

January 2005

Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation

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Recommended Citation

Fellows, Mark A. and Haydock, Roger S. (2005) "Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation," *William Mitchell Law Review*: Vol. 31: Iss. 3, Article 15.

Available at: <http://open.mitchellhamline.edu/wmlr/vol31/iss3/15>

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FEDERAL COURT SPECIAL MASTERS: A VITAL RESOURCE IN THE ERA OF COMPLEX LITIGATION

Mark A. Fellows[†] and Roger S. Haydock^{††}

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*Judges should tailor case-management procedures to the needs of the particular litigation and to the resources available from the parties and the judicial system. Judicial time is the scarcest resource of all: Judges should use their time wisely and efficiently and make use of all available help.*¹

I. INTRODUCTION

Special masters serve critically important functions in our civil justice system. Indeed, masters make our criminal justice system work more effectively as well, allowing judges and magistrate judges more time to handle criminal matters and trials. The need for their services will continue to increase, making special master appointments more common and important in the years ahead. The recent federal legislation regarding class actions will result in additional federal court work ideally suited to be performed by special masters.

Masters perform a wide variety of tasks. They serve various roles in pretrial discovery and proceedings, facilitate the mediated settlement of cases, make recommendations and submit reports to judges, assist with complex issues, chair advisory committees composed of lawyers of record, help administer class actions and settlements, propose orders jointly recommended by parties, make decisions based on a judicial reference or the parties' consent, and become engaged in post-trial proceedings. The experience, skills, and expertise a special master needs depend upon the specific role or roles they perform in a case.

It is both an honor and a privilege to be a judicial master. For those who have never served as a judge, it is the closest they will serve in that related role. For those who have served as a judge, it is an opportunity to again serve in the public interest.

For that is what attracts and prompts many to serve as masters: the opportunity to serve the public by helping the judiciary, the parties, and the lawyers. The work of special masters imposes on them significant social roles and responsibilities that go far beyond the assistance provided to private and public parties engaged in federal court litigation. It is a great sense of satisfaction derived from this hard work that draws and motivates those serving as masters.

In addition, other factors contribute to the commitment and

1. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.1 (2004).

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dedication of special masters: the chance to serve outstanding federal judges, the opportunity to be with excellent lawyers, and reasonable financial remuneration, all make special master work professionally and personally satisfying. But these experiences are offset with times of frustration, anxiety, long hours, and criticism. It can be the best and worst of times, all in the same day.

This article begins with a concise overview of the history and roles of special masters, explains the highlights of new Federal Rule 53 on masters, describes the growing need for masters, and concludes with the benefits and drawbacks of using special masters.

While masters contribute significantly to our federal judicial system, they are not the only way to substantially improve our civil system. More Article III judges and magistrate judges, who ought to be better paid, are a primary way to improve our system of justice. More federal court administrative and support staff are needed to help our system work effectively and efficiently.

Judicial masters should not be used in common, routine cases. These cases need to be resolved without the services of a paid special master. Complex cases involving multiple parties and significant issues, multidistrict litigation (MDL) proceedings, and class actions are cases that will or may require the services of masters who are compensated by parties and lawyers with the resources to pursue and defend these cases. This article will address these and related issues.

Not all judges, lawyers, and parties will agree that an expanded use of masters will be of great benefit. Some contend that federal judges or magistrate judges should do the tasks a special master may perform. Some lawyers view the existence of a master as another hurdle to overcome in proceeding with a case. Some parties complain of the added expense involved with judicial masters.

But many others believe that special masters help a case proceed much more efficiently, effectively, and economically. Masters can devote blocks of time to an event which judges do not have available. They can meet and confer with lawyers and parties regarding issues in ways judges cannot. They may be the only available judicial specialist to help an overloaded and unavailable court staff. They can add a balanced perspective for judges from the world of practice and business and filter in an unbiased way what lawyers submit and parties allege. They can, in short, assist judges in achieving civil justice.

Those who have served as special masters have recently begun to educate judges and lawyers about the use of special masters. The new Academy of Court-Appointed Masters is composed of special masters from both federal and state courts.² These very experienced and highly dedicated experts are available to assist judges and lawyers in selecting and using special masters.

We write this article as part of the initial efforts to organize special masters and create a national association of masters. There is no easy way to determine who serves as a judicial master. There are no ways masters can readily communicate with each other. There currently are no special programs designed to train masters. Now there will be.

This article is dedicated to all those who have served as special masters in federal court. After serving as a judicial master, it is easy to believe in the importance of the role in our grand system of justice. After reading this article, we hope it will be clear how vital masters are to everyone receiving fair, just, and expedient civil justice.

II. CURRENT USE OF SPECIAL MASTERS

A. *Rule 53 History and Recent Amendments*

Before the enactment of the Federal Rules of Civil Procedure, federal courts had authority under the common law to appoint special masters and define their duties.³ When the Federal Rules of Civil Procedure were enacted in 1938, the special master's role under Rule 53 was limited to hearing testimony and issuing findings of fact in jury trials and further limited in non-jury trials to situations "showing that some exceptional condition requires it."⁴ Exempt from the "exceptional condition" requirement were "matters of account and of difficult computation of damages."⁵

2. Academy of Court-Appointed Masters homepage, at <http://www.courtappointedmasters.org>.

3. *In re Peterson*, 253 U.S. 300, 312 (1920) (holding the power of the courts "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause"); *Kimberly v. Arms*, 129 U.S. 512, 524–25 (1889) (stating that referral to a master has always been within the power of a court of chancery).

4. Shira A. Scheindlin & Jonathan M. Redgrave, *The Evolution and Impact of the New Federal Rule Governing Special Masters*, 51 FED. LAW. 34, 35 (Feb. 2004).

5. *Id.*

Courts provided a strict interpretation of exceptional conditions, making it clear that neither the congestion of the court docket⁶ nor the complexity of the litigated issues were sufficient to justify a special master appointment.⁷

By the late twentieth century, the actual use of special masters grew beyond the language and original intent of Rule 53.⁸ This was especially true with respect to special master appointments to oversee complex discovery issues⁹ and the implementation of post-judgment orders and decrees.¹⁰ To bring the rule back into harmony with the realities of its implementation, the Advisory Committee on Civil Rules issued revisions to Rule 53 that took effect on December 1, 2003.¹¹ The intent of the drafting committee was clearly to increase the use of federal special masters:

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. . . . This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments.¹²

6. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957) (“congestion in itself is not such an exceptional circumstance as to warrant a reference to a master”).

7. *Id.* (“[M]ost litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court.”).

8. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 215 F.R.D. 158, 328 (2003) [hereinafter AMENDMENTS] (“From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions.”). Scheindlin, *supra* note 4, at 36.

9. *See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 967 (9th Cir. 1999) (referring all pretrial matters to special master). *See also* Scheindlin, *supra* note 4, at 36 (“References of discovery and discovery disputes have been seen as particularly useful because of their time-consuming nature or need for immediate resolution.”).

10. *See, e.g., Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988) (affirming special master appointment due to failure to comply with court order). *See also* Scheindlin, *supra* note 4, at 37 (“For example, an area specifically identified by the Federal Judicial Center as warranting the involvement of a special master under the prior version of Rule 53 was the administration of class settlements.”).

11. AMENDMENTS, *supra* note 8, at 319–73.

12. *Id.* at 328.

Rule 53(a)¹³ now permits appointments to address pretrial and post-trial matters “that cannot be addressed effectively and timely” by a district court judge or magistrate judge.¹⁴ The amended rule also allows the appointment of special masters to perform duties *during the trial itself* with significant new limitations.¹⁵ A master may only be appointed to address matters to be decided by the court and not by a jury;¹⁶ although appointment in a jury case is allowed with the parties’ consent.¹⁷ In non-jury cases, trial masters are permitted but the traditional requirement that “some exceptional condition” warrant the appointment has been retained.¹⁸ The exceptional condition requirement is meant to retain its traditional meaning under the *La Buy* interpretation of the previous version of the rules.¹⁹ Likewise, the need to perform an accounting or resolve a difficult computation of damages bypasses the exceptional condition requirement.²⁰ As an additional consideration, the appointing judge must weigh the fairness of imposing the special master expenses on the parties.²¹

13. FED. R. CIV. P. 53(a).

(a) Appointment

(1) Unless a statute provides otherwise, a court may appoint a master only 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 by the court 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 post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Id.

14. FED. R. CIV. P. 53(a)(1)(C).

15. FED. R. CIV. P. 53(a)(1)(B).

16. *See id.*

17. FED. R. CIV. P. 53(a)(1)(A).

18. FED. R. CIV. P. 53(a)(1)(B)(i).

19. AMENDMENTS, *supra* note 8, at 329 (the “exceptional condition” phrase “is retained, and will continue to have the same force as it has developed”).

20. FED. R. CIV. P. 53(a)(1)(B)(ii).

21. *See* FED. R. CIV. P. 53(h) (“[t]he court must allocate payment of the master’s compensation among the parties after considering . . . the means of the parties”). *See also* AMENDMENTS, *supra* note 8, at 341 (“The need to pay compensation is a substantial reason for care in appointing private persons as masters.”).

B. *Functions of the Special Master*

The Special Master position is unique within the justice system. A special master “is a surrogate of the Court and in that sense the service performed is an important public duty of high order in much the same way as is serving in the Judiciary.”²² Accepting appointment as a special master entails assuming the duties and obligations of an officer of the judiciary,²³ and likely requires adherence to ethical standards applicable to judges.²⁴ For example, a master may be subject to the same conflicts disclosure and disqualification rules as are federal judges.²⁵ Yet the special master is also subject to the jurisdiction of the court and, like a party to the litigation, has standing to appeal certain orders bearing on the special master duties and compensation.²⁶ As a practical matter, the special master serves at the pleasure of the appointing judge, who retains the power to remove the master at any time and with or without cause.²⁷

Although special masters serve as a “surrogate of the court,” it is clear that masters may not be granted judicial responsibility for an entire dispute.²⁸ Rather, the special master’s role is to assist the judge by assuming specific duties to facilitate the adjudication of the case.²⁹ One traditional role delineated under the previous

22. *Louisiana v. Mississippi*, 466 U.S. 921, 921 (U.S. 1984) (Burger, C.J., dissenting from approval of certain special master staff expenses).

23. *In re Gilbert*, 276 U.S. 6, 9–10 (1928) (ordering special master to return a portion of fees).

24. *See, e.g., Jenkins v. Sterlacci*, 849 F.2d 627, 630 n.1 (D.C. Cir. 1988) (“we believe that, at least insofar as special masters perform duties functionally equivalent to those performed by a judge, they must be held to the same standards as judges for purposes of disqualification”).

24. FED. R. CIV. P. 53(a)(2).

26. *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 995 (9th Cir. 2003) (holding special master “has the right to appeal” order that he return certain fees); *Hinckley v. Gilman, C. & S.R. Co.* 94 U.S. 467, 469 (1876) (special master “occupies the position of a party to the suit, although an officer of the court”).

27. *See* FED. R. CIV. P. 53(b)(4) (“The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.”).

28. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (master not “to displace the court”); *In re Peterson*, 253 U.S. 300, 312 (1920) (“[judicial] power includes authority to appoint persons unconnected with the court to aid judges in the performance of *specific judicial duties*”) (emphasis added).

29. *Peterson*, 253 U.S. at 312. *See also* *Kimberly v. Arms*, 129 U.S. 512, 523 (1889) (enumerating typical master duties as including the responsibility to “take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in

version of Rule 53 was that of assisting the jury when the legal issues were deemed too complex for the jury to handle on its own.³⁰ The other common and permissible justification for reference—even absent any exceptional condition—was complex accounting matters.³¹ In the context of the increased complexity of litigation, modern practice pushed past the limits of Rule 53. As a response, the revised rule delineates three specific roles to be filled by a special master appointment: pre-trial masters, post-trial masters, and consent masters.³²

1. *Pretrial Special Masters*

Even in the era of the restrictive *La Buy* exceptional condition standard for special master appointments, reference of the management and supervision of discovery in complex cases was relatively uncontroversial.³³ The appointment of a special master whose authority was limited to managing discovery was perceived by the courts to be less of an abdication of the judicial function because it did not deprive the parties of the right to a trial before the court on the basic issues of the litigation.³⁴ *First Iowa Hydro Electric Co-op. v. Iowa-Illinois Gas & Electric Co.* perfectly illustrates this tolerance for discovery masters.³⁵ Decided only four months after *La Buy*, *First Iowa* was, like *La Buy*, an anti-trust case involving multiple parties, numerous motions and complex legal issues.³⁶ The key difference between the cases is that the district judge's order appointing the special master in *First Iowa* restricted his

particular cases, the auditing and ascertaining of liens upon property involved, and similar services.”).

30. *See, e.g., Dairy Queen Inc. v. Wood*, 369 U.S. 469, 478 (1962) (stating court may “appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone.”).

31. *See, e.g., Stauble v. Warrob, Inc.*, 977 F.2d 690, 694 (1st Cir. 1992) (“masters are most helpful where complex quantitative issues bearing on damages must be resolved”).

32. Scheindlin, *supra* note 4, at 37; FED. R. CIV. P. 53(a)(1)(A), 53(a)(1)(C).

33. *See, e.g., United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 217 (W.D. Mo. 1985) (finding master's participation warranted because the “vast amount of evidence necessary to litigate this case would result in extensive discovery requiring nearly constant supervision.”).

34. *First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co.* 245 F.2d 613, 625 (8th Cir. 1957) (discussing *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)).

35. *See id.*

36. *Id.* at 624 (“There are ten defendants, whose separate answers pose evidentiary and procedural problems of great magnitude.”).

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“duties and powers” to the “discovery proceedings.”³⁷ The fact that the scope of the master’s responsibilities was limited to managing discovery seemed to lower the exceptional condition threshold such that issue complexity alone was enough to justify the appointment.³⁸

With the emergence of ever more complex civil litigation and ever more congested dockets, the need for discovery masters has simply become accepted:

After careful reflection, the court is satisfied that the magnitude of the case, the complexity of the anticipated discovery problems, the sheer volume of documents to be reviewed, many of which are subject to claims of privilege, the number of witnesses to be deposed, the need for a speedy processing of all discovery problems in order to meet the trial date . . . all argue in favor of using a special master to supervise discovery and prepare the pretrial order for purposes of the . . . trial. While the government is partially correct in pointing out the absence of serious discovery disputes thus far, defendants point out that there are an estimated four million government documents yet to be produced, and an estimated two thousand documents that the government has tentatively asserted are privileged. Discovery in these and other areas can be effectively and more efficiently handled through the constant attention of a readily available special master.³⁹

This reality of modern practice is validated in the language of the revised Rule 53, which permits appointment of masters to address pretrial matters “that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.”⁴⁰ And research has shown that active management of discovery results in closer conformity to time limits for responses and reduced time between requests without affecting the quantity

37. *Id.* at 620 (stating the order “conferred no powers in respect to the jury trial” demanded by plaintiffs and that all of the master’s duties were “preliminary to and in preparation for the jury trial on the merits”).

38. *Id.* at 626 (“We think the Court did not distort or exaggerate the complications of the issues to be anticipated in the discovery proceedings.”).

39. *In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (from pretrial order appointing special master). See also *Symposium: Mass Torts After Agent Orange—Procedural History Of The Agent Orange Product Liability Litigation*, 52 BROOK. L. REV. 335, 338–39 (1996).

40. FED. R. CIV. P. 53(a)(1)(C).

or selection of the requests.⁴¹ Discovery master appointments are an obvious avenue to achieve these efficiency gains when judges and magistrate judges are not available. Accordingly, judges and commentators agree that, under the new rule, pretrial special master appointments are likely to continue to increase in the coming years.⁴²

2. *Post-Trial Special Masters*

Before the recent revisions to Rule 53, special masters were often appointed to perform various post-trial functions.⁴³ Post-trial master appointments can be divided into three broad categories: recommending remedial orders after a finding of liability, monitoring compliance with court orders, and evaluating and administering claims.⁴⁴

Masters charged with recommending remedial measures after the court has determined liability are often consultants with specific expertise in areas such as environmental law for environmental clean-up litigation,⁴⁵ or government housing and educational administration for a school desegregation case.⁴⁶ However, a court may instead appoint a generalist special master with the authority to engage expert consultants if required.⁴⁷

Special master appointments requiring the monitoring of court orders or consent decrees are often seen in “institutional reform litigation” involving prisons, school districts, nursing homes, public housing, and mental hospitals.⁴⁸ Although special

41. Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 804 (1998) (citing PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 52 (1978)).

42. *E.g.*, Scheindlin, *supra* note 4, at 38 (“[G]iven the increasing volume of complex litigation, it is likely that the use of special masters for pretrial . . . matters will increase under the reformulated rule.”).

43. *See* AMENDMENTS, *supra* note 8, at 328.

44. Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternate Dispute Resolution*, ALI-ABA CLE, September 18-19, 261, 275-79 (2003).

45. *See, e.g.*, *United States v. Conservation Chem. Co.*, 106 F.R.D. 210 (W.D. Mo. 1985) (referring to master expert in land use and environmental law).

46. *See, e.g.*, *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 767 (E.D.N.Y. 1974) (“A skilled master, with expertise in government housing laws and in educational administration to coordinate the efforts of the parties, is crucial if a just and workable remedy is to be devised.”).

47. Farrell, *supra* note 44, at 276 (citing cases).

48. James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 801-02 (1991).

master monitor appointments are relatively common, there is room for controversy when the monitored party believes the master is exceeding the proper scope of their investigative duties under the decree or order.⁴⁹ With this in mind, the revised Rule 53(b)(2) requires the appointment order to state the master's investigation and enforcement duties and ground rules for ex parte communication with the parties and the court.⁵⁰ The advisory committee notes encourage courts to make monitoring orders "as precise as possible" but provide no substantive guidelines about the types of duties or extent of ex parte communication that is appropriate.⁵¹

Finally, courts have consistently used special masters in the role of evaluating claims after a finding of liability in court.⁵² Often these cases involve complex damages determinations in situations where there are thousands of claimants and a limited pool of resources.⁵³ Methodologies such as aggregation of claims and sophisticated inferential statistics may be required in order to complete such an allocation.⁵⁴ High-profile examples of claim evaluation and administration appointments include the committee chaired by Paul Volcker administering the settlement of claims made by holocaust survivors against two Swiss banks,⁵⁵ the Agent Orange product liability compensation procedures,⁵⁶ and the administration of the Dalkon Shield intrauterine device litigation settlement.⁵⁷

49. A recent such controversy arose in litigation over the appointment of a master to investigate government handling of Indian trust accounts. *See Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (issuing *mandamus* to remove an individual technically appointed as a court monitor under the court's inherent power rather than Rule 53).

50. FED. R. CIV. P. 53(b)(2)(A)–(B).

51. *See* AMENDMENTS, *supra* note 8, at 334.

52. *See, e.g.,* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 478–91 (1986) (describing an example in the asbestos litigation context).

53. *See* Farrell, *supra* note 44, at 278–79.

54. *See* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 824 (1992) (describing the damages allocation procedures employed in *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990)).

55. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 151–58 (E.D.N.Y. 2000).

56. *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), (*aff'd*, 818 F.2d 1794 (2d Cir. 1987)).

57. *See* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 100–110 (1990).

3. *Consent Masters*

The revised Rule 53 allows the court to appoint a special master to “perform duties consented to by the parties.”⁵⁸ The idea that parties may stipulate to have their dispute resolved outside of the scope of an Article III court has a long history.⁵⁹ Such a solution is functionally similar to the court enforcing a post-dispute agreement between the parties to submit to some flavor of alternative dispute resolution such as mediation or arbitration.⁶⁰

C. *Special Master Roles*

Although the trial, pretrial, post-trial, and consent special master functions were specifically codified in revised Rule 53, masters fill numerous roles within and across the named functions.⁶¹ Three important, specific roles are described below: settlement master, decision-making master, and case management master.

1. *Settlement Masters*

Courts have come to realize that the appointment of a neutral third-party who is granted “quasi-judicial” authority to act as a “buffer” between the court and the parties can be a useful approach to reaching a settlement.⁶² This is especially the case in complex litigation involving numerous parties, “especially when the disputes have ‘matured’ and have become both repetitive and time-consuming.”⁶³ The use of settlement masters to reach global settlements in large-scale tort litigation dates back at least to the

58. FED. R. CIV. P. 53(a)(1)(A).

59. *See, e.g.*, *Heckers v. Fowler*, 69 U.S. 123, 127 (1864) (“[T]he parties agreed in writing to refer the cause to a referee, ‘to hear and determine the same, and all issues therein, with the same powers as the court.’”).

60. *See Farrell, supra* note 44, at 287–88 (“where the parties consent to the reference, the master’s determinations must be given the weight to which the parties have stipulated and may not be set aside and disregarded at the discretion of the court”).

61. Some of these roles are subsets of the categories laid out in *Rule 53* and some roles run across the codified categories. *See id.* at 267 (roles not recognized by the rule still serve the rule’s “underlying purpose—to give judges the means to discharge in a fair and efficient manner the complex, time consuming duties imposed by modern litigation”).

62. Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881, 884 (1996).

63. *Id.* at 884–85.

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Dalkon Shield and Agent Orange litigation beginning in the late 1980s.⁶⁴

There is a real sense that court-ordered settlement efforts, such as can be implemented by a settlement master, are capable of achieving results not possible in piecemeal litigation:

Reviewing the agreements that have emerged from these mediation and negotiation processes, one cannot help but be awed by the creativity of the attorneys and neutrals. They have fashioned resolutions that bear little resemblance to the resolutions that likely would have been produced through the traditional case-at-a-time negotiation, settlement conference, and trial process. These global agreements provide a more thoughtful—and perhaps more equitable—basis for compensation than was available through the ad hoc group-settlement process that characterized mass tort litigation in the previous era. In creating such agreements, plaintiff and defense attorneys clearly have taken control of the dispute resolution process.⁶⁵

However, the management of settlement procedures raises ethical issues distinct from those raised by judicial dispute resolution. Specifically, complex conflict of interest questions can arise out of the relationships between the parties, their attorneys and the neutral.⁶⁶ The equity of the resulting damage allocation procedures can also be controversial.⁶⁷ Finally, the appropriateness of ex parte communications about the substance of the dispute—between the settlement master and the judge and between the master and the parties—raises a difficult ethical issue for settlement masters.⁶⁸

Rule 53 does not lay down specific standards regarding master ex parte communications, but appears to work from the latent assumption that they are not generally appropriate.⁶⁹ The rule

64. Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use Of Alternative Dispute Resolution In Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1614, 1620 (1995).

65. *Id.* at 1620.

66. *See id.* at 1620–21; Farrell, *supra* note 44, at 292–94.

67. Hensler, *supra* note 64, at 1621.

68. *See* Feinberg, *supra* note 62, at 885.

69. *See* Farrell, *supra* note 44, at 294 (“It is significant that the new rule does not provide that unless expressly granted such authority, the master is not authorized to engage in ex parte communications.”).

provides that the order appointing the master state the “circumstances—if any—in which the master may communicate ex parte with the court or a party.”⁷⁰ Some level of ex parte communication with the parties is required for the master to adequately perform mediation or facilitated negotiation roles. In order for the master to be an effective mediator, the master will need to have private, ex parte talks and caucuses with individual parties and lawyers. Ex parte communication between the settlement master and the judge may be barred in order to insulate the judge from knowledge of the merits of the dispute should the case eventually move to trial.⁷¹

It is clear that the order of appointment should prescribe ex parte communication guidelines for the settlement master that both facilitate settlement processes and preserve an unbiased forum for judicial dispute resolution.⁷² As a practical matter, the settlement master will need, at minimum, to update the judge about the progress of settlement negotiations without divulging the substance of the talks. Drawing that particular line requires some delicacy.

2. *Decision-Making Masters*

Due to increasing docket pressures and limited judicial resources, it is relatively common for special masters to be appointed to decide non-dispositive motions, especially in the context of discovery.⁷³ The order appointing Sol Schreiber as special master in the Agent Orange Product Liability Litigation provides an example of the scope of such decision-making duties:

The special master shall be empowered and charged with the duty to: . . . (a) Rule upon all pending and future motions relating to discovery. . . . (c) Rule on legal and factual disputes concerning the proper scope of discovery . . . including, but not limited to, issues of discoverability, privilege, attorney work product, discovery of expert testimony and trial preparation materials. (d) Issue or modify protective orders, where deemed appropriate,

70. FED. R. CIV. P. 53(b)(2)(B).

71. See Farrell, *supra* note 44, at 297.

72. Where parties object to the ex parte communication guidelines in the order, limitations on such communications may be required in order to avoid later claims that the procedures violated constitutional due process. See *id.* at 296.

73. Scheindlin, *supra* note 4, at 36–37.

relating to discovery matters. . . . (j) Regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties as set forth in this order. . . . (m) Rule on any request for an order compelling discovery. . . . The court hereby refers to the special master all pending motions and applications with respect to the conduct of discovery in this action, and requests that the master be prepared to rule at the conference described below upon as many aspects of the outstanding discovery problems as may be conveniently handled at that time.⁷⁴

The ethical obligations of a decision-making master are likely quite different from those of a master filling the role of a settlement neutral. For example, the Model Code of Judicial Conduct prohibits judges from engaging in *ex parte* communications with parties during a case.⁷⁵ To the extent that a special master is granted adjudicative powers, the master would be wise to similarly limit the conditions under which the master engages in *ex parte* communications with the parties.⁷⁶

If, for example, a special master is appointed to serve in a capacity that spans the settlement and decision-making roles,⁷⁷ the master could have a difficult time resolving the *ex parte* communication issue, even if the communication ground rules are established with the consent of the parties.⁷⁸ This example illustrates the need for ethics guidelines regarding conflicts issues tailored especially to various function and role combinations often filled by special masters. Such guidelines would alert judges,

74. *In re* Agent Orange Prod. Liab. Litig., 94 F.R.D. 173, 174–75 (E.D.N.Y. 1982) (pretrial order appointing special master).

75. Subject to some exceptions,

[a] judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding. . . .

MODEL CODE OF JUDICIAL CONDUCT CANON § 3(B)(7) (2000).

76. *See* Farrell, *supra* note 44, at 295 (“To the extent that masters take on judicial responsibilities, . . . constraints on *ex parte* communication may be applicable.”).

77. For example, a pretrial, decision-making master ruling on discovery issues may be later asked by the parties to serve as a mediation neutral in the same dispute.

78. *Id.* (“some would argue that such [*ex parte*] communications are improper . . . and must be prohibited whether or not the parties consent”).

parties and masters to possible future conflict situations and help judges prescribe appropriate ex parte communications rules in special master appointment orders.

3. Case Management Masters

Masters filling a case management role are not as deeply involved in the merits of the disputes as are settlement masters. Neither must they possess decision-making authority over an aspect of the dispute. Instead, case management masters can be viewed as administrators or managers who work with the parties to establish agreement as to procedures that can be followed to move the case forward.⁷⁹ In large-scale MDL or class action litigation, the master could operate by “chairing” a representative committee of attorneys on both sides of the dispute. The goal may be to get the parties to agree on a discovery schedule, a stipulated proposed order on specific discovery mechanics, or an agenda for a series of status conferences before the judge.⁸⁰

However, in some situations, the goal might be much more ambitious.⁸¹ For example, the master may be tasked with working with the parties to create a classification or categorization scheme that breaks out different types or levels of injury, liability or damages.⁸² In this way, settlement efforts may be targeted at certain subsets of plaintiffs or specific discovery processes may be prescribed for other subsets.

In some situations, the decision-making and case management

79. See Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 217 (1995) (“In particular, a master can help resolve difficult and time-consuming pre-trial issues and (with the assistance of the parties) help narrow and shape the dispositive issues for presentation to the court.”).

80. In general, the more specific the order of reference, the less likely the appointment will be rejected on appeal. See *id.* at 216 (citing cases where appointments for “routine” discovery and case management were overturned).

81. Indeed, it is often the case that the most ambitious case management appointments have the most open-ended appointment orders. See Farrell, *supra* note 44, at 294 (“Some of the most complex tasks, for instance, those involved in providing case management in a mass tort case, have sometimes been assigned in short, general orders.”).

82. For an example of such a classification scheme in a mass tort context, see *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, Pretrial Order No. 127, 2, at http://www.mnd.uscourts.gov/Baycol_Mdl/pretrial_minutes/baycol127.pdf (“[T]he Special Masters shall place each plaintiff in one of the categories and/or subcategories listed in Paragraph 1 of this Order and may modify or add categories and subcategories consistent with this Order and place plaintiffs accordingly.”).

roles may be intertwined. This could be the case if a master had broad decision-making authority over discovery matters but elected to proceed whenever possible by reaching agreement on stipulated proposed orders. In other situations, the master may lack explicit decision-making authority but the parties are aware of the weight the master's recommendations would likely have with the judge. This awareness may increase the parties' motivation to agree on stipulated case management orders.

D. Conditions Warranting Referral

While the recent amendments authorize discretionary referrals for pretrial and post-trial matters where a judge or magistrate cannot address the issue in a timely manner,⁸³ special masters serving during the trial itself may only be appointed if "warranted by some exceptional condition."⁸⁴ This begs the question of what conditions may qualify as "exceptional" and how severe the condition must be to reach the threshold. The touchstone decision defining exceptional conditions for the purpose of special master appointments is *La Buy v. Howes Leather Company*.⁸⁵

This case was an anti-trust action involving eighty-seven individual plaintiffs confronting the judge with complex joinder and discovery issues requiring numerous motion hearings.⁸⁶ The plaintiffs estimated the trial would take six weeks and the judge told the parties that he questioned his ability to find available time on his docket.⁸⁷ Without the parties' consent, the judge referred the case to a special master "to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law."⁸⁸ The judge also authorized the special master to "commence the trial of this cause."⁸⁹ The parties appealed the reference to the special master and the judge justified the appointment by pointing out that 1) the cases were very complex, 2) they would take considerable time to try, 3) his calendar was congested, and 4) "voluminous accounting" would be required if

83. FED. R. CIV. P. 53(a)(1)(C).

84. FED. R. CIV. P. 53(a)(1)(B)(i).

85. 352 U.S. 249 (1957).

86. *Id.* at 251-52.

87. *Id.* at 253.

88. *Id.*

89. *Id.*

the plaintiffs prevailed.⁹⁰

In rejecting the referral, the Supreme Court held that the referral of the “general issue” to the master “amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.”⁹¹ In answer to the judge’s argument that the cases were complex, the Court noted that the very complexity of antitrust litigation “is an impelling reason for trial before a regular, experienced trial judge.”⁹² The prospect of a lengthy trial was also rejected by the Court as an exceptional condition,⁹³ as was docket congestion.⁹⁴ The Court agreed that the voluminous accounting task potentially qualified as an exceptional condition, but only after the court itself “determined the over-all liability of defendants” and provided that “circumstances indicate that the use of the court’s time is not warranted” to perform the accounting.⁹⁵ The *La Buy* decision sets a high standard for determining exceptional conditions that survives to this day in regard to the appointment of trial masters.⁹⁶ *La Buy* also illustrates the absence of the exceptional condition requirement in its consideration of post-trial accounting tasks.⁹⁷

As a practical matter, the special master referrals have occurred, and will continue to occur, when the court and the parties feel the need for a special master. A judge who tries to foist

90. *Id.* at 254, 259.

91. *Id.* at 256.

92. *Id.* at 259 (“But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court.”).

93. *Id.* (“Nor does petitioner’s claim of the great length of time these trials will require offer exceptional grounds. . .”).

94. *Id.* (“[C]ongestion in itself is not such an exceptional circumstance as to warrant a reference to a master.”).

95. *Id.*

96. *See, e.g.,* *Sierra Club v. Clifford*, 257 F.3d 444, 446–47 (5th Cir. 2001) (holding case pending two years, which combined voluminous filings and highly technical documents with court’s crowded docket and inexperience with subject matter, nevertheless did not create exceptional condition); *United States v. Microsoft Corp.*, 147 F.3d 935, 954–95, (D.C. Cir. 1998) (same where alleged violation of consent decree by software company involved technical issues); *Reiter v. Honeywell, Inc.*, 104 F.3d 1071, 1072 (8th Cir. 1997) (same where case on docket more than one year). An alternative view of the “exceptional condition” requirement is that it is met when the court faces a problem that requires something other than “traditional courtroom-bound adjudicative process” to resolve. *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 221 (W.D. Mo. 1985) (labeling such problems “polycentric”).

97. *See La Buy*, 352 U.S. at 259.

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a special master on litigants who strongly oppose a master will need a rather high exceptional condition to justify the reference. However, in the vast majority of cases the lawyers will realize that a master can save the parties a lot of time and money, and there will be no objection to a reference. Indeed, in these cases the litigants and the judge will welcome with open arms a special master to do the work that cannot be done by other judicial officers.

III. BACKDROP: A CRISIS IN THE COURTS

The 2003 Rule 53 amendments should be viewed in light of recent developments in the federal judiciary and the evolution of federal litigation. Specific issues of concern are increases in civil filings and the duration of civil cases, the growing judicial workload, chronic budget issues, and the growing complexity of federal civil litigation.

A. *Civil and Criminal Case Filings*

Workloads for federal court judges continue to increase significantly. While the total number of federal civil filings decreased 3.1% between 2002 and 2003, the overall figures mask some significant local increases.⁹⁸ For example, civil filings increased 76% in the Eastern District of Pennsylvania and 89% in the District of Delaware.⁹⁹ Civil filings in the Third Circuit districts increased over 30%.¹⁰⁰ A more detailed analysis by claim type supports the conclusion that the modest overall decrease in filings has not reduced the judicial workload.¹⁰¹

98. Civil filings for the twelve months ending March 31, 2002 totaled 265,091 compared to 256,858 for the same period in 2003. OFFICE OF JUDGES PROGRAMS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS [hereinafter JUDICIAL CASELOAD STATISTICS], *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2002 and 2003*, 36, Table C, at <http://www.uscourts.gov/caseload2003/tables/C00Mar03.pdf>. More recent data comparing the twelve months ending December 31, 2003, to 2002 shows an increase of 0.3% in civil filings in 2003 over 2002. OFFICE OF JUDGES PROGRAMS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY [hereinafter STATISTICAL TABLES], *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2002 and 2003*, 22, Table C, at <http://www.uscourts.gov/judiciary2003/dectables/C00Dec03.pdf>.

99. JUDICIAL CASELOAD STATISTICS, *supra* note 98.

100. *Id.*

101. The caseload statistics are broken out by categories of claims (e.g., contract, real property, tort, etc.) and subcategories (e.g., airplane, automobile,

The fact that 17,168 fewer asbestos-related product liability claims were filed in 2003 than 2002 more than accounts for the 8233 fewer total filings in 2003.¹⁰² However, the fact that fewer complex asbestos claims were filed in 2003 likely means that even more judicial resources were expended on those cases in 2003 than in 2002 as the cases progressed through the system.¹⁰³ In fact, the “Nature of Suit” classifications seem to have missed the next wave of complex product liability actions as the “Other Product Liability” category reflects an increase of 10,830 filings in 2003 over 2002.¹⁰⁴

The 10.8% increase in federal criminal filings between 2002 and 2003 reflects an additional strain on court resources.¹⁰⁵ Enhanced enforcement of immigration laws largely accounts for the increase, along with increased prosecution of weapons violations.¹⁰⁶ The long-term upward trend in criminal filings is even more pronounced. Criminal filings have risen 55% since 1994.¹⁰⁷ In addition, bankruptcy filings increased 7.1% in 2003

asbestos, other). See JUDICIAL CASELOAD STATISTICS, *supra* note 98, at *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending March 31, 2003*, 36, Table C-2 (2003), at <http://www.uscourts.gov/caseload2003/tables/C02Mar03.pdf>. For a more detailed discussion of judicial workload, see *infra* Part III.C.

102. See *id.* The decline in asbestos-related filings may be the beginnings of a return to relative normalcy after an increase of 98% in such filings the previous year. WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY, n. 5 (2004) at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html#foot5>.

103. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“Like *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation.”).

104. The “Other Product Liability” total for 2003 was 19,034 compared to 8,204 in 2002. JUDICIAL CASELOAD STATISTICS, *supra* note 98, *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, during the 12-Month Period Ending March 31, 2003*, 36, Table C-2 (2003), at <http://www.uscourts.gov/caseload2003/tables/C02Mar03.pdf>.

105. JUDICIAL CASELOAD STATISTICS, *supra* note 98, *U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2002 and 2003*, 57, Table D, at <http://www.uscourts.gov/caseload2003/tables/D00CMar03.pdf>.

106. Criminal immigration filings increased from 11,247 in 2002 to 14,600 in 2003. JUDICIAL CASELOAD STATISTICS, *supra* note 98, *U.S. District Courts—Criminal Cases Commenced, by Major Offense (Excluding Transfers), During the 12-Month Periods Ending March 31, 1999 Through 2003*, 77, Table D-2, at <http://www.uscourts.gov/caseload2003/tables/D02cMar03.pdf>. Weapons and firearms prosecutions increased from 6303 in 2002 to 8325 in 2003. *Id.*

107. REHNQUIST, *supra* note 102, at n. 4.

over 2002.¹⁰⁸

B. *Civil and Criminal Trials*

While the overall number of civil filings has not risen dramatically, the number of cases pending before the federal district courts is on the rise. Total pending civil cases rose from 254,536 in 2000¹⁰⁹ to 269,686 in 2003.¹¹⁰ The increase in criminal filings has been accompanied by a similar increase in the number of criminal cases currently pending before the federal courts. The number of pending cases rose 7.9% between 2002 and 2003.¹¹¹

The average duration of a civil case from filing to trial has steadily increased from 19.5 months in 1998 to 22.5 months in 2003.¹¹² The driving factor in the increase is the fact that long cases are getting even longer. Between 1994 and 1999, 7.2% of civil cases were pending for three years or longer.¹¹³ Between 2000 and 2003 that figure increased to 13.0%.¹¹⁴ An increase in complex products liability actions such as breast implant, asbestos litigation, and drug cases largely explains the increase in long duration

108. There were 1,504,806 bankruptcy filings in 2002 and 1,611,268 in 2003. JUDICIAL CASELOAD STATISTICS, *supra* note 98, at *U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2002 and 2003*, 105, Table F, at <http://www.uscourts.gov/caseload2003/tables/F00Mar03.pdf>.

109. STATISTICAL TABLES, *supra* note 98, at *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2000 and 2001*, 22, Table C, at <http://www.uscourts.gov/judiciary2001/dectables/c00dec01.pdf>.

110. STATISTICAL TABLES, *supra* note 98, at *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2002 and 2003*, 22, Table C, at <http://www.uscourts.gov/judiciary2003/dectables/C00Dec03.pdf>.

111. The number of pending criminal cases rose from 56,169 in 2002 to 61,005 in 2003. STATISTICAL TABLES, *supra* note 98, at *U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2002 and 2003*, 43, Table D, at <http://www.uscourts.gov/judiciary2003/dectables/D00CDec03.pdf>.

112. U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, JUDICIAL CASELOAD PROFILE REPORT 2003, at <http://www.uscourts.gov/cgi-bin/cmsd2003.pl> (this is a real-time report run for 2003 data in all federal districts). The median time for civil cases from filing to trial is calculated from the date a case was filed to the date trial began. *Id.*

113. OFFICE OF JUDGES PROGRAMS, ANALYTICAL SERVICES OFFICE, JUDICIAL FACTS AND FIGURES, Table 2.4, at <http://www.uscourts.gov/judicialfacts/figures/table2.04.pdf> (last visited Feb. 8, 2005).

114. *Id.*

cases.¹¹⁵ Many of the lengthy cases reported in these statistics are, in fact, still pending before the federal judiciary.¹¹⁶ The statistics including cases that reach disposition before trial also show a duration increase in recent years. In 2000, the median duration from filing to disposition of a civil case was 8.2 months.¹¹⁷ In 2001 and 2002, the median duration rose to 8.7 months, and in 2003 rose again to 9.3 months.¹¹⁸

Federal criminal case durations have also been on the increase in recent years. For each year between 1988 and 1994, the median duration—from filing to disposition—of a criminal bench trial was less than one month.¹¹⁹ With the exception of 1998 and 2000, each year since 1994 has seen a median criminal bench trial duration above one month.¹²⁰ For 2001, 2002 and 2003, the median durations were 2.3, 3.0, and 2.6 months respectively.¹²¹

Most recently, the new federal law known as the Class Action Fairness Act of 2005¹²² will cause more class actions to be processed in the federal courts.¹²³ These cases will add the equivalent of a lot of individual cases to the docket of a judge and a district. All this contributes significantly to an already over-crowded federal docket in many districts.

C. *Judicial Workload*

Consistent increases in case filings and average duration inevitably lead to increased demands on the federal judiciary. This is born out in both weighted and unweighted judicial workload statistics.¹²⁴ The number of authorized federal district court judge

115. *Id.* (noting the particular influence of breast implant cases on case duration statistics).

116. *Id.*

117. U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, JUDICIAL CASELOAD PROFILE REPORT 2003, at <http://www.uscourts.gov/cgi-bin/cmsd2003.pl> (real-time report run for all federal districts).

118. *Id.*

119. OFFICE OF JUDGES PROGRAMS, ANALYTICAL SERVICES OFFICE, JUDICIAL FACTS AND FIGURES, Table 4.7, at <http://www.uscourts.gov/judicialfacts/figures/table4.07.pdf> (last visited Feb. 8, 2005).

120. *Id.*

121. *Id.*

122. Pub. L. No. 109-002.

123. *See id.* Sec. 4 (eliminating complete diversity requirement for class claims and granting federal jurisdiction where total claim value exceeds \$5,000,000 and there are more than one hundred class members).

124. Judicial workload is tracked in terms of assigned cases per year per judge.

positions has gradually increased from 575 in 1988 to 680 in 2003.¹²⁵ However, despite expansion in the judiciary, the caseload assigned to each federal district court judge has risen steadily over that period. For the 1988–1995 period the weighted filings show that each judge averaged 289 civil and 134 criminal felony cases per year.¹²⁶ For the 1996–2003 period, the average weighted filings rose to 331 civil cases and 161 criminal felony cases each year.¹²⁷ In the future, the recently enacted Class Action Fairness Act will add immeasurably to case filings.¹²⁸ Clearly, caseloads are rising faster than the rate of appointments of new district court judges to handle them.

D. *Financial and Salary Crises*

As Chief Justice Rehnquist explained in his most recent Year-End Report on the Federal Judiciary, the federal courts are consistently planning the distribution of inadequate resources:

The continuing uncertainties and delays in the funding process have necessitated substantial effort on the part of judges and judiciary managers and staff to modify budget systems, develop contingency plans, cancel activities, and attempt to cut costs. Many courts may face hiring freezes, furloughs, or reductions in force. I hope that the Congress will soon pass a Fiscal Year 2004 appropriation for the Judiciary, and that in future years the Judiciary's budget is enacted prior to the beginning of the fiscal year.¹²⁹

EXPLANATION OF SELECTED TERMS, <http://www.uscourts.gov/library/fcmstat/cmsexpl03.html> (last visited Jan. 16, 2005). Weights are applied "to filings . . . to account for the different amounts of time required to resolve various types of civil and criminal actions." *Id.* The "weighted filings" total is "the sum of all weights assigned to civil cases and to criminal felony defendants." *Id.* For example, the average civil or criminal felony case receives a weight of approximately 1.0. *Id.* Higher weights are assigned to more complex cases, such as a death penalty habeas corpus case (weight = 5.99). *Id.* Lower weights are assigned to cases demanding relatively little time from judges, such as student loan cases (weight = 0.031). *Id.*

125. OFFICE OF JUDGES PROGRAMS, ANALYTICAL SERVICES OFFICE, JUDICIAL FACTS AND FIGURES, Table 4.5, <http://www.uscourts.gov/judicialfacts/figures/table4.05.pdf> (last visited Feb. 8, 2005).

126. *Id.* These figures are weighted caseloads. *Id.* The increase in unweighted caseloads is similar. *Id.*

127. *Id.*

128. Class Action Fairness Act of 2005, *supra* notes 122-23.

129. REHNQUIST, *supra* note 102, at <http://www.supremecourtus.gov>

The Judicial Conference Executive Committee fiscal year 2004 financial plan was based upon a presumed 4.7% funding increase that was significantly less than the 7.3% increase required to maintain services at the 2003 level.¹³⁰ The 2004 plan retained full funding for judicial officer, chambers staff and law enforcement salaries and benefits.¹³¹ However, funding for the account that includes support staff salaries was cut 12.2% below the level required to maintain the requirements of the 2003 level.¹³² Support staff reductions above a certain level clearly could reduce judicial capacity to handle increased caseloads—especially complex cases with a large load of filings.

The continuing failure of congressional appropriations to allow for even cost-of-living increases to judicial salaries has caused early resignations and retirements among federal judges and has reduced the number of applicants interested in vacant positions.¹³³ Many have expressed concern that judicial salaries are so far below what judges can earn in private practice that it “restricts the universe of lawyers in private practice who are willing to be nominated for a federal judgeship.”¹³⁴ The fear is that a shrinking pool of applicants will eventually cause erosion in the quality of the federal judiciary.¹³⁵

/publicinfo/year-end/2003year-endreport.html (last visited Feb. 2, 2005).

130. *Judiciary Plans Cuts to Combat Projected Shortfalls in Court Funding*, THE THIRD BRANCH, Vol. 35, No. 12 (Dec. 2003), available at <http://www.uscourts.gov/ttb/dec03ttb/shortfalls>.

131. *Id.*

132. *Id.*

133. *Insecure About Their Future: Why Some Judges Leave the Bench*, THE THIRD BRANCH, Vol. 34, No. 2, (Feb. 2002), available at <http://www.uscourts.gov/ttb/feb02ttb/feb02.html#insecure>. The reasons for leaving the bench must be exceedingly compelling because those leaving before retirement forfeit all retirement benefits and the right to an undiminished salary for life. *Federal Judicial Pay Erosion: A Report on the Need for Reform*, American Bar Association/Federal Bar Association (2001), <http://www.fedbar.org/whitepaper.pdf>.

134. *Insecure About Their Future*, *supra* note 133. United States Supreme Court Justice Anthony Kennedy summarized the impact of the pay problem: “Ask United States Senators. They will tell you that when they have been requested by the White House to find candidates, to find the best lawyers in the system, they have been routinely rejected by experienced senior members of the bar. And this is a problem.” *Bar Associations Note Failures in Progress on Judicial Pay, Urge Immediate Action*, THE THIRD BRANCH, Vol. 35, No. 6 (June 2003), <http://www.uscourts.gov/ttb/june03ttb/june03.html#judpay>.

135. House Representative Cliff Stearns (R-FL) remarked during consideration of Representatives of H.R. 4690, the Fiscal Year 2001 Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, “If the

E. Growth of Complex Cases, Class Actions, MDLs

There has been much discussion over the perceived increase in complex litigation and questions about the capacity of courts to effectively manage complex cases.¹³⁶ A necessary first step to measuring the problem is in the definition: what is complex litigation? The Complex Litigation Project of the American Law Institute defined complexity solely in terms of multidistrict and multiparty disputes.¹³⁷ Attempts at a more expansive definition include factors such as the number of parties, joinder issues, multiple forums, protracted time, difficulties in choice and application of law, legal technicality, difficult legal issues, difficulties in crafting remedies, legal context, technical facts, intricate evidence, size of the stakes, and indeterminacy of the law.¹³⁸ Other definitions focus on “dysfunctions” preventing the judge, lawyers or jury from performing their defined litigation tasks.¹³⁹ Under a more expansive definition, multidistrict and class litigation is not inherently complex, but is quite likely to produce a textbook complex case.¹⁴⁰ Both multidistrict and class litigation is on the increase in federal courts.

After a dip in the late 1990s, the total number of civil actions centralized by the Judicial Panel on Multidistrict Litigation per year has been rising. The total number of consolidated civil actions was 38,179 in 2001, increased to 39,109 in 2002, and further increased to 45,010 in 2003.¹⁴¹ These figures may, in fact, underreport the true number of individual claims that are consolidated each year.

issue of adequate judicial salaries is not soon addressed, I believe there is a real risk that the quality of the Federal judiciary, a matter of great and justified pride, will be compromised.” 146 CONG. REC. H5146-01 (daily ed. June 26, 2000).

136. See generally Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213 (1991) (reviewing historical developments and philosophical issues in handling complex cases).

137. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY 7 (1994) (“As used in this Project, ‘complex litigation’ refers exclusively to multiparty, multiforum litigation.”).

138. Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 787–800 (1998).

139. JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 86 n. 1 (1998).

140. See *id.* at 820.

141. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2003, <http://www.jpml.uscourts.gov/StatisticalAnalysis2003.pdf>.

Some courts have allowed “bundling” of complaints such that numerous individual plaintiffs are included on one complaint and pay only one filing fee.¹⁴² Putative class action claims are also counted as one complaint.

The longer-term up trend in MDL activity is apparent in the increase in the number of multidistrict litigations approved under 28 U.S.C. §1407.¹⁴³ The 1960s saw an average of 14.5 MDLs filed per year.¹⁴⁴ In the 1970s an average of 38.9 were filed per year and in the 1980s, an average of 41.1 were filed.¹⁴⁵ In the 1990s the average number rose significantly to 49.3.¹⁴⁶ Between 2000 and 2003, an average of 65.25 MDLs were filed per year.¹⁴⁷

Another form of rapidly growing complex litigation is the class action lawsuit. The number of pending federal class action cases more than doubled between 1996 and 2003, from 2441 to 4977.¹⁴⁸ The most recent figures for the twelve months ending March 31, 2004, show a further increase to 5083 pending class action lawsuits.¹⁴⁹ State court class actions have been the area of greatest concern to defendants and tort reformers. New federal legislation requires class action lawsuits to be heard in federal court if they

142. See generally *In re Baycol Prods. Litig.*, MDL No. 1431, Pretrial Order No. 61, at http://www.mnd.uscourts.gov/BaycolMdl/pretrial_minutes/baycol61.ord.pdf (discussing the practice of bundling and ordering severance and individual filing as a cure for misjoinder).

143. 28 U.S.C. § 1407 (2005).

144. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, DOCKET SUMMARY (Aug. 12, 2004). The Panel only makes summary statistics available at the civil action level and not at the level of the consolidated litigation. To derive the MDL totals, the author tallied the number of MDLs transferred each year based upon the date of filing from the Docket Summary report dated August 12, 2004.

145. *Id.*

146. *Id.*

147. *Id.* As of August 12, 2004, the cutoff date of the report, 46 MDLs had been filed in 2004. *Id.*

148. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR, Table X-4, <http://www.uscourts.gov/judbus2003/contents.html>; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1997 ANNUAL REPORT OF THE DIRECTOR, Table X-4, http://www.uscourts.gov/judicial_business/contents.html. See also FEDERALIST SOCIETY, ANALYSIS: CLASS ACTION LITIGATION—A FEDERALIST SOCIETY SURVEY, 1 CLASS ACTION WATCH 1, 5 (1999), <http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm> (reporting 338% increase in putative class actions between 1988 and 1998 from repeated surveys of defendant corporations).

149. U.S. DISTRICT COURTS, CLASS ACTION CASES PENDING, BY NATURE OF SUIT AND DISTRICT FOR THE TWELVE MONTH PERIOD ENDED MARCH 31, 2004, Table X-4 (available from the Administrative Office of the United States Courts).

meet minimum requirements in terms of number of plaintiffs and the amount in controversy. This legislation will create a flood of federal court class action filings.¹⁵⁰ There is every reason to believe that class action filings will continue to increase at a substantial rate due to the increasing influence of societal factors commentators believe drive mass tort class action filings—such as nationwide product distribution, the development of new drugs and medical devices, the emphasis on individual entitlement, and the perceived rise of an entrepreneurial plaintiff's bar.¹⁵¹

A component of litigation directly affected by the increase in complex litigation, and worthy of special mention, is discovery practice. Research has shown that increased discovery activity, as measured by the number of discovery requests, is positively related to the number of parties, the number of claims and the amount in controversy.¹⁵² As the extent of discovery expands, it becomes more important to the parties and, necessarily, more contentious and adversarial.¹⁵³ Attorneys commonly complain about a lack of efficient assistance from courts in resolving discovery disputes.¹⁵⁴ Indeed, judges are increasingly aware of the effect of litigation complexity on the tractability of discovery and recognize special master appointments as a curative option.¹⁵⁵

150. Class Action Fairness Act of 2005, *supra* notes 122-23. See also Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 510-14 (2000) (describing the potential of federal diversity class action jurisdiction to reform state court "abuses").

151. See Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J., 567, 569-70 (2004).

152. Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 792 (1998) (citing to research studies).

153.

As cases become more complex, lawyers spend more time in discovery. The proportion of time that lawyers spend in discovery to trial time, I believe, is much greater today than it was twenty years ago. Consequently, lawyers tend to use discovery as a means of applying, and all too often displaying, their adversarial skills. This has led to more contentiousness in discovery.

Robert L. Ferguson, Jr., *Use and Abuse of Discovery*, 37 MD. B.J. 26, 26 (2004).

154. See McKenna & Wiggins, *supra* note 152, at 804 ("Sixty-nine percent of all those interviewed, and 93% of big-case litigators, said they did not get 'adequate and efficient help from the courts in resolving discovery disputes and problems.'").

155. *Cordova v. Pac. States Steel Corp.*, 320 F.3d 989, 995 (9th Cir. 2003) ("[I]n this era of complex litigation, special masters may, subject to judicial review, be called upon to perform a broad range of judicial functions [including]

Other litigation components that create more work for judges involve motion practice. There continue to be an ever-increasing use of motions—non-dispositive and dispositive—in cases. As lawyers for all parties file motions to dismiss and for summary judgment to gain a litigation advantage, they also file a growing number of other motions such as motions seeking to disqualify counsel, pursue Rule 11 sanctions, and obtain reconsideration.

F. The Use of Magistrate Judges

The rate of appointment of federal magistrate judges has increased in recent years at a rate slightly lower than the rate of appointment of federal district court judges.¹⁵⁶ The number of sitting magistrate judges increased from 472 in 1988 to 543 in 2003.¹⁵⁷ The decreased use of part-time magistrates over the same period means that a larger percentage of currently sitting magistrate judges serve full-time than in 1988.¹⁵⁸ Since the mid-1990s' restricting of prisoners' access to federal civil rights and habeas corpus appeals, the bulk of magistrate attention has shifted from criminal to civil cases.¹⁵⁹ Despite the broad range of magistrates' potential duties—from conducting scheduling and discovery conferences, entering orders governing the pretrial phases of criminal cases, conducting settlement conferences, and reporting and recommending on dispositive motions over a broad range of criminal matters ranging from social security benefit cases to habeas corpus petitions to requests for injunctive relief—magistrates contribute to the disposition of civil litigation, especially in the pretrial phase.¹⁶⁰ Despite magistrate contributions

supervising discovery.”).

156. JUDICIAL FACTS AND FIGURES, *supra* note 119, at Table 4.6, <http://www.uscourts.gov/judicialfactsfigures/table4.06.pdf> (last visited Feb. 8, 2005).

157. *Id.*

158. *Id.* (163 served part-time in 1988 versus 49 in 2003).

159.

When I came to the federal bench in 1992, the magistrate judges were presiding over very few civil trials. This has not been the case in recent years. Over the past nine years, I have had several hundred cases in which the parties have consented to proceed before a magistrate judge, and I have tried about 60 of those cases.

Suzanne Terada, *The Role of Magistrate Judges*, HAW. B.J. 6, 6 (Oct. 2001) (quoting from interview with Magistrate Judge Barry Kurren).

160. See Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 4 FED. CTS. L. REV., a.1, III.4 (1999).

to the civil case workload, the court crisis continues. It is also worth noting that federal magistrates are permitted by statute to themselves serve as federal court special masters.¹⁶¹

IV. EVALUATING SPECIAL MASTER APPOINTMENTS

It is abundantly clear that granting the courts a flexible mechanism for appointing special masters to address litigation issues is an appropriate way to meet the challenge presented by the growth of complex civil litigation. The revised Rule 53 creates more realistic guidelines grounded in decades of experience with actual special master appointments. The new rule paves the way for the appointment of pretrial and post-trial masters to deal with issues common to complex litigation without subjecting the appointment to uncertain appellate review over the existence of an “exceptional condition” justifying the appointment. Some commentators, however, question whether opportunities for special master contributions are appropriately compartmentalized into pretrial, trial and post-trial bins.¹⁶² The best measure of the potential special master contribution may be best taken by the judge’s discretion based upon the individual characteristics of the litigation and may, in fact, span the three categories defined by Rule 53. The revised rule does not readily accommodate such appointments.

Another key consideration is cost and efficiency. Speedy and inexpensive resolution of cases is the hallmark of ADR. To the extent that special master appointments are delayed by disputes between the parties and the mechanics of the appointment and to the extent that the special master fees and expenses exceed those required by court personnel to perform the same duties, the special master appointment is less than successful. Excessive special master fees and costs leave the parties and the public with the impression that justice has a price.¹⁶³ To be sure, these criticisms do not apply to cases where the expertise and availability of the special master expedite the resolution of the dispute in the best tradition of ADR.

161. See 28 U.S.C. § 636(b) (2) (2003).

162. See Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternate Dispute Resolution*, ALI-ABA CLE, Sept. 18–19, 261, 302 (2003).

163. *Id.* at 301.

V. CONCLUSION

Several factors together argue for the increased use of special masters in federal civil litigation. First, the 2003 revisions to Rule 53 open the procedural door to special master appointments. This is especially the case in the pretrial, post-trial, and damage computation settings where masters have been traditionally used under the previous version of the rule. This article points to three specific roles played by masters—settlement, decision-making, and case management—and points out both the potential utility of such appointments and some of the unique ethical challenges they present.

Second, the chronic and continuing budget pressures being felt by the federal judiciary in combination with increasing caseloads mean that special master appointments can be an effective resource allocation tool in cases where dockets are full, the case is amenable to the contribution of a master, and the parties are in a position to pay the necessary fees and expenses. Finally, the unprecedented growth in complex civil litigation means that the case management challenges faced by the judiciary are simply unprecedented.

Those serving as special masters and those who are qualified to be special masters are making a name for themselves to assist judges and lawyers in learning about their qualifications, experience, and availability. The Academy of Court-Appointed Masters now serves as a site for information about the advantages of special masters and the names of those who have served as special masters.¹⁶⁴ In the future, more, readily available information about masters will be forthcoming.

These realities require that courts deploy all reasonable tools at their disposal. And the expanded use of special masters may well be the most effective, efficient, and economical tool to use. Revised Rule 53 explicitly opens the door to special master appointments in appropriate cases. This article suggests and strongly encourages judges to walk through the door.

164. Academy of Court-Appointed Masters homepage, at <http://www.courtappointedmasters.org>.