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We Need Help: The Increasing Use of Special Masters in Federal Court

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I. RULE 53—THE PROCEDURAL BASIS FOR THE APPOINTMENT OF SPECIAL MASTERS

In 2003, the Federal Rules of Civil Procedure were amended to provide a much needed update of Rule 53, which governs the appointment of special masters. This rule revision was undoubtedly intended to expand the use of masters in new directions to help courts cope with ever-increasing caseloads and address difficult issues that require disproportionate and often unavailable judicial attention and expertise. In considering the future of judging, I envision a continued expansion of the need for judicial adjuncts. To lay the foundation for my remarks, I will briefly describe the limited vision of the 1938 version of Rule 53 and the key terms of the revised rule.

Old Rule 53 focused primarily on the use of trial masters who heard testimony and recommended findings of fact. Masters could be appointed "only when the issues [were] complicated."[1] The critical inquiry when reviewing such an appointment was whether the master would assist the jury in reaching a resolution. In non-jury matters, appointments could be made only upon a showing of some exceptional condition. In 1957, in *La Buy v. Howes Leather Co.*, the Supreme Court rejected duration of the trial, complexity of the issues, and court congestion as exceptional conditions.[2] This decision significantly limited the use of special masters for years.

By the end of the twentieth century, however, the practice of appointing special masters had outgrown the limitations of the old rule. Relying on their inherent authority to appoint adjuncts, courts expanded special masters' roles to include supervising pre-trial discovery disputes, conducting settlement negotiations in complex cases, imple-

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1. FED. R. CIV. P. 53(b) (superseded 2003).

2. 352 U.S. 249, 259 (1957).

menting and enforcing post-judgment orders and decrees, and administering and distributing limited settlement funds.

Rule 53 has been revised to codify the use of special masters on an as-needed basis with the parties' consent or, when exceptional conditions require, by court order.[3] In addition, it encourages, if not requires, increased participation by the litigants. The Rule now (1) limits the use of special masters in most trials, particularly jury trials; (2) authorizes the use of masters when parties consent; (3) authorizes the use of masters to assist with pre- and post-trial matters; (4) adopts specific procedures and standards for the appointment of masters; and (5) imposes standards for reviewing the masters' actions.[4]

The revised rule specifies that the Code of Judicial Conduct applies to special masters, as does the standard for judicial disqualification under 28 U.S.C. § 455, absent the parties' consent.[5] The proposed master must file an affidavit addressing any potential grounds for disqualification, and the parties must be given notice and an opportunity to be heard and suggest candidates prior to appointment.[6]

When appointing the special master, the court must specify her duties; the circumstances (if any) in which she may have any ex parte contact; the "materials to be preserved and filed as the record of the master's activities"; and the procedures for filing the record, reviewing the master's orders, findings and recommendations, and setting the master's compensation.[7] Prior to the court acting on a master's report, the parties have the right to object and submit evidence.[8]

If the parties object, the court must review de novo all findings of fact[9] unless the parties stipulate with the court's consent that the standard of review is clear error[10] or the findings under Rule 53(a)(1)(A) or (C) will be final.[11] The court reviews de novo all conclusions of

3. FED. R. CIV. P. 53.

4. *Id.*

5. FED. R. CIV. P. 53(b)(3)(A).

6. FED. R. CIV. P. 53(b)(1).

7. FED. R. CIV. P. 53(b)(2).

8. FED. R. CIV. P. 53(f)(1).

9. FED. R. CIV. P. 53(f)(3).

10. FED. R. CIV. P. 53(f)(3)(A). In this regard the Advisory Committee noted that "[c]lear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request." FED. R. CIV. P. 53 advisory committee's note.

11. FED. R. CIV. P. 53 (f)(3)(B). The Advisory Committee Note emphasizes that the court is free to decide the facts (as well as legal conclusions) de novo even absent an objection by the parties. FED. R. CIV. P. 53 advisory committee's note.

law.[12] A master's procedural rulings may be set aside only for abuse of discretion.[13]

With this quick review of Rule 53, I now turn to when and whether a court should appoint a special master. In many ways, this is an old discussion. Critics have always worried that the role of the courts is diluted when adjudicatory functions are delegated to court adjuncts who are not publicly accountable. Another criticism is that the appointment of masters creates a two-tiered justice system where only rich parties can afford the services of paid private court adjuncts, while run of the mill cases must muddle along with the help of free public servants. Those who advocate the expanded use of court adjuncts have brushed aside these concerns, stressing the benefits of appointing special masters to efficiently resolve discovery disputes, settle cases, distribute limited funds to thousands of claimants, and monitor and enforce court decrees. Rather than revisit this debate, I will discuss the considerations that lead a court to make such appointments. I am satisfied that this analysis sufficiently defends the continued and expanding role for private adjuncts, even in the face of the concerns I have just mentioned.

II. CONSIDERATIONS FOR APPOINTING SPECIAL MASTERS

I believe there are four primary considerations that govern a court's decision to appoint a special master: (1) time commitment; (2) knowledge expertise; (3) resources; and (4) neutrality.

I begin with time commitment. A judge already relies on others to perform the tasks of judging even without making an extrajudicial appointment. Judicial staffs have grown over the years. When I first entered the federal system, all district courts had two law clerks; today, most district judges have three full-time law clerks. Most judges also use student law clerks to help with research and writing. In addition, there is often a high ratio of Magistrate Judges to District Judges—sometimes as high as one-to-one, but more often two-to-one or three-to-one. The Alternative Dispute Resolution Act of 1998[14] required all courts to implement a court-annexed alternative dispute resolution program. The demands of our caseload already force us to employ a great army of help.

That said, some tasks are simply too time consuming for a district judge to undertake, even with the assistance of law clerks, and special

12. FED. R. CIV. P. 53(f)(4).

13. FED. R. CIV. P. 53(f)(5).

14. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–58 (2000)).

masters can provide much-needed help. Some examples come to mind. The first is reviewing vast numbers of documents in camera—sometimes in the tens of thousands of pages—to determine whether a privilege has been validly asserted or whether secret documents can be declassified. I have increasingly seen these reviews assigned to a special master who can devote the time and attention to this single task, with the master's cost often borne by the party asserting the privilege.[15]

Another example of the support special masters can provide is monitoring compliance with long-term injunctions or consent decrees, which can be a full-time job for the court. In one case, the court appointed a special master to ensure that a school system was providing timely due process hearings for allegedly disabled children in need of special placement, and to ensure that children found to have disabilities were properly accommodated.[16] In another case, an Independent Monitor was appointed to review the United States Department of Agriculture's compliance with a consent decree resolving a large class action lawsuit brought by African-American farmers, who alleged that the Department had discriminated against them in processing their credit and benefit applications.[17]

The second consideration that governs a court's decision whether to appoint a special master consists of two parts: knowledge and expertise. Generally, the terms can be used synonymously, but there is a significant difference between the two in the context of special master appointments. I am using the word "knowledge" to mean "skills" as opposed to subject matter expertise (which I will address shortly). I view skills as trans-substantive, as opposed to expertise, which is generally limited to a scientific specialty or even subspecialty.

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15. *See* Joint Order Appointing Special Master, *In re* Bausch & Lomb Contact Lens Solution Prod. Liab. Litig., No. 2:06-MN-77777-DCN, MDL No. 1785 (N.Y. Sup. Ct. & D.S.C. Nov. 26, 2007) (appointing a Special Master to review defendant's privilege claims); Special Master's Pre-Trial Order No. 38 at 5–7, *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., Master File No. 1:00-1898, Nos. 04 Civ. 5424, 04 Civ. 2399 (S.D.N.Y. Oct. 29, 2007) (resolving privilege dispute after review of privilege logs containing over ninety-six thousand entries—later reduced to about forty-four thousand—and in camera review of approximately four thousand documents). *See also* Order of Reference to Special Master at 4–5, United States v. McDonnell Douglas Corp., Crim. No. 99-0353 (D.D.C. July 2, 2001) (appointing Special Master to review classified documents to determine whether the documents are discoverable under Rule 16 of the Federal Rules of Criminal Procedure or under *Brady v. Maryland*, 373 U.S. 83 (1963)).

16. *See* Blackman v. District of Columbia, 185 F.R.D. 4, 5 (D.D.C. 1999) (appointing a Special Master to assist in resolution of individual plaintiffs' motions for emergency relief where the District of Columbia had been found to be in violation of the Individuals with Disabilities Education Act).

17. *See* Order of Reference to a Monitor, Pigford v. Glickman, No. 97-1978 (D.D.C. Jan. 4, 2000).

The most obvious example of such skills are computer skills—broadly defined—with deference to Professor Marcus's upcoming discussion on the Electronic Lawyer.[18] Judges are increasingly appointing special masters to address issues related to electronically stored information (ESI). For example, in a large class action alleging violations of the Americans with Disabilities Act, plaintiffs claimed that the defendant had failed to preserve relevant electronic evidence.[19] The court appointed a Special Master to investigate the allegations and propose findings and remedies.[20] The order of appointment instructed the Special Master to provide a "detailed description" of the defendant's computer hardware, systems, networks, email, office and database applications, and software, and to identify all persons responsible for those systems.[21] The court also requested extensive investigation of the defendant's backup protocols to determine whether there had been any suspension or alteration of the protocols, and whether any backup media had been erased or destroyed since the beginning of the litigation.[22] It is clear to me that this extensive investigation could not have been undertaken without the skills and time of a special master.

Similarly, in another recent case, the court appointed a Special Master to supervise the "means and methods for efficiently obtaining discoverable ESI" in complex multi-district litigation involving an allegedly defective pharmaceutical product.[23] No particular discovery dispute was referred to the Master; instead, he was directed to review all discovery requests and employ his skills to determine "where such information is stored and how it can most effectively be accessed and made available."[24]

In a third case involving intellectual property claims by a manufacturer of medical devices against an inventor and his company, a Special Master was appointed to "mak[e] decisions with regard to search terms; oversee[ ] the design of searches and the scheduling of searches and production; coordinat[e] deliveries between the parties and their

18. *See* Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263 (2009).

19. Order Appointing Special Master at 1, Hohider v. United Parcel Serv. Inc., No. 04-0363 (W.D. Pa. Dec. 19, 2007).

20. *Id.*

21. *Id.* at 2–3.

22. *Id.*

23. Order at 1, *In re* Seroquel Prods. Liab. Litig., No. 6:06-md-1769-Orl-22DAB (M.D. Fla. Oct. 5, 2007) (order describing duties of Special Master).

24. *Id.* at 2.

vendors; and advis[e] both parties, at either's request, on cost estimates and technical issues."[25]

These examples highlight the skills that special masters bring to the process. Resolving questions of a party's obligation to preserve and produce electronic records in light of difficult technical issues can have a significant impact on the cost of litigation as well as the prompt resolution of the case. The appointment of a special master who fully understands the technology and employs a language largely unspoken by lay people and beyond the command of even the most tech-savvy judges is invaluable.

I now turn to the related yet distinct consideration of expertise. Many civil cases involve disputes in a particular area of business, science, or the arts. An increasing number of these disputes involve highly complex and substantive issues that often require the assistance of those with particular subject matter expertise.

For example, in one case, the court appointed a Special Master to assist in the implementation of a permanent injunction that required the defendant to install filtering technology on its peer-to-peer file sharing software to prevent unauthorized distribution of plaintiff's copyrighted works.[26] Several filtering technologies existed at widely different costs.[27] The Special Master was directed to recommend, based on his substantive knowledge of the field, the filtering technology that would most effectively prevent further infringement of plaintiff's copyright while preserving the noninfringing uses of defendant's product.[28] In another case involving the copyright to certain computer software, the court appointed as a Master an expert in reading source codes.[29]

Special masters have been appointed in the context of a *Markman* hearing,[30] where the court must construe the claims of a disputed patent. Because courts interpret patent claims by giving them their "or-

25. Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 559 (W.D. Tenn. 2003).

26. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1240 (C.D. Cal. 2007).

27. *Id.* at 1237.

28. Order Re: Appointment of Special Master at 6, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., Nos. CV 01-8541, CV 01-9923 (C.D. Cal. Nov. 29, 2007). The court directed the Special Master to consider cost only as a secondary concern. *Id.* at 7.

29. RGIS, LLC v. A.S.T., Inc., No. 2:07-CV-10975, 2008 WL 186349, at 3 (E.D. Mich. Jan. 22, 2008) (citing FED. R. CIV. P. 53 advisory committee's note; 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2601 (3d ed. 2008)).

30. Markman v. Westview Instruments, Inc., 52 F.3d 967, 970–71 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996).

dinary and customary meaning"[31] as understood by a "person of ordinary skill in the art . . . at the time of the invention,"[32] the court must determine, inter alia: What is the relevant art? What constitutes ordinary skill in that art? How would such a person understand the meaning of the claim terms based on the intrinsic evidence?

Appointing special masters to conduct the *Markman* hearing, ideally with the judge present as an active observer, can be an efficient method of handling the highly technical issues that often arise. In one case, for example, the court appointed a special master to oversee the claims construction process and conduct a *Markman* hearing "[g]iven the highly technical nature of the patents" relating to plasma display panels.[33] Noting that he attended the hearing "as an observer," the judge adopted the Master's recommendations, and commented that the "parties' investment in [the Special Master's] expertise" was "well worth the expense" in light of the Master's ability to "digest[ ] an enormous amount of complex information" and produce a "finely crafted claims construction" in "expedited fashion."[34] The use of special masters in this context brings a level of specialized knowledge and expertise that the court cannot provide in highly technical disputes. The net effect is increased equity and more precise rulings—a prospect that all parties should welcome.

The third consideration is resources. The resolution of certain disputes requires a "team" or "interdisciplinary" approach that a court cannot provide. I envision, on occasion, the need for a panoply of professionals—investigators, accountants, economists, and computer experts—working together, or at least in a coordinated manner, to gather information in the hope of formulating the best possible outcome. On such occasions, the court's appointment of a special master that can act as a general contractor and pull together the talents and resources of these various disciplines makes a lot of sense.

The final consideration is neutrality. This is particularly important when considering the appointment of a settlement master. Two particular circumstances come to mind where a judge's concern for the appearance of impartiality may lead her to appoint a special master. The first is class actions where the court must eventually hold a fairness hearing and evaluate a proposed settlement. I have always found

31. Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp., 320 F.3d 1339, 1346 (Fed. Cir. 2003).

32. *See* Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005).

33. *See* Samsung SDI Co. v. Matshushita Elec. Indus. Co., No. 5-1680, 2006 WL 5100539, at *1 (W.D. Pa. Nov. 6, 2006).

34. *Id.*

this challenging because both sides are jointly proposing the settlement and in the absence of objectors there is no one to point out the flaws in the proposal. Yet the court is expected to act as a fiduciary and protect the interests of the absent class members. This role is even more difficult if the judge has also conducted the settlement negotiations and acted as a mediator or settlement broker. Once that happens, the judge becomes invested in the settlement and her ability to evaluate its fairness is compromised.

A second situation in which neutrality is an important consideration is the delicate stage at which the negotiations are occurring. When summary judgment motions or post-trial motions to set aside or reduce a verdict are pending, it is often an ideal time for the parties to discuss settlement. The court can conduct the settlement discussions, but the court risks either a loss of neutrality or the appearance of neutrality because it has the power to decide the "life or death" motions, and the parties may believe that resisting the judge's settlement suggestions will cause them to lose the motion. Or, perhaps more importantly (and dangerously), the court may decide the motion against the party who stubbornly refuses to settle. Both of these examples favor the appointment of a special master to supervise settlement discussions in appropriate cases.[35]

III. CONCLUSION

Where will we be in 2020 with respect to the use of special masters, and will that be a good place? Our system of public justice entitles parties to a neutral decisionmaker free of any conflicts of interest, and it places great value on the transparency of public proceedings (i.e., open courtrooms, written opinions, and appellate review). On the other side of the scale, however, is the need to resolve litigation in a timely and cost-effective manner. After years of judging, I concur with the tired truism that justice delayed is justice denied. If the court refuses to get the help it needs, it will not be able to effectively deal with its docket, which now includes larger cases with more parties and technically complex issues—reflective of society's increasing complexity—in matters that involve new technologies and their widespread uses, to mention just one growing area. Thus, while there are always valid concerns about the use of private court adjuncts, I firmly believe that we will see more and varied appointments of such adjuncts by the year 2020, to the benefit of the courts.

35. The cost of appointing a master is an important issue which should not be ignored. Nonetheless, it is beyond the scope of this discussion.