

MASTERS IN THE STATE OF MICHIGAN

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With the advent of email communications and electronic document storage, even a simple business dispute can generate an extraordinary number of documents during discovery. When you add in cloud storage, where the number of documents that can be stored and the temporal scope of such storage are virtually unlimited, a business dispute can often involve 100,000 pages or more of stored communications and documents.

An entire cottage industry has recently developed to assist attorneys with drafting search term parameters for e-discovery requests and to electronically host and search documents produced through e-discovery. This phenomenon has added a significant layer of expense to litigating most business disputes. Fees and expenses for document hosting and search capabilities required by counsel to manage the data produced can often exceed several thousand dollars per month and last the entire time the case is active.

This explosive environment of electronic discovery has placed extraordinary burdens upon litigants and trial court judges seeking to manage their dockets. Standard business disputes may now require counsel's review of 100,000 to 200,000 pages of information. In complex cases, it is not unheard of that documents in excess of 1,000,000 pages are produced; and in extremely complicated anti-trust style cases, documents in excess of 1,000,000,000 pages are often the norm.

Today, in both state and federal trial courts, the appointment of a "Special Master" can often be a valuable option to assist the parties and court through the arduous e-discovery process.

In the short-term, the appointment of a Special Master may impose additional costs upon the parties; but in the long-term, it may result in overall cost savings by reducing the number of discovery motions and accelerating the time it takes to prepare a case for trial. It may be helpful to analyze the rules governing the appointment of Special Masters in Michigan and reconsider a prior pivotal ruling in this area.

Under Rule 53 of the Federal Rules of Civil Procedure, a court is expressly authorized, unless a statute provides otherwise, to appoint a Master to: (A) perform duties consented to by the parties; (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury, if an appointment is warranted by: (i) some exceptional condition; or (ii) the need to perform an accounting or resolve a difficult computation of damages; or (C) address pre-trial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

Rule 53 expressly authorizes district courts to appoint Masters upon consent of the parties and where exceptional circumstances exist to warrant such appointment. The parties are free, with the court's approval, to structure the duties and obligations of the Special Master in the manner they desire as long as the parties are given an opportunity to address the court on the Master's order, report or recommendation. The court must conduct a *de novo* review of all objections to the Master's findings of fact, unless the parties previously stipulate that the findings will be reviewed for clear error. As to procedural matters only, the review is limited to an abuse of discretion by the Master. See Fed. R. Civ. P. 53(f) (1), (2), (3) and (5).

Practitioners skilled in the art of complex commercial litigation welcome the assistance and involvement of a Special Master. Litigants understand that a Special Master with a single complex case has more time available than a district court judge to address their disputes and can

provide a more extensive opportunity for oral argument than would otherwise be available on a court's busy docket. Such litigants freely consent to spending the fees necessary to compensate the Special Master for extensive pre-trial discovery work when the amount in controversy exceeds the additional charges that will be imposed by the Master's services and will be more than recouped by the savings in time achieved in utilizing the Master, as opposed to following normal federal court motion practice. In a single complex case, a Special Master can hear multiple complex motions at the same time and provide resolutions that the parties generally find acceptable. Additionally, the Special Master has the time and ability to assist in voluntarily facilitating a resolution of a discovery dispute prior to bringing the matter ~~on~~ to the Master or judge? for formal hearing. Often times, by simply scheduling complex discovery production in periodic tranches, as opposed to a document dump, the Special Master can provide a valuable service in managing document production for litigants.

In the trial courts of the State of Michigan, the appointment of a Special Master is prohibited. In *Carson Fischer Potts & Hyman v J. Leonard Hyman*; 220 Mich. App. 116 (1997), the Court of Appeals concluded that all judicial power of the State of Michigan is vested exclusively in the court system consisting of the Supreme Court, the Court of Appeals, one trial court of general jurisdiction known as the Circuit Court, one probate court and courts of limited jurisdiction that the legislature may from time to time establish. Article VI, Michigan Constitution, 1963.

The Court of Appeals in *Carson* concluded that since the Michigan Constitution vests all judicial power in the judicial system described in Article VI, it is unconstitutional for a judge to delegate any such power to anyone in any matter. An exception exists in the Constitution to permit retired judges sitting by designation for short periods of time to handle judicial duties of

other sitting judges. It is important to note that in *Carson*, the trial court imposed the Special Master upon the parties to the litigation over the objection of one party and endowed the Master with powers to resolve discovery disputes with finality. The fees of the Special Master were also imposed directly upon the parties in *Carson*, over objection.

Despite the constitutionally accepted prohibition against the appointment of Special Masters in Michigan courts, it is still a common practice in complex commercial cases for litigants to stipulate to an order appointing a Special Discovery Master to resolve their discovery disputes and further stipulate to be bound by the rulings of that Master. In other actions, litigants have stipulated to an order appointing an arbitrator to resolve discovery disputes that may arise between them in final and binding arbitration. In this fashion, litigants in Michigan trial courts may still benefit from a Special Master so long as such benefits are evident through a stipulated order that does not infringe upon the trial court's power to adjudicate cases before it. By acting via a party-stipulated agreement, the trial court neither delegates its authority to the Special Master, nor imposes the Special Master upon the parties, without mutual consent. This seemingly overcomes the main objections addressed in the *Carson* opinion.

CONCLUSION

Rule 53 of the Federal Rules of Civil Procedure is an excellent vehicle allowing federal trial courts, with consent of the parties, to appoint Special Masters to assist in complex commercial disputes, thereby expediting the litigation process and curtailing the time normally required for complex discovery. Given the developments in e-discovery that have arisen post *Carson*, it is time for the Michigan Supreme Court to consider adopting a rule similar to Fed. R.

Civ. P. 53 to allow its trial courts the benefits available through the appointment of Special Masters.

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