



CHECKLISTS TO SAVE CLIENTS TIME AND MONEY IN A BIG CASE

By Hon. Richard A. Levie (Ret.)

As litigation becomes more expensive and time-consuming, the reality is that only 1 to 2 percent of cases are disposed of with a jury verdict. In these circumstances, the overwhelming financial cost of litigation is in the discovery and pretrial stages; the major, indirect, non-financial cost is the loss of employee time spent assisting counsel in trial preparation.

One way to minimize costs and maximize efficiency is through use of a Special Master. While Special Masters can serve in many roles, including as settlement masters, the most frequent use (and the one considered here) is the adjudicative function of overseeing discovery and resolving discovery and privilege disputes. The ultimate goal of the Special Master is to save time for judicial officer and reduce the litigation costs for the parties. The following are checklists that may aid in determining whether and when to use a Special Master.

- Pre-litigation checklist
 - Is this a “big” case measured by anticipated cost and amount of resources to prepare and try, or by the potential impact of a bad litigation outcome?
 - Is it anticipated that there will be discovery disputes?
 - Will there be e-discovery issues and disputes?
 - Are there likely to be disputes over claims of privilege or work product protection?
 - Is there a need to have immediate or easy access to a decision-maker?
 - Is this a time-sensitive case where there is a need to move discovery along on a short, efficient timeline?
 - Is there a benefit to working with a neutral third party who has the trust and confidence of the parties and/or the presiding judicial officer?

- Selection checklist
 - Do you want a Special Master who is a former judge, practicing attorney or non-lawyer expert in a particular field?
 - Is experience with managing “big” cases important?
 - Does the candidate have a reputation for making decisions and not jumping to conclusions?
 - Can the parties agree on a candidate to recommend to the presiding judicial officer signifying the parties’ confidence and trust in the candidate?
 - Have the parties jointly interviewed the candidates on matters of experience, availability, rates and charges and use of legal assistants/associates and references?
 - Have the parties discussed with the candidate the contents of the Rule 53 appointment order to get the views of the candidate based upon his/her prior experience as a Special Master?
- Timing of selection
 - At the outset of the case
 - Using a Special Master at the beginning of a case can make the Rule 26(f) discovery conference more productive by having a neutral present to make suggestions, foster an environment of cooperation, test and comment on parties’ concerns and serve as a sounding board in terms of possible reactions by the presiding judicial officer to positions taken by the parties.
 - Using a Special Master who has experience with electronic discovery issues may also assist the parties in using a more focused and cost-efficient approach to electronic discovery issues.

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THE RESOLUTION EXPERTS



- o Waiting until problems arise
 - Experienced counsel may be able to work together cooperatively, minimizing the involvement of a Special Master.
 - Is there a risk that aggressive litigation tactics at the outset of a case may create an environment less conducive to cooperation and more likely to generate more disputes?
- Making efficient and cost-effective use of a Special Master
 - o Development of a case management order
 - Need CMO to deal with discovery, privilege and electronically stored information.
 - Have parties meet and confer to discuss and prepare a draft CMO that sets out matters on which the parties agree and then short summaries of each party's position on matters to which there is no agreement.
 - Meet with the Special Master to discuss the proposed CMO(s) and get input from the Special Master.
 - Have the Special Master share the draft CMO(s) with the parties before submission to the presiding judicial officer to avoid surprises to the parties and to afford the parties a chance to object.
 - o Meet in-person or by phone on a weekly basis at the beginning
 - Have the parties meet and confer on a proposed agenda that will be submitted to the Special Master before the conference.
 - Discuss recent discovery, anticipated discovery and any anticipated discovery problem—discussion may eliminate the need for motions practice.
 - o Consider word limits for motions.
 - o Consider agreeing that the Special Master's decisions are final, eliminating appeals to the court with limited exceptions, such as case-defining issues and privilege. Such an agreement is appealing to the court because it eliminates or minimizes the need for judicial intervention.
 - o Have the Special Master issue oral or written preliminary findings on motions.
 - Informs the parties of the Special Master's views and conclusions.
 - Parties are permitted a defined period of time in which to request a Report and Recommendation.

- Use of preliminary findings allows parties to consider carefully whether or not to seek a Report and Recommendation, which then becomes a published decision.

The factors and considerations noted above are suggestions to assist counsel in evaluating the timing and appropriateness of using a Special Master. ■

Hon. Richard A. Levie (Ret.) is a full-time mediator, arbitrator, special master and case evaluator based in the Washington, DC, office of JAMS. Judge Levie has served as special master in many civil cases, including the federal tobacco lawsuit, five antitrust actions including the AT&T/T-Mobile and U.S. Airways/American Airlines merger cases and a multi-billion-dollar *qui tam* False Claims Act case. He is a past president and current board member of ACAM. Judge Levie can be reached at rlevie@jamsadr.com.

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