

## Uses of Special Masters in MDL & Mass Tort Litigation

**Panel:**

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## Types of Special Master Appointment

Most Common:

1. Adjudicative: case management, discovery, privilege, ESI, analysis and recommendations
2. Settlement: Mediation, Data Compilation/Analysis
3. Administration: Adjudication of claims, oversee distribution of settlement funds, allocation, claim appeals

## Finding the Right Special Master

1. Parties suggest candidate to the court – implies candidate has confidence of the parties
2. Court suggests candidates to the parties – implies candidate has confidence of the court
3. How would a prospective special master 'apply'?
4. Sources of candidates:
  - a. ACAM – search by geography, case experience
  - b. Ask colleagues who have used Special Masters in other cases
  - c. Court panels of previously screened individuals (PAWD-ESI)
  - d. Former Judges
5. Interview prospective candidate (with all counsel present):
  - a. Prepare jointly acceptable statement about the case
  - b. Ask about experience
  - c. Ask about rates
  - d. Ask for names of counsel in other cases – references
  - e. Ask about assistants/associates/clerks
  - f. Avoid substantive questions probing for anticipated rulings

## Mechanics of Appointment

- Requirements of Fed. R. Civ. P. 53
- Contents of the appointment order – samples at ACAM website
- Should there be consultation between the proposed (expected to be appointed) Special Master and (a) counsel for the parties and (b) the appointing judicial officer before appointment regarding the contents and scope of the appointment order?
- What about provisions on ex parte discussions between: (a) the Court and the SM and (b) the SM and the parties

## Mechanics of Appointment-Continued

### Rule 53: Masters

- Disqualification
  - Bias or prior knowledge; lawyer or witness in case; financial interest; impartiality might be reasonably questioned
  - Affidavit required before appointment (see form)
- Order: Prepared by court (see form)
  - Duties
  - Communications with Courts & parties
  - Preservation of files
  - Time limits & standards of reviewing orders
  - Compensation
  - Reports & Orders to be immediately filed & served
  - Objection within 21 days, or as court orders
  - Review by court of any objection
  - Compensation: Normal Monthly billing

## APPOINTMENTS: REASONS/REACTIONS

- What causes parties or court to propose appointment?  
Type of case? Size of case? Number of parties and/or counsel?
- What do plaintiffs' counsel look for?
- What do defense counsel look for?
- What do Judges look for?

## Special Masters: Case Management

1. Work with the parties to develop an efficient and cost-effective case management order – may be different CMOs for discovery, privilege and ESI issues
  - a. Require parties to meet and confer
  - b. Have parties propose draft CMO(s) specifying areas of agreement and areas of disagreement (with reasons for each party's position)
  - c. Discuss the proposed CMO(s) with the Special Master and get informal reaction from Special Master
    - i. Ideally, comments from Special Master will enable the parties to reach agreement on the terms of the CMO and to jointly submit the CMO to the court
  - d. With CMOs, Special Master may consider circulating a draft to the parties before sending it to the judge
    - i. Avoids surprises to the parties
    - ii. Affords the parties the opportunity to “buy in” to the CMO
    - iii. Forces the parties to lay out arguments/concerns about the CMO before it is submitted to the judge

## Settlement Masters

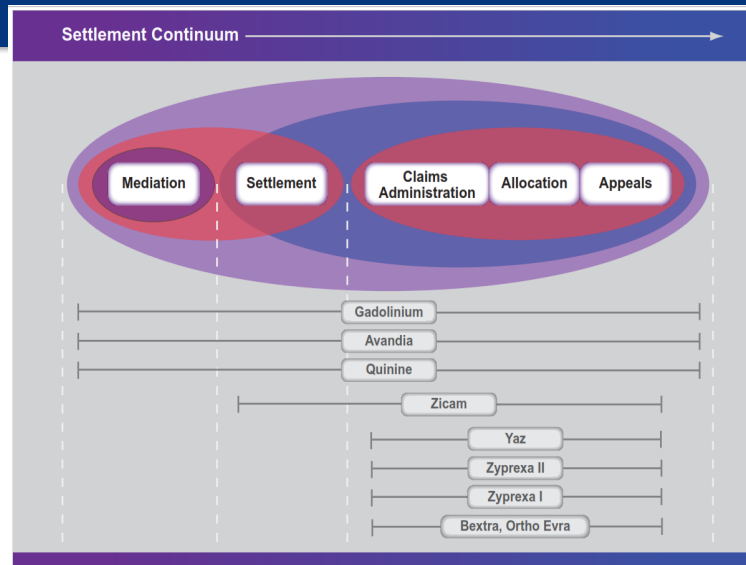
- What are the roles?

What are lessons learned?

Examples

How does a Special Master “apply” or make interest/ability known?

## Settlement Masters



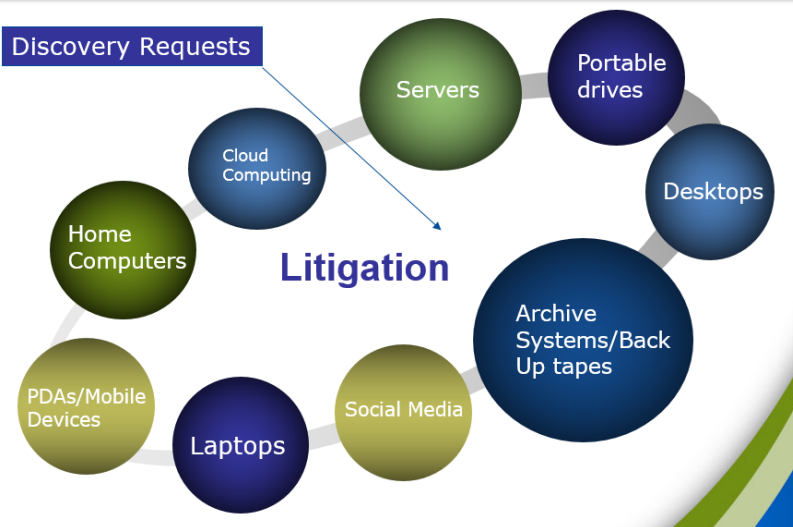
## e-Discovery Special Masters

- Use of Special Masters and Discovery Referees
  - Assistance with e-Discovery
  - Motion Practice
  - Cost Shifting
  - Sanctions

## Special Master: Managing e-Discovery

- Experienced Special Master
  - Offers special expertise and experience in managing e-discovery problems relevant to industry and type of dispute
  - Has established rapport and reputation with sitting judges
  - Understands legal framework and applicable laws
  - Facilitates collaboration between counsel
  - Allows for one master instead of armies of experts
  - Can recommend other necessary parties & vendors to manage e-Discovery

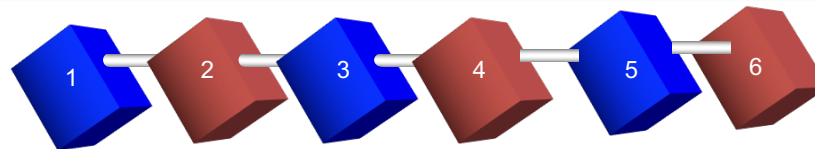
## Technology Advancement Leads to ESI “Explosion”



## New Federal Rules re ESI

### Overall approach

- ESI treated separately from documents
- Attorneys must collaborate



Is ESI  
Reasonably  
Accessible?

26 (f)  
Conference,  
in California,  
see Rules of  
Court 3.724  
and 3.728.

Form of  
Production

Retrieval of  
inadvertently  
produced  
documents  
("Clawback")

Safe harbor  
for  
destruction  
in normal  
business  
operations

Cost  
shifting

## Rule 26 – Duty to Disclose; General Provisions

- (a)(1) Initial disclosure: Must produce or describe location of all relevant ESI
- (f): Discovery conference: must develop a discovery plan to present to court within 14 days, including
  - Any issues about disclosure or discovery of ESI, including the form in which it should be produced.
- (b)(2)(B): Reasonably accessible
  - Need not provide discovery of ESI that is “not reasonably accessible because of burden or cost.”
  - Producing party has burden of showing that ESI is not “reasonably accessible.”
  - If requesting party shows good cause, court may still order production and impose conditions.

## Rule 26 – Duty to Disclose; General Provisions

- (b)(5)(B): Inadvertent Disclosure:
  - Party claiming that it inadvertently produced privileged or work product material may notify receiving party, and state basis for the claim.
  - Receiving party must promptly return, sequester or destroy all copies; must try to retrieve any information already disclosed. May not use until claim of privilege is resolved. May promptly present claim to court for resolution of claim of privilege.



## Rule 34 – Production of Documents, ESI, etc.

- May request “to inspect, copy, test or sample” documents, ESI, etc.
- Request may “specify the form or forms in which [ESI] is to be produced”
- Producing party may object to the requested form, stating reasons
- AND, must state the form it intends to use
- If requesting party does not specify the form, producing party may produce ESI in form in which it is ordinarily maintained, or another “reasonably usable” form
- Need not produce ESI in more than one form

## Rule 37 – Failure to Make Discovery; Sanctions

- (f) Safe Harbor: absent exceptional circumstances, party will not be sanctioned for failing to provide ESI lost as a result of routine, good faith use of an electronic information system

## Order of Reference/Order of Appointment for ESI Appointment

- Carefully draft the Order of Reference or Order of Appointment
  - Give the referee or master broad authority not only to decide disputes, but also to manage, organize, and schedule discovery
  - Describe the procedure for issuing, correcting and reviewing the Referee's orders
  - Authorize the referee or master to act flexibly and informally
    - Letter briefs
    - Telephonic hearings
    - eMail communications

## Motion Practice ESI: Common Issues

- Too much data
- Too little data
- Missed time deadlines
- Trade secret issues
- Accusations of spoliation
- Privilege
- Sanctions

## Questions or Comments?

Thank you!