

# ALERT

April 2020

## **Special Referee & Special Discovery Masters: Assisting Courts, Counsel & Litigants With The "New Normal"**

**By: Michael Cardello III**

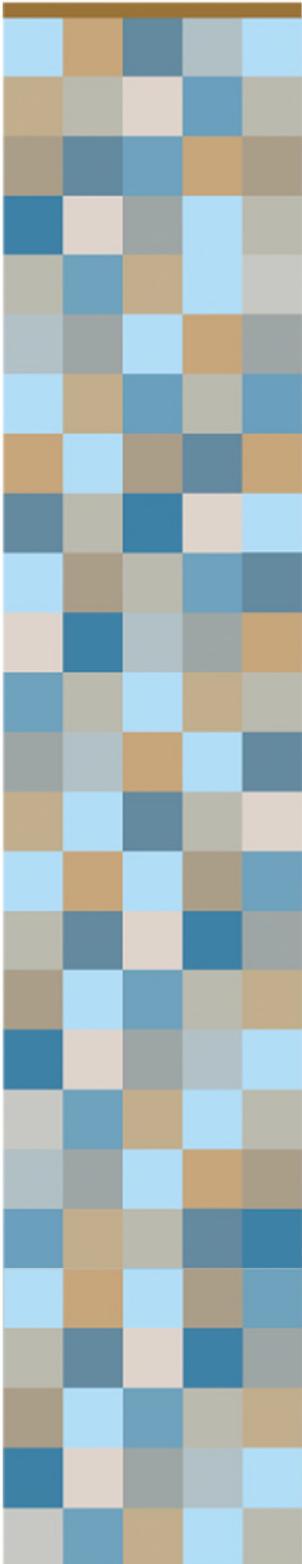
As New York State and the rest of the world continue to manage the effects of the COVID-19 pandemic, altering life as we knew it, there is a glimmer of hope that this pandemic will be sufficiently remediated to permit the economy to restart within the foreseeable future. New York State has been especially hit hard by the virus and state and local governments have taken drastic action to reduce transmission of the virus. Fortunately, the New York Court System is currently attempting to get back to some semblance of the way it was prior to COVID-19.

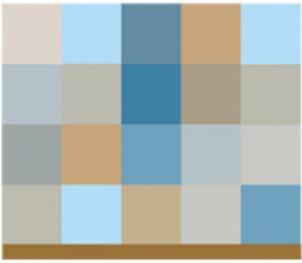
In March, 2020, the Chief Administrative Judge of the State of New York, the Honorable Lawrence K. Marks, issued a series of administrative orders essentially staying all court proceedings in New York State. This effectively shut down the New York State Court System with the exception of essential and emergent matters (which do not include Commercial Division cases). However, many businesses have continued to carry out their operations remotely. Fortunately, New York State is now slowly opening up the court system for non-essential matters, in what has been deemed a "virtual" court system; counsel will make court "appearances" via Skype for Business. This is a very important step toward getting the court system fully functional again. However, the virtual court system, while helpful, will likely not be sufficient to address the backlog of cases caused by the shutdown of the court system for almost a month, leaving lawyers and their clients with limited recourse to litigate or resolve their disputes. As a result, the courts, in conjunction with counsel, must find effective ways to reduce the backlog of cases. An effective tool to assist with this process is the appointment of a Special Referee or Special Discovery Master.<sup>1</sup>

Pursuant to Section 3104 and Rule 4311 of the New York Civil Practice and Rules, a court can appoint a Special Referee to supervise the discovery process and/or handle other issues specified by the court. The use of Special Referees has been

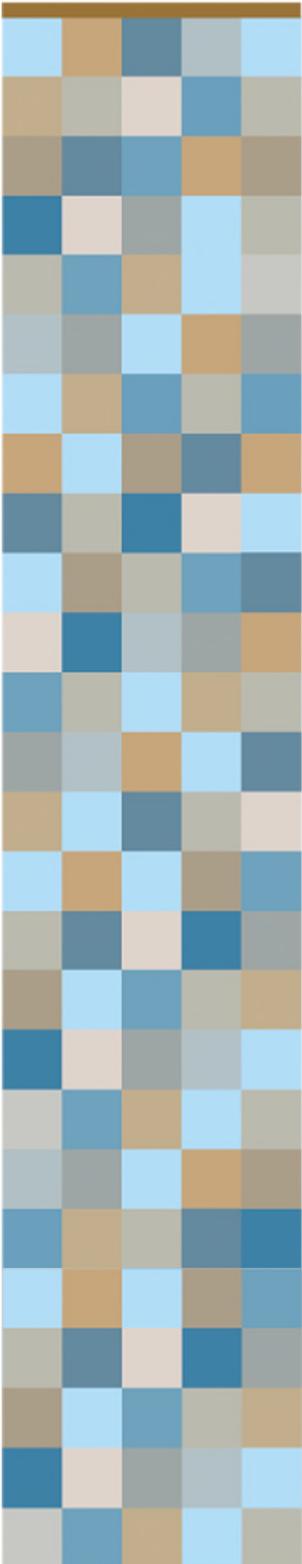
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<sup>1</sup> For the purposes of this Alert, the terms "Special Discovery Master" and "Special Referee" shall have the same meaning and used interchangeably.





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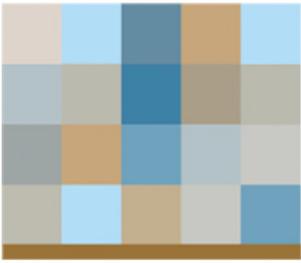


authorized by the CPLR for some time, and has proven to be extremely helpful to courts, litigants and counsel. However, during these unprecedented times, the use of Special Referees will become particularly important to help reduce the backlog of cases.

Now, more than ever, because of the economic and social pressures created by the "shelter in place" mandate in New York and other jurisdictions, resolving business disputes expeditiously is imperative for the economy to recover. Special Referees' ability to move cases forward toward final adjudication or resolution will be immensely helpful to the Court, counsel, and litigants, as courts address the current backlogs. For example, throughout the shutdown, preliminary conferences and/or compliance conferences, during which discovery deadlines would have been set, were either not scheduled, or if they were scheduled prior to the pandemic, have been adjourned. Moreover, many deadlines set forth in existing orders can no longer be feasibly satisfied. In both instances, a court will need to schedule a conference with the parties to address discovery deadlines moving forward as well as any discovery disputes. Alternatively, a Special Referee can be appointed, dispensing with the need for court intervention by working with the parties to address the discovery process. Additionally, many disputes were extant prior to the COVID-19 pandemic and are ripe to be brought to the Court's attention. A Special Referee can be employed to resolve these issues and other disputes, alleviating added pressure on already crowded calendars, and providing parties with a timely resolution.

Depending on the need of a particular case and the order of appointment, a Special Referee may also assist the court, in among other things; facilitating cooperation between the parties to minimize motion practice, coordinating pretrial preparation; holding telephonic and/or video disclosure conferences and status conferences; overseeing deposition practice, adjudicating motions pertaining to party and non-party discovery; and resolving disputes concerning the use of experts and evidentiary issues.

Special Referees are typically engaged at court-approved rates. The ability of the Special Referee to assist the parties in achieving timely, economical, and efficient determinations of disputed issues (especially during this unique time) will undeniably outweigh the costs associated with the appointment of a Special Referee. Both pre- and post- the COVID-19 pandemic, Special Referees have been, and will continue to be, an invaluable resource to judges, counsel, and litigants.



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*Moritt Hock & Hamroff LLP is a broad based commercial law firm with more than 75 lawyers and a staff of patent agents and paralegals. The firm's practice areas include: alternative dispute resolution; business succession planning; commercial foreclosure; commercial lending & finance; construction; copyrights, trademarks & licensing; corporate & securities; creditors' rights & bankruptcy; cybersecurity, privacy & technology; employment; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; mergers, acquisitions & private equity; not-for-profit; patents; real estate; secured lending, equipment & transportation finance; tax; and trusts & estates.*

*Michael Cardello III is a Partner with the firm and is a Co-Chair of the firm's Litigation Department. Mr. Cardello and other attorneys at the firm are regularly appointed as Special Referees/Special Discovery Masters in New York State and Federal Actions.*

*Jacquelyn J. Moran, Counsel to the firm, assisted in the drafting of this Alert. Ms. Moran concentrates her practice in all areas of commercial litigation and bankruptcy. She also assists in referee matters handled by the firm.*

If you are considering the engagement of a Special Referee/Special Discovery Master, you can contact Mr. Cardello at [mcardello@moritthock.com](mailto:mcardello@moritthock.com) or at his direct dial (516) 880-7290.



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