

# The Strategic Use Of E-Discovery And High-Tech Experts In Complex Litigation, Regulatory And Compliance Matters

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The increasingly complex global economy poses many challenges for corporate counsel. Not only are they confronted with a host of legal, regulatory and compliance concerns, but also with the need to effectively manage and control the associated costs and risks. With the advent of new technological enhancements that enable businesses to operate more efficiently comes the task of how best to control the costs of the burgeoning amount of electronically stored information that is continuously being produced. The amount of e-mail alone being created by a company is growing at a rate of 30 percent annually<sup>1</sup>.

In an effort to regain control over what can easily become unwieldy and

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excessively costly cases, counsel are more frequently incorporating the use of e-discovery and high-tech experts into their strategies. The use of such experts has evolved significantly over the years.

Until recently, the function of an e-discovery expert in a high-stakes trial was to serve in the classic "battle of the experts" role. To help better manage cases and the associated costs, counsel is now strategically using experts in high-tech investigations and electronic discovery matters. There will continue to be an upward trend in using these specialists as independent special masters and court-appointed neutrals as well as in the more traditional roles of consultant and expert witness.

With cases involving megabytes of data a relic of the past, counsel faces the daunting task of reviewing data sets that from the outset involve gigabytes and/or terabytes of data. To put this in perspective, one gigabyte of data is roughly the content of a pile of books stacked over 30 feet high<sup>2</sup>.

Matters involving highly sophisticated technical issues may require the courts to appoint an independent special master to resolve issues that are otherwise too complex to deal with via the traditional judicial process. A special master is truly independent and reports directly to the judge and/or magistrate, and makes unbiased determinations of

fact related to technical issues that are then presented to the presiding judge and/or magistrate.

When recently appointed as an independent special master, the parties involved in the litigation acted in typical fashion and agreed to the federal judge's selection as well as equally splitting the expert's fees. By eliminating the need to retain separate teams of high-tech consultants and experts, the parties' costs were reduced considerably.

Special masters also help facilitate the discovery process, while ensuring that both sides are able to obtain the relevant information needed. The individual in this role is expected to approach every engagement in a professionally sound manner and maintain an audit trail at all times.

The role of an independent special master in e-discovery matters does not extend to rendering legal opinions, but instead focuses on presenting the court with relevant evidence. It is the court's responsibility to make legal rulings as to how the evidence will be produced. When a special master is also designated to serve as an evidence referee, they have more discretion to act on their own and can make procedural rulings.

Once a special master is selected, independent communications by any party with the special master is prohibited unless all parties to the matter are present or accessible by telephone. All conversations between the judge and the special master throughout the duration of the proceedings are considered to be confidential.

Although either side can challenge the proposed special master, once the appointment is made both sides are compelled to work with that person until the conclusion of the case. Any party to the case can call the special master to testify regarding the evidence that the special master handled.

As an example, a request was made to one of the authors when recently serving as an independent special master to require testimony related to evidence recovered during production. Typically, special masters may be called to testify on issues related to the process. They can, however, be examined on the scope of their engagement, which at times can be quite extensive, depending on the complexity and volume of data involved.

More frequently, the courts are utilizing discovery referees for massive litigation matters that might potentially take years to resolve due to the complex issues relating to discovery. A discovery referee is usually a retired judge that is capable of making legal rulings. This individual is brought in to expedite the discovery process. Increasingly, discovery referees are requiring that high-tech and electronic discovery experts serve as independent special masters to address advanced electronic technologies.

Both discovery referees and special masters are independent experts who are completely impartial to all the parties of the case. The special master is often tasked with expediting the production of data and ensuring that no obstacles exist that will delay the dates set forth in the judge's orders. In addition to moving the case along as quickly as possible, the role of special master includes developing a high-tech plan of action and overseeing the production, which may require the retention of consultants by the special master.

Court-appointed neutrals are of particular value in disputes in which there is little or no disagreement about the underlying facts, but the experts on each side put their own slant on the facts<sup>3</sup>. When such situations arise, the judge has no other option than to select an impartial expert witness. The role of this individual depends on the judge's creativity and can span from reviewing the evidence and providing insight on a particular question to testifying in court or other legal proceedings<sup>4</sup>.

Whether the high-tech expert is brought in as an independent special master or a court appointed neutral the roles are very similar. The use of court-appointed experts has increased significantly, especially in cases where examining computer source code is required to determine whether there is a misappropriation of a trade secret, copyright or patent infringement.

The more traditional role for high-tech specialists to serve as a consultant or expert still occurs on a routine basis. When counsel retains a high-tech specialist as a consultant, he is not expected to have to testify, and as such his communications are protected under attorney-client privileges. However, if counsel later determines that the consultant will be presented to the court as an expert witness, then the privilege is waived. Due to the lack of privilege, when counsel speaks directly to his client, it is advisable that the expert not be present so that he does not have to testify about what he overheard.

Due to the voluminous nature of electronically stored information and the sheer cost of electronic discovery, counsel and the courts will no doubt continue to rely on high-tech and electronic discovery experts as a strategic maneuver to improve efficiencies and better manage costs.

<sup>1</sup> Frank Chambers, "EDD Tips for Email from the Front Line," *Law Technology Today*, March 2007, referenced in Cynthia L. Jackson, *Business Guide to Compliance: Plan Now for Managing Electronic Data & Avoid Tomorrow's Legal Risks*, Baker & McKenzie, 2007, 31.

<sup>2</sup> *Bloomberg News* (2005, April 2). *Google Doubling Storage on Free E-mail Service*. The New York Times. Retrieved December 4, 2007 from [www.nytimes.com/2005/04/02/technology/02google.html](http://www.nytimes.com/2005/04/02/technology/02google.html)

<sup>3</sup> Lee A. Hollaar, Ph.D., "Analysis & Perspective: The Use of Neutral Experts," *Expert Evidence Report*, Vol. 4, No. 24, December 20, 2004, 6, 660.

<sup>4</sup> *Ibid*.



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