

REASONS TO USE E-DISCOVERY REFEREES THAT KNOW THE TECHNOLOGY AND THE LAW

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Practitioner tips:

Do not disregard a lack of understanding of technology at the beginning of litigation. This can often cost parties time and money later in the process when they must quickly hire an expert. Educate yourself on the workings of the technology involved in eDiscovery, and decide if a discovery referee is appropriate early in the process.

Do not assume that a discovery referee will automatically have the requisite knowledge for the case. eDiscovery cases are becoming increasingly more complex as the amount and types of data increases. Be sure that the discovery referee understands the underlying mechanisms and data pertinent to the case, or else you may have to hire a subsequent neutral.

INTRODUCTION: BENEFITS OF A DISCOVERY REFEREE

The importance of discovery referees such as special masters is increasing with the quantity of electronic data at issue in many cases. *A discovery referee is a neutral person appointed by a court, arbitrator, other decision-making body, or the parties themselves, to make factual determinations in complicated cases.* In e-discovery disputes, for example, discovery referees are increasingly being appointed and tasked with reviewing technical compliance with discovery requests, routing out attempts to avoid compliance, opining on intentional or reckless spoliation of evidence, and determining whether discovery orders are being followed. If done right, discovery referees can be a boon to the court and litigants – the right discovery referee saves the parties' time, saves the parties' money, and, perhaps most importantly, makes the correct technological and legal decisions necessary for resolution of the underlying dispute.

COMPLEX E-DISCOVERY DISPUTES: WHEN ONLY AN EXPERT WILL DO

While it is crucial to have a sound grasp of discovery law, a feasible application of these rules is not possible without an understanding of the underlying data. This is especially true in complex e-discovery disputes where data under a litigation hold can reach over 20 terabytes, which is enough to hold over twice the printed collection of the Library of Congress. (John H. Jessen, *"An Overview of ESI Storage & Retrieval,"* 11 Sedona Conf. J. 237, 237 (2010).)

Of course, with this quantity of data, some complex disputes will require that even a technologically experienced discovery referee utilize forensic neutrals. Even so, a discovery referee that is not adept at technology and forensics will do a disservice to both the courts and your clients because they will not be able to quickly and accurately understand the advice of forensic neutrals. In turn, their decisions will come at the expense of the parties, because their decisions will be delayed and possibly inaccurate with respect to the technology involved.

The idea of discovery referees is relatively new, and some continue to push back against the value. Sometimes this is because the parties and counsel continue to function with an adversarial mindset,

Cooperation is key in eDiscovery, even in the adversarial litigation processes. Hiring a discovery referee or other technologically knowledgeable neutral will benefit both parties in cases where the underlying data is complex and requires specific expertise. This can also avoid using eDiscovery as an oppositional mechanism itself, keeping the requests for eDiscovery production at a cost reasonable to the case at hand.

Before acquiring a discovery referee, be sure to verify he or she is aware not only of the legal aspects of eDiscovery, but of the basic elements of electronic data as well, such as allocated versus unallocated space and metadata. Frequently a discovery referee plays a key role in the explanation of these most basic components, and a lack of knowledge on his or her part can cost the parties more time and money.

treating discovery, like the overall litigation itself, as an adversarial rather than a cooperative, process. Courts continue to grapple with the best way to encourage cooperation in discovery, while preserving the adversarial nature of the litigation process. For example, courts sometimes insist that parties pay for their own requests, to encourage reasonableness in discovery production. Otherwise, adverse parties may think it is in their benefit to make the cost of production prohibitively expensive. Likewise, some courts are making exceptions to the American rule, deciding that losing parties have to pay for discovery costs. See *Race Tires America Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010)

Sometimes this is because the parties are not comfortable with the idea of imposing a neutral in the litigation process, and question whether the added value is worth the added cost. However, when faced with serious e-discovery issues- particularly issues that if handled badly may lead to severe monetary and other sanctions or even the loss of the case- turning to the protection, knowledge, and experience of a technologically adept neutral adds value and makes every kind of sense.

CAVEATS FOR COUNSEL

WHAT TO LOOK FOR IN A DISCOVERY REFEREE

Counsel should be aware before agreeing to an e-discovery neutral or referee that it can be a double-edged sword. If counsel is not mindful of the unique considerations that make these discovery referees helpful, they may not only end up paying for the referee, but spending additional time and money on consultants and experts in addition to the referees. Mastery of the law surrounding e-discovery is a necessary ingredient to effective resolution of an e-discovery dispute. While necessary, however, it is not sufficient. When it comes to e-discovery, technical aptitude and understanding of the inner workings of the technologies at issue is the key ingredient that a referee must have if the parties are to effectively, efficiently and thoroughly address e-discovery disputes.

Before committing to a discovery referee, counsel should ensure their referee is aware, at a minimum, of the following basic elements of electronic information. Thus, a referee should be able to readily provide complete answers to the following questions:

About Law and Forensics:

Law and Forensics solves the complex legal issues at the convergence of technology and the law. Our team includes some of the foremost thought leaders in eDiscovery and electronic forensics as well as the pioneers in the latest techniques in cyber security. It is this expertise which allows us to solve information governance problems efficiently and cost effectively.

We work with our clients, whether law firms, corporate organizations or government agencies, to resolve eDiscovery issues, perform electronic forensic examinations and investigations, and help bridge information and communication gaps between technologists and legal professionals.

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What is free space?

What is difference between an OST and PST file?

How does a file system interact with an operating system?

How does the keyword search operate?

It is only when a discovery referee has a sufficient understanding of the technology, that the referee can appreciate where the data is likely to be located, what kind of data the parties require, the type of searches that are likely to provide that data, and the most efficient and narrowly tailored ways to locate and extract the required evidence.

WHEN COUNSEL SHOULD REJECT A NEUTRAL

If a neutral cannot answer these simple technology questions, then it is likely that using that neutral will cost more money and delay the timeline. A neutral that lacks the technical experience for building email servers, web servers, or computer systems could cost the parties substantially more money and time. In the best case, each party will need to hire an expert to explain technology concepts to the neutral, while the neutral may have to hire a technologist to interpret these statements and the ultimate results. This adds layers upon layers of cost and delay. Moreover, a neutral that lacks the technical know-how, but believes understanding the technology is not a predicate to making substantive rulings, can undermine the merits of the case. These referees either order broad discovery at a substantial cost, or improperly minimize the importance and amount of discovery, effectively reducing the viability of the claims and defenses at issue.