e-discovery issues and best practices guides, such as *The Sedona Principles*, should be able to effectively and efficiently steer the parties toward agreed-upon protocols and procedures. Assisting the lawyers to agree on the scope of preservation, disclosure and production and methods for resolving privilege claims are good examples of collaborative legal assistance.

The technical component focuses on the application of specialized knowledge and skills in information technology and/or computer

forensics to assist the parties in handling discovery issues. This may involve providing technical specifications for discovery or actually conducting discovery investigations and searches in a neutral capacity. Specially trained lawyers and non-lawyers should be able to serve in this capacity. Such appointments will advance the ultimate resolution of the case by allowing the parties and the court to focus on the merits of a case as informed by any evidence derived from the electronic sources.

Other tasks might also warrant the appointment of a special master. Such tasks might include helping the parties to investigate and understand whether certain sources of data are not reasonably accessible because of undue burden or cost under Rule 26(b)(2)(B), on-site inspection of computers, mirror-imaging of hard drives, review of records to determine authenticity, sampling of various sources of electronic storage, and evaluation of the cost of retrieving and designing flexible and effective search protocols.¹⁸⁰

B. *Monitoring Discovery Compliance*

The use of masters to monitor discovery compliance is also likely to grow given the complex issues arising in the discovery of ESI. A special master may hold regular status conferences to receive compliance reports and ensure that discovery is proceeding efficiently. A special master with technical experience may analyze reports from the parties relating to their examination of data sources and their processes for data retrieval, screening, and production.

C. *Adjudicative Role: Discovery Special Master*

The supervision of discovery disputes is very time consuming. A district judge rarely has the time to provide the hands-on supervision such disputes often require. For example, particularly sensitive or contentious depositions may need on-site supervision in order to quickly resolve disputes. On-site inspections of computer systems by opposing counsel or experts often require careful protocols and supervision in order to protect confidentiality and privacy. Ruling on objections to

¹⁸⁰ See, e.g., *Ameriwood Indus., Inc. v. Liberman*, No. 06 Civ. 524, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006), *amended on clarification*, 2007 WL 685623 (E.D. Mo. Feb. 23, 2007) (appointing special master to create a mirror image of defendants' hard drives, recover relevant documents, and produce them to plaintiff after defendants reviewed them for privilege and work product protection; approving agreed-upon search protocol; and directing list of "hits" from searches to be provided to plaintiff).

interrogatories and document requests and resolving disputes regarding the scope of non-party discovery might also require a significant investment of judicial resources. Similarly, an in camera review for privilege can require a judge to carefully read thousands of documents. Finally, many discovery issues that arise in the context of e-discovery require a court to develop a sophisticated understanding of the accessibility of ESI and the costs and burdens of preserving that data and/or retrieving it and translating it into a useable format. There is also the question of whether a party should be sanctioned for its failure to produce ESI. It is these tasks that trial judges often assign to a judicial adjunct, be it a magistrate judge or a special master.

1. Reviewing Claims of Privilege or Work Product

Special masters are often appointed to conduct privilege reviews. The first step in an assertion of privilege is the preparation of a privilege log as required by Rule 26(b)(5)(A). Often, the privilege logs prepared by a party do not meet the requirements of the Rule. Litigants have been known to list documents on a privilege log without providing the necessary information to sustain their privilege claims.¹⁸¹ Indeed, litigants have conceded that they placed documents on the log without any review simply to protect the privilege.¹⁸² This over-cautious approach has led to logs containing thousands of entries. When this happens a court may need to appoint a special master to work with the parties to reduce the volume of listings on the log. The next step may be to conduct a sampling of listed documents to determine whether privilege decisions can be made based on categories of documents (and claims of privilege) rather than by painstaking review of each document.¹⁸³ At the end of the day, the master may need to read all the remaining documents, based on an intimate knowledge of the case and

¹⁸¹ See, e.g., *Bolorin v. Borrino*, — F.R.D. —, No. 06 Civ. 1295, 2008 WL 376769, at *2 (D. Conn. Feb. 11, 2008) (finding defendants' privilege log "shows superficial compliance with the requirements" of the Rule but lacks sufficient detail to determine applicability of privilege); *Corvello v. New England Gas Co.*, 243 F.R.D. 28, 36-37 (D.R.I. 2007) (finding privilege log did not include sufficient information to establish privilege, and noting that many documents for which privilege was claimed appeared from the descriptions in the log to be newspaper articles or communications between third parties).

¹⁸² See, e.g., *In re MTBE Prods. Liab. Litig.*, MDL 1358, Nos. 04 Civ. 5424, 04 Civ. 2399 (S.D.N.Y. Oct. 29, 2007) (Special Master's Pre-Trial Order # 38) (on file with the authors) (noting that defendant "acknowledges that it overdesignated documents as 'privileged'" and that on further review of initial privilege logs defendant reduced claims of privilege from 39,389 to 19,684 in its "Phase I" log and from 36,429 to 17,166 in its "Phase II" logs).

¹⁸³ See, e.g., *In re MTBE*, Master File No. 00 Civ. 1898 (S.D.N.Y. Mar. 26, 2007) (Case Management Order # 26) (on file with the authors) (directing plaintiffs to select a sample of approximately one percent of documents listed in defendant's privilege log for in camera review by the Special Master).

the “players” to determine whether the privilege is properly asserted and has not been waived. The need for special masters to conduct privilege reviews is likely to expand because of the huge volume of ESI that will be produced and be subject to assertions of privilege.

2. Accessibility: Preservation, Production, and Cost

As discussed earlier, Rule 26(b)(2)(B) creates a two-tiered discovery scheme, presumptively allowing discovery of accessible ESI, but not requiring the production of relevant ESI from sources considered to be “not reasonably accessible.” Upon a showing of good cause, production of ESI from the second-tier of sources might be required, but if so, certain conditions on that production might be imposed including cost-shifting or cost-sharing. Determinations regarding accessibility and forms of production may be beyond the ability of many judges. Technical savvy, combined with an understanding of the legal standards, might be needed to make a fair determination on the issue of accessibility. The appointment of a master could greatly assist the court to determine whether retrieving ESI from a designated source is truly unduly costly and/or burdensome. A specialist can help examine the source and accurately calculate the costs of restoration and the likelihood of retrieving information in a useable format. Perhaps more importantly, the neutral specialist will be able to find the most cost-effective method of carrying out these tasks, in part because he or she is a disinterested party.

3. Spoliation: Fault and Prejudice

As noted earlier, ESI is often created automatically and is often lost automatically. Much information is only stored briefly and may be impossible to preserve or retrieve without undue cost and burden. When a party is unable to produce information that it admittedly once had, the court is faced with several questions. Was it reasonable to expect the litigant to modify its routine document retention protocol and/or electronic information systems to preserve the type of information that is now lost? What would have been the cost of such a modification? How effective would the modification have been? How much inconvenience would it have caused to the ongoing business of the litigant? Did the litigant make a credible attempt to implement a litigation hold? Did the litigant and its outside counsel properly monitor compliance with the litigation hold? Does the absence of the lost information prejudice the requesting party?

Some of these questions do not require the assistance of a special master but others might. For example, assessing the feasibility and cost of implementing a modification to an electronic information system may be beyond the capacity of the court. Of course the court could always accept evidence from the parties' competing experts, but this might be less efficient than appointing a neutral master. Determining competing claims regarding spoliation could be a legitimate and useful role for a special master.

D. *Technical Assistance*

Finally, there are cases that present technical issues that are beyond the competence of a generalist judge. For example, whether one party's computer software infringes the licensed software of another company will often require a sophisticated review of the source codes used in that software, which may affect the scope of discovery necessary to prove the claims and defenses.¹⁸⁴ Similarly, the identification of the author of certain emails may require a review of hard drives from discarded computers, back-up files containing old emails, or even an inspection of email servers to determine whether that server was used to create the offending emails.¹⁸⁵ Finally, technical expertise may be required to propose a statistically valid sample of ESI, execute a search of that valid sample, and then reach a conclusion based on the results of the sampling.

CONCLUSION: UNIQUE CHALLENGES OF E-DISCOVERY

Generalist judges are not and cannot be experts on electronic

¹⁸⁴ See, e.g., *RGIS, LLC v. A.S.T., Inc.*, No. 07 Civ. 10975, 2008 WL 186349 (E.D. Mich. Jan. 22, 2008) (appointing special master to review parties' source codes to determine whether substantial similarities exist and staying discovery of defendant's source code until special master submits a report of his findings); *In re Subpoena to Chronotek Systems, Inc.*, No. SACV 06-374, 2007 WL 2177013 (S.D. Tex. Jul. 27, 2007) (adopting report of Special Master regarding the relevance of third party's source code to patent dispute); *Revolutionary Software v. Eclipsys Corp.*, No. C 05-03127 (N.D. Cal. Dec. 11, 2006) (Notice of Intent to Appoint a Special Master) (appointing a special master to evaluate source code and its derivatives in defendant's products to determine if they are the same as plaintiff's source code); *Evolution, Inc. v. SunTrust Bank*, No. 01-2409, 2004 WL 2278559 (D. Kan. Sept. 29, 2004) (adopting order of Special Master resolving discovery dispute about whether defendant produced source code and object code in usable format).

¹⁸⁵ See, e.g., *D & P Painting & Const., Inc. v. Azteca Enter.*, No. 04-07205 (Dist. Ct. Dallas County 2005) (directing the Special Master to examine defendant's hard drives in order to evaluate the origin of certain email messages and determine the form in which they were sent to plaintiff).

hardware and software that enable people to create, store, retrieve, and search ESI. In order to manage discovery in cases involving a substantial amount of ESI, and assuming the stakes at risk warrant the cost, court adjuncts with specialized knowledge may become more the rule than the exception. Thankfully, revised Rule 53, which is no longer tethered to the concept of “exceptional condition,” now permits such appointments whenever the parties consent to an appointment or when the court determines that a pre-trial or post-trial matter “cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”¹⁸⁶ While we surely do not suggest that such appointments are needed in every case, or even the majority of cases, there will be a subset of cases—often (but not always) involving many parties and/or non-parties, voluminous records, or complex or technical issues—that will benefit from the availability of these adjuncts. The appointment of a special master may make it possible to accomplish in days what would otherwise consume months of litigation and require both sides to incur substantial costs. The key is finding a person who understands his or her role, has the skills to fulfill it, and is accorded the appropriate level of authority and respect to get the job done. If such appointments ultimately reduce the costs of litigation by resolving disputes over the scope of discovery (accessibility), the form of production, and a rational approach to search and retrieval, then the appointment will have been successful. Another measure of success will be a marked decrease in sanctions motions, which many in the legal community fear has become a prime goal of discovery—*i.e.* not to find documents but to learn that documents cannot be found and as a result someone should be punished. These benefits counsel in favor of the expanded use of special masters to assist in e-discovery matters in appropriate cases.

¹⁸⁶ FED. R. CIV. P. 53(a)(1)(C).

APPENDIX A: *PHILIP MORRIS* APPOINTMENT ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,
et al.,

Defendants.

Civil Action
No: 99-2496 (GK)

ORDER

Upon consideration of the representations of counsel, the applicable case law, and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion, it is this 22nd day of December 2000 hereby **ORDERED** that:

1. Hon. Richard A. Levie (Ret.) (the “Master”) shall be appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure as special master in this action for the purpose of considering matters referred to him as described in Paragraph 2 below. The Master shall have the rights, powers and duties provided in Rule 53 and may adopt such procedures as are not inconsistent with that Rule or with this or other Orders of the Court.

2. The following matters are referred to the Master:

- a. To develop, with the assistance (and preferably the consent) of the parties, a comprehensive detailed case management plan consistent with Order #37, filed November 21, 2000, to be submitted to the Court for final approval no later than February 20, 2000.
- a. To develop, with the assistance (and preferably the consent) of the parties, a procedure for resolving discovery disputes, including the narrowing and refining of issues, so that all such discovery disputes may be initially decided by the Master and controlling issues of law

may be decided by the Court as early and expeditiously as possible. The procedures should be submitted to the court for final approval no later than February 20, 2001.**

- b. To develop, with the assistance (and preferably the consent) of the parties, a procedure for resolving privilege disputes, including the narrowing and refining of issues, so that all such disputes may be initially decided by the Master and controlling issues of law may be decided by the Court as early and expeditiously as possible. This procedure should be submitted to the court for final approval no later than February 20, 2001.†
- c. Any other such matters that all parties agree to present to the Master for his consideration and for a report to the Court.

3. With respect to the responsibilities described in Paragraph 2 above, the Master shall submit reports and recommendations to the Court pursuant to Rule 53(e), including findings of fact and conclusions of law, where appropriate.

4. Compensation at rates mutually agreeable to the Master and the parties shall be paid to the Master on a periodic basis by the parties, together with reimbursement for reasonable expenses incurred. The Government will be responsible for paying one-half of the Master's fees and expenses; Defendants shall be jointly responsible for paying the other half of the Master's fees and expenses. Final allocation of these amounts shall be subject to taxation as costs at the conclusion of the case at the discretion of the Court.

/s/ Gladys Kessler

Gladys Kessler
U.S. District Judge

** The court anticipates that in certain instances the parties and/or the Master may identify such controlling issues of law and bring them directly to the Court for resolution without any initial Report and recommendation.

† The court anticipates that in certain instances the parties and/or the Master may identify such controlling issues of law and bring them directly to the Court for resolution without any initial Report and recommendation.

APPENDIX B: MTBE APPOINTMENT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re: Methyl Tertiary Butyl Ether :
("MTBE") Products Liability Litigation :

ORDER

This Document Relates To: All Cases :

MDL No. 1358 (SAS)

-----X

SHIRA A. SCHEINDLIN, U.S.D.J.:

This multi-district litigation involves dozens of product liability cases, filed in nearly twenty states. The numerous plaintiffs, including states, cities, municipalities and entities, allege that more than one hundred defendants have contaminated or threaten to contaminate groundwater through manufacture, distribution, and sale of gasoline that contains methyl tertiary butyl ether ("MTBE"). Plaintiffs assert causes of action for conspiracy, public and private nuisance, design defect, defective product, failure to warn, negligence, and violations of various state business and environmental laws. Moreover, plaintiffs allege market share, concert of action and enterprise liability. Plaintiffs are suing more than one hundred defendants.

Because of the number of parties involved, and the numerous state and federal laws implicated, these actions are far more complex than typical multi-district litigations. Furthermore, the nature of the claims necessarily raise complicated scientific issues. Given the complexity of this case, no district or magistrate judge of this Court could resolve every pretrial matter that might arise from discovery, effectively and in a timely manner, and still pay adequate attention to the remainder of his or her docket. Overseeing the myriad discovery disputes that are sure to arise requires a staff of its own. Therefore, the parties have requested—and consented to—the appointment of a special discovery master.

Accordingly, I am appointing, pursuant to Federal Rule of Civil Procedure 53(a)(1)(A) and (a)(1)(C) (as amended effective December 1, 2003), after giving the parties notice and an opportunity to be heard (including the opportunity to recommend candidates), Kenneth E. Warner, Esq. to serve as Special Master, until further order of this Court. The Court has received an affidavit from Mr. Warner disclosing whether there are any grounds for disqualification under 28 U.S.C. § 455. The parties have consented, with the Court's approval, to waive any such grounds for disqualification. *See* Fed. R. Civ. P. 53(a)(2) and (b)(3). The Special

Master's appointment is therefore effective immediately.

IT IS FURTHER ORDERED THAT:

1. The Special Master is directed "to proceed with all reasonable diligence" in the performance of his duties. Fed. R. Civ. P. 53(b)(2). To wit, Mr. Warner is appointed to resolve such discovery disputes that may arise, and which have been specifically referred to him by the Court, including electronic discovery disputes, questions of privilege, work product, relevancy, scope, and burden.
2. In furtherance of his duties, the Special Master may communicate *ex parte* with the Court on any matter. The Special Master may not communicate *ex parte* with the parties (except to arrange scheduling matters) without the consent of all parties.
3. The Special Master shall preserve, as a record of his activities, all written submissions received from the parties, all written submissions sent to the parties, and any transcripts of hearings before the Special Master. The Special Master shall file with the Clerk of the Court such records upon the request of any party or the Court. The Special Master shall also file any order, report, or recommendation to the Court.
4. A party may file objections to—or a motion to adopt or modify—the Special Master's order, report, or recommendation no later than 20 days from the time that order, report, or recommendation is served. The party filing such objection or motion must also file the relevant record.
5. Any order, report, or recommendation of the Special Master on non-dispositive motions, unless it involves a finding of fact or conclusion of law, will be deemed a ruling on a procedural matter. The Court will set aside a ruling on a procedural matter only where it is clearly erroneous or contrary to law. *See* 28 U.S.C. § 636.
6. Barring a stipulation of the parties with the Court's consent setting some other standard of review, *see* Fed. R. Civ. P. 53(g)(3), the Court will decide *de novo* all objections to findings of fact or conclusions of law made or recommended by the Special Master.
7. The Special Master's compensation, as well as any costs and expenses, will be paid equally by the plaintiffs and defendants. Mr. Warner shall be compensated at a rate of \$500 per hour. If the Special Master finds that he needs the assistance of any paralegal or lawyer in his office, that expense shall be billed by the Special Master at the ordinary rates for

those people.

8. Finally, this Order may be amended at any time upon notice to the parties, and an opportunity to be heard.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
 June 18, 2004

APPENDIX C: *D&P PAINTING* APPOINTMENT ORDER

CAUSE NO. 04-07205

D & P PAINTING & CONSTRUCTION, INC.,	§ IN THE DISTRICT COURT
	§
Plaintiff,	§
	§
v.	§ 134 th JUDICIAL DISTRICT
	§
AZTECA ENTERPRISES, INC., MERIDIAN	§
COMMERCIAL, L.P. and GILBERT MAY, INC.	§
d/b/a PHILLIPS/MAY CORPORATION, d/b/a	§
THE TERMINAL STATION RENOVATION	§
TEAM, and LIBERTY MUTUAL INSURANCE	§
COMPANY,	§
	§
Defendants/Counter-Plaintiffs	§
	§
v.	§
	§
LIBERTY MUTUAL INSURANCE COMPANY,	§
and DALLAS/FORT WORTH	§
INTERNATIONAL AIRPORT BOARD,	§
Defendants	§
	§
v.	§
	§
INSURORS INDEMNITY COMPANY,	§
	§
Third-Party Defendant.	§ DALLAS COUNTY, TEXAS

SPECIAL MASTER ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

Pursuant to Rule 171 of the TEXAS RULES OF CIVIL PROCEDURE the Court appoints, Peter Vogel, a practicing attorney whose address is 1601 Elm Street, Suite 3000, Dallas, Texas 75201, whose telephone number is (214) 999-3000, to serve as Special Master (hereafter the “**Master**” in this case).

I.
GENERAL

The Master shall generally assist the Court and is empowered to act in accordance with TEXAS RULES OF CIVIL PROCEDURE Rule 171, with all powers and duties pursuant thereto.

II.
SPECIFIC

The Master is hereby requested to investigate and report to the Court concerning the allegations of the Plaintiff regarding various emails sent to the Plaintiff in this lawsuit. The Master is hereby requested to perform a complete evaluation of the e-mail messages attached to this Motion as Exhibit “A” and Exhibit “B” as may be identified by the parties, and which may be located on various servers, laptops, or desktop computers, and/or on various electronic storage devices including, without limitation, computer hard drives, Compact Discs (CDs), Digital Video Discs (DVDs), diskettes, magnetic tape, flash memory, and/or the like. The emails contained in Exhibit “A” and Exhibit “B” are identical except for caricature symbol seen in Exhibit “B” as ☺ (“smiley face symbol”) in place of the letter “P” in the name D&P Painting.

The Master is hereby ordered to provide his opinions, if possible, to the following questions in a written report directed to the Court:

1. Did the TSR Team Defendants initially send the e-mails in the form of Exhibit “A” or Exhibit “B” to this Motion?
2. Did Plaintiff initially receive the e-mails in the form of Exhibit “A” or Exhibit “B” to this Motion?
3. If it is determined that Plaintiff initially received the e-mails in the form of Exhibit “A” or Exhibit “B” to this Motion, provide an opinion and/or explanation of the reason for the change in the e-mails to include the “smiley face” symbol.

The Master is hereby empowered the authority of this Court to investigate these issues wherever the Master deems necessary, including possible inspection outside of Texas and the jurisdiction of this Court.

The Master hereby has the authority of this Court to issue subpoenas in conjunction with his appointment as set out herein and to access the property of third-parties in conjunction with his work in this matter.

III.
COSTS

D&P Painting & Construction, Inc. and the Terminal Station Renovation Team (individually and collectively) shall each deposit into the Master's trust account, on or before the 4th day of March, 2005, the total sum of \$10,000.00 (\$5,000.00 each) to be retained in the Master's trust account pending disbursement necessitated by fees and expenses incurred by the Master appointed herein.

The Master shall submit itemized statements to the Court, with copies to the parties, detailing the work done, the hours spent, routine costs incurred, and other expenses including outside consultants who may be required, and if necessary. The parties shall share these fees, costs and expenses equally and the Master shall be empowered to debit the trust for payment of same.

In the event that the sums in the Master's trust account should become inadequate to cover the anticipated fees and expenses of the Master appointed herein, the Master may request the Court to order the deposit of additional sums by the parties. The parties shall, within ten (10) business days of such order, deposit the additional sums into the Master's trust account.

The Court sets the rate of the Master's compensation at \$600 per hour. The Master shall also be reimbursed for reasonable expenses including amounts incurred in employing other persons to provide clerical, secretarial and stenographic assistance. Upon final termination of the case, the Court shall enter an Order charging all costs and expenses of the Master as Court costs to be awarded to the party prevailing on this issue or to be divided equally or disproportionately, as justice may require.

This Order may be amended or altered as the Court may deem appropriate.

SO ORDERED

This _____ day of _____, 2005.

Anne Ashby, Judge

3. *Shell Interrogatory Responses.* Unless the parties have resolved their issues regarding the Shell defendants' interrogatory responses by April 2, 2007, the Court or the Special Master will address the issue at a conference at 10:00 a.m. on that date.

4. *Napoli Bern Defendants' Document Production.* By April 2, 2007, each defendant in the Napoli Bern cases shall write a letter to plaintiffs' counsel reporting whether it has environmental investigation or remediation documents pertaining to the relevant geographic regions. This letter shall be written in a manner calculated to allow plaintiffs' counsel to positively distinguish those defendants that must produce documents from those that need not.

5. *Suffolk County Statute of Limitations Motion.* Plaintiffs and defendants in the *Suffolk County* case may, simultaneously, submit supplemental briefs on the issue of the applicability of federal law versus New York law. These briefs, no longer than ten double-spaced pages, shall be submitted by March 27, 2007.

6. *Suffolk County Defendants' Proposed Motion to Bar Punitive Damages.* Defendants may file a motion to bar punitive damages in accordance with the following schedule: initial brief submitted by April 9, 2007, opposition brief by April 30, 2007, and reply brief by May 14, 2007. Notwithstanding defendants' proposed motion, this Court will, as planned, hear oral arguments at the April 27, 2007 conference on the *Suffolk County* plaintiffs' Motion to Set Trial by Bellwether Wells.

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
March 26, 2007

APPENDIX E: JOHN B. APPOINTMENT ORDER

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., et al.,
Plaintiffs,
DAVE GOETZ, Commissioner,
Tennessee Department of Finance
and Administration, et al.,
Defendants.
No. 3:98-0168
JUDGE HAYNES

ORDER

In accordance with the memorandum filed herewith, the Defendants' motion to postpone the November 20, 2007 hearing is GRANTED. The hearing is reset for Thursday, November 29, 2007 at 8:00 a.m. The Commissioner of the Department of Finance and Administration and Children's Services shall be present. Darin Gordon, director of TennCare and Dr. Wendy Long, the person named in Interrogatory No. 22 shall also be present for this hearing.

For the reasons stated in the accompanying Memorandum, the Defendants' first motion for clarification or in the alternative reconsideration of the Order of October 10, 2007 (Docket Entry No. 1032) is GRANTED, in part to clarify that the implementation of the March 17, 2004 Memorandum is limited to a second review of the Defendants' paper documents for relevance to this action, production to the Plaintiffs and preservation. This motion is otherwise DENIED. It is further ORDERED that the Defendants shall designate instanter the individuals in the State Attorney General's Office and the agencies that implement the Consent Decree in this action who will conduct this supplemental paper review for relevance to this action, production to the Plaintiffs and preservation.

For the reasons state in the accompanying Memorandum, the Defendants' second motion for clarification or in the alternative reconsideration of the October 10, 2007 Order (Docket Entry No. 1042) is DENIED. All data from the Department of Children's Services TNKids database and the Tennessee Mental Health and Development Disabilities Incident and Incident Reports database shall be provided in their native format without redaction, but subject to an appropriate protective order to protect the privacy interests of the children, doctors and other protected persons. The parties have ten (10) days from the date of entry of this

Order to submit an appropriate protective order and if they are unable to agree upon a protective order, their counsel shall file separate proposed orders with a statement of their differences.

It is the further **ORDERED** that the Plaintiff's computer expert, Michael Tigh, his computer expert and Mr. Ronald J. Hedges, the Court's monitor, shall forthwith inspect the State's computer system and any computer of the fifty (50) key custodians that contain information relevant to the action. These inspections are to assess whether any production of information required by the Consent Decree or previous Order of the Court and the October 10, 2007 Order of the Court, has been impaired or comprised or removed. Mr. Tigh and/or his computer expert shall make forensic copies of any computer inspected to ensure the preservation of all existing electronically stored information ("ESI"). The United States Marshal or his designated deputies shall accompany Mr. Tigh, his computer expert and Mr. Hedges to ensure that this Order is fully executed. Mr. Hedges shall provide any necessary guidance to the United States Marshal or his designee in executing this Order. A copy of this Order shall be provided to the United States Marshal.

It is so **ORDERED**.

ENTERED this 14th day of November, 2007.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

APPENDIX F: *HOHIDER* APPOINTMENT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARK HOHIDER and ROBERT DIPAOLO,
On Behalf of Themselves and All Others
Similarly Situated,

Plaintiffs,

v.

UNITED PARCEL SERVICE, INC., AND
DOES 1-100

Defendants.

Consolidated Civil Action
No. 04-0363
Judge Joy Flowers Conti

PRESTON EUGENE BRANUM
On Behalf of Themselves and All Others
Similarly Situated,

Plaintiffs,

v.

UNITED PARCEL SERVICE, INC., AND
DOES 1-100

Defendants.

ORDER APPOINTING SPECIAL MASTER

AND NOW, this 19th day of December, 2007, pursuant to F.R.C.P. 53(b), following the grant of notice and an opportunity to be heard to the parties and after due consideration of the parties' responses, it is hereby ORDERED that Jeffrey Joyce of Kroll Ontrack is appointed Special Master. The Special Master is hereby directed to prepare and file a report and recommendation containing findings of fact and conclusions of law concerning the disposition of the pending Plaintiffs' Motion for Preservation Order and for Sanctions. The Special Master is hereby directed to proceed with all reasonable diligence to perform the duties set forth herein, as well as any additional duties which the Court in its discretion may impose from time to time as necessary by further orders.

(A) SPECIAL MASTER'S DUTIES

1. Investigation and Enforcement Duties

The Special Master shall undertake an investigation, engaging and directing the employees and resources at the disposal of his firm, and other experts and consultants as he may deem necessary, to determine the following:

A. A detailed description of the following computer hardware, systems, networks, applications, and software used, owned, or controlled by UPS from May 10, 2000 to the present:

- 1) The types and brands of hardware and operating systems;
- 2) Application software;
- 3) Electronic mail applications, including the identity of persons responsible for their administration;
- 4) Personal and office planner applications;
- 5) Word-processing and database applications;
- 6) Server-side applications;
- 7) Any other computers or other hardware that may have been used to generate, receive, or store any data relevant to the subject matter of this litigation;
- 8) All computer networks in place;
- 9) All backups performed on computer systems, including the procedures and devices used to carry out the backups (including their brand names), versions of backup software used, and tape rotation schedules;
- 10) The physical location(s) where backups are stored or catalogued, including offsite locations;
- 11) The persons responsible for conducting, maintaining, storing, and cataloging any backups made;
- 12) The identity of any backups currently in existence, including their physical locations, their custodians, their dates of creation, contents, and media types;
- 13) The identity of any backup media that has been erased, copied over, destroyed, or otherwise altered since the commencement of this litigation;
- 14) The suspension or amending of any standard or extraordinary backup or data destruction protocols that occurred as a result of this litigation;
- 15) The identity of any data destruction that occurred after this litigation took place; and
- 16) The identity of all persons responsible for any of the above items.

B. Specific findings of fact concerning whether UPS withheld, deleted, destroyed or permitted to be destroyed, information, documents and electronically stored information ("ESI") that it was legally obligated to maintain in connection

with this lawsuit, and whether any such information, documents or ESI that formerly existed either in usable or reasonably retrievable form was withheld, deleted or overwritten by UPS.

C. Should the Special Master determine that UPS did not retain and safeguard responsive documents, information or ESI in usable or reasonably retrievable form, then the Special Master shall undertake a further investigation to determine whether such documents, information or ESI are relevant and can be recovered or reconstituted, and make specific findings regarding the expense and time that will be required to recover responsive ESI.

D. The Special Master shall examine the adequacy of UPS's efforts to preserve and retain information, documents and ESI related to the claims at issue in this lawsuit, including but not limited to the adequacy of UPS's document retention policies and procedures, the existence of any directives to UPS employees to keep and maintain documents, including ESI, and/or not to destroy documents including ESI (i.e., litigation hold notices or orders), and any other affirmative preservation efforts made by UPS (collectively "UPS's retention practices"). The Special Master shall make specific findings concerning, among other things: the earliest date that UPS was reasonably on notice of potential nationwide class litigation with Plaintiffs as well as potential litigation with the original named plaintiffs, a timeline detailing UPS's retention practices, a determination as to the adequacy of UPS's retention practices and the litigation hold notice or order, the extent to which UPS or its counsel audited document and data retention compliance, or otherwise took affirmative steps to ensure that all relevant evidence was preserved.

E. The Special Master also shall examine whether Plaintiffs' actions in prosecuting this case contributed in any way to the alleged failure to maintain relevant evidence, including but not limited to an examination of Plaintiffs' pre-litigation communications about the scope of their claims, the date that Plaintiffs first became aware of potential document preservation issues, Plaintiffs' decision to withdraw their earlier Motion to Compel in 2005 and any delay by Plaintiffs in requesting the entry of a document preservation order.

F. Finally, with respect to Plaintiffs' Motion for Preservation Order, the Special Master shall specifically review the litigation hold order and other preservation activities described by UPS as having been undertaken in August 2007, and make findings of fact and conclusions of law concerning the extent to which such activities are sufficient to ensure the future retention of evidence relative to the discoverable claims at issue in this case.

2. Report and Recommendation

Following his investigation and review of the evidence and arguments of the parties, the Special Master shall prepare and file on the docket, a written Report and Recommendation concerning the recommended disposition of the Plaintiffs' Motion for Preservation Order and for Sanctions in accordance with Rule 53, Fed. R. Civ. P. The parties will be provided twenty (20) days from the filing of the Report and Recommendation in which to file objections to the Report. The Special Master's findings of fact and conclusions of law will be reviewed de novo.

3. Special Master's Authority

The Special Master shall have the authority to regulate the proceedings necessary to perform the assigned duties, and to take all appropriate measures to perform fairly and efficiently the assigned duties. The Special Master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(B) CIRCUMSTANCES IN WHICH THE SPECIAL MASTER MAY COMMUNICATE EX PARTE WITH A PARTY OR THE COURT

The Special Master shall be empowered to communicate on an ex parte basis with a party or the Court for purposes of seeking to maintain the confidentiality of trade secret or proprietary information, if any, concerning the operations of UPS's systems, or for routine scheduling and other matters which do not concern the merits of the parties' claims concerning the subject matter of this Order.

The Special Master may communicate with the Court ex parte on all matters as to which the Special Master has been empowered to act.

(C) CONFIDENTIALITY

The Special Master agrees to be bound by the terms of the Stipulation and [Proposed] Order of Confidentiality ("Confidentiality Order") signed by the parties and the Court in this case on November 2, 2004 (attached to this Order as Attachment A).

(D) NATURE OF MATERIALS TO BE PRESERVED AND FILED AS THE RECORD OF THE SPECIAL MASTER'S ACTIVITIES

Subject to the requirements of the Confidentiality Order, the Special Master will preserve and file, as an appendix to his Report and Recommendation, all materials reviewed by the Special Master, expressly identifying all evidence considered in making or recommending findings of fact. The Special Master will

file the record on the docket by means of the Court's Electronic Case Filing System.

(E) TIME LIMITS

The Special Master shall prepare and file his Report and Recommendation with the Court within ninety (90) days of the date of this Order, unless he or a party can show to the Court reasonable cause for requiring additional time.

(F) COMPENSATION

The Special Master shall be entitled to be compensated at his customary or prevailing rate for similar services provided to his private clients, including any retainer, fees and costs. At the outset of his appointment, the Special Master shall prepare a budget of estimated fees and costs and then submit that budget to both parties and the Court. Any objections to the Special Master's budget must be made within five (5) days of its submission. After approval of the estimated fees and expenses by the Court, the Special Master shall be paid by Defendant UPS. The Special Master shall submit to both parties and the Court, invoices for services performed according to his company's normal billing cycle and UPS shall pay such invoices within thirty (30) days of receipt. In accordance with Rule 53(h), Fed. R. Civ. P., after making a decision on the merits of Plaintiffs' Motion, the Court will consider on a motion of a party whether to amend this interim allocation of the Special Master's compensation.

(G) DESIGNEES

The parties shall designate the following person as the primary contact for the Special Master:

For Plaintiffs: Walter W. Noss, Scott + Scott, LLP, 33 River Street, Chagrin Falls, OH, 44022, Phone: (440) 247-8200, Email: wnoss@scott-scott.com

For Defendant: Dena Hong, UPS Corporate Legal Department, 55 Glenlake Parkway, Atlanta, Georgia 30328, Phone: (404) 828-7098, Email: dhong@ups.com

IT IS SO ORDERED.

_____/s/ Joy Flowers Conti_____
U.S. District Judge Joy Flowers Conti

DATE: 12/19/2008