The Use and Abuse of Referees and Special Masters in Discovery

Wednesday, October 26th, 9:00 - 10:30

As courts have become more burdened and short of funds, they have increasingly turned to private judges, referees, or special masters to resolve discovery disputes. This panel will address the pluses and minuses of this trend, including the consequences of having a parallel system of justice for well-heeled parties, the consequences of having cutting-edge issues of, for example, e-discovery, resolved in private, the advantages and disadvantages of having discovery motions carefully considered and extensively litigated, how to work effectively with a referee, and so on.

Panelists:

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BY RICHARD LEE

Appointing a Discovery Referee in California State Court

IN THE COURSE OF LITIGATION, it is almost inevitable that disputes arise about discovery. Whether they pertain to objections at deposition or the timeliness and scope of written discovery responses, they often can be resolved through informal discussions or compromises between counsel. At other times, counsel may need to involve the court through discovery motions. In a few instances, however, particularly in those involving obstructionist counsel or a multitude of discovery issues, it may be prudent to consider the appointment of one or more discovery referees. The presence of a referee during depositions can often persuade even the most obstreperous counsel and witnesses to behave in a more reasonable manner. On the other hand, the costs associated with the appointment of a discovery referee may far exceed the utility provided.

California statutory law provides for the appointment of a discovery referee by a written stipulation of the parties or, when the parties cannot agree, upon the court's own motion or its ruling on a party's noticed motion.[1] When one party's counsel demonstrates an intention to obstruct the discovery process at every turn (whether by engaging in abusive behavior at deposition or ignoring discovery requests) or when the case is complicated by an enormous amount of documents and issues, the court may decide that a discovery referee's appointment is the most efficient method by which to resolve such matters.[2]

While a referee may make matters more efficient from the court's perspective, the parties in the litigation may be more concerned with the expense. Counsel should remember that discovery referees are paid by the hour, and the fees are usually apportioned equally between the parties.[3] If a referee is appointed early in discovery and is compelled to attend depositions, analyze objections, and consider numerous discovery requests and motions, his or her fees can pose a daunting obstacle to settlement—and, possibly, an attorney's relationship with the client. Counsel should therefore be familiar with the process by which referees are appointed and what steps may be taken to advocate or oppose an appointment.

The Appointment Process

The first step a trial court must take to appoint a discovery referee is to make a written determination that "exceptional circumstances" require the appointment. The finding also must be specific to the circumstances of the particular case.[4] Case law provides guidance as to what constitutes exceptional circumstances.[5] Examples include the following:

- Multiple issues must be resolved.
- Multiple motions must be heard simultaneously.
- A discovery motion before the court is only one in a sequence of many.
- The number of documents to be reviewed require an inordinate amount of time.

After the determination is made and the referee is appointed, the discovery review process is established at the referee's discretion.[6] The referee may, for example, decide to consult with each of the parties' counsel, consider all the matters in dispute, and then set a timetable for briefs and discovery motions. Sometimes, the referee may request briefs before meeting with counsel. Again, however, referees are paid by the hour, so they have personal as well as professional incentives to be thorough before making discovery recommendations to the court.

A discovery referee, while sometimes useful when dealing with numerous complicated discovery issues, can open a Pandora's box of consequences for all parties, not the least of which may be the substantial expense.

Counsel may expect referees to schedule informal conferences and hearings to seek input.[7]

Referees generally do not make the actual decisions on discovery disputes but rather they simply make recommendations to the court.[8] The recommendation and approval process may allow for the parties, including those parties that are represented by obstructionist counsel, to get multiple opportunities to object and present their arguments. Specifically, the court may allow the parties to object within 10 days of the service and filing of the referee's recommendations and another 10 days for responses to the objections.[9] Alternatively, the court may set a schedule that is based on the parties' stipulation or that is based on its own convenience. Whatever the schedule, the delays stemming from objections to the referee's recommendations may make litigation even more costly and may force the parties to spend more time in the courtroom than they would have if a referee had not been appointed.

Counsel should also keep in mind that the referee's report may include recommendations not only on procedural and substantive discovery matters but also for sanctions against parties and counsel.[10] Thus, maintaining a civil approach to discovery disputes, especially before the referee, is paramount. Let those on the other side be the jerks.

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Furthermore, unless the court sets forth, in its written ruling appointing the referee, a ceiling on the amount of hours that the referee should bill, it is possible that the referee may stay with the litigation until the case's final disposition, whether that means settlement or the close of trial.

A Motion to Disqualify

With all these considerations regarding ballooning costs, delays, and additional, time-consuming courtroom appearances, what can counsel do to avoid the court's appointment of a referee? Either or both parties can move to disqualify a discovery referee, much in the way that the parties can use peremptory challenges to disqualify a trial judge.[11] Such a motion to disqualify must be timely. When a referee is to be appointed only for a limited number of discovery disputes, the motion must be made at least 5 days before the hearing or trial date, so long as the referee assigned to hear the disputes is known for at least 10 days prior to the hearing or trial date.[12] And when a discovery referee is appointed for all discovery purposes, generally, the motion must be made within 10 days of the notice of the appointment of the referee.[13]

A discovery referee, while sometimes useful when dealing with numerous complicated discovery issues, can open a Pandora's box of consequences for all parties, not the least of which may be substantial expense. Caution is the word of the day when considering agreeing to a discovery referee or when the court imposes one. In a perfect world, disputes can be resolved with phone calls and letters, but litigation can be an imperfect, contentious battleground that unfortunately may lead to incivility and stubbornness. Resorting to a discovery referee is an extreme measure, and so the threat of moving for a referee's appointment may actually be an effective negotiating tool in resolving disagreements with obnoxious opposing counsel. Nevertheless, in some high-stakes cases in which a referee's fees will constitute only a fraction of the total discovery costs, the appointment of a referee may save the parties trouble. ■

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[1] CODE CIV. PROC. §§638, 639(a)(5); CAL. R. CT. 244.1, 244.2.
[2] *See* CODE CIV. PROC. §639(a)(5); *see also* Hood v. Superior Court, 72 Cal. App. 4th 446, 449 (1999).
[3] CODE CIV. PROC. §645.1.
[4] CODE CIV. PROC. §639(d)(2).
[5] Taggares v. Superior Court, 62 Cal. App. 4th 94, 105 (1998).
[6] *See* CAL. R. CT. 244.2(h)(2).
[7] *See generally* CAL R. CT. 244.2(h).
[8] CODE CIV. PROC. §§639(a)(5), 643.
[9] CODE CIV. PROC. §643(c).
[10] *See* Sauer v. Superior Court, 195 Cal. App. 3d 213, 225 (1987).
[11] CODE CIV. PROC. §§170.6, 639(b).
[12] CODE CIV. PROC. §639(b)(B).
[13] CODE CIV. PROC. §639(b)(A).

State Court Authorities Governing Special Masters, Referees, Commissioners, and Similar Judicial Adjuncts

And

Comparison State Rules to Federal Rule of Civil Procedure Rule 53

State	**Authorities and Comparison to FED. R. CIV. P. Rule 53**
Alabama	ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53 Adopts pre-2003 amended version of the federal rule but state rule does not apply to state district courts.
Alaska	ALASKA R. CIV. P. 53 ALASKA CT. R., CHILD IN NEED OF AID 4 ALASKA CT. R., DELINQUENCY 4
Arizona	16 PART 1, A.R.S. RULES OF CIV. PROC., RULE 53 ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party) Adopts pre-2003 amended version of the federal rule.
Arkansas	ARK. R. CIV. P. 53 Modeled after pre-2003 amended version of the federal rule but limited to non-jury actions.
California	CAL. CIV. PROC. CODE §§ 638 - 639 (West 2004) Requires agreement of the parties.
Colorado	COLO. CT. C.P.R. 53 Adopts pre-2003 amended version of federal rule.
Connecticut	CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53 Limited scope – only applies to family law matters. Pilot program established for civil/family discovery masters and civil matter settlement conferences scheduled to end 12/31/2004.

Delaware	DEL. S. CT. R. 43(b)(v) DEL. CT. CH. R. 135 – 47 DEL. FAM. CT. C.P.R. 53 DEL. SUPER. CT. CRIM. R. 5 Limited to hearing issues of fact.
District of Columbia	D.C. SUPER. CT. R. CIV. P. 53 D.C. SUPER. CT. R. DOM. REL. 53 D.C. SUPER. CT. R. CRIM. P. 117 Adopts pre-2003 amended version of the federal rule.
Florida	FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005) Requires parties' consent.
Georgia	GA. CODE ANN. §§ 9-7-1 to -6 (1982 & Supp. 2004)
Hawaii	HAW. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Idaho	IDAHO R. CIV. P. 53 IDAHO CRIM. R. 2.2 Adopts pre-2003 amended version of federal rule.
Illinois	Illinois does not use fee officials.[1]
Indiana	IND. R. TRIAL P. 53 Adopts pre-2003 amended version of federal rule.
Iowa	IOWA R. CIV. P. 1.935 Adopts pre-2003 amended version of federal rule.
Kansas	KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002) When parties consent, any issue can be referred to a special master. Contains language where without the parties consent, the court can only refer a case to a master when justice will be measurably advanced, or to cases that will be tried to a jury when they involve examination of complex or voluminous accounts.
Kentucky	KY. R. CIV. P. 53.01

1. Mullaney, Wells & Co. v. Savage, 282 N.E.2d 536, 538 (Ill. App. Ct. 1972).

	When appointed to matters other than judicial sales, settlement, receivership, and bills of discovery assets of judgment debtors, appointment requires that the matter involve complex calculations, multiplicity of claims, or other exceptional circumstances.
Louisiana	LA. REV. STAT. ANN. § 13:4165 (West Supp. 2004) Court can appoint in any civil action with parties consent if there is a complicated issue or when exceptional circumstances exist.
Maine	ME. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Maryland	MD. CIR. CT. R. CIV. P. 2-541 Limited to non-jury matters.
Massachusetts	MASS. R. CIV. P. 53 MASS. R. CRIM. P. 47 Adopts pre-2003 amended version of federal rule but also requires assent of all parties prior to special master appointment.
Michigan	MICH. CT. RULES PRAC. R. 3.913 Applies to probate and juvenile court. Can conduct preliminary inquiries and can preside at hearings other than a jury trial or preliminary examination.
Minnesota	MINN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Mississippi	MISS. R. CIV. P. 53 Can refer any issue to a special master with the written consent of the parties, otherwise appointment requires an exceptional condition.
Missouri	MO. R. CIV. P. 68.01 Adopts pre-2003 amended version of federal rule.
Montana	MONT. CODE ANN. § 25-20-R. 53 (2003) Adopts pre-2003 amended version of

	federal rule.
Nebraska	NEB. REV. STAT. §§ 25-1129 to -1137 (2004) Appointment requires written consent of the parties.
Nevada	NEV. R. CIV. P. 53 NEV. 1ST JUD. DIST. CT. R. 5 Adopts pre-2003 amended version of federal rule.
New Hampshire	N.H. R. SUPER. CT. 85-A Appointment requires written consent of the parties.
New Jersey	N.J. CONST. art. 11, § 4, ¶ 7 N.J. R. CIV. PRAC. 4:41 Appointment requires parties' consent.
New Mexico	N.M. R. CIV. P. 1-053 Adopts pre-2003 amended version of federal rule.
New York	N.Y. UNIF. TRIAL CT. R. § 202.14 Chief Administrator of courts has power of appointment.
North Carolina	N.C. GEN. STAT. § 1A-1, R. 53 (2003) Modeled after pre-2003 amended version of federal rule. Certain actions require parties' consent prior to appointment.
North Dakota	N.D. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Ohio	OHIO REV. CODE ANN. CIV. R. 53 OHIO REV. CODE ANN. CRIM. R. 19 OHIO REV. CODE ANN. JUV. R. 40 Modeled after pre-2003 amended version of federal rule. Does include pre-trial and post-trial matters, or matters where the parties consent.
Oklahoma	OKLA. STAT. ANN. tit. 12, §§ 612-619 (West 2000) Can appoint to any civil action with the parties' written consent.
Oregon	OR. R. CIV. P. 65 Appointment requires written consent of

	the parties; without consent of the parties, appointment requires an exceptional condition.
Pennsylvania	42 PA. CONS. STAT. ANN. §§ 1558, 1920.51 (West 2002) Court can appoint at any time after the preliminary conference and master can hear any issue or the entire matter.
Rhode Island	R.I. R. CIV. P. 53 R.I. R. PROC. DOM. REL. 53 Adopts pre-2003 amended version of federal rule but also provides greater latitude in appointing a special master; special master may be appointed to any issue where the parties agree.
South Carolina	S.C. R. CIV. P. 53 Allows appointment when the parties consent.
South Dakota	S.D. CODIFIED LAWS § 15-6-53 (West 2004) Adopts pre-2003 amended version of federal rule.
Tennessee	TENN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Texas	TEX. R. CIV. P. 171 Adopts pre-2003 amended version of federal rule but requires parties' consent to appointment of a master. Other modifications include that the case must be an "exceptional one" and there must be "good cause" for appointment of a master.
Utah	UTAH R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Vermont	VT. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule with minor modifications. State rule is narrower because for actions to be tried by a jury, appointment is only made when the action requires investigation of accounts or examination of

	vouchers.
Virginia	VA. S. CT. R. 2:18, 3A:1 A court decree refers a matter to a "commissioner in chancery."
Washington	WASH. SUPER. CT. CIV. R. 53.3 Adopts rule that is broader than the pre-2003 amended version of federal rule. State rule allows appointment for "good cause" and allows appointment of special master to discovery matters.
West Virginia	W. VA. R. CIV. P. 53
Wisconsin	WIS. STAT. § 805.06 (1994) Adopts pre-2003 amended version of federal rule with minor modifications, i.e. "referee" used in place of "special master."
Wyoming	WYO. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.

Special Masters: Mastering the Pretrial Discovery Process

by Cary Ichter and S. Paul Smith

Although discovery under the Georgia Civil Practice Act[1] is supposed to be a cooperative, largely self-executing process, as a general proposition, it is often anything but that, and the courts' supervision is frequently compelled by the inability of the parties to agree about much of anything. All too often the courts become drawn into discovery battles that are every bit as incomprehensible to the courts as they are wasteful of the time and resources of all involved.

In our experience, complex commercial cases are particularly prone to discovery disputes. Such cases frequently require the exchange of an enormous volume of data by the parties under the supervision of the courts. Complex commercial cases nearly always involve more data, more documents, more witnesses, and, because of the amounts in controversy, more lawyers. This, of course, means more issues and more disputes, which yield more motions and more work for the already overburdened courts. The only thing there is less of is judicial time and resources with which to address the litigation landslide. The discovery process can grind to a halt, while the parties wait for the court to clear the way of the obstacles the parties have created. Sound familiar?

The purpose of this article is to propose a solution: the use of special masters to ride herd over unruly armies of lawyers in complex civil cases and to handle time-consuming issues in other cases.[2] Of course, not everyone will agree that special masters are the answer, but we believe that they can go a long way toward addressing problems that arise when complex cases overwhelm the courts with equally complex and burdensome discovery disputes. As one noted commentator put it: "Special masters can help redress the imbalance that demoralizes a court that is confronted by the squads of lawyers and masses of data that invariably accompany major cases."[3] Under the Civil Practice Act, special masters may be appointed by the court upon the request of the parties or when "the facts and circumstances of any such case require it."[4]

We submit that once a complex case reaches motion practice in the course of discovery, the appointment of a special master to resolve discovery disputes is appropriate because it would: (1) allow judges to concentrate on pressing matters that can be addressed more quickly in other cases without getting bogged down in the minutiae of complex-case discovery; (2) save time and money for the litigants in the long run; and (3) promote efficient and fair resolution of the case itself.

The Legal Foundation for Special Masters for Discovery

The use of special masters has a long tradition dating back to the English courts in chancery and continuing in equity cases in the United States. As Justice Brandeis explained in *Ex parte Peterson*, courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power 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 progression of a cause."[5]

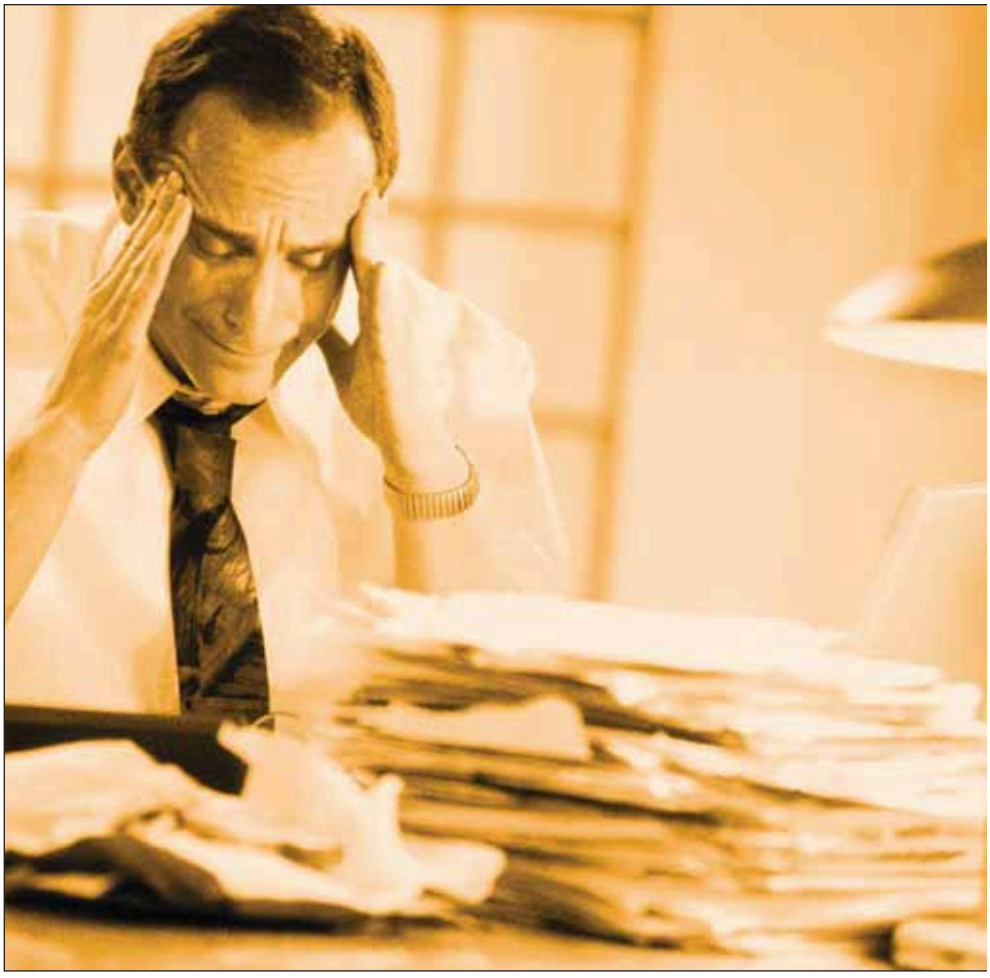
In Georgia, special masters are governed by O.C.G.A. § 9-7-1 to § 9-7-6. O.C.G.A. § 9-7-2 provides that "[u]pon application of either party, after notice to the opposite party, the judge of the superior court, in equitable proceedings if the case shall require it, may refer any part of the facts to an auditor to investigate and report the result to the court. *Furthermore, the judge may, upon his own motion, when in his judgment the facts and circumstances of any such case require it, refer the same to an auditor.*"[6] In short, the decision of whether to refer a matter to a special master is one that is commended to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.[7]

The type of master that is contemplated by the statute appears to be primarily in the role of a fact-finder, evidentiary analyst or discovery referee.[8] Indeed, the use of special masters for discovery in complex cases in the federal system is common and has been extensively discussed, particularly with respect to the recently revised Rule 53 of the Federal Rules of Civil Procedure.[9] Judge Scheindlin, a member of the Advisory Committee on the Federal Rules of Civil Procedure that amended Rule 53, explained further:

> With respect to "discovery" masters, district courts increasingly viewed resort to a Rule 53 master as necessary in light of increasing docket pressures and limited judicial resources. Masters have been appointed to oversee the discovery process, which can entail resolving disputes, establishing procedures and schedules, monitoring document production, and attending depositions and conferences. References of discovery and discovery disputes have been seen as particularly useful because of their time-consuming nature or need for immediate resolution. Factors considered in these appointments included the volume of material to be produced and exchanged, the scientific and technical nature of the information subject to discovery, and the complexity of the underlying dispute.[10]

While virtually all, if not all, referral orders appointing special masters appear to be made pursuant to section 9-7-2, a persuasive argument can be made, and has been made in other jurisdictions, that the courts have the inherent power to appoint special masters. Indeed, courts have long been held to have the inherent power to prescribe the manner in which the business of the court is to be conducted.[11]

In addition, the courts have certain authority conferred upon them by statute that could empower them to appoint special masters. For example, O.C.G.A. § 15-1-3(4) empowers "every court" to "control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." Moreover, it has long been recognized that the courts' power to make a referral is not limited to suits for an accounting.[12] In passing upon the constitutionality of the



Magistrate's Act in the criminal context, the Supreme Court of Georgia declared, "The judges of superior court have been given authority to appoint other inferior judicial officials, *i.e.*, judges pro hac vice, special masters, ex-officio justices of the peace; and U.S. District Court judges have statutory authority to appoint federal magistrates. We have not found any cases, nor have we been cited to any, holding these delegations of authority to be unconstitutional."[13]

The Mechanics of a Referral Order

The mechanics of such an appointment or referral are fairly simple. If the parties consent to the appointment or if the court finds that the matter would benefit from appointment of a master, the court may make a referral. The court need only enter an order making the appointment, describing the scope of the master's appointment and powers, describing the manner in which the master is to report to the court, and directing as to how the master is to be compensated. A form order that includes the standard elements of a referral order is provided at the conclusion of the article.

Because a special master is not an Article III judge or a judge appointed under Article VI of the Georgia constitution, a special master may not issue dispositive rulings. The special master may, however, issue rulings upon non-dispositive matters, such as discovery disputes, and may conduct hearings on dispositive matters and issue a report and recommendation to the court.

The appointing court maintains the ability, and the obligation, to oversee the decisions of the special master, reviewing, when called upon by motion of a party, the decisions of the master. As one court has explained it, "In essence, then, the trial judge who appointed a special master in a non-jury civil case has transformed his role into that of an appellate court, at least with regard to the resolution of factual issues."[14]

The Need for Special Masters

Nationally, between 1993 and 2002, state court caseloads have increased at a steady pace. Over those 10 years, state court civil case filings increased 12 percent, criminal case filings 19 percent, domestic relations case filings 14 percent and juvenile case filings 16 percent.[15] Overall, state court civil case filings increased 12 percent from 1993 to 2002, and 96.2 million new cases were filed in state courts in 2002.[16] Those trends have continued unabated.

Appointments of new judges have not kept pace with growing caseloads. While all categories of new case filings have averaged more than 1 percent growth per year, the growth in the pool of

judges to handle those matters has risen by less than 0.5 percent per year.[17] In other words, the rate of case filings is outstripping the growth of judicial resources by a factor of better than two to one. Meanwhile, budgets for courts, at all levels all across the country, are being cut.

Of particular concern is that increasingly complex, technical and resource-consuming matters are being introduced at the state court level. The difficulties are multiplied because state courts often lack the support found at the federal level, where judges enjoy the assistance of one or more clerks and larger support staffs. With larger dockets involving more complicated matters and more "managerial judging" to be done, state courts are often strained to the breaking point.

Within this deluge of disputes are more and more complex commercial matters—matters that can involve highly technical factual, legal and discovery issues and tens of thousands to millions of pages of documents. The documents in these cases are often a mixture of technical, confidential, proprietary and privileged materials that are maintained in a host of different environments, including electronic versions that exist on desktops, in hard drives, servers, archives and legacy back-up systems that may not be currently supported by any existing vendor. In short, it hardly requires the creative minds of high-powered legal talent to uncover genuine discovery issues that require significant technical competence.

Tens of thousands of pages of documents usually translate, minimally, into scores of witnesses, and, given the ability to work remotely that technology affords us, taking testimony from those witnesses is often a multi-jurisdictional operation. And then there are the experts, who construct technical complexities atop procedural complexities. In the final analysis, a single complex matter could become a full time job for a court, and few, if any, state courts have the ability to dedicate all their time and attention to a single matter.

A study conducted by the Federal Judicial Center found great satisfaction in all quarters, judges and litigants, with the performance and contributions of special masters in cases to which masters were appointed, concluding that special masters were "extremely to very effective."[18] The study reported, "The work of special masters is very helpful; in fact one judge in responding to the FJC Study 'wished he had appointed a discovery master earlier.' The FJC Study shows that generally, judges appointing special masters thought that the 'benefits of appointments outweighed any drawbacks."[19] The study concluded that special masters delivered "better, faster, and fairer resolution of litigation in the cases in which masters are used, as well as ... easing the burdens these cases place on the judiciary."[20]

Answering Objections

Of course, not everyone agrees that special masters should be more regularly appointed. One argument that has been leveled against enlarging the use of special masters is that in doing so the courts abdicate their responsibility and their power. The same argument was employed to protest the use of arbitration, and that argument lost in favor of maximizing the functional efficiency of the process. Congress, through the Federal Arbitration Act, and the states decided that private adjudication of matters is not problematic because arbitration can be more cost-efficient and reduced the burden on the court system, in addition to promoting the freedom of parties to define their own relationships by contract. This is not to say that the arbitration system is perfect, or that everyone is satisfied with it, but the policy considerations that have prompted the more prevalent use of arbitration apply with equal weight to the use of special masters.

The use of special masters promotes the same ends as arbitration, but the special master is backed up by the trial court that makes the referral. Unlike the decisions of arbitrators, every decision of a special master is subject to review by the referring court. Hence, with special masters there is no abdication of power and no loss of authority in the judicial branch. The special master is a tool of the court; the special master in no way replaces the court.

Others object that the costs of a special master should not be thrust upon litigants simply because they are involved in complex litigation. We believe, to the contrary, that the introduction of a special master to a complex matter can actually reduce the costs of the matter. First, because of the undistracted attention a special master can lavish upon a complex matter, he or she can fashion matter-specific and issue-specific structure and discipline on the discovery process at an earlier stage than might other-

wise be possible. "This sharpened focus will beget more timely and responsive production of requested discovery materials, will decrease the burden upon and the cost to the producing party and will shorten the pretrial discovery stage with commensurately foreshortened litigation."[21]

On the other hand, it is our experience that, when confronted with complex, resource-consuming matters, courts can tend to apply rigid and formulaic structures to the matters in the hope that fixed schedules and procedures will move the matter along without the intervention or attention of the court. Bitter experience has proven that such formulas simply do not work. "[T]oo much pressure applied in the wrong circumstances can wreck an entire pretrial process … . A special master devoting a substantial attention to one case may be more successful at finding the proper balance than a … judge with responsibility for many cases."[22]

Additionally, the introduction of a special master "into the discovery process may induce the parties to be more cooperative because they are compelled with an unbiased individual focused on the discovery process, rather than with a beleaguered judge to take note of the dilatory maneuvering."[23] As one commentator has noted, "The reality is that efficiencies brought about by special masters ultimately save money for the parties and save public resources."[24]

Finally, if the special master also introduces the deterrent effect of shifting the costs of unsuccessful discovery maneuvering to the nonprevailing party, the master might all but eliminate costly, time-consuming and meaningless discovery motions practice. In short, special masters, properly used, could represent an enormous cost savings for litigants in complex cases.

Conclusion

Courts have the inherent power to control their dockets, and one tool they can use to accomplish that end is the appointment of a special master in proper cases. While this power has been usually reserved for instances involving complex matters of accounting, there is no impediment to a court employing O.C.G.A. § 9-7-1 *et seq.* to efficiently move nightmarishly complex cases along. We believe there is good reason to do so: it would ease the burden on the courts, promote efficiency within the case itself; and in the end save money for the litigants.

Not everyone will agree that more frequent use of special masters is a good idea. But many of the arguments against the use of special masters were previously used against arbitration, and, ultimately, the use of arbitration has grown. If we, as lawyers, are serious in our complaints about discovery abuse, waste, and delay by the courts, we have an obligation to do something about it or stop complaining altogether. Using special masters for discovery matters in complex cases is one way we can help. GBJ

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Endnotes

1. O.C.G.A. § 9-11-1 *et seq.* (2006).
2. It is beyond the scope of this article to fully explore the many uses court can make of special masters, but here are a few that can be found in the cases and the literature: overseeing and monitoring discovery; conducting large *in camera* document reviews; supervising class notice process; conducting *Daubert* and similar statutory expert witness evaluations; managing electronic data discovery; presiding over evidentiary hearings; overseeing the winding up of the affairs of corporations and partnerships; calculating attorneys' fees and other damages; preserving marital estates and issuing reports and recommendations in domestic relations matters; disputes concerning the management and legal compliance of public institutions such as schools, jails and utilities systems; and making value determinations for damages purposes in complex damages cases.
3. Wayne D. Brazil et al., Managing Complex Litigation: A Practical Guide to the Use of Special Masters, 5 (1983).
4. O.C.G.A. § 9-7-2.
5. Ex parte Peterson, 253 U.S. 300, 364-65 (1920); *see also* Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 462 (1983) ("[T]here has always existed in the federal courts an inherent authority to appoint masters.").
6. O.C.G.A. § 9-7-2 (emphasis added).
7. *See* Mobley v. Faulk, 42 Ga. App. 314, 156 S.E. 40 (1930). Given the importance in this state of a trial by jury, it is not surprising that in those instances where it was error to appoint a special master, or not

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error to *not* appoint a special master, the jury's role was a primary consideration. *See, e.g.*, Franklin v. Franklin, 267 Ga. 82, 475 S.E.2d 890, 891 (1996) (reversing because "[a]lthough a trial court has the authority to refer an equitable proceeding to an auditor, it is apparent that no purpose is served in appointing an auditor in a domestic case where pursuant to a proper demand, all issues relating to alimony and property division must ultimately be submitted to the jury"); Steenhuis v. Todd's Constr. Co., 227 Ga. 836, 183 S.E.2d 354, 355 (finding no abuse of discretion in not appointing an auditor where "it cannot be said that a jury is not better qualified to pass upon the same than an auditor"). For this reason, the U.S. Supreme Court's decision in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957), severely restricted the power of federal courts to employ Rule 53, except in exceptional cases, because to do so would "displace the court."

8. *See* Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1276 (2005) ("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. 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.").
9. *See, e.g.*, Fellows & Haydock, *supra* note 8; Shira A. Scheindlin & Jonathan Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. ST. BAR J. 18 (2004).
10. Scheindlin & Redgrave, *supra* note 9, at 21.
11. "That the courts possess certain inherent powers, is a proposition which, so far as we know, has never been questioned. This means, then when the constitution declares that the legislative, judicial, and executive powers shall forever remain separate and distinct (art. 1, sec. 1, par. 23), it hereby invests those officials charged with the duty of administering justice according to law with all necessary authority to efficiently and completely discharge those duties the performance for which is by the constitution committed to the judiciary, and to maintain the dignity and independence of the courts." Lovett v. Sandersville R.. Co., 199 Ga. 238, 33 S.E.2d 905 (1945) (citations omitted).
12. *See, e.g.*, Candler v. Bryan, 189 Ga. 851, 8 S.E.2d. 81, 85 (1940). The *Candler* case citied with approval the decision in *Lamar v. Allen*, 108 Ga. 158, 33 S.E. 958 (1899), in which the Supreme Court had noted, "As a matter of fact, there was but one question to be determined, that is, who was the brother of Richard Lamar," and yet held, "An examination of this record satisfies us that this was a case in which reference to an auditor was peculiarly appropriate. No jury could have dealt with the mass of conflicting testimony in as satisfactory a way as the same was dealt with by the intelligent and able auditor to whom the case was referred." Candler, 8 S.E.2d at 85-86.
13. State v. Andrews, 240 Ga. 541, 242 S.E.2d 153, 156 (1978).
15. Collins v. Foreman, 729 F.2d 108, 119 (2d Cir. 1984). Consequently, it makes good sense for parties to ensure that a record of proceedings before a special master is maintained so that the parties have a record to present to the trial court should it become necessary to do so.
15. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, COURT STATISTICS PROJECT (2003).
16. *Id.*
17. FRANCES KAHN ZEMANS, COURT FUNDING, ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE 1, 11 (Aug. 2003).
18. WILLGING ET AL., SPECIAL MASTERS' INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE'S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS (2000).
19. *Id.*; *see also* Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1313 (2005).
20. WILLGING ET AL., *supra* note 18.
21. Richard H. Agins, *An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery*, 23 PACE L. REV. 689, 720 (Spring 2003).
22. *Id.* (quoting ROBERT D. MCLEAN, PRETRIAL MANAGEMENT IN COMPLEX LITIGATION: THE USE OF SPECIAL MASTERS IN *UNITED STATES V. AT&T*, at 278 (1983)).
23. Agins, *supra* note 21, at 720.
24. WILLGING ET AL., *supra* note 18, at 59.

SAMPLE ORDER

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____,
Plaintiff,

v.

CIVIL ACTION
FILE NO. _____

_____,
Defendant.

ORDER APPOINTING SPECIAL MASTER

This action is before the court on **[the Court's own motion]** **[the application of the parties]** to appoint _____ as a Special Master in the above-styled case, subject to the terms and conditions set forth herein.

Duties

The Special Master is hereby directed to proceed with all reasonable diligence to perform the following functions:

A. Case Management: The Special Master shall have the authority to conduct scheduling conferences, establish case management orders and discovery schedules, and otherwise perform such acts necessary to expeditiously and efficiently move the case through the discovery process, including issues related to electronic data discovery and privilege.

B. Conflict Resolution: The Special Master shall have the power to entertain all motions for relief brought by the parties concerning discovery, with or without a hearing, and shall issue written rulings thereon with all reasonable diligence upon submission to the Special Master. Included within the power to conduct hearings on motions shall be the power to receive testimony under oath before a court reporter, and to preside over the reception of evidence into the record.

C. Settlement: The Special Master may serve as a mediator, if requested by the parties, to facilitate settlement of the case.

D. Sanctions: The Special Master may award costs of motions and impose sanctions upon any party for failure to comply with discovery requirements.

E. Other Duties: The Special Master may perform such other and further tasks not specifically enumerated above if such additional undertaken in furtherance of the above scope of appointment. The Special Master may perform additional tasks and functions (including, but not limited to, ruling on motions for non-discovery related injunctive relief) if the parties consent thereto, or if the Court, upon application of one of the parties, specifically appoints the Special Master to so act.

Conduct of Parties

The parties are instructed to cooperate with the Special Master in all respects, including, but not limited to, making available to the Special Master any facilities, files, databases, documents, or other materials the Special Master may request to fulfill the Special Master's duties hereunder. The parties are not permitted to engage in ***ex parte*** communication with the Special Master or the Special Master's administrative staff, except as would be permitted with the Court and the Court's staff, or except as such communications may relate to settlement of the case where the Special Master has been asked to serve as a mediator.

Compensation of the Special Master

The Court has considered the fairness of imposing the likely cost of the Special Master on the parties and has taken steps to protect against unreasonable expense and delay. In light of the determined need for the appointment of the Special Master, the Court concludes that the parties shall bear the cost of the Special Master on the following terms and conditions: The Special Master shall charge an hourly rate of $___.00 and shall keep an account of all hours or quarter-hour fractions thereof, and any expenses incurred by the Special Master in the performance of the Special Master's duties hereunder. The Special Master will issue an invoice describing the work performed and the hours attributable to the work performed, plus the expenses incurred by item, to the parties on a monthly basis. The parties shall each pay their *pro rata* **[i.e., if two parties, 50% each; if four parties, 25% each, etc.]** share of the invoice promptly and in no event less than 30 days from the issuance thereof. Any dispute by any party over any aspect of the invoice shall first be raised informally with the Special Master for possible resolution, and if resolution is not agreed, then the party disputing any aspect of the invoice may address such dispute to the Court by motion, to which the Special Master may respond.

Miscellaneous

The Special Master is instructed to maintain all pleadings and correspondence submitted by the parties in connection with the case and to forward the entirety of such documents and records to the Court at the conclusion of discovery. The parties need not file with the Court a duplicate of the documents submitted to the Special Master.

The Special Master, by accepting this appointment, represents to the Court that there are no matters within the scope of this appointment for which the Special Master could or should be disqualified, and that the Special Master accepts the terms and conditions of this appointment set forth herein.

This Order shall be effective upon the submission by the Special Master of the affidavit required immediately above.

SO ORDERED, this _____ of _____, 200__.

_____
Judge, _____ Court of
_____ County

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UTILIZING "SPECIAL MASTERS" IN FLORIDA: UNANSWERED QUESTIONS, PRACTICAL CONSIDERATIONS AND THE ORDER OF APPOINTMENT

Howard R. Marsee

Author's note August 25, 2009 -- *This article was initially published in the October 2007 issue of The Florida Bar Journal. This is a revised version of that article. It has been updated to reflect amendments, since the article was first written, to Rule 53 of The Federal Rules of Civil Procedure.*

"Masters" are adjuncts of the court, exercising limited judicial authority and appointed by the court to perform specific tasks. "Special masters" typically are appointed by the presiding judge to serve in specific cases.[1] "General masters" serve more broadly and typically are appointed to serve over a variety or class of cases, often on a venue-wide basis.[2] The terms "special master" and "general master" are sometimes confused or used indiscriminately, even within the same case.[3]

The master's authority derives from his or her appointment by the court. Historically, courts relied upon the common law and upon the court's inherent authority to appoint masters and to define the master's duties and responsibilities.[4] The practice of utilizing masters to assist trial judges in the disposition of cases predates the American legal system and has its origin in common law English chancery courts during the reign of King Henry VIII.[5] Congestion in the federal court system spawned the use of masters in the United States as early as the colonial period.[6]

Over time, the use and appointment of masters came to be governed by state and federal rules of civil procedure. At the state court level in Florida, the appointment of special masters in civil cases is now governed by: Rule 1.490 of Florida Rules of Civil Procedure (hereinafter Rule 1.490); Rule 12.492 of the Florida Family Law Rules of Procedure (hereinafter Rule 12.492): and Rule 5.697 of the Florida Probate Rules (hereinafter Rule 5.697).[7] At the federal level, appointment is governed by Rule 53 of the Federal Rules of Civil Procedure (hereinafter Rule 53). The role of masters has evolved, from a strict and limited role of trial assistance, to a more expanded view – with the duties and responsibilities of masters now extended to every phase of litigation.[8] As court dockets have burgeoned, and as litigation has become increasingly complex, the utilization of masters has increased.

> *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 the parties, make decisions based on judicial reference or the parties' consent, and become engaged in post-trial proceeding.* [9]

The purpose of this article is to identify some of the yet unanswered questions surrounding the use of special masters in Florida, and to provide practical information for lawyers involved with the appointment of a "special magistrate" or "special master." Because the special master's authority and duties derive from the order appointing him or her, special consideration has been given to the form of that order.

A note on nomenclature is unavoidable. "Magistrates" have replaced "masters" in Florida state courts. Effective October 1, 2004, the Supreme Court of Florida amended Rule 1.490, Rule 12.492 and Rule 5.697 so that all references to "master" thereafter became "magistrate." [10] "Special

masters" became "special magistrates." The change was essentially administrative and cosmetic.[11] Both "master" and "magistrate" denote court appointees with varying degrees of limited judicial authority. The subject of *general* magistrates, except incidentally, is outside the scope of this article. We are concerned here with masters serving specifically delineated tasks in specific cases – masters that have been historically designated as "special masters."

Rule 53 continues to use the term "master" but has abandoned the term, "special master." A careful reading of Rule 53, however, suggests that Rule 53 uses "master" synonymously with the historic term "special master." "Master" within the context of Rule 53 is a court-appointee in specific cases before the district court. Rule 53 makes no distinction between "general masters" and "masters" because federal courts have institutionalized the role of magistrate judge.[12]

For purposes of simplicity and unless context clearly indicates the need for a distinction, this article will use the terms "master", "special master" and "special magistrate" interchangeably.

Consent to Appointment: The issue of consent under Rule 1.490(c) and Rule 12.492(b) is straight forward. No reference may be made to a special magistrate without the consent of the parties.[13] Several Florida appellate decisions have held lack of consent fatal to the appointment of a special master.[14] Mandamus is appropriate to correct a trial court's referral without consent.[15] In *Prater v. Lehmbeck,* where a party filed a blanket objection to referral to a master, but nevertheless participated in the referred proceedings, the trial court assumed consent from the party's participation and was reversed on appeal.[16] To minimize issues regarding consent, the order appointing the special magistrate should recite that the referral is consensual.

An interesting consent issue is whether a party, having given consent *ab initio* to the appointment of a special magistrate, may later withdraw that consent. This may occur in matters involving continuous magistrate supervision, such as supervision of discovery matters, when one party decides that the magistrate's rulings aren't as favorable as desired. Rules 1.490, Rule 12.492

and Rule 5.697 are silent on this question and there seems to be no Florida appellate law on point. Logic would seem to require, at a minimum, that the party withdrawing consent should move for a court order relieving the magistrate of his or her duties and responsibilities and – until that order is rendered -- that the party is bound by the order appointing the special magistrate.

Probate Rule 5.697 is a relatively new rule, having been adopted in 1992 and "patterned after" Rule 1.490.[17] On its face, there is no requirement for consent by the parties to the appointment of a special magistrate, and as yet there are no appellate decisions addressing this point. The drafters of Rule 5.697 apparently chose not to adopt the consent language contained in subsection (c) of Rule 1.490. It would seem to follow that a consent requirement was not intended. One reason for this may lie in the relatively narrow scope of duties performed by the special magistrate in probate. Subsection (b) provides that special masters may be appointed "in connection with the *court's review of guardianship accountings and plans*." This delegation of duties is more restrictive than the delegation of duties contained in Rule 1.490.[18]

Under Federal Rule 53, consent is not in all instances necessary. Subsection (a)(1) provides that non-consensual referrals, in cases to be decided by the court without a jury, may be justified by: exceptional conditions; the need to perform an accounting or difficult damage computation; *or* the need to address pretrial or post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge[19] Rule 53(a)(3) requires the court to "consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay". Notwithstanding Article III of the U.S. Constitution, non-consensual referrals to special masters have been sustained against constitutional attack where the master's duties were performed under the "total control and jurisdiction of the district court…."[20] The Supreme Court has recognized that in certain situations, the efficiency and expertise benefits of such referrals outweigh the

diminution of Article III values (neutral, independent adjudication) – creating a kind of balancing test.[21]

The master's qualifications: Rule 1.490(b), Rule 12.492(a) and Rule 5.697(b) provide that the court may appoint "members of The Florida Bar as special magistrates." The subsections go on, however, to provide that "upon showing that the appointment is advisable, a person other than a member of the Bar may be appointed." Rule 5.697 requires "good cause shown" for the appointment of some person other than a member of The Florida Bar. Where the task to be performed requires certain types of expertise, (*e.g.*, accounting, corporate share valuation, patent issues, scientific questions), the need for a non-lawyer may be the raison d'être for appointment of the master.

Rule 53(a)(2) contains no bar membership requirement. It provides that, without the consent of the parties, "a master must not have a relationship to the parties that would require disqualification of a judge under 28 U.S.C. § 455. The court may enter an order of appointment only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. The Academy of Court-Appointed Masters, a national organization, offers the following suggested affidavit language.

> *I have thoroughly familiarized myself with the issues in this case. As a result of my knowledge of the case, I can attest and affirm that I know of no grounds for disqualification under 28 U.S.C. § 455 that would prevent me from serving as the special master in the captioned matter.*[22]

Rule 1.490, Rule 12.492, Rule 5.697 and Rule 5.697 require no affidavit regarding disqualification, but they do provide in subsection (d), subsection (c) and subsection (c), respectively, that all "grounds for disqualification of a judge shall apply to a magistrate." Therefore, although not required, it may be good practice in Florida state court actions to have the master file a modified affidavit similar to that recommended by the Academy of Court-Appointed Masters.

In the order of referral to the master, the subject of the master's qualifications should be addressed. If the appointment is pursuant to Rule 1.490 or Rule 12.492, and the appointment is to a person other than a member of the Florida Bar, then the order should recite the reasons that referral to a non-Bar member is "advisable." If the referral is pursuant to Rule 5.697, then the basis for a finding of "good cause" ought to be recited. In all cases under Rule 53, and in state court cases where an affidavit regarding disqualification has been filed, the order of appointment probably should recite that the affidavit has been filed.

Oath and Bond requirements: Rule 1.490a) of the Florida Rules of Civil Procedure requires persons appointed as *general* magistrates to "take the oath required of officers by the constitution and the order shall be recorded before the magistrate discharges any duties of that office." [23] In the case of *special* magistrates, Rule 1.490(b), Rule 12.492(a) and Rule 5.697(b) specifically provide the administration of an oath is discretionary with the court. This distinction between general and special masters has its roots in chancery.[24] Rule 53 doesn't address the subject of an oath.

Subsections (b) and (e) of Rule 1.490, and subsections (a) and (d) of Rule 12.492 address the question of whether a bond may be required of the special magistrate. The gist of the subsections is that the requirement of a bond is discretionary with the court. However, Rule 1.490(e) and Rule 12.492(d) specifically provide that the court *may* require bond of magistrates who are appointed to dispose of real or personal property, and those subsections establish language that such bonds should contain. Rule 5.697 does not address the subject of a bond. Rule 53 also is silent on the subject of a bond. If a bond is going to be required in a case, whether state or federal, then any bond requirements should be included in the order of reference to the master. The order should also address all issues regarding funding of the bond.

The master's powers and duties: In broad terms, the master's authority is established by the terms contained in the order of reference. Therefore, it is extremely important to delineate in the

court's order the task or tasks the master is to perform. The following is a representative sampling of tasks assigned to masters in state and/or federal cases: ruling upon and monitoring discovery matters; conducting in camera document inspections; coordinating discovery in multi-party or multi-district cases; supervising class action notices; monitoring settlement and judgment compliance; administering the distribution of settlement or judgment proceeds; making findings of fact and recommendations regarding real property disputes; disposing of real or personal property under jurisdiction of the court; overseeing the winding down of corporations and other business entities; calculating damages and/or attorney's fees; making insurance coverage determinations; serving as technology masters; and managing settlement efforts in complex cases.

Rule 1.490, Rule 12.492 and Rule 53 offer some specific guidelines regarding the exercise of the master's powers, duties and authority. For example, Rule 1.490(d) and Rule 12.492(c) provide that "the magistrate shall hold hearings in the county where the action is pending, but hearings may be held elsewhere by order of court to meet the convenience of the parties or witnesses." Interestingly, Rule 1.490(d) and Rule 5.697(c) provide that "process issued by a magistrate shall be directed as provided as provided by law." Rule 12.492 contains no such provision, and one is left to wonder whether the omission suggests that the special master under 12.492 may not issue process. If hearings are going take place outside the county where the action is pending, then this should be included in the reference order. If any unusual problems with process are anticipated, then these too ought to be addressed in the order.

Rule 1.490(f), Rule 12.492(e) and Rule 5.697(d) deal with the subject of hearings before the magistrate. Generally, they place on the magistrate the duty to set and notice hearings, and provide the authority to proceed *ex parte* if any party fails to appear. The magistrate may examine parties and witnesses on oath and may require the production of books, papers, writings, vouchers, and other documents. Under Rule 1.490 and Rule 12.492, the special magistrate may admit evidence by

deposition or otherwise and "may take all actions concerning evidence that can be taken by the court and in the same manner." The language of Rule 5.697 differs slightly. It makes no reference to deposition testimony, but says essentially that the special magistrate shall admit evidence that "would be admissible in court." Under Rule 1.490(f) and Rule 5.697(d), evidence at hearings is to be taken "in writing' and shall "be filed with the magistrate's report. Rule 12.490(e) differs slightly and provides that, "unless otherwise ordered by the court, all parties shall equally share the cost of a court reporter at a special magistrate's proceeding." Rule 12.492(e) also specifically provides that if *all* parties waive the presence of a court reporter at hearing, they should do so in writing. In almost every instance, therefore, it seems that a court reporter is advisable, and that the order of reference should provide who is to make arrangements for the reporter and how the costs are going to be allocated.

Rule 1.490(g) and Rule 12.492(f) deal with the content of the magistrate's report:

In the reports made by the magistrate no part of any statement of facts, accounts, charge, deposition, examination, or answer shall be recited. The matters shall be identified to inform the court what items were used.

The precise language of Rule 5.697 differs, but the substance is the same. As will be discussed hereinafter, the creation of a record is one of the master's most important duties. Failure to provide an adequate record can have serious consequences.

Omitted from Rule 1.490, Rule 5.697 and Rule 12.492 is whether the magistrate has the authority to impose sanctions on any party for non-compliance with any of the magistrate's directives. Rule 53 explicitly addresses this question. Under Rule 53(c) the master has the authority to *impose* any *non-contempt* sanction provided by Rules 37 or 45,[25] but is limited to *recommending* contempt sanctions. Absent an explicit delegation of contempt authority either by statute or by Rule 1.490, Rule 12.492 or Rule 5.697, it is doubtful whether a special magistrate under these Rules may

do more than recommend a contempt sanction to the presiding judge.[26] It is also unclear whether a magistrate under Rule 1.490, Rule 5.697 or Rule 12.492 may impose non-contempt sanctions (*e.g.*, award attorney's fees or costs, strike pleadings or defenses, or order matters taken as admitted) or whether he or she is confined to recommending such sanctions to the presiding judge.

Rule 53, Rule 1.490, Rule 12.492 and Rule 5.697 have very similar provisions regarding the dispatch with the master is to proceed. Rule 1.490(f), Rule 12.492(e) and Rule 5.697(d) provide that the magistrate "shall proceed with reasonable diligence" in every reference and with "the least practicable delay." They go further to say that any party may apply to the court for an order to the magistrate to speed the proceedings. Rule 53(b)(2) *requires* that the order of reference "direct the master to proceed with all reasonable diligence."

Rule 53(d) makes specific reference to "Master's Orders." Indeed, Subsections (d) and (e) envision a court adjunct that both *reports* to the court and issues *orders* to the parties. At no place in Rule 1.490, Rule 12.492 or Rule 5.697 is there reference to the master issuing or filing *orders*. One can fairly ask whether a magistrate under the state rules has authority, whether explicit or implicit, to *issue* orders – as opposed to *recommending* orders to the appointing judge. At least one appellate decision has held that a special master's role is advisory only, and that any ultimate disposition and determination must be adjudicated by the court.[27]

On their face Rule 1.490, Rule 12.492 and Rule 5.697 seem to envision a narrower grant of power to masters than those granted by Rule 53. One reason is historic. Rule 1.490, Rule 12.492 and Rule 5.697 are based mainly on the old Chancery Act, sections 54 through 65, which were taken in large part from the Federal Equity Rules.[28] The former practice in equity was to have testimony taken by a master or special examiner.[29] Masters in chancery were not adjuncts with adjudicative functions. In England, chancellors would primarily utilize masters as assistants to aid in the performance of ministerial functions such as: recording testimony, disposing of property in pursuance

of settling judgments, presiding over evidentiary hearings, tabulating damages, and auditing accounts.[30] In essence, masters in equity were information gatherers and advisers. Read in this historic context, it is easy to see why Rule 1.490, Rule 12.492 and Rule 5.697 make no reference to the issuance of *orders* by masters. It seems that Rule 53 has been "revised extensively to reflect changing practices in using special masters"[31] -- whereas Rule 1.490, Rule 12.492 and Rule 5.697 are still tethered to earlier equity practice.

When appointing a special magistrate under Rule 1.490, Rule 12.492 or Rule 5.697 it seems advisable to specifically include in the order of reference: whether the special magistrate may issue orders; under what circumstances he or she may do so; and what types of orders are permissible. Rule 53 (b)(A) provides that the order appointing a master *must* state the master's duties and any limits on his or her authority. Subsection (c) of Rule 53 (which enumerates fairly broad categories of power vested in a master) opens with the language "Unless the appointing order directs otherwise…." This underscores the relatively broad nature of authority granted the master under Rule 53. This means also, however, that care must be taken in drafting the order of reference. An order of reference that too narrowly delineates the grants of power could be construed as a *limitation* upon the broader authority granted by Rule 53. The order of reference needs to be clear whether the intention is to expand or curtail the authority granted by the language of the applicable rule.

The record, report and exceptions: Rule 1.490, Rule 12.492, Rule 5.697 and Rule 53 differ significantly on the subject of the master's report to the court. Rule 1.490(h) requires the special magistrate to take evidence "in writing" and file that written *record* with the magistrate's *report.* Rule 12.492 requires a court reporter at hearing *unless waived by all parties*. Rule 5.697(d) provides that "evidence shall be taken in writing or by electronic recording" and that the record "shall be filed with the magistrate's report." All three rules prohibit the recitation of evidentiary detail in the body of the report. Rule 53 does not specify how the record is to be created or what recitations may be

contained in the magistrate's report, but it does provide in subsection (e) that the master must report "as required by the order of appointment." Under all three rules the *report* itself must be filed with the court.

After the magistrate's or master's report has been filed with the court, any party may file exceptions or objections to any or all of his or her findings and/or recommendations. Under Rule 1.490(h), Rule 12.492 and Rule 5.697(f), a party's exceptions must be *served* within 10 days of the master's *service* of copies of the report on the parties. Rule 12.492(g), unlike Rule 1.490(h), provides for the *filing* of cross-exceptions within 5 days of service of the opposing party's exceptions. Under Rule 53(f)(2) a party "may *file* objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are *served*, unless *the court sets a different time*." (Emphasis supplied). (Effective December 1, 2009, Rule 53 (f)(2) is amended and the 20 day time period becomes 21 days.) Cautious practitioners will note the distinction between "file" and "serve" in these rules.

If no exceptions or objections are filed, then the court, after expiration of the time for filing exceptions or objections, may act on the report. Rule 1.490(h), Rule 12.492(g) and Rule 5.697(f) each provide that the court "*shall* take appropriate action on the report." It has been held reversible error for the court to act on the magistrate's report before the expiration of the time for exceptions.[32] Even in the absent of exceptions by a party, the "trial court -- prior to entry of a final judgment in accordance with the master's report" -- has a duty to examine and consider the evidence for itself and to determine whether under the law and facts the findings and recommendations of the magistrate are justified.[33] One Florida District Court of Appeal, addressing this issue under Rule 1.490, expresses this view that *review* of the magistrate's *record* is obligatory.[34] There seems to be no appellate decision addressing a potential problem created by Rule 12.492(e), which subsection

suggests that all parties may *waive the presence of a court reporter* at a magistrate's hearing. Without a record to review, how is the court to rule on exceptions to the magistrate's report?

From the language of Rule 53(f)(1), a hearing is required but it lies within the discretion of the federal court whether to review the *record* or *evidence* underlying the master's report. Rule 53(f)(1) provides:

(2) Opportunity for a Hearing: Action in General. In acting on a master's order, report, or recommendations, the court ***must*** *give the parties notice and an opportunity to be* ***heard****;* ***may*** *receive evidence; and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master for instructions.* (Emphasis supplied]

Under Rule 1.490, Rule 12.492 or Rule 53, the court *must* provide an opportunity to be heard once exceptions or objections are filed. Rule 5.697(f) provides that all "timely exceptions *may* be heard by the court on reasonable notice by any party."

Subsections (f)(3), (4), and (5) of Rule 53 provide explicit standards for the court's review of the master's report. The court must decide *de novo* all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's approval, that the master's findings of fact will be reviewed for "clear error" or that findings of fact by a master appointed under Rule 53 (a)(1)(A) or (C) will be final. If such stipulations exist, the order of reference should acknowledge them and recite the court's consent. The court must decide *de novo* all conclusions of law made or recommended by the master. "*Unless the order of appointment establishes a different standard of review*," the court may set aside a master's ruling on a procedural matter only for an *abuse of discretion*. It is interesting to note that the appointing judge, arguably, may establish his or her own standard of review for matters of procedure. If some standard other than abuse of discretion is to be utilized, this is a subject that ought to be addressed in the order of reference.

Rule 1.490, Rule 12.492 and Rule 5.697 provide no explicit standards for a judge reviewing the report and recommendations of a special magistrate. Instead, we need look to published appellate decisions in Florida. The early decisions, arising during a time when special masters served essentially as fact finders, couched the standard of review in jury-verdict terms. In essence, these decisions hold that because the special master had the opportunity to observe the witnesses and assess their veracity, the master's findings and conclusions were to be accorded the same weight as a jury verdict in a common law action.[35] In examining the various appellate decisions addressing the question of review standards, we see that over time two disparate sets of standards emerge. One line of cases has adopted a "competent substantial evidence" standard for findings of fact and a "clearly erroneous" standard for issues of law.[36] A second line of decisions applies a "clearly erroneous" standard for findings of fact and a "misconception of the law" standard for conclusions of law.[37] The two lines of cases are irreconcilable as to nomenclature, *i.e.*, with respect to what they *call* the standards of review. One Fifth District Court of Appeal decision interjects yet another variation on the theme. In *Anderson v. Anderson,* the Fifth District Court of Appeal speaks of "a 'clearly erroneous' standard for findings of fact and an 'abuse of discretion' standard for the application of law to the facts." *[38]*

There appears to be no Florida appellate decision considering what the standard of review should be for *procedural* conclusions by the magistrate under Rule 1.490, Rule 12.492 or Rule 5.697. For example, if the magistrate concludes that a party's responses to requests for admission are insufficient and that the matter requested be deemed admitted, what standard should the presiding judge apply? Under the federal rule, the standard of review would be "abuse of discretion." One can only speculate whether a state appellate court would apply an "abuse of discretion" standard, a "clearly erroneous" standard, or a "misconception of the law" standard.

An equally thorny problem is that of the special master's record. As we have seen above, Rule 1,490 requires that evidence be taken in writing and *filed* with the magistrate's report. The court has a *sua sponte* duty to examine and consider the evidence and to determine whether under the law and facts the findings and recommendations of the magistrate are justified.[39] If the magistrate fails to make and file a written record, then the court is thwarted in this responsibility. Some earlier appellate decisions held that it was the responsibility of the party filing exceptions to insure that the record was made and filed, and failing to do so, that their exceptions should be overruled.[40] Later decisions have placed the onus of creating an accurate and complete written record on the master. In the *Boalt v Boalt* and *De Clements v De Clements* cases,[41] trial courts denied exceptions to special master reports because the records of the masters' proceeding were defective or unavailable. The trial courts in each case placed the burden of providing the record, at the time of hearing on the exceptions, on the excepting party. In each case the appellate court reversed. These decisions notwithstanding, Rule 12.492(g) provides that the "party seeking to have exceptions heard shall be responsible for the preparation of the transcript of proceedings before the magistrate."

The requirement of Rule 1.490 to create and *file* a record *with the magistrate's report* creates some problems of expense and practicality. The parties may find it cost effective to have a court reporter recording hearings, but want to withhold the ordering of a transcript until the filing of exceptions. Further, some clerks of court may balk at voluminous filings of papers without an imminent hearing that necessitates the filing. A common sense solution would be to address this problem in the order of reference or by a stipulation of the parties. In any event, however, the special magistrate, the court and the parties would be wise to create a complete an accurate record for each proceeding presided over by the special magistrate – even if that record is subject to delayed transcription and filing.

Rule 53 contains no explicit provision requiring a written record or filing of such record with the master's report. However, subsection (b)(C) requires that the order of reference specify the nature of the materials to be preserved and filed as the record of the master's activities. Because a written record is essential if the court is to perform a de novo review, the need for a record is central in the procedural scheme of the Rule.

Form of the master's report: The format of the master's or magistrate's report may be as varied as the many tasks that can be assigned to him or her. However, due to the need for court review and rulings on exceptions, the report should clearly distinguish between findings of fact, rulings of a procedural nature, recommendations, and conclusions of law. This aids the parties and the presiding judge in assessing: whether the master is deciding a matter within the scope of his or her appointment; what records need to be reviewed for the purpose of ruling on exceptions, and what standard of review is applicable to a given decision or conclusion. The report should reflect clearly whether the master or magistrate is acting in an adjudicatory role (*e.g., ruling on procedural matters, matters of sanctions, etc)* or in a fact finding or advisory role.

Ex parte communications: Rule 53 (b)(B) requires that the order of reference specify the circumstances, if any, under which the master may communicate *ex parte* with the court or a party. Rule 1.490, Rule 12.492 and Rule 5.697 are silent on the subject of *ex parte* communications. In most instances, *ex parte* communications are probably not desirable or necessary. An exception may be in situations where the master is serving as a settlement master.[42] Whether dealing with a federal or state appointment, the subject of *ex parte* communications ought to be addressed in the order of reference. To the extent that a special master is granted adjudicative (as opposed to advisory) powers, it probably would be wise to limit the conditions under which the master engages in *ex parte* communications with the parties.[43]

Master's compensation: Rule 53(b)(E) requires that the order of appointment specify the basis, terms, and procedure for fixing the master's compensation under Rule 53(g). Under that subsection, compensation may be paid either by a party, parties or a fund or subject matter that is within the court's control. It also permits the court to specify how the compensation is to be allocated among the parties. Rule 1.490 and Rule 5.697 make no reference to the magistrate's compensation. Rule 12.492(h) provides that "the costs of a special magistrate may be assessed as any other suit money in family proceedings and all or part of it may be ordered prepaid by the order of the court." The order of reference should provide in some detail how compensation is going to be addressed. One appellate decision outlines criteria the court should consider in adjudicating the compensation to be paid the magistrate where the amount of compensation is in controversy.[44]

A final note: Today, electronic discovery looms large in litigation.[45] The U.S. Supreme Court on April 12, 2006, approved extensive electronic discovery amendments to several of the Federal Rules of Civil Procedure. [46] These took effect on December 1, 2006. The Florida Bar is exploring whether to propose modifications similar to the Federal amendments.[47] The labyrinthine, technical aspects of electronic discovery, and the increasing complexity of litigation generally, create fertile ground for the utilization of special masters. Additional expansion of the role of masters seems inevitable. Carefully drafted orders of reference, which anticipate issues and problems, can do much to make the utilization of special masters effective and cost-efficient.

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[1] The provisions of Fed. R. Civ. P. 53, taken in their entirety, point to a case-specific designation of the person serving as "master."

[2] *See generally: Bell v. Bell,* 307 So.2d 911, at note 3 (Fla. 3rd D.C.A. 1975); Fla. Fam. Law R. P. 12.490; Fla. R. Juv.P. 8.060; *and* Fla. R. Traf. Ct. 6.630.

[3] *Compare Gray v. State of Florida,* 489 So.2d 86 (Fla. 5th D.C.A. 1986) (The appellate court's language suggests confusion as to the status of the "master" involved in the case) *with Ciccarelli v Ciccarelli,* 352 So.2d 1204 (Fla. 4th D.C.A. 1977) (The appellate court uses both terms in one sentence to describe a master, who from the context of the case,

appears to be the same person.) *and Bell v Bell, supra* (Fla. 3rd D.C.A. 1975) (The trial court in its judgment uses the term "special master" to refer to a separate and distinct "general master" in the case.)

[4] *See Ex Parte Peterson,* 253 U.S. 300, 312-13 (1920): *Kimberly v. Arms,* 129 U.S. 512, 524-525 (1889).

[5] *See* Irving R. Kaufman, *Masters in the Federal Courts : Rule 53,* 58 Col. L. Rev. 452, 452 (1958).

[6] *See* Bryant, *The Office of Masters in Chancery: Colonial Development,* 40 A.B.A. Journal, 595 (1954).

[7] It should be noted that Rule 1.490 of the Florida Rules of Civil Procedure governs the appointment of *both* general and special magistrates in civil cases. However Florida Family Law Rules of Procedure 12.492 governs only the appointment of special magistrates. Rule 12.490 governs the appointment of general masters in family law cases. The appointment of general masters in family law, and the use of masters under the Florida Rules of Juvenile Procedure, are beyond the scope of this article.

[8] For a detailed history of this evolution, *see* Mark A. Fellows and Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation,* 31:3 William Mitchell Law Review (2005); *and* Shira A. Scheindlin and Jonathan M. Redgrave, *Master Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters,* New York State Bar Journal (January 2004).

[9] Mark A. Fellows and Roger S. Haydock, *supra at* 1270.

[10] *Amendments to the Florida Rules of Appellate Procedure, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Florida Family Law Rules of Procedure, the Florida Rules of Juvenile Procedure, and the Florida Probate Rules,* 887 So.2d 1090 (Fla. 2004).

[11] The change in nomenclature was prompted by the need to reconcile the language of Rule 1.490 with 2004 legislative changes to various related statutes. *See id* at 1090.

[12] *See* Fed. R. Civ. P. 53(h). (dealing with the applicability of Rule 53 to magistrate judges.)

[13] Consent is also required for referral to a general master under Fla. Fam. Law R. P. 12 490.

[14] *See Rosenberg v. Morales,* 804 So.2d 622 (Fla. 3rd D.C.A. 2002); *Pesut v. Miller,* 773 So.2d 1185 (Fla. 2d D.C.A. 2000); *and Wilson v. McKay,* 568 So. 2d 102 (Fla. 3rd D.C.A. 1990).

[15] *Novartis Phams. Corp v. Carnoto,* 798 So.2d 22 (Fla. 4th D.C.A. 2001). *Pesut v. Miller, supra.*

[16] 615 So.2d 760 (Fla. 4th D.C.A. 1993).

[17] Committee Note to Fla. Probate R. 5.697.

[18] *Compare* subsections (b) and (c) of Rule 1.490 *with* subsections (b) and (c) of Rule 5.697.

[19] Fed. R. Civ P. 53(a)(1).

[20] *See e.g., United States v. Raddatz,* 447 U.S. 687 (1980) (appointment upheld where magistrate judge had no independent authority to enforce orders, and dispositive decisions on the law and facts were reviewed de novo on the record).

[21] *See Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584 (1985), *and Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982).

[22] The Academy of Court-Appointed Masters (ACAM) was created in 2004 at a conference sponsored by the National Arbitration Forum. ACAM has completed a handbook that contains sample appointment orders, as well as numerous useful references and appendices. The title is *Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges.* First published March 2004, the handbook may be downloaded from the ACAM website: www.courtappointedmasters.org. (last visited February 23, 2007).

[23] This is consistent with the requirements for general magistrates under Fla. Fam. Law R. P. 12.490 *and* Fla. Probate Rule 5.697(a).

[24] *See generally Quee v. Breed,* 165 So. 56 (Fla. 1936) *and Lyle, et al v. Hunter,* 136 So. 633 (Fla. 1931).

[25] Rule 37 relates to failures to make discovery and the consequences for such failures. Rule 45 deals with failures to comply with supoenae.

[26] *See Gray v. State of Florida, supra.* (A "general or special master" appointed by Seminole County to hear a child support case found the father in contempt by virtue of arrearage and ordered him jailed. The father resisted and was ultimately convicted of battery and resisting arrest. The appellate court reversed the conviction, holding that the master was without authority to order the arrest.)

[27] *Tucker v. Diodato*, 321 So.2d 569 (Fla. 4th D.C.A. 1975) (a special master appointed for the purpose of presiding over an involuntary hospitalization under the Baker Act ordered the Petitioner hospitalized.).

[28] Authors Comment to Fla. R. Civ. P. 1.490.

[29] *Id.*

[30] *De Clements v. De Clements*, 662 So.2d 1276, 1279 (Fla. 3rd D.C.A. 1995); *See* James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters,* 66 N.Y.U. L. Rev. 800, 800-01 (1991).

[31] *Administrative Office of the U.S. Courts, Amendments to the Federal Rules of Civil Procedure,* 215 F.R.D. 158, 328 (2003).

[32] *Berkheimer v. Berkheimer,* 466 So.2d 1219 (Fla. 4th D.C.A. 1985).

[33] *De Clements v. De Clements, supra* at 1282; *Bell v. Bell, supra* at 914 (A fascinating aspect of this case is that the trial judge appointed a special master to rule on exceptions that a party had filed to a report of the general master. The appellate court found this to be an impermissible delegation of judicial power.)

[34] *Id.*

[35] *See Mahan v. Mahan,* 88 So.2d 545, 547 (Fla. 1956); *Lyon v. Lyon,* 54 So.2d 679, 680 (1951); *Harmon v. Harmon,* 40 So.2d 209 (1949); and *Kent v. Knowles,* 133 So. 315, 316 (Fla. 1931).

[36] *See Cerase v. Dewhurst,* 935 So.2d 575, 578 (Fla. 3rd D.C.A. 2006); *Robinson v. Robinson,* 928 So.2d 360 (Fla. 3rd D.C.A. 2006); *Carlson v. Carlson,* 696 So.2d 1332, 1333 (Fla. 4th D.C.A. 1997);

[37] *See In Re: The Guardianship of Anne Ruppert,* 787 So.2d 925, 926 (Fla. 2d D.C.A 2001); *Ares v. Cypress Park Gardens Homes I Condominium Assn;* 696 So.2d 885, 887 (Fla. 2d D.C.A. 1997); and *De Clements v. De Clements, supra* at 1282.

[38] 736 So.2d 49, 50 (Fla. 5th D.C.A. 1999).

[39] *De Clements v. De Clements, supra* at 1282.

[40] *See Ben-Hain v. Tacher,* 418 So.2d 1107 (Fla. 3d D.C.A. 1982) *overruled by De Clements v. De Clements, supra* at 1284.

[41] *Boalt v. Boalt,* 672 So.2d 109 (Fla. 4th D.C.A. 1996) and *De Clements v. De Clements, supra.*

[42] *See generally* Mark A. Fellows and Roger S. Haydock, *supra at* 1280-1282.

[43] Mark A. Fellows and Roger S. Haydock, *supra at* 1283.

[44] *See Novartis Pharms. Corp. v. Carnoto,* 837 So.2d 1127, 1129 (Fla. 4th D.C.A. 2003).

[45] *See generally* Robert H. Thornburg, *Electronic Discovery in Florida,* The Florida Bar Journal (October 2006)

[46] *Amendments to the Federal Rules of Civil Procedure,* available at: www.uscourts.gov/rules/Ediscovery (last visited February 19, 2007).

[47] Robert H. Thornburg, *supra* 36.

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Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool

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SPECIAL MASTERS IN STATE COURT COMPLEX LITIGATION: AN AVAILABLE AND UNDERUSED CASE MANAGEMENT TOOL

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I. INTRODUCTION

Judicial masters have an honored place in the American judicial system.[1] Masters are regularly used in the highest court of the land, and provide a valuable service to the operation of the

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1. *See Ex parte* Peterson, 253 U.S. 300, 312 (1920) (providing in a decision written by Justice Brandeis that courts have inherent power to appoint special masters to aid judges in the performance of judicial duties).

Court.[2] Masters also have an important role—and a greater potential to contribute—in litigation in the trial courts. The breadth of roles served by special masters is reflected by the number of names used to describe their role; names include "auditors, assessors, appraisers, commissioners, examiners, monitors, referees, and trustees."[3] Under state law, receivers may also serve a special master-like role. This expansive definition is used by the Federal Judicial Center (FJC) in its study of special masters,[4] and use of the term "special master" in this article includes those roles.

Generally, masters have been used more extensively in federal court litigation, although they are often put to use in the state courts as well. Particularly in state court litigation, however, there are both opportunities and needs for the litigation benefits masters can provide. Indeed, because state court judges may not have magistrate judges or other resources available, special masters may be very valuable to state court judges.

This article examines the role masters have played in litigation and explores the benefits that might be obtained from the greater use of masters in the future. The FJC survey of federal judges appointing special masters concluded that special masters were "extremely or very effective."[5] The FJC study is an empirical survey of the effectiveness of special masters, and it includes commentary from judges regarding their experience after appointing special masters.[6] These benefits include better, faster, and fairer resolution of litigation in the cases in which masters are used, as well as an easing of the burdens these cases place on the judiciary. This article also analyzes the barriers to the use of masters and how they might be removed.

II. CURRENT USE OF JUDICIAL MASTERS IN STATE AND FEDERAL COURTS

Rule 53 of the Federal Rules of Civil Procedure (F.R.C.P. Rule

2. *See generally* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 10.12 (8th ed. 2002).

3. Thomas E. Willging et al., *Special Masters' Incidence and Activity*, FED. JUD. CENTER 1 (2000) [hereinafter FJC Study], *available at* http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index.

4. *Id.*

5. *Id.* at 58.

6. *Id.*

53) allows courts to appoint a special master to perform or manage certain aspects of a case, if consented to by the parties.[7] It is becoming almost commonplace in complex federal court cases for special masters to be appointed as mediators or facilitators of other alternative dispute resolution processes.[8] In 2003, F.R.C.P. Rule 53 was amended to allow courts to appoint special masters to assist with pretrial and post-trial work.[9] When courts appoint a special master to address pretrial or post-trial matters, it is usually because the court cannot efficiently address the matter.[10] Use of special masters also arises when a matter requires protracted fact finding,[11] for example, the making of a difficult damages computation.[12]

State court rules governing procedural aspects of a case vary from state to state. Twenty-three states have a rule of civil procedure that nearly mirrors the pre-2003 amended F.R.C.P. Rule 53.[13] Twenty-four states have a rule of civil procedure that differs from F.R.C.P. Rule 53, the current rule, and the pre-2003 amended version of the rule, primarily by not including the F.R.C.P. Rule 53 language stating that appointment of a special master should be the "exception and not the rule."[14] Some states allow for

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

8. *See generally In re* Kensington Int'l Ltd., 368 F.3d 289 (3d Cir. 2004); United States v. Yonkers Bd. of Educ., 29 F.3d 40 (2d Cir. 1994).

9. FED. R. CIV. P. 53(a)(1)(C); *see also* Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. ST. B.J. 18, 21-22 (Jan. 2004), *available at* http://www1.jonesday.com/FILES/tbl_s31Publications/FileUpload137/1086/Revisions_in_Federal_Rule_53.pdf (discussing the 2003 changes to Federal Rule 53 and how the amendments conform the rule to actual practice).

10. FED. R. CIV. P. 53 advisory committee's note to 2003 amendments; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.52 (2004) [hereinafter MANUAL] (noting that courts will appoint special masters when the amount of discovery work will impose an undue burden on the judge).

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

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

13. *See infra* Special Master Authorities Appendix (comparing state court rules (by state) to the federal rule). Alabama, Arizona, Colorado, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming have all adopted a rule similar (some may contain minor modifications) to the pre-2003 amended version of the federal rule. *Id.*

14. *See id.* (comparing state court rules (by state) to the federal rule and noting additional requirements, such as written consent of the parties). Alaska, California, Delaware, Florida, Georgia, Kansas, Louisiana, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia,

appointment of a special master but limit the scope of when a special master can be appointed.[15] At least one state authorizes the use of a special master under a state constitutional provision.[16] Nevertheless, most states provide some procedure, whether by statute or as part of the state court rules of civil procedure, that allows courts to appoint special masters to handle certain aspects of litigation.[17] In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters.[18]

A. Benefits Provided by Special Masters

State courts employ special masters to serve a variety of objectives. The objective of some state courts is to alleviate some of the caseload problems.[19] The sheer magnitude of a complex case may overwhelm the time available to a judge who has other cases on the docket. Conducting in camera review of documents to review claims of privilege might take weeks or months of time, and many judges cannot fairly absent themselves from their other cases to devote this amount of time to a single case. Other courts appoint special masters to preside over discovery motions involving highly specialized issues.[20] A special master will assist the parties in

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Washington, and West Virginia all have a rule that does not include the language providing the appointment of a special master should be the "exception and not the rule." *Id.*

15. *See id.* Arkansas, Maryland, and Michigan limit appointment to non-jury actions, while Connecticut currently allows appointment in family law matters as part of a civil matter pilot program scheduled to end in December 2004. *Id.* Kentucky limits appointment to matters involving judicial sales, and settlement and receivership, while Vermont limits appointment to actions requiring account/voucher investigation. *Id.*

16. MICH. CONST. art. VI, § 23.

17. *See infra* Special Master Authorities Appendix.

18. *Id.* Even in the absence of express rule authority, courts may have some inherent authority to appoint a special master. *See* Mitan v. New World Television, Inc., No. 225530, 2002 WL 31928598, at *6 (Mich. Ct. App. Nov. 12, 2002), *rev'd*, 669 N.W.2d 813 (Mich. 2003) (reversing and remanding a decision by the Michigan Court of Appeals where the court of appeals concluded the district court erred in appointing a special master under the Michigan Constitution).

19. *In re* Pub. Law No. 305 & Pub. Law No. 309, 334 N.E.2d 659, 666 (Ind. 1975).

20. *See* MANUAL, *supra* note 10 (stating that special masters are increasingly appointed because they bring expertise in areas of "accounting, finance, science, and technology"); JUDICIAL COUNCIL OF CALIFORNIA, DESKBOOK ON THE MANAGEMENT OF COMPLEX CIVIL LITIGATION § 2.05 (Matthew Bender 2003) [hereinafter CALIFORNIA DESKBOOK] (stating that a master may bring technical expertise or first-hand litigation experience in similar matters to bear on such

developing a discovery plan that is both logical and cost effective.[21]

Construction defect suits present many difficult factual issues and create unique settlement problems.[22] Initial case management is therefore important, and often courts will enlist the help of a special master.[23] A special master can help resolve problems regarding sequencing of different types of discovery, manage interim settlement negotiations between the many parties, and resolve discovery disputes.[24]

Aside from pretrial work, some courts use special masters to assist with settlement negotiations.[25] In complex litigation matters, parties often select attorneys for their expertise at litigating.[26] Judges therefore suggest that special counsel or special masters preside over settlement discussions and in "post-settlement claims-resolution proceedings."[27]

B. Actual Use of Special Masters in State Courts

Many state courts have realized the benefits of appointing special masters to assist in case management. The following list provides a broad overview of state courts' use of special masters over the past three years. Undoubtedly, state courts have used special masters in a much broader range of cases; however, the following list provides a representative sampling of state court cases documenting use of a special master.

- Presiding over attorney professional responsibility violation proceedings.[28]
- Overseeing or monitoring discovery.[29]

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issues).

21. CALIFORNIA DESKBOOK, *supra* note 20.
22. *Id.* § 3.10.
23. *Id.* § 3.13.
24. *Id.*
25. *Id.* § 2.92.
26. *Id.*
27. *Id.*
28. *See* Ligon v. Dunklin, No. 04-661, 2004 WL 2036927, at *1 (Ark. Sept. 9, 2004) (appointing a special master to preside over disbarment proceedings); *In re* Rutherford, 569 S.E.2d 840 (Ga. 2002) (adopting the special master's recommendation that the court accept attorney's petition for voluntary surrender of his license to practice law); *In re* Meagher, 681 N.W.2d 145, 147 (Wis. 2004) (appointing a referee to preside over hearing regarding attorney's petition for reinstatement of license to practice law).
29. *See* Leo's Gulf Liquors v. Lakhani, 802 So. 2d 337, 338 (Fla. Dist. Ct. App.

- Conducting in camera document inspection.[30]
- Supervising class notice process.[31]
- Overseeing employment promotion practices within a city fire department.[32]
- Presiding over divorce proceedings.[33]
    - Overseeing discovery.
    - Determining spousal income for purposes of spousal support.
    - Determining value of marital estate.
    - Preserving the martial estate.
    - Determining depletion amount of marital assets.
- Making child support determinations.[34]
- Modifying a child support order.[35]
- Making findings of fact and recommendations regarding property disputes.[36]

2001) (appointing a special master to preside over discovery in a negligent misrepresentation claim for the sale of a business where discovery continued over a three-year period); Lipco Elec. Corp. v. ASG Consulting Corp., No. 8775/01, slip op. 50967U, 2004 WL 1949062 (N.Y. Sup. Ct. Aug. 18, 2004) (appointing a referee to supervise, monitor, and schedule discovery including document protection orders, and any other discovery issue that might arise); *see also* Ron Kilgard, *Discovery Masters When They Help—and When They Don't*, 40 ARIZ. ATT'Y 30 (Apr. 2004) (discussing use of discovery masters); Janet Griffiths Peterson, *The Appointment of Special Masters in High Conflict Divorces*, 15 UTAH B.J. 16 (Aug./Sept. 2002) (discussing use of special masters in divorce cases).

30. Gaton v. Health Coalition, Inc., 774 So. 2d 59, 60 (Fla. Dist. Ct. App. 2000).

31. Edwards v. Long Beach Mortgage Co., No. CT 02-16446, 2004 WL 2137824, at *7 (Minn. Dist. Ct. July 22, 2004).

32. *See* Broadnax v. City of New Haven, 851 A.2d 1113, 1119 (Conn. 2004) (affirming the trial court's decision to appoint a special master to oversee the promotion practices of New Haven's fire department after repeated allegations of affirmative action violations among others).

33. *See* Hough v. Hough, 92 P.3d 695, 698 (Okla. 2004) (appointing a special master to assist with divorce proceeding because one party was continuously uncooperative); *In re* Marriage of Petropoulos, 110 Cal. Rptr. 2d 111, 115-16 (Cal. Ct. App. 2001) (appointing special master to determine debts and assets of the parties, income of the parties, and the parties' credibility).

34. *See* Eberhardt v. Eberhardt, 672 N.W.2d 659, 664 (N.D. 2003) (sending determination of party's request to increase child support to a judicial referee).

35. *See* Lasker v. Johnson, 123 S.W.3d 283, 286 (Mo. Ct. App. 2003) (appointing a special master after one party attempted to modify a child support order without circuit court approval).

36. *See* Gilbert v. Nicholson, 845 So. 2d 785, 787 (Ala. 2002) (appointing a special master to inspect and oversee roadway construction); Watkins v. Hartwell R.R. Co., 597 S.E.2d 377, 378 (Ga. 2004) (appointing a special master to resolve a right-of-way dispute between a railroad and a property owner making

- Overseeing environmental restoration project.[37]
- Overseeing the winding up of a general partnership.[38]
- Making insurance coverage determinations.[39]
- Presiding over evidentiary hearings.[40]
- Presiding over a judicial misconduct action.[41]
- Determining facts in a mortgage foreclosure action.[42]
- Conducting preferential lien hearings.[43]
- Calculating attorney fees.[44]

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improvements to the disputed property); Libby v. Vachon, No. CV-02-651, 2004 WL 1433690, at *1 (Me. Super. Ct. Apr. 22, 2004) (appointing a referee to preside over a dispute where one party constructed a culvert diverting water to neighbor's property and neighbor subsequently blocked the culvert); Young v. Hayward, No. RE-01-35, 2003 WL 21957120, at *3 (Me. Super. Ct. July 31, 2003) (appointing a referee to decide a case involving contaminated well water where the parties could not agree on the cause or the settlement terms); Fisher v. Cranberry Township Hearing Bd., 819 A.2d 181, 183 (Pa. Commw. Ct. 2003) (appointing a referee to conduct hearings, review evidence, and make findings of fact regarding property rezoning); Houston v. Mounger, No. E2002-00779-COA-R3-CV, 2003 WL 22415363, at *1 (Tenn. Ct. App. Oct. 23, 2003) (appointing a special master as a surveyor in a property boundary line dispute).

37. *See* Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 878 So. 2d 522, 530 (La. Ct. App. 2004) (appointing a special master to oversee a restoration project whose duties included obtaining necessary permits, and contracting with necessary parties, which included a dredging company).

38. *See* Seminatore v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, Gen. P'ship, 774 N.E.2d 1233, 1235 (Ohio Ct. App. 2002) (referring winding-up of a partnership to a special master). The FJC Study reports that a lawyer respondent to the study found that in South Carolina, use of a special master in a case accounting for partnership activity is almost "automatic." FJC Study, s*upra* note 3, at 74.

39. *See* Buller v. Minn. Lawyers Mut., 648 N.W.2d 704, 707 (Minn. Ct. App. 2002) (agreeing to refer determination whether insurance policy provided coverage to a consensual special magistrate (retired Minnesota Supreme Court justice)).

40. *See* Brooks v. State, 816 So. 2d 199 (Fla. Dist. Ct. App. 2002) (ordering appointment of a special master to make evidentiary findings regarding timely notice of appeal); Williams v. State, 816 So. 2d 718 (Fla. Dist. Ct. App. 2002) (requesting appointment of a special master to conduct a hearing regarding a party's right to raise a claim of ineffective assistance of counsel).

41. *See In re* Anderson, 82 P.3d 1134, 1141 (Utah 2004) (appointing a special master to gather additional evidence in a juvenile court judge misconduct proceeding).

42. *See* United Cos. Lending Corp. v. Candela, 740 N.Y.S.2d 543, 545 (N.Y. App. Div. 2002) (ordering appointment of a referee to determine outstanding mortgage balance in a foreclosure action).

43. *See* Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct., 41 P.3d 327, 329 (Nev. 2002) (affirming trial court decision to appoint a special master to preside over preferential lien hearings in which the special master did not have a conflict of interest).

Federal courts make extensive use of special masters. The following list highlights case situations where federal courts have put special masters to work.

- Complex litigation or mass tort cases.[45]
- Calculating attorney fees.[46]
- Finding investigative facts.[47]
- Preparing redistricting plans for state house and senate.[48]
- Acting as a trustee over a constructive trust.[49]
- Determining net profits due.[50]
- Reviewing documents for possible redaction of privileged documents in a summary judgment motion.[51]
- Managing discovery disputes.[52]
- Conducting in camera document review.[53]
- Conducting evidentiary hearings in a claim under the

44. *See* Jan Skutch, *Special Master Calls for Heads of Roberson, Woodall*, LOCAL NEWS NOW, SAVANNAH MORNING NEWS, Mar. 30, 2000, *at* http://www.savannahnow.com/stories/033000/LOCshiggs.shtml (discussing the special master's recommendation regarding disciplinary action against two attorneys involved in a medical malpractice case where they claimed over seventy percent of the cash portion of the patient's settlement). *See generally* MANUAL, *supra* note 10, § 21.727 (noting that courts have broad discretion to refer issues regarding a fee amount request to a special master).

45. *See In re* Kensington Int'l Ltd., 353 F.3d 211, 215 (3d Cir. 2003) (appointing special masters to preside over bankruptcy proceedings in mass tort asbestos litigation); *see also* Bedouin L. Joseph, *The "Nuts & Bolts": The Louisiana Special Master Statute: A Valuable Tool or an Expensive and Unnecessary Diversion?*, 51 LA. B.J. 261, 262 (Dec. 2003/Jan. 2004) (noting mass tort and complex litigation cases "continue to inundate [Louisiana] courts").

46. Am. Presents, Ltd. v. Hopkins, 330 F. Supp. 2d 1217, 1234 (D. Colo. 2004).

47. *See* Cobell v. Norton, 310 F. Supp. 2d 102, 104 (D.D.C. 2004) (ordering a special master to investigate whether the Department of Interior concealed information).

48. Larios v. Cox, 306 F. Supp. 2d 1212, 1213 (N.D. Ga. 2004).

49. Triple Five of Minn., Inc. v. Simon, 280 F. Supp. 2d 895, 909 (D. Minn. 2003).

50. *Id.*

51. Diversified Group, Inc. v. Daugerdas, 304 F. Supp. 2d 507, 510 (S.D.N.Y. 2003).

52. Good Stewardship Christian Ctr., Inc. v. Empire Bank, 341 F.3d 794, 797 (8th Cir. 2003).

53. *In re* Omeprazole Patent Litig., 2004 WL 842024, at *1 (S.D.N.Y. 2004).

National Childhood Vaccine Injury Act.[54]

- Determining necessary relief in Voting Rights Act matter.[55]
- Reviewing attorney fee applications in class action litigation.[56]

In addition to reported decisions, an empirical study created by FJC studied federal courts' use of special masters.[57] The FJC Study also found non-attorney special masters' activities included testifying to a jury, establishing a claims process, recommending approval of or implementing a settlement, and drafting an enforcement decree.[58]

Federal courts recognize the benefits that special masters offer, and the courts continue to appoint masters to manage difficult and complex issues.[59] Many resources used by federal courts are also used extensively within state courts.[60] Like federal courts, state courts should appoint special masters to manage difficult or complex issues. In many situations, state court and federal court litigation is indistinguishable and often involves the same issues and the same attorneys.[61] Both federal and state court rules permit courts to appoint special masters.[62] State courts should take greater advantage of the discretion allowed under the rules and appoint special masters to difficult matters.

State courts' use of special masters may be limited by various

54. Dixon v. Sec'y. of Dep't of Health & Human Servs., 61 Fed. Cl. 1, 6 (2004).

55. United States v. Berks County, Pa., 250 F. Supp. 2d 525, 542 (E.D. Pa. 2003).

56. *In re* Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 184 (3d Cir. 2002).

57. FJC Study, *supra* note 3.

58. *Id.* at 41.

59. *See* MANUAL, *supra* note 10 (noting that the Federal Rules of Civil Procedure allow judges to appoint special masters when pretrial and post-trial matters cannot be efficiently and effectively addressed by a judge, particularly in cases requiring accounting, finance, science, and technology expertise); *see also* FJC Study, *supra* note 3, at 13 (showing that in 1506 cases out of 445,729 docket entries, the court made some entry to a special master).

60. *See* DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) 3 (West, 2004) (noting that the Manual for Complex Litigation is used extensively by state courts).

61. *See, e.g.*, ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS § 1.1 (Thomson West, 3d ed. 2004).

62. *See supra* notes 13-14 and accompanying text.

hurdles or standards inherent in the authorities allowing state courts to appoint a special master.[63] Some of the conditions or limitations include:

- Requiring consent of the parties before appointing a special master.[64]
- Requiring a finding of an extraordinary need.[65]
- Limiting the scope of cases permitting appointment of a special master.[66]
- Limiting appointment to non-jury actions.[67]
- Requiring that an action to be tried to a jury involve "examination of complex or voluminous accounts."[68]

Nevertheless, state courts can put special masters to work, and such limitations should not stand in the way of utilizing special masters when allowed.

In state courts, a contentious divorce proceeding, such as one involving custody issues, is one situation where the court may appoint a special master to make decisions regarding "day-care, . . . diet, . . . discipline, health care, and daily routines."[69] Any decisions the special master makes regarding "education, religious training, vacations and holidays, supervision of visitation, and participation in physical and psychological examinations" would require adoption by the court.[70] The court's goal in appointing a special master to a divorce/custody proceeding is to protect the child from ongoing litigation and parental conflict.[71]

Courts can also appoint special masters to resolve complex calculations. Special masters hear evidence and make damages recommendations regarding the fair market value of property.[72] In one case, the court noted that appointment of a special master might be useful in determining the value of improvements to a

63. *See infra* Special Master Authorities Appendix (listing the authorities by state and stating some of the authorities' limitations).
64. FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005).
65. TEX. R. CIV. P. 171.
66. CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53.
67. MD. CIR. CT. R. CIV. P. 2-541.
68. KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002).
69. Griffiths Peterson, *supra* note 29, at 18.
70. *Id.*
71. *Id.*
72. McKemie v. City of Griffin, 537 S.E.2d 66, 67 (Ga. 2000).

water system.[73] In another case, the trial court appointed a special master to make an accounting of a company's books and bank accounts.[74] Special masters help determine amounts due under rental agreements.[75] When a case involves a dispute regarding attorneys' fees and the court appoints a special master, the special master can offer recommendations that might include disbarment.[76]

Cases involving school funding are one area where several state courts have appointed special masters. In Arkansas, the school-funding program was declared unconstitutional.[77] Since the *DuPree* decision, several cases have again challenged revisions to the state's educational-funding program.[78] In 2002, the Arkansas Supreme Court once again declared the state-funding program unconstitutional.[79]

After the state missed a January 2004 deadline where it was to complete a cost study and propose a funding program that is constitutional, the court appointed two special masters.[80] The special masters were to answer ten questions related to steps the state had taken to bring the educational system into compliance with the state's constitution.[81] The Arkansas Supreme Court discussed the anticipated work of the special masters and noted that it would primarily involve document review.[82] Nevertheless, the court mentioned that if the masters determined that they needed to take testimony, the masters had the authority to subpoena witnesses or other materials.[83] In April 2004, the masters released their report (128 pages) and noted their findings with respect to the state's action in bringing the educational system into

73. Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 928 P.2d 1047, 1052 n.5 (Utah Ct. App. 1996).

74. *See* HRR Ark., Inc. v. River City Contractors, Inc., 87 S.W.3d 232, 235-36 (Ark. 2002) (noting that the trial court appointed a special master where the case involved a dispute about a sale of assets with provisions related to adjustments for revenue shortfalls, and the parties asserted counterclaims for unpaid commissions and unpaid rent).

75. Fallahzadeh v. Ghorbanian, 82 P.3d 684, 685 (Wash. Ct. App. 2004).

76. Skutch, *supra* note 44.

77. DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

78. Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530 (Ark. 1996); Magnolia Sch. Dist. No. 14 v. Ark. State Bd. of Educ., 799 S.W.2d 791 (Ark. 1990).

79. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002).

80. Lake View Sch. Dist. No. 25 v. Huckabee, 144 S.W.3d 741 (Ark. 2004).

81. *Id.* at 742.

82. *Id.* at 742-43.

83. *Id.*

compliance with the state constitution.[84] Courts in Idaho, Kentucky, New Jersey, New Mexico, New York, and West Virginia have also appointed special masters to cases involving school-funding programs.[85]

Courts often appoint a special master to cases involving property disputes. In New Jersey, a court appointed a special master to recommend the number of housing units that a development lot could yield while complying with a zoning ordinance.[86] In another New Jersey case, the court appointed a special master to assist in revising a zoning ordinance at issue in a land use regulation case.[87] In Arizona, a court appointed a special master to a matter involving violations of a subdivision's covenants, conditions, and restrictions.[88] The special master heard testimony, conducted an on-site visit, and found that one of the parties did violate the subdivision's covenants, conditions, and restrictions.[89] The trial court adopted the special master's recommendations and findings, and the appellate court affirmed the decision.[90] State courts in California, Florida, Massachusetts, Michigan, Texas, and Washington have appointed special masters to assist in resolving property disputes ranging from zoning ordinance disputes to disputes concerning defective construction.[91]

84. Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2004 WL 1406270, at *1 (Ark. June 18, 2004); *see also* Molly A. Hunter, *Special Masters Report on Compliance in Arkansas, Offer Favorable Views on Early Childhood Education and Consolidation*, ACCESS (April 7, 2004), *at* http://www.schoolfunding.info/states/ar/4-7-04mastersreport.php3 (discussing the special masters' findings regarding the Arkansas school-funding program).

85. Hunter, *supra* note 84; *see* Idaho Sch. for Equal Educ. Opportunity v. State, 97 P.3d 453, 456 (Idaho 2004) (noting the district court's appointment of a special master to assess dilapidated schools in the state); Rose v. Council for Better Educ. Inc., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke, 710 A.2d 450 (N.J. 1998); State *ex rel.* Justice v. Bd. of Educ., 539 S.E.2d 777 (W. Va. 2000); *State Court Appoints Three Special Masters to Fix School Funding Formula,* NY1 NEWS (Aug. 4, 2004), *at* http://www.allianceforqualityeducation.org/State%20court%20appoints%203%20masters.html.

86. Toll Bros. v. Township of W. Windsor, 803 A.2d 53, 66 (N.J. 2002).

87. S. Burlington County NAACP v. Mount Laurel Township, 456 A.2d 390, 454-55 (N.J. 1983).

88. Ahwatukee Custom Estates Mgmt. Ass'n v. Turner, 2 P.3d 1276, 1278 (Ariz. Ct. App. 2000).

89. *Id.*

90. *Id.*

91. Regan Roofing Co. v. Superior Court, 27 Cal. Rptr. 2d 62 (Cal. Ct. App. 1994); Clay v. Monroe County, 849 So. 2d 363 (Fla. Dist. Ct. App. 2003); Yankee

III. ASSESSMENT OF SPECIAL MASTERS' CONTRIBUTIONS

Cases where courts have appointed special masters have been met with success and complaints. Courts frequently adopt the special master's recommendations. Nevertheless, a losing party often appeals a court's decision where it adopts a recommendation by a special master.

A. Drawbacks

Expense is one area that some view as a drawback related to use of special masters.[92] Whether expense is incurred by the parties or by the court, use of special masters may result in incurring additional expense.[93] Nevertheless, the reality is that efficiencies brought about by special masters ultimately save money for the parties and save public resources.[94]

Cases where parties question the special masters' recommendations or findings often involve situations where a party asserts that the special master heard an argument raised for the first time on appeal.[95] More often than not, the appellate court affirms the trial court decision because transcripts of the hearing before the special master are not available.[96]

Decisions where the appellate court vacates the findings of a special master have occurred when the trial court appointed a special master without the consent of the parties.[97] In Missouri, a trial court adopted an accountant's report as a report of a special master purportedly in accordance with Missouri Rule of Civil

Adver. Co. v. Outdoor Adver. Bd., 464 N.E.2d 410 (Mass. App. Ct. 1984); Northview Constr. Co. v. City of St. Clair Shores, 249 N.W.2d 290 (Mich. 1976); City of Garland v. Walnut Villa Apartments, L.L.C., No. 05-01-00234-CV, 2001 WL 789298, at *1 (Tex. App. July 12, 2001); Peterson v. Koester, 92 P.3d 780 (Wash. Ct. App. 2004).

92. FJC Study, *supra* note 3, at 59.

93. *Id.*

94. *Id.*

95. *See* Simmons v. Bearden, 596 S.E.2d 136, 137 (Ga. 2004) (arguing on appeal that the special master's determination was based on issues "neither considered nor ruled on below"); Gotel v. Thomas, 592 S.E.2d 78, 79-80 (Ga. 2004) (noting that the appellate court could not review the argument that the special master erred by considering an argument first raised on appeal because no transcript of the hearing before the special master was available).

96. *See Simmons*, 596 S.E.2d at 137; *Gotel*, 592 S.E.2d at 79-80.

97. Perez-Vasquez v. Smith-Rivera, No. 3D03-3256, 2003 WL 23006699, at *1 (Fla. Dist. Ct. App. 2003).

Procedure 68.01.[98] The appellant argued that the trial court erred in adopting the report, and the court of appeals agreed with the appellant.[99] The court of appeals noted that the trial court did not provide notice to the appellant that it was appointing the accountant as a special master, the accountant was not sworn in, and the appellant never had an opportunity to challenge the accountant's report.[100] Consequently, the Missouri Court of Appeals stated that the accountant's report could not be considered on remand.[101]

Parties have appealed appointment of a special master in jurisdictions that limit the appointment of a master to unusual or exceptional cases.[102] If the trial court fails to make findings of the required condition precedent to use of a master, disqualification may be appropriate.[103] In most such situations, however, the reviewing court will readily determine that sufficient grounds existed for appointment of a master, even if they were not specifically found in the order of appointment.[104] In one Texas case, a party challenged the trial court's appointment of a special master for discovery on the grounds that the trial court did not have "good cause" to appoint the master.[105] In reviewing the matter, the Texas Court of Appeals noted that a trial court's decision to appoint a special master is within the court's discretion but should only occur when there is "good cause."[106] On review, the court of appeals noted that the case only involved two plaintiffs and one defendant.[107] Moreover, the court noted that neither party made a contention that the case was overly complicated.[108] The court concluded that the case was not exceptional and that the trial court did not show good cause when deciding to refer discovery matters to a master.[109]

98. Shaner v. Sys. Integrators, Inc., 63 S.W.3d 674, 679 (Mo. Ct. App. 2001).
99. *Id.*
100. *Id.*
101. *Id.*
102. *See, e.g.*, Wallin v. Drewery, 783 So. 2d 786 (Miss. Ct. App. 2001); Tollett v. Carmona, 915 S.W.2d 562 (Tex. App. 1995). *But see* Venetian Casino Resort, L.L.C. v. Eighth Judicial Dist. Court of Nev., 41 P.3d 327 (Nev. 2002).
103. *See, e.*g., *Tollett*, 915 S.W. 2d at 563.
104. *Wallin*, 783 So. 2d at 790.
105. *Tollett*, 915 S.W.2d at 563.
106. *Id.* at 564.
107. *Id.*
108. *Id.*
109. *Id.*

Challenges to a court's appointment of a special master also occur when a party believes the special master has a conflict of interest. Often times, a party will need to show that the perceived conflict of interest is more than speculation.[110] Nevertheless, if a legitimate conflict of interest exists, special masters should recuse themselves from a proceeding.[111] Parties should be aware that special masters are frequently attorneys and that accommodations should be made to limit the special master's role in the proceeding so as to avoid any possible conflict of interest.

B. Successes

Although the FJC Study is anecdotal in nature, it notes great satisfaction in the work special masters do and how federal judges view the special masters' work.[112] The work of special masters is very helpful; in fact, one judge in responding to the FJC Study "wished he had appointed a discovery master earlier."[113] The FJC Study shows that generally, judges appointing special masters thought that the "benefits of appointments outweighed any drawbacks."[114]

In a case involving allegations of damages from lead-based paint, a special master was able to determine that the alleged damages occurred after the paint manufacturer stopped selling lead-based paint.[115] The special master recommended dismissal of the case based on a variety of legal theories, and the trial court judge adopted the special master's recommendations.[116]

The work of special masters has also been successful when the work involves "side issues" or general research for the court. The Pennsylvania Supreme Court appointed a special master to gather data regarding death penalty cases in the state.[117] The court was

110. *Wallin*, 783 So. 2d at 790.

111. *But see* Venetian Casino Resort, L.L.C. v. Eighth Judicial Dist. Court of Nev., 41 P.3d 327 (Nev. 2002) (noting that despite the fact the plaintiff waived its right to object to the special master appointment, the concerns of the plaintiff were not so serious for the special master to recuse herself from the proceeding).

112. FJC Study, *supra* note 3, at 61.

113. *Id.* at 64.

114. *Id.* at 66.

115. *See Understanding Lead-Pigment Litigation*, *at* http://www.leadlawsuits.com/infobystate_MS.htm (last visited Jan. 6, 2005) (noting Gaines v. Sherwin Williams).

116. *Id.*

117. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53

studying concerns regarding race-based disparate treatment, and it needed to review evidence.[118] The special master was able to gather the data, and a state commission called for a moratorium on executions.[119]

Special masters also provide valuable services to the court when a matter involves a highly technical dispute. For example, courts often appoint special masters to assist in resolving electronic discovery matters.[120] A special master who possesses the right qualifications is in a better position to resolve the dispute as compared to a judge with little or no technical expertise.[121] Special masters can help answer questions such as what is the right amount of data to produce.[122] Electronic discovery disputes often involve a question of which party should bear the cost of production, and a special master is in the best position to determine the answer.[123]

Whether a court has appointed a special master to assist with pretrial or post-trial matters, the FJC Study shows that attorneys and judges alike thought that the special master helped manage the case more efficiently.[124] Even the attorneys involved in cases where special masters were appointed thought the special masters were "effective in meeting the goals of the appointment, [and] describ[ed] the appointments as a good idea."[125]

IV. NEED FOR SPECIAL MASTERS

A. Financial and Workload Crises in the Courts

Across the country, state budget crises are limiting individuals'

DEPAUL L. REV. 1411, 1441 (2004) (focusing in part "on the interaction between empirical evidence of racial discrimination in the administration of the death penalty").

118. *Id.*

119. *Id.* at 1481.

120. Richard H. Agins, *An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery*, 23 PACE L. REV. 689, 694 (2003) (suggesting "that a properly qualified special master can provide substantial assistance to the court where electronic data discovery raises difficult questions related to the quantity or format of information, or to the maintenance of ongoing operations of the producing party while discovery is in progress").

121. *Id.* at 718.

122. *Id.* at 719.

123. *Id.* at 723.

124. FJC Study, *supra* note 3, at 67.

125. *Id.*

access to the courts.[126] In response to budget cuts, states have temporarily suspended jury trials, closed courtrooms and courthouses, and reduced court hours.[127] Other states considered taking measures that would require employees to take unpaid days off, reduce judicial education, cut court staff, and curtail court interpretation services.[128]

Comparing fiscal year 2002-03 to 2003-04, states experiencing some of the most significant budget cuts are reacting by cutting court support staff.[129] In Massachusetts, where the court's budget declined by 25%, courts reduced staffing by more than 1000 employees through layoffs and attrition.[130] The California judicial budget decreased by 25%, and its Chief Justice outlined a series of action steps for courts to consider in managing reduced budgets.[131] The action steps required a "90-day vacancy period after an employee leaves a position, and a review to see if the position can be eliminated."[132] In fact, 62% of the nation's state courts have delayed hiring or imposed hiring freezes during the recent slowed economic period.[133]

126. *See* ABA State Court Funding Crisis, *ABA Commission on State Court Funding*, *at* http://www.abanet.org/jd/courtfunding/funding_comm.html (last visited Jan. 6, 2005) (stating that the ABA launched the "ABA Commission on State Court Funding, . . . to examine problems arising from chronic under-funding of state judicial systems"); C.J. Ronald M. George, *State of the Judiciary* (Mar. 23, 2004), *at* http://www.courtinfo. ca.gov/reference/soj0304.htm.

127. ABA State Court Funding Crisis, *Summary of Issues and ABA Policies*, *at* http://www.abanet.org/jd/courtfunding/issues.html (last visited Jan. 6, 2005) (noting Alabama temporarily suspended jury trials in 2002; Los Angeles County California closed courtrooms and courthouses; and Oregon closed courthouses on Fridays); *see also* Lisa Stansky, *The Big Squeeze: State Legal Systems are Feeling the Pain of Tight Budgets*, Special to the National Law Journal, *at* http://jud13.flcourts.org/avweb/news_1.htm (last visited Jan. 6, 2005) (detailing measures taken by state courts across the country in response to budget cuts).

128. Stansky, *supra* note 127.

129. *See* State Budget Appropriations to the Judicial Branch, *at* http://www.abanet.org/jd/courtfunding/pdf/state_budget_tables.pdf (last visited Jan. 6, 2005) (showing double-digit budget decreases in Alabama, Arizona, California, Colorado, Massachusetts, and South Carolina); David L. Hudson, Jr., *Courts' Cash Crunch*, 2 No. 3 A.B.A.J. E-Report 1 (Jan. 24, 2003) (noting Colorado had a hiring freeze); ABA State Court Funding Crisis, *supra* note 127.

130. State Budget Appropriations to the Judicial Branch, *supra* note 129; ABA State Court Funding Crisis, *supra* note 127.

131. C.J. Ronald M. George, *Remarks on the Budget* (Dec. 13, 2002), *at* http://www.courtinfo.ca.gov/reference/budget1202.htm.

132. *Id.*

133. Kenneth G. Pankey, Jr., *Funding State Courts: Trends in 2002: Budget Woes and Resourceful Thinking*, *available at* http://www.ncsconline.org/

While budget cuts create financial management problems for the courts, the problems become more complicated as court caseloads continue to increase.[134] Since 1993, state court caseloads have increased at a steady pace.[135] Over the past ten years, state court civil case filings have increased 12%, criminal case filings 19%, domestic relations case filings 14%, and juvenile case filings 16%.[136] It is noteworthy that state court caseloads have increased at a rate two to three times higher than the growth in the number of state court judges, which has only averaged about one-half of 1% per year over the last ten years.[137] As courts react to continued financial constraints combined with increased caseloads, innovative solutions are needed to ensure that individuals have continued access to justice.[138]

Some of the problems in the state court system are magnified when the problems are part of a large court system such as the California court system.[139] California's state budget problems have drawn national attention.[140] California courts have been forced to take drastic measures to help manage financial constraints and workload problems.[141] In California, some of the effects from

WC/Publications/ KIS_FundCt_Trends02_Pub.pdf (last visited Feb. 11, 2005).

134. *See* Hudson, *supra* note 129 (noting that Oregon planned to close state courts on Fridays and lay off thirty-nine court employees with the result that courts will be unable to hear cases involving shoplifting, prostitution, criminal trespass, and vandalism); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, COURT STATISTICS PROJECT, 10 (2003), *available at* http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Overview.pdf (showing state court civil case filings increased 12% from 1993 – 2002, and that 96.2 million new cases were filed in state trial courts in 2002).

135. *See* NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, *supra* note 134, at 10 (stating combined civil, criminal, domestic relations, and juvenile case filings have increased fifteen percent since 1993).

136. *Id.*

137. *Id.* at 11.

138. *See* Frances Kahn Zemans, *Court Funding*, ABA Standing Committee on Judicial Independence 1, 11 (Aug. 2003), *at* http://www.abanet.org/jd/courtfunding/ pdf/courtfunding.pdf (stating that courts' cost-cutting measures may "affect the quality of justice and its availability to the public").

139. JUDICIAL COUNCIL OF CAL. FACT SHEET 1 (Jan. 2003), *at* http://www.courtinfo. ca.gov/reference/documents/cajudsys.pdf (noting that California's court system is the largest in the nation).

140. *See* JUDICIAL COUNCIL OF CAL., 2004 ANNUAL REPORT, PRESERVING EQUAL ACCESS TO JUSTICE, PROGRESS AND CHALLENGES OF THE CALIFORNIA JUDICIAL BRANCH, 3 (2004), *available at* http://www.courtinfo.ca.gov/reference /documents/ar2004.pdf (last visited Jan. 3, 2005) (stating that California courts face "catastrophic budget reductions due to an ailing state economy").

141. *See id.* at 2 (stating that some judicial programs have been curtailed, and

reduced budgets and increased workloads have included increases in workers compensation claims by court employees, continued court closures, increased case backlogs and service delays, and elimination of services and programs.[142]

In Minnesota, there is concern that funding levels have not increased proportionately to increases in caseloads.[143] Of particular concern is funding for the public defender system.[144] In 2004, the Minnesota public defender system faced potential layoffs of up to 40% of its staff.[145] Some predict Minnesota's judicial system could come to a halt.[146]

According to the ABA study of judicial branch budgets, Minnesota's judicial budget actually increased from fiscal year 2002-03 to 2003-04.[147] Although the state judicial budget increased, it only increased at an annual rate of 0.07% while the state court caseload grew at an average annual rate of 1.7%.[148] Court workloads are leaving courts in search of creative solutions so that no one is denied justice.[149]

Increasingly, courts are making use of court referees to perform duties that are traditionally performed by a judge.[150] One commentator suggests that this is the result of state legislatures

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others are in danger of being eliminated); *see also* Blaine Corren, *Hearing Documents High, Costs of Budget Cuts*, CT. NEWS, May – June, 2004, at 1, *available at* http://www.courtinfo.ca.gov/courtnews/mayjun04.pdf (stating that some California courts are keeping vacant positions open for years and requiring mandatory furloughs, and others are cutting services).

142. Corren, *supra* note 141, at 1, 6.

143. James L. Baillie, *Our Public Defender System: A Funding Crisis*, 61 BENCH & BAR OF MINN. 5, 5 (2004).

144. *Id.*

145. *KARE 11 News: Crisis in the Courts?* (NBC affiliate television broadcast, July 18, 2004).

146. *See id.* (stating if layoffs become a reality, the state's court system could grind to a halt).

147. *See* State Budget Appropriations to the Judicial Branch, *supra* note 129.

148. *Id.*; s*ee also* MINN. JUDICIAL BRANCH, 2003 ANNUAL REPORT 5 (2003), *available at* http://www.courts.state.mn.us/documents/CIO/annualreports/2003/mjb_annual_report_2003.pdf (showing that over the past decade, Minnesota's case filings increased eighteen percent, which corresponds to an approximate 1.67% average annual increase).

149. *See* MINN. JUDICIAL BRANCH, *supra* note 148, at 3 (noting that due to continued caseload increases, and revenue decreases "[t]he judicial branch continues to search for alternative solutions to resolve disputes"); Corren, *supra* note 141, at 1 (stating that in California, due to budget cuts and reduced staffing levels, court employees need to become "generalists").

150. *See, e.g.,* Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-five Years of Radical Change*, 26 HAMLINE L. REV. 219, 233 (2003).

failing to fund additional judicial staffing needs.[151] In Nebraska, courts utilize referees in child support cases to ensure cases meet case progression standards, and in Minnesota, courts in the second and fourth judicial districts use court referees for landlord/tenant disputes.[152] It is noteworthy that in Minnesota, the fourth judicial district (where referees are utilized), has the highest caseload per judge of any court in the country.[153] So, as caseloads increase, courts continue to rely on judicial referees.[154]

Statistics show that complex litigation matters,[155] and class action claim filings are on the rise.[156] Court dockets continue to increase.[157] One problem that state courts have is lack of legal support staff—federal court judges often employ one or more law clerks, whereas state court judges generally do not employ law

151. *Id.*

152. Nebraska Supreme Court Child Support Goals and Rules at 7.3-7.4, *available at* http://court.nol.org/rules/CHSUPPREFS.07.PDF (last visited Jan. 3, 2005); Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense Is Much More Than "Did You Pay The Rent?"*, 28 WM. MITCHELL L. REV. 65, 68 (2001).

153. Sheran & Amdahl, *supra* note 150, at 240.

154. *See* Probate Court Functions, *at* http://www.mahoningcounty probate.org/a_about_the_probate_court.htm (last visited Jan. 3, 2005) (stating that in Ohio, due to heavy caseloads, probate courts are using referees to handle cases filed with the court).

155. The term "complex litigation" has been defined many ways. Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.–NW. J. ENVTL. L. & POL'Y 71, 74 (1999). One source defines "complex litigation" as including "those cases in which the normal adversary process is impaired, and special rules, tailored to the specific litigation, must be devised if the cases are to be adjudicated and decided efficiently and fairly." Jack Friedenthal, *Tackling Complex Litigation*, 74 NOTRE DAME L. REV. 1301 (1999) (reviewing JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM (1998)).

156. *See* Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. ST. B.J. 18, 22 (Jan. 2004) (stating that the increased occurrence of complex litigation will likely lead to increased use of special masters); Bedouin L. Joseph, *The Louisiana Special Master Statute*, 51 LA. B.J. 261, 262 (Dec. 2003/Jan. 2004) (noting mass tort and complex litigation cases "continue to inundate [Louisiana] courts"); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (stating that state courts rarely encounter the problems of complex litigation because the cases are in federal court; however state courts do see nationwide class action suits, and such suits have reportedly increased) (citing Commentary, 18 Class Action Rep. 1, 1 (1995)).

157. *See* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 570-71 n.23 (2004) (noting federal and state court dockets continue to grow, resulting in delays) (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (1991)).

clerks.[158] Court-appointed referees can help manage particular aspects of complex litigation matters, such as discovery disputes.[159] When complex litigation matters arise in state courts, the cases often need "managerial judging."[160] In Connecticut, complex litigation matters involving real estate limited partnerships, environmental insurance litigation, and construction litigation have arisen in state courts and are examples of cases requiring managerial judging.[161]

B. State Courts' Response–Common Cases

In response to concern about the pace of litigation, Connecticut established a pilot case management program.[162] Connecticut's pilot program established time standards for the disposition of civil cases.[163] The program provides "discovery judges" who are assigned to individual cases and then monitor case progress.[164] In addition, the program provides special masters who will primarily hear settlement conferences.[165] Connecticut's pilot program was scheduled to end in December 2004.[166] Assuming the program succeeds, the judicial branch then wants to use it as a model for further deployment.[167]

Concerns regarding timeliness of state court dispositions

158. Lloyd Milliken, Jr., *Fixing the Broken Class Action Lawsuit System*, 47 RES GESTAE 19, 21 (2003).

159. Vivien B. Williamson, *ADR: An Overview*, 600 PRACTICING L. INST. LITIG. 707, 712 (1999) (noting referees help resolve complicated financial or technical issues, and in California they resolve discovery disputes); Steiner, *supra* note 155, at 80 (noting that courts can appoint a discovery referee before a discovery dispute arises).

160. Barry Schaller, *Managerial Judging: A Principled Approach to Complex Cases in State Court*, 68 CONN. B.J. 77, 79 (1994).

161. *Id.* at 79-80.

162. STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2003), *at* http://www.jud.state.ct.us/external/super/Standorders/RaiseBar-Feb.pdf.

163. *Id.*

164. STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2003), *at* http://www.jud.state.ct.us/external/super/Standorders/BPP-1P.htm.

165. STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2003), *at* http://www.jud.state.ct.us/external/super/Standorders/RaiseBar-Feb.pdf.

166. *Id.*

167. *But see* STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2005), *at* http://www.jud.state.ct.us/external/super/Standorders/BPP.htm#Pilot (stating that administrative appeals of fifteen and twenty-four month cases in the BPP have been suspended).

persist.[168] The presence of complex cases directly affects a court's average case resolution time.[169] One problem that state courts encounter more frequently than federal courts is the number of criminal cases.[170] When a criminal case involves a constitutional issue or a severe offense with a possible long-term incarceration, the efficiency of the court declines.[171] It is noteworthy that the two states with the highest number of death penalty cases also take the most time to resolve their caseloads.[172]

C. Complex Cases

Federal statutes help manage caseload problems by defining how courts can aggregate cases that contain a common question of fact. After consolidating the cases, a single judge hears the case.[173] Multidistrict litigation statute, 28 U.S.C. § 1407, requires that at least two cases be "pending in different districts" and "involv[e] one or more common questions of fact" before the cases may be aggregated or consolidated.[174] A multidistrict litigation (MDL) panel determines whether to allow the consolidation.[175] Mass tort claims are typical claims that are brought to a MDL panel for consolidation.[176] State courts as well as federal courts preside over

168. *See* Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 642 (2002) (noting that slow disposition of civil cases in state courts may be the result of the high number of criminal cases and criminal case priority, and lack of judges and court personnel); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 U. SEATTLE L. REV. 433, 453 (1996) (noting that state courts' time-to-disposition is usually greater than federal courts' time-to-disposition).

169. *See* Roger A. Hanson, Brian J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts*, CASELOAD HIGHLIGHTS (Nat'l Center for State Cts., Williamsburg, Va.), Mar. 2002, at 1, 2, *available at* http://www.ncsconline.org/D_Research/csp/Highlights/ COLR_Vol8No1.pdf (noting that in Florida, case resolution times are comparatively longer due to the number of complex cases in the state court system).

170. *Id.*

171. *Id.*

172. *Id.*

173. DAVID F. HERR, MULTIDISTRICT LITIGATION: HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 2 (Little, Brown and Company 1986, Supp. 1996). For a thorough discussion of state-court counterparts to the federal statute, see MARK HERRMANN ET AL., STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS (Thomson West, 2d ed. 2004).

174. 28 U.S.C. § 1407(a) (2004).

175. *Id.*

176. HERRMANN, *supra* note 173, at 1.

mass tort proceedings.[177] In situations where within a single state many claims are pending within various state courts, a statewide process similar to the federal MDL process is needed.[178] Many lawyers are at least aware of the federal MDL process; however, fewer are familiar with similar state court processes.[179]

Two examples of where state courts have implemented innovative programs to help manage state court caseloads and case disposition timeliness are programs in Pennsylvania and California. Pennsylvania Rule of Civil Procedure 213 defines the requirements for consolidation of claims in Pennsylvania state courts.[180] In Pennsylvania, claims that are frequently coordinated and consolidated include automobile accident cases (particularly when they involve an insurance coverage dispute) and mass tort cases involving "manufacture and use of bone screws and breast implants."[181]

Management of other mass-tort claims often occurs in the Philadelphia Court of Common Pleas, where the "Complex Litigation Center" was established to specifically manage mass tort claims.[182] The court was the first in the nation to establish an exclusive court to manage complex, mass tort claims.[183] The streamlined procedures of the Complex Litigation Center were designed to encourage communication among the parties and the court, and to eliminate redundant efforts.[184] The program created standardized procedures for managing claims involving asbestos, lead paint, carpal tunnel syndrome, Norplant, latex gloves, diet drugs, and Tylenol.[185]

In its effort to streamline mass-tort case management proceedings, the Complex Litigation Center set up standardized pleadings for mass torts.[186] In addition, it centralized motion practice for mass torts.[187] Discovery proceedings are also

177. *Id.*
178. *Id.*
179. *Id.*
180. PA. R. CIV. P. 213.
181. HERMANN, *supra* note 173, at 420.
182. Mary McGovern, *Complex Litigation Center Programs*, Complex Litigation Center, *available at* http://courts.phila.gov/pdf/civil2001/clc.pdf (last visited Feb. 11, 2005).
183. *Id.*
184. HERRMANN, *supra* note 173, at 422.
185. *Id.* at 421.
186. *Id.* at 422.
187. *Id.* at 423.

standardized, and a discovery schedule is synchronized with its trial calendar.[188] The Pennsylvania Complex Litigation Center has been viewed as a success, as it "succeeded in dramatically reducing the asbestos docket and quickening the pace of other mass-tort proceedings."[189]

In California, the civil practice code outlines rules for aggregation of multi-county claims.[190] California's program is one of the most organized programs in the country.[191] After receiving a petition for case coordination or consolidation, a judicial council appoints a judge to determine whether to allow claim aggregation.[192] California often permits case consolidation, and when approved for consolidation, the judicial council will then appoint a judge to hear the consolidated case.[193] California's coordination program is essentially identical to the federal multidistrict litigation program except that California permits complex case coordination for both pretrial and trial purposes.[194] Other states, including Illinois, New York, and Texas, have also adopted programs that allow for case coordination or consolidation at the state court level.[195]

When courts consolidate cases, the result may be a complex case with the possibility of overwhelming the judge and/or jury.[196] In 1997, California set up the Judicial Council on Litigation Task Force "to find ways [for state] trial courts [to] manage complex civil litigation more efficiently and effectively."[197] The California Task Force noted that complex litigation involves claims requiring exceptional management so the courts are not excessively burdened.[198] The California Judicial Council approved Task Force recommendations, including "[d]istributing the *Deskbook on the*

188. *Id.* at 422-23.

189. *Id.* at 421.

190. CAL. CIV. PROC. CODE § 404 (West 1974); Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 911 (2001).

191. Rheingold, *supra* note 190.

192. *Id.*; HERRMANN, *supra* note 173, at 115.

193. Rheingold, *supra* note 190, at 911-12; HERRMANN, *supra* note 173, at 119.

194. HERRMANN, *supra* note 173, at 109.

195. *Id.* at 247, 379, 493.

196. Hugh H. Bownes, *Should Trial by Jury be Eliminated in Complex Cases?*, 1 RISK: ISSUES IN HEALTH & SAFETY 75, 79-80 (1990).

197. Complex Civil Litigation Task Force, Fact Sheet (Sept. 2004), *available at* http: www.courtinfo.ca.gov/reference/documents/comlit.pdf.

198. *Id.*

Management of Complex Litigation to all judges."[199] In addition, six trial courts participated in the "Complex Civil Litigation Pilot Program" with the goal being to give trial court judges tools to manage complex litigation cases more efficiently and effectively.[200]

The complex litigation programs in Pennsylvania and California are the exceptions rather than the rule. State courts continue to encounter challenges when faced with in-state complex litigation matters and/or class action lawsuits. Some practitioners are calling for a solution to manage class action lawsuits, urging for expansion of federal jurisdiction so that more class action claims can be heard in federal courts.[201] Another way state courts can manage judicial caseloads is through use of special masters.[202]

Special masters bring much-needed expertise and specialization to cases involving highly specialized issues. In addition, by allowing special masters to manage pretrial discovery matters, judges are able to focus on additional pending cases. In essence, by referring case management matters to special masters, in a complex litigation matter or mass-tort case, the judge and special master are able to work on parallel tracks and move a case along more quickly. The net result that courts realize when using special masters is two-fold: improved efficiency in resolving cases, and increased number of cases resolved.

D. State, Federal Coordination

Special masters have potential value in coordinating parallel state and federal proceedings.[203] One instance where a special master was appointed to manage the state-federal coordination was in the silicone gel breast implant litigation.[204] Either assigning a

199. *Id.*

200. *Id.*

201. Milliken, *supra* note 158, at 20-21.

202. Thomas Greene & Patricia A. Conners, *State Antitrust Enforcement*, 1427 PRACTICING L. INST. CORP. 809, 836 (May 2004). Under Rule 53 of the Federal Rules of Civil Procedure, a court may appoint a special master to perform duties consented to by the parties, make or recommend findings of fact, and address pretrial and post-trial matters that the judiciary cannot resolve efficiently. FED. R. CIV. P. 53.

203. *See* MANUAL, *supra* note 10, § 20.31 (noting that complex litigation often involves cases brought in both federal and state court). *See generally* William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992) (discussing approaches to complex case coordination among state and federal courts).

204. *See* MANUAL, *supra* note 10, § 20.311 (citing Francis E. McGovern,

special master in state court proceedings to coordinate with federal court proceedings, or cross-appointing a special master (appointing as a state court master the same individual assigned in federal court) may offer tremendous rewards in overall case management.

V. THE FUTURE

Special masters provide benefits to courts, whether federal or state, in terms of the specialized expertise they offer, and the ability to ease burdens on the judiciary from extensive discovery processes and case management tasks. State court rules permit the use of special masters. In turn, state courts should take advantage of the discretion inherent in the rules to appoint a special master to manage or oversee difficult and complex matters.

In appointing a special master, the state court, following the practice of federal courts, should provide a written order of reference. The written order of reference should detail the circumstances justifying the appointment of the special master.[205] In addition, the reference to the special master should outline the procedures for the special master to follow, and identify reporting requirements for the special master, while also providing a provision regarding the special master's fees.[206]

State courts have an opportunity to streamline case management and resolve cases more quickly by utilizing special masters. In addition, in the interest of justice, special masters offer much-needed expertise in the areas of accounting, finance, science, and technology, which in certain cases, can help ensure a fair result. Increased use of special masters by state courts will benefit all involved with litigation—the parties, the attorneys, and the courts.

Rethinking Cooperation Among Judges in Mass Tort Litigation, 44 UCLA L. REV. 1851, 1870 (1997)).

205. *See* MANUAL, *supra* note 10, § 40.28 (providing a sample order for referral of privilege claims to a special master).

206. *Id.*

SPECIAL MASTER AUTHORITIES APPENDIX

State Court Authorities Governing Special Masters, Referees, Commissioners, and Similar Judicial Adjuncts
And
Comparison State Rules to Federal Rule of Civil Procedure Rule 53

State	**Authorities and Comparison to FED. R. CIV. P. Rule 53**
Alabama	ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53 Adopts pre-2003 amended version of the federal rule but state rule does not apply to state district courts.
Alaska	ALASKA R. CIV. P. 53 ALASKA CT. R., CHILD IN NEED OF AID 4 ALASKA CT. R., DELINQUENCY 4
Arizona	16 PART 1, A.R.S. RULES OF CIV. PROC., RULE 53 ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party) Adopts pre-2003 amended version of the federal rule.
Arkansas	ARK. R. CIV. P. 53 Modeled after pre-2003 amended version of the federal rule but limited to non-jury actions.
California	CAL. CIV. PROC. CODE §§ 638 - 639 (West 2004) Requires agreement of the parties.
Colorado	COLO. CT. C.P.R. 53 Adopts pre-2003 amended version of federal rule.
Connecticut	CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53 Limited scope – only applies to family

	law matters. Pilot program established for civil/family discovery masters and civil matter settlement conferences scheduled to end 12/31/2004.
Delaware	DEL. S. CT. R. 43(b)(v) DEL. CT. CH. R. 135 – 47 DEL. FAM. CT. C.P.R. 53 DEL. SUPER. CT. CRIM. R. 5 Limited to hearing issues of fact.
District of Columbia	D.C. SUPER. CT. R. CIV. P. 53 D.C. SUPER. CT. R. DOM. REL. 53 D.C. SUPER. CT. R. CRIM. P. 117 Adopts pre-2003 amended version of the federal rule.
Florida	FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005) Requires parties' consent.
Georgia	GA. CODE ANN. §§ 9-7-1 to -6 (1982 & Supp. 2004)
Hawaii	HAW. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Idaho	IDAHO R. CIV. P. 53 IDAHO CRIM. R. 2.2 Adopts pre-2003 amended version of federal rule.
Illinois	Illinois does not use fee officials.[207]
Indiana	IND. R. TRIAL P. 53 Adopts pre-2003 amended version of federal rule.
Iowa	IOWA R. CIV. P. 1.935 Adopts pre-2003 amended version of federal rule.
Kansas	KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002) When parties consent, any issue can be referred to a special master. Contains language where without the parties

207. Mullaney, Wells & Co. v. Savage, 282 N.E.2d 536, 538 (Ill. App. Ct. 1972).

	consent, the court can only refer a case to a master when justice will be measurably advanced, or to cases that will be tried to a jury when they involve examination of complex or voluminous accounts.
Kentucky	KY. R. CIV. P. 53.01 When appointed to matters other than judicial sales, settlement, receivership, and bills of discovery assets of judgment debtors, appointment requires that the matter involve complex calculations, multiplicity of claims, or other exceptional circumstances.
Louisiana	LA. REV. STAT. ANN. § 13:4165 (West Supp. 2004) Court can appoint in any civil action with parties consent if there is a complicated issue or when exceptional circumstances exist.
Maine	ME. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Maryland	MD. CIR. CT. R. CIV. P. 2-541 Limited to non-jury matters.
Massachusetts	MASS. R. CIV. P. 53 MASS. R. CRIM. P. 47 Adopts pre-2003 amended version of federal rule but also requires assent of all parties prior to special master appointment.
Michigan	MICH. CT. RULES PRAC. R. 3.913 Applies to probate and juvenile court. Can conduct preliminary inquiries and can preside at hearings other than a jury trial or preliminary examination.
Minnesota	MINN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Mississippi	MISS. R. CIV. P. 53

	Can refer any issue to a special master with the written consent of the parties, otherwise appointment requires an exceptional condition.
Missouri	MO. R. CIV. P. 68.01 Adopts pre-2003 amended version of federal rule.
Montana	MONT. CODE ANN. § 25-20-R. 53 (2003) Adopts pre-2003 amended version of federal rule.
Nebraska	NEB. REV. STAT. §§ 25-1129 to -1137 (2004) Appointment requires written consent of the parties.
Nevada	NEV. R. CIV. P. 53 NEV. 1ST JUD. DIST. CT. R. 5 Adopts pre-2003 amended version of federal rule.
New Hampshire	N.H. R. SUPER. CT. 85-A Appointment requires written consent of the parties.
New Jersey	N.J. CONST. art. 11, § 4, ¶ 7 N.J. R. CIV. PRAC. 4:41 Appointment requires parties' consent.
New Mexico	N.M. R. CIV. P. 1-053 Adopts pre-2003 amended version of federal rule.
New York	N.Y. UNIF. TRIAL CT. R. § 202.14 Chief Administrator of courts has power of appointment.
North Carolina	N.C. GEN. STAT. § 1A-1, R. 53 (2003) Modeled after pre-2003 amended version of federal rule. Certain actions require parties' consent prior to appointment.
North Dakota	N.D. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Ohio	OHIO REV. CODE ANN. CIV. R. 53 OHIO REV. CODE ANN. CRIM. R. 19

	OHIO REV. CODE ANN. JUV. R. 40 Modeled after pre-2003 amended version of federal rule. Does include pre-trial and post-trial matters, or matters where the parties consent.
Oklahoma	OKLA. STAT. ANN. tit. 12, §§ 612-619 (West 2000) Can appoint to any civil action with the parties' written consent.
Oregon	OR. R. CIV. P. 65 Appointment requires written consent of the parties; without consent of the parties, appointment requires an exceptional condition.
Pennsylvania	42 PA. CONS. STAT. ANN. §§ 1558, 1920.51 (West 2002) Court can appoint at any time after the preliminary conference and master can hear any issue or the entire matter.
Rhode Island	R.I. R. CIV. P. 53 R.I. R. PROC. DOM. REL. 53 Adopts pre-2003 amended version of federal rule but also provides greater latitude in appointing a special master; special master may be appointed to any issue where the parties agree.
South Carolina	S.C. R. CIV. P. 53 Allows appointment when the parties consent.
South Dakota	S.D. CODIFIED LAWS § 15-6-53 (West 2004) Adopts pre-2003 amended version of federal rule.
Tennessee	TENN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Texas	TEX. R. CIV. P. 171 Adopts pre-2003 amended version of federal rule but requires parties' consent to appointment of a master. Other modifications include that the

	case must be an "exceptional one" and there must be "good cause" for appointment of a master.
Utah	UTAH R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Vermont	VT. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule with minor modifications. State rule is narrower because for actions to be tried by a jury, appointment is only made when the action requires investigation of accounts or examination of vouchers.
Virginia	VA. S. CT. R. 2:18, 3A:1 A court decree refers a matter to a "commissioner in chancery."
Washington	WASH. SUPER. CT. CIV. R. 53.3 Adopts rule that is broader than the pre-2003 amended version of federal rule. State rule allows appointment for "good cause" and allows appointment of special master to discovery matters.
West Virginia	W. VA. R. CIV. P. 53
Wisconsin	WIS. STAT. § 805.06 (1994) Adopts pre-2003 amended version of federal rule with minor modifications, i.e. "referee" used in place of "special master."
Wyoming	WYO. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.

DISCOVERY masters

When They Help—and When They Don't

BY RON KILGARD

The use of discovery masters in civil cases is a practice, like mediation, that has grown gradually, not because of any top-down directive from the judiciary or the legislature, but because of the necessities of actual cases. Like mediation 10 years ago, discovery masters are largely unregulated by rule or statute: The current rule on masters, Rule 53, has nothing to say about discovery masters. And discovery masters are the subject of few cases. This article takes a look at these neglected creatures.

The Law on Discovery Masters

Old Rule 53

Court-appointed masters have long been the subject of Federal Rule of Civil Procedure 53 and its Arizona counterpart. Until it was recently amended, the heart of the federal rule, subsection (b), was an admonition against using masters in the first place: "Reference to a master shall be the exception and not the rule."[1] The balance of the rule deals in some detail with the compensation and powers of the master, the nature of the proceedings in front of the master (witnesses, subpoenas, etc.), and the contents, filing and format of the master's "report."

The Arizona rule, which has not yet been amended, differs only in details from the old federal rule. In fact, the

Arizona rule is even more restrictive of the master's powers than the federal rule was, for it prohibits reference in any cases to be tried to a jury.

There is one glaring omission. There is nothing in the old federal rule, and there is nothing in the current Arizona rule, about discovery or pretrial procedures generally. This is not surprising given the fact that the rule was originally adopted as Equity Rule 59 in 1912.

Lots of things have changed since President Woodrow Wilson's first term, among them the techniques of modern civil litigation. There really wasn't discovery when the rule was adopted, at least not in the sense in which we understand it. The rule was designed for traditional masters—people who acted as decision makers of specifically identified substantive issues. Some authorities doubted that rule even applied to discovery masters.[2]

The federal cases on discovery masters are few—and there are no Arizona cases.[3] Generally, the courts have recognized that the appointment of discovery masters, though still the exception and not the rule, is quite different from appointment of the full-fledged special master contemplated by Rule 53. As one district court indicated, "Courts have distinguished between dispositive matters and discovery or other non-dispositive motions or issues, requiring a much greater showing to warrant referral of dispositive matters than for discovery matters."[4]

In appropriate cases, the courts recognize that discovery masters are not only permissible, but invaluable.[5] In many cases, especially those decided before magistrates were widely used, it is hard to see what the court could have done except appoint a master. On the other hand, courts do not hesitate to reverse an appointment when the parties oppose the master and there is no apparent need for him or her.[6] But on the nuts and bolts of the practice, the cases are essentially silent.

New Rule 53

The obvious disconnect between the rule and the practice led the Judicial Conference to propose a completely new rule, which became effective Dec. 1, 2003. The new rule deals with discovery masters and traditional adjudicatory masters. The new rule keeps traditional masters on a short leash[7] but recognizes the very different concerns bearing on discovery masters. Appointment of discovery masters is available, even over the parties' objection, whenever there are "matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge."[8] The new rule addresses several issues concerning discovery masters that were addressed neither in the old rule nor the case law:

In appropriate cases, courts recognize that discovery masters are not only permissible, but invaluable.

- Consultation With the Judge. Should the discovery master confer privately with the judge to maximize the efficiency of the engagement, or should he decide things entirely on his own to provide a clear record of authority and review? The rule makers recognized that different cases will require different relationships with the trial judge. The new rule requires only that the appointment order spell out clearly "the circumstances—if any—in which the master may communicate ex parte with the court."[9]
- Appearing Before the Judge. May the special master appear before the judge as a lawyer during the course of his

engagement? An early draft of the rule simply forbade the practice. As finally adopted the rule is silent on the matter, with the Notes suggesting that the judge address the issue at the time of appointment.[10]

- Impartiality. The impartiality requirements applicable to federal judges apply awkwardly to lawyers, who, after all, have ongoing practices. The new rule provides that the master must be qualified under the relevant federal statute (28 U.S.C. § 455), but, recognizing that this may prove difficult, the parties may consent to the appointment.[11] The central point is that all potential conflicts be disclosed and agreed to.[12]
- Orders. The new rule recognizes that discovery masters typically do not issue lengthy "reports," the mainstay of the old rule, but make decisions on specific discovery issues. The new rule provides that these decisions are to be filed, that the court will review them on a timetable set by the court, and so on.[13]
- Standard of Review. The rule also addresses the vexing topic of the standard of review. The law on this subject is scarce, so it is helpful to have it spelled out in the rule. Procedural matters are reviewed only for an abuse of discretion.[14] Legal matters are, of course, reviewed *de novo*.[15] Factual findings are also reviewed *de novo,* unless the parties consent in the appointment order to a different standard.[16]
- Other Matters. The new rule addresses in detail a host of other matters, but it is noteworthy how the rule is almost entirely a codification of existing practice, at least the better practice, and not a template for a new practice. The new rule, if adopted in Arizona, will streamline the use of discovery masters in superior court and make us all more comfortable with what we're doing, but it will not significantly alter the current practice.

Discovery Masters in Practice

The issues addressed and the concerns raised by the cases, and the new rule, confirm my own experience as a discovery master, which has been entirely in state court. It strikes me that there are certain factors that tend to indicate that appointment of a discovery master is a good idea, and a couple of others that indicate the opposite. Let's start with some of the circumstances in which appointment of a discovery master is useful, both to the court and to the parties.

Cases Suitable for Discovery Masters

1. The Parties Want One

When the parties consent to a discovery master, they are pretty much stuck with him.[17] They are also far more likely to be content with him. If the parties consent, it usually means that they are concerned that the institutional limitations of superior court, the caseload, the pre-emptive demands of the criminal trial calendar, and the lack of legal support staff for judges will have an adverse effect on their client. It may seem odd that both parties could conclude this, but they often do. Even adversaries sometimes have common ground.

2. The Contentious Case

Highly contentious lawsuits are hard for the superior court to manage.[18] The weary judge, forced to decide disputes based on incomplete information at unpleasant hearings, will be tempted to split the difference. Matters will get worse as each side nurses real and imagined grievances.

A discovery master can be a useful tool in these cases. The lawyers will not stop hating each other because of the discovery master, but they will gradually stop telling the same story over and over again. Reviewing the deposition schedule month after month, or in some cases, week after week, gives the discovery master a familiarity with the witnesses, the practices on fees and travel, what documents have been produced, and so on, that gradually do narrow the areas of dispute. Item by item, disputes are cleared away. And the mere fact of having to discuss these issues in person with the master present, and not in angry faxes and e-mails written late at night, has a taming effect on the lawyers.

3. Privilege Disputes

Genuine privilege disputes over large numbers of documents throw a wrench into the litigation system. The document-by-document review necessary to resolve them is all but impossible for a superior court judge, given the obligations of her docket. Cases like these are naturals for discovery masters. As one court found, "A special master is best situated to conduct the detailed, close analysis necessary to ferret out which documents are privileged."[19]

4. The Big Case

Size alone does not necessarily mean a case is suitable for a discovery master, but numerous lawyers and witnesses bring their own problems. Especially if the parties are trying to squeeze into a court-ordered schedule, simply scheduling depositions becomes almost impossible. A discovery master who meets with the lawyers on a fixed schedule reviewing all of the depositions, hearing all the excuses why a witness couldn't make it last month, becoming familiar with the lawyers' various schedules and airport preferences, and so on, can keep the case on track.

Cases Unsuitable for Discovery Masters

I have found two circumstances in which appointment of a discovery master is counterproductive.

1. The Contentious Cases Revisited

Let's return to the contentious case. Although, as I have said, a master can do a world of good in such cases, one must be wary that the discovery master doesn't simply become a forum for more disputes.

In a typical lawsuit in superior court, the system can only handle so many discovery disputes. Lawyers who insist on calling the court in the middle of depositions will gradually find their resolve worn down. Motions on minor issues that will not be heard in court for two months, by which time they may be moot, eventually will not be filed.

However, when a discovery master is readily available and can be reached essentially any time day or night (the parties are paying for him, after all), one can end up with a case in which every deposition leads to protracted phone calls with the discovery master, every minor document dispute results in a motion and every routine squabble about an expert's fee gives birth to a hearing.

In such cases, the master must develop procedures to prevent discovery from swamping the case. But in many such cases, the master should not have been appointed in the first place.

2. The Routine Case

A second case in which the master can do more harm than good is the case that just doesn't need one. Seeing the parties infrequently, the master will have little more familiarity with the case than the trial judge, and often even less, because he will not have handled the motions on the merits. The decisions on the few matters that come before him will often be appealed to the trial judge, adding nothing to the process but delay and expense. Like every other tool of litigation, from fountain pens to handheld computers, masters work best if they are used, and they should only be used if they are needed.

Selecting the Master

Because the pool of masters is simply lawyers and former judges, the lawyers seldom have any trouble in finding someone willing to serve. More difficult is finding someone who is right for the case. In this respect, selecting a master is no different from selecting an arbitrator or a mediator.

Obviously, if the parties can agree on someone, the master is far more likely to be effective. And, of course, whoever is selected should have common sense and a good knowledge of the law on discovery, privilege, and so forth. It won't do much

good to have a master if the judge finds it necessary to reverse every third decision, or if the parties come to lack confidence in his abilities. But in an appropriate case, a competent discovery master can benefit the parties and court enormously.

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endnotes

1. "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional circumstance requires it." FED. R. CIV. P. 53(b) (before Dec. 1, 2003).
2. *See Simpson v. Canales*, 806 S.W.2d 802, 807 (Tex. 1991) (good discussion of the historical background). And even if the rule doesn't apply, courts have the inherent power to appoint masters.
3. On the other hand, pursuant to statute, discovery masters are widely used in California state courts, and there is a substantial case law on them. *E.g., Lu v. Superior Court*, 55 Cal. App. 4th (Ct. App. 1997); *San Diego Unified Port Auth. v. Barnhart*, 116 Cal. Rptr. 2d 65 (App. 2002); *Collins v. Kanoff*, 2003 WL 145631 (App. 2003).
4. *In re Sunrise Securities Litigation*, 124 F.R.D. 99 (E.D. Pa. 1989).
5. *Id.* (discovery master appropriate because of extensive disputes on privileged documents); *Mercer v. Gerry Baby Prods. Co.*, 160 F.R.D. 576, 577 (S.D. Iowa 1995) (discovery master appropriate because "the lawyers are out of control").
6. *See Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991).
7. *See Chartone Inc. v. Bernini*, 418 Ariz. Adv. Rep. 60, 66 n.3 (Ct. App. 2004) (discussing new federal rule).
8. FED. R. CIV. P. 53(a).
9. FED. R. CIV. P. 53(b)(2)(B).
10. Committee Note, Subdivisions (a)(2) and (3), FED. R. CIV. P.
11. FED. R. CIV. P. 53(b)(3).
12. Committee Note, Subdivisions (a)(2) and (3), FED. R. CIV. P.
13. FED. R. CIV. P. 53(e) & (g).
14. FED. R. CIV. P. 53(g)(5).
15. FED. R. CIV. P. 53(g)(4).
16. FED. R. CIV. P. 53(g)(3).
17. *Simpson*, 806 S.W.2d at 811.
18. *Mercer*, 160 F.R.D. at 576.
19. *Sunrise Securities Litigation*, 124 F.R.D. at 100.

DIVISION III METHODS OF CIVIL DISCOVERY
PART A In General
CHAPTER 41 Regulation of Discovery Methods
PART C. Reference and Preliminary Trial Conferences

1-41 California Deposition and Discovery Practice § 41.20

§ 41.20 Court Appointment of Referee

[1] Appointment and Challenge

A court must appoint as **referee or referees** the person or persons, not exceeding three, agreed on by the parties. n1 When the parties do not agree on the selection of a **referee or referees,** a court may appoint a **referee,** in accordance with *Code of Civil Procedure Section 640(b)*, when, in any pending action, it determines that it is necessary to appoint a **referee** to hear and determine any and all discovery motions and disputes relevant to discovery in the action. n2 The appointment may be made on the written motion of any party or on the court's own motion. n3 The **referee** is authorized to report his or her findings to the judge and make a recommendation on the findings. n4 Such an appointment may be appropriate, for example, in cases of great magnitude or complexity. n5

When a **referee** is appointed under *Code of Civil Procedure Section 639(5)(a)*, the order must indicate whether the **referee** is being appointed for all discovery purposes in the action. n6

If either party objects to the **referee** appointed by the trial court, that party may promptly file a peremptory challenge pursuant to *Code of Civil Procedure Section 170.6*. n7

If a discovery **referee** has been appointed for all discovery purposes, the motion to disqualify an appointed **referee** under *Code of Civil Procedure Section 170.6* must be made to the court by a party either within ten days after notice of the appointment, or if the party has not yet appeared in the action, within ten days after the appearance. n8 If the discovery **referee** has been assigned only for limited discovery purposes and the **referee** assigned is known at least ten days before the date set for hearing, the motion to disqualify an appointed **referee** under *Code of Civil Procedure Section 170.6* must be made at least five days before the date set for hearing. n9

[2] Trial Court's Acceptance of Referee's Report

A trial court may accept a discovery **referee's** report without holding a hearing. Although such a report is advisory rather than determinative and the trial court must independently consider the **referee's** findings before acting on his or her recommendations, the trial court is not required to hold a hearing as a matter of law. If the court's order demonstrates a considered and careful review, not only of the **referee's** report, but also of the transcript of the proceedings before the **referee,** and of the objections, replies, and other papers filed after the **referee's** report was submitted, the court fulfills its judicial responsibilities. n10

[3] Allocating Costs of Reference

The prevailing party may not recover the costs of a discovery **referee** as a matter of right. n11 The trial court may order the party who requests the **referee** to pay the **referee's** fees. n12 However, it is the trial court's responsibility to form a fair means of discovery dispute resolution that considers the financial status of the parties. If the appointment of a discovery **referee** is inappropriate because of the costs that would be incurred by the parties, the trial court should consider alternatives, including a pro bono **referee,** a retired judge of the superior court sitting by assignment, or retention of the matter by the trial court. n13 The court should also consider retaining the discovery dispute, particularly when the parties object and uncomplicated matters are involved. Such action is in keeping with the goals of independent calendaring. n14

It is an abuse of discretion for a trial court to order discovery disputes to be heard by a private **referee,** with the parties sharing the costs equally, without considering the economic impact on the parties. n15 Moreover, the court may not appoint a **referee** at a cost to the parties unless the court finds either that no party has established an economic inability to pay a pro rata share of the **referee's** fee, or that one or more parties has established an economic inability to pay a pro rata share of the **referee's** fees and that another party has agreed voluntarily to pay that additional share of the **referee's** fee. n16 If the issue of economic hardship is raised by a party before the **referee** commences his or her work, the referring court must determine a fair and reasonable apportionment of the reference costs before issuing its order. n17 Unless there is something to make the court question the accuracy a lawyer's unsworn representation concerning a party's financial hardship or of a litigant's sworn declaration of financial hardship, counsel's representation or a litigant's declaration should be considered sufficient, and no more can be required. n18 "Fair and reasonable" apportionment does not mean imposing the entire cost of reference on an objecting financially-able party because the other party is indigent. n19

In determining whether a party has established an inability to pay the **referee's** fees under *Code of Civil Procedure Section 639(d)(6)(A)* (requiring that the court make that determination), the court must consider only the ability of the party, not the party's counsel, to pay these fees. If a party is proceeding *in forma pauperis*, the party must be deemed by the court to have an economic inability to pay the **referee's** fees. However, a determination of economic inability to pay the fees is not limited to parties that proceed *in forma pauperis*. For those parties who are not proceeding *in forma pauperis*, the court, in determining whether a party has established an inability to pay the fees, must consider, among other things, the estimated cost of the referral and the

impact of the proposed fees on the party's ability to proceed with the litigation. n20

In considering a litigant's indigence in connection with a possible reference, the court may accept counsel's representations, without requiring declarations or an application to proceed in forma pauperis, unless the court has reason to suspect the representations are inaccurate. n21

The allocation of the **referee's** fees must be made by the court and not by the **referee.** n22

One court has held that a trial court does not have the authority to order an attorney to pay his or her client's share of discovery **referee's** fees under *Code of Civil Procedure Section 128*. n23 However, the appellate court emphasized the narrow nature of its holding, noting that the trial court, in this case, did not justify its order that counsel pay the fees of the discovery **referee** on the basis of *Code of Civil Procedure Sections 2023.010 et seq.* and *2031.010 et seq.* n24 It may well be that, in a proper case, the burden of such fees could be placed on an erring attorney under the discovery statute. n25

Legal Topics:

For related research and practice materials, see the following legal topics: Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersRefereesRemovalsCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *Code Civ. Proc. § 640(a)*.

(n2)Footnote 2. *Code Civ. Proc. § 639(a)(5)*.

(n3)Footnote 3. *Code Civ. Proc. § 639(a)*.

(n4)Footnote 4. *Code Civ. Proc. § 639(a)(5)*. *See Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 225-226, 240 Cal. Rptr. 489* (**referee's** order imposing issue sanction on plaintiff was advisory and not binding on court; due process not denied when judge independently reviewed **referee's** order before signing it, and reviewed it again at hearing on plaintiff's motion opposing order).

(n5)Footnote 5. *See, e.g., Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1266, 1269-1270, 64 Cal. Rptr. 2d 561* (**referee** was appointed before discovery dispute even arose).

(n6)Footnote 6. *Code Civ. Proc. § 639(c)*; *see Code Civ. Proc. § 639(d)* (required contents of written order).

(n7)Footnote 7. *Autoland, Inc. v. Superior Court (1988) 205 Cal. App. 3d 857, 859-862, 252 Cal. Rptr. 662 , superseded on other grounds by statute* (*Code Civ. Proc. § 641* grounds for disqualification do not constitute exclusive bases for disqualifying **referee)**.

(n8)Footnote 8. *Code Civ. Proc. § 639(b)(A)*.

(n9)Footnote 9. *Code Civ. Proc. § 639(b)(B)*.

(n10)Footnote 10. *Marathon Nat. Bank v. Superior Court (1993) 19 Cal. App. 4th 1256, 1260-1261, 24 Cal. Rptr. 2d 40 ; see Rockwell Internat. Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 1269-1270, 32 Cal. Rptr. 2d 153* (trial court abdicated its judicial responsibility by entering order on **referee's** report without proper review).

(n11)Footnote 11. *Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 594, 3 Cal. Rptr. 3d 593* (rejecting defendant's argument that it was entitled to recover costs of discovery **referee** as expert witness fees under *Code Civ. Proc. § 1033.5(a)(8)*).

(n12)Footnote 12. *Marathon Nat. Bank v. Superior Court (1993) 19 Cal. App. 4th 1256, 1261-1262, 24 Cal. Rptr. 2d 40* .

(n13)Footnote 13. *Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 101, 72 Cal. Rptr. 2d 387* (court must consider effect of reference on party of "modest means" as well as on party who is truly indigent); *DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1283-1285, 49 Cal. Rptr. 2d 229* , (trial court erred in appointing **referee** where plaintiff claimed indigence and motion did not raise complex or time-consuming issues). *Solorzano v. Superior Court (1993) 18 Cal. App. 4th 603, 616, 22 Cal. Rptr. 2d 401* (abuse of discretion to order indigent plaintiffs to pay half of **referee's** fee).

(n14)Footnote 14. *Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 104, 72 Cal. Rptr. 2d 387* (emphasizing use of word "necessary" in *Code Civ. Proc. § 639(e)*) (*now see Code Civ. Proc. § 639(a)(5)*, amended without substantive change, 2000 Stats., Ch. 644, § 2); *see, e.g.*, *Hood v. Superior Court (1999) 72 Cal. App. 4th 446, 449-450, 85 Cal. Rptr. 2d 114* (vacating reference orders in routine tort action and directing court to decide run-of-the-mill discovery "dispute" after both sides served a small number of special interrogatories, a dispute arose, and both sides filed motions to compel further responses).

(n15)Footnote 15. *McDonald v. Superior Court (1994) 22 Cal. App. 4th 364, 368-370, 27 Cal. Rptr. 2d 310 ; see Solorzano v. Superior Court (1993) 18 Cal. App. 4th 603, 616, 22 Cal. Rptr. 2d 401* (*Code Civ. Proc. § 645.1*, governing payment of **referee** fees, did not authorize court to appoint privately compensated discovery **referee** without considering monetary burden on litigants; trial court must find fair means to resolve discovery disputes, considering parties' financial status).

(n16)Footnote 16. *Code Civ. Proc. § 639(d)(6)(A)*.

(n17)Footnote 17. *McDonald v. Superior Court (1994) 22 Cal. App. 4th 364, 368-370, 27 Cal. Rptr. 2d 310* (plaintiff's declaration was competent evidence of her ability to pay **referee's** fees).

(n18)Footnote 18. *Hood v. Superior Court (1999) 72 Cal. App. 4th 446, 450, 85 Cal. Rptr. 2d 114* (sworn declaration of 71-year-old lawyer representing himself that order obligating him to pay **referee's** fees would be a hardship, together *with* sworn statement of his income and expenses, was sufficient proof of his inability to pay **referee's** fees).

(n19)Footnote 19. *Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 104, 72 Cal. Rptr. 2d 387* .

(n20)Footnote 20. *Code Civ. Proc. § 639(d)(6)(B)*.

(n21)Footnote 21. *DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1283-84, 49 Cal. Rptr. 2d 229 . See also Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1269-1270, 64 Cal. Rptr. 2d 561* (court noted that party made no showing of financial hardship).

(n22)Footnote 22. *DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1286, 49 Cal. Rptr. 2d 229* (court should make a provisional fee allocation order, subject to readjustment after **referee** returns report and recommendation); *McDonald v. Superior Court (1994) 22 Cal. App. 4th 364, 370, 27 Cal. Rptr. 2d 310* .

(n23)Footnote 23. *Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 782, 98 Cal. Rptr. 2d 426 ; see Code Civ. Proc. § 128(a)(4), (5)* ("(a) Every court shall have the power to do all of the following: ... (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein ... (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected *with* a judicial proceeding before it, in every matter pertaining thereto.").

(n24)Footnote 24. *Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 782, 98 Cal. Rptr. 2d 426* .

(n25)Footnote 25. *See Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 782-783, 98 Cal. Rptr. 2d 426* .

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DEPARTMENT: PRACTICE TIPS: STRATEGIES FOR THE EFFECTIVE USE OF **DISCOVERY REFEREES**

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TEXT:

[*16] **The discovery reference process requires nimble counsel to balance cost and risk**

Discovery references are a common part of the litigation landscape in California, but they are increasingly controversial. The main sources of contention are the amount and allocation of **referees'** fees, the potential for bias on the part of **referees,** and the claimed overuse of **discovery** references. n1 For practicing litigators approaching this pretrial minefield, the most compelling task is to ensure the most effective use of **discovery referees** on behalf of their clients.

n1 *See* JUDICIAL COUNCIL OF CALIFORNIA, SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION AND THE JUDICIAL SYSTEM, ALTERNATIVE DISPUTE RESOLUTION IN CIVIL CASES, REPORT OF THE TASK FORCE ON THE QUALITY OF JUSTICE 55-59, 87-91, 97-100 (Aug. 1999) [hereinafter ADR REPORT].

Discovery references can be expensive and unpredictable, and the law governing discovery references is ambiguous at best. Nevertheless, a court most likely will be disinclined to reverse the recommendation of the **discovery referee** it appointed, so litigators must seek to obtain an outcome from the **referee** that can be presented to the court for routine confirmation.

Discovery disputes generally are raised by formal motions that are brought

pursuant to the Discovery Act and *Rule 335 of the California Rules of Court* on a regular briefing schedule. n2 The authority for discovery references is exclusively statutory. n3 *Code of Civil Procedure Section 639(e)* expressly provides for court-ordered reference of **discovery** matters to **referees** "when the court in any pending action determines in its discretion that it is necessary for the court to appoint a **referee** to hear and determine any and all **discovery** motions and disputes relevant to **discovery** in the action and to report findings and make recommendations thereon." n4

n2 *CODE CIV. PROC. §§ 2016 et seq.*; CAL. R. OF CT. 335.

n3 *Aetna Life Ins. Co. v. Superior Ct., 182 Cal. App. 3d 431, 435 (1996).*

n4 *CODE CIV. PROC. § 639(e)*.

A special reference under *Code of Civil Procedure Section 639* may be ordered on motion of a party or on the court's own motion without the consent of the parties. When consent of the parties is absent, the reference is merely advisory and the referee's findings are not binding on the superior court. n5 A Section 639 referee's findings of fact, though not binding on the court, are entitled to great weight when supported by substantial evidence. n6

n5 *Aetna Life Ins. Co., 182 Cal. App. 3d at 436.*

n6 *In re Avena, 12 Cal. 4th 694, 710 (1996).*

Section 639(e) references are very common in civil litigation. Less frequent are references under *Code of Civil Procedure Section 638*, which, in contrast to Section 639, provides for a binding reference by agreement of the parties to determine the issues submitted, rather than to hear, report, and recommend. n7 Section 638 referees are much like arbitrators in a binding arbitration. Thus, unlike Section 639 referees, Section 638 referees do not make recommendations to the court, and their appointment is not subject to a detailed court order, among other distinctions. The difference between Section 638 and Section 639 references is rooted in the California Constitution. Article VI, Section 22, limits the nonconsensual delegation of judicial powers to the delegation of subordinate judicial duties and precludes delegation of such matters as the determination of questions of law. n8 A Section 639 referee, for example, cannot determine a motion for summary adjudication. n9

n7 *CODE CIV. PROC. § 638*.

n8 CAL. CONST. art. VI, § 22; *Kim v. Superior Court, 64 Cal. App. 4th 256, 259-61 (1998); Aetna Life Ins. Co., 182 Cal. App. 3d at 435.*

n9 *Jovine v. FHP. Inc., 64 Cal. App. 4th 1506, 1523-25 (1998).*

Section 639's guidance on when trial courts may delegate **discovery** disputes to **referees** is unclear, however. Along with the appellate bench, the Judicial Council has addressed this lack of clarity in its recent "Alternative Dispute Resolution in Civil Cases, Report of the Task Force on the Quality of Justice" (the ADR Report). n10 In *Hood* v. *Superior Court* and *DeBlase* v. *Superior Court*, the courts held that discovery references were unwarranted under the

circumstances of those cases n11 -- but these holdings are helpful only for the most obvious cases. In *Hood*, for example, a general discovery reference was ordered by a trial court faced with clear and straightfor ward discovery motions. The appellate court commented that "any judge could resolve the discovery 'dispute' in about five minutes." n12

n10 *See MacMillan v. Superior Court, 50 Cal. App. 4th 246, 253, 256-58 (1996)* (expressing "serious concerns about the increasing use of **discovery referees,**" detailing those concerns, and inviting legislative response) *and* ADR REPORT, *supra* note 1, at 55 and nn. 217, 218, and 219 (recommending legislation to limit discovery references to those that are required by "exceptional circumstances of the particular case").

n11 *Hood v. Superior Court, 72 Cal. App. 4th 446 (1999); DeBlase v. Superior Court, 41 Cal. App. 4th 1279 (1996).*

n12 *Hood, 72 Cal. App. 4th at 449.*

The opinion in *Taggares* v. *Superior Court* sets forth specific but elastic factors that might justify a blanket discovery reference:
- The need to resolve multiple issues will have an undue effect on the court's time or resources.
- Multiple motions must be heard, either at the same time or seriatim.
- A significant number of documents must be reviewed. n13

n13 *Taggares v. Superior Court, 62 Cal. App. 4th 94, 105 (1998).*

For cases that are classified as complex, a **discovery referee** may be appointed even in the absence of **discovery** disputes. Such a **referee** can help in the planning and scheduling of **discovery** in order to "suppress unnecessary and burdensome discovery procedures." n14

n14 *Lu v. Superior Court, 55 Cal. App. 4th 1264, 1269-70 (1997); see* CAL. R. OF CT. 1800-1830 and app., div. 1, *Stds. of Jud. Admin.*, § 19(f).

Once it becomes clear that a discovery reference may be forthcoming, litigators must focus their attention on the selection and appointment of the **discovery referee** as well as the establishment of the rules that will govern the reference. Without the right **referee** and an adequate reference order, it will be difficult to achieve an effective result.

A **discovery referee** may be appointed on the court's own motion or on the application of a party. In either circumstance, lawyers should be prepared with a list of referee candidates rather than suddenly finding themselves in the corridor of the courthouse trying to pick a name from a list provided by the court. n15

n15 The court is required to provide the parties with a "sufficient number of names" from which to select a **referee.** CAL. RULES OF CT. 244.2(b).

Consenting to a **discovery referee** may cause problems because a consensual **referee** does not fit cleanly under either Section 638 or Section 639. The parties' mutual consent therefore creates an opportunity for the trial court to

apply the law of Section 638 **referees** to a **discovery** [*19] dispute that Section 639 should govern. Also, when a **referee** is selected by mutual consent, it is unclear whether the referee's fees will be recoverable as costs. The right to court review, and the procedures for the review, will differ depending on whether the reference is consensual (Section 638) or nonconsensual (Section 638). n16 It may be difficult to show good cause to withdraw consent to a consensual referee. n17

n16 *CODE CIV. PROC. §§ 638*, *639*, *645*.

n17 CAL. RULES OF CT. 244.1(e) provides that the referee's error of fact or law does not constitute good cause for withdrawing consent.

Ethical and conflicts issues are a preliminary concern in selecting a referee. Referees have at least two conflicting customers to consider in each assignment, and thus referees have an incentive to try to leave each side happy to some degree. Some parties, such as insurance companies and large law firms, are more likely than others to have used a specific referee in the past and to provide business for the referee in the future.

Against that backdrop, *Rule 244.2(c) of the California Rules of Court* generally requires that referees disclose facts that might provide grounds for their disqualification. More specifically, "A referee who has been privately compensated in any other proceeding in the past 18 months, as a judge, referee, arbitrator, mediator, or settlement facilitator, by a party, attorney or law firm in the instant case shall disclose the number and nature of such other proceedings, including the name of any party, attorney, and law firm that appeared in the previous case and is appearing in the instant case." n18 The ADR Report recommends extending the reporting period to 24 months and including the referee's service as an expert witness or attorney to the list of relationships that must be disclosed. n19 If the referee does not present an adequate conflicts form to the parties, the parties can prepare and present a form to the referee.

n18 CAL. RULES OF CT. 244.2(c).

n19 ADR REPORT, *supra* note 1, at 89.

Parties most commonly select a retired judge as a **referee.** Retired judges who serve as **discovery referees** usually charge from $ 300 to more than $ 500 per hour. Retired judges may have strong credibility with sitting judges. Retired or semiretired attorneys also may be chosen as referees--a situation that particularly occurs in smaller practice communities--and attorneys may work for more affordable rates than judges.

Some referees prefer formal proceedings and expect formal papers as well. Others take a more informal approach to the proceedings and the required documents. Some referees are amenable to hearing motions on informal papers, such as letter briefs, rather than formal noticed motions with briefing on the statutory schedule for motions. Less formal proceedings may be particularly appropriate when the referee has demonstrated a firm grasp of the case or when the specific motion raises only a few issues. If cost is a primary factor in selecting a referee, the parties, either separately or jointly, may investigate whether a prospective referee is amenable to a less structured proceeding.

A party can object to the appointment of a specific referee, but the procedures for doing so are somewhat amorphous. *Code of Civil Procedure Section 641* provides for objections to the appointment of any person as a referee on a variety of grounds, including the referee's relationship to a party, interest in the case, and bias (either toward an issue or a party). An objection to the appointment of a person as a referee must be made with "reasonable diligence" in a writing filed with the court and served on the referee, according to *Rule 244.2(c) of the California Rules of Court*. Neither the statute nor the rule sets forth further detail on the format or timing of an objection. Absent further guidance in a statute, rule of court, or published appellate opinion, any objection should be asserted as promptly as possible and in a formal captioned document that provides the evidentiary support for the objection and justification for its timing. The requirement of reasonable diligence suggests that counsel should exercise initiative in determining whether any grounds exist for objection to the appointment of the specific referee.

A referee also is subject to a peremptory challenge pursuant to *Code of Civil Procedure Section 170.6*. A close reading of Section 170.6 uncovers conflicting guidance on the timing of peremptory challenges to **discovery** and other **referees.** This issue has been addressed in two appellate opinions, *Autoland, Inc.* v. *Superior Court*, and *Pedus Services, Inc.* v. *Superior Court*. n20

n20 *CODE CIV. PROC. § 170.6*; *Autoland, Inc. v. Superior Court, 205 Cal. App. 3d 857 (1988); Pedus Servs., Inc. v. Superior Court, 72 Cal. App. 4th 140 (1999).*

The *Autoland* and *Pedus* courts disagree on the timing of a Section 170.6 peremptory challenge to an appointed **referee.** The *Autoland* court held that "an objection to the appointment of a **discovery referee** must be made immediately upon notice of the selection by the trial judge." n21 Noting that the *Autoland* holding rests upon an analogy of a **discovery referee** to an all-purpose judge, the *Pedus* court rejected the analogy n22 by relying on the California Supreme Court's definition of all-purpose judge in *People* v. *Superior Court (Lavi)*. n23

n21 *Autoland, 205 Cal. App. 3d at 861.*

n22 *Pedus, 72 Cal. App. 4th at 144-46.*

n23 *People v. Superior Court (Lavi), 4 Cal. 4th 1164, 1179-80 (1993).*

Pedus adopts the "10 day/5 day" rule of Section 170.6(2), which provides, in pertinent part, that "where the . . . referee assigned to or who is scheduled to . . . hear the matter is known at least 10 days before the date set for . . . hearing, the motion shall be made at least five days before that date." n24 It is unclear from *Pedus*, however, whether the "hearing" referred to is a hearing before the referee or before the court on the referee's report. Thus a peremptory challenge should be asserted at the earliest possible time. n25 Counsel should be mindful that the next appointee may be worse than the one being challenged, and there are limitations on the number of peremptory challenges available to a party. n26

n24 *Pedus, 72 Cal. App. 4th at 146.*

n25 *Shain v. Peterson, 99 Cal. 486, 487 (1893).*

n26 *CODE CIV. PROC. § 170.6(3)*.

The Reference Order

Once a referee has been appointed, the next step is assuring that the order of reference establishes a sound foundation for the proceedings before the referee. *Rule 244.2(a) of the California Rules of Court* requires a Section 639 reference to be made by written order with specific provisions. The order is the charter for the reference proceeding, determining its scope and procedures as well as the referee's powers. The clearer the reference order, the better. If the court appoints the referee in a minute order, and the minute order is imprecise, counsel should prepare and submit for the court's approval an order that better conforms to the requirements of the California Rules of Court.

Whether the reference is appointed as a result of a party's motion or upon the court's own initiative, Rule 244.2(a) requires that the order specify the reasons for the reference, the scope of the reference, and any conditions on the reference, including any limitation on the referee's total fees or hourly fee as well as the terms of the obligation of each party to pay the referee. n27 (The ADR Report recommends setting forth in the reference order a maximum hourly rate and a maximum number of hours for the reference. n28) The order also must name the referee. n29 If the reference is upon motion of a party, the motion papers must specify the scope of the reference. n30

n27 *See also* CAL. R. OF CT. 532.2(a).

n28 ADR REPORT, *supra* note 1, at 98, 99.

n29 CAL. R. OF CT. 244.2(b).

n30 CAL. R. OF CT. 244.2(a).

Rule 244.2(e) of the California Rules of Court mandates additional provisions:

> An order of reference under *Section 639(e) of the Code of Civil Procedure* to assist in the resolution of a **discovery** dispute shall:
> (1) Grant the **referee** authority to set the date, time, and place for all hearings determined by the referee to be necessary, to direct the issuance of subpoenas, to preside over hearings, to take evidence, and to rule on objections, motions, and other requests made during the course of the hearing.
> (2) Require the referee to submit a written report to the parties and to the court within 20 days after the completion of the hearing, with a proposed order and any recommendation for the imposition of sanctions.
> (3) Require that objections to the report shall be served and filed not later than 15 calendar days after the [*20] report is *mailed* to counsel, that any party who objects to the report shall serve and file notice of a request for a hearing, and that copies of the objections and any responses shall be served on the referee.
> (4) State that the court may seek the recommendation of the referee as to an allocation of referee's fees.
> (5) Address other matters as necessary. n31

n31 CAL. R. OF CT. 244.2(e) (emphasis added); *see also* CAL. R. OF CT. 532.2(e).

Subdivision (e)(2) of Rule 244.2 regarding written referee's reports parallels *Section 643 of the Code of Civil Procedure.* A written referee's report should be the rule, not the exception. A waiver is appropriate only if the parties reach an agreement and commit it to writing.

The order provisions of Rule 244.2(e) set the timetable for written exceptions, although they do not specify the form. They imply that a hearing on exceptions is required, although case authority exists to the contrary. n32 One might infer that a written report is mandatory, even though there are circumstances in which it may not be needed. Subdivision (e)(5) of Rule 244.2 is a catch-all provision that allows a reference order to include language permitting a mutual waiver of a written report.

n32 *Marathon Nat'l Bank v. Superior Court, 19 Cal. App. 4th 1256, 1259 (1993).*

The Reference Hearing

A thorough, well-organized, and thoughtful hearing before the referee will increase the likelihood that the reference report will be clear and acceptable. Proceedings before referees are governed by the Evidence Code. n33 Since references under *Code of Civil Procedure Section 639* are quasi-judicial proceedings, "A referee cannot make decisions based on information or matters which would be inadmissible before court." n34

n33 *EVID. CODE § 300*; *Syfirst Family Ltd. Partnership v. Cheung, 70 Cal. App. 4th 1334, 1341 (1999).*

n34 *Rice v. Brown, 104 Cal. App. 2d 100, 104 (1951).*

The court in *In re Rose* held that the findings of a referee must be supported by evidence in the record. n35 *Rose* involved a referee's hearing on a habeas corpus petition that claimed ineffective assistance of counsel. The referee implicitly disbelieved the petitioner's attorney, who was the sole witness, and recommended denial of the petition. The referee's report, however, contained no finding that the attorney witness was not credible, Accordingly, the court held that the referee's findings were not supported by evidence on the record.

n35 *In re Rose, 62 Cal. 2d 384, 388-89 (1965).*

It is counsel's responsibility to ensure that the hearing is a success. n36 In measuring the hearing's effectiveness, several objectives should be met:
- The proper disposition of all evidentiary objections--a difficult goal to accomplish in any hearing.
- The orderly and specific handling of all **discovery** items, which will minimize the potential for ambiguity in the **referee's** rulings. The presentation in the moving papers can advance this objective by, among other things, limiting the number of items addressed in the motion and grouping together items raising common issues.
- The avoidance of repetitious and irrelevant arguments by counsel, with the

referee stepping in as needed.
- The timely filing of the referee's report, with a clear set of recommendations that are consistent with the rulings at the hearing and the grounds for those rulings expressed on the record.
- The proper custodial care of exhibits by the referee, pursuant to the referee's obligation. n37

n36 A referee should have access to court facilities for hearings, and hearings held in private facilities must be open to the public on the request of any person. CAL. R. OF CT. 244.2(d).

n37 CAL. R. OF CT. 243(e).

Parties should consider addressing the structure of the hearing at the outset and seeking some agreement on the order in which issues will be considered and resolved. The referee might be asked to give a tentative ruling as a means of setting an agenda for the hearing. Counsel may find it difficult to persuade a referee to dispose of evidentiary objections. It is worth making a record of the request to rule on evidentiary objections at the outset of the hearings in order to provide some defense to the argument that evidentiary objections were waived. Parties should consider asking the **referee** to specify the order in which the disputed **discovery** items will be addressed, and the time allocated to each, in order to avoid the situation in which there is extensive argument on a few items and the rest receive cursory treatment due to everyone's exhaustion.

Communications with referees must be conducted with discretion and care. Referees are subject to penal statutes regarding corrupt influencing n38 and misconduct. n39

n38 PENAJ. CODE § 95 (prohibiting threats, gifts, and ex parte communications).

n39 *PENAL CODE § 96* (prohibiting promises by referee to a party as well as willfully and corruptly permitting prohibited communications).

Hearing transcripts are not required by statute or court rule. If the papers are lengthy and formal, or the amount at stake is large, it may be advisable to have a court reporter record and transcribe the proceedings at the hearing. If the proceedings are not reported, counsel can invite a paralegal to the hearing to take detailed notes.

The decision to prepare a transcript of the proceedings does not ensure that an organized hearing with clear rulings will result. In fact, there are risks involved when a transcript is prepared. The referee may rely on the reporter's presence to compensate for an undisciplined hearing. Opposing counsel may use the transcript to second-guess the referee or distort the referee's rulings. Some lawyers will selectively extract from a transcript just those remarks that place the opposing party or counsel in the worst light, and a hearing transcript that is filled with extraneous arguments invites misuse by opposing counsel. Lawyers may try to use the referee's comments or the argument of their opponents as a ruling. A court reviewing exceptions to a referee's report may be distracted rather than enlightened by the kind of argument that occurs at reference hearings.

The Referee's Report

The law is not definitive regarding the required elements of a **discovery referee's** report. There is no express requirement for item-by-item rulings, for example, or any particular level of supporting analysis. Nevertheless, item-by-item rulings are recommended, unless certain items can be clearly grouped together and treated in common. The referee's written report should be accompanied by a proposed order that allows the court to confirm the report promptly once the time for filing exceptions has expired. The more inadequate the report, the more problems may arise in its review.

If the referee's rulings are clear, and counsel agree on the rulings, the referee's report might be waived. However, a waiver may result in the loss of the rulings' precedential value. At the very least, rulings should be confirmed with opposing counsel in countersigned correspondence or placed on the record and transcribed. If opposing counsel cannot be counted upon to abide strictly by agreements confirmed in correspondence, then a formal report should not be waived.

The referee's report is due no later than 20 days from the conclusion of the hearing. n40 With respect to the court's review of the referee's report--a review that can be disappointing to the party taking exception to the report--the rules again offer little guidance. In fact, the general rule is confusing: the court must give the referee's report an independent review, n41 but the referee's findings of fact are entitled to great weight if supported by substantial evidence. n42 It follows from these rules that if the issues raised in discovery disputes are not factual in nature, the court should be guided by an independent review standard rather than a deferential one.

n40 Mandamus is available to compel a report--but it would seem impolitic in most circumstances. *Apartment and Hotel Fin. Corp. v. Will, 69 Cal. App. 476, 478-79 (1924).*

n41 *Rockwell Int'l Corp. v. Superior Court, 26 Cal. App. 4th 1255, 1269 (1994); Marathon Nat'l Bank v. Superior Court, 19 Cal. App. 4th 1256, 1261 (1993).*

n42 *In re Avena, 12 Cal. 4th 694, 710 (1996); Estate of Beard, 71 Cal. App. 4th 753, 777 (1999).*

A party that fails to object to a referee's report may waive its right to object. n43 The objection to the referee's report should specify the evidence overlooked or rejected by the referee. n44 *Code of Civil Procedure Section 645* provides that a referee's report on facts has the effect of a special verdict. n45

n43 *Martino v. Denevi, 182 Cal. App. 3d 553, 557 (1986).*

n44 *Id.*

n45 A special verdict makes findings of fact, with the judgment reserved to the court. *CODE CIV. PROC. § 624*. *CODE CIV. PROC. § 645* provides that a decision of a referee may be excepted to and reviewed "in like manner as if made by the court." On its face, this provision pertains to a *CODE CIV. PROC. § 638*

reference rather than to a *CODE CIV. PROC. § 639(e)* reference.

In *Martino* v. *Denevi*, the court indicated two methods of taking exception to the report of a **discovery referee:** 1) filing written objections, and 2) filing a motion to set aside the report. n46 Both alternatives are supported by case law going back as far as the 1850s. n47 The party taking exception to the report has only 15 calendar days after the referee mails the report to file objections and/or move to set aside or modify the report. n48 The objections [*22] or motion must be set forth in formal papers. The objections may be based on the referee's improper exclusion of evidence, the admission of improper evidence, or any other act materially affecting the rights of the objecting party. The papers must specify what evidence, if any, the referee failed to notice or consider. n49 The objections must be sent to the referee so that the referee can correct any error that he or she acknowledges. n50

n46 *Martino, 182 Cal. App. 3d 553.*

n47 *McHenry v. Moore, 5 Cal. 90, 92 (1855).*

n48 CAL. R. OF CT. 244.2(e)(3).

n49 *Martino, 182 Cal. App. 3d at 556.*

n50 CAL. R. OF CT. 244.2(e)(3).

The statutes and rules do not establish any briefing schedule, nor do they specifically apply the normal briefing calendar and notice provisions for motions to the exception procedures. The absence of such provisions suggests that a hearing is not required, as the court in *Marathon National Bank* v. *Superior Court* expressly held. n51 This leaves the objecting party in a bit of a quandary, however. Rule 244.2(e)(3) requires that a party filing objections to a referee's report also "serve and file notice of a request for a hearing" n52 that need not be held. The provision for a request for a hearing suggests that the trial court selects the hearing date, if any, which provides further confusion to the briefing schedule. Parties should consider proposing a briefing schedule in the request for a hearing and including the schedule in a proposed order granting the request.

n51 *Marathon Nat'l Bank v. Superior Court, 19 Cal. App. 4th 1256, 1259 (1993).*

n52 CAL. R. OF CT. 244.2(e)(3).

Since the court need not set a hearing, what must it do? The *Marathon* court held that the trial court "may consider the matter as the circumstances dictate." n53 More specifically, the trial court's orders need only "demonstrate a considered and careful review" of the referee's report and recommendations as well as the written and oral proceedings underlying that report so that the court of appeal can "say with confidence that the trial court did not abdicate its judicial responsibilities." n54 This appears to be a standard readily satisfied by any experienced judge--or easily found satisfied by any appellate court desirous of finding it satisfied.

n53 *Marathon, 19 Cal. App. 4th at 1261.*

n54 *Id.*

What if no exception is taken to the referee's report? Because the referee lacks the power to issue an order, the court's order of reference cannot relegate a party dissatisfied with a referee's recommendations to the party's appellate remedies. n55 It would appear, then, that a referee's report, on its own, has no legal force, even if there are no exceptions to it. Some action of the court is required to give effect to the referee's recommendations.

n55 *Doyle v. Superior Court, 50 Cal. App. 3d 1878, 1884 n.1 (1996).*

Neither the statutes nor the California Rules of Court provide a procedure for confirming a referee's report. n56 In order to give effect to a referee's recommendation, a motion for confirmation should be filed promptly after the 15-day period has expired for exceptions to the report. Once the time for exception has expired, the motion can arguably be made by an ex parte application. The application should include a copy of the referee's report and a proposed order.

n56 *CODE CIV. PROC. §§ 639 et seq.*; CAL. R. OF CT. 244.2, 532.2.

Even in the absence of judicial confirmation of the referee's recommendation, as a practical matter it would seem that the courts might enforce the recommendations of a **discovery referee** to which no exception has been taken. There is some authority that a motion to confirm may be granted at some remove from the submission of the referee's report. n57

n57 *Martino v. Denevi, 182 Cal. App. 3d 553, 557 (1986).*

Fees and Costs

The fees subject to dispute in the **discovery** reference process include the fees that are billed to the parties by the **discovery referee,** the fees that an adverse party may seek to recover, and the fees that a party may seek to shift to an adverse party. Referee's fees may be recoverable as costs. n58

n58 *CODE CIV. PROC. § 1023*; *DeBlase v. Superior Court, 41 Cal. App. 4th 1279, 1285 (1996); Winston Square Homeowners Ass'n v. Centex West, Inc., 213 Cal. App. 3d 282, 293 (1989); Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9, 140 Cal. App. 2d 833, 835 (1956).*

The referee's fees are fixed by the court and are supposed to be reasonable. They should be determined based on the time devoted to the reference. n59 In spite of these principles, a number of uncertainties about fees arise and need consideration. For example, [*55] the referee's billable time may include travel time. In choosing between two equally acceptable referees, the referee with a nearby office may be preferable.

n59 *CODE CIV. PROC. § 1023.*

Referee's fees usually are divided equally between the plaintiffs' side and the defendants' side or equally among all parties. The parties can stipulate in writing to a different fee arrangement. *Code of Civil Procedure Section 1023* implies that the referee's fees must be a "rate," which, as a practical matter, means an hourly rate.

The court may allocate the referee's fees among the parties in any fair and reasonable manner. n60 The court may decide to make one party pay all the fees subject to a later reallocation. A party might seek a reallocation of the referee's fees by way of a cost bill, even if the party is on the losing side. Courts routinely state that the referee's fees are subject to reallocation, but subsequent reallocation is not common.

n60 *CODE CIV. PROC. § 645.1*.

The cost of a referee can be a significant burden on an indigent party or one with comparatively limited resources. The appellate courts encourage the trial courts to handle discovery disputes themselves when a party claims indigence or use cost-free alternatives to expensive **discovery referees.** They prohibit a court from imposing the full cost of the **referee** on a party with extensive resources or on the referee. n61 On the other hand, in complex, multiparty litigation, if a party makes a showing of "significant hardship," the court cannot force that party to contribute to the cost of the referee. n62

n61 *DeBlase, 41 Cal. App. 4th 1279, 1282-86; Taggeres v. Superior Court, 62 Cal. App. 4th 94 (1998).*

n62 *Lu v. Superior Court, 55 Cal. App. 4th 1264, 1270 (1997).*

The California Rules of Court also recognize the economic burden of referees. Rule 244.2(a) requires that the trial court consider the economic impact of a reference on the parties in deciding whether to make a reference on the motion of a party. Additionally, the rule provides that the court may determine the fair and reasonable division of the reference costs if a party raises an economic hardship argument prior to the time the referee has commenced providing services. This order can be modified at a later time, and the court is permitted to consider the referee's recommendation regarding the division of fees. n63

n63 CAL. R. OF CT. 244.2(a).

Actual payment of the fees by a responsible party can be an issue. In a recent case, the court held that, under the proper circumstances, a referee could secure a lien on a party's settlement proceeds, but the trial court cannot order the party's counsel to pay the referee's fees. n64 A party's failure to pay the court-ordered fees of a **discovery referee** could subject the party to **discovery** sanctions as [*56] well as other types of sanctions. n65

n64 *MacMillan v. Superior Court, 50 Cal. App. 4th 246, 255 (1998).*

n65 *CODE CIV. PROC. § 2023* (discovery sanctions), § 128(a) (general sanctions).

The Judicial Council and the legislature should address the gaps that remain

in the law governing **discovery referees,** the proceedings before them, and the disposition of **referee** recommendations. The use of **discovery referees** has disturbed courts and commentators. There are biases inherent in the use of **discovery referees,** and the system appears vulnerable to abuse by under funded courts or courts lacking the appropriate degree of diligence. The discovery reference process requires counsel to plan carefully and make tradeoffs between cost and risk. With even the best-laid plans, however, the law remains unresolved on a number of important aspects of discovery references. Thus the potential for disappointment remains available to one and all, but most especially to the inattentive litigator.

Legal Topics:

For related research and practice materials, see the following legal topics: Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesGovernmentsCourtsCourt Personnel

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FEATURE: RECENT LEGISLATION MAKES THE USE OF COURT-APPOINTED **DISCOVERY REFEREES** MORE USER FRIENDLY: **DISCOVERY** CHANNEL

By Christine Byrd

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TEXT:

[*22] Until recently, California courts had the authority under *Code of Civil Procedure Section 639* to require parties to use **discovery referees** whenever "necessary." The decision as to when a **discovery referee** was necessary was left to the discretion of the trial court. However, critics charged that **discovery referees** were often unnecessary and imposed undue financial burdens on the parties.

Responding to such criticisms, two years ago the California Legislature enacted a new law, AB 2912, n1 that, beginning in 2001, eliminated the trial court's discretion under Section 639 and imposed specific conditions on the appointment of **discovery referees** in order to protect parties against unnecessary or inappropriate appointments. n2 The legislation dramatically amended Section 639 and other provisions applicable to **discovery referees.** The legislature also directed the Judicial Council to collect and report information regarding the use of **discovery referees** under Section 639. The next year, the legislature extended the reporting deadline but underscored its mandate: "It is the intent of the Legislature that the practice and cost of referring **discovery** disputes to outside **referees** be thoroughly reviewed." n3

n1 2000 Cal. Stat. ch. 644, § 2.

n2 When all parties consent to the appointment of a **discovery referee,** *Code of Civil Procedure § 638* applies, not § 639. When the parties do not consent, § 639 is applicable. The focus of this article is on § 639.

n3 *CODE CIV. PROC. § 640.5*. The legislature also expanded its mandate by

requiring the Judicial Council to report on the use of **referees** in **discovery** matters pursuant to either *Code of Civil Procedure § 638* or § 639.

The new requirements for the appointment of a **discovery referee** without the consent of all parties are clear regarding what a court cannot do and what an appointment order must contain:
- The court cannot appoint a **discovery referee** absent "exceptional circumstances."
- The court cannot appoint a **discovery referee** without express findings regarding the ability of the parties to pay for the **referee's** fees.
- The court order appointing a **discovery referee** must be in writing.
- The court must specify in the order the scope of the reference.
- The court order must include the name, business address, and telephone number of the referee.
- The court order must specify the maximum hourly rate the referee may charge and, if a party requests, the maximum number of [*24] hours that the referee may charge.

One of the most significant requirements is the change in the standard under which a **discovery referee** can be appointed absent the consent of the parties. Under the new law, a **discovery referee** can be appointed only under "exceptional circumstances..., which must be specific to the circumstances of the particular case." n4 This amendment should go far in preventing any unnecessary appointments, although what constitutes "exceptional circumstances" justifying a court's decision to appoint a **discovery referee** remains to be seen. It is worth noting that the language is substantially similar to the language in *Rule 53 of the Federal Rules of Civil Procedure*, governing the appointment of special masters, which provides that a reference to a master "shall be the exception and not the rule." n5

n4 *CODE CIV. PROC. § 639(d)(2)*.

n5 *FED. R. CIV. P. 53(b)*.

Ability to Pay

A requirement in the new law that is as important as the changed standard for appointment of a **referee** involves the **referee's** fees. Even if exceptional circumstances warrant the appointment of a **discovery referee,** the court cannot appoint one without first determining whether the parties have the ability to pay the referee's fees. n6 In fact, the bulk of the amendments enacted in 2000 address this issue. To appoint a **discovery referee,** the court must find that "no party has established an economic inability to pay a pro rata share of the referee's fees." n7 As for the obvious question of whether a lawyer's ability to pay may be considered, the answer is no. The court is allowed to consider "only the ability of the party, *not the party's counsel*, to pay these fees." n8

n6 *CODE CIV. PROC. § 639(d)(6)*. No such finding is required if the referee is serving gratis. The requirement of findings regarding the parties' ability to pay for the referee applies only when the referee is being appointed "at a cost to the parties." *CODE CIV. PROC. § 639(d)(6)(A)*.

n7 *CODE CIV. PROC. § 639(d)(6)(A)*.

n8 *CODE CIV. PROC. § 639(d)(6)(B)* (emphasis added).

The economic analysis of a party's ability or inability to pay for a **discovery referee** must not take place in a vacuum. The court is expressly directed to consider "the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation." n9 The purpose of this amendment is to ensure that no party is forced to sacrifice necessary case preparation in order to pay the costs of a **discovery referee.** Indeed, at the request of a party, the order for the appointment of a **discovery referee** must set forth clearly the maximum number of hours for which the **referee** may charge. n10 The maximum may be modified but only upon written application (by a party or by the referee) and only for good cause.

n9 *Id.*

n10 *CODE CIV. PROC. § 639(d)(5)*.

The provision for a cap on a **discovery referee's** fees is an obvious response to past criticisms, and its benefit to the parties is clear. It may also help the court by making it easier to assess the economic impact of an appointment, particularly on parties with limited financial resources who might benefit from the appointment of a **discovery referee.**

If one party is unable to pay, then a **discovery referee** cannot be appointed unless any other party, even an opposing party, "has agreed voluntarily to pay that additional share of the **referee's** fee." n11 In this circumstance, the court may proceed to appoint the **discovery referee.** While such cases may not be common, this provision will be a benefit in large multiparty cases in which the larger parties are willing and able to pay a **referee's** fees and the smaller parties are unable to do so. The legislature did not address the implications of having a **discovery referee** paid by only one side in a lawsuit. In that situation, to avoid an appearance of bias, the court may wish to withhold from the **discovery referee** the identity of the party or parties paying the **referee's** fees.

n11 *CODE CIV. PROC. § 639(d)(6)(A)*.

The new law also requires that the court specify the scope of the reference at the time the **discovery referee** is appointed. This requirement appears twice in the amendments. First, Section 639(c) requires that the order "indicate whether the **referee** is being appointed for all **discovery** purposes in the action." n12 Second, Section 639(d)(3) requires that the order specify "the subject matter or matters included in the reference." n13 These changes are a significant improvement, because the written order will give clear direction to the referee and to the parties as to the scope of the appointment. However, the use of different language in subsections (c) and (d) is puzzling.

n12 *CODE CIV. PROC. § 639(c)*.

n13 *CODE CIV. PROC. § 639(d)(3)*.

The remaining requirements are informational in nature. The court order now must be in writing, and it must include the name, business address, telephone

number, and maximum hourly rate of the referee. n14 Also, a copy of the order must be forwarded to the presiding judge of the court. n15

n14 *CODE CIV. PROC. § 639(d)(4)* and (5).

n15 *CODE CIV. PROC. § 639(e)*.

In the event that a party disagrees with a **discovery referee's** report, a full review by the court is available: "The decision of the **referee**...is only advisory." n16 The court may adopt the referee's decision in whole or in part, change the decision, or disregard it entirely, but only "after independently considering the referee's findings and any objections and responses thereto filed with the court." n17 It should be noted that, regarding the review, the statute does not provide the parties with any right to a hearing.

n16 *CODE CIV. PROC. § 644(b)*. No such review is available for a consensual general reference pursuant to § 638. *CODE CIV. PROC. § 644(a)*.

n17 *CODE CIV. PROC. § 644(b)*; *CODE CIV. PROC. § 643*.

Benefits of Using a Referee

These new requirements should eliminate unnecessary appointments, but **discovery referees** should continue to be appointed in appropriate cases. The types of cases in which **discovery referees** have traditionally been appointed are those requiring the full-time [*25] attention of a judge, those requiring technical expertise, or both.

For example, environmental cleanup cases can easily involve dozens of parties if all current and prior landowners are named in an action or in the cross-actions. They can also include technical issues. Likewise, construction defect cases, in which numerous contractors and subcontractors are sued, can also contain multiple parties and technical issues.

A **discovery referee** who understands the technical problems in a multiparty case can handle **discovery** matters quickly and efficiently. Such a **referee** can be a tremendous benefit to the parties. However, for parties who are individuals without insurance coverage, the cost of a **discovery referee** can be burdensome. The changes to Section 639 allow the courts to continue to appoint **discovery referees** in those cases in which they will be a benefit to the parties, but the changes protect small parties against prohibitive fees.

Of course the appointment of a **discovery referee** does not guarantee that **discovery** will proceed more efficiently than it would before a judge. Some judges are excellent at actively supervising **discovery** matters and rarely appoint **discovery referees.** For example, Judge J. Stephen Czuleger is reluctant to appoint **referees** even when lawyers request one. "It is not enough for lawyers to tell me there is a need for a referee in their case," Judge Czuleger said. "They need to tell me specifically what they want the referee to do, rather than leaving it open-ended." n18

n18 Telephone interview with author. Mar. 13, 2002.

Lawyers frequently see the appointment of a **referee** as leading to a delay of the trial. However, the appointment of a **discovery referee** should not prolong the resolution of a case. Indeed, one of the benefits of having a **discovery referee** should be the faster handling of **discovery** matters. A good **discovery referee** can allow the parties to obtain legitimate **discovery** and enforce legitimate objections while minimizing the time and expense normally associated with **discovery** disputes.

For example, a **discovery referee** can 1) require that disputes be raised immediately, 2) eliminate "meet and confer" sessions, and 3) streamline the documentation that must accompany a motion to compel. With a **discovery referee,** counsel can sit down and discuss precisely what information is being sought; what information is relevant; what persons or locations are likely to have that information; what logistics, software requirements, or organizational issues are involved; and what type of search is likely to result in useful information. A **discovery referee** also can work with counsel to develop a **discovery** program that serves the interests of all parties. [*26] The appointment of a **discovery referee** should shorten, rather than lengthen, the life of a case.

The Delay Issue

Although the amendments to Section 639 are a definite improvement, they do not address the critical issue of delay. Not one of the changes to Section 639 requires that a **referee** hear **discovery** matters promptly. *Code of Civil Procedure Section 643* does provide that the **referee** must report to the court "within 20 days after the hearing, if any, has been concluded and the matter has been submitted." n19 However, before Section 643 applies, the referee continues to have discretion and control over the speed with which a matter is heard and submitted.

n19 *CODE CIV. PROC. § 643(a)*.

Although legislative changes to address the issue of delay will no doubt be suggested in years to come, the courts can also address this problem in the meantime. One simple way to eliminate delay is for the court to ensure that the **discovery referee** is both active and knowledgeable. Another way is by including a sunset provision in the appointment order, so that the appointment automatically concludes at a certain date with the issuance of a final report. Judge Czuleger has also developed a simple way to eliminate delay. His policy is to maintain the original trial date, regardless of the appointment of a **referee.** He believes that this policy is effective in encouraging efficiency in the **discovery** process.

The changes to Section 639 do not apply to the appointment of **discovery referees** with the consent of all parties, which is addressed by Section 638. Even so, parties should contemplate using the new amendments as guidelines when consenting to Section 638 appointments. The new Section 639 requirements are thoughtful and worthwhile. Parties also should consider requesting a sunset provision in any appointment of a **discovery referee,** whether under Section 638 or 639.

The overall impact of the new changes governing the appointment of **discovery referees** under Section 639 remains open to debate, but data on the implementation of the new amendments will be available soon. The Judicial

Council is required to collect all orders appointing **discovery referees,** both under Section 638 and Section 639. The Judicial Council is then required to report to the legislature on the number of appointments, the cost to the parties, and the time spent by the **discovery referees.** n20 The deadline for that report is July 1, 2003. n21

n20 *CODE CIV. PROC. §§ 638(c), 639(e), 640.5*.

n21 *Id.*

It will be interesting to review the information collected by the Judicial Council and to see what effect, if any, the legislative changes have had on **discovery referee** appointments.

Legal Topics:

For related research and practice materials, see the following legal topics: Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferences

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