

## ARTICLES

### E-DISCOVERY MEDIATION & THE ART OF KEYWORD SEARCH

*Daniel B. Garrie, Esq.*  
*Edwin A. Machuca, Esq.*<sup>1</sup>

#### INTRODUCTION

Identifying keywords when combing through large volumes of electronically stored information (“ESI”) is a necessary requirement of electronic discovery.<sup>2</sup> Finding ways to streamline this process in order to achieve maximum efficiency is a major priority for any party involved in the process of electronic discovery, to say nothing of the need to maintain the costs associated with such search at an economically feasible level. A workable solution to both needs is the use of a mediator,<sup>3</sup> neutral, or special master<sup>4</sup> (collectively, a “Special Master”). The process of selecting a Special Master can be daunting, however, choosing one with the ability to not only comprehend the legal elements of the case, but also grasp the different technology systems utilized in e-discovery and keyword search, is critical.<sup>5</sup> The right Special Master will benefit the interests of both parties because she will be able to assist in

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<sup>1</sup> Daniel B. Garrie, Esq., has a B.A. and M.A. in computer science, is a Partner at Law & Forensics LLC, an e-discovery and forensics firm, and is an e-Discovery Neutral and Special Master with Alternative Resolution Centers ([www.arc4adr.com](http://www.arc4adr.com)). He can be reached at [daniel@lawandforensics.com](mailto:daniel@lawandforensics.com). Mr. Garrie is also the co-author of “Dispute Resolution and E-Discovery” (2011 Thomson Reuters), [store.westlaw.com/disputeresolution](http://store.westlaw.com/disputeresolution). Edwin A. Machuca, Esq., is in-house counsel for CBRE, Inc., a Fortune 500 commercial real estate services company, and can be reached at [edwin.machuca@cbre.com](mailto:edwin.machuca@cbre.com). The authors would like to thank Sid Rao, Yoav Griver, and Khalid Bashjawish for their assistance with this article.

<sup>2</sup> See, e.g., *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006); *Stern v. Shelley*, 2010 WL 4721708 (D.S.C. 2010); *Fisher v. Ciba Specialty Chemicals Corp.*, 2007 WL 987457 (S.D. Ala. 2007).

<sup>3</sup> A. Skinner, *The Role of Mediation for ESI Disputes*, DEFENSE RESEARCH INSTITUTE’S E-DISCOVERY CONNECTION NEWSL. (May 2009) and 70 THE ALABAMA LAWYER No. 6, at 426 (Nov. 2009).

<sup>4</sup> *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357 (U.S.D.C. Md., Oct. 15, 2008) (citing Fed. R. Civ. P. advisory committee notes to the 1983 amendments contained in Rules 26 through 37).

<sup>5</sup> See, e.g., *Grant Street Group, Inc. v. Realauction.com, LLC*, 2010 WL 4808510 (W.D. Pa. 2010).

narrowing the scope of the search to a manageable extent. This alternative is also a boon to both parties, as well as the court, because a mediator can expedite an agreement and the parties maintain control over the keyword selection process.<sup>6</sup> Not having a qualified Special Master can result in, among other things, a poorly designed search, which will cause the parties to have to perform a series of subsidiary searches as gaps and problems in the original search become apparent.<sup>7</sup>

I. A SPECIAL MASTER'S COMPREHENSION OF KEYWORD  
SEARCH TECHNOLOGY IN THE CONTEXT OF ELECTRONIC  
DISCOVERY REQUIRES AN EXPERTISE IN ENTERPRISE  
TECHNOLOGIES AND SEARCH COUPLED WITH KNOWLEDGE OF  
THE LAW TO DELIVER VALUE TO THE MEDIATION PROCESS

In today's fast-paced and technology driven world, entities engaged in e-discovery are left with minimal options when segregating relevant from non-relevant info—the menu of options is search terms or “keywords” and not much else.<sup>8</sup> It goes without saying that parties are not overwhelmed with a buffet of options in terms of choices to assist in the parsing of data. However, the alternative choice involves the more traditional and time-tested document review process involving hard copies, which as a result of technology is going the way of the dinosaur due to its impracticality, high cost and inefficiency. Despite the increased efficiencies yielded by the technology-inspired advancement of keyword searches, (e.g., predictive coding),<sup>9</sup> disputes over search methodology often result in

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<sup>6</sup> See *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (advising that discovery requests can be more effective if both parties “negotiate a list of search terms to be used in identifying responsive documents”); see generally Judge Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479 (2009).

<sup>7</sup> See, e.g., *McNulty v. Ready Ice Holding Co.*, 2011 WL 116892 (E.D. Mich. 2011); *Dataworks LLC v. Commlog LLC*, 2011 WL 66111 (D. Colo. 2011).

<sup>8</sup> See, e.g., *In Equity Analytics LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. 2008); *In re Vioxx Products Liability Litigation*, 2006 WL 1726675 at \*2 n.5 (5th Cir. 2006);

<sup>9</sup> Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search*, XVII RICH. J.L. & TECH. 9 (2011), quoting *E-Discovery Institute Survey on Predictive Coding*, E-DISCOVERY INST., 2 (Oct. 1, 2010), available at <http://www.e-discoveryinstitute.org/pubs/PredictiveCodingSurvey.pdf> [hereinafter *Survey on Predictive Coding*] (explaining that predictive coding is “a combination of technologies and processes in which decisions pertaining to the responsiveness of records gathered or preserved for potential production purposes . . . are made by having reviewers examine a subset of the collection and having the decisions on those documents propagated to the rest of the collection

the court ultimately determining how the search will be conducted. For example, in *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, the plaintiff's proposed keyword search was too narrow and the defendant's proposed keyword search was too broad, so the court was left in the "uncomfortable position" of crafting and imposing its own search methodology for the parties.<sup>10</sup>

Although the technology exists to simplify searches (and it continues to evolve) and improve the efficiencies of discovery in general, there is still a requirement that the individual(s) conducting the search are knowledgeable regarding the benefits and limitations of the technology. In e-discovery disputes, Special Masters may be tasked with reviewing technical compliance with discovery requests,<sup>11</sup> routing out attempts to avoid compliance,<sup>12</sup> opining on intentional or reckless spoliation of evidence,<sup>13</sup> and determining whether discovery orders are being followed.<sup>14</sup> Courts and arbitrators may be unfamiliar with the latest methods of storing, processing, copying, retaining or hiding ESI and often do not have the resources to devote to learning them.<sup>15</sup> For the foregoing reason, technically proficient Special Masters, sometimes working in concert with computer forensics experts, are needed to resolve

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without reviewers examining each record."); *see generally*, DANIEL GARRIE, *DISPUTE RESOLUTION AND E-DISCOVERY* (2012).

<sup>10</sup> 256 F.R.D. 134

<sup>11</sup> *Board of Regents of University of Nebraska v. BASF Corp.* 2007 WL 3342423 (D. Neb. 2007) (appointing a computer forensics expert to assist in further discovery when plaintiff did not meet the obligation to affirmatively direct compliance with the order in objective good faith); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006) ("Wachtel II") (appointing Special Master in light of a lengthy pattern of repeated and gross non-compliance with discovery).

<sup>12</sup> *E.g.*, *Maggette v. BL Dev. Corp.*, No. 2:07CV181-M-A, 2010 U.S. Dist. LEXIS 91647, 13 (N.D. Miss. 2010) (discussing Special Master's finding of bad faith when appointed to investigate allegations of concealing responsive documents).

<sup>13</sup> *E.g.*, *Medcorp, Inc. v. Pinpoint Technologies, Inc.*, 2010 WL 2500301, 1 (D. Colo. 2010) (reviewing Special Master's decision on sanctions for spoliation in the form of an adverse jury instruction *de novo*).

<sup>14</sup> *E.g.*, *Wixon v. Wyndham Resort Development Corp.*, 2009 WL 3075649, 3-4 (N.D. Cal. 2009) (rejecting Special Master's conclusion that defendant was not required to produce documents on a certain drive, and rejecting Special Master's conclusion that defendant should not be sanctioned).

<sup>15</sup> *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-62, 70 FED. R. SERV. 3d 1052 (D. Md. 2008) citing *U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 24, 69 FED. R. SERV. 3d 1598 (D.D.C. 2008) ("Whether search terms or "keywords" will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics . . . . Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.").

complex e-discovery issues.<sup>16</sup> Special Masters have the expertise to analyze case specific facts and circumstances, and confirm compliance or unearth devious acts done to hide ESI.<sup>17</sup>

A Special Master armed with this knowledge can help parties avoid common traps and pitfalls, such as using the wrong search terms or avoiding the wrong locations, which can often result in negative outcomes. In turn, the result can be overproduction, spoliation, or non-production. An example of this occurred in *Nycomed U.S., Inc. v. Glenmark Generics, Ltd.*<sup>18</sup> In this case, the court ordered the defendant to pay \$100,000 to the plaintiff and \$25,000 to the clerk of the court because the defendant deliberately failed to identify and search the electronic databases that were likely to contain discoverable information.<sup>19</sup> The foregoing is one stark example of how vital a component in the e-discovery process the selection of a qualified Special Master can often be. The last thing any party wants to happen is for a court to undertake the process of determining the parameters of a particular search because said party did not possess enough knowledge of the keyword search technology to use it to their full advantage.

Special Masters may be appointed with or without the consent of the parties or pursuant to a motion.<sup>20</sup> The scope of the Special Master's authority may be limited by the appointment or reference order,<sup>21</sup> the statutory basis,<sup>22</sup> or the rules of due process.<sup>23</sup> In seek-

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<sup>16</sup> See, e.g., *Gipson, et al. v. Southwestern Bell Tel. Co.*, No. 08-2017-EFM-DJW, 2008 U.S. Dist. LEXIS 103822, at 6 (D. Kan. Dec. 23, 2008) (recommending a Special Master appointment in a complex case involving 115 motions in just one year); *Costello v. Wainwright*, 387 F. Supp. 324, 325, (M.D. Fla. 1973) (appointing a Special Master where evidence likely to be highly technical).

<sup>17</sup> See, e.g., *Eastman Kodak Co. v. Sony Corp.*, 2006 WL 2039968, 1, (W.D.N.Y. 2006) (adopting Special Master's recommendation that Eastman Kodak had complied with Sony's discovery request notwithstanding Sony's objection as to the form of production); *Maggette*, 2010 U.S. Dist. LEXIS 91647, at 11, 60-63 (imposing sanctions where the Special Master found in just minutes information that defendant, a "sophisticated corporation with very significant financial resources, had repeatedly and stridently insisted did not exist for close to five years.").

<sup>18</sup> 2010 WL 3173785 (E.D.N.Y. 2010).

<sup>19</sup> *Nycomed U.S. Inc. v. Tolmar, Inc.*, 2011 WL 1675027 \*12 (D.N.J. 2011).

<sup>20</sup> FED. R. CIV. P. 53(a)(1)(A) (notes of advisory committee on 2003 amendments to rules) ("Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent."); see *Schwimmer v. U.S.*, 232 F.2d 855, 865, 56-2 U.S. Tax Cas. (CCH) P 9711, 50 A.F.T.R. (P-H) P 644 (8th Cir. 1956) ("Beyond the provisions of Fed. R. Civ. P. 53 for appointing and making references to Masters, a Federal District Court has "the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.").

<sup>21</sup> FED. R. CIV. P. 53(b)(2) (requiring that the appointment order state the scope of a Special Master appointment); see, e.g., *In re New York Bextra and Celebrex Prod. Liab Litig.*, Index No. 560001/2005, Case Management Order No. 10 (June 21, 2006) (appointment of the Honorable Fern M. Smith as Special Master) available at [www.nycourts.gov/suptctmanh/mass](http://www.nycourts.gov/suptctmanh/mass) (appointing a

ing a Special Master, attorneys often favor retired judicial officers or experienced attorneys. However, these same rules may not always apply to a Special Master tasked with making e-discovery decisions because practicing attorneys are not always on the cutting edge of the latest technology advancements. The ideal Special Master will have a solid background in both technology and law. A strong blend of both of these disciplines will help the parties negotiate the boundaries of ESI collection, and understand the limits and advantages to the various collection and review methods.

## II. COUNSEL SHOULD SELECT A SPECIAL MASTER WHO NOT ONLY UNDERSTANDS THE LAW BUT GRASPS THE TECHNOLOGY

Moving forward without a qualified Special Master can be akin to skydiving without a parachute for several reasons.<sup>24</sup> In this regard, chief among counsel's responsibilities is an understanding of the technology on which his or her client's information is stored. Courts have lamented this problem, and in *United States v. O'Keefe* Judge Facciola stated, in a colorful section of the opinion:

Whether search terms or "keywords" will yield the information sought is a complicated question involving the interplay, at least,

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Special Master and defining scope of authority under N.Y. COMP. CODES R. & REGS., Tit. 22, Section 202.14, (2006); see generally Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31(3) WM. MITCHELL L.R. 1269, 2004, available at [www.courtappointedmasters.org/articles/fellowshaydock.pdf](http://www.courtappointedmasters.org/articles/fellowshaydock.pdf) (discussing the revised rule 53(2)9b)).

<sup>22</sup> FED. R. CIV. P. 53(a)(1) (providing for the scope of the appointment of a Special Master "unless a statute provides otherwise. . ."); see *Cobell v. Norton*, 334 F.3d 1128, 1143-44 (D.C. Cir. 2003) (overruling District Court's appointment of a Special Master where appointment was in conflict with "28 U.S.C. Section 455(a): A judicial officer must be disqualified from "any proceeding in which his impartiality might reasonably be questioned, that is, questioned by one fully apprised of the surrounding circumstances."), citing *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co, Inc.*, 535 U.S. 229, 232-33, 122 S. Ct. 1290, 152 L. Ed. 2d 346 (2002) (per curiam).

<sup>23</sup> FED. R. CIV. P. 53(b)(1) (requiring that parties received notice and opportunity to be heard prior to the appointment of a Special Master); see *McGraw-Edison Co. v. Central Transformer Corp.*, 308 F.2d 70, 135 U.S.P.Q. 53, 6 FED. R. SERV. 2d 959 (8th Cir. 1962) (arguing that unnecessary appointment of a Special Master could amount to denial of due process of law); see, e.g., *Cobell v. Norton*, Case No. 1:96CV01285, at 1-2 (D.D.C. Oct. 2, 2002) (Special Master Monitor Joseph S. Kieffer, III) (presenting due process challenge to the appointment of a Special Master).

<sup>24</sup> See, e.g., *Trusz v. UBS Realty Investors LLC*, 2010 WL 3583064 at \*4 (D. Conn. 2010); *Degeer v. Gillis*, 2010 WL 5096563 (N.D. Ill. 2010); *Spieker v. Quest Cherokee, LLC*, 2008 WL 4758604 (D. Kan. 2008).

of the sciences of computer technology, statistics and linguistics . . . Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.<sup>25</sup>

Similarly, in *Equity Analytics, LLC v. Lundin*, the court stated that “determining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence.”<sup>26</sup> The foregoing cases illustrate that parties should be sensitive to the fact that selecting effective counsel may just be the tip of the iceberg in terms of having the support of individuals who are knowledgeable of the technology related to e-discovery. Parties should take the time to perform proper due diligence when selecting counsel to ensure that the individual not only has a mastery of the law pertaining to the specific case, but can also utilize the appropriate technology that would benefit the client’s e-discovery needs.

Notwithstanding the importance of selecting competent legal counsel who can also grasp the technological aspects of the case, parties should be cognizant that they may still be well short of an effective keyword search because e-discovery,<sup>27</sup> for purposes of efficiency, requires that the attorneys share their understanding of the case and the technology with opposing counsel.<sup>28</sup> Failure to account for this fact can shift the burden of selecting a field expert in e-discovery to the court. However, this is not an ideal outcome for the parties.

For example, in *Lundin*, the court appointed a computer forensics expert (at the cost of the parties) to search ESI. The court may also require further affidavits from the parties as to the adequacy of proposed search methodologies.<sup>29</sup> Understandably, most courts, concerned with the disclosure of facts, will usually lean in

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<sup>25</sup> 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

<sup>26</sup> 248 F.R.D. 331, 333 (D.D.C. 2008).

<sup>27</sup> *Asarco v. EPA*, No. 08-1332 (FGS/JMF), 2009 U.S. Dist. LEXIS 37182, at \*3 (D.D.C. Apr. 28, 2009).

<sup>28</sup> See, e.g., *Rexall Sundown, Inc. v. Perrigo Co. of S.C.*, No. CV 07-3397, 2008 U.S. Dist. LEXIS 47617, \*2 (E.D.N.Y. June 19, 2008); *Elliott v. U.S. Att’y Gen.*, No. 06-1128, 2006 U.S. Dist. LEXIS 80204, \*7-9 (D.D.C. Nov. 2, 2006); *J. C. Assoc. v. Fid. & Guar. Ins. Co.*, No. 01-2437, 2006 U.S. Dist. LEXIS 32919, \*1-4 (D.D.C. 2006); *ClearOne Commc’ns, Inc. v. Chiang*, No. 2:07 CV 37 TC, 2008 U.S. Dist. LEXIS 27617, \*3 (D. Utah Apr. 1, 2008).

<sup>29</sup> *Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008).

the direction of ordering additional discovery, trusting that this is the best method for extracting the truth, or encouraging the parties to try to settle their dispute.<sup>30</sup> In such a scenario, the parties can benefit substantially by either coming to an agreement or petitioning the judge to appoint a Special Master that knows both the law and the technology, to ensure that appropriate documents are produced at a reasonable price respective to the underlying issue.<sup>31</sup>

In *Hohider v. UPS*,<sup>32</sup> a class action filed in the Western District of Pennsylvania alleging a pattern or practice of unlawful discrimination against employees under Title I of the Americans with Disabilities Act of 1990, (ADA), 42 U.S.C. §§ 12101 to 12117, the plaintiff alleged that the defendant, UPS, had failed to preserve electronic information relevant to the dispute. The court issued a detailed order, requiring the Special Master to examine UPS's computer systems and backup data, and to make recommendations as to sanctions or remedies.<sup>33</sup> The court ordered the Special Master to determine whether UPS had "withheld, deleted, destroyed or permitted to be destroyed" relevant information, and whether UPS had a duty to preserve the data.<sup>34</sup> The areas of the Special Master's investigation included plaintiff's pre-litigation communications about their claims, and whether they had put defendant on notice to preserve ESI.<sup>35</sup>

One additional note of caution, however, is that the Special Master should also possess a strong understanding of the particular industry in which the parties in dispute operate. Therefore, a skilled lawyer, who is also technologically knowledgeable, may still prove to be ineffective to its client if such Special Master lacks the requisite industry knowledge for the specific business area in dis-

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<sup>30</sup> Carrie Lonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 709 (2011).

<sup>31</sup> See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010); *Pension Committee of University of Montreal Pension Plan v. Banc Of America Securities LLC*, 685 F.Supp.2d 456 (S.D.N.Y. 2010); *Hammann v. 800 Ideas, Inc.*, 2010 WL 4943391 (D. Nev. 2010); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

<sup>32</sup> *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 22 A.D. Cas. (BNA) 133 (3d Cir. 2009); see also *J.B. Hunt Transport, Inc. v. Bentley*, 207 Ga. App. 250, 256-7, 427 S.E.2d 499 (1992) (upholding jury instruction that destruction of logbook supported a reasonable presumption that the logbook showed that the driver was compelled by Hunt to drive with insufficient rest.)

<sup>33</sup> See *Hohider v. United Parcel Serv.*, No. 04-363 (W.D. Pa. Dec. 19, 2007) (appointing Special Master).

<sup>34</sup> See *id.*

<sup>35</sup> *Id.*

pute.<sup>36</sup> Often, the type of court-appointed mediator knows the particular business area in dispute but has no more technological education or experience than the parties or the court. For example, if the parties are in an insurance-related dispute, organizations such as ARIAS have a stable of potential mediators and arbitrators with years of impressive, insurance-related experience available for choosing. Few of them, however, would likely know the differences involved in recovering data from an AS400 or an OS390W. Demonstrably, a Special Master appointed for discovery purposes needs both a firm grasp of the business field as well as a firm grasp of theory and application around the field of electronic search methodology, including an understanding of the algorithms by which software searches for information.<sup>37</sup>

### CONCLUSION

As technology continues to evolve, its influence on the way we live our lives and conduct our business will continue to be significant. In terms of utilizing the technology at our disposal to best leverage efficiencies in e-discovery, it is critical that parties focus on securing effective counsel with the following credentials: (i) knowledge of the law; (ii) knowledge of technology; and (iii) industry specific knowledge of the business area in dispute. The ability to secure an individual with these attributes may not always be possible due to cost constraints, a possible dearth of such qualified individuals in the legal community, and/or any number of other possible reasons.

However, appointing a Special Master will address the risks inherent in not securing legal counsel with the requisite technological acumen to adequately address this gap. Failure to either hire counsel with these skills or to appoint a Special Master can prove detrimental to the parties involved in a dispute. For one, the parties risk incurring significant cost overruns due to the impractical and inefficient process of traditional hard copy document review. Second, the actual production itself may run a greater risk of inad-

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<sup>36</sup> See also Amy Cook, *ADR Is A-OK*, CBA REC., Apr. 2008, at 6; AM. BAR. ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), available at <http://www.abanet.org/dispute/webpolicy.html>.

<sup>37</sup> See Scheindlin, *supra* note 6, at 181 (stating that primary considerations that a court should consider in selecting a Special Master is "(1) time commitment; (2) knowledge and expertise; (3) resources; and (4) neutrality.").



vertent disclosure, spoliation, overproduction, misconduct or worse. Finally, parties may rely on the court to provide such experts (at the parties sole cost and expense), but doing so essentially removes from the respective parties' hands the ability to conduct their own due diligence to vet individuals based on the parties' criteria and not on the courts. Any of the foregoing scenarios is not an ideal one for two parties involved in a dispute and should be avoided at all costs.

