ELECTRONIC DISCOVERY: WHY THE APPOINTMENT OF SPECIAL MASTERS IN ALL LARGE ELECTRONIC DISCOVERY DISPUTES IS VITAL TO THE PROGRESS OF AMERICAN CIVIL JUSTICE

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Part 1: Introduction

The Federal Rules of Civil Procedure begin simply enough, stating in the opening rule that all following rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[1] Therefore, the main goal of litigation should not be to push away those that cannot easily afford adjudication and, instead, should be to foster equal opportunity inside the court system.[2]

This rule, utopian enough on its face, becomes even more so when faced with terabytes[3] of information found on multiple servers from Orlando, Florida to Moscow, Russia. The speedy and inexpensive determination articulated in Rule 1 is put in direct conflict with the time and expense associated with retrieving and reviewing electronic documents from around the world and preparing for trial.

The current system of discovery, as proposed in the Federal Rules of Civil Procedure,[4] does not go far enough in regards to electronic discovery. They are etched into an outdated system that will not work when, instead of hundreds of boxes of paper, there is the potential for millions of boxes. The system in place does not assure a speedy and inexpensive determination in lawsuits, and therefore the system must be modified.

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[1] FED. R. CIV. P. 1.

[2] Equal opportunity inside of the court room is a well intentioned goal that will never be reached.

[3] A Terabyte of information is equal to 50,000 trees worth of printed information.

[4] The current rules on discovery are found beginning at FED. R. CIV. P. 26 and end at FED. R. CIV. P. 37.

After being hired as an advisor to the Federal Rules Advisory Board, I have been tasked with devising a system to return discovery to a reasonably priced model, ensuring the ability of the relevant facts to be determined while also allowing the adversarial system to continue in place. The solution devised involves the appointing of an Electronic Discovery Master (EDM) to litigation cases when the amount in controversy in a federal civil case reaches a specified threshold.[5] This will aid the proceedings in countless ways, but most importantly, it will provide the court with the ability to once again provide justice in an efficient, effective and economical way. This paper is broken into six parts. Part I provides an introduction to the context and bigger picture in which this system will fit. Part II explains who the stakeholders are in this system, and why they have a strong interest in a successful resolution plan. Part III examines the current discovery system employed in litigation and the problems, inherent in the system, that present far reaching problems for discovery as a whole. Part IV discusses the proposed design system to improve the current electronic discovery pitfalls, discussing both the advantages to the new system, as well as the potential problems with the proposed changes. Part V briefly touches on ethical issues present inside the designed system. Finally, Part VI concludes by providing a precise summary of why the old system is flawed and why the adoption of the proposed system will save time and expenses while providing a more fair adjudication process, and also touches on the support that systems like the one designed have already begun to receive from the electronic discovery community.

Part II: Stakeholders

A design system reaching and amending the current processes of the federal courts will have numerous stakeholders who all have something to gain, or lose, with the proposed system. First, there are parties in many litigation matters who are often subject to power-based resolution, meaning that more wealthy litigants often control the entire process, dictating the court through usage of monetary funds. This new system will put litigants in a much more fair position in this regard. As Justice Murphy declared in *Hickman v. Taylor*,"[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

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[5] The threshold will be determined by different circuits, but when the amount in controversy is at least $1 million, there will be a mandatory $30,000 retainer fee for a qualified EDM. Additionally, the maximum that will be paid for a retainer of an EDM is $150,000, which will only qualify for cases with more than $25 million in controversy.

To that end, either party may compel the other to disgorge whatever facts he has in his possession."[6] While useful in theory, the advancement of technology has made the process much more burdensome to non-wealthy litigants. Therefore, the proposal attempts to equalize the power to some extent, both in a monetary and legal fashion, among litigants in a practical manner.

Additionally, many members of the judiciary and the court system overall have likely been hoping for a resolution such as this for years. Judges, and the federal court system, have enough going on[7] without completely learning a new way of working through discovery. Many judges do not have the time or the patience to fully educate themselves on the many intricacies of e-discovery. The proposed system answers these demands, both allowing the judges to focus on the bigger picture in e-discovery cases, while providing a valuable confidant already well educated in this specialized area of law who can educate the judge on the necessary points in a given controversy, granting relief to the entire federal court system.

Additionally, litigation attorneys from large firms, who have spent years honing their craft, may well take exception to this new system which forces a third party neutral into adversarial proceedings. These attorneys may well see the EDM as an enemy to their cause, standing in their way of 'winning' a case. However, the EDM should not be seen as such. Since the goal of discovery is to make sure both parties have the accurate facts of a case, attorneys should be pleased that an EDM has been tasked with making that process more effective and efficient.

Finally, this system will have an impact on education in law school as well as those who become EDMs. This system design is only being brought about because there has been a huge failure to adequately educate in law schools, and law firms, throughout the country. Many practicing attorneys do not even understand the intricacies of e-discovery, and many judges are unable to determine if parties, or even themselves, are being taken advantage of because they also have not received adequate training. Therefore, this system can, in the end, add a benefit to the educational levels at law schools, ensuring that the basics of electronic discovery are

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[6] Hickman v. Taylor 329 U.S. 495, 507 (1947).

[7] The average District Court Judge has more than 400 new cases filed every year that must be dealt with in an effective and efficient manner. (http://www.uscourts.gov/Common/FAQS.aspx)

covered during Civil Procedure. In the mean time, this design system opens a niche area to those who do understand the full scope of electronic discovery, and are willing to offer that knowledge for a specified retainer.

Part III: The Current E-discovery System

The Federal Rules of Civil Procedure outline the entire scope of discovery inside civil litigation. After initial filings, parties are to meet and confer through a FED. R. CIV. P. 26(f) conference. At that conference, a plan for discovery, both electronic and paper, is to be discussed, formulated and agreed upon by the parties. After this plan is determined, the parties themselves are put in charge of discovery, and interaction by a judicial figure is limited to serious party disputes. Therefore, when problems are, in fact, brought before a judge, they are generally taken as very severe matters. These problems can well be magnified when involving special masters are appointed under FED. R. CIV. P. 53.[8]

Rule 53:

The problem inherent in this system, and exasperated by electronic discovery, is that a special master appointed under FED. R. CIV. P. 53 is ordinarily appointed after problems have already arisen. Often, millions has been spent throughout a litigation only to find that evidence has been hidden, or worse, destroyed. The current E-discovery system, and specifically FED. R. CIV. P. 53, are far too reactive to effectively monitor electronic discovery.

For example, in *Hohider v. United States Parcel Service, Inc.* a special master was appointed to the process only when the plaintiffs in a disabilities class action claimed that three years of electronically stored

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[8] FRCP 53 (a) allows a judge to appoint a special 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 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 pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district (emphasis added).*

information had been spoliated.[9] The defendant in that case argued "it had no duty to preserve relevant ESI[10] until the case was certified, some three years after the lawsuit was filed."[11] The special master, once appointed, found this to be a serious violation of the litigation hold process, and recommended that the court take action.[12]

Hohider undoubtedly shows that the process in place today is gravely flawed. The special master was appointed, at the earliest, three years removed from when the litigation hold likely should have been put into place. This failure to appoint a master cost the plaintiffs relevant evidence that should have been preserved for trial. The judge correctly appointed the special master to oversee the case after plaintiff's alleged violations, but by that time three years of potentially relevant documents relating to an entire class of plaintiffs were lost.

Additionally, in *In re Seroquel Products Liability Litigation*, the court appointed a special master after plaintiffs moved for sanctions relating to defendant's "failure to timely comply with numerous discovery obligations since the inception of this litigation."[13] There, the discovery plan was a failure from the start, as the court stated:

> During the status conference held on November 20, 2006, the Court requested that the parties meet and confer "to submit either agreed proposals to cover document preservation, production protocol and resolution of this issue about formatting of things already produced by December 5, 2006." Doc. No. 84 at 43. However, instead of submitting an agreed proposal for production protocol and formatting, the parties submitted competing proposals (Doc. No. 99 & 100), apparently without a good faith conference within the meaning of Local Rule 3.01(g). Three days before the December 8, 2006 status conference, the parties finally began discussions about electronic documents being produced with searchable load files, bates-stamped TIFF's and various metadata fields. Doc. No. 100 at 1-2 (December 10, 2006). Following the status

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[9] Hohider v. United Parcel Service, Inc., 257 F.R.D. 80 (W.D. Pa., 2009).
[10] Electronically Stored Information is commonly referred to as ESI.
[11] *Id.* at 83.
[12] *Id.*
[13] In re Seroquel Prods. Liab. Litig., 244 F.R.D., 650, 651 (M.D. Fla. 2007).

> conferences before the Court on December 11-which the Court had to adjourn and carry over to December 12, 2006 because the parties had been unable to agree ahead of time-the parties proposed a Joint Motion to adopt two case management orders. Doc. No. 110.[14]

The court, after discussion, ruled that the defendant had been "purposely sluggish"[15] in its production of documents to plaintiff, and thereafter appointed a special master for past and future ESI issues.[16]

Obviously, many of the problems in *Seroquel* that began at the meet and confer session would have been avoided if there had been no delay in the appointment of a special master. This delay cost plaintiffs both time and money, as the "purposely sluggish" nature of defendant greatly extended the time necessary for discovery, therefore raising both attorney fees and litigation expenses.

As both *Seroquel* and *Hohider* demonstrate, the current system in United States federal courts is too reactive, causing the damage to be done, in some cases, years before the matter is brought before any sort of judicial figure. With a court system as well intentioned and developed as the federal system strives to be, it is time for a change. This change must proactively deal with potential ESI matters before they cost filing parties millions of dollars as well as relevant evidence.

Part IV: Proposed System

The proposed system involves the early, proactive involvement of a special master educated in the realm of electronic discovery. Even before the FED. R. CIV. P. 26(f) conference, detailing the proposed plan for discovery, an EDM will be appointed when the amount in controversy, cumulative between claims and counterclaims, reaches the threshold

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[14] *Id.* at 652.
[15] *Id.* at 661.
[16] Order (appointing Special Master), In re Seroquel Prods. Liab. Litig., No. 6:06-md-1769-Orl-22DAB (M.D. Fla. 2007).

amount determined inside each circuit. This proposal, simple in the abstract, would result in immediate benefits in both the efficiency and economy of litigation. The special master's involvement at every phase of the discovery gambit will be discussed, examining both the benefits and compromises the new system will entail. The EDM will be significantly involved prior to and during the FED. R. CIV. P. 26(f) conference, but will remain a constant throughout, a neutral party educated on electronic discovery issues that will be the first contact should issues arise throughout discovery.

Selection of an EDM:

EDMs for the various circuits will be selected by a national panel.[17] This panel will select, on a biyearly basis,[18] a pool of eligible EDMs for each and every circuit. The selection criteria will primarily focus on the electronic discovery acumen of candidates, as well as any mediation abilities the candidate possesses. Following this selection, EDMs will be assigned to electronic discovery cases on a random basis, and further cases will not be received until all EDMs have been assigned an equal number of cases.[19]

Power of the EDM:

Before detailing the proposed system, a brief description of the EDMs authority should be mentioned. Under FED. R. CIV. P. 53 (c) an appointed Master can be granted full adjudicative power in proceedings where appointed, including the issuance of sanctions as punishment for delay or recklessness throughout the proceedings. However, the EDM will not be granted these full adjudicative powers, and will not have the sole power to sanction. The standard appointing order for an EDM will explain that the EDM will provide the presiding judge with information relating to the parties' electronic discovery issues. Additionally, the EDM's words and opinions will be given heavy weight, so when sanctions are brought up by an EDM, the judge will take these opinions under

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[17] The selection panel itself could be another entire system design. Here, it is just assumed that this panel will be neutral in its selection criteria.

[18] This committee will also be in charge of reviewing the system as a whole, and potentially making changes in the system as they see fit.

[19] This will prevent a lot of potential favoritism for certain EDMs by certain judges, as they cannot just choose whomever they want.

consideration.[20] This will make the parties weary of ignoring the EDM, or delaying the reporting of information to the EDM. Further, the EDM will only be involved during the discovery process, and cannot be called as a witness at trial. The EDM will serve as an e-discovery advisor to the presiding judge, but will not have the final say in any procedural matters.

Prior to FED. R. CIV. P. 26(f) Conference:

This will be the initial stage for the appointed EDM. Once the initial pleadings have been made, a judge will determine whether the amount in controversy transcends the threshold amount established inside a circuit. If the amount in controversy is over the threshold value, an EDM will be appointed to the case.[21] It cannot be stressed how important it is to get the EDM involved as this extremely early juncture, as prior to the FED. R. CIV. P. 26(f) conference, each party's entire discovery plan should be outlined. The EDM will reach out to each party's counsel separately, only after each has had sufficient time to determine and analyze their own client's information. In conjunction with the EDM, lead counsel for a party will walk through their intended discovery plan, detailing both proposed requests as well as information regarding their own client's data. The EDM, as a neutral third party, should at this time only listen and obtain objective information, and not make any judgments on whether the proposed plans are reasonable inside the scope of litigation.[22]

After these initial meetings with lead counsel for all interested parties, the EDM will have developed a general understanding of electronic discovery issues for the entire case, and will also know the

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[20] The judge is not merely a rubber stamp in this scenario. Often, since an EDM is more directly involved with the parties, an EDM will develop bias towards or against various parties. Additionally, the judge should be looking at the case in its entirety, and make sanction determinations based on those factors.

[21] An EDM can be initially waived by both parties, as a fixed fee is attached to the appointment. However, if there are any electronic discovery issues brought before the court, the judge will have the discretion, at that time, to appoint an EDM for the remainder of the case. This EDM will be given time to review the issues brought before the court, and give advice to the presiding judge on the important issues.

[22] There will be exceptions allowed, specifically where an EDM sees a problem that must be dealt with immediately so as to avoid later troubles. Examples include a party identifying too many custodians or too wide a scope of documents where an EDM can reasonably believe that not acting will result in large expenses at a later time.

issues that each side will likely raise at the FED. R. CIV. P. 26(f) conference.

At the FED. R. CIV. P. 26(f) Conference:

Prior to this meeting, FED. R. CIV. P. 26(f) requires both sides to create a discovery plan detailing the entire scope of discovery. Often, this meeting is not prepared for in an effective way and FED. R. CIV. P. 26(f) is ignored, much to the later chagrin of those involved. This will rarely be a significant problem in cases involving an EDM, as the EDM will be in charge of facilitating parties into creating a proposed discovery plan in anticipation of this conference.

At the actual FED. R. CIV. P. 26(f) conference, the EDM will play a vital role as a mediator to the parties. Since this conference is not attended by the judge, this conference has historically been a place where 'strong' parties have been able to assert influence over 'weak' parties. In the electronic discovery context, words and phrases such as metadata, sampling, form of production, concept searching, data mapping and inaccessible data will come up routinely. However, many client representatives are still uneducated in electronic discovery terminology, and will be unable to effectively represent parties when lacking this knowledge. The EDM's most important role at the FED. R. CIV. P. 26(f) conference will be to offer counsel for both sides on the implications of what opposing counsel is requesting as well as aiding the parties in determining a workable discovery plan for the remainder of the case.[23]

At this point, the EDM, who understands the extent of information that both parties have in their possession, can call together the parties for a mediation session.[24] At this session, the parties will know what information the other side has, as that should be during the FED. R. CIV. P. 26(f) conference. The EDM should only use this provision if there is

[23] Upon initial review of this, it may be seen as showing bias towards the weaker parties in litigation. However, a workable discovery plan should be the goal of all parties at a 26(f) conference.

[24] This procedure will only be done where the EDM, after consulting the presiding judge, has determined that a settlement is beneficial for both sides. Usually this will be implemented when the evidence clearly indicates one party sits in a vastly superior position, so they will obtain the more favorable settlement terms without the time and money spent on unnecessary document review.

belief that a realistic resolution can be accomplished before going through the entire discovery process, which as mentioned can be quite expensive.[25]

When Issues Arise:

The EDM will stay informed of the important advances in every case he is assigned at a particular time.[26] After the FED. R. CIV. P. 26(f) conference, it is common for there to be disagreements about discovery. These can range from failure to produce documents on time, to the spoliation of evidence, to the inadvertent disclosure of privileged documents. No matter the issue, the EDM will be the first mediator in these issues, and only if an issue is unresolved at this level will a member of the judiciary become involved. However, most issues will be taken care of in an effective way simply through the parties meeting and working through the issues with the EDM on hand.

Advantages of the System:

Reestablish the prevalence of FED. R. CIV. P. 1:

The system created will provide many advantages to the system currently in place. First and foremost, it will reestablish FED. R. CIV. P. 1 as the most crucial rule for litigants to follow at all times in civil litigation. This rule is often lost when litigating parties get into the trench warfare of discovery that too often happens. With this system in place, control of litigation can once again be found without undue costs to any of the presiding parties.

Balance of Power:

When parties enter litigation, there is always the potential problem that one party will hold much of the negotiation power. In discovery involving electronic documents, that balance of power can become even more pronounced. One party may come to the table with a plethora of

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[25] The potential problem with this step is that the parties may well realize who has the power at this point, and act accordingly, not settling for a reasonable amount. However, the EDM should make it clear that time and expenses should be weighed against that power, and reasonable settlement options will more than likely prevail.

[26] The EDM will only be intimately involved prior to the 26(f) conference and at the pretrial Rule 16 conference. In between, the EDM will play a more passive role, only becoming involved when an issue between the parties arises.

electronic discovery knowledge along with seemingly endless supplies of funding. The other party, conversely, may have inadequate experience in the vast ocean of electronic discovery issues, along with limited funds, and can quickly become prey to its potentially never ending expenses. The EDM model attempts to balance that power, and reinforce the overriding goal in discovery, to provide the basic facts of the case to both parties.[27]

Electronic discovery, if not handled carefully, can easily hide or mask important facts involved in cases. A corrupt but experienced electronic discovery specialist may have the ability to make documents almost disappear, or at the very least hide documents long enough to where they will not be found during the immediate litigation. With the appointment of an EDM, this deliberate failure to turn information over can be avoided, as one of the primary goals of the EDM is to guarantee equal access to facts involved in litigation, which is incidentally the primary goal of discovery.[28] An EDM will understand where all documents for both sides have been stored and how to access and retrieve these documents in a reviewable fashion.[29]

Educated Neutral providing Judicial Assistance:

Further, an EDM will be a trained specialist in this field, providing the court system a powerful ally in a field still almost completely devoid of adequate training and supervision. Many judges do not have the time or the patience to learn something as complex and time-consuming as electronic discovery. Therefore, many of them simply ignore the problems, and only deal with them when they are forced to, often after those problems have ballooned out of control. This proposed system will reduce that dilemma, providing the judges with a powerful ally who can both squash minor electronic discovery issues without involving the courts

[27] Hickman at 507.
[28] *Id.*
[29] This is similar to other discovery except that electronic discovery in many cases will multiply the problems. If a document is the "needle in a hay stack" for one side or the other, it can be easily hidden or deleted so the other party will never know it existed. In normal discovery, the documents are often immediately bates labeled and copied for the opposing side. Electronic discovery is too expensive to copy every single document.

as well as provide valuable advice to the judges when judicial interaction becomes necessary.[30]

Potential Consequences in the System:

Neutrality:

Although an EDM will provide a trained specialist to the court system, which in many cases will be helpful, the neutrality of every EDM must be critically analyzed. First, with the hands-on interaction an EDM will have with parties throughout the discovery process, an EDM will develop a more intimate relationship with both parties. This relationship, depending on the attitude of the parties towards a third party sticking the proverbial nose inside a party's business, can become unfavorable in a very quick manner. Counsel will already enter litigation with varying degrees of difficulty in obtaining information from clients who are cautious in their approach. Adding to those problems a court appointed third party may make this situation worse, thereby making key information even harder to efficiently obtain.[31] When interaction with an EDM becomes sour, it can quickly create a negative relationship which the EDM may have a problem putting aside when issues get in front of a federal judge. One of the primary benefits of the current system, which places the judge on the outside looking in on the discovery process, is that this adjudicator will not be influenced one way or the other by a parties' attitude. Impartiality is a core principle engrained into the judicial system and the potential for an EDM to be influenced must be disclosed.

Although failure to maintain perfect neutrality may seem, on its face, a large detriment to the new system, it should be noted that currently, when special masters are approved by their court, that special master's opinion is vital to the judge's decision in most situations anyway.[32] The

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[30] The EDM, as will be discussed shortly, will not be perfectly neutral, but that is nothing new to the appointment of Special Masters.

[31] It is common for clients to tell their counsel that they have their information under control, only to later find out that custodians and important information has not been disclosed to the opposition.

[32] Both *Seroquel* and *Hohider* provide examples of members of the Judiciary taking favorable approaches to those approaches used by a Special Master. This is done either because the judge truly agrees with the assessment by the special master or may in fact be done because the judge is not fully educated on electronic discovery in general or the

appointment, therefore, should not create any more prejudice against certain parties than were natural in the process before. The appointment of a special master by a judge signifies both: 1. that the judge believes the master to be well equipped to handle the problems associated with the appointment and 2. the trust the judge has that the special master will ultimately attempt to find an acceptable solution for the court.

Education/Training

With the appointment of a mandatory EDM, many attorneys who have spent the time to become well educated and knowledgeable about electronic discovery issues may well feel that this required EDM has destroyed any advantages they obtained through rigorous training. An EDM will guide the entire electronic discovery process, making the playing field much more balanced. This is done to make litigation fairer, but at some point the adversarial system originally endorsed by the federal courts must have room to breathe. Without the ability to use special skills and experience obtained through rigorous education, there may be no point for anyone to learn even the basics of electronic discovery law.

However, this argument is not as frightful as it seems on its face. Education and training, when the playing field is otherwise level, should actually help those who understand electronic discovery issues more. For example, after an EDM mandates disclosure of certain information, those who understand the best ways to efficiently and effectively cull that information will have the most time to prepare for the later stages of litigation. Additionally, time will not have to be spent educating unknowledgeable members of the judiciary or opposing counsel. Instead, clients' funding can be spent on getting vital information from the opposing side to better understand the overriding facts of a case, to make settlement negotiations, and prepare for trial if it makes it to that stage.[33] Finally, educated attorneys may in fact find it helpful that an appointed expert is in the room whose sole job is to show unknowledgeable parties the importance of producing electronic information in a readily usable format, with correct data attached.

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specific issues present inside a case, making it almost a necessity to rely on the special master (which can create problems are have been briefly discussed).

[33] As of 2002, only 1.8% of all federal cases actually go to trial. Patricia L. Refo, *The Vanishing Trial*, 30 Litigation Online, 2 (2004).

Part V: Ethical Considerations

Although ethical considerations have been considered throughout, a brief additional note should be made here. If parties were as honest as they should be, an EDM system would be unnecessary, as all facts would accurately come to light in the courts of discovery. Parties would not try and hide important documents, and the expenses would be controlled by each party. However, this is clearly not the case, as the origination of electronic discovery cases stemmed from documents being deliberately destroyed or lost.

Further, the litigation system is grounded in the belief of adversarial combat. Therefore, attorneys do not always believe making information hard to obtain is illegal or ethically wrong in any way. However, numerous electronic discovery groups, including The Sedona Conference, have stated that cooperation is vital to the effective usage of electronic discovery.[34] When dealing with millions of pages of documents, cooperation becomes more vital for both sides, as spoliation can only lead to higher expenses for both parties.[35]

Part VI: Conclusion

As can easily be identified, the proposed design system successfully answers many of the questions raised by the current unsatisfactory structure. The time, money, and potential evidence lost can greatly be reduced. More importantly, perhaps, the control factor that many companies possess, with seemingly bottomless pockets, would be greatly diminished, as a more fair plan for discovery would be put into place involving an expert in the field.

Support for a system design of this nature has been recently found across the country. For example, the Honorable Shira A. Scheindlin & Jonathon M. Redgrave have published work endorsing the necessity of appointing special masters in more cases where ESI is a large hurdle to

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[34] *See* The Sedona Conference Cooperation Proclamation, http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf (last visited May 7, 2011).

[35] One final note that should be made is that attorneys may want litigation prices to stay high so they can continue to bill at obscene rates. However, that issue is far outside the scope of this paper.

fair litigation.[36] Additionally, the Western District of Pennsylvania has recently identified and registered a number of lawyers to serve as special electronic discovery masters.[37] When multiple stakeholders dealing in the field identify this as a problem, the next logical step is to identify a solution addressing the problems brought to light by stakeholders. The EDM system answers many of the questions presented and most importantly brings litigation back under control of FED. R. CIV. P. 1.

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[36] Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The intersection of two recent revisions to The Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347 (2008).

[37] Nora B. Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, THE FEDERAL LAWYER, February 2011, at 36.