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Federal court creates electronic discovery special masters program

by Tracy Carbasho

Federal judges in Pittsburgh believe calling upon special masters to address electronic discovery issues as early as possible will facilitate a more efficient case management process.

"Electronic discovery is a very topical area of concern today," said U.S. District Court Judge Joy Flowers Conti. "There are daily decisions being made around the country that involve situations where they have a dispute regarding electronic discovery."

Conti, who chairs the court's Case Management and Alternative Dispute Resolution (ADR) Committee, said electronically stored information has become the primary source of evidence in many lawsuits. As a result, lawyers and judges are faced with e-discovery issues and corresponding technological concerns, such as how to retrieve electronically stored data. E-discovery disputes are becoming increasingly complex and common as the technology pertaining to data continues to evolve.

The Board of Judges for the U.S. District Court for the Western District of Pennsylvania decided on Nov. 16, 2010 to make it easier to resolve the disputes by establishing and maintaining a list of attorneys with expertise in e-discovery who could serve as special masters. The November order, signed by Chief Judge Gary Lancaster, states that special masters must have an active bar admission; have demonstrated litigation experience; have demonstrated e-discovery knowledge, training, and experience; and have mediation or other ADR training or experience.

Approximately 70 attorneys applied to be included on the list for potential appointment as a special master in future cases. Of that number, about 27 were accepted and the remainder were either conditionally approved or rejected.

Local judges were a bit surprised that some applications came from interested attorneys and judges who live outside Pittsburgh in areas such as Washington, D.C. The list of approved special masters will be maintained on the court's website and applications may be taken again in the future.

Attorneys accepted into the program were required to complete a four-hour orientation session. Subsequent training will also be held for judges and law clerks.

"The purpose of the program is to have readily available a cadre of parties to help the court resolve thorny issues," said Conti. "The special masters will assist the court in making proper decisions about how disputes should be resolved. If we would have had special masters to call upon in the past,

mistakes could have been avoided and there could have been a cost savings for the parties."

The most common e-discovery problems that federal judges see pertain to cases that include a large volume of electronically stored information. In such cases, the parties can rarely agree on how to produce the documents. This is a primary reason why Conti suggested to the ADR Committee that having a panel of special masters would be extremely helpful.

Conti commended her fellow judges, the court personnel, and members of the special master subcommittee for their collaboration in bringing the program to fruition. Subcommittee members and individuals who have helped create or support the program include, but are not limited to, Conti, Judge Nora Barry Fischer, Judge Arthur Schwab, various other federal judges, Jay Glunt, Richard Lettieri, Karen Engro, Susan Ardisson, Steven Silverman, Melissa Evans, Dan Wilt, Rodger Leasure, Colleen Willison, David Cohen, and Jennifer Mason.

Judge Schwab chaired the Case Management and ADR Committee before Conti began serving in this capacity.

"The new e-discovery special master program flows from the court's integration of its mandatory ADR program and its updated case management process through the leadership of Judge Conti and revisions to the Local Rules," noted Schwab. "This new e-discovery special masters program is at the cutting edge because it is a formal, web-based program that is well integrated into an overall case management and ADR process."

As a means of providing a formal structure for tackling e-discovery issues, the U.S. District Court for the Western District drafted new local rules that became effective in September 2009. The local rules are intended to supplement the Federal Rules of Civil Procedure and to provide guidance to lawyers in fulfilling their duties regarding e-discovery. The special master program complements the revised local rules.

"Attorneys spend needless time doing e-discovery. If they could meet early in the process with someone who is knowledgeable on e-discovery, technology, and mediation, it would help the parties and make the case run more smoothly," said Judge Fischer, who is overseeing the subcommittee. "Technology is changing very quickly and some of the attorneys appearing before me may not be adept at understanding technology. It often takes a skilled outsider to talk to clients in the appropriate technology lingo. Judges don't always keep up on the latest technology either, so they would also need outside expertise."

Fischer said the subcommittee is working with the court's Information Technology Committee, especially members Dan Wilt and Rodger Leasure, to include profiles of the special masters on the court's website. The special masters will set their own fees and this information is expected to be on the website, as well.

"Some of the bigger firms are doing a lot of e-discovery in-house, but mid-size and small firms may need the special masters program," said Fischer. "Some people might be concerned that this program will be expensive, but they should go into it with their eyes wide open. The attorneys and their clients will ultimately have to decide if it's best for them. We also think this program will benefit the local bar because it will help lawyers get work."

Schwab said hiring an e-discovery master is cost-effective because it brings a very knowledgeable and skilled person to the e-discovery decision-making process where the cost is shared among the parties.

Fischer said some parties may prefer that a judge review the discovery information. However, she quickly added that each federal judge is typically carrying a volume of more than 200 cases, so asking a judge to resolve issues could delay the case.

"Using a special master is another layer in the process, but if the program is used correctly, the parties could save a lot of money and time," said Fischer. "The decisions must be made based on strategy and budget."

Although the creation of an official list of special masters is new, the issues surrounding e-discovery are anything but new. In fact, several of the federal judges in the Western District have called upon attorneys to serve as special masters in resolving e-discovery disputes in the past.

This marks the first time, however, that an official list and a formal program have been created. The local judges say the Western District's program is one of the first of its kind in the United States, giving them reason to believe that other courts will be looking to the Pittsburgh effort as a model worth emulating.

The problems often associated with e-discovery have been causing difficulties for so long that some of the articles co-authored by Judge Conti and attorney Richard Lettieri date back to 2007.

Lettieri, primary principal at the Lettieri Law Firm, was asked by Conti to recommend individuals to serve as special masters in 2007, 2009, and 2010. He is now on the list to serve as a special master in the new program. His background and training in e-discovery, mediation, and a host of technology subjects make him an ideal candidate to serve as a special master.

"It's a major effort to bring electronic evidence into a federal court in a reasonable way," said Lettieri. "The special master program is the result of a multi-year effort by the judges in the Western District to deal with the issue. I believe that eventually e-discovery will become a core competency for attorneys, but I think the transition period will be 10 to 15 years."

Jay Glunt, a partner at Ogletree, Deakins, Nash, Smoak & Stewart, has also been approved to serve as a special master. He noted that e-discovery problems could include issues pertaining to the collection of information, the preservation of data, paying for the retrieval of the information, and other matters.

"Discovery can be incredibly expensive. In the past, parties might come forward after months or years of discovery and say they have a problem," said Glunt. "Judges realize that e-discovery is expensive and burdensome. Attorneys can end up litigating things that have nothing to do with the merits of the case. These issues can occur in civil, criminal, or bankruptcy cases."

Glunt said other federal courts in the United States may appoint special masters, but the process is usually done on an ad hoc case-by-case basis. The other programs are not as formal as the one established in the Western District.

"Using a special master could save hundreds of thousands of dollars and a lot of time. I believe trial lawyers need to understand technology to a higher degree," added Glunt. "The e-discovery special master program will help the bar by educating attorneys on these matters."

The special master initiative will be under the umbrella of the court's Case Management and ADR Committee.

"The special master program will enhance the effectiveness of case management," said Karen Engro, ADR coordinator/consultant for the court. "ADR and the special master program are pieces of the broader case management process and can lead to increased efficiency in resolving cases." ■