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Using Special Masters in State Court — Implementing Rule 46

Presented By

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DRAFT

THE NEW SPECIAL MASTER RULE—UNIFORM SUPERIOR COURT RULE 46:

Floatees for the Courts in the Perfect Storm

By Cary Ichter

Georgia courts, like those in so many other jurisdictions, are facing a perfect storm: Resources are dwindling; Budgets are drying up; Dockets are burgeoning; And Litigation is becoming increasingly complex and demanding. As most participants in the Georgia judicial system are painfully aware, the courts, judges, judicial assistants, court administrators and everyone else who works with the court system is going to have to learn to do more with less. Georgia's court budget was cut by \$12 million in FY09 (more than 8%) and by \$7 million (less than 8%) in FY10.¹ Pay has been frozen; benefits have been cut; hiring has been stopped; furloughs have been commenced; and the move towards an electronic case management system with electronic filing and the centralized processing of cases has been put on hold.

At the same time that available resources are dwindling, the demands upon the judiciary are escalating. Between 1997 and 2007, the total number of cases filed across all Georgia courts increased from 1,628,530 cases to 2,463,192 cases, or 834,662 more filings in 2007 than in 1997, an increase of 51.25%. In 1997, the number of cases per 100,000 total population filed in state court was 7,812; in 2007 the number of cases per 100,00 total population filed in state court was 9,933, an

¹ National Center for State Courts,
<http://www.ncsconline.org/wc/budget/activities/georgia.asp>

increase of 27.15%. For each of the types of courts tracked, there were double digit percentage increases; probate courts saw a 1997-2007 increase in filings of 103.72%.²

To multiply and magnify the difficulties the courts face, with fewer resources and more demands, the courts must now also deal with the seemingly inscrutable mysteries of electronic discovery. In short, the court's are navigating through a perfect storm—or at least a nasty downpour.

The New Uniform Superior Court Rule 46

Recognizing the strain this confluence of events will place on the effective workings of the courts, the Georgia Supreme Court recently approved Uniform Superior Court Rule 46 (USCR 46), clarifying when, why and how trial courts can appoint special masters to assist in the supervision of the litigation process.¹ The new rule, which parrots to a significant extent the language of Rule 53 of the Federal Rules of Civil Procedure (FRCP), implicitly recognizes that “particularly in state court litigation...there are opportunities and needs for the litigation benefits masters can provide.”²

USCR 46 details a litany of situations in which the courts are empowered to appoint a special master, upon motion of any party or upon the court's own motion. The regime established by USCR 46 allows the courts to refer matters to masters for pre-trial, trial, and post-trial activities, assisting in everything from investigating and reporting on matters identified by the court,³ to supervising implementation of court orders⁴ to overseeing depositions taken outside of the court's jurisdiction.⁵

² ROSS—add foot note.

Under the Rule, the order appointing a special master, known as a referral order, is to describe (i) the master's duties and limits on his or her authority, (ii) the circumstances, if any, under which the master may communicate with the parties on an ex parte³ basis, (iii) the materials the master is to maintain and file with the court reflecting the master's activities, (iv) time limits and procedures for reviewing the master's orders, findings, recommendations and reports, and (v) the basis terms and procedures for fixing the master's compensation.

Through the use of special masters, the courts can delegate resource consuming aspects of case oversight and management. In so doing, the courts can and do promote the efficient, effective, thoughtful and prompt resolution of issues and cases. The enhancement of the speed and quality of justice realized by the use of special masters is not restricted only to the particular case to which the master is appointed; by freeing the courts from the daily supervision of cases that are metastasizing motions machines, judges are better able to give due consideration to other, less controversial and less resource-consuming matters on their dockets.

The use and effectiveness of special masters in the federal system is well-documented.⁶ Masters serve vital pre- and post-trial functions in navigating complex litigation, allowing the parties to more fully present and articulate their positions and allowing the courts to make reasoned adjudications. Put simply, "special masters

³ The issue of ex parte communications involves not only communications between the parties and the special master but also the special master and the court. The referral order ought to address when that is permissible.

serve *critically important* functions in our civil justice system.”⁷ A number of cases illustrate the effectiveness of masters.

In *United States v. Conversation Chem. Co.*, for example, the court appointed a master with expertise in land use and environmental law to recommend remedial measures after the court determined liability.⁸ By appointing the master, the court avoided a long costly round of hearings to fashion a remedy. The master’s specialized knowledge of the issues underlying the case allowed for a more appropriate remedy in a shorter amount of time.

Likewise, in *Berne Corp. v. Gov’t of the Virgin Islands*, following nearly a decade of intricate litigation, the court appointed a special master to monitor governmental compliance with a settlement agreement that reformed the territorial real property tax assessment system.⁹ The use of the master allowed the *Berne* court to ensure compliance without having to act as an enforcement gatekeeper or to entertain further enforcement litigation. Both *Conversation Chemical* and *Berne* illustrate but a slice of the benefits that masters bring to complex litigation, acting as proxies for the court to help the parties navigate law suits and reach fair outcomes.

Currently, in Georgia, special masters assist the courts in handling everything from complex commercial cases and mass tort cases, and there are many situations in which the appointment of a special master is legislatively mandated. For example, Chapter 2 of Title 22 provides for the appointment of special masters to oversee and adjudicate condemnation actions. The Legislature approved the use of special masters in such cases , “intend[ing] to provide a simpler and more effective method

¹⁰of condemnation....”¹¹ Judge Alimo described the statute as representing an “attempt[] at the outset to achieve a more perfect conciliation between the parties by providing for the use of experienced, competent attorneys as special masters.”¹²

Similarly, O.C.G.A. §23-3-63 mandates the appointment of a special master in actions for removing any cloud upon title. More recently, O.C.G.A. §23-3-43 granted the complainant the option of having the court appoint a special master to hear quia timet action, that is, actions seeking the cancellation of “any forged or other iniquitous deed....”¹³

Until the passage of USCR 43, however, trial courts were flying blind when it came to appointing masters to assist them in dealing with large, resource-consuming matters. The new Rule confirms the existence of the courts’ powers to make such appointments and provides the courts with a clearly defined process and framework for using special masters.

The Special Use of Special Masters in E-Discovery

One area where the use of special masters is particularly appropriate is in exploding area of electronic discovery that has become a standard feature of complex commercial litigation. We have just rounded the corner in the computer age, and already the ubiquity of electronic data is breath-taking. Today, over 99 percent of all information is created and stored electronically; nearly 10 billion e-mails are sent every year; fewer than one-third of all e-mails are ever printed; electronic documents come in a wide variety of file formats; and hard drives in stand-alone PCs account for

less than 55 percent of the total data stored each year.⁴ In short, the volume of Electronically Stored Information (ESI) is massive beyond imagination, and it is often difficult to locate, difficult to access, and expensive to produce.

The nature of electronically stored information (ESI) necessitates a new approach to discovery: rather than shredding, documents are destroyed in seconds with mere keystrokes; instead of letters being transmitted to a single recipient, correspondence are instantaneous transmitted worldwide to unlimited addressees by the push of a button.

As technology develops at breakneck pace, the courts can scarcely keep abreast of each new development while struggling to manage their burgeoning dockets. Judge Shira Scheindlin of the United States District Court for the Southern District of New York explained, “general judges are not and *cannot be* experts on electronic hardware and software that enable people to create, store, retrieve, and search ESI.”¹⁴ Experienced special masters Mark Fellows and Richard Haydock have conclude that “with the emergence of ever more complex civil litigation and ever more congested dockets, the need for discovery masters has simply become accepted.”¹⁵

To be sure, disputes over matters such as the programming routines of computer software, or the ownership of a unique internet address, or the mapping of a network that exists on a global scale, or the spoliation of electronic data present

⁴ Applied Discovery, *Developing an Effective Electronic Discovery Response Plan*, <http://www.ncsconline.org/wc/budget/activities/georgia.asp>

unfamiliar terrain and difficult questions to even the wisest jurist. Technological questions increasingly plague discovery, where documents are often paperless and communication is entirely digital.

While the Georgia Civil Practice Act, unlike the Federal Rules of Civil Procedure, has not yet been amended to address the special challenges of E-discovery, the absence of rules does not translate into the absence of issues; indeed, in Georgia there may be more issues and those issues may be more complicated and more confounding because of the absence of legislative guidance.

Federal Courts use special masters to handle e-discovery issues with some regularity. In *Hobider v. United Parcel Service, Inc.*, for example, the court appointed a special master to deal with allegations that the defendant destroyed ESI.¹⁶ The court gave the special master very specific instructions to investigate allegations of UPS' non-compliance with ESI preservation requirements.¹⁷ The special master researched the allegations and relevant legal theories in depth and, after ninety days, prepared a comprehensive report to the court. The court used its referral order to effectively target the special master's attentions to the specific areas that concerned the court and to ensure that each was handled appropriately, in accordance with the requirements of the FRCP.

Research by Judge Shira Scheindlin and Jonathan Redgrave found that special masters generally play four roles in e-discovery: (i) facilitating the electronic discovery process; (ii) monitoring discovery compliance related to ESI; (iii) adjudicating legal disputes related to ESI; and (iv) adjudicating technical disputes and assisting with

compliance on technical matters.¹⁸ Some masters overseeing e-discovery may be selected for their expertise in relevant case law and the development of e-discovery trends, while others are selected because of technical expertise to help companies face daunting record retention tasks.¹⁹ Regardless of specialty, these masters work to fill in the gaps where traditional court function falls short.

With a limited amount of time to handle a dearth of cases, Georgia courts can scarcely afford the time that E-discovery disputes are sure to demand. Instead of effectuating fair dispositions of cases on the merits, courts will struggle to deal with mindless bickering over access to software algorithms; instead of resolving pressing motions and moving toward the merits of disputes, courts will entertain rounds of objections regarding the mere *right* to discover ESI. With the new USCR 43, it need not be so.

The Georgia special master rule specifically provides that the court may appoint a master “(C) to provide guidance, advice and information to the court on complex or specialized subjects, including, but not limited to *technology issues related to the discovery process.*”²⁰ Where the Georgia Civil Practice Act lags behind the Federal Rules, the Uniform Superior Court Rules do not, and the inclusion of subsection (C) provides an invaluable resource to Georgia courts going forward.

Special masters have the ability to give e-discovery disputes the time, attention, and expertise they require, particularly in the absence of a statutory regime. Special masters, as they do in numerous other parts of litigation, can focus on creating fair and customized solutions e-discovery issues that take into account the challenges of

technological innovation as well as the unique needs of the parties in the case. Special masters have the ability to dedicate considerable time to problem-solving and e-discovery disputes resolution, taking into the development of state and federal case law, without the burdens of a unwieldy docket of cases clamoring for attention.

Empirical data shows that both judges and attorneys are generally pleased with the results from special master proceeding.²¹ Willging's study concluded that "all of the judges appointing...masters or experts, almost all of the special masters or experts they appointed, and almost all of the attorneys though that, on the whole, the benefits of the appointments outweighed any drawbacks."²² One judge even lamented that he "wished he had appointed a discovery master earlier."²³

This pattern of successes will undoubtedly continue in the e-discovery realm, where clients, attorneys, and judges can expect special masters to approach ESI disputes with care and expertise, giving each appropriate focus. Anything less risks upsetting the expectation that the process will proceed fairly and without purposeful disruption.

Various critical analyses support the notion that special masters remain an underused resource in ESI discovery. Lynn Jokela and David F. Herr argue for the use of special masters in resolving technical disputes, saying "a special master who possesses the right qualifications is in a better position to resolve the dispute as compared to a judge with little or no technical expertise."²⁴ Such special masters can "provide substantial assistance to the court where electronic data discovery raises difficult questions related to the quantity or format of information[.]"²⁵ This is

especially important as the costs of discovery continue to rise and parties dispute responsibility for various costs of maintaining and producing ESI. Disputes as to who should bear costs in ESI discovery are particularly well suited for a special master.²⁶

Objections and Responses

Those who are critical of the use of special master typically raise the issue of cost first. There is no doubt that the use of a special master introduces a layer of cost to any litigation in which a special master is appointed. An examination of cost without the consideration of value, however, offers a distorted picture. A study conducted by the Federal Judicial Center (“ FJC Study”) found that, while some respondents believed that the appointment of special masters in their cases raised the cost of the litigation, fully half of the respondents believed that the appointment of a special master reduced the cost of the litigation by resolving issues more expeditiously and through agreements, assisting in the settlement of cases, and reducing the likelihood of appeal.²⁷

Another objection to appointment of special masters is that appeals of the master’s decisions to the trial court would slow down the process. Research has not borne out this objection either. The FJC Study found that all judges and almost all attorneys involved in litigation in which masters had been appointed agreed that the masters “effectively met the purposes and goals of the appointment, and judges “described the level of effectiveness as ‘extremely’ or ‘very’ effective.”²⁸

In short, the experience of those who have used special masters in the types of cases for which Rule 46 was written has been that special masters expedite the litigation process, assist the parties in eliminating and narrowing issues, reduce the likelihood of trial and appeal, and, often, reduce the cost of litigation and the delay that appears to otherwise be inherent in the system.

CONCLUSION

The increased use of special masters in many jurisdictions points to their utility to the judicial process, and the passage of USCR 43 highlights the recognition of an emerging need for the more regular use of special masters in the State of Georgia. In a world where courts are increasingly strained by their workload and litigation simultaneously becomes increasingly complex, special masters provide an outlet. Nowhere is this more true than in discovery.

Georgia courts stand at a crossroads. The courts have, through the passage of USCR 43, recognized and embraced the usefulness of special masters, even specifically highlighting their use in technical electronic discovery disputes. At the same time, Georgia lacks a comprehensive set of rules to govern e-discovery, breeding uncertainty among lawyers and judges. The courts, drowning in flooded dockets, stripped of resources with which to stay afloat, faced with a future waves of new technologies and the complexities that attend them, can stay afloat with the use of special masters—floatees for the perfect storm.

¹ GA. R. SUP. CT. 46.

² Lynn Jokela and David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31:3 WM. MITCHELL L. REV. 1299 (2005).

³ GA. R. SUP. CT. 46(a)(1)(E).

⁴ GA. R. SUP. CT. 46(a)(1)(D).

⁵ GA. R. SUP. CT. 46(a)(1)(G).

⁶ See Thomas E. Willging et al., *Special Masters' Incidence and Activity*, FED. JUD. CENTER 1 (2000).

⁷ Mark A. Fellows and Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31:3 WM. MITCHELL L. REV. 1270 (2005) (emphasis added).

⁸ United States v. Conversation Chem. Co., 106 F.R.D. 210 (W.D. Mo. 1984).

⁹ Berne Corp. v. Gov't of the Virgin Islands, - F.3d -, No. 08-3897, 2009 WL 1667687 (3d Cir. June 16, 2009).

¹¹ O.C.C.A. §22-2-101.

¹² Bronw V. Georgia Power Co., 371 F. Supp. 543, 547 (S.D. Ga. 1973).

¹³ Other statutes that permit or mandate the appointment of special masters include O.C.G.A. §28-5-100 (permits appointment of a special master by the Claims Advisory Board to make recommendations as to compensation claims), §36-67A-5 (providing for appointment of special masters in certain rezoning cases) and §45-19-36 (appointment by Governor of a special master in disputes involving allegations of unlawful practices).

¹⁴ Shira S. Scheindlin and Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to The Federal Rules of Civil Procedure*, 30:2 CARDOZO L. REV. 387 (2008) (emphasis added).

¹⁵ Fellows and Haydock, *supra* note 3 at 1277.

¹⁶ Hohider v. United Parcel Service, Inc., 257 F.R.D. 80 (W.D. Pa. 2009).

¹⁷ See No. 04-363 (W.D. Pa. Dec. 19, 2007) (order appointing Special Master).

¹⁸ Scheindlin and Redgrave, *supra* note 10 at 374.

¹⁹ See *Id.*

²⁰ GA. R. SUP. CT. 46(a)(1)(C) (emphasis added).

²¹ See Willging et al., *supra* note 2.

²² *Id.* at 61.

²³ *Id.* at 64.

²⁴ Jokela and Herr, *supra* note 1 at 1314.

²⁵ Richard H. Agins, *An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery*, 23 PACE L. REV. 689, 694 (2003)

²⁶ *Id.* at 723.

²⁷ Thomsas E. Willging, et al., *Special Masters' incidence and Activity*, FED. JUD. CENTER 1, 58 (2000).

²⁸ *Id.*