E-Discovery Special Master (EDSM) Program:

In 2011, the U.S. District Court for the Western District of Pennsylvania became the first federal court in the nation to create an E-Discovery Special Master (EDSM) Program. After three years of implementation, the judges share the experience of lawyers, judges, and EDSMs who have participated in the program, the benefits received, "lessons learned," and their expectations for the program going forward, for consideration by lawyers and judges from other jurisdictions.

By Hon. Joy Flowers Conti, Hon. Nora Barry Fischer, and Richard N. Lettieri

Progress Update

In May 2011, the U.S. District Court for the Western District of Pennsylvania established the first E-Discovery Special Masters (EDSM)[1] program in the nation to aid the court and the local bar in resolving issues in cases involving electronically stored information (ESI). This program was created to provide technical expertise to the local federal court and bar in light of evolving ESI case law, constant changes in technology, and the belief that ESI is a continually evolving area that requires the application of specialized knowledge.

Brief History

The program involved the selection, training, and maintenance of a panel of qualified EDSMs that the parties and the court could use to address ESI issues that may arise during the course of litigation. The court determined that this resource was necessary based upon the dramatic increase in electronic evidence, including social media, and the slow but steady increase in ESI issues arising in litigation. Hence, the court appointed a subcommittee to delve into these issues, and the EDSM program was developed. The February 2011 issue of *The Federal Lawyer* highlighted the creation of this program in "Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court."[2]

The selection of EDSMs was based upon their (1) knowledge of e-discovery, (2) experience with e-discovery, (3) relevant litigation experience, and (4) training and experience in mediation. After completing a detailed application process, the candidates were evaluated, and those who qualified were required to complete a court-approved training session prior to being admitted to the program. After an individual who became a panel member was selected to serve as an EDSM in a particular case, the court considered various factors and used an order that clearly defined the duties and responsibilities of the EDSM in that case.[3]

Since the inception of the program, the subcommittee of the court, comprising judges, court staff, and local practitioners,[4] has monitored and directed its implementation. As part of this process, the subcommittee undertook a number of specific activities in 2013 to assess (1) the effectiveness of the program, (2) suggested improvements in its implementation, and (3) "lessons learned," for our use and the benefit of others.

This article describes each of these activities, shares the data or anecdotal information resulting from each, and attempts to assess the progress made toward the objectives listed above. More detailed information concerning each activity is provided in three brief appendixes at the end of the article, so that readers can review the data from which the authors' conclusions are drawn.

While the EDSM program has been a helpful tool to the court and many litigants, the data and observations illustrate its "work in progress" nature. Final conclusions regarding the ultimate utility and value of the EDSM program may still be several years off.

Hard Data from Reports

In 2009, the court modified its local rules to reflect changes in the Federal Rules of Civil Procedure (FRCP). One of those changes added section 11 to the form of the Rule 26(f) report to be filed with the court.[5] That section requires participants to discuss key ESI issues at the Rule 26(f) "Meet and Confer" and report the progress of their discussions to the court.

The subcommittee believed that the Rule 26(f) reports that had been filed with the court might contain valuable information which could be studied to determine how often ESI issues arise in cases in this district. After assessing the capabilities and resources available, the subcommittee agreed on a modest effort to review two sets of section 11, Rule 26(f) report data as submitted. Data from 54 reports from March 2010 were compared with data from 68 reports from March 2012.[6] While by no means scientific or statistically valid, the subcommittee believed that this method of reviewing the comparative data provided a snapshot

to consider possible changes that might have occurred regarding ESI in litigation filed in the court over the two-year time period. The key questions that the subcommittee expected the data to address were:

1. Had there been any noticeable changes relative to ESI recorded in these reports over the two-year time period?
2. If so, how might any changes be interpreted?

Interpreting the Data

Appendix A at the end of this article highlights the data from the analysis of the reports. The response to Question 2 provides the answer to one of the subcommittee's fundamental questions. In answer to the question: "Of the lawyers using the correct form that included the Section 11 related to ESI, is either party seeking ESI?" there was a slightly greater than **24 percent increase** (from 50 percent in 2010 to 74.07 percent in 2012) in the number of parties who were seeking ESI during this two-year period.

It is difficult to draw conclusions based upon so little data, but the opinions of the members of the subcommittee were mixed regarding the relatively small increase. It appeared to be inconsistent with the active educational role assumed by members of the subcommittee and the judges. Their active participation in the Federal Bar Association (FBA)-sponsored "E-Discovery Series" of quarterly ESI educational sessions initiated in 2007, as well as other ESI education sponsored by the local and state bars, had led them to believe the increase in ESI awareness among litigators would be higher. The expectation of several of the subcommittee members was that more than 74 percent of the litigators in federal court would be seeking ESI in their cases.

While it was important to interpret correctly the significance of the 24 percent increase in cases in which the parties indicated that ESI was an issue, the subcommittee was also interested to learn whether there was a corresponding increase in EDSM appointments, and if so, whether there was a correlation between the two increases. It reported that since the program became operational in May 2011, 13 EDSMs had been appointed. While there had been a gradual year-to-year increase in appointments over this period, the total number was small. Since usage is one reasonable factor in assessing the value of the program, the subcommittee wondered why the parties did not request, or the court appoint, EDSMs more often. Was it reasonable to assume that a 24 percent increase in awareness might result in a corresponding increase in the number of appointments?

Assuming that the number of Rule 26(f) Reports the court reviewed for 2010 and 2012 (54 and 68 respectively) were typical, the number of annual reports submitted would range from approximately 600 to 800,[7] making the small number of EDSM appointments statistically insignificant. Using the limited data available, the subcommittee concluded that based upon usage alone, the EDSM program had minimal impact in most cases, but in cases where an EDSM was appointed, the court and parties found significant benefits.

Since the inception of the program, the appointment of an EDSM has been considered the exception, not the rule. Clearly, all cases do not lend themselves to the appointment of an EDSM. Resolution of ESI issues by agreement of the parties is not only preferred but encouraged. Only after it is clear that resolution is not possible is the EDSM option to be considered. Judicial discretion is also important. While usage is important to measure, and will provide a baseline for continued measurement over time, other factors like the benefits received from the appointment of an EDSM by the parties and the court are viewed as more important indicators of effectiveness. So much for the hard data. Hence, the subcommittee questioned: was there any other evidence upon which a reasonable evaluation might be based?

Progress and Perspectives

On Sept. 12, 2013, members of the subcommittee participated in an FBA-sponsored, "E-Discovery Series" luncheon event entitled, "E-Discovery Special Master (EDSM) Program: Progress and Perspectives." The panel was organized with the goal of sharing first-hand experiences from attorneys and judges who had participated in cases involving the appointment of an EDSM.

Appendix B lists the participants, the questions, and a summary of the responses provided. To a large extent, the two lawyers who participated in the session felt that the EDSM appointment in their individual cases was effective, saved money for their clients, and reduced the time required to resolve ESI issues. These views were further confirmed in confidential surveys received by the court from EDSMs who had been appointed.

From a judicial perspective, the EDSM appointments were also deemed highly successful. In cases where counsel had experience with ESI, it was reported that the parties appreciated the knowledge and experience of the EDSM, which led to more focused discussions, less contention, and faster resolution of ESI issues. It was also recounted that less experienced counsel welcomed a knowledgeable EDSM who, in some instances, served as an e-mediator tasked with resolving issues in a neutral environment of cooperation and trust. The judges commented that sometimes these e-discovery counsel are being hired as co-counsel or to provide discrete advice to one party, and that litigants often forgo e-discovery based upon the small size of the case. A recurring theme of participants at this session was the realization that the EDSM, serving as an e-mediator early in the discovery process, can be very effective.

As a result of this session, an effort to incorporate e-mediation into the well-established alternative dispute resolution program in the court is now being evaluated. A pilot program utilizing EDSMs as e-mediators is expected to be launched in 2014.

This input was pivotal in confirming the value to the parties and the court of the EDSM program. Although it remains unclear how widespread the usage of EDSMs might become, experienced litigators have reported that the appointment of an EDSM in an appropriate case is a more efficient and cost-effective way to resolve e-discovery disputes than litigating ESI issues using traditional motions practice.

EDSM "Town Hall" Meeting

Additional anecdotal feedback regarding the EDSM program was provided on Oct. 12, 2013, when the 49 members of the EDSM panel were invited to hear a report from the judges[8] regarding the status of the program. Twenty-one EDSMs were able to attend. Specifically, the judges' report consisted of factual data, including a summary of the number of appointments, the kinds of cases where appointments were made; and the judges who had made the appointments. The court also invited three EDSMs to provide specific information about their respective experiences and each shared the nature of the ESI issues in the case, the kind of services provided (e-mediation or a report and recommendation), and the time involved in the appointment. There was also time allotted for the EDSMs to provide feedback to the judges in attendance regarding the program.

Of significance was the stated preference of the EDSMs, who

participated in the panel discussion as part of the session, regarding the superior results that they achieved in resolving ESI issues through e-mediation. They agreed that since resolution of ESI technical issues required some level of cooperation, mediating agreement between the parties with the help of a technically astute and experienced EDSM generally led to a technically sound and mutually accepted resolution. In several instances, technical problems that sometimes lend themselves to objective resolution were more easily achieved with a higher satisfaction level because the parties were encouraged to seek mutually beneficial alternatives fostered by the mediation process.

The EDSMs who had been appointed also shared the advantages of the program that they had experienced, or had been shared with them by lawyers who had participated in the cases. First, they observed that the appointment of an EDSM was a cost-effective means of resolving ESI disputes. Far from increasing costs, overall costs were reduced by a faster resolution of the issue. Second, the EDSM was able to resolve issues more informally through the exchange of e-mails or conference calls rather than formal motions to the court, at a savings of time and money. Third, because the EDSMs were distanced from the merits of the case, counsel for both sides were less concerned about sharing documents with the EDSM, helping speed up the process.

Lessons Learned

2013 was an ESI learning year for the lawyers, judges, and EDSMs of the court. The EDSM program has provided the judges and lawyers with a valuable resource to help resolve disputed ESI issues early in the litigation, with greater speed and reduced cost. The experiences of 2013, outlined in this article, allow us to reach these following preliminary conclusions:

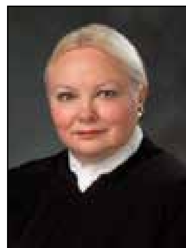
- In appropriate cases,[9] appointment of an EDSM saves the court and parties time and speeds up the proceedings by not permitting the case to get "bogged down" in e-discovery issues.
- Overall, the parties indicated that the appointment of EDSMs was cost-effective and reduced the length of the discovery process.
- E-mediation is a successful and preferred approach to resolving ESI issues due to the technical and objective nature of ESI and the fact that cooperation of the parties is paramount to the discovery process.
- In the face of continued reduction of financial resources, and the continued growth of ESI-related issues, judicial appointments of EDSMs provide a cost-effective means of leveraging judicial resources, speeding the judicial process, and reducing costs in cases with moderate to heavy ESI content.

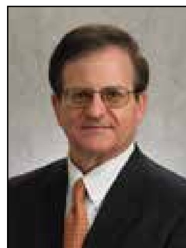
Conclusion

The court and its subcommittee are not attempting to increase the appointment of EDSMs *per se.* Instead, the court is attempting to address the impact that technology is having on the litigation process in an effective manner that benefits the litigants, the court, and the public. Thus far, the program has shown promise as a useful resource in this effort.

The subcommittee will continue its efforts to provide ESI training to the legal community in Western Pennsylvania (like recent programs on the significance of metadata and a comparison of the advantages and disadvantages of predictive coding), as well as to monitor the effectiveness of the EDSM program in the future. Of special interest will be the potential use of an EDSM as an e-mediator.

Mindful of the proposed revisions to the FRCP now being contemplated and the need to achieve enhanced proportionality (i.e., the reduction of the cost and scope of ESI, consistent with the value of the case), as well as the budgetary constraints imposed on the court, the court will continue its efforts to innovate, assess, and report how its EDSM program can achieve these purposes for its benefit and for possible adoption by other federal courts facing the same challenges. ⊙





Hon. Joy Flowers Conti is chief judge for the U.S. District Court for the Western District of Pennsylvania. She is a past president of the Allegheny County Bar Association, a former law professor at Duquesne University School of Law, and a frequent speaker on e-discovery. Hon. Nora Barry Fischer is a judge on the U.S. District Court for the Western District of Pennsylvania. She is a graduate of Notre Dame Law School, Fellow of the American College of Trial Lawyers, and past president of the Academy of Trial Lawyers of Allegheny County. Richard N. Lettieri, is a technologist and a lawyer who limits his practice to electronic evidence and e-discovery. He serves as co-counsel in litigation, and is an E-Discovery Special Master. A frequent writer and speaker on ESI, read his complete bio at www.lettierilaw.com.

Endnotes

[1]*See* www.pawd.uscourts.gov.

[2]For a complete description of the program read: Hon. Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court,* The Federal Lawyer (February 2011).

[3]Two examples of court orders appointing EDSMs are *UPMC, et al v. Highmark Inc.,* et al (ECF No. 77, civil No. 12-cv-692) and *Seymour et al v. PPG Industries, Inc.* (Civil No. 09-cv-1707).

[4]Members of the subcommittee include David R. Cohen, Melissa Evans, Jay Glunt, Steve Silverman, Jennifer Mason, Susan Ardisson, Dave Oberdick, Carole Katz, Colleen Willison, Brian Kravetz, Hon. Joy Flowers Conti, Hon. Nora Barry Fischer, and Richard N. Lettieri.

[5]*See* www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

[6]*See* Appendix A.

[7]The total number of cases filed in the Western District of Pennsylvania is significantly higher than this number. However, Rule 26(f) reports filed with the court are not required in all types of proceedings. These exceptions are listed in Local Rule 16.1 A.6 and can be found at www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

[8]Appendix C provides a brief summary of this report. Special thanks to Brian Kravetz, senior law clerk to the Hon. Nora Barry Fischer, for his help in summarizing this report and other data used in this article. www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx

[9]*See* Appendix C.

Appendix A : Rule 26 (F) Report Study: Comparison of Responses (March 2010—March 2012)

1. Did the parties use the correct Rule 26(f) report (containing the full ESI question 11)?

	Number of Reports	*Correct Form*	*Percentage*	*Incorrect Form*	*Percentage*
2010	54	30	55.56%	24	44.44%
2012	68	54	79.41%	14	20.59%

2. Of the parties using the correct form, is either party seeking ESI in this case?

	Number of Reports	*Correct Form*	*Percentage*
2010	30	15	50.00%
2012	54	40	74.07%

3. Of the parties using the incorrect form, is either party seeking ESI in this case?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	24	7	17	29.17%	70.83%
2012	14	2	8	14.29%	57.14%

4. Of the parties using the correct form, is either party seeking metadata?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	5	21	16.67%	70.00%
2012	54	10	32	18.52%	59.26%

5. Of the parties using the correct form, have the parties agreed on a production format?

	Number of Report	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	11	18	36.67%	60.00%
2012	54	32	12	59.26%	22.22%

6. Of the parties using the correct form, will the parties be using the standard clawback?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	20	9	66.67%	30.00%
2012	54	44	6	81.48%	11.11%

7. Of the parties using the correct form, have the parties agreed on an ESI search protocol?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	11	18	36.67%	60.00%
2012	54	14	28	25.93%	51.85%

8. Of those using the correct form, have they agreed on what is "reasonably assessable"?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	8	20	26.67%	66.67%
2012	54	16	27	29.63%	50.00%

9. Of the parties using the correct form, did they report an unresolved preservation issue?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	0	30	0.00%	100.00%
2012	54	2	34	3.70%	62.96%

10. Of the parties using the correct form, did they identify any outstanding ESI issues?

	Number of Reports	*Yes*	*No*	*Percentage Yes*	*Percentage No*
2010	30	1	26	3.33%	86.67%
2012	54	2	28	3.70%	51.85%

Appendix B: Excerpt from the FBA E-Discovery Series Event "E-Discovery Special Master Program (EDSM): Progress and Perspectives" held Sept. 12, 2013, at the Federal Courthouse in Pittsburgh.

Participants

- Two federal judges: Hon. Joy Flowers Conti, U.S. District Court for the Western District of Pennsylvania, and Hon. Nora Barry Fischer, U.S. District Court for the Western District of Pennsylvania
- Two experienced attorneys who served in cases where an EDSM was appointed: Robert W. Pritchard, Shareholder, Littler Mendelson, and Robert J. Ridge, Partner, Clark Hill Thorp Reed
- Two e-discovery special masters: David R. Cohen, Partner, E-Discovery Practice Leader, Reed Smith and EDSM, Western District of Pennsylvania, and Richard N. Lettieri, E-Discovery Counsel, Principal, Lettieri Law Firm, LLC and EDSM
- Moderator: Rich Ogrodowski, Principal at Goldsmith & Ogrodowski

Was the EDSM successful/helpful in resolving the ESI issue(s) for which he/she was appointed?

Bob Ridge: "E-discovery can dwarf everything else including the substance of the case, if you let it. We couldn't have resolved the technical issues without the EDSM. Dave Cohen was fluent and facile technically and very responsive."

Rob Pritchard: "We had a lot of sophisticated technical people involved in the process. They discovered early that they had to abandon extreme positions and get down to business. Rick Lettieri

demonstrated an expertise not only in ESI, but as an experienced and effective mediator. He listened well, but kept the process moving forward. As a result, we resolved the issues a lot faster than we would have otherwise."

Chief Judge Conti: "From a judicial perspective, the appointment of an EDSM in certain cases is very efficient. It is not meant for routine matters. Every case will not have an EDSM assigned. However, there are certain kinds of cases where it makes sense to consider an EDSM:

- Large, complex cases, where it may become the norm to consider the early involvement of an EDSM
- Asymmetrical cases where one side is very ESI knowledgeable and the other side is not; here, trust becomes an issue and the involvement of an e-neutral can help overcome the trust issue.
- In cases where both parties are technically sophisticated but are locked in a technical disagreement, a technically competent e-mediator can be very helpful; instead of having to prepare a full-blown presentation to the court, the EDSM can use a less formal process that is faster, more efficient, and ultimately costs the client less money."

Dave Cohen: "Parties appearing before me expressed appreciation that I could suggest some cost-saving technical resolutions and compromises based on my e-discovery experience, but another important benefit was the opportunity to quickly and efficiently address discovery issues that otherwise would have required much more time-consuming and expensive formal motions practice. We were able to quickly achieve mediated resolutions with regard to most issues raised, but even where it was necessary for me to issue proposed rulings, those matters were promptly addressed through e-mail 'briefs' and telephone arguments, rather than requiring more expensive, time-consuming, and difficult to schedule formal briefing and court hearings. In addition, since I was only helping with discovery issues and not the merits, the parties did not have to worry about my seeing documents (e.g., to help resolve privilege issues) that there were concerns about showing to the judge."

Who pays for the appointment of an EDSM, and is it considered cost-effective from the client perspective?

Chief Judge Conti: "Typically, costs are split 50/50 between the parties, subject to review. If there is a wide disparity between the resources of the parties, this split may be adjusted by the court, or by motion of the parties. A party's conduct relative to ESI may also impact cost allocation."

Judge Fischer: "I echo Chief Judge Conti's comments and add that some judges have threatened cost shifting in the face of unreasonable e-discovery requests."

What's the threshold to appoint an EDSM?

Chief Judge Conti: "Usually the parties have a technical issue involving ESI that they can't resolve. Special expertise is required and the court doesn't have the time or technological background to research the technical issues. The court will attempt to get the parties to resolve the technical issues and resist a 'knee-jerk' appointment. Sometimes the court will recommend that one or both parties seek the help of an EDSM or an E-Discovery Counsel who can help."

Judge Fischer: "I have found that getting involved early in the process, identifying if ESI will be an issue and asking questions of the parties at the Rule 16 Scheduling Conference, has avoided some potential ESI disputes later in the process."

Was the EDSM introduced into the dispute at the optimal time? Could it have been sooner?

Bob Ridge: "Ours was a technology-driven case. At the case management conference, the judge asked counsel if an EDSM should be appointed and both sides responded, 'Yes.'"

Judge Fischer: "The optimal time to bring up ESI is at the Rule 26(f) Meet and Confer. Our Report to the Court had a section 11 on ESI added in 2009 to help facilitate this discussion. If the parties don't raise the issue there, I usually raise it at the Case Scheduling Conference."

Thus far, EDSMs have been used sparingly in the Western District of Pennsylvania. Based upon your experience, do you expect their usage to increase? Why? Why not?

Chief Judge Conti: "I've been very pleased with the EDSM program thus far. I'm told there have been 13 appointments made thus far. When used, it has been very helpful to the parties and the court. While every case will not have an EDSM appointed, I anticipate a modest increase in appointments resulting from the continued evolution and complexity of the technology, as well as the increased complex litigation in our court, primarily complex patent litigation."

Judge Fischer: "I agree with Chief Judge Conti's comments and would add that I see an uptick in the use of EDSMs in Bankruptcy Court, because of an increase in data in these cases and the downsizing of court resources because of budgetary constraints."

Rick Lettieri: "Yes. Appointments of EDSM are up nationally and I anticipate a slow, but steady increase in their use. In addition to providing benefits to our local court and bar, this initiative of our local district court may serve as a model for other courts addressing the same issues."

Appendix C: Summary of the information shared by the judges and EDSMs at the Oct. 10, 2013, Town Hall Meeting, which 21 EDSMs attended.

Types of Cases: Mostly Complex Civil Litigation

- Patent infringement (Maxim MDL/*Sightsound v. Apple*)
- Class actions (FLSA/G20 civil rights cases)
- Antitrust (UPMC/Highmark cases)
- False Claims Act (*U.S. v. Education Management*)
- Trade secrets
- Criminal – *U.S. v. Misquitta* – mail/wire fraud
- Bankruptcy court – Garlock access to records

Types of Appointments to Date:

- ESI protocol/search terms/custodian issues
- Forensic investigation
- Hybrid EDSM and discovery special master (Maxim MDL/ education management)
- Bankruptcy court redaction of judicial records
- 1 pure e-mediation
- Criminal case—costs of search and retrieval of documents sought by criminal defendant