**Be Careful What You Ask For: When Do You Want an Examiner, Receiver, CRO, Trustee, or other Neutral?**

## I. Overview and Introduction.

A. This section of the seminar will address the issue of neutrals. What is a "neutral?" Probably the best example of a neutral person is a judge. Neutrals are individuals who essentially meet the ethical and legal standard one expects for judges, but who are appointed or selected in various courts by the Judge or the parties to fill various roles in the case with the goal being that the addition of the neutral person to the case will facilitate a more efficient resolution of particular issues.

B. The general standard was stated succinctly by the Supreme Court: "[A judge] should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149–50, 89 S. Ct. 337, 339–40, 21 L. Ed. 2d 301 (1968).

## II. Bankruptcy Trustees in Chapter 11 Cases.

### A. Keith

**Chapter 11 Trustees**

"We've got to get someone in there that can run the company!" says your creditor client. "These guys don't know what they are doing and keep stealing all the money."

"How about if we ask the court to appoint a Chapter 11 trustee," you say. "Then someone with neutrality can run the company and report to the court. It would even result in exclusivity being lifted, and we could file our own plan if we wanted to."

[*Interlude of indeterminate length*]

"I can't believe the Chapter 11 trustee just doesn't get it. He's suing me for a preference and breach of contract. To make matters worse, he's hired the most expensive lawyer in town, and it's too expensive to file my own plan and disclosure statement because I have to pay you and the trustee's lawyers. Why did you talk me into seeking the appointment of a Chapter 11 trustee?"

Not all cases are right for the appointment of a Chapter 11 trustee as the above discussion demonstrates. There are, however, times when a trustee can break log jams and bring sanity to difficult (think impossible) cases. And, the right Chapter 11 trustee, can even be a miracle worker in the eyes of some. So before we get into the exotic, let's discuss the basics of Chapter 11 Trustees:

**Code section**: 11 U.S.C. 1104(a) provides that any time between the filing of the bankruptcy case and before confirmation of a plan, the court may appoint a Chapter 11 trustee for cause including fraud, dishonesty, incompetence or gross mismanagement. Finally, a trustee may be appointed in the best interests of creditors, equity security holders, or other interests of the debtor's estate.

The language of the Code provides:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

While the moving party bears the burden of proof to have a trustee appointed, there is no prescribed standard, especially given the strong presumption that the debtor remain in possession postpetition. It is important to note that this is one area where the Court maintains maximum discretion and may appoint a trustee after a full evidentiary hearing or facts that are a matter of record. In fact, while most Chapter 11 trustee appointments are the result of a motion filed by the UST or other party in interest, courts have found authority to appoint trustees sua sponte.

**Standard for Appointment**: The default rule in Chapter 11 is that present management remains in place upon filing of the bankruptcy petition. Debtors in possession control and manage their own affairs within the confines of the Chapter 11 process including reporting and disclosure obligations as set out in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. Because a trustee appointment upsets this balance and the normality of a Chapter 11 case, it is a significant event in the life of a Chapter 11 case. Additionally, the cost, expense, and uncertainty of a Chapter 11 trustee make it something most courts issue sparingly. The evidence considered by a Court in appointing a Chapter 11 trustee generally is taken from a review of the "totality of the circumstances."

When considering whether to appoint a trustee for cause, courts may consider both the pre- and postpetition misconduct of a debtor's management, but courts should not consider predictions as to management's future conduct. The fact that a debtor's prior management might have been guilty of fraud, dishonesty, incompetence, or gross mismanagement does not necessarily provide grounds for the appointment of a trustee, as long as a court is satisfied that the current management is not similarly guilty and/or is taking sufficient steps to remedy the wrongs committed by prior management.

The most common basis for appointing a trustee is gross mismanagement and/or incompetence. In order for this appointment to be made, the debtor's management must show a willingness to depart from ordinary business judgment to a degree that it can no longer be afforded deference. The factors used to determine whether or not management is guilty of gross mismanagement may vary depending up on the facts of the case. Some factors and fact-specific analysis for the appointment of a trustee have included the need for a neutral party to mediate disputes between the debtor and its creditors, acrimony between debtor and creditor, management conflicts of interest, breaches of fiduciary duties ; excessive intercompany transfers. While there are other factors that may apply in specific circumstances, one may assert that "you know it when you see it." A good example of a case where the Court noted its power to appoint a trustee either on motion or sua sponte after consideration of a voluminous record including a debtor in possession prone to excessive litigation is In re Thomas.

Cause to appoint a trustee is not a defined term in the Bankruptcy Code. Whether a particular act or omission rises to the level of cause requires consideration of all pertinent facts and circumstances.

Unlike § 1104(a)(1) 's mandatory provision, § 1104(a)(2) "envisions a flexible standard." Section 1104(a)(2) expressly provides that the court shall order for the appointment of a trustee in a Chapter 11 case if it is in the best interests of the creditors and the estate. "The flexible standards embodied in § 1104(a) are intended to accommodate two goals: (1) facilitation of the debtor's reorganization; and (2) protection of the public interest and of creditors." 7 Collier on Bankruptcy ¶ 1104.02[3][a] (16th ed. 2016) (citing H.R. 8200, 94th Cong. § 1104 (1978)). The "interests" standard appears to be more of a balancing test; that is, whether the benefits to all interests of the estate that would come from the appointment of a chapter 11 trustee outweigh the detriment of the estate. Courts have considered various factors when utilizing this balancing test, including: "(1) the trustworthiness of the debtor; (2) the debtor's past and present performance and prospect for rehabilitation; (3) whether the business community and creditors of the estate have confidence in the debtor; and (4) whether the benefits outweigh the costs." LHC, 497 B.R. at 293 (citations omitted). It should be noted that "[a]ppointment of a trustee under § 1104(a)(2) is within the sound discretion of the bankruptcy judge." Id . (citations omitted).

**Rules and notice**: Federal Rule of Bankruptcy Procedures 2007.1 provides that a motion for an order to appoint a trustee or an examiner under Section 1104(a) of the Bankruptcy Code shall be made in accordance with Rule 9014. Further, a request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by Section 1104(b) of the code. Pending court approval of the person elected, any person appointed by the United States trustee under Section 1104(d) and approved in accordance with the provisions of FRBP 2007.1(c).

FRBP 2009 allows the court, in the absence of conflicts, to order one trustee over jointly administered cases but leaves open the possibility of separate trustees if conflicts of interest would be created by one trustee sitting over multiple debtors.

Chapter 11 trustees should be aware of FRBP 2015, which requires the filing and transmission to the UST of a complete inventory of the property of the debtor within 30 days after qualifying as a trustee, unless the inventory has already been filed. The same rule also requires records of receipts and disposition of money and property. Furthermore, Chapter 11 trustees must be disinterested. FRBP 2014(a). Disclosure of contacts is key and the disclosure should be timely and thorough.

**Who selects the Chapter 11 trustee**: The U.S. Trustee, after consultation with parties in interest, appoints a disinterested person. The trustee appointment is subject to court approval. While the actual appointment of the trustee may seem like a black box, the Office of the United States Trustee has provided some guidance. The UST consults with creditors and parties in interest to find a qualified candidate. Parties are allowed to recommend candidates. The U.S. Trustees look first for independence. Then, the experience of a candidate is considered.

**Payment**: The Chapter 11 trustee gets paid under and is limited to the compensation described in Section 326 of the bankruptcy code and paid under Section 330 unless the court orders otherwise.

**Benefits of a Chapter 11 Trustee Appointment**

The primary benefit of a Chapter 11 trustee is a neutral officer to take control of the affairs of a Chapter 11 debtor. Most courts acknowledge the important role of the trustee, and in many cases actually provide deference to the appointed candidate.

Aside for acting for the debtor in possession, a strong Chapter 11 trustee has the unique opportunity to build consensus among disparate and often warring factions. Talented trustees take their appointment as a gateway to meeting with all parties affected by the bankruptcy case, assess operations, and then propose a plan or final solution.

**Drawbacks of a Chapter 11 Trustee**

Cost is a major drawback of a Chapter 11 trustee. Most trustees will insist upon hiring qualified professional and will require time to get up to speed.

The devil you know is sometimes better than the devil you don't. Many a creditor has moved for the appointment of a Chapter 11 trustee only to get exactly what they asked for, and like a dog chasing a car have asked the question, "now that I've caught it, what do I do with it?"

## III. Bankruptcy Examiners.

### A. John Young

[Examiners section follows. (30 pages)]

# EXAMINERS IN BANKRUPTCY CASES

Presented by:

**John F. Young**
Markus Williams Young & Hunsicker LLC
1700 Lincoln Street, Suite 4550
www.markuswilliams.com

MARKUS WILLIAMS
YOUNG & HUNSICKER LLC
*Attorneys at Law*

## I. GROUNDS FOR APPOINTMENT OF EXAMINER

Under section 1104(c) of the Bankruptcy Code, the court, on request of a party in interest or the United States Trustee, is instructed to order the appointment of an examiner if one of two conditions is met:

(1) the appointment is in the interests of creditors, any equity security holders, and other interests of the estate (11 U.S.C. § 1104(c)(1)); or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000 (11 U.S.C. § 1104(c)(2).

The statute further provides that an examiner should not be appointed if a chapter 11 trustee has been appointed or if a plan has been confirmed.

### A. Is 1104(c)(2) Really Mandatory?

The two grounds for the appointment of an examiner have given rise to some litigation, particularly over whether the mandatory examiner requirement of section 1104(c)(2) is in fact mandatory. The terms of the statute seems straight forward: if the debtor has more than $5 million in qualifying claims, the court "shall order" the appointment of an examiner if a party with standing moves for the appointment. The history behind this provision supports the mandatory nature of the appointment. During the debates leading to the adoption of the Bankruptcy Code in 1978, it appears that one of the more contested issues was whether a trustee would be mandatory for some or all chapter 11 debtors. The House bill called for discretionary trustee appointment based upon cost-benefit analysis. The Senate version, on the other hand, made trustee appointments mandatory for "public companies" with defined liabilities of more than $5 million and at least 1,000 equity security holders. The compromise that became law adopted the "presumption" that the debtor would remain in possession, but called for the mandatory appointment of an examiner if the debtor had more than $5 million in qualifying claims. *See* Leonard L. Gumport, *The Bankruptcy Examiner*, 20 Cal. Banker. J. 71, 83-97 (1992).

### B. Courts are Divided on "Mandatory" Appointment

Despite the clear statutory history, parties have often argued that section 1104(c)(2) (and its predecessor section 1104(b)(2)) do not mandate the appointment of an examiner. The leading circuit court authority on this issue is *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498 (3d Cir. 1990) (mandatory language is in fact mandatory). Although most courts have confirmed that the section 1104(c)(2) examiner appointment is mandatory, a few have focused on the "as is appropriate" language to hold that if an investigation is not appropriate, no examiner need be appointed. *See U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114 (Bankr. D. Del 2010). Other courts have rejected this reasoning, holding that reading the statute in this manner conflates subsections (c)(l) and (c)(2) by making both dependent upon a court's determination that an investigation is appropriate. *See Walton v. In re Cornerstone Ministries Investments, Inc.*, 398 B.R. 77 (N.D. Ga. 2008) (reversing bankruptcy court); *In re UAL Corp.*, 307 B.R. 80,84 n.2 (Bankr. N.D. III. 2004) ("[I]f paragraph (c)(2) were not mandatory, then

§ 1104(c) would have the following meaning: 'If specified debt is less than $5 million, it is in the court's discretion to appoint an examiner; and if specified debt is more than $5 million, it is in the court's discretion to appoint an examiner.'"). See also Jonathan C. Lipson, *Understanding Failure: Examiners and the Reorganization of Large Public Companies*, 84 Amer. Bankr. L. J. 1 (2010) ( Prof. Lipson quotes from Bankruptcy Judge Robert Gerber: "[M]andatory appointment [of examiners] is terrible bankruptcy policy, and the Code should be amended...to give bankruptcy judges...the discretion to determine when an examiner is necessary and appropriate...." ;*But see* Clifford J. White III and Walter W. Theus, Jr., *Chapter 11 Trustees and Examiners after BAPCPA*, 80 Am. Bankr. L. J. 289, 290 (Summer 2006) ("If equipped with a mandate of sufficiently broad scope, an examiner may promote efficiency by navigating among the frequent multiplicity of other investigations by government authorities, boards of directors, creditors, and shareholders. The examiner may play the lead role among the players in the bankruptcy case by conducting an expansive and timely investigation that will aid parties later in pursuing monetary recoveries and other remedies. In many respects, the examiner should pre-empt the bankruptcy field by vastly reducing the need for early and duplicative discovery efforts by separate creditors or committees.").

## II. DUTIES OF THE EXAMINER

### A. Primary Duty is to Investigate

The chapter 11 examiner's role is primarily as an investigator and reporter. The examiner's duties are set forth in section 1106(b) of the Bankruptcy Code:

> An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. § 1106(b). The duty specified in section 1106(a)(3) is the duty to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan. The examiner has the duty under section 1106(a)(4) to report on the investigation performed under section 1106(a)(3). Furthermore, "the examiner answers solely to the court….." *In re Fibermark, Inc.* 339 B.R. 321, 325 (Bankr. D. VT. 2006)

### B. Scope of Investigation

The scope of an examiner's investigation is defined by the order appointing the examiner. Some orders are broad. *See, In re DBSI, Inc.*, Case No. 08-12687 (PJW) (Bankr. D. Del.) ("The Examiner is directed to: (a) investigate the circumstances surrounding (i) any and all of the Debtors' inter-company transactions and transfers; (ii) any and all transactions and transfers between and among the Debtors and any non-debtor affiliates, and (iii) any and all transactions and transfers between and among the Debtors and any insiders, officers, directors and principals of the Debtors...."); *In re Washington Mutual, Inc.*, Case No. 08-12229 (MFW) (Bankr. D. Del.) ("The Examiner is directed to investigate ... (a) the claims and assets that may be property of the Debtors' estates that are proposed to be conveyed, released or otherwise compromised and settled

under the Plan and Settlement Agreement ..., and the claims and defenses of third parties thereto ... and (b) such other claims, assets and causes of action which shall be retained by the debtors and/or the proceeds thereof, if any, distributed to creditors and/or equity interest holders pursuant to the Plan, and the claims and defenses of third parties thereto ....").

Other orders directing the appointment of an examiner are broad, but with specific limitations. *See, In re Refco, Inc.*, Case No. 05-6006 (RDD) (Bankr. S.D.N.Y.) ("[T]he Examiner is authorized to investigate and to report all any topic that might reasonably result in the assertion of a claim or right by any of the Debtors' estates with the exception of any claim or right of Refco Capital Markets, Ltd."); *In re Anderson News, LLC*, Case No. 09-10695 (CSS) (Bankr. D. Del.) ("The Examiner shall examine the merits of any and all claims and causes of action held by the Debtor's estate against 'insider[s]'and 'affiliate[s]' . . . of the Debtor . . . , [T]he Examiner shall neither examine nor evaluate the estate's claims against the defendants in that certain antitrust action filed on March 9, 2009, in the United States District Court for the Southern District of New York ....").

Other orders directing the appointment of an examiner are limited to specific transactions or topic areas. *See, In re SemCrude, L.P.*, Case No. 08-11525 (BLS) (Bankr. D. Del.) ("The Examiner is directed to (a) investigate the circumstances surrounding (i) the Debtors' Trading Strategy and the transfer of their NYMEX account, (ii) the Insider Transactions and the formation of Energy Partners, and (iii) the potential improper use of borrowed funds and funds generated from the Debtors' operations and the liquidation of their assets to satisfy margin calls related to the Trading Strategy for the Debtors and certain entities owned or controlled by the Debtors' officers and directors .... "); *In re Enron Corp.*, Case No. 01-B-16034 (AJG) (Bankr. S.D.N.Y.) ("[T]be Examiner is directed to prepare a report regarding the issues concerning [Enron North America Corp.]'s continued participation in the Cash Management System . . . . [and] to participate in both the Cash Approval and Risk Assessment Committees . . . . "); *In re Tribune Co.*, Case No. 08-13141 (KJC) (Bankr. D. Del) ("The Examiner shall . . . evaluate whether there are potential claims and causes of action held by the Debtors' estates in connection with the leveraged buy-out of Tribune that occurred in 2007 . . . "); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC) (Bankr. D. Del) ("The Examiner shall: (a) investigate any and all accounting and financial statement irregularities, errors or misstatements . . . [and] (b) investigate any possible post-petition unauthorized use of cash collateral by the Debtor .... ").

### C. Court's Ability to Guide and Expand Duties

The court has the ability to guide the examiner's investigation. Section 1106(a)(3) is prefaced by "except to the extent that the court orders otherwise." Furthermore, section 1104(c) directs the court to order the appointment of an examiner to perform such an investigation "as is appropriate." Therefore, courts have significant control over the scope of the investigation. *See UAL Corp.*, 307 B.R. at 86-87.

Significant authority also supports, the court expanding the examiner's duties beyond the required investigation under sections 1106(a)(3) and (4). Specifically, the examiner can perform "any other duties of the trustee that the court orders the debtor in possession not to perform" 11 U.S.C. § 1106(b) (emphasis added). Courts have routinely cited section 1106(b) as authority to expand the powers of an examiner. But a careful reading of the statutory language discloses that

the court's ability to grant the examiner broad, wide-ranging authority is in reality significantly circumscribed.

Although, section 1106(b) allows examiners to perform trustee duties that the court orders the debtor in possession not to perform, it is silent about vesting examiners with rights or powers that are denied the debtor in possession. Efforts to impose upon examiners duties substantially broader than those delineated by the Bankruptcy Code lack solid statutory support and should be viewed with caution. *See Official Committee of Unsecured Creditors v. Chinery (In re Cybergenics)*, 330 F.3d 548, 577-78 (3d Cir.), cert. dismissed, 540 U.S. 1001 (2003).

Despite the lack of solid statutory support and often without thoughtful (or any) consideration of the "other duties" clause and related provisions of the Bankruptcy Code, courts have expanded an examiner's duties to include the following:

- facilitation of communication among the parties;
- holding monthly status conferences to monitor the case;
- coordination of discovery efforts of debtors and committees;
- plan mediation, facilitation and negotiation;
- resolution of disputed claims;
- review and settlement of administrative claims;
- prosecution of claims on behalf of the debtor;
- analysis of tax issues;
- preparation and filing of tax returns;
- handle and control all funds, bank accounts and disbursements of the debtor;
- investigation of the condition of property;
- marketing, negotiation and sale of assets;
- review of proposed agreements, leases, transfers, conveyances, expenditures, payments and transactions to determine whether the debtor should be permitted to engage in such transactions;
- review of proposed transactions between the debtor and affiliates, officers and directors to determine whether the debtor should be permitted to engage in such transactions;
- examination of fees and expenses;
- waiver of the debtor's attorney/client privilege;
- review of debtor's financial viability and recommendation as to whether a trustee should be appointed;
- determination of what financial information should be revealed to parties;

- oversight of debtor's actions with respect to partnerships;
- oversight of creditors' and professionals' negotiations and compliance with court orders;
- exercise of the right to vote on plan confirmation on behalf of partnerships; and
- any and all duties of a trustee.

*See The Bankruptcy Court's Watchdog: The Appointment, Role and Power of Examiners Today* (published by ABI, 2011). However, in delegating broad powers and duties to an examiner, the bankruptcy court should be mindful of the jurisdictional and constitutional limitations of vesting examiners with expanded powers. *See e.g. City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011) (holding that is special master makes significant decisions without careful review by trial judge, judicial authority is effectively delegated to an official who has not been appointed pursuant to Article III of Federal Constitution).

In some circumstances, courts will authorize an examiner to prosecute claims of the debtor, either before confirmation to a plan or pursuant to the plan. However, ordering an examiner to prosecute claims belonging to the estate is difficult to justify under the Bankruptcy Code. The Bankruptcy Code's delineation between the duties and powers of a trustee and the prohibition of an examiner becoming a trustee or being employed by the trustee run counter to appointing an examiner to prosecute claims. Furthermore, commentators frequently recognize as well as courts that the unique and independent role of an examiner suggests that an examiner should not be authorized to prosecute claims. Such an appointment is likely to negatively impact the examiners independence and integrity or the parties and public's perception of the independence of the examiner. *Official Committee of Asbestos Personal Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Company).*, 285 B.R. 148 (Bankr. D. Del. 2002)

## III. DIFFERENCES BETWEEN AN EXAMINER AND A CHAPTER 11 TRUSTEE

An examiner usually has only a couple of a trustee's duties specifically those set out in sections 1106(b)(3) and (4), unless the court orders otherwise. He has none of a trustee's powers and rights. The trustee has a fiduciary duty to creditors and others with interests in the estate. The examiner's duty is to independently conduct an unbiased investigation and to report the results of the investigation to the court and to parties in interest.

The Bankruptcy Code is designed to insure the examiner's impartiality and lack of bias. Like a trustee an examiner must be disinterested. See 11 U.S.C. §§ 1104(d) and 101(14). Likewise, a person who has served as examiner in a case cannot later serve as a trustee in case. 11 U.S.C. § 321(b). This provision eliminates any personal incentive that an examiner might have to advocate that grounds exist for the appointment of a trustee. Finally, and for similar reasons, a trustee is prohibited from employing as a professional a person who has served as an examiner in the case. 11 U.S.C. § 327(f). Although the examiner pursues adequate and detailed knowledge about the case from his investigation, that knowledge should be set out in the examiner's report. Persons dealing with the examiner should be assured that the examiner is a truly independent actor not impaired by personal or pecuniary interests.

## IV. THE PROCEDURAL MECHANICS OF THE APPOINTMENT

The appointment of an examiner, like the appointment of a chapter 11 trustee, is governed by section 1104(d) of the Code and Bankruptcy Rule 2007.1. After the court directs the appointment of an examiner, the United States Trustee is required to consult with parties in interest and to then appoint one disinterested person to serve as examiner. During the consultation, the United States Trustee will usually inquire about those persons best suited be considered as potential examiner candidates. The United States Trustee will also seek candidates with the skill sets necessary and appropriate to effectively perform the investigation called for in the court's order.

Once the United States Trustee designates a candidate to serve as an examiner, Rule 2007.1 sets forth the procedures for formalizing the appointment. Under Rule 2007.1(c), the United States Trustee files an application seeking the approval of the appointment. The application will identify the person appointed and, to the best of the applicant's knowledge, all of the person's connection with the debtor, creditors, any other parties in interest, their respective attorneys and accountants; the United States Trustee, or persons employed in the office of the United States Trustee. The application will describe the parties in interest with whom the United States Trustee consulted regarding the appointment. The application will also be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States Trustee, or persons employed in the office of the United States Trustee.

The examiner's service begins once the court enters an order approving the appointment. Unlike a chapter 11 trustee, an examiner cannot be supplanted by an election. *See* 11 U.S.C. § 1104(b); Fed. R. Bank. P. 2007.1(b).

## V. WORK PLAN AND BUDGET

A court-approved work plan and budget are often required by the appointment order. But see, *Anderson News* (no work plan/budget required by Court). Developing a work plan and budget generally requires cooperation and discussions among parties-in-interest (e.g., United States Trustee, debtor, lender, statutory committees, retained financial advisors) so that the examiner may determine; (1) events that have transpired to date; (2) issues appropriate tor the investigation; (3) the status and progress of any other pending investigations (e.g., SEC, DOJ, Commodities Future Trading Commission); (4) the availability and condition of the debtor's books and records; (5) the extent to which the examiner will need to engage and retain professionals; and (6) other matters likely to affect the investigation.

As discussed below, an examiner is often precluded by the appointment order from making public information regarding his investigation until his report is filed. In many cases, therefore, the work plan and budget may be required to be filed under seal.

## VI. EXAMINER'S RETENTION OF PROFESSIONALS

The examiner is generally authorized by the court to retain counsel and other professionals, such as a financial advisor, under standards equivalent to those under section 327 of the

Bankruptcy Code. The examiner and his professionals are typically compensated pursuant to sections 328 and 330 of the Bankruptcy Code and any orders entered in connection with the case in the same manner as other professionals retained in the case. There is no specific authority for these compensation and payment procedure, but court's generally rely on § 105(a) of the Bankruptcy Code.

## VII. DUTY OF COOPERATION WITH EXAMINER

Initial orders appointing examiners (or related orders) may require (a) parties-in-interest to cooperate with examiner, (b) the examiner to cooperate in and avoid interfering with ongoing federal, state and local investigations and (c) coordinated discovery process between the examiner's investigation and other Rule 2004 motions by parties in interest.

For example, in *In re WorldCom, Inc.*, No. 02-13533 (Bankr. S.D.N.Y. 2002), in addition to the examiner and Congress, various governmental agencies investigated the debtor as they sought to build civil and criminal cases. A protocol was established to address distribution of information among the various governmental parties:

(1) Criminal prosecutors were given first claim on information. They could decide whether witnesses could speak only to the criminal investigators, or to the SEC and/or examiner as well Criminal prosecutors were also given the right to limit the scope of interviews by others;

(2) SEC was given second claim on all information and the right to protect its civil enforcement action against the premature disclosure of information through the examiner;

(3) It was necessary for parties to ensure certain information was not disclosed to examiner by prosecutors in order to protect grand jury secrecy. This included information developed through grand jury testimony, subpoenaed documents and testimony developed therefrom.

(4) It was also necessary to monitor the information flowing from the examiner to the prosecutors to avoid allegations that the examiner acted as an agent of the prosecutors and that the information was improperly obtained.

In *Anderson News*, an agreed upon stipulation and order was approved governing coordination of a Rule: 2004 discovery process running side-by-side with the examiner's investigation and provided, among other things, various classifications of confidentiality regarding information produced in connection with the examiner's investigation; protocols for disclosure, and the means for separate and simultaneous productions of certain documents to the examiner and various creditor parties.

## VIII. BANKRUPTCY RULE 2004 AND SUBPOENA POWER

"An examiner's investigation is conducted under Fed. R. Bankr. P. 2004 and is broader than the scope of civil discovery. The investigation of an examiner in bankruptcy, unlike civil discovery under Rule 26(c), is supposed to be a 'fishing expedition,' as exploratory and groping as appears proper to the Examiner." *FiberMark*, 339 RR. at 324 (quoting *Air Line Pilots Assoc.*

*Int'l v. Am. Nat'l Bank & Trust Co. (In re Ionosphere, Inc.)*, 156 RR. 414, 432 (S.D.N.Y.1993)). The scope of an examiner's investigation, however, is limited to his duties under sections 1104 and 1106 of the Bankruptcy Code, as well as the appointment order. At the outset of the investigation, or as needed during the investigation, an examiner can obtain court authorization to issue subpoenas to, and conduct examinations of, potential witnesses under Rule 2004. Such orders generally serve to limit costs and unnecessary delay.

## IX. WITNESS INTERVIEWS BY EXAMINER

Witness interviews generally comprise a significant part of any investigation. Persons with critical knowledge are almost always interviewed in person, often more than once. While examiners often obtain orders granting them subpoena powers, the goal of any investigation is to obtain the best information available in the most effective and efficient manner suitable. For these reasons, it is often the best course for an examiner to forego formal depositions in favor of informal interviews. The use of transcription services may assist the examiner in preserving for later use the content of such interviews and reducing the need for multiple follow up communications. Any such unsworn transcript essentially serves as the examiner's notes and is generally not made available to patties in interest. The use of videoconference and telephonic interviews may be helpful in obtaining cost effective access to persons, particularly third parties, who are believed to have limited or corroborating information regarding the investigation.

Generally, the only persons permitted to be present with a witness at his interview are his counsel and, if the witness is a current or former employee of the debtor, counsel for the debtor.

## X. THE EXAMINER'S STANDARD OF REVIEW WHEN ANALYZING CLAIMS

The process of an examiner's work is related to the standard that will be used to evaluate the matters he is assigned to investigate. In at least one case, the court provided guidance regarding the standard to be used by the examiner. See *Report of Anton R. Valukas, Examiner, In re Lehman Brothers Holdings, Inc.*, No. 08-13555 (Bankr. S.D.N.Y, Mar. 11,2010) (noting that bankruptcy court requested examiner to investigate "colorable claims"). In most cases, the standard of review is left to the examiner's discretion. As a result, examiners' reports have not been uniform in the standards employed to evaluate potential claims or causes of action and examiners have run the gamut in selecting applicable standards,

A number of examiners have utilized a standard akin to that governing a motion to dismiss. *See Report of Kenneth N. Klee, As Examiner, In re Tribune Co.*, No. 08-13141 (Ban.kr. D. Del July 27, 2010); *Final Report of Examiner, In re Refco, Inc.*, No. 05-60006 (Bankr. S.D.N.Y. July 11, 2007). Others have employed a heightened standard more analogous to that applied on a motion for summary judgment. See *Report of Anton R. Valukas, Examiner, In re Lehman Brothers Holdings, Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Mar. 11, 2010); *Final Report of Neal Batson. Court-Appointed Examiner, In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. June 30, 2003). At least one examiner employed a standard in his report intended to set forth claims that would survive both motions to dismiss and for summary judgment. See *Third and Final Report of Dick Thornburgh, Bankruptcy Court Examiner, In re WorldCom, Inc.*, No. 02-13533 (Bankr. S.D.N.Y. Jan. 26, 2004). One examiner adopted a motion to dismiss "plus" standard, concluding tor purposes of his report that a claim or cause of action existed if there were facts sufficient to state a claim

that was facially plausible giving due consideration to the viability of potential defenses that may likely be asserted. See *Report of Don A. Beskrone, Examiner, In re Anderson News, LLC*, No. 09-10695 (Bankr. D. Del. May 12, 2011). Finally, some examiners fail to specifically describe the standard they applied to determine whether claims existed. *See Final Report of Louis J. Freeh, In re SemCrude*, No. 08-11525 (Bankr. D. Del. Apr. 15, 2009); *Final Report of Michael J. Missal Bankruptcy Court Examiner, In re New Century TRS Holdings, Inc.*, No. 07-10416 (Bankr. D. Del. Mar. 26, 2008).

## XI. FORM OF THE EXAMINER'S REPORT

Sections 1104 and 1106 of the Bankruptcy Code (hereinafter, the "Code") provide for the appointment of an examiner and set forth the examiner's duties in connection with his or her investigation. The Code further provides that the examiner shall, as soon as practicable, "file a statement of any investigation ..., including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate[.]" See 11 U.S.C. § 1106(a)(4)(A).

The Code does not provide any guidance regarding the form or structure of an examiner's report. Most examiners' reports include the procedural background of the case, recite the topics which the examiner was appointed to examine, as set forth in the court's order appointing the examiner, and describe the examiner's investigation, including the documents and testimony collected. Furthermore, a review of examiners' reports filed in recent bankruptcy cases suggests that a report's form and structure is largely left to the examiner's discretion and influenced by the scope of the examiner's investigation.

In *In re Lehman Brothers Holdings Inc., et al.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y.), for example, the court instructed the examiner to address ten separate issues relating to certain events and transactions leading up to debtors' bankruptcy filing and the existence of any colorable avoidance actions, administrative claims and state law claims (such as for breach of fiduciary duty) by or against the debtors. In his report, the examiner distilled these ten issues into three primary topics: (i) the reasons for Lehman's failure and the existence of any colorable causes of action arising out of Lehman's failure; (ii) the existence of any colorable avoidance actions or administrative claims; and (iii) the existence of any colorable claims arising out of a sales transaction with Barclays Capital, Inc. The examiner's organization of the report in this manner enabled him to set forth the facts he obtained during the course of his investigation and to provide a detailed analysis of the potential causes of action he believed existed based on those facts.

The examiner in *In re Tribune Company, et al.*, Case No. 08-13141 (KJC) (Bankr. D. Del) was tasked with a similar role, specifically, that of evaluating potential claims and causes of action held by the debtors' estates against various entities. In evaluating the potential claims and causes of action, the examiner constructed a continuum of possible conclusions, ranging from "highly likely" to "highly unlikely," with steps in between. The examiner judged each claim and cause of action according to this continuum, ranking the viability of the claim at issue based on this scale.

In addition to form and structure, the Code likewise lacks guidance with respect to the number of reports that the examiner may file with the court to report the findings of his or her investigation. In some cases, such as *Tribune* and *Lehman*, the examiner only filed a single report.

In other cases, such as *In re WorldCom. Inc., et. al.*, Case No. 02-13533 (AJG) (Bankr. S.D.N.Y.) and *In re New Century TRS Holdings, Inc., et. al.*, Case No. 07-10416 (KJC) (Bankr. D. Del.) the examiner flied more than one report.

## XII. SHOULD THE EXAMINER'S REPORT BE PUBLICLY FILED OR FILED UNDER SEAL?

As a general rule, courts appointing examiners and the Office of the United States Trustee (the "U.S. Trustee") have indicated a strong preference that examiner reports be publicly filed. More often than not, however, the time constraints facing examiners prevent resolution of all claims of confidentiality or privilege before the deadline for filing the examiner's report. As a result, to meet the deadline, it is sometimes necessary for an examiner to file his or her report (or portions thereof) under seal until issues related to confidentiality and privilege can be sorted out.

In *New Century*, for example, the order appointing the examiner was supplemented (the "Supplemental Order") prior to the examiner issuing his final report to provide for the report to be filed under seal for at least ten (10) days, with the report being served only upon the debtors, the official committee of unsecured creditors and the Office of the U. S. Trustee (collectively the "Service Parties"). The Supplemental Order authorized the Service Parties to file a motion to keep the report under seal beyond the ten (10) day period to protect disclosure of privileged or confidential information. While the ten day seal period was extended by the court, the report was eventually unsealed.

In *Tribune*, the examiner's court-approved work plan included a procedure for the examiner and his professionals to attempt to resolve claims of confidentiality during the process of the investigation. Despite the examiner's best efforts, approximately fifty-three (53) documents utilized in his report remained subject to claims of confidentiality as of the deadline for filing the report. As a result, the examiner moved to file his report under seal and simultaneously asked the court to overrule the parties' claims of confidentiality and unseal the report. By the time of the hearing on the examiner's motion, most of the parties withdrew their claims of confidentiality and the examiner was authorized to publicly file his report in full.

## XIII. USE OF THE EXAMINER'S REPORT

An examiner's report is meant to be a "source of information that assists parties in identifying assets of the estate, evaluating a plan of reorganization, or describing likely and legitimate areas of recovery." *In re FiberMark, Inc.*, 339 B.R. 321,325 (Bankr. D. Vt. 2006). While motions or orders relating to the appointment of an examiner may shed light on the intended use of the report, recent bankruptcy cases illustrate that the ultimate use of the report may differ significantly from the use initially intended by the parties or the court.

The examiner's interim report in *In re DBSI, Inc. et al.*, Case No, 08-12687 (PJW) (Bankr. D. Del.), for example, led to the appointment of a chapter 11 trustee. While the examiner's proposed work plan with respect to his investigation only contemplated the filing of a single and final report at the conclusion of the examiner's four-month investigation, the examiner, during the course of his investigation, determined that an interim report would be appropriate in part because the examiner had uncovered information that brought into question issues concerning the debtors;

books and records and use of cash. The interim report further described the conduct of the debtors' officers and directors with respect to the debtors, its investors and its creditors, and management's misuse of the debtors' funds.

Citing this information, the U.S. Trustee moved for the appointment of a chapter 11 trustee, arguing that the "fraud and misconduct on the part of DBSI's current management constitutes clear grounds for the court to direct the appointment of a chapter 11 trustee under 11 U.S.C. § 1104(a)." The debtors ultimately entered into a stipulation agreeing to a trustee's appointment.

Examiner reports have also been used by parties to provide a blueprint for future litigation, as illustrated by *Lehman*. The examiner's report in *Lehman* concluded that Lehman may have grounds to file litigation against JPMorgan Chase Bank, N.A. ("JPMorgan") and Citigroup, Inc. in connection with Lehman's failure. Following the report's issuance, the liquidating trustee filed suit against JPMorgan and, more recently, Citigroup, Inc., based on factual allegations similar to those set forth in the examiner's report.

Similarly, in *New Century*, both the post-confirmation liquidating trustee and plaintiffs in a securities fraud class action used the examiner's report as a road map for pursuing litigation against the debtors' officers and directors and independent auditors.

A related issue deals with the admissibility of the examiner's report in litigation or other judicial proceedings. In those cases where an examiner was appointed to conduct an analysis of objective issues, or where the examiner's report was not in dispute, courts tended to admit both the examiner's factual findings and conclusions. *See FiberMark*, 339 RR. at 326, and the cases cited therein.

In the face of an objection, however, most courts seem to agree that an examiner's factual findings constitute inadmissible hearsay, but an examiner's conclusions are admissible, with the court to decide the weight afforded such conclusions. See, e.g., *FiberMark*, 339 RR. at 327; *Newby v. Enron Corp. (In re Enron Corp. Securities, Derivative & "ERISA" Litig.)*, 623 F. Supp. 2d 798, 823 n.21 (S.D. Tex. 2009) (stating that examiner was an "extremely qualified expert in bankruptcy" and thus his conclusions and opinions were admissible as expert opinion in determining the defendants" liability). *But cf. In re Baldwin-United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985) (stating that an examiner's report does not "have the evidentiary character of an opinion by a Court expert" appointed under Fed.R.Evid. 706). As stated by the *FiberMark* court, "[i]n essence, an examiner's report paints a picture, his or her image of what happened in the case, and ends with that expert's opinion of what that story means, in legal terms. The report puts the story on paper and provides a context for debate. It is the duty of the parties to formulate a fuller version of the debate using the rules of evidence." *FiberMark*, 339 B.R. at 325.

A notable exception to the cases cited above is *In re Washington Mutual*, Case No. 08-12229 (MFW) (Bankr. D. Del) ("WaMu"), in which the court excluded the entire examiner's report from admission at the hearing on confirmation of the debtors' proposed plan. In *WaMu*, the court appointed an examiner to review; among other things, a settlement agreement underlying WaMu's then-proposed reorganization plan, between WaMu, JPMorgan and the Federal Deposit Insurance Corporation (the "FDIC"). The settlement resolved lawsuits by and between those entities involving the ownership of about $4 billion in disputed deposit accounts and entitlement to

received and expected tax refunds resulting from WaMu's operating losses. The settlement also included a complete release of claims against JPMorgan and the FDIC by WaMu, its shareholders and creditors. The Official Committee of Equity Security Holders (the "WaMu Equity Committee") objected to the proposed settlement and requested the appointment of an examiner, arguing that investors needed to know the potential value of the company's assets and the potential claims that were released under the proposed settlement to determine whether the settlement was fair and in the best interests of the estate.

An examiner was appointed, conducted an investigation, and filed a report concluding that the proposed settlement "reasonably resolve[d] contentious issues" and was not made in bad faith. The examiner's report further provided that any further litigation would be "highly unlikely" to recover more for shareholders and, instead, would "essentially result ln gambling with currently guaranteed recoveries to unsecured creditors in order to attempt to obtain speculative recoveries for shareholders and other 'out of the money' claimants."

Parties in other cases have entered into stipulations resolving issues regarding the admissibility of an examiner's report. For instance, in ***Tribune***, the patties stipulated to the use and admissibility of the examiner's report during the confirmation hearing. In pertinent part, the parties agreed that: (i) the examiner's opinions would be admissible by any entity for all purposes to the same extent as the opinions testified to by an expert witness under the Federal Rules of Civil Procedure; (ii) the examiner's opinions would not be binding on the court or any entity, nor would there be a presumption of correctness attributed to such opinions; and (iii) all entities would have an opportunity to state and describe their agreement or disagreement with any of the examiner's opinions in their confirmation briefs and to submit appropriate evidence and/or expert testimony in support of their positions during the confirmation hearing.

## XIV. DISCHARGE OF THE EXAMINER

At the conclusion of an examiner's investigation, and after a report is filed, the examiner typically files a motion for an order discharging the examiner and granting other, related relief (a "Discharge Motion"). These motions and subsequent orders (a "Discharge Order") typically contain the following provisions:

- Discharge: A Discharge Order typically will state that the examiner is discharged from any commitments or representations with respect to his duties as examiner.

- Cooperation: A Discharge Order often will require an examiner to cooperate with other parties in the case, particularly in responding to requests for information regarding the examiner's investigation. In Tribune, for example, the Discharge Order provided that the examiner would respond to "reasonable written inquiries" from the parties concerning documents received, maintained or created during his investigation. As discussed more fully below, a Discharge Order typically will place limits on third-party discovery directed to the examiner or his/her professionals.

- Payment of Fees: A Discharge Order typically provides for the reimbursement of the examiner and the examiner's professionals for their reasonable fees and actual costs after the date of discharge for, inter alia, the disposition of documents obtained during the course

of the investigation, responding to discovery requests authorized by the court and preparing and prosecuting fee applications.

- Release: A Discharge Order typically will Include provisions addressing the exculpation of an examiner and his/her professionals. These release provisions generally are broad, providing for the release of the examiner and his/her professionals from any and all liability with respect to any act or omission, statement or presentation arising out of, relating to, or involving in any way, his/her investigation or any report, pleading or other writing filed by the examiner in connection with the bankruptcy cases, except in the case of gross negligence or willful misconduct.

- Disposition of the Investigative Record: A Discharge Order also may address the disposition of the examiner's investigative record (consisting of all documents he or she has gathered and/or prepared during the course of the investigation) as of the date of discharge.

    - In *Lehman*, for example, the Discharge Order required the examiner and his professionals to transition the maintenance of a database of documents compiled during the investigation to a neutral vendor that would undertake custody of and maintain the database,

    - Similarly, in *Tribune*, the examiner was authorized to transfer both his report and the non-confidential documents comprising his investigative record to the debtors; claims agent, which would maintain the documents at the debtors' expense and provide public access to same. The examiner, in turn, was required to maintain the complete record (including privileged materials) for a period of two years following his discharge.

While the respective examiners' dispositions of the investigative records in *Lehman* and *Tribune* were relatively non-controversial, the issue raised concerns and elicited objections in *New Century*, where the disposition of the investigative record, as requested by the examiner, prompted questions regarding the neutrality of an examiner.

The court ultimately granted the examiner's request for authority to transfer portions of the investigative record) including certain materials claimed to be privileged or confidential, to the liquidating trustee. The court reasoned that allowing the transfer of these materials was not inconsistent with the protective order previously entered relating to these materials, but instead furthered the purpose of the order in preventing the bankruptcy estate from having to pay twice for the same investigation in pursuit of potential claims.

The court denied, however, the examiner's request for an order providing that his sharing of documents with governmental agencies, the U.S. Trustee and the liquidating trustee failed to constitute a waiver of any applicable protection or privilege, leaving that issue for another day, and perhaps, another court.

## XV. THIRD-PARTY DISCOVERY OF THE EXAMINER

An examiner is an independent third-party and an officer of the court, whose role is disinterested, non-adversarial, and investigative in nature. See *Baldwin*, 46 B.R. at 316-17; see also *In re Big Rivers Elec. Corp.*, 213 B.R. 962, 977 (Bankr. W.D. Ky. 1997) (recognizing the examiner is an independent third-party and an officer of the court). The examiner is a fiduciary only to the court, and not to other interested parties and does not "act as a conduit of information to fuel the litigation fires of third-party litigants." *Baldwin* 46 B.R. at 316. As such, an examiner is generally not subject to civil discovery and courts have held that an examiner's investigative file is not a judicial record and that there is no right to public access of same. See *Air Line Pilots Ass'n. Int'l v. Am. Nat'l Bank & Trust Co. (In re Ionosphere Clubs, Inc.)*, 156 B.R 414,435 (S.D.N.Y. 1993), aff'd, 17 F.2d 600 (2d Cir. 1994) ("The public interest is in the Report and the Examiner's conclusions, not in the Record upon [which] the conclusions are based.").

An examiner typically will request protection from third-party discovery of both himself and his professionals as part of his Discharge Motion and the court typically will include such a provision in the Discharge Order. In general, such provisions preclude any creditor, party-in-interest in the particular bankruptcy case, or third-party from issuing or serving formal or informal discovery requests on the examiner or his/her professionals relating the debtors, the bankruptcy case, or the examiner's report, appointment, or investigation. Furthermore, the Discharge Motion will typically request and the Discharge Order permit discovery requests upon the examiner and his/her professionals only if: (i) requested by order of a federal district court in the context of a criminal proceeding pending before that court; or (ii) the party requesting such discovery cannot obtain the requested documents from any other source, production would not violate any order of the court, and the documents requested are not privileged.

## XVI. BENEFITS AND DETRIMENTS OF AN EXAMINER

### A. Benefits of an Examiner

Many examiner motions advance alternative grounds for relief in motions for the appointment of a chapter 11 trustee. Often these are filed by the United States Trustee early in the case, particularly when there are reasonable grounds to suspect that management has engaged in fraud, wrongful acts or other misconduct. See 11 U.S.C. § 1104(e). A party moving for a trustee will frequently face an uphill struggle, Some courts have raised the burden of proof on trustee motions to a "clear and convincing" standard. Much of the evidence is under the control of the debtor. The debtor will often claim to have replaced the bad actors in its management, and therefore that any pre-petition misconduct that occurred was not performed by "current management," as required by section 1104(a)(1). But an investigation is still necessary to assure that all wrongdoers have been identified and that the scope of the pre-petition misconduct is fully established, and often an independent examination by a highly-qualified examiner can help clear the air and free the parties to begin to work toward a plan while knowing that a thorough investigation is underway,

In recent years, parties have increasingly sought the appointment of mandatory examiners to investigate issues that have arisen after the filing of the case, These issues include valuation of estate assets, violations of the debtor's fiduciary duties by negotiating deals that are detrimental to the interests of one or more constituencies. The movants will claim they need the assistance of an

examiner to discover the truth about what is happening in the case. The debtor will claim that the movants are overly aggressive adversaries seeking to derail the plan confirmation process and to exact unfair concessions from others in the case. Because the issues underlying an examiner motion filed on the eve of confirmation would likely form the basis of objections to the plan, the court may consider hearing confirmation first. If the court concludes that the objections lack merit, confirmation of the plan will moot an examiner motion because an examiner cannot be appointed post-confirmation. Otherwise, the court can deny or delay confirmation and direct the appointment of an examiner to provide an independent review of the issues raised in the objections.

### B. Detriments of an Examiner

Tensions often arise between examiner and parties-in-interest regarding the range of substantive and procedural issues to be addressed by the examiner. For example, if creditor parties are permitted to undertake or continue Rule 2004 examinations or other discovery during the pendency of the investigation, such parties may attempt to have the examiner pursue their prerogatives. While in some cases such parties and the examiner may share a common interest in obtaining similar types of information, there may be instances in which common ground does not exist, such as where creditors are parties to pending litigation with the debtor. It should always be remembered that the examiner, as an objective and disinterested person, has goals distinct from those of any particular creditor or party in interest, Similarly, creditors may feel that the investigation is not progressing as quickly as they would like and may seek to compel the examiner to press the investigated parties for expedition. The debtor and/or investigated parties may have issues with the reasons the examiner is pursuing certain information or the methods employed. Disputes regarding such issues that are not capable of informal resolution, are most appropriately raised with the court because that is the source of the examiner's charge. Additionally, it should be noted that the cost of the investigation has been the source of tension between the examiner and parties in interest in certain cases.

### C. Best Practices for Examiners

At the conclusion of his appointment as examiner in the Lehman bankruptcy cases Anton R. Valukas detailed for the United States Trustee's office his recommendation as to the best practices for examiners. Attached is a copy of the letter sent by Mr. Valukas to Diana Adams, United States Trustee summarizing his recommendations.

**ANTON R. VALUKAS**
**Chairman of the Firm**
Tel 312 923-2903
Fax 312 840-7679
avalukas@jenner.com

Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312 222-9350
www.jenner.com

Chicago
Los Angeles
New York
Washington, DC

April 1, 2010

*Via E-mail and US Mail*

Diana Adams
United States Trustee
Office of the United States Trustee
33 Whitehall Street, 21st Fl.
New York, NY 10004

*Re: Best Practices for Examiners*

Dear Diana:

When I undertook my appointment as Examiner in the Lehman bankruptcy, you and Cliff White asked that I report, at the conclusion of my investigation, on suggested best practices that might assist future Examiners perform their work. The Lehman examination was, of course, unique to Lehman; and given its size and scope, practices that worked for Lehman may or may not translate to other examinations. But I offer the following observations.

*Initial Steps*

*Recommendation 1: New Examiners should speak with and review the reports of former Examiners to learn what worked in prior assignments.*

The recommendations that follow are not simply mine. As I embarked upon this process, I began by speaking with other Examiners who had served in major proceedings, precisely to get a sense of best practices before I formed my own work plan. I spoke with Richard Thornberg (Worldcom), Neal Batson (Enron), and Josh Hochberg (Refco), and I was greatly assisted by their input. I reviewed the reports filed by those Examiners, and by others, in great detail, to see how they organized, conducted and reported upon their own investigations. All of that was enormously useful and future Examiners should build on our collective experience.

*Recommendation 2: If the Court has not imposed a timetable for the Report, the Examiner should give himself and his team the discipline of a deadline.*

The Lehman matter was especially challenging, given the scope of my assignment and the size of the universe I was asked to explore. It was apparent that our factual investigation would require hundreds of witness interviews. The volume of Lehman documents alone was estimated to amount to close to half a trillion pages; and relevant documents resided not just at Lehman but with dozens of third parties. Added to the magnitude of the work was the limit of time. Although the Court did not impose any deadline for the completion of my Report, I was keenly aware of the exclusivity date for the Debtors to suggest a plan and the fact that the value of my Report would be greatly enhanced if I were able to deliver the Report prior to that date.

My team and I ultimately reviewed more than thirty million pages of documents and interviewed more than 250 witnesses; we produced a comprehensive Report and filed it within thirteen months of my appointment. We could have done more work. We had collected millions more pages we might have reviewed; we had billions more pages we might have requested. We had identified hundreds more people we might have talked to. We might have circled back and re-interviewed each of the 250+ persons we had already talked to. But the fact is that doing that additional work might in theory have added marginally to the final product, while the stark reality is that to do so would have come at an unreasonable cost, both in dollars and time. I set a deadline and adhered to it; and the process was better for that.

*Recommendation 3: The Examiner should enlist, accept, and use the aid and cooperation of the community.*

I have said this before, and I emphasize it again here. My Report could not have been filed as expeditiously as it was without the genuine assistance and cooperation my team and I received from nearly every constituent in the Lehman community.

My order of appointment required that I meet with the interested parties. I would like to think that I would have had the good sense to do exactly that even if the Court had

not had the wisdom to have ordered it, because those meetings were extremely helpful.

By the time of my appointment, the Debtors, the Creditors Committee, and other parties had assembled documents and performed analyses. We asked for – and were provided access to – all of that work product.[1]

The Debtors, the Creditors Committee and the interested parties were and are represented by the cream of the New York and National bars. These excellent lawyers had excellent suggestions, and our conversations with the parties provided real guidance to steer the investigation. Other Examiners could benefit as I did by seeking out and listening to the parties.

That said, while it is important to seek suggestions and guidance from the parties and their counsel, it is critical that the Examiner maintain independence and objectivity.

*Recommendation 4: The Examiner should perform every task necessary to produce a complete report; but do each task once, and do it right. That said, there is utility in doing some early interviews even before document production is complete.*

We were eager to begin witness interviews immediately. We needed, of course, to first collect and review documents. But there were exceptions. One of the suggestions made by other Examiners was that a few key interviews – even before document production – could be very useful to inform issues and suggest the direction of the investigation.

---

[1] While I am sincere in my praise of the parties' cooperation, I don't want to overstate its contribution to the final Report. I have also said this before: we had hoped that the parties' document collection and analysis, by the time of my appointment four months after the bankruptcy filing, would have been more mature and complete than it turned out to be. Because it was not so, I had to extend the projections I had made for completion of my work. But the fact remains that it is a good practice to feed off the work of others wherever possible.

We identified a relatively small number of key witnesses to interview even though document production was in its infancy. In general, those early interviews were with persons who (1) would help inform us on overriding issues and (2) would be available and willing to submit to further interviews after document review. And the other Examiners were right – these initial, early interviews did greatly assist the direction of the investigation.

***Organization of the Team***

*Recommendation 5: The Examiner, of course, needs to assemble the right team for the task and organize it efficiently.*

Every examination will be different and the manpower and organization needs will vary accordingly. But let me set out what did work for me and this matter as a guide for others.

It was apparent that this matter would require the almost full-time participation of scores of lawyers and financial professionals. Organizing them, coordinating their efforts, and avoiding redundancies and waste would present challenges.

*First,* we analyzed the 10 issues that had been assigned to me in my order of appointment and sorted them into four substantive areas. Five teams were created – four substantive teams and one administrative team which exercised oversight and coordination.

*Second,* we assembled a group of senior lawyers as team leaders with backgrounds and experience as trial lawyers, former prosecutors, bankruptcy lawyers, securities specialists and corporate lawyers. Each team was then staffed with other lawyers as necessary. As you know, Bob Byman served as my lead attorney, basically as chief of staff. It was his job to coordinate the activities of the five teams.

*Third,* each team was required to develop a work plan for my approval, so that they and I had a shared understanding of what work they proposed to do and by what deadlines. The work plans were shared among all of the teams so that we could reach consensus that nothing was overlooked but that nothing was being done twice. The work plans from each team listed the documents they wanted to collect, the search

terms to be used for collection, and the parties from whom to request documents. The work plans listed the witnesses each team proposed to interview and the anticipated order and dates for interviews. Of course, there were many witnesses listed by multiple teams; Bob would coordinate which team would take the lead for individual witnesses.

*Fourth,* each team prepared and periodically updated an annotated proof outline of its anticipated sections of the Report. That way, we were able to see early on what areas were covered, what areas remained for planned fills, and whether there were any holes that needed to be plugged.

*Fourth,* we asked Duff & Phelps, my financial advisors, to organize themselves similarly so that each legal team would have counterparts – dedicated advisors focusing on specific issues. To minimize unnecessary expense to the estate, Duff was asked to periodically list for us each deliverable they had been asked to perform, including the team which had made the assignment and the expected delivery date. Duff was instructed that it was not to perform any tasks unless they were reported on the deliverables list.

When we identified areas which required education on topics that even great lawyers might not be intimately familiar with – topics such as credit default swaps or derivative trading or FAS 157 accounting – we had Duff prepare and give us tutorials. We offered the same tutorials to the government as part of our cooperation with them (see below).

*Fifth,* we had regular communication among and within teams to ensure that teams and sub-teams did not develop silo mentalities, at the same time avoiding redundancy as much as possible.

Fee examiners in run of the mill cases typically react negatively to billing entries that show inter-office meetings. This was not a run of the mill event. As the investigation unfolded, hundreds of thousands of documents were reviewed daily; multiple witnesses were interviewed each day. Individual witnesses and documents did not usually fit neatly within a single team's responsibility. It was critical that every team knew what every other team was finding in real time.

We held weekly team leader meetings; key documents were circulated to all team leaders as they were found; interview summaries were circulated to all team leaders as they were prepared. We decided that all team leaders needed to be kept as informed as possible about daily events; each team leader exercised discretion as to whether and to what extent to pass on information to team members.

*Government Coordination*

*Recommendation 6: Government coordination is essential, and best accomplished by regular, agreed protocols.*

My order of appointment, of course, required that I cooperate with government agencies that may have an investigative interest in Lehman; but even if I had not been so ordered, cooperation was essential lest the government decide to block or shut down an area of my inquiry.

I initially met with the SEC and representatives of the US Attorneys for the Southern and Eastern Districts of New York and the District of New Jersey. After the initial face to face meetings, we held weekly conference calls for most of the period. We had several other face to face meetings.

We established several protocols that made the process agreeable to the government, so that they did not feel a need to restrict my investigation.

*First*, we agreed to clear with them any witness before we took an interview. We sent our proposed list of witnesses to the government periodically; after a default period of time (generally 5 business days) without express reservation, we would then be free to schedule an interview. Once scheduled, we would give the government notice of that, so that they had another opportunity to ask us not to interview a particular individual. We asked the government to advise us if there were any questions or subjects they wished us to address in interviews. Over the course of the investigation, the government did ask us to defer speaking to a number of individuals; but eventually, they released us to speak with every person we requested.

*Second*, we kept the government informed in real time of the significant facts we were developing. Our communications were, as these things almost always are, one way.

In our weekly calls, we would debrief the government on key information or documents as we learned it.

*Third*, as mentioned above, we made Duff available – as well as our lawyers who became expert in areas such as Repo 105 – to give the agencies tutorials on subjects they might not be totally familiar with.

Cooperation with the government, of course, includes our interaction with your office. We need not describe to you what that interaction was, but I hope you agree that I achieved my goal to keep you appropriately informed without overly immersing you in unnecessary detail.

***Document Collection and Review***

*Recommendation 7: The Examiner should get – but try not to have to use – Rule 2004 Subpoena power.*

Within weeks of my appointment, I filed a motion asking that the Court grant me expansive Rule 2004 subpoena powers. It was important to have subpoena power; and it was equally as important not to have to use it. Having the power gave my lawyers the leverage to negotiate voluntary production on a much faster track than formal process would have provided.

It was also important that the parties knew I would use the power if pressed. There was a single party which did not voluntarily in timely fashion produce the documents we requested. We issued a subpoena to that party and teed up a motion to compel for the Court; and the party decided to produce rather than fight the subpoena. With the exception of a few other instances where a producing party *requested* a subpoena, we were not otherwise required to use formal process or the Court's assistance to get the documents and interviews we sought.

The document experience carried into the way we conducted interviews, which I describe in detail below. But in all areas, the point is that the Examiner's role is investigative but not adversarial. It is necessary to get the facts, to ask the hard questions, to press for complete production. But it is not necessary to do so with an adversarial tone; it was my experience that we achieved full and complete production

far more quickly by adopting a cooperative tone than we would have through a formal subpoena process.

*Recommendation 8: The Examiner will likely be asked to agree to confidentiality stipulations to get documents; he should agree, but perhaps with a standard order.*

Nearly every producing party requested confidentiality agreements during document production. As part of the cooperative process, I agreed to any reasonable request for such agreements rather than take the time to negotiate or argue. In retrospect, this is the one area in which I might have acted differently than I did. We ended up with 16 different formal agreements and 5 different informal undertakings. It turns out that only a single agreement has come to issue – our relatively minor dispute with the CME over the publication of three documents. But if there had been more disputes, the Court and I would have had to sort out all of these different agreements with slightly different terms. If I had it to do over, I might have asked the Court to approve a single form of protective order to govern production from all parties.

*Recommendation 9: The Examiner should use contract attorneys where possible to conduct document review.*

As you know, we used contract attorneys to the fullest extent practicable to do first level document review. We had as many as 70 contract attorneys working at the same time, and our experience with them was excellent. We estimate that the savings to the estate, over the rates that would have been charged by Jenner associates, was in the tens of millions of dollars; moreover, we could not have deployed 70 additional, full time Jenner lawyers without a substantial time lag – the whole process would have taken much longer without the use of contract attorneys.

*Recommendation 10: But substantive review must be done by lawyers who are fully integrated and invested.*

We do not want to suggest that contract attorneys should have been used to an even greater extent than they were. As a group, the contract attorneys performed very well for first level review – that is, the initial screening of a data dump to identify documents of possible substantive interest. All second level review was performed by Jenner

lawyers. Our experience was that most of the contract attorneys did not have the skills, background and commitment to do effective and efficient second level review.

Jenner lawyers supervised the contract attorneys and exercised quality control. Jenner lawyers who did document review were fully integrated into the substantive teams so that they actually knew what to look for and so that they were able to make more refined searches to locate key documents more quickly.

*Recommendation 11: The documents should be collected and maintained so as to make them an asset of the estate.*

Our document collection and archival was conducted by seasoned trial lawyers who know how to try cases. As a result, the data base we have assembled is, as it should be, a valuable asset of the estate to limit costs in any pending and future litigation.

Many lawyers are familiar with document management systems such as Concordance which have served them in the past. But we recognized early on that those usual systems would not be up to the task of handling the quantities of documents we would assemble. We involved IT personnel at the outset to ensure that we had the right systems, and opted to maintain our document repository on two extremely robust, easy to search systems, CaseLogistics and Stratify.

The numbers are staggering. We extracted roughly 35 million pages of documents from Lehman's systems – an enormous amount of material, yet only one tenth of one per cent of the universe of Lehman's electronically stored data. We used carefully refined searches so that we would not be overwhelmed with returns. We kept careful records of the search terms we used, the date ranges of the searches, and the custodians against whom the searches were run. Those searches need not be rerun; the parties can look at our searches and add focused additional searches if necessary to their specific needs, but they need not reinvent our wheel. We have assembled the collected documents into electronic, searchable format, so that parties may pull what is relevant to them.[2]

*Witness Interviews*

[2] Protective order issues still remain before free public access can be granted, but the documents are assembled; that substantial work need not be done again.

*Recommendation 12: The Examiner should consider using informal interviews in most cases.*

As you know, one of the suggestions made to me by other Examiners – which I adopted – was that wherever possible interviews be conducted informally, without requiring that the witness be sworn and without transcripts. There are obvious pros and cons. Even had I used transcribed statements under oath, they would have no evidentiary value in pending or future litigation, so the real advantage of oath and transcription is that a quotation of a witness's testimony can be precise. But my team of seasoned litigators estimated that it could easily double the amount of time take interviews with transcription; it would add significant cost; and, significantly, we anticipated that witnesses would be far more likely to be open and candid in an informal setting than if a reporter was transcribing each word. Moreover, the creation of transcribed statements might have impacted pending Government investigations and the government's willingness to release persons for interview.

Balancing these factors, I decided to use informal interviews wherever possible – and that turned out to be possible in all cases. As I noted above in the document collection process, our tone was investigative rather than adversarial. The informality of the interviews was a definite aid. We asked the tough questions where we had to; but the informal setting and objectivity we brought to the process made the witnesses comfortable to fully answer our questions.

To assure accuracy, all interviews were conducted by at least two attorneys, one of whom was assigned to keep careful notes. Flash summaries were prepared as soon as possible, usually the day of the interview, and reviewed by all lawyers present while recollections remained sharp; and full summaries were made and reviewed as soon as practical after that.

*Recommendation 13: The Examiner should make the interviews an open book, not an occasion for cross-examination.*

Prior to each interview we provided advance notice of the topics we intended to cover and advance copies of the documents we anticipated showing the witness. That procedure would have been anathema to a litigator – but, again, my goal was to get the

facts, not to surprise a witness into some admission. By giving advance notice, witnesses were able – and expected – to refresh recollection before the interview rather than on the fly. That greatly reduced the need for follow-up interviews. It put the witnesses and their counsel at ease that we were not trying to trap.

A number of the parties – including nearly every party against whom I reported colorable claims – have expressly told me that while they might disagree with my conclusions, they were satisfied with the process. I commend that process to future Examiners.

*Recommendation 14: Interview outlines should be shared among teams.*

In general, detailed interview outlines were prepared at least a week in advance and circulated among team leaders so that all substantive teams could have input on each interview. Moreover, having the outlines prepared in advance allowed us to identify the topics to counsel for the interviewee as described above.

*Recommendation 15: The Examiner can supplement or supplant interviews with written questions.*

In all, my lawyers and I interviewed more than 250 individuals. There was only one individual I sought to interview but could not – Hector Sants, chief executive of the UK's Financial Services Authority ("FSA"). However, the FSA did provide detailed, written answers to specific questions that would have been posed to Mr. Sants, and while not perhaps as satisfying as an interview, they sufficed.

In other cases, letters to interested parties' counsel with fairly discrete questions to confirm key background facts proved very helpful. For example, we asked a clearing bank to confirm that we had set out in a written question a comprehensive list of all collateral calls made in a particular period. The written exchange was more efficient than Q&A in an interview.

*The Report*

*Recommendation 16: Examiners should carefully define terms not defined in their orders of appointment.*

My order of appointment asked me to opine on the existence of colorable claims but did not define that term. The Second Circuit has described colorable claims as ones "that on appropriate proof would support a recovery," "much the same as that undertaken when a defendant moves to dismiss a complaint for failure to state a claim."[3]

I was mindful of the fact that there is a high likelihood that an actual claim will be asserted wherever I have concluded that a colorable claim exists, so I was reluctant to adopt a motion to dismiss standard. Having conducted an extensive factual investigation, I felt it was appropriate to use a higher threshold standard, and therefore defined "colorable claim" as one for which I found sufficient credible evidence to support a finding by a trier of fact.

In addition to defining terms, I recommend that future Examiners do something early on that I did somewhat late. Appendix 2 to my Report is a 98 page glossary of defined terms, names, acronyms and phrases; without that glossary and the ability to use abbreviations for defined terms, the Report would have been cumbersome and unwieldy. I did not append another document that was created during the writing process – a set of protocols that collectively amounts to our own private Blue Book of Citations. Although there were many individuals who contributed first drafts of sections, the overall Report was carefully edited to conform to the Glossary and Blue Book, resulting in a uniform style and appearance. That is not merely cosmetic; I believe that it greatly enhanced the readability of this lengthy tome.

But I confess that we came a little late to the realization how useful the Glossary and Blue Book would be. The editing process would have been less a challenge had we begun assembling and circulating those documents to the substantive teams before first drafts were created.

---

[3] *In re STN Enters.*, 779 F.2d 901, 905 (2d Cir. 1985); *In re KDI Holdings, Inc.*, 277 B.R. 493, 508 (Bankr. S.D.N.Y. 1999).

*Recommendation 17: The Report should contain as much detail on the claims that are not found as it does for claims which are found.*

We devoted as much time and energy to conclude that claims did not exist as we did to conclude that there were claims. And we devoted almost as much space in the Report to those non-claims as we did to the claims.

I felt it was important that the Report set out the detailed facts that led me to conclude the absence of claims so that the parties can use that analysis to make measured judgments whether to expend their own time pursuing claims I have concluded are not there.

*Recommendation 18: Examiners should consider whether persons against whom the Examiner tentatively determines there are colorable claims should be given an opportunity to supplement the record.*

After I made tentative determinations as to colorable claims, I decided to give each such person and entity an opportunity to present additional factual detail they thought might dissuade me. I stressed that I was not looking for a *Wells* submission, but simply additional facts that I might not have had in making the initial determination. Every identified party took me up on the offer and presented additional materials.

I should stress that I perceived no obligation to go through that procedure, and I do not recommend that any such procedure be used in all Examiners' investigations. I simply note that under the unique circumstances of my investigation, the process worked; it had a real impact upon reaching fair and reasoned judgments. Future Examiners should consider whether it might work for them.

* * * * * *

Diana, it has been my great honor and privilege to have served as Examiner in this matter; thank you again for the trust you showed in me and our firm. I hope that this is useful to you; and I stand ready to assist in any further way I can.

Sincerely,

Anton R. Valukas

cc: Robert L. Byman

## IV. Receivers.

### A. Rhoades

[Receivers section follows. (17 pages)]

# Receiverships, Another Chapter

By

C. David Rhoades, CFE, CTP, CFC

Presented to the Tenth Circuit Fellows of the American College of Bankruptcy

August 23 - 24, 2019

Santa Fe, New Mexico

**Receiverships, another Chapter.**

The concept of Receiverships dates back well over 150 years. The case law, much of which was promulgated by the United States Supreme Court laid a foundation that has remained solid to this day. In this paper, I will give the applications that have been used to operate Receiverships and that can be used today as an alternative to utilizing the Federal Bankruptcy Courts.

Receiverships can be either under Federal or State jurisdiction. In my practice of doing nearly 200, Federal cases only comprise about 5% of those filed. Regardless of the jurisdiction, the basics are governed by the state law. I will explore the operations of a Receivership and the case law that sets forth the rules for the operations.

Because much of the case law and statutes are state related, and since my experience is primarily in Oklahoma, I will support my concepts with Oklahoma law. 12 O.S. §§1551 – 1554, see Exhibit A. As you can see, there is very little statutory law the governs Receiverships in Oklahoma. There is a high probability that the other states will have comparable case law and statutes that can be applied, as we have in Oklahoma.

It is paramount to get an Order Appointing Receiver that defines as many variables as possible. At least under Oklahoma law, the scope for the Receivership Estate and the power of the Receiver is functionally unlimited as long as the Order Appointing Receiver dictates the guidelines. The scope and powers are outlined herein:

**1. A Receiver is Independent.** Although usually nominated by a creditor, a receiver can be appointed *sua sponte*. The parties must understand the relationship between all of the stakeholders. The Receiver works for the Judge and the Judge alone. This creates an independent party for a situation in which the parties usually are adverse. These cases support this relationship:

**a)** A receiver is not an agent of a receivership's creditor, and, thus, statements by the receiver cannot be imputed to the creditor. *See Atlantic Trust Co. v. Chapman*, 208 U.S. 360, syllabus (1908) ("The receiver is not the agent of the plaintiff in the

litigation nor does the plaintiff have any control or authority over him . . . ."); 12 C. Wright, A. Miller, & M. Kane, Fed. Practice and Proc., § 2981, at 9-10 (2d ed. 1997) (A receiver "is . . . not an agent of the parties."); Actions of a receiver cannot be imputed to a party in the receivership action. *In re Phillips*, 24 B.R. 712, 714 (Bankr. E.D. Cal. 1982) ("The receiver is not the agent of the plaintiff nor . . . acting on the plaintiff's behalf or under his control.").

**2. Judicial Immunity.** A Receiver must be able to do their job without the threat of intervention. It is inevitable that the parties will attempt to influence the decisions that the Receiver makes and when they are unsuccessful, the threats begin. With judicial immunity, the Receiver is protected by this shield and can do their job. The Courts have reinforced this concept.

**a)** The case of *Hathcock v. Barnes*, 25 P.3d 295, 296 (Okla.Civ.App. 2001) cited with approval the Oklahoma Supreme Court case of *Farrimond v. State ex rel. Fisher*, 8 P.3d 872, 876 (Okla. 2000) which noted "a court-appointed receiver acts as a functionary of the court and as such is performing a judicial act. Thus, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches". *See also, Teton Millwork Sales v. Schlossberg,* 311 F. App'x 145, 150 (10th Cir. 2009) ("a court-appointed receiver has absolute quasi-judicial immunity if he is faithfully carrying out the appointing judge's orders.") (citation omitted).

**3. Business Judgment Rule.** As a Receiver, one cannot always 'get it right' even with Court approval of the major decisions. It has been recognized that in a fiduciary capacity, a Receiver has to do the best they can with what they have to work with. It is important when considering a candidate for appointment, that you attempt to find someone that has some relevant experience, where their decisions have a better chance of success. This does not mean industry specific, although that helps, but does mean that a broad range of experience is necessary. An example of this is:

**a)** Although there appears to be a dearth of federal common law on this topic, Oklahoma courts have also long recognized that a receiver's decisions regarding the management and operations of property within his control are subject to the business judgment rule. *See Harris v. Dildine*, 251 P. 76, 77 (Okla. 1926), ("A receiver is vested with discretion to manage and control the property entrusted to him in such manner as an ordinarily prudent business man would manage and control his own property.") (Internal quotation marks and citations omitted). "[R]eceivers, just like corporate directors, are entitled to the deference of the business judgment rule in their decision-making concerning the management of a corporation." *Golden Pac. Bancorp v. F.D.I.C.*, No. 95 CIV. 9281 (NRB), 2002

WL 31875395, at *9 (S.D.N.Y. Dec. 26, 2002), *aff'd sub nom. Golden Pac. Bancorp. v. F.D.I.C.*, 375 F.3d 196 (2d Cir. 2004).

**4. Authority.** In addition to the state statutes and case law, there is some Federal support for the receivership process. Examples are:

**a)** Federal Rule of Civil Procedure 66 and federal common law support the appointment of a receiver. The 11th Circuit Court of Appeals held in the case of *National Partnership Inv. Corp. v. National Housing Development Corp.*, 153 F.3d 1289 (11th Cir. 1998) at pages 1291-1292:

As the First Circuit noted in Chase *Manhattan Bank, N.A. v. Turabo Shopping Center, Inc.*, 683 F.2d 25, 26 (1st Cir. 1982), "[m]ost federal court decisions dealing with the appointment of a receiver pendente lite appear to apply federal law without discussion." Of those circuits that have directly addressed the issue, each has held that the appointment of a receiver in a diversity action is governed by federal law. *See Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993); *Turabo*, 683 F.2d at 26; see also *Resolution Trust Corp. v. Fountain Circle Assocs. Ltd. Partnership*, 799 F.Supp. 48, 50 (N.D.Ohio 1992); *New York Life Ins. Co. v. Watt West Inv. Corp.*, 755 F.Supp. 287, 289-90 (E.D.Cal.1991). Commentators generally approve of the conclusion reached by these courts. *See* 12 Charles Alan Wright et al., Federal Practice and Procedure § 2983, at 33-35 (2d ed.1997); 13 James Wm. Moore et al., Moore's Federal Practice ¶ 66.09 (3d ed.1998).

The conclusion that federal law governs the appointment of receivers is based on several considerations. First and foremost, the appointment of a receiver in equity is not a substantive right; rather, it is an ancillary remedy which does not affect the ultimate outcome of the action. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497, 43 S.Ct. 454, 456, 67 L.Ed. 763 (1923). The conclusion that federal law governs the appointment of a receiver thus does not conflict with the *Erie* doctrine's requirement that state law apply to matters of substance. *New York Life*, 755 F.Supp. at 291, 12 Wright § 2983, at 34; 13 Moore ¶ 66.09; *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674, 70 S.Ct. 876, 880, 94 L.Ed. 1194 (1950) (noting that, in a diversity case, a declaratory remedy may be given by a federal court even if that remedy is unavailable in state court); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) (stating that the equity power of a federal court exercising diversity jurisdiction cannot be equated with state law under the *Erie* doctrine).

Second, Federal Rule of Civil Procedure 66 and the accompanying Advisory Committee's Note assert the primacy of federal law in the practice of federal receiverships. *New York Life*, 755 F.Supp. at 289-90, 12 Wright § 2983, at 35. Thus, to the extent Rule 66 dictates what principles should be applied to federal receiverships, courts must comply with the Rule even in the face of differing state law. *See Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965) (stating that in a diversity case, "[w]hen a situation is covered

> by one of the Federal Rules, ... the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."); *see also* 12 Wright § 2983, at 34 (stating that the conclusion that federal law governs the appointment of a receiver is consistent with *Hanna*). [footnotes omitted]
>
> *See also, Am. Bank & Trust Co. v. Bond Int'l Ltd.*, No. 06-CV-0317-CVE-FMH, 2006 WL 2385309, at *7 (N.D. Okla. Aug. 17, 2006) (accord).

**5. What assets to take must be considered in the Pleadings.** The universe is limited to one of two decisions. The decision consists of what needs to be considered is the breath and scope of what needs to be done. Fundamentally, do you take:

**a)** The assets.

**i.** These must be defined.

**ii.** Eliminates confusion.

**iii.** Is usually faster to convert from a tangible asset(s) to cash, or

**b)** The entity.

**i.** Allows for inclusion of things that you do not know at the time of the filing. Sometimes this is good and sometimes it is bad. Knowing the debtor/defendant, their history, their credibility, and their business operations will guide this decision.

**ii.** More responsibility for dealing with the taxes and other enforcement actions, becomes the responsibility of the Receiver, unless exculpated in the Order Appointing.

**c)** At the conclusion of the case, the Receivership is dismissed and all of the historical liabilities go back to the debtor/defendant. This is important when there are things like environmental impacts that are not remediated, assets that have a negative value and taxes that cannot be dealt with within the Receivership.

**6. Impediments: A Receivership is an extraordinary remedy but at the discretion of the Court, can be invoked.** Once a Judge becomes comfortable with the process, they usually will give a great deal of deference to the Receivership process. It allows them to have someone step in and shield the Court from unnecessary work with the best interests of the Court and the parties in mind. The Receiver can make nearly all of the operating decisions,

bring solutions instead of problems to the Court and move a case along, sometimes dragging the parties with them. Below is some support for the appointment:

**a)** the 5th Circuit Court of Appeals in the case of *Santibanez v. Wier McMahon & Co.,* 105 F.3d 234 (5th Cir. 1997) at page 241 opines:

> Moreover, the District Court had the power to appoint a receiver to take possession of the judgment debtor's property for preservation under Federal Rule of Civil Procedure 66. Under that rule, the appointment of a receiver can be sought "by anyone showing an interest in certain property or a relation to the party in control or ownership thereof such as to justify conservation of the property by a court officer." 7 Moore et al., ¶ 66.05[1]. The appointment is in the sound discretion of the court. *Id*. Similarly, "the form and quantum of evidence required on a motion requesting the appointment of a receiver is a matter of judicial discretion." 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2983 (1973) (citing authorities). Courts have held that receivers may be appointed "to preserve property pending final determination of its distribution in supplementary proceedings in aid of execution." 7 Moore et al., ¶ 66.05 [1] (citing *Haase v. Chapman*, 308 F.Supp. 399 (W.D.Mo.1969)).

**b)** the 1st Circuit Court Appeals in the case of *Consolidated Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322 (1st Cir. 1988) beginning at page 326 noted (this is reformatted below to allow for better analysis):

> Courts have recognized many factors that are relevant for a court to consider when determining the appropriateness of the appointment of a receiver. These include:
>
> i. fraudulent conduct on the part of the defendant, *see Burnrite Coal Briquette Co. v. Riggs,* 274 U.S. 208, 212, 47 S.Ct. 578, 579, 71 L.Ed. 1002 (1927);
>
> ii. imminent danger that property will be lost or squandered, *see Gordon v. Washington*, 295 U.S. 30, 37-39, 55 S.Ct. 584, 588-89, 79 L.Ed. 1282 (1935); *Garden Homes, Inc. v. United States*, 200 F.2d 299, 301 (1st Cir.1952);
>
> iii. the inadequacy of available legal remedies, *see Leighton v. One William Street Fund, Inc.,* 343 F.2d 565, 568 (2d Cir.1965);
>
> iv. the probability that harm to the plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment, *see Mintzer*, 263 F.2d at 825;
>
> v. the plaintiff's probable success in the action and the possibility of irreparable injury to his interests in the property, *see Bookout v. First*

*Nat'l Mortgage & Discount Co.*, 514 F.2d 757, 758 (5th Cir.1975); and

vi. whether the interests of the plaintiff and others sought to be protected will in fact be well served by the receivership, *see Commodity Futures,* 481 F.Supp. at 441.

All of the foregoing do not have to be met, in fact one is sufficient. Additionally, this is not the universe of the reasons that a Receiver should be appointed.

**c)** the 2nd Circuit Court of Appeals opined in *Citibank, N.A. v. Nyland (CF8) Ltd.*, 839 F.2d 93 (2d Cir. 1988) at page 97:

> We agree with appellants' contention that the appointment of a receiver is not automatic under the mortgage agreement, that "the appointment of a receiver is considered to be an extraordinary remedy", and that the remedy should be employed cautiously and granted only when clearly necessary to protect plaintiff's interests in the property. *Chambers v. Blickle Ford Sales, Inc.*, 313 F.2d 252, 260 (2d Cir.1963). We believe that Citibank made an adequate showing that allowing New York Land to have a continuing role in managing the building would be harmful to the premises' marketability. This harm to its marketability would also reduce the value of the security represented by Citibank's mortgage.
>
> Furthermore, the mortgage agreement between Citibank and Nyland provides that upon the occurrence of any event of default (as explained in the mortgage), Citibank may apply for the appointment of a receiver. Given that it is undisputed that several events of default had occurred, we believe that this provision strongly supports the appointment of a receiver. *See* New York Real Property Law § 254(10); *Meyer v. Indian Hill Farm, Inc.*, 258 F.2d 287, 293-94 (2d Cir.1958); *Febbraro v. Febbraro*, 70 A.D.2d 584, 585, 416 N.Y.S.2d 59 (2d Dep't 1979). It is entirely appropriate for a mortgage holder to seek the appointment of a receiver where the mortgage authorizes such appointment, and the mortgagee has repeatedly defaulted on conditions of the mortgage which constitute one or more events of default. *See, e.g., Mancuso v. Kambourelis*, 72 A.D.2d 636, 637, 421 N.Y.S.2d 130, 131 (3d Dep't 1979); *Febbraro v. Febbraro, supra; Home Title Insurance Co. v. Isaac Scherman Holding Corp.,* 240 A.D. 851, 267 N.Y.S. 84, 85 (2d Dep't 1933). *See also, Am. Bank & Trust Co.,* 2006 WL 2385309, at *7.

**7. Power of the Receiver.** The Receiver has many of the same powers that a Trustee under 11 USC bankruptcy provisions can invoke. This allows for a case to be handled with efficiency

and mitigates the involvement of the Courts. Again, these are other ways where the Receivership speeds the process along. Some of those powers are:

**a) The ability to reject contracts.** The Receiver has a right to reject any contracts or leases related to the Assets as found in *Sunflower Oil Co. v. Wilson,* 142 U.S. 313, 322 (1892) and *U.S. Trust Co. v. Wabash W. Ry. Co.*, 150 U.S. 287 (1893).

**b) The ability to sell assets free and clear of liens, claims and encumbrances.** The limitations are similar to a trustee's, in that they cannot remove deed covenants, avoid certain taxes, and other provisions. It is clear that a Receiver may conduct a sale of assets prior to the entry of a final judgment. One hundred thirty-two (132) years ago, the United States Supreme Court addressed the notion of a Receiver's sale free and clear prior to entry of a final judgment in *First National Bank of Cleveland v. Shedd,* 121 U. S. 74, 7 Sup. Ct. 807, 30 L. Ed. 877 (1887); wherein it was held that there is "no doubt" that a Court has the power to authorize a Receiver to sell property prior to an adjudication of the merits of a foreclosure case.

i. **When defined in the Motion to sell the assets, the sale can force the Right of Redemption or its abandonment.** We include in our sale orders the verbiage that addresses this right by forcing the issue: To protect the Debtor's equity of redemption pursuant to 42 Okl. St. §18, the Sale Order should provide that the Debtor has the right to redeem the property by paying the total amount due on the Creditors' claims in cash at any time prior to the entry of the Confirmation Order. Such procedure protects the Debtor's right to redeem the property by tendering money. The origin of the equity of redemption and the means by which such right is terminated in Oklahoma is the case of *Balduff v. Griswold*, 60 P. 223 (Okla.Terr. 1900), which cites as the origin of such concept the case of *Carr v. Carr*, 52 N.Y. 251 (1873), which in turn cites at page 258 the case of *Murray v. Walker*, 31 N.Y. 399 (1865) wherein at page 404 it was held that a debtor's equity of redemption in mortgaged real property is terminated when they have the "right to answer; and either contest the honesty of the loan, or tender the money and redeem". The Receiver

> requests the Court enter the Sale Order, providing that the equity of redemption afforded to Debtor shall be fully enforceable until entry of the Confirmation Order; and that upon entry of the Confirmation Order, all rights of the Debtor in and to the property including any equity of redemption shall be finally and forever extinguished and that the Receiver's fee is earned in either case.

**c) Injunctions to prohibit creditors from gaining a superior position without justification.** In nearly every case, creditors attempt to improve their payment position by trying to get a judgement or other priming position to other unsecured creditors. This race to the courthouse can be eliminated by including in the Order Appointing something similar to the following: To facilitate this Court's jurisdiction and to protect the assets in its possession, it has long been held that other parties should not be permitted to interfere with a receiver's administration of the assets held *in custodia legis*. This concept dates back at least 164 years to English common law and the case of *Ames v Birkenhead Dock Trustees* (1855) 20 Beav 332 wherein Lord Romilly, Master of Rolls said "There is no question but that this court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous; this court requires and insists that application should be made to the court, for permission to take possession of any property of which the receiver either has taken or is directed to take possession." Cited with approval by the U. S. Supreme Court in *Barton v. Barbour,* 104 U.S. 126, 129 (U.S. 1881). This Court has authority to issue blanket injunctive relief that is binding on both parties and non-parties as part of this Court's equitable jurisdiction over the assets in this receivership. The recent case of *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543 (6th Cir. 2006) addressed and specifically approved a blanket injunction binding on both parties and non-parties beginning at page 551:

> Once assets are placed in receivership, a district court's equitable purpose demands that the court be able to exercise control over claims brought against those assets. The receivership court has a valid interest in both the value of the claims themselves and the costs of defending any suit as a drain on receivership assets. *See SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir.1985). To this extent,

> the receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained. *See Barton v. Barbour,* 104 U.S. 126, 128, 26 L.Ed. 672 (1881) ("It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained.") This power extends to the institution of any suit, and not just a proceeding for execution of a judgment against the receivership in the receivership court. *Id.* at 129, 104 U.S. 126. ("We think, therefore, that it is immaterial whether the suit is brought against [the receiver] to recover specific property or to *552 obtain judgment for a money demand. In either case leave should first be obtained.") Because the court's power of injunction in a receivership proceeding arises from its power over the assets in question, non-parties to the underlying litigation may be bound by a blanket stay, so long as the non-parties have notice of the injunction. *See Bien v. Robinson,* 208 U.S. 423, 427, 28 S.Ct. 379, 52 L.Ed. 556 (1908) (finding "frivolous" the contention that a non-party would not be bound by the court's injunction against claims against a receivership under the court's control); *see also SEC v. Wencke,* 622 F.2d 1363, 1371 (9th Cir.1980) (finding the district court's equitable powers over the property in receivership sufficient to justify a blanket stay against litigation without leave of the court, even against non-parties).
>
> The appointment of a Receiver constitutes an implied injunction against any interference with property in the custody of the Receiver. *See Moller v. Herring,* 255 F. 670, 670 (5th Cir. 1919).

**d) Subpoena power can be granted in the Order Appointing Receiver and should be, to facilitate the discovery process.** This concept allows the Receiver to find assets and marshal them. It also inspires parties that are reluctant to either divulge or turn over data to do so to avoid being held in contempt of Court or have the Court's protection in the event other parties do not want them to divulge information.

**e) If the power to appoint a receiver is included in the loan documents for the Plaintiff creditor, the appointment is nearly guaranteed.**

i. *Citibank, N.A. v. Nyland (CF8) Ltd., supra*, because the mortgages provide for the appointment of a Receiver, the application was granted.

**f) The ability to bridge operating licenses can be granted in the Order Appointing Receiver.** There are times that it is critical for the ongoing operation

of the Receivership Estate business to be able to operate with licenses that are held by the company. This dictates that the Receivership be granted over the entity, not just the assets. Examples:

i. In the healthcare field, without the preservation of the license, the facility has to close and sometimes lose a competitive funding advantage from CMS who pays Medicare and Medicaid. Also, the certificate of need was awarded by the State Department of Health and without it, no new patients or residents can be on-boarded.

ii. In most states where individuals or companies are in the business of selling alcoholic beverages, whether in a package store or in a bar/restaurant, there is a license required to operate. Without the instant preservation of the license, the business closes and the going concern value lost.

**g) The assets can be marshalled immediately.** The Order Appointing Receiver should include provisions where anyone who is currently holding any assets of any kind (or the proceeds of the sale of the assets) should turn them over to the Receiver and those assets will become a part of the Receivership Estate. The Receiver can analyze the assets and then choose to keep them or reject them, based upon the business judgment rule.

**h) Assets of the Receivership Estate are held in Custodia Legis.** Once a Receiver is appointed, all property in the possession of the debtor passes into the custody of the Receivership court, and becomes subject to its authority and control. In the exercise of its jurisdiction over the debtor's property, the court has power to issue injunctions and all other writs necessary to protect the estate from interference and to ensure its orderly administration. *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995).

**8. Forced cooperation by Defendant/Debtors.**

i. We include in the Order Appointing Receiver the following paragraph: In the event that any parties to this action or any entities owned by the Defendants, either individually or collectively, have assets in their possession or have transferred assets that may be or was property of the Estate, the parties shall identify those

assets and at the Receiver's discretion, turn the assets over to the Receiver for further disposition. All such property shall be included in the Estate.

**9. Forced cooperation by creditors (including injunctive relief).**

i. We put in our Orders Appointing Receiver the following paragraph: In order to promote judicial efficiency, all persons who receive actual or constructive notice of this Order are enjoined in any way from disturbing or in any way interfering with the Receiver's administration of the Estate or from prosecuting any new proceedings (including collection or enforcement proceedings) that involve the Receiver or the Estate unless such person or persons first obtain the permission of this Court or the Receiver. All parties to this case and any other entity given notice of this order are hereby enjoined from any and all of the following:

a) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Assets, the Estate or the Receiver that was or could have been commenced before the entry of this Order or to recover a claim against the Assets, the Estate or the Receiver that arose before the entry of this Order;

b) any act to obtain possession of or to exercise control over the Estate or any property thereof;

c) any act to create, perfect, or enforce any lien against the Estate or any property thereof;

d) any act to create, perfect, or enforce against the Estate or any property thereof any lien to the extent that such lien secures a claim that arose before the entry of this Order;

e) any act to collect, assess, or recover a claim against the Assets, the Estate or any property thereof, or the Receiver, that arose before the entry of this Order; or

f) the setoff of any debt related to the Assets that arose before the entry of this Order against any claim against the Assets, the Estate or any property thereof or the Receiver.

**10. Forced cooperation by outsiders.** We put the following paragraph in the Order Appointing Receiver: **The parties and all other persons or entities served with a copy of this order shall cooperate fully with and assist the Receiver in the performance of his duties** subject to a party's appropriate assertion of the Fifth Amendment privilege against self-incrimination, and other appropriate assertion of any other privilege or right. This cooperation and assistance shall include, but not be limited to, the turnover of any and all Assets, providing any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this order; providing any password required to access any computer or electronic files in any medium; turning over any assets (cash or other tangible assets); and advising all persons who owe money to Defendants resulting from Defendants' ownership of the Assets that all such debts should be paid directly to the Receiver.

**11. The ability to put the entity into either a Chapter 7 or 11 if circumstances warrant.** There are instances that the ability to invoke the powers of the Receivership in other jurisdictions are cumbersome and it is more efficient to use the bankruptcy court to facilitate the process.

**12. The ability to issue Receiver's Certificates (Court approved loans).** There is the ability, with the Court's approval, where a Receiver can borrow money for the operation of the assets that becomes a super priority obligation and a priming lien similar to § 364 of the Federal Bankruptcy Code.

**13. Cost.** It is my experience that the cost is substantially less in state court receiverships. The elimination of many of the procedural processes, the types of pleadings, the flexibility of the Receiver versus the trustee or the Debtor in Possession saves money. The lack of mandatory reporting such as the voluminous Monthly Operating Reports saves manpower, which equates to money. The reporting is done on a request basis, typically. The elimination of the first day motions and orders and other basic pleadings also saves time and money. When it comes to a plan, in Receiverships it is done with the sale to a third party or back to the original equity holders and there are no disclosure statements or formal plans, just the sale motions and orders, which are substantially shorter, but still inclusive.

**14. Speed.**

a) Sales can be done and closed in 75 days.

b) Discovery can be accelerated.

c) Usually the dockets are processed faster.

**15. Similar result as a foreclosure, just faster.**

a) Free and Clear.

b) With notice and opportunity, the buyer can be in title inside of 75 days.

c) Insurable title.

**16. Avoidance of environmental liability for the Plaintiff.**

a) One of the biggest fears from a Plaintiff's standpoint is that they could become a 'responsible party' for liabilities that are discovered in the future and that is eliminated because they do not take the asset in title.

b) The Receiver can do the clean-up without incurring any liability. Another utilization of the Judicial Immunity protection awarded to the Receiver.

**17. Multi-state jurisdiction is possible by domesticating the case.** This can be done by:

a) Filing a separate action in the affected state.

**i.** This is a short pleading and only deals with the specific assets that need attention in that jurisdiction.

**ii.** Requesting that the new court take judicial notice of the base case with an emphasis on what is being requested in the new jurisdiction.

**18. Operation of a business is flexible.**

a) Initially it is better to leave the existing folks in place to maintain continuity. Most of the staff people need and want their jobs and the upper management is not important to the day-to-day operations.

b) However, replace whomever (including the owners) if they cannot be trusted.

**19. Tasks that should be granted in the Order Appointing Receiver:**

a) Forensic Accounting to determine where the money went.

b) GAAP conversion of the existing accounting to allow all stakeholders to be able to compare the business to some level of standards that would be more easily

defined. Caution is warranted if the historical accounting was done consistently on a tax basis.

c) Valuation of the business or the assets. This is not typically as detailed as an appraisal and is much less costly.

d) Going Concern Analysis should be done superficially in the early stages and then in more depth once the case has progressed and the Receiver has a better handle on the business.

**20. Fees and expenses are a super priority and there is a specific lien issued at appointment that extends beyond the life of the case.** Without this provision, it is suspect that anyone would want to be appointed. It is important for a Receiver to do a superficial analysis of the assets to determine if they are going to get paid. There are circumstances where one takes a Receivership to assist the Court or the citizens of the community. Those should be considered carefully.

**21. Privileged communications.** The Receiver can have a provision in the Order Appointing Receiver that allows them privileged communications with all lawyers in the case and their staff. This inclusion usually improves the potential for settlement, since all parties can tell the Receiver the truth and not just the specific side's wants and desires.

**22. Corporate Governance.** The ability to remove the board of directors and appoint someone else or himself can be done if the Receiver is appointed over the entity. This eliminates the capacity for the Defendant to attempt to put the entity into a Chapter proceeding or do other things that will throw a wrench in the gears of the operation of the business.

**23. Acceptance usually requires an education.**

a) Many Judges do not understand the process and the scope, so it is important to give the Court enough ammunition to be able to grant the request for the appointment. Once they have appointed a Receiver and it goes smoothly, the subsequent requests are much easier.

b) Many lawyers don't understand how a Receivership benefits their client and their case. On the other hand, the defendant/debtor that does understand will resist, because their client does not want to be exposed to the light of day that the Receivership invokes.

**24.** A question that has come up and I have not done appropriate research to deal with is: Can a Receiver create a procedure that would allow for the cram down of secured creditors similar to USC §1129 of the bankruptcy code? The answer appears to be NO.

The powers and opportunities of a Receivership can be used by insolvency professionals to benefit their clients and the Courts. This saves time and money for both the Courts and the creditors. Hopefully, the foregoing provides some support for you to use when appropriate.

12 Oklahoma Statutes

A receiver may be appointed by a Judge of the Supreme Court or a district court judge:

1551. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

1552. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property or in connection with a mortgagee foreclosing his mortgage by power of sale under the Oklahoma Power of Sale Mortgage Foreclosure Act:

a. where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or

b. that a condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt, or

c. that a condition of the mortgage has not been performed and the mortgage instrument provides for the appointment of a receiver.

1553. After judgment, to carry the judgment into effect.

1554. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceeding in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

1555. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

1556. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity.

EXHIBIT A

## V. Special Masters

### A. John Young

[Special Masters section follows. (257 pages)]

**Missouri Law Review**

Volume 67
Issue 1 *Winter 2002*

Article 8

Winter 2002

# Special Masters in Bankruptcy: The Case against Bankruptcy Rule 9031

Paulette J. Delk

# Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031

*Paulette J. Delk**

## I. INTRODUCTION

Although American bankruptcy courts hear hundreds of individual, partnership, and corporate bankruptcy cases every year involving complex environmental, tax, tort, and contract issues, bankruptcy courts and the parties before them may not benefit from the assistance of special masters. Rule 9031 of the Federal Rules of Bankruptcy Procedure[1] makes Rule 53 of the Federal Rules of Civil Procedure ("FRCP")[2] governing the appointment and duties of the special master inapplicable in bankruptcy cases. While many courts and commentators recognize that federal courts have inherent authority to appoint special masters,[3] bankruptcy courts have not relied upon this inherent power freely in light of Rule 9031, which could be construed as so restricting the bankruptcy court's authority to appoint special masters as to foreclose the possibility of relying on any other power completely. In this Article, the Author attempts to demonstrate that bankruptcy courts regularly hear cases in which the court and the parties could benefit from the services of a special master and that bankruptcy courts are hampered in their ability to handle cases in the most just and efficient manner possible because of their inability to appoint special masters. Part II of this Article examines the role of the special master in the federal courts generally. It examines the scope of tasks traditionally performed by special masters, as well as the expanded role that special masters have played in recent years as the courts increasingly have relied on special masters in case management. Part III examines the nature of complex bankruptcy cases and the role that special masters could play in these cases. Part IV provides background

---

* Professor of Law, Cecil C. Humphreys School of Law, University of Memphis. B.A., Fisk University 1967; M.S.W., Atlanta University 1969; J.D., DePaul University 1980.

1. FED. R. BANKR. P. 9031; *see infra* note 56 and accompanying text.

2. FED. R. CIV. P. 53.

3. *See, e.g.*, Veneri v. Draper, 22 F.2d 33, 35 (4th Cir. 1927); United States v. Conservation Chem. Co., 106 F.R.D. 210, 217-21 (W.D. Mo. 1985); Jordan v. Wolke, 75 F.R.D. 696, 700-01 (E.D. Wis. 1977); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 415 n.80 (1986) [hereinafter Brazil, *Special Masters*]; Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 943 (1994) [hereinafter Farrell, *Coping with Scientific Evidence*]; I.H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 34 (1970); *see infra* notes 131-43 and accompanying text.

on the history and rationale for Rule 9031. Part V explores the roles of the examiner and trustee in bankruptcy, and compares those roles with the role of the special master. Part VI discusses the concept of the federal courts' inherent authority to appoint persons to assist the court in performing specific, well-delineated judicial tasks in furtherance of the efficient administration of cases.

## II. SPECIAL MASTERS IN FEDERAL COURTS GENERALLY

### *A. A Brief History*

The practice of appointing special masters to provide assistance to courts is a long and well-established one. Some historians believe that the practice of appointing persons to assist the court, through a formal process, was first established in early Roman law through the use of the judex—a private person appointed by a praetor, with the consent of the parties to an action, to hear and decide the case.[4] Special masters were used in England at least as far back as the seventeenth century (introduced in the British legal system by the Normans, some historians believe), although the actual benefit to the court, and, especially to the parties, was questionable at that time.[5] The practice of appointing special masters to assist the court continued in America beginning at least as early as the eighteenth century.[6] Not long thereafter, the federal judiciary began to use

---

4. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.8(1), at 190 (2d ed. 1993); 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 416 (A. Goodhart & H. Hanbury eds., 7th ed. rev. 1956); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 193 (1959); 2 CHARLES P. SHERMAN, ROMAN LAW IN THE MODERN WORLD §§ 849, 881, at 404, 434 (1937); James R. Bryant, *The Office of Master in Chancery: Early English Development*, 40 A.B.A. J. 498, 498 (1954); *see also* Simpson v. Canales, 806 S.W.2d 802, 806-11 (Tex. 1991) (reviewing the history of special masters).

5. *See generally* 1 HOLDSWORTH, *supra* note 4, at 424-25 (describing generally the abuses in the system); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 452 (1958) (citing 6 THE WORKS OF JEREMY BENTHAM 43 (Bowring ed., 1843); 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 360 (3d ed. 1944) (describing the masters' practice of delaying proceedings for the purpose of charging a special fee for acceleration, and increasing the number of appearances before the master and the number of services that the masters were required to perform to increase fees); Linda J. Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1075-79 (1975) (describing the history of the special master system in England)).

6. *See* James R. Bryant, *The Office of Master in Chancery: Colonial Development*, 40 A.B.A. J. 595, 598 (1954) (describing the history and process of development of the special master in colonial America); Linda J. Silberman, *Masters and Magistrates Part II: The American Analog*, 50 N.Y.U. L. REV. 1297, 1321-22 (1975) (noting that special

special masters on a regular basis to handle discrete aspects of cases, such as taking and reporting testimony,[7] determining questions at issue where facts and evidence were complex and voluminous,[8] and auditing and stating accounts.[9] Early on, federal courts held that they had the authority to appoint special masters through their "inherent power to provide themselves with appropriate instruments required for the performance of their duties."[10] Courts pointed to this inherent power as their authority to appoint special masters even over the objections of the parties.[11] Many courts held, however, that this inherent power was bound by limitations imposed through Article III of the United States Constitution[12] and determined that it was inappropriate to refer to the special master matters that were determinative of a "fundamental issue of liability" because the special masters do not meet the requirements imposed by Article III.[13] As a result, in the absence of the full consent of all of the parties, the most widely accepted practice was to refer matters to the special master that were narrow, well-defined, and specific.[14]

---

masters have been a part of the federal judiciary of the United States since its inception).

7. *See, e.g.*, Holt Mfg. Co. v. C.L. Best Gas Traction Co., 245 F. 354, 357 (N.D. Cal. 1917).

8. *See, e.g.*, United States *ex rel.* Brading-Marshall Lumber Co. v. Wells, 203 F. 146, 148-49 (E.D. Tenn. 1913).

9. *See, e.g.*, Thompson v. Smith, 23 F. Cas. 1092 (C.C. Ohio 1869).

10. *In re* Peterson, 253 U.S. 300, 312 (1920); *see also supra* notes 131-43 and accompanying text.

11. *Peterson*, 253 U.S. at 312. According to the *Peterson* court:

> 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 progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters. . . .

*Id.*

12. U.S. CONST. art. III, § 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

13. *See* Stauble v. Warrob, 977 F.2d 690, 695-96 (1st Cir. 1992) (citing *In re* Bituminous Coal Operators' Ass'n, 949 F.2d 1165, 1168 (D.C. Cir. 1991); Burlington N. R.R. v. Dep't of Revenue, 934 F.2d 1064, 1073 (9th Cir. 1991)). The attributes most commonly cited are lifetime tenure and the protection from the diminution of salary.

14. Where the parties have not consented, the courts traditionally treat the special master's report as advisory, to be adopted by the court only to the extent that the court agrees with it after making an independent review of the entire record. *See, e.g.*, Heckers

### B. Current Use of Special Masters

As a part of the 1938 enactment of the FRCP, Rule 53(b) specifically authorized the appointment of special masters.[15] FRCP 53(b) was drafted to follow the basic practices and guidelines of the earlier Equity Rules[16] and to clarify certain of those practices. Like the Equity Rules, FRCP 53(b) contemplates specific and well-defined duties for the special master in the federal court system. Although some courts have expanded the role of the special master in a manner that has generated some controversy[17] and have justified the appointment of special masters for controversial reasons,[18] there remain some clear-cut and uncontroversial roles for special masters. These roles involve duties, such as accounting and computation, determining relevant issues under circumstances where the evidence is voluminous,[19] and advising the court on severable issues that are highly technical in nature.[20] The appointment of special masters to perform these duties is seldom questioned by the parties, courts, or commentators. These tasks and duties assigned to and performed by special masters are generally held to be invaluable aids to the federal courts. In complex litigation, where there are often hundreds, and sometimes thousands,

---

v. Fowler, 69 U.S. (2 Wall.) 123, 131-33 (1864); Mastin v. Noble, 157 F. 506, 508 (8th Cir. 1907); Holt Mfg. Co. v. C.L. Best Gas Traction Co., 245 F. 354, 356 (N.D. Cal. 1917); *In re* Thomas, 45 F. 784, 787 (D.C.S.C. 1891).

15. FED. R. CIV. P. 53(b).

16. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli-lxx (1842).

17. The use of special masters in pretrial management has been questioned by many as an improper expansion of the traditional use of special masters because it requires the exercise of judicial authority, which special masters do not have. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 20.14, at 16 (3d ed. 1982); Wayne D. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1 AM. B. FOUND. RES. J. 143, 143-44 (1983) [hereinafter Brazil, *Referring Discovery Tasks*] (The author found that, although Rule 53 may not authorize the use of special masters to perform pretrial management matters, courts still may appoint special masters to perform these duties through their inherent authority.).

18. *See* LaBuy v. Howard Leather Co., 352 U.S. 249, 251-55 (1957). In *LaBuy*, the Supreme Court indicated that under Rule 53, calendar congestion, complexity of the issues, and the possibility of a lengthy trial were insufficient reasons to appoint a special master whose duties were to carry out the full fact-finding function on the merits of the case. *Id.* at 259. The Court determined that the use of the master in this manner displaced the court rather than aiding it. *Id.*

19. *See In re* Peterson, 253 U.S. 300, 312 (1920).

20. *See* Danville Tobacco Ass'n v. Bryant-Buckner Ass'n, 333 F.2d 202, 208-09 (4th Cir. 1964) (where a district court appointed an official in a tobacco association to assist it in making judgments regarding tobacco marketing, a highly technical market).

of claims in a single case, special masters have been assigned to assist the court in performing a variety of discrete functions.[21] In complex cases, district court judges often appoint special masters to summarize and evaluate claims, and to develop and implement case management and evaluation plans.[22] Two frequently cited, complex cases in which special masters were appointed to evaluate claims and develop case management plans are the Alabama DDT case[23] and the Ohio asbestos case.[24] In these cases, the special masters are credited with developing innovative plans and data collection systems that greatly aided the courts in streamlining the cases and bringing about their resolution.[25] The Alabama DDT and Ohio asbestos cases involved an extraordinary amount of evidence and claims, and, for that reason, may be viewed as unusual cases. But there are other complex litigation cases, without the extraordinary volumes of evidence and claims found in the Alabama DDT and the Ohio asbestos cases, in which special masters have been used quite effectively. Special masters were appointed, in these more commonplace cases,

---

21. For a thorough analysis of the use of special masters in complex litigation, see Brazil, *Special Masters*, *supra* note 3, at 394. *See also* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 478-91 (1986) (noting that special masters are used often in complex litigation to provide expert, technical assistance, but, just as frequently, they are used to provide advice on techniques for gathering and analyzing large amounts of empirical data).

22. To the extent that the special master's assigned duties include discovery responsibilities, some have questioned the district court's authority under Rule 53 to make such assignments to special masters. *See generally* Brazil, *Special Masters*, *supra* note 3, at 395-98. Nevertheless, special masters are frequently appointed to supervise discovery in complex cases. *See, e.g.*, Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 (N.D. Cal. 1987) (special master appointed to resolve discovery disputes where egregious discovery disputes found to exist); United States v. Conservation Chem. Co., 106 F.R.D. 210, 214 (W.D. Mo. 1985) (affirming the appointment of a special master in a case involving voluminous technical and scientific data); *In re* Agent Orange Prod. Liab. Litig., 94 F.R.D. 173, 173-75 (E.D.N.Y. 1982) (affirming the appointment of a special master in a case involving more than four million documents); United States v. Int'l Bus. Machs. Corp., 76 F.R.D. 97, 98-99 (S.D.N.Y. 1977); Fisher v. Harris, Upham & Co., 61 F.R.D. 447, 449-53 (E.D.N.Y. 1973).

23. Wilhoite v. Olin Corp., No. CV-83-C-5021-NE (N.D. Ala. filed 1983); Hagood v. Olin Corp., No. CV-83-C-5917-NE (N.D. Ala. filed 1983).

24. *In re* Related Asbestos Cases (N.D. Ohio filed 1983).

25. *See, e.g.*, Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 215-20 (1995); Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, C842 ALI-ABA 931, 946-51 (1993) [hereinafter Farrell, *Role of Special Masters*]; Jonathan S. Liebowitz, *Special Masters: An Alternative Within the Court System*, 48 DISP. RESOL. J. 64, 66-67 (1993).

to supervise discovery depositions, evaluate services, conduct surveys, receive confidential and privileged documents, and review highly technical documents.[26]

In recent years, judges and lawyers have given increased attention to active judicial case management, including devices such as: pretrial scheduling, and settlement conferences; discovery limits and deadlines; innovative methods of hearing and disposing of motions; and case monitoring. Judicial intervention through these case management devices reduces both the duration and expense of litigation. Costs are reduced when judicial management causes settlement of a case at an earlier stage of the process—thus eliminating the transaction costs of motions and discovery that otherwise might have occurred. Costs and duration are also reduced when pretrial conferences succeed in refining issues, which, in turn, may reduce the number and extent of motions and discovery.[27]

---

26. *See, e.g.*, *In re* U.S. Dep't of Def., 848 F.2d 232, 235-37 (D.C. Cir. 1988) (special master appointed to review sensitive government documents because the special master already had security clearance and was an intelligence expert with the ability to develop a sample of the documents and to summarize the reasonable positions that the parties might take on the possible exemption of each document); *In re* Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985) (affirming the district court's appointment of the special master to supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact, and the power to hear motions for summary judgment or dismissal); First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 628 (8th Cir. 1957) (special masters appointed to take discovery depositions that the court felt needed continuous supervision, and externally imposed an order that a master could provide), *cert. denied*, 355 U.S. 871 (1957); Costello v. Wainwright, 387 F. Supp. 324, 327-28 (M.D. Fla. 1973) (In this class action suit brought by Florida prisoners alleging constitutional deprivations caused by inadequate health care provided in the prison system, the court appointed a special master to aid the court in evaluating the quality of medical services provided to the inmates. The special master assisted the court by "organizing, directing and conducting a comprehensive survey of the health care services provided by the Florida Division of Corrections to inmates committed to its custody, and to report his findings to the Court."); TransAmerican Natural Gas Corp. v. Mancias, 877 S.W.2d 840, 843 (Tex. App. 1994) (The appellate court affirmed a district court's appointment of a special master to receive discovery documents that opposing counsel alleged to be confidential and privileged by ruling that it was proper for the court to appoint a special master with special training to assist in reviewing documents of such a technical nature to determine questions of privilege and discoverability.); *see also* United States v. Conservation Chem. Co., 106 F.R.D. 210, 216 (W.D. Mo. 1985); *In re* Agent Orange Prod. Liab. Litig., 94 F.R.D. 173, 174 (E.D.N.Y. 1982).

27. *See generally* Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 463 (8th Cir. 1983); MAUREEN SOLOMON & DOUGLAS SOMERLOT, TASK FORCE ON REDUCTION OF LITIG. COST AND DELAY, JUD. ADMIN. DIVISION, A.B.A., CASEFLOW MANAGEMENT IN THE TRIAL COURT (1987); MAUREEN SOLOMON & DOUGLAS SOMERLOT, LAW. CONF. TASK FORCE ON REDUCTION OF LITIG. COST AND DELAY, A.B.A., DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM (1986); Terry

Special masters have come to represent an important element in the use of these case management devices and in the overall search for ways of bringing cases to a just and acceptable end as quickly as possible.[28] Special masters have been important to the courts, particularly in settlement discussions, because of the more informal nature of the role of the special master.[29] Courts also have begun to appoint special masters with increasing frequency at the pretrial stage to facilitate settlements by delegating some tasks to the special master to minimize direct judicial involvement in settlement efforts early on and to avoid the appearance of bias or prejudgment.[30] Effective and efficient case management requires flexibility.[31] Lawyers and judges have come to accept that

---

Hackett, *California Adopts New Case Management Rules to Reduce Delay*, 75 JUDICATURE 108 (1991); Maureen Solomon & Holly Bakke, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17 (1989); Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation*, 75 F.R.D. 117, 125 (1978).

28. *See generally* Liebowitz, *supra* note 25 (describing how special masters can assist the courts in controlling the length of complex litigation). Federal courts also are increasingly turning to court-appointed managerial experts for assistance. For a thorough discussion of the courts' use of these experts and their authority to appoint them, see generally Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341.

29. *See, e.g.*, Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 218 (1995) (noting the role of the special master in facilitating settlement discussions, advising the court, and evaluating the claims of parties); Farrell, *Role of Special Masters*, *supra* note 25, at 946-49 (noting the role of the special master in discovery and settlements, and as advisors, fact finders, and case managers); Liebowitz, *supra* note 25, at 65 (reviewing a case in which a special master held eighty-five hearings in which 166 plaintiffs had claims against three defendants and in which the use of the special master had a significant impact on the court's ability to conclude the case at all).

30. Judicial participation in the settlement process is the subject of much debate. While some believe that judges can and should play a major role in helping parties achieve settlement, others believe that the extent and nature of the judge's role in settlement matters should be limited so that the judge can maintain neutrality and can render a disinterested opinion should settlement discussions fail. *See, e.g.*, DORIS MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 23 (1986) (discussing disagreement among trial judges as to the proper involvement of the judiciary in the use of particular settlement techniques); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322-23 (1986) (reviewing and discussing the change in emphasis from narrowing issues in the pretrial phase to promoting settlement).

31. Increasingly, courts have found a variety of innovative ways in which special masters can assist the court. *See, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig., 129 F.R.D. 434, 435 (E.D.N.Y. & S.D.N.Y. 1990) (special master appointed expressly to achieve settlement of this complex case); *In re* Agent Orange Prod. Liab. Litig., 94 F.R.D. 173, 173-75 (E.D.N.Y. 1982) (The use of a special master to supervise discovery and prepare the pretrial order was justified in light of the "sheer volume of documents to be reviewed, the number of witnesses to be deposed, [and] the need for a speedy

differences in complexity and subject matter of lawsuits present the need for different types of case management practices. The appointment of special masters is one of the case management practices frequently employed by the courts because it has proven to be particularly effective and efficient.

## III. POTENTIAL USE OF SPECIAL MASTERS IN BANKRUPTCY CASES

In bankruptcy cases requiring the estimation of claims, computation of damages, valuation hearings, and, in cases of corporate debtors, highly technical companies, the appointment of a special master could prove to be particularly beneficial to the bankruptcy court. Often, a large, complex, corporate Chapter 11[32] case with numerous claimants[33] requires estimation of claims, computation of damages, and valuation hearings. The bankruptcy court is required to estimate any unliquidated or contingent claim, the "fixing or liquidation of which . . . would unduly delay the closing of the case."[34] Where there are numerous claims of this type, a special master could be appointed by the bankruptcy court to review the potential claims and to develop a method or propose a formula for estimating the claims in question.[35] Particularly in cases where the debtors are

---

processing of all discovery problems in order to meet the trial date"); Costello v. Wainwright, 387 F. Supp. 324, 325-26 (D.C. Fla. 1973) (special master appointed to evaluate the quality of medical services).

32. 11 U.S.C. §§ 1101-1174 (2000). Chapter 11 is primarily designed for the reorganization of the debts of a business through a reorganization plan. The plan must be voted upon by specified creditors and shareholders, and must be confirmed by the court.

33. Corporations and sole proprietorships filed 9,947 Chapter 11 cases in the twelve-month period ending June 30, 2000. *See Filings*, Bankr. L. Daily (BNA) (Aug. 15, 2000) (reporting based on data released by the Administrative Office of the United States Courts); *see also* Alexander D. Bono, *Class Action Proofs of Claim in Bankruptcy*, 96 COM. L.J. 297, 297 (1991) (noting the rise in class action issues arising in bankruptcy cases).

34. 11 U.S.C. § 502(c) (2000). For examples of situations in which the courts have estimated claims in a Chapter 11 context, see *In re Thomson McKinnon Securities, Inc.*, 191 B.R. 976, 979-81 (Bankr. S.D.N.Y. 1996) (estimation of claims involving trust accounts and churning claims against the debtor); *Beatrice Co. v. Rusty Jones, Inc.*, 153 B.R. 535, 536-37 (N.D. Ill. 1993) (estimation of contingent claims and validation of liquidated claims in a Chapter 11 case).

35. At least one commentator has suggested that special masters could be helpful to a bankruptcy court "when it must estimate the values of a large number of claims in which the debtor has admitted liability. In these situations, special masters may obviate the need for any oral hearing, [because] valuation of damages often involves more concrete, objective factors than does evaluating liability." David Kauffman, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 170 (1982) (internal citations omitted).

involved in highly technical areas, the appointment of a special master with specific expertise could prove to be an invaluable service to the court and could expedite matters considerably.

In *In re White Motor Credit Corp.*,[36] the bankruptcy court, presiding over a Chapter 11 case involving a corporation and five of its affiliates in which there were 160 products liability suits pending in state and federal courts across the country, with the potential for the existence of many more unfiled suits, proposed the appointment of a special master for just that purpose.[37] The court proposed appointing the special master to assist it in developing a program for resolving the 160 pending product liability cases and for identifying and resolving the potential unfiled product liability cases, and to "conduct hearings on non-settled claims."[38] The court cited as reasons for the use of the special master: (1) the amount of time that it was already spending on this case on a daily basis; (2) the fact that travel to the residences of the parties and the witnesses may be required; and (3) the inappropriate use of the court's time in addressing what would be "'matters of account and . . . difficult computation of damages.'"[39] These are the same reasons why district courts appoint special masters, and they are the same tasks that special masters appointed by the district courts perform.[40] Ultimately, the bankruptcy court was unable to appoint a special master in this case—not because the services of a special master were not warranted—but due to jurisdictional issues.[41]

The only case in which a bankruptcy court successfully appointed a special master is a case in a Puerto Rican bankruptcy court, which involved the reorganization of a broadcasting company.[42] Upon the petition of the creditors' committee, the bankruptcy court appointed a special master for the express purpose of negotiating and conducting the sale of two television stations.[43] The

---

36. 11 B.R. 294 (Bankr. N.D. Ohio 1981).

37. *See id.* at 296. The appointment of a special master to assist in the formulation of a program to determine and resolve product liability claims was approved in this case, but, on appeal, the court determined that the state courts where cases were initially pending were the proper forums for resolving these cases and not the bankruptcy court. *In re* White Motor Credit, 761 F.2d 270, 275 (6th Cir. 1985). The state courts were deemed to be the proper forums because there were some defendants in the tort cases who could not be transferred out of the jurisdiction, meaning that the cases would "have to be tried twice in different courts" if the federal court heard some of the cases. *Id.* at 273-74. Thus, in the interest of justice and judicial economy, and because state issues predominated, these cases remained in the state courts and were tried by state judges.

38. *In re White*, 11 B.R. at 295.

39. *Id.* at 297 (quoting FED. R. CIV. P. 53(b)).

40. *See supra* notes 22-26 and accompanying text.

41. *In re White*, 761 F.2d at 271.

42. *In re* Am. Colonial Broad. Corp., 758 F.2d 794 (1st Cir. 1985).

43. *Id.* at 796.

sale of this kind of asset requires special knowledge and expertise, and the court saw the need for the assistance of an individual with special knowledge in this area. The court did not give the special master the final decision in this matter; rather, it retained the power to make the final decision regarding whether to allow the sale to go forward, thus maintaining the special master's duty as a specific, discrete one—not one that was case determinative.[44] The order appointing the special master was appealed by the losing bidder, the debtor, but the appeal was unsuccessful because both the district court and the court of appeals held that the order was not a final one—thus, it could not be appealed unless an applicable exception existed (and the court of appeals held that no such exception applied in this case).[45] This case stands alone among reported bankruptcy cases in which a bankruptcy judge appointed a special master and in which the special master actually performed the designated services.

In many districts, the most frequent need for a special master in a bankruptcy case is in the self-employed, small-business Chapter 13 cases[46] in which there is reason to believe that greater assets and income exist than noted in the schedules, but where the debtor's records are in a chaotic state, and require extensive effort to track down and sort through to verify the accuracy of the bankruptcy schedules. This assistance could be very helpful to the creditors and to the court, but it would not be an efficient use of the court's time. The standing Chapter 13 trustees[47] are unable to devote the time that would be required to fulfill this task because of the sheer volume of Chapter 13 cases in many districts.[48] As a result, the potential benefit to creditors, in many of these cases, would merit the appointment of a special master.

In Chapter 11 cases, there are frequent motions to modify the automatic stay[49] in which the court must determine the value of the property at the center of the controversy in order to decide if the automatic stay should be modified.

---

44. *See supra* note 14 and accompanying text.

45. *In re Am. Colonial*, 758 F.2d at 798-803.

46. 11 U.S.C. §§ 1301-1330 (2000). This Chapter, as its title suggests, is designed to provide for the "Adjustment of Debts of an Individual with Regular Income." Debtors propose a payment plan generally of a three-to-five-year duration, which must be confirmed by the court, and, in return, the debtors receive a discharge from most remaining debts upon completion of the plan.

47. 11 U.S.C. § 1302(a) (2000); *see also* 28 U.S.C. § 586(b) (1994). These statutes permit the appointment of a person to serve as the trustee in the Chapter 13 cases filed in a particular region when the number filed in the region warrants the full-time attention of a single trustee. Many districts have the services of a standing trustee, and some districts with extremely large Chapter 13 filings have the services of more than one standing trustee.

48. *See Filings*, *supra* note 33 (For the twelve-month period ending June 30, 2000, there were 380,770 Chapter 13 cases filed.).

49. 11 U.S.C. § 362 (2000).

Often, both the creditor and the debtor present appraisals of the property, but the court must reach an independent decision as to the actual value of the property for purposes of deciding whether the creditor's motion to modify the automatic stay should be granted. Also, in Chapter 11 cases, the court must determine whether the plan of reorganization is feasible.[50] Whether the plan is feasible or not depends, in large part, on financial information regarding the debtor and whether the data demonstrate, *inter alia*, that the debtor's capital structure and earning power are adequate to support the plan of reorganization.[51] Creditors who object to the plan of reorganization may present data to dispute the debtor's projections. The court must analyze all of the information in order to make an independent determination regarding the feasibility of the plan of reorganization. In both instances, a special master could provide valuable assistance to the court in analyzing the various appraisals and financial data provided by the debtor and creditors.

Among the multitude of bankruptcy cases filed annually,[52] there are many cases that require specific and easily delineated tasks, such as the estimation of claims,[53] computation of damages, and analysis and assessment of appraisals and

---

50. 11 U.S.C. § 1129 (a)(11) (2000).

51. *See, e.g., In re* Merrimack Valley Oil Co., 32 B.R. 485, 488-91 (Bankr. D. Mass. 1983); *In re* Landmark at Plaza Park Ltd., 7 B.R. 653, 658-60 (Bankr. D.N.J. 1980).

52. *See Filings, supra* note 33. In the twelve-month period ending June 30, 2000, there were 1,276,922 bankruptcy petitions filed; in the twelve-month period ending June 30, 1999, 1,352,030 petitions were filed.

53. Under the Bankruptcy Act of 1898, ch. 541, § 57(d), 30 Stat. 544 (repealed 1979), not all claims were required to be estimated. Section 57(d) of the Act provided that if the estimation of a contingent or unliquidated claim would unduly delay the administration of the estate or any proceeding under this Act, the claim would not be allowed. The result was that the creditor's claim would be unaffected by the discharge in bankruptcy, and the creditor could pursue the debtor after the claim was fixed or liquidated despite the debtor's discharge. Section 502(c) of the Code requires the estimation of contingent or unliquidated claims when the fixing or liquidation of those claims would unduly delay the administration of the case. 4 COLLIER ON BANKRUPTCY ¶ 502.04[1], at 502-51 (Lawrence P. King ed., 15th ed. rev. 2001). Congress wanted "to afford the debtor complete bankruptcy relief," and § 502(c) was one means that Congress used to achieve this goal. H.R. REP. NO. 95-595, at 352 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6308. Section 502(c)'s estimation of the claims requirement adds to the number of claims in which the court directly must involve itself by taking evidence to determine the proper estimation. Where a claim is fixed, liquidated, and well-documented, the claim is automatically allowed without a review by the court, unless a party in interest objects to the claim. 11 U.S.C. § 502(c) (2000).

In the reorganization under Chapter 11 of one chemical company, the potential existed for the individual estimation of 187 contingent and unliquidated claims against the debtor. *In re* Borne Chem. Co., 16 B.R. 509, 512 (Bankr. D.N.J. 1980).

financial data. These kinds of tasks make the appointment of a special master a practical and desirable addition to the tools available to assist the district court and bankruptcy judge in bankruptcy cases. Moreover, these tasks involve the kind of services that masters historically have performed.[54]

## IV. SPECIAL MASTERS PROHIBITED IN BANKRUPTCY

### *A. Source of the Prohibition*

Although there are many kinds of proceedings in which a bankruptcy court may benefit from the services of a special master, bankruptcy courts are not authorized to appoint special masters at this time. Because of a bankruptcy rule that expressly prohibits the appointment of a special master in bankruptcy cases, special masters may not be appointed by bankruptcy judges.[55] The Bankruptcy Code provides no statutory prohibition against the appointment of special masters; the only prohibition against the appointment of a special master in bankruptcy cases is set forth in a procedural rule that states: "Masters Not Authorized: Rule 53 F.R.Civ.P. does not apply in cases under the Code."[56]

This procedural rule, Bankruptcy Rule 9031, is a single, simple sentence providing neither guidance nor elucidation.[57] A Committee Note, also a single, simple sentence, follows the rule, stating: "Committee Note: This rule precludes the appointment of masters in cases and proceedings under the Code."[58] The note only adds the word "proceedings" to the word "cases" in its "discussion" of the Bankruptcy Rule that makes FRCP 53 of the FRCP inapplicable under the Code.[59] This single-sentence rule and the lack of a true explanation or discussion in the Committee Note calls into question the authority of even the district court to appoint a special master in a bankruptcy case.[60] The rule is not limited in its application to bankruptcy cases that are before the

54. 1 DOBBS, *supra* note 4, § 6.6(1), at 133 (noting that masters traditionally performed specific tasks associated with taking evidence).

55. FED. R. BANKR. P. 9031.

56. FED. R. BANKR. P. 9031. In contrast, the Bankruptcy Code expressly prohibits bankruptcy judges from appointing receivers in bankruptcy cases. 11 U.S.C. § 105(b) (2000).

57. FED. R. BANKR. P. 9031.

58. FED. R. BANKR. P. 9031.

59. FED. R. BANKR. P. 9031.

60. *See supra* notes 56-58 and accompanying text.

bankruptcy court.[61] Rather, it is apparently applicable to all courts hearing a bankruptcy case, including the district court.[62]

The only other published and official explanation for Rule 9031 comes from the Advisory Committee on Bankruptcy Rules' preface to the then-proposed Rules of Bankruptcy Procedure in which the Committee provided discussion of each of the proposed rules.[63] In its discussion of proposed Rule 9031, the Advisory Committee reviewed former Bankruptcy Rule 513,[64] which made FRCP 53 applicable in bankruptcy cases, and explained: "There does not appear to be any need for the appointment of special masters in bankruptcy cases

---

61. FED. R. BANKR. P. 1001 provides: "The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. . . . These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." Should the United States district court withdraw the reference of a bankruptcy case or proceeding from the bankruptcy court, the district court judge would be prohibited from appointing a special master in the bankruptcy case or proceeding because of Rule 9031, despite the fact that the case or proceeding is one in which the appointment of a special master greatly would assist the court in "secur[ing] the just, speedy, and inexpensive determination of [the] case." *Id.*

62. *See* Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 271 ("The propriety of appointing special masters in bankruptcy cases is subject to some dispute. This consideration led the author to use a semantic substitute—the court-appointed 'special advisor'—in the Manville Bankruptcy-Trust litigation." (footnotes omitted)). Mark Peterson, the special advisor to the court in *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 573 (E.D.N.Y. & S.D.N.Y. 1995), *aff'd*, 100 F.3d 944 (2nd Cir. 1996), the case referred to by Judge Weinstein, was appointed to develop a plan for restructuring the trust payment schedule and refinancing the trust, and to evaluate the claims by the type of disease. These are duties traditionally assigned to special masters. *See also* Minerex Erdoel, Inc. v. Sina, Inc., 838 F.2d 781, 783 (5th Cir. 1988), *cert. denied*, 488 U.S. 817 (1988); *In re* Elcona Homes Corp., 810 F.2d 136, 140 (7th Cir.1987) (Both cases support the proposition that district courts may not allow the appointment of a special master in a bankruptcy case through their reference powers.).

63. [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-120 to 2-124 (Lawrence P. King ed., 15th ed. rev. 2001).

64. FED. R. BANKR. P. 513, titled *Special Masters*, provided: "if a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply." FED. R. BANKR. P. 513 (repealed Aug. 1, 1983), *reprinted in* 12 COLLIER ON BANKRUPTCY, at 5-103 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978). COLLIER ON BANKRUPTCY explains: "The word 'judge' meant the United States district judge, not the bankruptcy judge." [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001). Accordingly, former Rule 513 generally applied only when a Chapter X case was retained by the district judge although it probably would apply when a district judge removed any case from the bankruptcy court to the district court. *See* FED. R. BANKR. P. 102(b) (repealed Aug. 1, 1983).

by bankruptcy judges. The Advisory Committee, therefore, has decided that former Rule 513 not be continued in the rules and that Rule 53 F. R. Civ. P. not be made applicable."[65] The Advisory Committee has given no further explanation for its decision that there no longer would be a need for the appointment of special masters in bankruptcy cases.[66] Given the language of Rule 9031,[67] making FRCP 53 inapplicable in all bankruptcy cases, no judge, whether of the district court or bankruptcy court, is authorized to appoint a special master. This kind of prohibition did not extend to district court judges under the Bankruptcy Act.[68] It is difficult to believe that this was the intended result of the rule, but it is the necessary result when the clear and unambiguous language of the rule is applied as written.

### *B. Evolution of the Bankruptcy Rules*

Having a grasp of the history of the Bankruptcy Rules is helpful in understanding the absence of a more complete discussion in the Committee Notes[69] and in understanding the Committee's failure to recognize that the rule is broad enough to prevent district court judges from exercising what has come to be considered by many as an inherent power.[70] The concept of having a formal, separately published set of rules to govern procedure in the bankruptcy courts is a relatively recent one.[71] Until 1976, when the final rules of the initial set of procedural rules were promulgated by the Supreme Court and became effective,[72] the Bankruptcy Act of 1898[73] contained all of the procedural, as well

---

65. [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001).

66. One commentator has suggested that Rule 53 was made inapplicable to bankruptcy cases through Rule 9031 because of "the expense of special masters in bankruptcy, and . . . 'public perceptions of cronyism.'" Kauffman, *supra* note 35, at 171 n.82. Rule 53 has been construed as requiring the parties' consent. Where the creditors and the court agree that the special masters can preform certain tasks more efficiently, the creditors agree to bear that expense. The bankruptcy estate would not bear the cost. The expense of the special master should not be a concern because it would be incurred only if the parties consent.

67. *See supra* notes 56-58 and accompanying text.

68. *See infra* notes 85-89 and accompanying text.

69. *See supra* notes 58-59 and accompanying text.

70. *See infra* notes 131-43 and accompanying text.

71. *See generally* Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 217 (1996) (discussing in great detail the history and process of bankruptcy rulemaking).

72. *See* Bankruptcy Rules & Official Forms, 425 U.S. 1003 (1975); Bankruptcy Rules & Official Bankruptcy Forms, 411 U.S. 989, 991 (1972); King, *supra* note 71, at 220 (describing the decision to draft and promulgate the rules in parts, so that the

as the substantive provisions, of bankruptcy law.[74] Prior to that time, experience in drafting separate procedural rules for bankruptcy was extremely limited.[75]

In 1964, Congress granted bankruptcy rulemaking authority to the Supreme Court.[76] For the first time, it was possible to draft a complete set of rules to provide for all procedural matters that may arise in bankruptcy cases. The Advisory Committee charged with drafting the rules decided to approach this awesome task chapter by chapter.[77] As draft rules were completed by the Committee, they were disseminated to the bench and bar for comment. Finally, in April of 1976, after many years of tedious and faithful work by the Committee, the final set of rules were promulgated.[78]

The enactment of the Bankruptcy Code,[79] with its extensive changes to the bankruptcy laws, made revisions to the rules an absolute necessity. The Code was enacted in 1978 with an effective date of October 1, 1979, but it was not until January 1, 1979, that a new Advisory Committee began its work on the new set of rules. This gave the Advisory Committee a mere nine months to draft a new set of rules to complement extensively modified bankruptcy laws. Even with the existence of a model to follow, nine months was a very short time when

---

effective dates of the first set of rules are different for different parts of the package of rules).

73. Bankruptcy Act of 1898, Pub. L. No. 55-171, 30 Stat. 544 (repealed 1978).

74. *See* King, *supra* note 71, at 217 ("At least seventy percent of the Bankruptcy Act, if not more, was procedural.").

75. *See* King, *supra* note 71, at 217-18. An Advisory Committee on Bankruptcy Rules was appointed in 1960 by the Chief Justice as Chair of the Judicial Conference of the United States to study the bankruptcy procedural rules contained in the General Orders in Bankruptcy and Official Forms and to recommend amendments. These committee members gained experience with drafting proposed rules, although the scope of their review was quite limited.

76. The statute read as follows:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act. Such rules shall not abridge, enlarge, or modify any substantive right. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Bankruptcy Act, Pub. L. No. 88-623, § 1, 78 Stat. 1001 (current version at 28 U.S.C. § 2075 (1994)).

77. King, *supra* note 71, at 224.

78. *See* Bankruptcy Rules and Official Bankruptcy Forms, 425 U.S. 1003 (1975).

79. 11 U.S.C. §§ 101-1330 (2000) (as enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)) [hereinafter Bankruptcy Code].

compared to the twelve years that the first Advisory Committee took to draft the initial set of rules.[80] In light of this short time period, the Advisory Committee decided that the best course of action was to draft a set of interim rules.[81] The sole goal of the Advisory Committee in drafting the interim rules was to fill the gaps between the new Code and the existing rules; this goal was completed in August of 1979.[82] These interim rules were adopted as local rules and were used between the effective date of the new Code and the promulgation of the replacement rules. No effort was made at that point to make a detailed study of the existing rules to determine which rules required modification or deletion in light of the broader range of cases that the bankruptcy court could hear under the Code.

The Advisory Committee then began its work on the permanent set of rules. During the time that the Committee was taking comments on the interim rules, the United States Supreme Court decided a landmark case, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[83] The far-reaching implications of this case caused concern among members of the bankruptcy bar and bench, who promptly turned their attention to it. No changes were made to the proposed permanent rules as a direct result of this case because the Committee did not think that the rules contained anything that pertained to jurisdiction and because it was hoped that proposed legislation would resolve the entire issue.[84] If the Committee had reviewed its work on the rules in light of the *Northern Pipeline* decision before sending them on to the Judicial Conference and the Supreme Court, it is possible that matters, like the appointment of special masters, might have been discussed more thoroughly and different decisions might have been made.

---

80. King, *supra* note 71, at 220-33.

81. *See* King, *supra* note 71, at 237.

82. JUD. CONF. OF THE U.S., COMM. ON RULES OF PRAC. & PROC., PRELIMINARY DRAFT OF PROPOSED NEW BANKRUPTCY RULES AND OFFICIAL FORMS, xix (1982).

83. 458 U.S. 50 (1982). In this case, a Chapter 11 debtor filed suit in the bankruptcy court against Marathon for damages based on a breach of contract and warranty, as well as misrepresentation, coercion, and duress. *Id.* at 56. Under the Bankruptcy Act of 1898, this kind of action would have been outside of the jurisdiction of the bankruptcy court, and the proper place to bring the action would have been the state court. The Bankruptcy Code had broadened the jurisdiction of the bankruptcy court so that it had jurisdiction to hear this kind of claim—one that was not directly a part of the bankruptcy matter. *Id.* at 54-55. The Supreme Court held that this broadened jurisdiction unconstitutionally vested the bankruptcy judges with "judicial power" without granting them the protection of Article III status. *Id.* at 87.

84. H.R. 6978, 97th Cong. (2d Sess. 1982) (reintroduced in the 98th Congress as H.R. 3, 98th Cong. (1983)). Granting bankruptcy judges Article III status would have done much toward resolving the jurisdictional issue.

### C. Evolution of the Bankruptcy Court

A discussion of the role and status of the bankruptcy judge under the Bankruptcy Act provides some background against which the prohibition against special masters in bankruptcy cases under the Code can be better understood. This is helpful in understanding why the Committee thought that there would be no need to make FRCP 53 applicable under the Code.

Until 1973 under the Bankruptcy Act, the person who presided over bankruptcy cases held the position of "referee in bankruptcy."[85] The "referee in bankruptcy" had limited jurisdiction over most bankruptcy cases. In Chapter X corporate reorganizations, the jurisdiction of the "referee in bankruptcy" was so limited that the "referee" served only as a special master to hear and report generally or upon specified matters to the district court judge.[86] When the "referee" acted in a Chapter X case, former Bankruptcy Rule 513 applied to make FRCP 53 applicable in those instances, rendering the "referee in bankruptcy" a special master appointed by the district court.[87] Under the Chandler Act of 1938,[88] the duties and workload of the "referee in bankruptcy" increased tremendously, but the jurisdiction of the court was still limited. In 1973, the title "referee in bankruptcy" was changed to "United States bankruptcy judge" due, in part, to recognition of the increased duties required of this

---

85. *See* H.R. REP. NO. 95-595, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5969.

86. The Bankruptcy Act of 1898, ch. 541, § 117, 30 Stat. 544 (1898) (repealed 1978); *see, e.g.*, Faucher v. Lopez, 411 F.2d 992, 995 (9th Cir. 1969) (The district court appointed the bankruptcy referee as special master to decide issues of fraud in the bankruptcy case.).

87. FED. R. BANKR. P. 513 (repealed Aug. 1, 1983), *reprinted in* 12 COLLIER ON BANKRUPTCY, at 5-103 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978) ("If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply."); *see also* 12 COLLIER ON BANKRUPTCY ¶ 513.6, at 5-106 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978) (discussing the district court judge's retention of jurisdiction in Chapter X corporate reorganization proceedings and that judge's reference of a proceeding under Chapter X to a referee in bankruptcy acting as a special master). The court in *United States v. Manning*, 215 F. Supp. 272, 293 (W.D. La. 1963), described the role of the bankruptcy referee:

> Rule 53 of the Federal Rules of Civil Procedure allows a district court to appoint a 'standing' master for its district or a 'special master'. As used in [the] rules the word "master" includes a referee, an auditor, and an examiner. Rule 53. . . . A Referee in Bankruptcy has even more power than a master: he may render a binding judgment.

88. Chandler Act, ch. 575, § 60e, 52 Stat. 883 (1938) (repealed 1979).

position.[89] Nevertheless, the new bankruptcy judges still did not have any greater jurisdiction than before.

In 1978, Congress enacted dramatically new bankruptcy legislation, which created and conferred on the bankruptcy courts very broad jurisdiction.[90] One of Congress's goals in reforming the bankruptcy laws was to create more efficient procedures for administering bankruptcies. To achieve this goal, Congress chose to vest broad powers and jurisdiction directly in the bankruptcy courts.[91] Even before Congress had an opportunity to enact permanent Bankruptcy Rules to accompany its newly enacted Bankruptcy Code,[92] its efforts were very quickly and successfully challenged in the landmark *Northern Pipeline* case.[93] The Supreme Court in *Northern Pipeline* held that the jurisdictional provisions of the Bankruptcy Code of 1978 were unconstitutional primarily because the Code had vested Article III[94] judicial power in non-Article III judges—judges who lacked lifetime tenure and protection against salary diminution.[95] Under the Bankruptcy Code, Congress granted to the bankruptcy courts all of the usual powers of the district courts, including the power to hear jury trials and to issue final judgments that were binding and enforceable in the absence of an appeal.[96] The Supreme Court held that this grant of judicial power without a grant of Article III status was unconstitutional as a violation of the separation of powers.[97] After the *Northern Pipeline* decision, Congress enacted amendments to the Bankruptcy Code to address the jurisdictional issues raised by the case.[98] In the 1984 Amendments, Congress gave federal district courts

---

89. FED. R. BANKR. P. 901(7) (repealed Aug. 1, 1983); *see* Joseph C. Zavatt, *The Use of Masters in Aid of the Court in Interlocutory Proceedings*, 22 F.R.D. 283, 285 (1958) ("Over the years since the Act of 1898, [the powers of referees in bankruptcy] (subject to review) have been extended . . . to the point where (since 1938) they have the power to grant or deny discharges—a power formerly reserved to the District Court Judge sitting as a bankruptcy court.").

90. *See supra* note 76.

91. *See generally* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. REV. 5 (1995).

92. Bankruptcy Rules, 461 U.S. 973 (1982) (Permanent rules for the 1978 Bankruptcy Code were not promulgated until 1983.).

93. 458 U.S. 50 (1982).

94. *See supra* note 12.

95. *Northern Pipeline*, 458 U.S. at 63.

96. *See* 28 U.S.C. § 1471(b) (This Section was added by Act of Nov. 6, 1978, Pub. L. 95-598, 92 Stat. 2668 (1978), but did not become effective pursuant to § 402(b) of such Act.).

97. *Northern Pipeline*, 458 U.S. at 85.

98. Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 378 (1984). The amendments to the Code to address the issues in *Northern Pipeline* took a considerable period of time, during which bankruptcy cases were in limbo. The obvious solution was

exclusive jurisdiction "over all cases under title 11" and nonexclusive jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[99] The district courts have exclusive jurisdiction, under

---

to make the bankruptcy judges Article III judges, but this had been rejected during the enactment process of the Reform Act and continued to be opposed. In a later amendment to the Bankruptcy Code, however, Congress created a Bankruptcy Review Commission, which recommended Article III status for bankruptcy judges to increase the efficiency of the bankruptcy process. The Commission pointed to the costs caused by the Article I status of bankruptcy judges, including those primarily associated with the necessity of drawing jurisdictional lines between core and non-core proceedings, and those caused by the constitutional uncertainty over the definition of core proceedings. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS § 3.1, at 718, 722-24, 732-35, 737-39 (1997). Both before and after this recommendation, many commentators advocated Article III status for bankruptcy judges. *See, e.g.*, Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 544-46 (1998) (pointing to the costs caused by dividing bankruptcy jurisdiction between the district and bankruptcy courts, including the delays caused by the division, and the doctrinal and constitutional uncertainty caused, and advocating Article III status for bankruptcy judges); Christopher F. Carlton, *Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century*, 14 BYU J. PUB. L. 37, 45-46 (1999). In his article, Mr. Carlton examined several proposals to amend the Bankruptcy Code and recommended Article III status for bankruptcy judges. He quoted the legislative history of the Reform Act of 1978's discussion of granting Article III status to bankruptcy judges:

> [T]he Constitution suggests that an independent bankruptcy court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions . . . . Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary.

Carlton, *supra*, at 45 n.55 (quoting H.R. REP. NO. 95-598, at 390 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6000). *But see generally* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567 (1998) (citing historical and constitutional policy reasons why Article I status is desirable for bankruptcy judges).

Granting Article III status to bankruptcy judges, however, would not resolve the problem of the appointment of special masters in bankruptcy. Rule 9031 prohibits the appointment of special masters in any bankruptcy case, whether before an Article III judge or not. *See supra* note 61-62 and accompanying text.

99. 28 U.S.C. § 1334(a)-(b) (1994) (granting district courts original and exclusive jurisdiction over "all cases under title 11," and original but not exclusive jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title

the 1984 Amendments, over all property of the bankruptcy estate wherever it is located.[100] Through these amendments, Congress chose to give broader jurisdiction over bankruptcy matters to the district courts. Congress dealt with the status of the bankruptcy judges by declaring that they constitute a "unit" of the district court called the bankruptcy court.[101] The district courts may refer all bankruptcy cases and proceedings within their jurisdiction to the bankruptcy courts,[102] but, under the 1984 Amendments, the proceedings are divided into "core" and "non-core" matters with bankruptcy judges being permitted to "hear and determine" the matter and enter final judgment only in the "core" proceedings.[103] During and after the time that *Northern Pipeline* was making its

---

11"). "Case" refers to the procedure followed in the administration of the debtor's estate and "proceeding" refers to the disputes occurring during the bankruptcy case. *See* 1 COLLIER ON BANKRUPTCY ¶¶ 3.01[1][c][i]-[ii], at 3-20 to 3-27 (Lawrence P. King ed., 15th ed. rev. 2001).

100. 28 U.S.C. § 1334(e) (1994).

101. *See* 28 U.S.C. § 151 (1994). Section 151, "Designation of bankruptcy courts," states:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (1994).

102. 28 U.S.C. § 157(a) (1994). Section 157(a) states that: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a) (1994).

103. 28 U.S.C. § 157(b)(1) (1994). Dividing the bankruptcy proceedings into "core" and "non-core" proceedings permitted Congress to allow bankruptcy judges to hear bankruptcy cases while maintaining Article I status without running afoul of *Marathon*. In its opinion in *Northern Pipeline*, the Court recognized an exception to the separation of powers that permitted Congress to set up legislative courts in specialized areas like bankruptcy where the adjudication of a "public right" is involved. The "core" matters involve issues directly related to the restructuring of the debtor-creditor relationship, the "public right;" these matters may be heard by the bankruptcy judge subject only to appeal. 28 U.S.C. § 158 (1994). Under 28 U.S.C. § 157(c)(1), there are circumstances under which bankruptcy judges may hear "non-core" proceedings:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party

way to the Supreme Court, bankruptcy courts were operating under the rules adopted under the Bankruptcy Act and interim rules designed to fill the gaps between the Bankruptcy Code and the original rules under the Act.[104] The first permanent rules were being drafted for the new Bankruptcy Code at the same time as amendments were being made to the Code to address the *Northern Pipeline* jurisdictional issues.[105] These jurisdictional issues also needed to be addressed in the rules. It may have been the haste and confusion of the day that led to the unexplained conclusion that special masters could not be appointed in bankruptcy cases.[106] Whatever the reason, what resulted was Rule 9031 with its inadequately explained prohibition against the appointment of special masters in bankruptcy cases.[107] A court's inability to use as important a case management device as special masters hinges on Rule 9031, a rule with virtually no explanation or justification—and one that appears to have been drafted in haste, without significant consideration given to its significant impact.

## V. NO COMPARABLE ROLE EXISTS

Special masters are appointed by the court to assist in cases where the issues are complicated and where exceptional conditions exist, or in matters of account and where there are difficult damages computations.[108] The special master is appointed to assist the court in cases in which the court deems help necessary to

---

has timely and specifically objected.

28 U.S.C. § 157(c)(1) (1994).

104. *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in* [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-116 to 2-119 (Lawrence P. King ed., 15th ed. rev. 2001).

105. *See supra* notes 83-84 and accompanying text.

106. *See generally* [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001).

107. The possibility exists that the Committee Notes were drafted with the former practice of having bankruptcy referees act as special masters in Chapter X cases under the former Bankruptcy Act in mind. At least one judge has suggested that Rule 9031 was drafted with this former practice in mind. *See In re* S. Portland Shipyard & Marine Rys. Corp., 32 B.R. 1012, 1020 n.9 (D. Me. 1983). The *In re S. Portland* court stated:

> Rule 9031 was enacted because the new Code, if left intact, would have made the reference of bankruptcy cases superfluous.... The new Code was not left intact, however; ... Rule 9031, which specifically addressed the situation in which all bankruptcy cases are to be heard by Bankruptcy Judges in the first instance, is incongruous in the situation created by *Northern Pipeline* whereby the District Court is to exercise bankruptcy jurisdiction.

*Id.* at 1021 n.10. The Committee never may have contemplated bankruptcy judges appointing special masters in bankruptcy cases.

108. FED. R. CIV. P. 53(a)-(b).

further the administration of justice.[109] The role of the special master is to represent the court in carrying out specified duties, as directed by the appointing court. The Bankruptcy Code does not provide for the appointment of a person in a comparable position. The Bankruptcy Code does provide for the appointment of trustees and examiners.[110] In fact, the Code mandates that, under certain circumstances, the court must appoint examiners and trustees after a request to do so[111] is made by a party in interest[112] or the United States Trustee.[113]

---

109. *See Ex parte* Peterson, 253 U.S. 300, 312 (1920) (Justice Brandeis, referring to the role of the special master, stated that he or she is an "instrument for the administration of justice [to be employed by the court] when deemed by it essential."); United States v. Manning, 215 F. Supp. 272, 293 (W.D. La. 1963) (noting that the special master is charged with the same obligations of a judicial officer).

110. 11 U.S.C. §§ 704, 1104, 1106, 1202, 1302 (2000) (explaining the duties of a trustee in a Chapter 7 case, the appointment of a trustee or examiner in a Chapter 11 case, the duties of a trustee and examiner, and the duties of trustee in a Chapter 12 case, respectively). For an excellent discussion of the role of the examiner and a comparison of that role to that of the trustee, see Leonard L. Gumport, *The Bankruptcy Examiner*, 20 CAL. BANKR. J. 71 (1992).

111. 11 U.S.C. § 1104 (2000) provides in relevant part:

> (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor. . . .
>
> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by curent or former management of the debtor, if
>
> (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
>
> (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

112. No definition for the term "party in interest" is provided in the Bankruptcy Code. Some guidance is provided in 11 U.S.C. § 102 (2000). The Legislative Statement

When they are appointed, trustees and examiners represent the bankruptcy estate, have very broad duties, and are required to perform comprehensive acts for the benefit of the entire estate,[114] such as accounting for property received,

---

provides that: "[r]ules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question. . . ." 11 U.S.C. § 102 (2000).

113. 28 U.S.C. §§ 581-589 (1994) (These provisions describe the United States Trustee system, which was designed, in large part, to perform and oversee the administration of bankruptcy cases.).

114. 11 U.S.C. § 323(a) (2000) provides, in relevant part, that "[t]he trustee in a case under this title is the representative of the estate." 11 U.S.C. § 1106 (2000) provides, in relevant part:

> A trustee shall—
>
> (1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;
>
> (2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;
>
> (3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
>
> (4) as soon as practicable—
>
> (A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and
>
> (B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates
>
> . . . .
>
> (b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. § 704 (2000) provides:

> The trustee shall—
>
> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
>
> (2) be accountable for all property received;
>
> (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
>
> (4) investigate the financial affairs of the debtor;
>
> (5) if a purpose would be served, examine proofs of claims and object

examining proofs of claims, furnishing information concerning the estate to parties in interest who have made requests, filing periodic reports of the operation of the business with taxing authorities, and making final reports to the court on the administration of the estate.[115]

In contrast, the special master is appointed by the court to represent the court by performing narrow, well-delineated tasks.[116] District courts order the special master to perform these well-delineated tasks in a very limited manner and for a specific proceeding within a case—not for the entire case.[117] Special masters have a different mission, different loyalties, and different supervisors than do trustees and examiners. Trustees and examiners are not authorized under the Code to perform the vast majority of tasks that a court would need and appoint a special master to perform.[118]

It is the general goal of all courts to conserve judicial resources and to enhance the efficiency of the court with regard to its case management.[119] Even as "units" of the district court,[120] bankruptcy courts share this same goal. Trustees and examiners, however, cannot help the bankruptcy courts in reaching this goal of conserving judicial resources and enhancing the efficiency of the courts with regard to case management. In Section 1104, where the Code provides for the appointment of trustees and examiners, there is nothing within

---

to the allowance of any claim that is improper;
(6) if advisable, oppose the discharge of the debtor;
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

115. 11 U.S.C. § 704 (2), (7), (8), (9) (2000).

116. *See supra* notes 14, 21-31, and accompanying text.

117. *See supra* note 14 and accompanying text. In fact, it is when courts have appointed a special master to perform tasks that amount to full and complete fact-finding in the case that courts find the appointment improper as a substitute for the judicial role.

118. Compare the duties of the trustee and examiner under 11 U.S.C. §§ 704, 1106, 1202, 1302 (2000), with the powers of the special master under FED. R. CIV. P. 53. *See also supra* notes 15-31 and accompanying text.

119. *See supra* notes 27-28 and accompanying text.

120. 28 U.S.C. § 151 (1994).

the outlined duties that would reflect the goal of providing assistance to the court.[121] There are alternate standards provided for the appointment of trustees and examiners,[122] and the trustee and the examiner have different duties; however, the appointment of these individuals is not designed to assist the courts in the management of the case.

The trustee's duties are to protect the debtor's assets for its creditors and equity security holders.[123] The trustee has broad powers to carry out this goal, including ousting the debtor's current management and operating the business directly. The examiner is appointed to conduct an investigation of the debtor.[124] The Code appears to contemplate that what the examiner will investigate is improper conduct by, toward, or involving the debtor.[125] The goal of the investigation by the examiner is directed at providing information about the feasibility and wisdom of the continued operation of the Chapter 11 debtor's business. The goal does not appear to be directed at the courts' management of the case as much as it is at the protection of the Chapter 11 debtor's creditors and equity security holders.[126] The examiner's investigation may provide information that ultimately effects the management of the cases; however, it is not the management of the case itself that the examiner's appointment is designed to effect.

Traditionally, special masters have been appointed in complicated two-party and class-action litigation.[127] In bankruptcy cases, particularly in proceedings brought to determine the dischargeability of debts[128] in complex commercial cases, problems related to the computation of damages may be quite complicated and may involve voluminous documents and repeated disputes among different claimants regarding quite similar matters, in much the same way as in two-party and class-action litigation. Although trustees and examiners may be appointed by the bankruptcy court,[129] the duties of the trustee and examiner as described in the Code[130] do not include providing case management assistance to the court in litigation matters like the discharge of debts, one of the very areas where complicated matters of account or computation are most likely to occur. In these

121. 11 U.S.C. § 1104(c) (2000).
122. 11 U.S.C. § 1104(a)(1), (c) (2000).
123. *See* 11 U.S.C. § 704 (2000).
124. 11 U.S.C. §§ 1104(c), 1106(a)(3)-(4), (b) (2000).
125. 11 U.S.C. § 1104(c) (2000).
126. 11 U.S.C. § 1104(c) (2000).
127. *See, e.g.*, Brazil, *Special Masters*, *supra* note 3.
128. 11 U.S.C. § 523(a)(1)-(16) (2000).
129. Examiners only may be appointed in Chapter 11 cases. *See* 11 U.S.C. §§ 103, 901 (2000).
130. *See supra* note 110 and accompanying text.

matters, the bankruptcy court is not authorized to appoint an individual with the expertise to assist the court in expediting these matters.

## VI. INHERENT AUTHORITY OF COURTS OF EQUITY

The authority of courts to control and direct the business of the court in the interest of the sound and efficient administration of justice flows from the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction. In fact, much of what courts must do in the conduct of their business is not provided for in any rule or statute and necessarily relies on inherent authority. The court's inherent authority to direct its business in the interest of the efficient administration of justice provides courts with significant leeway in conducting the business of the court. This inherent authority is well established and widely accepted in the federal judiciary.[131]

The historical development of the courts' authority to appoint special masters began in English courts of equity.[132] In this country, former Equity Rule 68, "Appointment and Compensation of Master," and former Equity Rule 59, "Reference to Master—Exception, Not Usual," provided the first statutory basis for the appointment of special masters; FRCP 53 developed as a modification of those rules.[133] Courts and commentators have emphasized that beyond FRCP 53, courts of equity have the inherent power to appoint special masters.[134] While

131. *See, e.g.*, Veneri v. Draper, 22 F.2d 33, 35 (4th Cir. 1927) ("There can be no question, we think, that under the federal practice the judge has the power in a proper case to refer a cause to an auditor for the purpose of simplifying the issues and thereby enabling the court and the jury to more readily determine the matters in dispute."); United States v. Conservation Chem. Co., 106 F.R.D. 210, 217-21 (W.D. Mo. 1985) (citing and reviewing numerous cases in which special masters were appointed to assist the court in various ways); Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) (appointing a special master pursuant to its inherent authority); Farrell, *Coping with Scientific Evidence*, *supra* note 3, at 943-44; Jacob, *supra* note 3, at 34.

132. *See supra* text accompanying notes 4-5.

133. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli-lxx (1842).

134. *See, e.g.*, *Ex parte* Peterson, 253 U.S. 300, 312 (1920) ("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 progress of a cause."); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982) (The federal courts' equitable power to appoint special masters to supervise implementation of decrees long has been established.), *cert. denied*, 460 U.S. 1042 (1983); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) ("Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U.S.C.A., for appointing and

some commentators have suggested that FRCP 53 is not applicable to pretrial phases of a civil lawsuit, they have observed that federal courts may have the power to appoint a special master in pretrial matters under their inherent authority.[135]

The fact that the federal courts' inherent authority to appoint special masters existed prior to FRCP 53 has been throughly researched and discussed by Wayne D. Brazil.[136] He noted that "the Advisory Committee's intent in drafting Rule 53 was to preserve the essentials of the system of referencing as it existed under the Federal Equity Rules between 1912 and 1938."[137] The "essentials of the system," as they relate to the duties of the special master, included appointing special masters to assist the courts by gathering and analyzing relevant data from complex financial records and making recommendations to the court, to aid in computing damages and in providing other well-defined assistance on specific, narrow issues.[138]

This is exactly the kind of assistance that bankruptcy courts need—assistance in performing very specific and well-focused tasks.[139] Bankruptcy courts are recognized as courts of equity,[140] and, as such, they have the inherent authority to appoint special masters to perform these same specific, narrow, well-defined tasks that special masters were appointed to perform by

---

making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" (quoting *Peterson*, 253 U.S. at 312)); Westchester Fire Ins. Co. v. Bringle, 86 F.2d 262, 263 (6th Cir. 1936); Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) ("This appointment [of a special master] is made pursuant to the court's general equity powers and not under Rule 53, Federal Rules of Civil Procedure."); Conn. Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225, 226 (D. Conn. 1940) ("The power of the court so to proceed [to appoint a special master] is beyond question. It exists independent of the rule. Rule 53 serves but to outline the procedure to be followed when the power is exercised."); Thompson v. Smith, 23 F. Cas. 1092, 1093 (C.C. Ohio 1869) ("[A]cted under the authority of a well-established principle, that the courts of the United States, in the exercise of their chancery powers, possess an inherent authority, in proper cases, to order a reference to a master."); Kaufman, *supra* note 5, at 462 ("There has always existed in the federal courts an inherent authority to appoint masters. . . .").

135. *See generally* MANUAL FOR COMPLEX LITIGATION § 20.14, at 16 (3d ed. 1982); Brazil, *Referring Discovery Tasks*, *supra* note 17, at 143.

136. Brazil, *Referring Discovery Tasks*, *supra* note 17, at 149-60.

137. Brazil, *Referring Discovery Tasks*, *supra* note 17, at 149 (citing statements of Robert G. Dodge, a member of the original Advisory Committee, and Edgar B. Tolman, the secretary of the Advisory Committee on the rules for civil procedure).

138. Brazil, *Referring Discovery Tasks*, *supra* note 17, at 155.

139. *See supra* notes 33-41 and accompanying text.

140. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974); Bank of Marin v. England, 385 U.S. 99, 103 (1966).

courts of equity prior to the enactment of FRCP 53. Bankruptcy courts have not relied upon this inherent authority to appoint special masters presumably because of the existence of Rule 9031.[141]

The only current prohibition against the appointment of a special master in bankruptcy is this procedural rule. There is no statutory provision within the Bankruptcy Code that prohibits the appointment of special masters. The Code expressly prohibits the appointment of receivers[142] through a specific statutory

---

141. Significant controversy exists regarding the relationship between written procedural rules and inherent judicial authority, and the extent to which procedural rules can and should limit courts' inherent authority over their process and procedure. The fact that a procedural rule addresses specific issues does not necessarily mean that a court successfully cannot assert its inherent authority to allow it to deal with those same issues. Courts sometimes find that the rules can be interpreted so that pre-existing inherent authority simply supplements the rules. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991); Link v. Wabash R.R., 370 U.S. 626, 629-33 (1962) (holding that FED. R. CIV. P. 41(b) authorizing dismissals on the motion of the defendant did not deprive courts of their inherent authority to dismiss without such a motion). The Court in *Chambers* rejected the argument that the sanction provisions of FED. R. CIV. P. 11 and 28 U.S.C. § 1927 restrict the court's inherent authority, and stated:

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct [in this case]. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.

*Chambers*, 501 U.S. at 46. *But see* Brooks Fashion Stores v. Mich. Employment Sec. Comm'n, 124 B.R. 436, 440 (Bankr. S.D.N.Y. 1991) ("The Bankruptcy Rules were promulgated by the Supreme Court pursuant to authority granted by Congress in 28 U.S.C. § 2075. As such, the Rules have the force of law."); John Papachristo, Comment, *Inherent Power Found, Rule 11 Lost: Taking a Short Cut to Impose Sanctions in* Chambers v. NASCO, 59 BROOK. L. REV. 1225, 1250-65 (1993) (arguing that the rules should be construed generally to pre-empt inherent authority).

Bankruptcy judges have not appointed special masters routinely pursuant to the inherent equitable powers granted the bankruptcy court under Bankruptcy Code § 105(a): "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (2000). Although § 105 serves as the depository of the bankruptcy court's inherent equitable powers, vesting the court with the power to issue orders necessary to carry out the provisions of the Bankruptcy Code, bankruptcy judges apparently have felt constrained by Rule 9031.

142. 11 U.S.C. § 105(b) (2000) ("Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title."). Under the former Act, the bankruptcy judge had the power to appoint receivers in bankruptcy cases, but the Bankruptcy Code replaced the role of the receiver in bankruptcy with the interim trustee. Under the Bankruptcy Code, there no longer was a need to appoint the receiver as under the former law. *See generally* BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL ¶ 6.02, at 6-4 to 6-7 (3d ed. 1992).

provision. If the drafters had specific and strong reasons why special masters should not be appointed in bankruptcy cases, it is likely that they would have drafted an express statutory provision, as opposed to a procedural rule, as they did regarding receivers.[143] However, the drafters failed to do so.

## VII. CONCLUSION

There are many reasons to permit bankruptcy courts to benefit from the unique services of special masters in the unusually complex bankruptcy case or proceeding—chief among them is an interest in the sound and efficient administration of justice. There are very few sound reasons to deny bankruptcy courts the benefit of special masters. In fact, Rule 9031, which is the sole prohibition against the appointment of special masters in bankruptcy cases, cites no reason at all for denying courts the benefit of this well-accepted case management device.

Many authorities have concluded that no express statutory basis is required for courts of equity to appoint a special master.[144] These authorities hold that courts of equity have inherent power and authority to do that which is necessary to carry out their duties, including appointing persons unconnected with the case to assist the courts in performing their duties.[145]

The effect of Federal Rule of Bankruptcy Procedure 9031 is to deny both the district court and the bankruptcy court the right to appoint a special master in appropriate cases. In denying these courts the power to appoint special masters in bankruptcy cases, Rule 9031 abridges the inherent power of both the district court and the bankruptcy court to act as courts of equity by employing a traditional tool available to a court of equity.[146] But, more significantly, it deprives debtors and creditors of the opportunity to benefit from this traditional judicial resource.

Congress expressly has authorized the Supreme Court to prescribe rules for the Bankruptcy Court.[147] However, in authorizing the Court to prescribe these rules, Congress provided that: "[s]uch rules shall not abridge, enlarge, or modify any substantive right."[148] The inherent power of courts to appoint special masters is a long-standing and well-accepted substantive right that, arguably, has been impermissibly abridged by this procedural rule. A procedural rule should

---

143. 11 U.S.C. § 105(b) (2000).

144. *See supra* notes 131-38 and accompanying text.

145. *See supra* notes 131-38 and accompanying text.

146. *See supra* notes 131-38 and accompanying text.

147. 28 U.S.C. § 2075 (1994) ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.").

148. 28 U.S.C. § 2075 (1994).

not function in a way that, even arguably, modifies an inherent right of the court.[149] Rule 9031 should be abrogated, and a new rule that would permit the appointment of special masters in bankruptcy cases consistent with the substantive rights of a court of equity should be promulgated.

149. *See In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971) ("[N]o rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law.").


# APPOINTING SPECIAL MASTERS

AND

# OTHER JUDICIAL ADJUNCTS

*A Benchbook for Judges and Lawyers*

JANUARY 2013 Edition

# APPOINTING SPECIAL MASTERS AND OTHER JUDICIAL ADJUNCTS

*A Benchbook for Judges and Lawyers*

## Table of Contents

ISBN 0-9786438-0-1

# Acknowledgements

Many professionals contributed to the development of this book.

We first acknowledge the federal and state court judges and magistrates who pioneered the use of masters and who presently appoint them to serve in many cases. The following judges and magistrates have been leaders in the use of masters: Michael J. Davis, Paul L. Friedman, Ronald Hedges, Lamar Pickard, Sam C. Pointer, Jr., Manuel Real, Lee Rosenthal, Barbara Jacobs Rothstein, Shira Scheindlin, and Jack B. Weinstein.

Other important contributors include Sol Schreiber, Frances McGovern, and Kenneth R. Feinberg, who have each served as special masters in many groundbreaking cases and who have given generously of their time to teach and write about special master work.

This book was originally written by several members of the publications committee of the Academy of Court-Appointed Masters (ACAM). The authors and editors included: Roger Haydock, David Cohen, Martin Quinn, and Randi Ilyse Roth. Cynthia Gilbertson and Ann Pagel Newman provided editing assistance. Other members of the initial ACAM publications committee included: David Ferleger, Mike Frascogna, Rick Grauer, Greg Miller, Gale "Pete" Peterson, and Clarence Sundram.

Subsequent editions were revised and edited by members of the Publication Committee including Roger Haydock, David Cohen, and Howard Marsee. Additional ACAM special masters contributed to the development of this book including A.J. Nichols and members of the Board of Directors: Cathy Yanni, Martin Quinn, Lewis Remele, Richard Levie, David Herr, Margaret Farrell, Francis McGovern, Patrick Juneau, John Upchurch, and Sherry Wetsch. Staff and students of the William Mitchell College of Law also contributed to this edition. Beginning in 2011, the Staff of the William Mitchell Journal of Law and Practice has conducted extensive research into federal and state cases involving special masters. They continue to assist in updating this book.

The first National Conference for Special Masters was held in October 2004 at the William Mitchell College of Law, with assistance from the Federal Judicial Center and the National Arbitration Forum. That conference led to the creation of ACAM and then to the development of this book.

# Introduction

This book provides invaluable information to judges and lawyers regarding the best use of special masters. Our civil justice system needs the services that judicial adjuncts can provide the courts, parties, and the public. This benchbook explains how special masters can be used to fulfill our mission to provide a just, speedy, and inexpensive determination for all disputes.

This 200 page- plus reference book is designed to help federal and state court judges and lawyers: (1) decide whether and when to appoint a master; (2) draft effective appointment orders; and (3) anticipate and effectively address ethical issues and practical concerns that arise in special master work. These materials may also be helpful to prospective judicial adjuncts and to parties considering whether to request the appointment of an adjunct.

Sections of this book comprise an invaluable resource regarding special master practice. These sections include a summary of all modern published federal and state court cases involving the use of special masters. Another section includes a summary of Federal Rule 53 and the rules or statutes authorizing masters and judicial adjuncts in every state. A final section includes a description of legal articles and literature on special masters. These unique resources are timely updated and provide a comprehensive research source.

All courts have the power to appoint a special master or other type of judicial adjunct to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of masters in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance. State court judicial officers may be designated as special masters, referees, masters, commissioners, magistrates, or one of the other names for a judicial adjunct.

Many federal and state court judges use masters, and more will do so in the future. Because of their heavy caseloads, many judges and magistrate judges do not have sufficient time for the tasks inherent in the administration of complex, multi-party, and class action cases. Judges need to conserve and preserve their time to rule on pretrial matters and to try cases. And, with expanding dockets and diminishing court budgets, judges are looking for places to turn for help.

Judicial adjuncts can provide courts, parties, and lawyers with essential services without tapping into court resources. Masters can act as mediators and settle civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can help with the growing burden on courts caused by electronically stored information (ESI) discovery problems; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement.

An adjunct can markedly reduce the burden on a judge, the judge's staff, and even the court's administrative staff. Parties and lawyers recognize that in some cases the appointment of a master can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced masters know how valuable they can be to case handling and resolution.

Section 1 of this book summarizes the various roles judicial adjuncts can serve.

Section 2 covers appointment orders. It explains the rules that govern appointment orders and provides a detailed checklist of items to include in an appointment order.

Section 3 covers ethical issues and practical concerns. It explains the sources of authority for ethics rules that govern judicial adjuncts, gives an overview of the rules, and provides a checklist for judges to review with their adjuncts early in the appointment.

The checklists provided in Sections 2 and 3 focus on key issues in the appointment process. Although the checklists are tailored to federal rules, they are also relevant in state courts because of the substantial similarity between state and federal rules, and because the same practical issues will arise in all jurisdictions.

Section 4 details provisions of Federal Rule 53 and the respective rules and statutes empowering special masters and judicial adjuncts for every state. These provisions permit comparative reviews among various procedural and substantive master regulations.

Section 5 includes a listing and summary of all federal court cases dealing with special masters. This section is divided by specific topics and uses.

Section 6 lists the major state court cases that involve judicial adjuncts. All 50 states are represented.

Finally, several appendices provide checklists, sample appointment orders, codes of professional conduct, and a bibliography of academic articles about the use of judicial adjuncts.

The goal of the Academy of Court-Appointed Masters (ACAM) is to assist the courts in providing all parties with a fair, affordable, and speedy resolution of litigation. ACAM members are available to serve as masters and as other types of judicial adjuncts. ACAM's web site provides information about the Academy and links to contact information and credentials for our members: http://www.courtappointedmasters.org. ACAM is very pleased to provide judges and lawyers with this book. We hope that you find it to be a practical, easy-to-use reference.

# Section 1.
# Types of Appointments

Judicial adjuncts can take on several types of roles. Often—but not exclusively—these roles arise in multi-district litigation (MDL) cases, class actions, or other complex or multi-party litigation. Judicial adjuncts appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure are referred to as "masters." Other adjuncts can have titles that reflect the nature of their role, such as monitor, mediator, facilitator, or arbitrator. Sometimes one adjunct will play multiple roles throughout the lifetime of a complex case. Generally, special masters and other judicial adjuncts serve in one or more of the following roles.

## 1.1 Settlement Master

The use of settlement masters to reach global settlements in large-scale tort litigation dates back at least to the Dalkon Shield litigation and Agent Orange litigation beginning in the late 1980s. Courts have come to realize that the appointment of a neutral third-party who is granted quasi-judicial authority to act as a buffer between the court and the parties can provide a useful approach to reaching a settlement. This is especially true in complex litigation involving numerous parties, or when the dispute has matured and individual settlements become repetitive and time-consuming.

## 1.2 Discovery Master

The use of discovery masters to manage and supervise complex cases is relatively commonplace. The discovery master can manage a discovery plan, issue orders resolving discovery disputes, make recommendations to the judge, and monitor ongoing discovery. Sometimes a discovery master will sit in on depositions that are particularly contentious. Because the authority of the master is limited to managing discovery, the courts and parties often view the discovery master's role as less judicial and more managerial in nature.

## 1.3 Electronic Discovery Master

Modern cases typically deal with electronically stored information (ESI) issues. The recent amendments to the discovery rules affect how judges and lawyers can resolve problems that arise from determining what information is readily accessible or recoverable, what is an appropriate native format, and whether meta data needs to be disclosed. A special master experienced in both discovery procedures and computer systems and software can be an invaluable help to a court and the parties. Substantial time and money can be saved by the use of a special master to help resolve ESI disputes.

## 1.4 Coordinating Master

The term 'coordinating master' includes special masters whose work requires them to coordinate activities in a variety of ways. For example, they may meet and confer with lawyers to develop proposed orders to submit to the judge; they may chair a liaison committee of lawyers; or they may work on other aspects of complex cases or the claims administration of class action settlements. They may also coordinate events in cases that are filed in both state and federal courts to provide uniform and efficient procedures.

## 1.5 Trial Master

Masters may be assigned trial duties. Parties may agree to have their dispute heard by a master, either for final decision or for findings and recommendations subject to review by the court. Trial masters may also compile and interpret technical or complex evidence or voluminous data. Trade secret suits are one context in which the need for a trial master may arise. In patent suits, an experienced patent attorney may be asked to conduct a *Markman* hearing and prepare findings and recommendations on the subject of disputed claim terms.[1]

## 1.6 Expert Advisor

It has long been considered within a court's inherent authority to engage the help of an expert advisor. An expert advisor can act as a judicial tutor, providing guidance on complex or specialized subjects. Patent cases and trade secret cases are two contexts in which the need for an expert advisor occasionally arises. When an advisor is utilized, the trial court conducts the trial with support from the advisor.

## 1.7 Technology Master

In cases intertwined with technological, scientific, or complex issues, masters with technical expertise can be very helpful. Adjuncts who are experts in civil procedure as well as experts in a technical field can provide the courts and parties with the expertise necessary to understand and resolve problems. Lawyers who retain their own experts also benefit from the contributions made by these independent court appointed experts.

## 1.8 Monitor

Masters can be helpful after the case is resolved to ensure that a court's order or settlement agreement is implemented properly and complied with over time. In civil cases, masters are often appointed to monitor compliance with structural injunctions, especially those involving employment or other organizational change, those involving facilities assisting the disabled, or those requiring reform in government agencies. By surveying the defendant's remedial efforts,

[1] *Markman v. Westview Instruments*, 517 U.S. 370 (1996).

the master can facilitate judicial evaluation of compliance with equitable relief. Federal courts almost never utilize monitors in criminal cases.

## 1.9 Class Action Master

Masters assisting in a class action may perform a variety of tasks specific to this context, including drafting or implementing a notice to the class or supervising settlement fairness hearings under Fed. R. Civ. P. 23.

## 1.10 Claims Administrator

Claims administration masters can be used to administer the settlement of class action claims or to pay out money damages to a class of recipients after trial. These masters can help select, work with, and monitor the claims administration organization that administers and manages the details of the settlement.

## 1.11 Auditor/Accountant

A judicial adjunct can assist the court by providing an accounting of complex financial information. For instance, a court might ask an adjunct to sort out a plaintiff's claims of damage or a defendant's ability to pay.

## 1.12 Receiver

An adjunct can be asked by the court to function as a receiver. As a receiver, the adjunct would hold and preserve property until a dispute is resolved. A receiver can be given quite extensive responsibilities. In some cases, they have been appointed to run parts of governments or businesses.

## 1.13 Criminal Case Master

In criminal cases, special masters can assist the court in administering the resolution of cases. Masters can assist the prosecution and the defense in negotiating plea bargains while preserving and protecting the interest of the public and the constitutional rights of the defendant. Judicial adjuncts may also help in administering or monitoring non-jail sentencing terms and conditions. A master may accompany a peace officer who is conducting a search for documents in the possession of certain professionals, such as attorneys or clergy. The master's role is to review sensitive documents and secure them until a court determines if the items are privileged.

## 1.14 Conference Judge

A settlement master in a criminal case is sometimes referred to as a "conference judge." These masters help to settle cases, often employing a community approach that involves the prosecutor, defendant, victim, and their families. Witnesses such as police officers sometimes participate. Conference judges are often able to obtain results that are more creative and more beneficial to the victims and their families than a typical plea bargain.

## 1.15 Ethics Master

A state court may appoint a Special Master to review evidence in connection with ethics complaints against attorneys. These Special Masters will recommend whether disciplinary action against an attorney is appropriate, and if so, what sort. This process may supplement the work done by an ethics board.

## 1.16 Appellate Master

The United States Supreme Court and state Supreme Courts have original jurisdiction over certain types of cases—for example, election disputes, or boundary disputes between states. Because these cases are outside of the Supreme Court's normal appellate function, courts will often appoint a Special Master to secure and review an initial evidentiary record, manage discovery and motion practice as would a trial court, and recommend a final disposition.

# Section 2.
# Appointment Orders

The appointment order is the fundamental document that establishes the judicial adjunct's powers, limits, and responsibilities. This order is often referred to as an "order of reference." Section 2 of this book provides a checklist of the items that should be included in an appointment order (specifying which items are mandatory under the federal rules) and explains each item in detail.

In all jurisdictions, a court has the authority to appoint a master if the parties consent. In some jurisdictions or in some cases, the court may only appoint a master to perform specific duties if all the parties consent. The issue of whether consent is necessary may depend upon the applicable law and what specific services the master will provide.

Federal Rule 53(a)(1)(a) empowers a judge to appoint a master to perform duties consented to by the parties. Rule 53(a)(1)(b) allows for an appointment of a master to conduct appropriate trial proceedings or to recommend findings of fact if an exceptional condition exists or there is a need to perform an accounting to resolve a difficult damage computation. And Rule 53(a)(1)(c) permits a master appointment to address pretrial and post trial matters in certain circumstances. Neither of the latter two subsections requires the consent of the parties, although a court may seek their agreement to an appointment.

In state court cases, the applicable law may or may not require consent, or an appellate decision may have decided whether consent is needed. A court usually has the power by applicable rule, statute, or judicial decision to appoint a special master. If a party does object, the duties of the master can be limited to those that are appropriate under the circumstances. If all parties object, the court may reconsider the appointment.

Federal Rule 53(b)(1) requires the judge to give notice to the parties and an opportunity to be heard about the appointment of a master. This subsection implies that the court may appoint a master even if the parties object as long as the appointment does not conflict with the provisions of Rule 53(a) explained above. Court decisions that review the propriety of appointments approve appointments that serve the interests of the court and the parties, that do not deny a party rights, and that do not cost an unreasonable amount. In cases involving a government party, sovereign immunity may prevent a court from requiring the government to pay a master's fee.

## 2.1 Items to Include in Appointment Orders

As a result of the substantial revisions that took effect in December 2003 and 2006, Rule 53 of the Federal Rules of Civil Procedure now prescribes a number of specific items an appointment order must include and suggests others that should be included. A copy of Rule 53 appears at

Appendix 4, along with the relevant Advisory Committee Notes published with the Amendments. The Notes deserve attention because they elaborate on many of the issues addressed in the rule.

The following checklist summarizes the information that will be provided in this chapter. Some of the optional provisions appear in state court master appointment orders. An additional copy of this checklist can be found at Appendix 1.

**Table 1. Checklist of Items to Include in Appointment Orders**

| ✓ | Step | Provision for Appointment Order | Section of Rule 53 | Mandatory to Include in Appointment Order According to Federal Rules? |
|---|---|---|---|---|
| ☐ | 1 | Direct master to "proceed with all reasonable diligence" | Rule 53(b)(2) | Yes |
| ☐ | 2 | Identify the master's duties | Rule 53(b)(2)(A) | Yes |
| ☐ | 3 | Identify when *ex parte* communication may occur | Rule 53(b)(2)(B) | Yes |
| ☐ | 4 | Identify what records the master must maintain | Rule 53(b)(2)(C) | Yes |
| ☐ | 5 | Describe how the master's rulings will be received and reviewed | Rule 53(b)(2)(D) | Yes |
| ☐ | 6 | Describe clearly how the master will be compensated | Rule 53(b)(2)(E) | Yes |
| ☐ | 7 | Statement that appoint-ment of a master is appropriate | Rule 53(a)(l) | No, but good practice |
| ☐ | 8 | Identify source of authority for appointment (Rule 53, or other source) | | No, but good practice |
| ☐ | 9 | Modify master's authority to impose sanctions for failure to cooperate | *See* Rule 53(c) | No, but default standard set out in Rule 53(c) will apply unless modified. |
| ☐ | 10 | List hearing procedures and location | Optional | Optional |
| ☐ | 11 | Describe how documents submitted by parties/ | Optional | Optional |

| ✓ | Step | Provision for Appointment Order | Section of Rule 53 | Mandatory to Include in Appointment Order According to Federal Rules? |
|---|---|---|---|---|
| | | lawyers may be provided to master | | |
| ☐ | 12 | Describe scope of discretion and authority of master not previously covered in Step 2 | Optional | Optional |
| ☐ | 13 | Certification, Oath, or Bond may need to be included under state law | Optional | Optional |
| ☐ | 14 | Include any stipulations agreed to by parties and approved by court relating to special master | Optional | May be included in separate Order |
| ☐ | 15 | Include disclosure affidavit | Rule 53(b)(3) | No, but the rule requires that an affidavit be filed. It is good practice to either attach the affidavit to the appointment order or reference its filing in the appointment order. |

The items in the checklist are explained below.

### ❑ 1. An appointment order must include the "magic words" directing the master to proceed with all reasonable diligence.

An appointment order must specifically "direct the master to proceed with all reasonable diligence." Fed. R. Civ. P. 53(b)(2). Some states require the master to proceed with due diligence and with the least practicable delay.

### ❑ 2. An appointment order must identify the master's duties.

Rule 53 provides that the order appointing a master must state "the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c)." Fed. R. Civ. P. 53(b)(2)(A). The rule adds that the court may also appoint a master to "perform duties consented to by the parties." Fed. R. Civ. P. 53(a)(1)(A).

An appointment order could simply contain a broad clause stating that the master may "perform any and all duties assigned to the master by the court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of

Civil Procedure and Article III of the Constitution." But a more specific order would help ensure that the court, master, and parties have a common understanding of the master's role. Where appropriate, the order language should also establish timetables and deadlines for performance of the master's duties.

A master's duties and responsibilities might include:

### a. Case-management duties

- Assisting with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to case management orders.
- Establishing discovery and other schedules; reviewing and attempting to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records); and supervising discovery.
- Overseeing the management of docketing, including the identification and processing of matters requiring court rulings.
- Compiling data and assisting with the interpretation of scientific and technical evidence, or making findings and recommendations with regard to such evidence.
- Helping to coordinate federal, state, and international litigation.
- Chairing committees of lawyers regarding issues of common interest.
- Working with lawyers to draft and submit proposed orders to the judge.

### b. Discovery-Related Responsibilities

- Coordinating disclosure and discovery schedules with the lawyers.
- Assisting with the formulation of a discovery plan to be submitted to the court.
- Establishing discovery schedules as needed and resolving time, method, and other conflicts.
- Assisting with issues raised by electronically stored information, native formats, and meta data.
- Monitoring depositions.

### c. Settlement-related duties

- Serving as arbitrator, mediator, or neutral in the context of a settlement.
- Proposing structures and strategies for settlement negotiations on the merits and on any subsidiary issues, and evaluating parties' class and individual claims.
- Administering alternative dispute procedures such as summary jury trials, mini-trials, and settlement conferences.

### d. Decision-making duties

- Assisting with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and making recommended findings of fact and conclusions of law.
- Interpreting any agreements reached by the parties.
- Issuing reports and recommendations.
- Holding trial proceedings and making or recommending findings of fact on issues to be decided by the court without a jury, if warranted by the conditions set out in Rule 53(a)(1)(B)&(C).
- Pursuing investigative or quasi-prosecutorial roles.
- Recommending that sanctions be imposed on a party or lawyer for wrongdoing.

### e. Post-trial duties

- Proposing structures and strategies for attorneys fee issues and fee settlement negotiations, reviewing fee applications, and evaluating parties' individual claims for fees (*see also* Fed. R. Civ. P. 54(d)(2)(D)).
- Administering, allocating, and distributing funds and other relief.
- Adjudicating eligibility and entitlement to funds and other relief.
- Monitoring or enforcing compliance with structural injunctions.
- Directing, supervising, monitoring, and reporting on implementation and compliance with the court's orders, and making findings and recommendations on remedial action if required.

### f. Duties that might arise in any role

- Assisting with responses to media and congressional inquiries.
- Making formal or informal recommendations and reports to the parties, and making recommendations and reports to the court, regarding any matter pertinent to the proceedings.
- Communicating with parties and attorneys as necessary in order to permit the full and efficient performance of the master's duties.

## ❑ 3. An appointment order must identify when *ex parte* communication may occur.

Rule 53 directs the court to set forth "the circumstances—if any—in which the master may communicate *ex parte* with the court or a party." Fed. R. Civ. P. 53(b)(2)(B). The propriety of a master's *ex parte* communication with the court or a party depends on the duties the master is assigned and on the language in a court order governing *ex parte*

communications. For example, if the master's duties include settlement negotiations, *ex parte* communication with a party may be necessary and appropriate. *Ex parte* communication with the court may be necessary and appropriate if the master's duties include assisting the court with legal analysis or providing the court with technical expertise. Where a master performs multiple roles, *ex parte* communication with the court might be appropriate concerning some topics but not others. The order might permit *ex parte* communication with the court about one type of matter but not another type of matter. Where a master plays a settlement role, the appointment order should spell out clearly the extent to which the master may report to the court on the progress of settlement discussions. The formula adopted should accommodate the court's need to know the progress of the mediation, and the parties' need to negotiate in confidence. One court adopted the following approach:

> The Mediator shall periodically report to the Court the status of the Mediation process, but those reports should be limited to matters general to the Mediation and its progress and not to specifics or to the merits of the Mediation or to the respective parties' positions or statements made during the course of the proceedings. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him by either of the parties or any matters which otherwise relate to the Mediation.

*In re Propulsid Prods. Liab. Litig.,* MDL No. 1355, 2002 WL 32156066 (E.D. La. Aug. 28, 2002).

The court should modify any restrictions on *ex parte* communications as needed if the master's duties change over time. *See, e.g., id.* (after the special master received additional mediation duties, the scope of his *ex parte* communications with the parties and the court changed).

*Ex parte* communication may be appropriate in the following circumstances:

### a. With the court

- To assist the court with legal analysis of the parties' submissions;
- To assist the court with procedural matters, such as apprising the court regarding logistics, the nature of the master's activities, and management of the litigation; and
- to assist the court's understanding of highly specialized matters.

### b. With the parties

- To arrange scheduling matters;

- To ensure the efficient administration and management of the litigation;
- To make informal suggestions to the parties to facilitate compliance with orders of the court;
- To address discovery or other procedural issues;
- To resolve privilege or similar questions, and in connection with *in camera* inspections;
- To discuss the merits of a particular dispute, for the purpose of resolving that dispute, but only with the prior permission of the opposing counsel involved;
- To work with subcommittees consisting of a subset of the lawyers in a case;
- To obtain information from lawyers regarding scheduling and hearing agendas; and
- To discuss other matters with the permission of the lead lawyers.

### ❑ 4. An appointment order must identify what records the master should maintain.

Rule 53 states that the court must define "the nature of the materials to be preserved and filed as the record of the master's activities." Fed. R. Civ. P. 53(b)(2)(C). The court may not want to obligate the master to maintain certain records and can specify in an appointment order that certain records need *not* be maintained. The court may amend the record requirements if the master's role changes. *See, e.g., In re: Propulsid Prods. Liab. Litig.,* MDL No. 1355, 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the special master was charged with new duties of administering a settlement program). Rule 53 also specifies that the order must state the "method of filing the record." Fed. R. Civ. P. 53(b)(2)(D).

The following are examples of records that a master might be ordered to maintain and file with the court, under seal or by regular filing:

- Normal billing records of time spent on the matter, with reasonably detailed descriptions of activities and matters worked on.
- Formal written reports or recommendations regarding any matter.
- Informal notes regarding any matter.
- Documents created by the master that are docketed in any court.
- Documents received by the master from counsel or parties.
- A complete record of the evidence considered by the master in making or recommending findings of fact.

The Advisory Committee Notes to the 2003 Amendments recommend that appointment orders "routinely" require masters to maintain a record of evidence considered unless there is no prospect that the master will make or recommend evidence-based findings of fact.

### ❑ 5. An appointment order must describe how the master's rulings will be received and reviewed.

Rule 53 directs the court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." Fed. R. Civ. P. 53(b)(2)(D). Rule 53 also provides for how and when parties may object to the master's rulings, and prescribes the default standard of review. Fed. R. Civ. P. 53(f). Specifically, the order should include:

- The mechanism the master should use to file and serve any formal order, finding, report, or recommendation (*e.g.*, whether the master will receive assistance from the clerk of court).
- A reference to Rule 53(f)(2), explaining that a party may file an objection to a special master's order, finding, report, or recommendation no later than 21 days after a copy is served. The order may set out a different time period.
- The consequences of failure to timely object to a master's ruling (*e.g.*, permanent waiver of any objection to the master's orders, findings, reports, or recommendations, such that they are deemed approved, accepted, and ordered by the court).
- The standard of review the court will employ if a party objects to a master's finding or conclusion, as set out in Rule 53(f)(3, 4, 5). Note that the default standard under the rule is *de novo* for findings of fact and conclusions of law, and abuse of discretion for procedural matters. The parties may consent otherwise regarding the standard of review for findings of fact or procedural matters; however, the *de novo* standard of review for conclusions of law may not be changed by agreement of the parties.
- Whether and under what circumstances the parties consent to a different standard of review or waive the right to object to the master's findings or conclusions.

### ❑ 6. An appointment order must clearly describe how the master will be compensated.

Rule 53 states that the court must set forth "the basis, terms, and procedure for fixing the master's compensation." Fed. R. Civ. P. 53(b)(2)(E). The Rule also raises related issues, such as how payment obligations will be allocated between the parties. Fed. R. Civ. P. 53(g)(3).

In setting forth the basis, terms, and procedures for compensation, the order should address some or all of the following:

- Include an explicit statement that the court has "consider[ed] the fairness of imposing the likely expenses on the parties" and has taken steps to "protect against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3).
- Identify the master's hourly rate or an index that will be used to determine it (e.g., the Laffey Index, available at the Department of Justice web site, http://www.usdoi.gov/usao/dc/Divisions/Civil Division/ Laffey Matrix 4.html).
- Identify the sorts of expenses the master may and may not charge to the parties (*e.g.*, overhead).
- Describe how the parties will allocate the cost of the master, and whether this allocation will change (*e.g.*, whether a re-allocation will be made after a verdict or settlement is reached).
- Specify whether the master's appointment is for a term certain (*e.g.*, a given number of hours, or until a certain task is completed), and how and whether that term may be renewed.
- Address whether the master will receive a one-time or continuing retainer.
- Address when and to whom the master must submit an itemized statement of fees and expenses.
- Address whether the master should provide only summary fee statements to the parties and provide complete statements to the court under seal (because itemized statements might reveal confidential communications between the master and the court).
- Establish deadlines for the parties' payment to the master of their share of any amounts owed.
- Establish the payment mechanism (e.g., whether payments are made directly to the master or deposited into the court registry for later disbursement).
- Address whether the master may hire, and obtain reimbursement or compensation for, support personnel (e.g., assistants, accountants, consultants, attorneys).

### ❑ 7. An appointment order should include a section establishing that appointment of a master is appropriate.

Rule 53 does not require that the appointment order state that appointment of a master is appropriate—but it is good practice to make that statement and specify why it is appropriate. Rule 53 provides that masters are appropriate only in limited circumstances. Unless a statute provides otherwise, a court may appoint a master only to:

a. Perform duties consented to by the parties;

b. Hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(1) Some exceptional condition, or
(2) The need to perform an accounting or resolve a difficult computation of damages; or

c. Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a)(1).

In the context of pretrial conferences, Rule 16 further states that "the court may take appropriate action, with respect to . . . the advisability of referring matters to a magistrate judge or master" and with respect to "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(2)(H, L). Boiled down, if the court needs help because a case presents unusually difficult, complex, or labor-intensive issues, appointment of a master is appropriate. *See also* Fed. R. Civ. P. 54(d)(2)(D) (regarding the use of masters to determine attorneys' fees).

In various appointment orders, Judges have used the language set out below to establish that appointment of a special master is appropriate in a specific case.

- The case requires complicated or detailed computations or accountings.
- The presence of multiple parties presents a difficult organizational challenge.
- The legal or factual issues will be especially sophisticated or protracted.
- There will be unusual discovery or evidentiary problems requiring continued oversight.
- The case will require a high degree of coordination with other lawsuits or other courts.
- Resolution of issues will require highly specialized or technical knowledge, or a detailed understanding of foreign law.
- To fully understand the dispute, the court will need the help of expert advisors or consultants.
- Timely or expedited decisions on masses of individual claims cannot be made without additional resources.

- The case will require lengthy oversight and administration of settlement funds.
- The case will require policing of complex injunctive relief.

### ❑ 8. An appointment order should identify the source of authority for the appointment.

Rule 53 does not require that the appointment order specify the source of authority for the appointment, but specifying the source of authority is good practice. Authority for the appointment could come from a variety of sources, including:

- Federal Rule of Civil Procedure 53 or an analogous state rule;
- The inherent authority of the court; or
- The parties' consent.

"Beyond the provisions of [Rule 53] for appointing and making references to Masters, a Federal District Court has `the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States,* 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re Peterson,* 253 U.S. 300, 312 (1920)); *see Ruiz v. Estelle,* 679 F.2d 1115, 116 n.240 (5th Cir. 1982) (same), *amended in part, vacated in part,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd. of Educ.,* 607 F.2d 737, 746 (6th Cir. 1979) (noting that the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the court's inherent power). The court's inherent power to appoint a special master, however, is not without limits. *See Cobell v. Norton,* 334 F.3d 1128, 1142 (D.C. Cir. 2003) (stating that in the absence of consent by the parties, the inherent authority of the court does not extend to allow appointment of a special master to exercise "wide-ranging extrajudicial duties" such as "investigative, quasi-inquisitorial, quasi-prosecutorial role[s]").

### ❑ 9. An appointment order should include a provision restating or modifying the master's authority to impose sanctions for failure to cooperate.

While it goes without saying that a court expects the parties to cooperate with a master, a party or counsel may nevertheless engage in inappropriate behavior. Rule 53 addresses this possibility: if appropriate, a master may "impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." Fed. R. Civ. P. 53(c). It is good practice to state this authority explicitly in the appointment order. In addition, the order should provide that the master shall have the full cooperation of the parties and their counsel, and explain that full cooperation includes making available to the master any facilities, files, databases, or documents the master requires to fulfill his or her functions.

- **10. An appointment order may include information relating to hearings the master may conduct.**

  There are a variety of hearings a master may preside over. Some will be informal, while others will resemble trial proceedings. It may be advisable to include in the order rules and procedures that govern these hearings, the location of a hearing if it is to occur in a place different than the court location, and other matters that relate to the processes.

- **11. An appointment order may specify how parties and lawyers may submit documents and information to a master.**

  A master may obtain a copy of documents filed with the clerk or administrator of the court; or it may be more efficient for a master to receive submissions from the parties without those documents having to be formally filed. The nature and purpose of the materials may determine the method of submission. Masters can readily receive information and documents by email or other form of electronic messaging, and these methods can be listed in the order.

- **12. An appointment order may include provisions regarding the discretion and authority of a master.**

  The scope of a master's discretion and authority may be included in the previous portion of the order detailing the duties of a master. Or it may be advisable or necessary to add additional and further descriptions regarding the general or specific responsibilities of the master. Some state court orders provide that: A Master shall have the discretion to determine the appropriate procedures for the completion of the master's duties and shall have the authority to take all appropriate measures to perform the assigned duties.

- **13. An appointment order may include references to a certification, oath or bond.**

  State statutes or rules may require a master to provide a certification or oath which states, in summary, that the master is familiar with the applicable special master standards and with the grounds for conflicts of interest and disqualification, and that nothing known to the master disqualifies the master. Or a special master may need to procure a surety bond for the benefit of the parties, especially if the master is performing receivership or accounting duties.

- **14. An appointment order may include any stipulations regarding the master.**

  The parties may have agreed to provisions and procedures regarding the role of the master which the court has approved. It may be wise to include these stipulations in the appointment order to avoid any later confusion caused by parties and lawyers entering the

case after the appointment order takes effect. The order could also refer to the other orders or incorporate them by specific reference, if appropriate.

### ❑ 15. An appointment order should include or reference a disclosure affidavit.

Rule 53(b)(3) provides that the court may enter an appointment order "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." *See also* Rule 53(a)(2) (discussing grounds for disqualification). It is good practice to attach the affidavit to the appointment order, or make reference in the appointment order to the affidavit's separate filing. While the court and the master should review § 455 very carefully to ensure there are no grounds for disqualification, or that all such grounds have been disclosed to the parties, the key averment in the master's affidavit could simply state:

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

In addition to thinking carefully about the items to include in the appointment order, the judge and the adjunct should give advance consideration to ethical issues and practical concerns that may arise during the course of the appointment. Table 4 on page 28 provides a checklist of these issues and concerns.

# Section 3.
# Ethical Issues and Practical Concerns

For better or for worse, the conduct of a special master (or other judicial adjunct) reflects significantly on the judge. Regardless of restrictions on *ex parte* conversations between the judge and the master, the parties (and the world) will likely believe that, to some extent, the master is able to speak for the judge and is informed by the judge's thinking. Parties read volumes into what the master says, does, and even hints at. In high-profile litigation, even the master's political, social, and religious activity might come under scrutiny. The press, legislative entities, and regulatory entities that cannot contact the judge about the case may try to contact the master about the case, hoping that the master will answer questions the judge will not answer.

What are the rules that should govern the master's behavior? The first rule, of course, is that the master should work with the judge to understand how he or she would like particular situations handled. Beyond that, though, what codes govern a master's conduct?

Section 3 of this bench book specifies the sources of ethical rules for judicial adjuncts, posits a set of basic ethics rules that apply to masters, and provides a checklist of difficult situations the master may face in the course of the appointment.

## 3.1 Sources of Ethical Rules for Judicial Adjuncts

Several different types of rules and codes of professional responsibility apply or can be construed to apply to a judicial adjunct's conduct, including:

a. **Applicable State Rules of Professional Responsibility.** If the judicial adjunct is a lawyer, he or she is governed directly by these rules. The state equivalent of Rule 1.12 of the Model Rules of Professional Responsibility may be particularly relevant to a lawyer serving as a judicial adjunct. (Rule 1.12 of the Model Rules of Professional Responsibility can be found at Appendix 6 or at: http://www.abanet.org/cpr/mrpc/mrpc_toc.html.)

b. **Code of Conduct for United States Judges ("CCUSJ"), 28 U.S.C.S. app. (2005).** The Compliance section of this Code makes it binding on federal court-appointed special masters, except for the limitations on: certain financial dealings; certain fiduciary activities; the practice of law; participation in political, civic, charitable, and legal organizations; and limitations on the receipt of gifts. (CCUSJ can be found at Appendix 7 or at: http://www.uscourts.gov/library/conduct.html.

c. **Code of Conduct for Judicial Employees ("CCJE").** Judicial adjuncts ordinarily are not judicial "employees." However, the CCJE states that:

> Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

A judge may choose to impose portions of this code on a master or other judicial adjunct. *See* CCJE, Introduction If 2. (CCJE can be found at Appendix 8 or at : http://www.uscourts.gov/library/conduct.html.

d. **28 U.S.C. § 455.** This statute governs the disqualification of federal judges. In addition, Federal Rule of Civil Procedure 53(b)(3) states that a court may appoint a master "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." (Section 455 can be found at Appendix 5 or at: http://codes.lp.findlaw.com/uscode/28/I/21/455.)

e. **Federal Rules of Civil Procedure.** Rule 53 directly governs masters. (Rule 53, along with the Advisory Committee Notes, can be found at Appendix 4 and at: http://www.uscourts.gove/rules/.

f. **Codes of Conduct for ADR organizations such as NAF, JAMS, and AAA.** Several alternative dispute resolution (ADR) organizations have their own ethical guidelines for their neutrals. *See, e.g.*:

- ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, particularly Canons I-VII, available at Appendix 9 and at : http://www.abanet.org/dispute/commercial_disputes.
- National Arbitration Forum's Code of Conduct for Arbitrators, available at Appendix 10 and at: http://www.adrforum.com/users/naf/resources/CodeofConductforArbitrators1.pdf.
- National Arbitration Forum's Code of Procedure, particularly Part IV "Arbitrators," Rules 20-24, available at: http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf
- JAMS Arbitrators Ethics Guidelines, particularly Guidelines I-IX, available at Appendix 11 and at: http://www.jamsadr.com/arbitrators-ethics/
- JAMS Comprehensive Arbitration Rules and Procedures, particularly Rule 30, available at:
- http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2030

g. **Applicable state court statutes and regulations.** There may be additional statutes or regulations in a given state that could serve as a source for ethical guidelines.

Which ethical code(s) govern a judicial adjunct's conduct depends on the nature of the appointment and on the rules that the judge has chosen to impose. To some extent, this is uncharted territory, and overlapping rules from several different codes may apply to some situations. For example, Rule 53 of the Federal Rules of Civil Procedure governs certain special masters, but may not govern monitors or other adjuncts not appointed explicitly under Rule 53. Moreover, depending on the situation, a judge may choose to impose certain provisions of the Federal Code of Conduct for Judicial Employees on a master in one case but not in another case.

Table 2 summarizes the potentially applicable codes.

**Table 2: Codes that Govern the Conduct of Judicial Adjuncts**

| Code | Acronym | Applicability | Notes |
|---|---|---|---|
| State Rules of Professional Responsibility | | All lawyers | If case is venued in jurisdiction in which adjunct is not licensed, which states' rules apply? |
| Code of Conduct for United States Judges | CCUSJ | See Compliance Section—except for a few specified exceptions, this code applies to special masters in federal court | |
| Code of Conduct for Judicial Employees | CCJE | Federal judges may impose these or similar standards on non-employee judicial adjuncts | |
| 28 U.S.C. § 455 | Disqualification Statute | Fed. R. Civ. P. 53(b)(3) makes this binding on special masters in federal court | |

| Code | Acronym | Applicability | Notes |
|---|---|---|---|
| Rule 53 of the Federal Rules of Civil Procedure | Rule 53 | Binding on special masters in federal court | Unclear to what extent: (1) 2003 amendments to the rule apply to masters who were appointed before the rule was amended; and (2) the rule applies to adjuncts who are not "special masters." |
| Rules of specific organizations like the American Bar Association, American Arbitration Association, JAMS, National Arbitration Forum | ABA, AAA, JAMS, NAF | Applies to neutrals who work for those organizations | |
| State rules | | | There may be specific state rules that govern the conduct of judicial adjuncts in that state |

## 3.2 Basic Ethical Rules for Judicial Adjuncts

The basic ethical rules listed below draw on all of the sources of authority explained above. This list is intended to serve as a common-sense guide for the appointing judge and the judicial adjunct to review together when the adjunct's appointment begins, and refer to later as necessary.

The basic rules for judicial adjuncts are summarized in the following table.

**Table 3: Basic Rules for Judicial Adjuncts**

| | Rule | Sources of Authority |
|---|---|---|
| Rule 1 | Preserve Dignity and Integrity of the Court | CCUSJ, Canon 1; CCJE, Canon 1 |
| Rule 2 | Competence and Diligence | Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A (1)-(5); CCJE, Canons 3.B and C; JAMS Guidelines, II; ABA/AAA Code, Canons I.B and IV. |
| Rule 3 | Propriety | CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABAIAAA Code, Canon I.A. |

| | | |
|---|---|---|
| Rule 4 | Neutrality/Absence of Conflict or Appearance of Conflict | Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon 3.F; ABA/AAA Code, Canons I and II; JAMS Guidelines, V. |
| Rule 5 | Disqualification | 28 U.S.C. § 455; CCUSJ, Canon 3.C; ABA/AAA Code, Canons I.H and I; JAMS Guidelines, VII. |

## Rule 1: Dignity and Integrity of the Court

Judicial adjuncts should observe high standards of conduct so as to preserve the integrity, dignity, and independence of the appointing court and judicial system.

Sources: CCUSJ, Canon 1; CCJE, Canon 1.

## Rule 2: Competence and Diligence

2A. A judicial adjunct should accept only assignments: (1) for which the adjunct is suited by education, training, and experience; (2) that the adjunct is able to undertake and complete in a competent, professional, and timely fashion; and (3) as to which the adjunct is physically and mentally able to meet the reasonable expectations of the parties and the appointing court.

2B. A judicial adjunct must maintain professional competence and diligently discharge assigned responsibilities in a prompt, fair, nondiscriminatory, and professional manner.

2C. A judicial adjunct must be patient, dignified, respectful, and courteous; apply an even-handed and unbiased process; and treat all parties with respect.

2D. A judicial adjunct must maintain order and decorum in judicial proceedings.

Sources: Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A(1)-(5); CCJE, Canons 3.B and C; JAMS Guidelines, II; ABA/AAA Code, Canons I.B and IV.

## Rule 3: Propriety

3A. A judicial adjunct should respect and comply with the law and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the adjunct and the judiciary.

3B. A judicial adjunct should not engage in any activities that would call into question the propriety of the adjunct's conduct in carrying out the responsibilities assigned by the appointing court.

3C. A judicial adjunct should not allow family, social, or other relationships to influence official conduct or judgment, nor should an adjunct use the prestige of the office for private gain or to advance or appear to advance the private interests of others.

3D. A judicial adjunct should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Comment: Whether an organization practices invidious discrimination is often a complex question to which judicial adjuncts should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on factors such as how the organization selects members; whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members; and whether it is in fact an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. [CCUSJ, comment to Canon 2C]

Sources: CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon LA.

## Rule 4: Neutrality/Absence of Conflict or Appearance of Conflict

4A. A judicial adjunct should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial adjunct knows that he or she (or a close relative) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the adjunct's ability to properly perform the assigned responsibilities.

4A. Before an appointment, a judicial adjunct should disclose to the appointing court and the parties all matters required by applicable law, any actual or potential conflict of interest or relationship, or other information of which the adjunct is aware that reasonably could lead a person to question the adjunct's impartiality. This duty of disclosure continues throughout the assignment and requires the prompt disclosure of any interest or relationship that arises that the party recalls or discovers.

Sources: Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon IF; ABAIAAA Code, Canons I and II; JAMS Guidelines, V.

## Rule 5: Disqualification

5A. Federal: A master may not have a relationship with the parties, counsel, action, or appointing court that would require disqualification of a judge under 28 U.S.C. § 455, unless waived by the parties with the court's approval after full disclosure of any potential grounds for disqualification.

5B. State: A judicial adjunct shall comply with the applicable state statutes and court rules governing disclosures, conflicts of interest, and disqualification.

5C. Financial interest: A judicial adjunct may not own a legal or equitable interest, however small, in a party, nor have a relationship with a party such as serving as its director or advisor.

Note: Some exceptions to this rule include: *de minimus* ownership of mutual funds that hold a party's securities, unless the judicial adjunct participates in management; holding office in an educational, religious, or similar organization that owns securities; and similar exceptions for government securities, mutual insurance companies, depositors in mutual savings associations, or similar associations, unless the outcome of a proceeding could substantially affect the value of the securities.

Sources: 28 U.S.C. Section 455; CCUSJ, Canon 3.C; ABAIAAA Code, Canons I.H and I; JAMS Guidelines, VII.

## Rule 6: Confidentiality

6A. A judicial adjunct should avoid making public comment on the merits of a pending action, except as appropriate in the course of official duties.

6B. A judicial adjunct should never disclose confidential information received in the course of official duties, except as required in the performance of those duties.

6C. These restrictions on disclosure continue to apply after the conclusion of the judicial adjunct's service, unless modified by the appointing judge.

Sources: CCUSJ, Canon 3.A(6); CCJE, Canon 3.D; ABAIAAA Code, Canon VI.B; JAMS Guidelines, IV.

## Rule 7: Compensation/Time-keeping/Gifts and Favors

7A. A judicial adjunct's compensation for official duties shall be determined by the appointing court.

7B. Reimbursement for expenses incurred in the course of service as a judicial adjunct or for outside activities shall be clearly disclosed and shall be limited to the actual costs and overhead the judicial adjunct reasonably incurs.

7C. A judicial adjunct should not solicit or accept anything of greater than *de minimus* value from anyone doing business with the judicial adjunct or with the appointing court, or from anyone whose interest may be substantially affected by the performance of the adjunct's official duties. Upon completion of an assignment, a judicial adjunct may not accept gifts of

any kind until a period of time has elapsed sufficient to negate any appearance of a conflict of interest.

Note: A federal special master is explicitly exempt from the limitations on receipt of gifts that apply to judges. The Compliance section of the CCUSJ makes Canon 5.C.4 relating to gifts inapplicable to special masters. Nonetheless, good practice in dealing with proffered gifts, meals, trips, and favors is to decline them.

Sources: Rule 53(h); CCUSJ, Compliance Section (B); CCJE, 4.E; ABAIAAA Code, Canon VII; JAMS Guidelines, V.G.

## 3.3 Checklist: Ethical Rules to Consider for Specific Circumstances

The general ethics rules discussed above have very different practical applications in different types of adjunct appointments. In some cases the judge may have strong concerns about the adjunct's outside political activity or interactions with the press, while in other cases these concerns may be minimal.

The judge and judicial adjunct should meet at the beginning of the appointment to consider the items on the following checklist. Each item on this list may require a particularized interpretation of the general ethical rules, depending on the circumstances of the case. This list is based on practical problems that have arisen in actual adjuncts' work.

**Table 4. Checklist of Ethical Considerations and Practical Concerns**

| ✓ | Step | Issue |
|---|---|---|
| ☐ | 1 | Conflicts of Interest |
| ☐ | 2 | Relationship With the Judge |
| ☐ | 3 | Relationship With the Parties |
| ☐ | 4 | Relationships Among Neutrals |
| ☐ | 5 | Gifts and Favors |
| ☐ | 6 | Interactions With Press |
| ☐ | 7 | Interactions With Legislative and Investigative Bodies |
| ☐ | 8 | Political Activity |

| ✓ | Step | Issue |
|---|---|---|
| ☐ | 9 | Timekeeping and Compensation |
| ☐ | 10 | Outside Work |

The following section lists questions that the judge and the adjunct should discuss about each of the items listed above. The judge and adjunct should consider these issues as they apply not only to the adjunct but also the adjunct's staff.

### ❑ 1. Conflicts of Interest

Are there any potential conflict issues that the adjunct should disclose?

- Has the adjunct ever been involved in litigation with either party, or with any subsidiary of either party?
- Does the adjunct have any ownership interest in either party?
- Does the adjunct sit on any boards or advisory committees that might have any jurisdiction over or connection to either party or the matter at issue?
- Is there any reason that the adjunct could not be fair and impartial to all parties?

### ❑ 2. Relationship With the Judge

a. What are the circumstances under which the judge and the adjunct should or should not be allowed to communicate *ex parte?*

- Regarding scheduling?
- Regarding the overall progress of any negotiations?
- Regarding the progress of the adjunct's work?
- Regarding the parties' positions in any disputes?
- Regarding legal matters pending before the judge?
- Regarding other matters?

b. What rules will govern the adjunct's relationship with the judge's law clerk? In a complex case that lasts many years, will the adjunct help orient each successive law clerk to the history and posture of the case?

c. How will these rules about the adjunct's *ex parte* communication with the judge be conveyed to the parties?

d. Are there any concerns about social relationships between the adjunct and the judge?

### ❑ 3. Relationship With the Parties

a. What are the circumstances under which the parties and the adjunct should or should not be allowed to communicate *ex parte?*

- Are there negotiating roles in which *ex parte* communications are appropriate?
- Are there adjudicative roles in which *ex parte* communications should be prohibited?
- Given the adjunct's multiple roles, how can the adjunct properly isolate confidential information received through *ex parte* communications? For example, can the adjunct have *ex parte* conversations while wearing one hat, and then effectively function as a neutral fact-finder while wearing a different hat?

b. Are there any concerns about social relationships between the adjunct and a party?

### ❑ 4. Relationships Among Neutrals

a. To what extent may multiple adjuncts assigned to the same case discuss confidential aspects of the case with each other?

b. Do additional ethical considerations arise where one neutral serves as an "appellate" entity reviewing the work of another neutral?

### ❑ 5. Gifts and Favors

a. What rule will the judge impose about gifts and favors?

- Are *de minimus* gifts allowed from the parties to the adjunct?
- If yes, what is the definition of *"de minimus?"*
- Should the rule be more strict if the government is a party?

b. Are *de minimus* gifts allowed between neutrals?

c. Are there any types of potential "favors" that the adjunct would need to discuss with the judge before accepting?

d. If the adjunct's fees are used to pay vendors (such as a class action administration firm), are there restrictions on gifts and favors that the adjunct may accept from the vendors?

### ❑ 6. Interactions With the Press

a. Reactive Press

- How should the adjunct respond to calls from the press about the case?

- May the adjunct comment about the case to the extent that information is in the public domain, or solely to explain procedural issues?
- May the adjunct talk with the press about the case to a greater extent than the appointing judge would talk with the press?

b. Proactive Press

- If press reports about the case are inaccurate, may the adjunct, for example, write an op-ed piece to try to correct the reporting?
- May the adjunct work through the press to create a better public perception of the case?
- Would the answer be different if the parties agree to the adjunct taking on this work?

### ❑ 7. Interactions With Legislative and Investigative Bodies

a. May the adjunct respond to inquiries about the case from legislators?

- May the adjunct say more to legislators than the appointing judge would say?

b. May the adjunct appear and testify before a legislative committee if asked to do so?

- If so, what are the types of questions that the adjunct must refuse to answer?
- For each category of refusal, what privilege will be claimed?

c. If the Government Accountability Office (GAO), for example, investigates the case, should the adjunct cooperate in the investigation?

- What types of materials should the adjunct provide?
- What materials are privileged? And what is the source of the privilege?

### ❑ 8. Restrictions on Political Activity and Other Outside Activities

Unlike a federal judge or judicial employee, a federal court-appointed master is not automatically required to refrain from partisan or non-partisan political activity. CCUSJ, Compliance section, B(1). But when a master's role will be highly public, the master and appointing judge should consider whether it is necessary to limit the master's group memberships, political activity, and fiscal relationships to ensure actual and apparent neutrality. As mentioned above, a federal judge may choose to impose such restrictions. CCJE, Introduction ¶ 2.

a. Should the adjunct's partisan or non-partisan political activity be restricted?

b. If yes, should the activity of the adjunct's staff be similarly restricted?

## ❑ 9. Timekeeping and Compensation

a. How should the adjunct record his or her time?

- Should the descriptions include confidential information?
- Should itemized bills be submitted only to the court and under seal?
- What time block should be used? (1/10 hour segments?)

b. To what extent may the adjunct charge for staff salaries and expenses?

c. May the adjunct charge an "overhead" rate in addition to actual expenses?

d. What will the process be for constructing and obtaining court approval of budgets and invoices?

## ❑ 10. Other Work

a. May the adjunct accept other work, or is this appointment considered to be "full-time" work?

b. May the adjunct work on another case with or against an overlapping party? After disclosure and consent?

# Section 4.
# Table of State Court Authorities Governing Judicial Adjuncts and Comparison Between State Rules and Fed. R. Civ. P. 53

*This chart originally appeared in 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 (2005) and is reprinted here with permission from the William Mitchell Law Review.*

| **State** | **Authorities and Comparison to FED. R. CIV. P. Rule 53** |
|---|---|
| Alabama | ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53<br>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<br>ALASKA CT. R., CHILD IN NEED OF AID 4<br>ALASKA CT. R., DELINQUENCY 4 |
| Arizona | 16 PART 1, A.R.S. RULES OF F CIV. PROC., RULE 53<br>ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party)<br>Adopts pre-2003 amended version of the federal rule. |
| Arkansas | ARK. R. CIV. P. 53<br>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)<br>Requires agreement of the parties. |
| Colorado | COLO. C. C.P.R. 53<br>Adopts pre-2003 amended version of federal rule. |
| Connecticut | CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53<br>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)<br>DEL. CT. CH. R. 135–47<br>DEL. FAM. CT. C.P.R. 53<br>DEL. SUPER. CT. CRIM. R. 5<br>Limited to hearing issues of fact. |

| State | Authorities and Comparison to FED. R. CIV. P. Rule 53 |
|---|---|
| District of Columbia | D.C. SUPER. CT. R. CIV. P. 53<br>D.C. SUPER. CT. R. DOM. REL. 53<br>D.C. SUPER. CT. R. CRIM. P. 117<br>Adopts pre-2003 amended version of the federal rule. |
| Florida | FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005)<br>Florida Family Law Rule 12.492<br>Florida Probate Rule 5.697<br>All require consent with the possible exception of Probate Rule 5.697. |
| Georgia | GA. CODE ANN. §§ 9-7-1 to -6 (1982 & Supp. 2004) |
| Hawaii | HAW. R. CIV. P. 53<br>Adopts pre-2003 amended version of federal rule. |
| Idaho | IDAHO R. CIV. P. 53<br>IDAHO CRIM. R. 2.2<br>Adopts pre-2003 amended version of federal rule. |
| Illinois | Illinois does not use fee officials.[1] |
| Indiana | IND. R. TRIAL P. 53<br>Adopts pre-2003 amended version of federal rule. |
| Iowa | IOWA R. CIV. P. 1.935<br>Adopts pre-2003 amended version of federal rule. |
| Kansas | KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002)<br>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<br>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)<br>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<br>Adopts pre-2003 amended version of federal rule. |

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

| State | Authorities and Comparison to FED. R. CIV. P. Rule 53 |
|---|---|
| Maryland | MD. CIR. CT. R. CIV. P. 2-541<br>Limited to non-jury matters. |
| Massachusetts | MASS. R. CIV. P. 53<br>MASS. R. CRIM. P. 47<br>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<br>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<br>Adopts pre-2003 amended version of federal rule. |
| Mississippi | MISS. R. CIV. P. 53<br>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<br>Adopts pre-2003 amended version of federal rule. |
| Montana | MONT. CODE ANN. § 25-20-R. 53 (2003)<br>Adopts pre-2003 amended version of federal rule. |
| Nebraska | NEB. REV. STAT. §§ 25-1129 to -1137 (2004)<br>Appointment requires written consent of the parties. |
| Nevada | NEV. R. CIV. P. 53<br>NEV. 1ST JUD. DIST. CT. R. 5<br>Adopts pre-2003 amended version of federal rule. |
| New Hampshire | N.H. R. SUPER. CT. 85-A<br>Appointment requires written consent of the parties. |
| New Jersey | N.J. CONST. art. 11, § 4, ¶ 7<br>N.J. R. CIV. PRAC. 4:41<br>Appointment requires parties' consent. |
| New Mexico | N.M. R. CIV. P. 1-053<br>Adopts pre-2003 amended version of federal rule. |
| New York | N.Y. UNIF. TRIAL CT. R. § 202.14<br>Chief Administrator of courts has power of appointment. |

| State | Authorities and Comparison to FED. R. CIV. P. Rule 53 |
|---|---|
| North Carolina | N.C. GEN. STAT. § IA-1, R. 53 (2003)<br>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<br>Amendment effective March 2011, amended in response to the December 1, 2007 revision of the Federal Rules of Civil Procedure. |
| Ohio | OHIO REV. CODE ANN. CIV. R. 53<br>OHIO REV. CODE ANN. CRIM. R. 19<br>OHIO REV. CODE ANN. JUV. R. 40<br>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)<br>Can appoint to any civil action with the parties' written consent. |
| Oregon | OR. R. CIV. P. 65<br>Appointment requires written consent of the parties; without consent of the parties, appointment requires an exceptional condition. |
| Pennsylvania | 42 PA. CONST. STAT. ANN. § 1126; PA. R. CIV. P. 1558, 1920.51<br>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<br>R.I. R. PROC. DOM. REL. 53<br>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<br>Allows appointment when the parties consent. |
| South Dakota | S.D. CODIFIED LAWS § 15-6-53 (West 2004)<br>Adopts pre-2003 amended version of federal rule. |
| Tennessee | TENN. R. CIV. P. 53<br>Adopts pre-2003 amended version of federal rule. |
| Texas | TEX. R. CIV. P. 171<br>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. Texas also uses masters in tax cases. |

| State | Authorities and Comparison to FED. R. CIV. P. Rule 53 |
|---|---|
| Utah | UTAH R. CIV. P. 53<br>Adopts pre-2003 amended version of federal rule. |
| Vermont | VT. R. CIV. P. 53<br>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. 3:23<br>A court decree refers a matter to a "commissioner in chancery." |
| Washington | WASH. SUPER. CT. CIV. R. 53.3<br>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)<br>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<br>Adopts pre-2003 amended version of federal rule. |

# Section 5.
# Selected Cases – Federal Cases
### Federal Cases Involving Masters in Various Roles

**Some of the cases that appear in this Appendix were obtained from the Special Master Case Reporter published by David Cohen www.SpecialMaster.biz**
(* = *appointment of masters was at issue*)

**Auditor**

*In re Peterson*, 253 U.S. 300 (1920) (holding that the lower court's appointment of an auditor to investigate facts, hear witnesses, examine accounts of the parties, sort out allegations, and make and file a report to clarify the issues was proper).*

*Arthur Murray, Inc. v. Oliver*, 364 F.2d 28 (8th Cir. 1966) (appointing an accountant to compute damages; finding that referral to a master to audit plaintiff's books and records was proper, and finding that referral to a master to explore collateral issues outside of the trial record was improper).*

*Petties v. District of Columbia*, 779 F. Supp. 2d 95 (D.D.C. 2011) (holding that failure by private provider of special education services to file timely request for hearing regarding its invoice dispute with school district precluded review of invoices by special master).

*In re Donald L. Loury*, No. BK11-41632-TLS, 2011 WL 5024302 (D. Neb. Oct. 21, 2011) (appointing referee in real estate dispute/bankruptcy case to conduct a final accounting between the parties).

*In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, No. 1203, 2011 WL 2932928 (E.D. Pa. July 20, 2011) (holding that under the Audit Rules, it was within the special master's discretion to appoint a Technical Advisor to review claims after the trust and claimant had the opportunity to develop the Show Cause Record).

*McDowell v. Price*, No. 4:08cv003979 SWW, 2010 U.S. Dist. LEXIS 116266 (E.D. Ark. Oct. 13, 2010) (appointing a special master to make accounting of the plaintiff's interest in the plans).

**Claims Administrator**

*Stern v. Marshall*, 131 S.Ct. 2594 (2011) (holding that a bankruptcy referee may exercise jurisdiction over a trustee's voidable preference claim against a creditor only where there was no question that the referee was required to decide whether there has been a voidable preference in determining whether and to what extent to allow the creditor's claim).

*United States v. Mastellone*, No. 10 Civ. 7374 (DLC), 2011 WL 4031199 (S.D.N.Y. Sept. 12, 2011) (appointing a special master to determine the award amount to be paid to each claimant).

*Douglas v. Discover Prop. & Cas. Ins. Co.*, No. 3:08cv1607, 2011 WL 3584759 (W.D. Pa. Aug. 12, 2011) (seeking appointment of a special master to adjudicate the claims of the members of a potential class action).

*Davis v. Unum Grp.*, No. 03-940, 2011 WL 2438632 (E.D. Pa. June 17, 2011) (denying plaintiff's request for the court to appoint a special master to supervise defendants' creation of a new procedure for the review of disability claim denials, terminations, and buy-outs).

*Grant St. Grp., Inc. v. Realauction.com, LLC*, No. 9-1407, 2011 WL 474327 (W.D. Pa. Feb. 4, 2011) (appointing a special master to oversee the claims construction process due to highly technical nature of the patents).

*Noah Systs., Inc. v. Intuit, Inc.*, No 06-cv-00933, 2010 WL 5638627 (W.D. Pa. Dec. 17, 2010) (adopting the report and recommendation of the special master which recommended constructions for various disputed claim terms).

*In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (appointing special master to oversee allocation and distribution of proceeds in case alleging that Swiss banks profited from the Holocaust).

**Class Action Master**

*Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3rd Cir. 2011) (District Court referred the case to a special master to consider and recommend a plan for dissemination of the Notice of Settlement, a distribution plan for members of the Indirect and Direct Purchaser settlement classes, division of the fund, amount of incentive awards for named plaintiffs, and fee requests.).

*In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175 (3d Cir. 2002) (appointing fee examiner to review class counsel's application for fees following settlement of class action).*

*Mayberry v. United States*, 151 F.3d 855 (8th Cir. 1998) (appointing special master to assist in settlement of damages).

*E.E.O.C. v. U.S. Steel Corp.*, Civil Action No. 10-1284, 2012 WL 2402907 (W.D. Pa. June 26, 2012) (discussing the involvement of a special master in a potential class action alleging violations of the Americans with Disabilities Act).

*United States v. City of New York*, 276 F.R.D. 22 (E.D.N.Y. 2011) (holding that a special master is one of the tools available to the court to make class actions more manageable).*

*In re Asbestos Prods. Liab. Litig.*, MDL No. 875, 2011 WL 6355308 (J.P.M.L. Dec. 13, 2011) (8,862 maritime cases were consolidated before a Magistrate Judge with assistance of a special master).

*United States v. City of New York*, No. 07-CV-2067, 2011 WL 2259640 (E.D.N.Y. June 6, 2011) (holding that exceptional conditions exist that require the appointment of a special master to conduct the individual claims process under Fed. R. Civ. P. 53(a)(1)(B) and appointing special master to take evidence, make findings of fact, and determine issues of law unique to individual claimants).

*Montez v. Hickenlooper*, No. 08-1399, 2011 U.S. Dist. LEXIS 89016 (D. Colo. May 10, 2011) (holding that the special master did not err in finding that claimant did not suffer from a covered disability as defined by the settlement agreement).

*Princeline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (appointing a special master to work with the parties to review and amend, as appropriate, the plan for class notice and distribution of the net settlement fund).

*Braud v. Transp. Servs. Co. of Ill.*, Nos. 05-1898, 05-1977, 05-5557, 06-0891, 2010 WL 3283398 (E.D. La. Aug. 17, 2010) (approving the settlement after master testified as to the fairness of the settlement).

*Beth V. v. Carroll*, 155 F.R.D. 529 (E.D. Pa. 1994) (appointing special master to review consent decrees and class certification).

*McLendon v. Cont. Grp., Inc.*, 749 F. Supp. 582 (D.N.J. 1989) (appointing special master to aid in post-liability settlement of damages for 5,000 claimants in ERISA case), *aff'd on other grounds*, 908 F.2d 1171 (3d Cir. 1990).

*In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985) (appointing three special masters to negotiate and implement settlement claims of service members and their relatives against the manufacturers), *aff'd in part, rev'd in part*, 818 F.2d. 179 (2d Cir. 1987).

*Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985) (appointing special master to profile claims of 1,000 member class for jury and compare claims of representatives with claims of class members), *aff'd on other grounds*, 782 F.2d 468 (5th Cir. 1986).

*In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y. 1982) (holding that appointment of a special master to resolve disputes and rule on discovery matters was warranted under the circumstances).

*Kyriazi v. W. Elec. Co.*, 465 F. Supp. 1141 (D.N.J. 1979) (appointing three-person panel to evaluate damage claims in class action sex discrimination suit with more than 10,000 potential claims), *aff'd on other grounds*, 647 F.2d 388 (3d Cir. 1981).

**Coordinating Master**

*In re United States*, No. 569, 1998 WL 968487 (Fed. Cir. Dec. 23, 1998) (holding that appointing special master for 120 cases was proper).*

*Zinn v. United States*, No. 1:11 CV 278, 2012 WL 3538047 (N.D. Ohio July 26, 2012) (discussing the appointment and duties of special master in a taxpayer dispute with United States).

*Cramer v. United States*, No. 1:11 CV 276, 2012 WL 3538022 (N.D. Ohio July 25, 2012) (discussing the appointment and duties of special master in a taxpayer dispute with United States).

*Burk v. United States*, No. 5:10-CV-470-H, 2012 WL 1185011 (E.D.N.C. Apr. 9, 2012) (appointing Magistrate Judge David W. Daniel as settlement master and directing him to meet with the parties and supervise negotiations in a medical malpractice action).

*Lee v. Marvel Enters.*, 765 F. Supp. 2d 440 (S.D.N.Y. 2011) (appointing a special master to oversee the annual meeting of SLMI shareholders to elect a board, and to reinstate the corporation).

*Res. Real Estate Opportunity OP, LP v. Cannery at Webster Station, LTD*, No. 3:11–CV–220, 2011 WL 6884243 (S.D. Ohio Dec. 28, 2011) (appointing a special master to appraise, advertise, and sell the property in a foreclosure action against the developer of high end loft apartments retro-fitted into a historic Cannery building).

*NLRB v. Jackson Hosp. Corp*., No. 07-549, 2011 WL 210679 (D.D.C. Jan. 14, 2011) (appointing a special master to resolve petitioner's motion to amend and to review cross motions for summary adjudication).

*In re Baycol Prods. Liab. Litig.*, No. 1431, 2002 WL 31422989 (J.P.M.L. Oct. 22, 2002) (appointing panel to consolidate pretrial proceedings in civil litigation cases).

**Discovery Master**

*Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (discussing the court appointment of an expert under the Fed. R. Evid. 706).

*Good Stewardship Christian Ctr., Inc. v. Empire Bank*, 341 F.3d 794 (8th Cir. 2003) (finding the district court did not abuse its discretion in appointing a special master and in taxing all costs to appellants).

*Aird v. Ford Motor Co.*, 86 F.3d 216 (D.C. Cir. 1996) (appointing special master in oversight of discovery and other procedural matters; on appeal, court held that the district court enjoys broad discretion to allocate the special master's fees as it thinks best under the circumstances of the case and can, in appropriate cases, tax the master's fees as costs against the losing party).

*United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741 (9th Cir. 1995) (appointing special master to supervise all non-dispositive pre-trial proceedings and to conduct and supervise settlement negotiations; district court is entitled to rely upon recommendations of special master in deciding whether to approve consent decree, but reliance cannot be so complete that it takes the place of court's obligation to independently scrutinize terms of settlement).

*Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992) (holding that the appointment of master to make recommendation on fundamental issues of liability over the objection of one party was improper).*

*In re Armco Inc.*, 770 F.2d 103 (8th Cir. 1985) (holding that it was error to refer trial on merits to master, but proper to refer all pretrial matters, as well as power to hear and make recommendations on dispositive motions).*

*Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, U.A.*, 657 F.2d 890 (7th Cir. 1981) (recommending that trial court appoint a special master to oversee discovery where counsel engaged in obstructionist tactics).

*In re Murphy*, 560 F.2d 326 (8th Cir. 1977) (appointing three-person special master panel to review documents submitted by the parties and to make preliminary rulings on the government's discovery motions in a patent suit).

*First Iowa Hydro Elec. Coop. v. Iowa-Ill. Gas & Elec. Co.*, 245 F.2d 613 (8th Cir. 1957) (finding that failure to make timely objection to the appointment of a special master either at the time of the order or promptly thereafter constitutes a waiver of error and objections made only to the special master are unavailing).*

*Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956) (granting master power of full and final judgment with regard to the question of what documents were subject to attorney-client privilege).

*Dish Network LLC v. Fun Dish, Inc.*, No. 1:08CV1540, 2012 WL 4322605 (N.D. Ohio Sept. 20, 2012) (appointing special master to oversee discovery disputes).

*LMD Integrated Logistic Servs., Inc. v. Mercer Distrib. Servs., LLC*, No. C10-1381 BHS, 2012 WL 3762508 (W.D. Wash. Aug. 29, 2012) (denying motion objecting to the special master's report, and accepting the special master's authority to review documents relating to the transaction between the parties).

*TransWeb, LLC v. 3M Innovative Props. Co.*, Civil Case No. 10-4413, 2012 U.S. Dist. LEXIS 97515 (D. N.J. July 13, 2012) (reviewing defendant's objection to the special master's recommendations on the application of tghe attorney-client privilege and the work product doctrine).

*Dillon v. Antero Res.*, No. 2:11-CV-01038, 2012 WL 2899710 (W.D. Pa. July 10, 2012) (advising the parties that the court would appoint a special master to resolve discovery issues should there be an unreasonable volume or frequency of discovery requests).

*In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, No. 1:00-1898, 2012 U.S. Dist. LEXIS 79349 (S.D.N.Y. June 5, 2012) (granting defendant's motion to compel production of documents).

*United States v. Duke Energy Corp.*, No. 1:00CV1262, 2012 WL 1565228 (M.D.N.C. Apr. 30, 2012) (discussing the special master's review of documents for privilege and work product).

*In re Jefferson Cnty., Ala.*, 465 B.R. 243 (Bankr. N.D. Ala. 2012) (appointing two special masters to investigate the sewer system and its operations).

*Nystedt v. Munroe*, No. 10–10754–RWZ, 2012 WL 244939 (D. Mass. Jan. 26, 2012) (appointing attorney to serve as special discovery master).

*Chevron Corp. v. Donzinger*, 783 F. Supp. 2d 713 (S.D.N.Y. 2011) (holding that allegations that the special master who presided over a deposition was biased were unfounded).

*In re Chevron Corp*, 749 F. Supp. 2d 170 (S.D.N.Y. 2011) (appointing a special master to preside at the deposition and to resolve, subject to review, any privilege and work product claims made in response to specific questions).

*In re Refco Sec. Regulation*, 759 F. Supp. 2d 342 (S.D.N.Y. 2011) (appointing special master in a multi-district litigation (MDL) concerning bankrupt securities broker and holding that a district court reviews discovery orders of a special master appointed in MDL for abuse of discretion).

*B & B Hardware, Inc. Fastenal Co.*, No. 4:10-CV-00317-SWW, 2011 WL 6829625 (E.D. Ark. Dec. 16, 2011) (appointing special master to oversee discovery during depositions).

*U-Haul Co. of Nev. v. Gregory J. Kamer, Ltd.*, No. 2:06-cv-618-RCJ-PAL, 2011 U.S. Dist. LEXIS 121820 (D. Nev. Oct. 20, 2011) (mentioning that it is permissible to disclose confidential information to court officials involved in the case, including a special master).

*Augustin v. Jablonsky*, Nos. CV 99-3126(DRH)(ARL), CV 99-2844(DRH)(ARL), CV 99-4238 (DRH)(ARL), 2011 WL 4953982 (E.D.N.Y Oct. 19, 2011) (denying plaintiff's motion for the appointment of a special master to oversee discovery in the damages phase of the class action proceedings).

*Knitting Fever, Inc. v. Coats Holdings, Ltd.*, No. CV 05-1065(DRH)(WPW), 2011 WL 3678823 (E.D.N.Y. Aug. 22, 2011) (denying motion to modify the protective order and appoint a special master to oversee access to discovery previously produced in the action).

*Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-cv-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011) (denying plaintiff's request that the Court appoint a special master to "address the technical issues regarding the types of e-discovery fees claimed by defendants [ ] and the reasonableness and necessity of" the e-discovery fees claimed as "costs" by defendants).*

*In re Vioxx Prods. Liab. Litig*., MDL No. 1657 § L, 2011 U.S. Dist. LEXIS 29261 (E.D. La. Mar. 21, 2011) (appointing a special master to oversee discovery in complex products liability case).

*In re Application of Chevron Corp*., No. 10 MC 00001 (LAK), 2010 WL 3489341 (S.D.N.Y. Sept. 7, 2010) (appointing special master at district court to preside over depositions to rule on objections and asserted privileges).

*Trusz v. UBS Realty Investors LLC*, No. 3:09 CV 268 (JBA), 2010 WL 3583064 (D. Conn. Sept. 7, 2010) (noting that if counsel are unable to agree on revised search terms for discovery of disputed documents, then the magistrate judge will appoint a special master to whom the parties can submit the dispute).

*In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx), 2010 WL 3260180 (C.D. Cal. Aug. 13, 2010) (finding that the volume of discovery warrants appointment of a special master to resolve discovery disputes).

*Language Line Servs., Inc. v. Language Servs. Assoc., LLC*, No. C 10-02605 JW, 2010 WL 2764714 (N.D. Cal. July 13, 2010) (concluding that due to the parties consent and the cost savings to the parties, which will result from a more focused management of the evidence, the appointment of a special master would be beneficial to the parties).

*Rand ex rel. Dolch v. Am. Nat'l Ins. Co.*, No. C 09-639 SI, 2010 WL 2758720 (N.D. Cal. July 13, 2010) (considering, but not appointing, special master to address discovery issues).*

*Philip M. Adams & Assocs. v. Dell, Inc.*, No. 1:05–CV–64 TS, 2010 WL 2733319 (D. Utah July, 9, 2010) (adopting the claim construction recommended by special master).

*Platypus Wear, Inc. v. Horizonte Fabricacao Distribicao Importacao Exportacao LTDA*, No. 08-20738-CIV, 2010 WL 1524691 (S.D. Fla. Apr. 15, 2010) (adopting special master's findings of fact).

*In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, MDL. No. 1827, 2010 WL 1264601 (N.D. Cal. Mar. 29, 2010) (recommending that the Department of Justice be permitted to review all civil discovery, but be prohibited from making any copies of foreign discovery of unindicted defendants).

*Flintkote Co. v. Gen. Accident Assurance Co. of Can.*, No. C 04-1827 MHP, 2010 WL 770181 (N.D. Cal. Mar. 5, 2010) (overruling defendant's objections to the special master report because the objections are not actually objections but rather a defective motion for reconsideration of the court's ruling).

*In re Avandia Mktg., Sales Practice, & Prod. Liab. Litig.*, Nos. CV030231, A134855, 2009 WL 4641707 (E.D. Pa. Dec. 7, 2009) (agreeing with the special master's report and recommendation that the majority of the documents reviewed in the case were not protected by attorney-client privilege).

*In re Omeprazole Patent Litig.*, No. M-21-81BSJ, 2004 WL 842024 (S.D.N.Y. Apr. 16, 2004) (referring evidence to special master for in camera document review because of potentially privileged content).

*Diversified Grp., Inc. v. Daugerdas*, 304 F. Supp. 2d 507 (S.D.N.Y. 2003) (appointing special master to review documents for possible redaction. Both parties filed objections to the report of the special master, but the district court adopted the report with a few additional redactions).

*United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990) (finding that the appointment of a special master was necessary in CERCLA case due to complexity of the issues, the number of parties, and the need to expedite the matter), *aff'd*, 982 F.2d 1436 (10th Cir. 1992).

*Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987) (finding that the appointment of special master to supervise discovery, and sovereign immunity did not preclude the court from requiring a party to pay all costs of the special master).

*United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978) (appointing two special masters in antitrust suit to review 500 documents and make recommendations on privilege and relevance).

*Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114 (C.D. Cal. 1977) (finding that exceptional conditions existed requiring that discovery be held under supervision of special master).

**Expert Master**

*Adkins v. VIM Recycling Inc.*, 644 F.3d 483 (7th Cir. 2011) (holding that the plaintiff's RCRA citizen suit should go forward, and that previously appointed special master was proper).

*Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600 (9th Cir. 2002) (appointing special master to evaluate medical testimony under *Daubert*).

*Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988) (appointing special master to assist in calculating damages in medical malpractice case).*

*United States v. Cline*, 388 F.2d 294 (4th Cir. 1968) (using surveyor who served both as master and as expert witness in border dispute).

*Danville Tobacco Ass'n v. Bryant-Buckner Assoc., Inc.*, 333 F.2d 202 (4th Cir. 1964) (upholding appointment of a special master with knowledge of tobacco marketing).*

*Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962) (appointing medical expert to examine infant plaintiff who may have suffered serious injuries which were difficult to diagnose).*

*Mohr v. Erie Cnty. Legislature*, No. 11-CV-559S, 2011 WL 3421326 (W.D.N.Y. Aug, 4, 2011) (holding that it was a virtual impossibility for the court to appoint a special master to recommend a redistricting plan, or to itself craft a redistricting plan, in a timeframe that would allow for the carrying and filing of designating petitions in accordance with deadlines established under New York's election law).

*Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 339 F. Supp. 2d 202 (D. Mass. 2004) (appointing special master to assist in research, analysis, and drafting opinion in patent infringement case).

*Xilinx, Inc. v. Altera Corp.*, Nos. 93-20409 SW, 96-90922 SW, 1997 WL 581426 (N.D. Cal. June 3, 1997) (appointing independent technical advisor in patent claim case to assist the court in understanding the relevant technology).*

**Monitor or Other Remedial Role**

*Brown v. Plata*, 131 S. Ct. 1910 (2011) (stating that courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers).

*Local 28 of Sheet Metal Workers' Int'l. Ass'n v. EEOC*, 478 U.S. 421 (1986) (appointing administrator to supervise union's membership practices to ensure compliance with court order).*

*United States v. Prater*, No. 10-12909, 2011 WL 6444584 (11th Cir. Dec. 22, 2011) (reviewing testimony from special master assigned to ensure compliance of court ordered injunction which supported defendants conviction).

*Hofmann v. De Marchena Kaluche & Asociados*, 657 F.3d 1184 (11th Cir. 2011) (reviewing appointment of a receiver-like "monitor" to oversee defendants' financial and business assets).

*NLRB v. E-Z Supply Corp*., No. 08-2077, 2010 WL 3449123 (2d Cir. Sept. 3, 2010) (appointing special master to examine the claims of respondent's counsel and oversee enforcement of the NLRB order).

*Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) (finding that appointment of a monitor to report on defendants' compliance with injunction that required defendants to "fix the system" exceeded the scope of the district court's authority).*

*Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (finding error where court monitor's role was supplemented by appointing him as special master-monitor, because his impartiality was doubted).*

*Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001) (appointing special master in connection with consent decree entered in civil rights action brought by bus passengers against county transportation authority), *cert. denied*, 535 U.S. 951 (2002).

*Bogard v. Wright*, 159 F.3d 1060 (7th Cir. 1998) (finding that order extending the term of the special master monitoring compliance with consent decree regarding treatment at state mental hospitals was a procedural order, not a grant of injunction or order continuing injunction).

*Harris v. Philadelphia*, 137 F.3d 209 (3d Cir. 1998) (appointing special master to monitor city's compliance with consent decree).

*In re Scott*, 163 F.3d 282 (5th Cir. 1998) (appointing special master to monitor implementation of judgments and injunction regarding conditions in state prisons).*

*Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357 (D.C. Cir. 1998) (appointing special master to monitor compliance with orders to improve jail conditions).

*Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997) (appointing special master to monitor implementation of court-ordered improvements in conditions at juvenile detention facilities).

*Hook v. Arizona*, 120 F.3d 921 (9th Cir. 1997) (appointing special master to monitor compliance with prison reform decree).*

*Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994) (appointing Governor as receiver in case challenging elections held by State Board of Agriculture).*

*Juan F. by & through Lynch v. Weicker*, 37 F.3d 874 (2d Cir. 1994) (finding that "court monitors" are given the same powers and are subject to the same limitations and standards as special masters).

*United States v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2d Cir. 1994) (holding that the district court did not overstep its constitutional authority by appointing a special master to implement a supplemental long term plan order in a housing segregation case).*

*In re Pearson*, 990 F.2d 653 (1st Cir. 1993) (appointing special master to monitor and analyze continuing efficacy of injunctive relief granted against treatment facility pursuant to consent decrees).*

*United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993) (stating that the appointment of a special master did not constitute a palpable error as a matter of law in a decades-long litigation that was especially complex and immersed in continuing transition).*

*Thomas S. by Brooks v. Flaherty*, 902 F.2d 250 (4th Cir. 1990) (appointing special master to monitor decree requiring reforms at state psychiatric hospital).

*Gary W. v. Louisiana*, 861 F.2d 1366 (5th Cir. 1988) (appointing special master to monitor compliance with injunction and court order regarding state treatment of children with retardation placed in out-of-state institutions).*

*Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988) (holding that appointment of a special master to supervise and coordinate the actions of prison officials to achieve full compliance was appropriate where non-compliance with a previous district court order was emphasized).*

*Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089 (3d Cir. 1987) (finding that contempt motion that raised the single issue of whether exhibitions of fountains complied with consent decree and court order raised matters that were too simple to be referred to a special master).*

*Brock v. Ing*, 827 F.2d 1426 (10th Cir. 1987) (appointment of special master to determine amount due to employees prevailing in action brought pursuant to the Fair Labor Standards Act was proper, and reversing district court's order that both parties pay into master reimbursement fund, finding that Rule 53 permits the expense to be borne by the parties in proportion as fairness may suggest).

*Nat'l Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536 (9th Cir. 1987) (appointing special master to monitor compliance with preliminary injunction).*

*Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987) (appointing special master to monitor prison reform compliance).*

*Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986) (appointing special master to monitor the implementation of the permanent injunction in prison reform case), *cert. denied*, 481 U.S. 1069 (1987).*

*Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (appointing special master to monitor state prison system's compliance with court order and finding that placing master in control of state prison would have been in error).*

*Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (upholding the appointment of special masters and monitors to supervise prison consent decree but finding that the order of reference to the monitors was too sweeping), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (appointing special master to monitor implementation of the relief order), *cert. denied*, 460 U.S. 1042 (1983).*

*United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (appointing special master to oversee the provisions of the order in a Fair Housing Act case).*

*Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84 (3d Cir. 1979) (directing special master to "plan, organize, direct, supervise and monitor" the implementation of remedial order by a state facility for the mentally retarded), *rev'd on other grounds*, 451 U.S. 1 (1981).*

*Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979) (appointing special master to give appraisal of desegregation plans submitted by defendants).*

*Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (appointing special master to monitor prison reform compliance case), *rev'd in part on other grounds*, 438 U.S. 781 (1978).*

*Ohio Valley Env't. Coal., Inc. v. Patriot Coal Corp.*, No. CIV. A. 3:11-0115, 2012 U.S. Dist. LEXIS 35161 (D. W.Va. Mar. 15, 2012) (reviewing consent decree, which calls for a process of appointing a special master to oversee the compliance requirements and for the court to retain limited jurisdiction during the implementation of the decree).

*United States v. City of New York*, No. 07–CV–2067 (NGG)(RLM), 2012 WL 745560 (E.D.N.Y. Mar. 8, 2012) (finding that a special master could be appointed and was appointed to determine a claimant's eligibility for remedial plan).

*Sierra Club v. Fola Coal Co., LLC*., CIV. A. No. 2:10-1199, 2012 U.S. Dist. LEXIS 17466 (D. W.Va. Feb. 9, 2012) (reviewing consent decree, which provided that if the special master makes a negative determination with respect to defendant's compliance with the narrative water quality standards pursuant to the decree, defendant shall pay an additional fee to the West Virginia Land Trust).

*United States v. Territory of the Virgin Islands*, No. 1986-265, 2012 U.S. Dist. LEXIS 15524 (D.V.I. Feb. 8 2012) (reviewing case in which special master was appointed to assist court in evaluating compliance).

*In re Eunice Train Derailment*, No. 00–1267, 2012 WL 70651 (W.D. La. Jan. 9, 2012) (appellant objects to the allocation of special master).*

*Greater New Orleans Fair Housing Center v. St. Bernard Parish*, Nos. 11–858, 11–737, 2012 WL 27785 (E.D. La. Jan. 5, 2012) (plaintiff's request the court appoint a special master to oversee future disputes that arise between the parties).

*Lee v. Marvel Enters.*, 765 F. Supp. 2d 440 (S.D.N.Y 2011) (stating that, in a related case, another district court appointed a special master to oversee shareholders meeting due to past misconduct by the board of directors).

*Windisch v. Hometown Health Plan, Inc*., No. 3:08-cv-00664-RCJ-WGC, 2011 U.S. Dist. LEXIS 116657 (D. Nev. Sept. 28, 2011) (stating that the court may appoint a special master to work with the parties to stipulate facts).

*Fisher v. United States*, Nos. CV 74-90 TCV DCB (lead case), CV 74-204 TVC DCB (consolidated case), 2001 U.S. Dist. LEXIS 104315 (D. Ariz. Sept. 13, 2011) (appointing special master oversee and enforce desegregation plan and discussing details for appointing and paying special master).

*Toerner v. Cameron Parish Police Jury*, No. 2:11 CV1302, 2011 U.S. Dist. LEXIS 90584 (W.D. La. Aug. 14, 2011) (appointing special master to avoid malapportionment problems).*

*In re Nims*, No. 11–15968–TJC, 2011 WL 1402771 (Bankr. D. Md. Apr. 13, 2011) (stating that a court must determine on a case by case basis what constitutes "cause" for purposes of granting automatic stay "for cause," and citing a 1992 case, *In re Robbins* (964 F.2d 342), in which a special master was used in a divorce proceeding. In that case, the parties agreed to let a special master hear the issue of how to divide the couple's stock, worth $4,000,000, and special master issued a report that the wife was entitled to the cash value of the stock at the time of the divorce).

*Consumer Advisory Bd. v. Harvey*, 697 F. Supp. 2d 131 (D. Me. 2010) (appointing special master to oversee consent decree requiring defendant to improve conditions of state mental institution).

*Woodard v. Andrus*, 272 F.R.D. 185 (W.D. La. 2010) (stating that use of a special master is appropriate "when liability has been determined in favor of the class and a formula for individual proof of damages has been established that is capable of being uniformly applied").

*Mueller v. U.S. of Am.-Corp*., No. EDCV 10-00276-DSF, 2010 U.S. Dist. LEXIS 128971 (C.D. Cal. Oct. 22, 2010) (mentioning that a referee was appointed by the state court in a partition action to sell the subject real estate).

*Evans v. Fenty*, No. 76-0293 (ESH), 2010 WL 1337641 (D.D.C. Apr. 7, 2010) (appointing special masters to make findings and recommendations addressing defendants' noncompliance with court orders, the available options for curing identified deficiencies, and whether a receivership was the most effective and efficient remedy available to the court).

*Doe v. Sec'y of Dep't of Health & Human Servs.*, 2010 WL 1369464 (Fed. Cl. Apr. 1, 2010) (appointing special master to issue a decision in conformity with parties' stipulated settlement agreement).

*United States v. S. Fla. Water Mgmt. Dist.*, No. 88-1886-CIV, 2010 WL 1292275 (S.D. Fla. Mar. 31, 2010) (adopting special master's recommendations).

*Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2010 WL 55886 (E.D. Cal. Jan. 4, 2010) (appointing special master to monitor and report on defendants filing of a long-range prison bed plan).

*Triple Five of Minn., Inc. v. Simon*, 280 F. Supp. 2d 895 (D. Minn. 2003) (appointing special master as trustee of constructive trust in partnership dispute), *aff'd in part, rev'd in part on other grounds*, 404 F.3d 1088 (8th Cir. 2005).

*United States v. Berks Cnty, Pa.*, 250 F. Supp. 2d 525 (E.D. Pa. 2003) (appointing special master to work with county to fashion a remedy in voting rights case).

*Duane B. v. Chester-Upland Sch. Dist.*, No. CIV. A. 90–0326, 1994 WL 724991 (E.D. Pa. Dec. 29, 1994) (appointing special master to help plaintiffs "fashion coherent and precise goals and plans" to move toward compliance with remedial orders).

*Alberti v. Klevenhagen*, 660 F. Supp. 605 (S.D. Tex. 1987) (appointing special master to monitor compliance with consent judgment in context of prison reform), *modified on other grounds*, 688 F. Supp. 1210 (S.D. Tex. 1987), *aff'd in part, rev'd in part on other grounds*, 903 F.2d 352 (5th Cir. 1990).

*Fox v. Bowen*, 656 F. Supp. 1236 (D. Conn. 1987) (appointing special master to assist in administering and evaluating the relief provided by the court's judgment relating to Medicare benefits for physical therapy).

*N.Y. Ass'n for Retarded Children, Inc. v. Carey*, 551 F. Supp. 1165 (E.D.N.Y. 1982) (appointing special master to monitor and oversee compliance with consent decree), *rev'd in part on other grounds*, 706 F.2d 956 (2d Cir. 1983).

*Jones v. Wittenberg*, 73 F.R.D. 82 (N.D. Ohio 1976) (appointing special master to supervise county sheriff and county commissioners compliance with court's order to remedy conditions in jail).

*Taylor v. Perini*, 413 F. Supp. 189 (N.D. Ohio 1976) (appointing special master to monitor prison reform compliance case).

*Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973) (appointing ombudsman to report to the court any matters concerning the operation of the Mountain View juvenile facility, especially any violations of the court's order).

**Propriety of Appointments Under Rule 53**

*La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (holding that the district court abused its discretion in referring matters in antitrust cases to a special master before it determined liability).*

*Frost v. S. Carolina Dep't of Correction,* No. 5:11-2520-JFA-KDW, 2012 WL 786835 (D.S.C. Mar. 9, 2012) (denying the Plaintiff's motion for appointment of a special master).

*Rowles v. Chase Home Fin., LLC*, No. 9:10-CV-01756-MBS, 2012 WL 80570 (D.S.C. Jan. 10, 2012) (reconfirming the appointment of the special master for all purposes specified in the settlement and to provide the verified report on the amounts awarded).

*Eads v. Astrue*, No. 11-1968, 2011 U.S. Dist. LEXIS 152697 (E.D. Pa. Dec. 20, 2011) (finding that where the magistrate judge has been appointed as special master under Federal Rule of Civil Procedure 53, the procedure under that rule shall be followed).

*Kifafi v. Hilton Hotels Ret. Plan*, No. 98-1517(CKK), 2011 U.S. Dist. LEXIS 97511 (D.D.C. Aug. 31, 2011) (declining to appoint a special master despite the parties' suggestions, stating that the dispute could be "effectively and timely addressed by an available . . . magistrate judge of the district").

*Taylor v. Islamic Republic of Iran*, No. 10-cv-844 (RCL), 2011 WL 3796156 (D.D.C. Aug. 29, 2011) (finding that appointment of a special master would not impose undue expenses on any party and will not result in unreasonable delay).

*Univ. of Pittsburgh v. Varian Medical Sys., Inc*., No. 2:08–CV–01307–AJS, 2011 WL 1877663 (W.D. Pa. Apr. 6, 2011) (appointing special master pursuant to Rule 53 to conduct a claim construction hearing and to make recommendations to the District Court regarding the legal construction of the disputed claim terms in the patents-in-suit).

*Hart v. Pa. Bd. of Prob. & Parole*, No. CA 10-4594, 2011 WL 925457 (E.D. Pa. Jan. 6, 2011) (stating that where the magistrate judge has been appointed as special master under Rule 53, the procedure under that rule shall be followed).

*In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, 731 F. Supp. 2d 1352 (J.P.M.L. 2010) (explaining that most multidistrict proceedings do not require the oversight of more than one judge and that the judge assigned to complex litigation arising out of the sinking of an offshore oil rig may choose to enlist special masters and other administrative tools at his disposal to assist in the complex multidistrict litigation).

*Ball v. Rodgers*, No. CV 00-67-TUC-EHC, 2010 WL 797146 (D. Ariz. Mar. 8, 2010) (denying plaintiff's motion to appoint a special master because plaintiff failed to show that there were any complex matters, exceptional conditions, or post-trial matters that could not be effectively and timely addressed by the court).

**Receiver**

*Hinckley v. Gilman, Clinton, & Springfield R.R. Co.*, 94 U.S. 467 (1876) (stating that the appointed receiver to a foreclosure suit had the right to appeal a decree ordering him to pay a balance owed on the settlement of his account).

*United States v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2d Cir. 1994) (holding that the district court did not overstep its constitutional authority by appointing a special master to implement a supplemental long term plan order in a housing segregation case).*

*Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976) (appointing a receiver as part of remedy in school desegregation case).

*United States v. City of New York*, 731 F. Supp. 2d 291 (E.D.N.Y. 2010) (explaining that the court enlisted a special master to develop a new valid firefighter selection procedure for the city's fire department).

*Levin v. Garfinkle*, 514 F. Supp. 1160 (E.D. Pa. 1981) (holding that plaintiff who obtained a judgment in an action for fraud, misrepresentation, and breach of fiduciary duty was entitled to a court-appointed receiver when defendants persisted in conduct that clearly manifested an intent to frustrate plaintiff's attempt to execute on the judgment).

*United States v. City of Detroit*, 476 F. Supp. 512 (E.D. Mich. 1979) (appointing mayor as temporary administrator of the Detroit wastewater treatment plant to perform the functions of a receiver and to facilitate compliance with EPA orders and consent decrees).

*Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1965), *supp'd by* 255 F. Supp. 724 (S.D. Ga. 1966) (appointing and later dismissing the State School Superintendant of Georgia as the receiver for the school district in school desegregation case).

*Gross v. Mo. & Ark. Ry. Co.*, 74 F. Supp. 242 (W.D. Ark. 1947) (holding that the appointment of a receiver to take charge of the subject of the dispute was appropriate pending resolution of case).

**Report on Attorney Fees**

*United States v. Sufi*, No. 11-1190, 2012 WL 118458 (6th Cir. Jan. 13, 2012) (upholding magistrate judge's order for defendant to reimburse the government for appointed counsel).

*Patel v. Attorney Gen. of the U.S.*, 426 Fed. App'x 116 (3d Cir. 2011) (appointing master in immigration litigation to provide a recommendation as to the number of hours, costs and expenses to be awarded to the appellant for fees he paid immigration attorneys in order to stay in U.S).

*In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113 (2d Cir. 2010) (discussing special masters approved cost, disbursement, and fee payments to plaintiffs from general settlement fund).

*Perez v. Carey Int'l, Inc.*, No. 08-16115, 2010 WL 1408288 (11th Cir. 2010) (issuing order adopting special master's report, except with regard to lowering recommended amount of attorneys' fees).

*Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ. v. Varian Med. Sys., Inc.*, No. 08CV1307, 2012 WL 2513496 (W.D. Pa. June 29, 2012) (discussing the appointment of a special master to oversee limited discovery on attorney's fees).

*United States v. Konrad*, CRIM. A. 11-15, 2011 WL 6739464 (E.D. Pa. Dec. 21, 2011) (borrowing from the provisions of Federal Rules of Civil Procedure 53, and Rule 54(a)(2)(D), which specifically allow a court to appoint a master to assist the court in determining the amount of attorneys fees).

*Westefer v. Snyder*, Civil No. 00-162-GPM Consolidated with Civil No. 00-708-GPM, 2011 U.S. Dist. LEXIS 14989 (S.D. Ill Feb. 15, 2011) (reviewing court's appointment of special master after it notified the parties, on its own motion, that it was considering the appointment of a special master to determine the attorneys' fees and costs to be awarded, and reviewing the parties' comments).*

*In re Tyco Int'l Ltd. Multidistrict Litig*., No. 02-md-1335-B, 2010 U.S. Dist. LEXIS 142865 (D.N.H. Dec. 3, 2010) (appointing special master to decide a dispute over attorney fees and adopting the report of the special master in its entirety).

*Allstate Ins. Co., v. Leong*, No. 09-00217 SOM/KSC, 2010 WL 3210753 (D. Haw. Aug. 13, 2010) (issuing order adopting report of the special master awarding attorneys' fees to prevailing party).

*Cerdes v. Cummins Diesel Sales Corp.*, No. 06-922, 2010 WL 2835755 (E.D. La. July 15, 2010) (order adopting recommendation of special master awarding lodestar fees to plaintiffs against their objection).

*In re AOL Time Warner S'holder Derivative Litig.*, No. 02 Civ. 6302(CM), 2010 WL 363113 (S.D.N.Y. Feb. 1, 2010) (issuing order adopting recommendation of special master concerning award of lodestar fees).

*Dulatre v. Astrue*, No. 03-00653 DAE-KSC, 2010 WL 26537 (D. Haw. Jan. 26, 2010) (issuing order adopting report of special master recommending grant of attorneys' fees pursuant to statute).

*Haw. Nurses' Ass'n v. Queen's Med. Ctr.*, No. 09-00235 SOM-LEK, 2010 WL 157479 (D. Haw. Jan. 15, 2010) (issuing order adopting report of special master, denying award of plaintiffs' attorneys' fees).

*Taylor H. v. Dept. of Educ.*, No. 09-00020 SOM-LEK, 2010 WL 157481 (D. Haw. Jan. 15, 2010) (issuing order adopting special master's recommendation that plaintiffs' motion for attorneys' fees and costs be granted in part and denied in part).

*Sierra Club v. Johnson*, No. C 08–01409 WHA, 2010 WL 147951 (N.D. Cal. Jan. 12, 2010) (issuing order granting entitlement to attorneys' fees, vacating hearing, and allowing for appointment of special master in the event of future fee disputes).

*Skaaning v. Sorensen*, 679 F. Supp. 2d 1220 (D. Haw. 2010) (issuing order modifying report of special master that recommended defendants' motions for attorneys' fees be denied).

**Report on Liability/Motions/Damages by Master**

*South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (referring matter to special master for consideration of motions by various nonstate entities for leave to intervene).

*O'Brien v. Islamic Republic of Iran*, No. 06-cv-690 (RCL), 2012 U.S. Dist. LEXIS 42091 (D.C. Cir. Mar. 28, 2012) (reviewing the special masters award of damages relating to the damages suffered by all plaintiffs in this case).

*Valida v. Schwarzenegger*, 599 F.3d 984 (9th Cir. 2010) (adopting the injunction-related recommendations of the court-appointed special master regarding the use of hearsay evidence in parole revocation hearings).

*Wilkerson v. Sec'y of Health & Human Servs.*, 593 F.3d 1343 (Fed. Cir. 2010) (holding trial to determine compensation for vaccination-related injuries before a special master of the Court of Federal Claims).

*United States v. City of New York*, No. 07-CV-2067, 2012 U.S. Dist. LEXIS 133283 (E.D.N.Y. Sept. 18, 2012) (determining damages to be awarded to black victims of New York City's discriminatory entry-level firefighter exam).

*Bergstrom, Inc. v. Glacier Bay, Inc.*, No. 08–C–50078, 2012 WL 787240 (N.D. Ill. Mar. 9, 2012) (using *de novo* review to modify the master's findings of facts and conclusions of law).

*Reynolds v. Ala. Dep't of Transp.*, Civil Action No. 2:85CV665-MHT, 2012 WL 444009 (M.D. Ala. Feb. 13, 2012) (appointing special master to provide recommendation as to the merits of defendant's motion for summary judgment).

*Moffett v. Computer Scis. Corp.*, No. 805–CV–01547, 2011 WL 4381760 (D. Md. Sept. 18, 2011) (appointing special master to issue report and recommendation concerning the plaintiff's application to FEMA for waiver of proof of loss requirements).

*Pe Chi-A Vang v. Cooper Tire & Rubber Co*., No. 11-614, 2011 WL 2728328 (D. Minn. June 10, 2011) (implementing order of special master where plaintiff sustained injuries from defendant company's tires).

*In re Bayou Sorrel Class Action*, No. 6:04CV1101, 2011 U.S. Dist. LEXIS 71010 (W.D. La. Apr. 27, 2011) (appointing special master to consider remaining claims under terms of a settlement agreement to determine whether matter could be considered final and closed).

*Absolute Software, Inc. v. Stealth Signal, Inc.*, 731 F. Supp. 2d 661 (S.D. Tex. 2010) (adopting special master's report and recommendation on claims construction in patent infringement case), *aff'd in part*, *rev'd in part*, Nos. 2010–1503, 2010–1504, 2011 WL 4793149 (S.D. Tex. Oct 11, 2011).

*Cooley v. Lincoln Elec. Co.*, 693 F. Supp. 2d 767 (N.D. Ohio 2010) (adhering to special master's ruling that certain of the expert opinions were not admissible at trial).

*Grant v. Metro Gov't of Nashville*, 727 F. Supp. 2d 677 (M.D. Tenn. 2010) (appointing special master to develop remediation plan in racial discrimination case), *rev'd*, Nos. 10–5944, 10–6233, 2011 WL 3796329 (M.D. Tenn. Aug. 26, 2011).

*Networks USA X, Inc. v. Nationwide Mut. Ins. Co*., 748 F. Supp. 2d. 836 (E.D. Tenn. 2010) (appointing special master to determine what amounts of rents and charges had been underpaid or overpaid).

*Cont'l Cas. Co. v. Fleming Steel Co.*, No. 06–829, 2010 WL 4668955 (W.D. Pa. Nov. 9, 2010) (adopting the report and recommendation of a special master who had been appointed to perform an accounting of the damages alleged by Schlosser in its counterclaim against Fleming Steel).

*Phelps v. Parsons Tech. Support, Inc*., No. 2:09-0327-JMS-WGH, 2010 U.S. Dist. LEXIS 116166 (S.D. Ind. Oct. 29, 2010) (mentioning in passing, that if necessary, a district court can appoint a special master to "resolve a difficult computation of damages").

*Medimmune, LLC v. PDL Biopharma, Inc.*, No. C08-5590 JF (HRL), 2010 WL 3636211 (N.D. Cal. Sept. 14, 2010) (appointing special master to review evidence in camera and to advise the court of whether evidence contains any information relevant to liability).

*Chrimar Systs., Inc. v. Foundry Networks LLC*, No. 06-13936, 2010 WL 3431569 (E.D. Mich. Aug. 30, 2010) (adopting special master's report in patent infringement case).

*Mon River Towing, Inc. v. Salvage Co.*, No. 06-1499, 2010 WL 1337693 (W.D. Pa. Mar. 31, 2010) (appointing special master to consider lost profit damages).

*Valore v. Republic of Iran*, No. M07-1827 SI, 2010 WL 1264601 (N.D. Cal. Mar. 29, 2010) (adopting recommendation of special master that DOJ be permitted to review all civil discovery but be prohibited from making copies of overseas discovery).

*Roger Miller Music*, *Inc*. v. *Sony/ATV Publ'g, LLC*, No. 3:04-1132, 2010 WL 1026980 (M.D. Tenn. Mar. 18, 2010) (appointing special master to determine damages in copyright infringement case).

*In re Moretto*, 440 B.R. 534 (B.A.P. 8th Cir. 2010) (appointing special master to determine amount of restitution owed by party to bankruptcy proceeding).

**Settlement Master**

*In re Giradi*, 611 F.3d 1027 (9th Cir. 2010) (appointing special master to oversee further proceedings on sanctions and/or discipline, after extensive litigation).

*In re Austrian & Germ. Bank Holocaust Litig.*, 317 F.3d 91 (2d Cir. 2003) (appointing special master to assist in settlement negotiations).

*Goodrich Corp. v. Town of Middlebury*, 311 F.3d 154 (2d Cir. 2002) (finding that district court did not abuse its discretion in deferring to special master's allocation recommendations after special master attempted settlement and conducted evidentiary hearings), *cert. denied*, 539 U.S. 937 (2003).

*Whitehouse v. LaRoche*, 277 F.3d 568 (1st Cir. 2002) (appointing special master to oversee establishment and use of settlement fund for new sewage treatment facility).

*AccuSoft Corp. v. Palo*, 237 F.3d 31 (1st Cir. 2001) (appointing special master to monitor compliance with settlement agreement).

*Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (finding that district court did not abuse its discretion in rejecting special master's recommendations in ERISA case where special master was appointed to make a recommendation for calculating attorney's fees).

*Hemelt v. United States*, 122 F.3d 204 (4th Cir. 1997) (finding that erroneous belief of special master and parties that settlement fund in class-action lawsuit under ERISA could include extracontractual person injury damages did not affect characterization of amounts received under settlement as not qualifying for exclusion from taxable income available for damages received on account of personal injuries or sickness).

*United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741 (9th Cir. 1995) (appointing special master to supervise all non-dispositive pre-trial proceedings and to conduct and supervise settlement negotiations, and holding that district court is entitled to rely upon recommendations of special master in deciding whether to approve consent decree, but reliance cannot be so complete that it takes the place of court's obligation to independently scrutinize terms of settlement).

*United States v. Charles George Trucking, Inc.*, 34 F.3d 1081 (1st Cir. 1994) (appointing settlement master in CERCLA case after settlement negotiations began in earnest).

*In re Fema Trailer Formaldehyde Prod. Liab. Litig.*, No. 2:07-MD-1873, 2012 U.S. Dist. LEXIS 146679 (E.D. La. Sept. 27, 2012) (supervising implementation of the settlement notice plan).

*Sarabri v. Weltman, Weinberg & Reis Co., L.P.A.*, Civil No. 10CV1777, 2012 WL 3809123 (S.D. Cal. Sept. 4, 2012) (assisting with mediation and settlement by entering into a class action settlement agreement pursuant to Fed. R. Civ. P. 23).

*Jensen v. Minn. Dep't of Human Servs*., No. 09-1775, 2012 U.S. Dist. LEXIS 98703 (D. Minn. July 17, 2012) (monitoring compliance with settlement agreement).

*Med. Assurance Co., Inc., v. Weinberger*, No. 4:06 CV 117, 2012 WL 1455214 (N.D. Ind. Apr. 26, 2012) (affirming appointment of special master to oversee settlement negotiations).

*Cason-Merenda v. Detroit Med. Ctr*., No. 06-15601, 2012 U.S. Dist. LEXIS 38810 (E.D. Mich. March 22, 2012) (overseeing settlement negotiations).

*24 Hour Fitness USA, Inc. v. Ramirez*, No. 12-2038-SAC, 2012 WL 859725 (D. Kan. Mar. 13, 2012) (appointing special master in arbitration proceeding to determine whether a particular person was covered by an arbitration agreement, what arbitration agreement applies, what terms of arbitration are enforceable, where and before who cases will be arbitrated, order of cases being arbitrated, and resolving pending and future motions).

*Byrd v. Time Warner Cable*, No. 1:09-CV-772, 2012 WL 368208 (S.D. Ohio Feb. 3, 2012) (enforcing a verbal settlement agreement made during a conference overseen by the magistrate).

*In re Sept. 11 Litig.*, 760 F. Supp. 2d (S.D.N.Y. 2011) (appointing special master to develop regulations to provide recoveries from federal funds to surviving victims and to families of deceased victims. and to administer the Victim Compensation Fund ("VCF")).

*Clearplay, Inc. v. Nissim Corp.*, No. 07-81170-CIV-HUCK/BANDSTRA, 2011 U.S. Dist. LEXIS 146861 (S.D. Fla. Dec. 21, 2011) (holding that plaintiff could have arbitrated before a special master, but that plaintiff failed to exercise that option and therefore defendant was free to proceed to litigation).

*United States v. Mastellone*, No. 10 Civ. 7374 (DLC), 2011 WL 4031199 (S.D.N.Y. Sept. 12, 2011) (appointing special master to review claims submitted by individuals suffering physical harm as a result the events of September 11, 2001, and to determine the amount of the award to be paid to each claimant from the DOJ Fund administered by the Attorney General).

*In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297 (E.D.N.Y. 2010) (finding that utilization of a single special settlement master and joint hearings on the settlement permitted termination of the litigation with minimal transaction costs, on the merits).

*Red v. Unilever PLC*, No. C 10-00387, 2010 WL 3629689 (N.D. Cal. Sept. 14, 2010) (ordering the appointment of a special master and appointment to hold any settlement funds being paid for attorney fees).

*Active Prods. Corp. v. A.H. Choitz & Co.*, 163 F.R.D. 274 (N.D. Ind. 1995) (appointing a panel of special masters and a chair to coordinate activities of masters necessary to manage a case filed by 23 named plaintiffs on behalf on themselves and 66 other parties, and naming as defendant 1,181 individual and corporate entities).

*In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2004 WL 1541922 (E.D. La. June 25, 2004) (considering joint motion and order for the appointment of a special master).

**Trial Master**

*Kansas v. Nebraska*, 131 S. Ct. 1847 (2011) (appointing special master with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem necessary).

*Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (appointing special master to consider complaint filed by State of Montana alleging that Wyoming breached Yellowstone River Compact by allowing its upstream pre–1950 water users to switch from flood to sprinkler irrigation, which increased crop consumption of water and decreased volume of runoff and seepage returning to the river system; special master found that Montana failed to state claim).

*In re Peterson*, 253 U.S. 300 (1920) (discussing appointment of an auditor to investigate facts, hear witnesses, examine accounts of the parties, sort out allegations, and make and file a report to clarify the issues in dispute).*

*Heckers v. Fowler*, 69 U.S. 123 (1864) (finding that referee not required, either by agreement of the parties or trial court order, to report specifically what his finding was upon the issues).*

*Chang v. United States*, Civil No. 02-2010 (EGS/JMF), 2012 U.S. Dist. LEXIS 1112 (D.C. Cir. Jan. 5, 2012) (holding by special master that plaintiff's deposition will be allowed while Ms. Pressley's deposition will not be allowed).

*Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (appointing special master at district court to work with the parties to review and amend, as appropriate, the plan for class notice and distribution of the net settlement fund; special master also recommended that claims by three travel booking companies be denied).

*In re Kensington Int'l Ltd.*, 353 F.3d 211 (3d Cir. 2003) (appointing special master to preside over bankruptcy proceedings in mass tort asbestos litigation).

*Charter Oak Fire Ins. Co. v. Hedeen & Cos.*, 280 F.3d 730 (7th Cir. 2002) (finding that in review of attorney's fees application the district court accepts a special master's findings of fact unless they are clearly erroneous).

*Shafer v. Army & Air Force Exch. Serv.*, 277 F.3d 788 (5th Cir. 2002) (appointing special master to investigate plaintiff's individual claims of non-promotion after a decision was made in a Title VII class action suit alleging sex discrimination).

*Schaefer Fan Co., Inc. v. J & D Mfg.*, 265 F.3d 1282 (Fed. Cir. 2001) (appointing special master to resolve disputes regarding compliance with settlement agreement and interpret terms of the agreement).

*Sierra Club v. Clifford*, *257* F.3d 444 (5th Cir. 2001) (appointing special master to conduct hearings and issue a report on alleged violations of the Clean Water Act).*

*Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877 (9th Cir. 2000) (appointing special master to hear attorney's fees motion).

*United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999) (referring all pretrial matters to special master; heard motion to dismiss), *cert. denied*, 530 U.S. 1203 (2000).

*United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (finding that reference of nonjury action to special master constituted abuse of discretion).*

*Reiter v. Honeywell, Inc.*, 104 F.3d 1071 (8th Cir. 1997) (finding that appointment of special master to preside over jury trial of employment dispute was improper where the only reason given for the appointment was that the case had been on the docket more than one year).*

*Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (appointing special master as trial master and court-appointed expert witness; supervised depositions, reviewed claim forms, and recommended compensatory damages for alleged victims of human rights violations).

*Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co. Ltd.*, 72 F.3d 857 (Fed. Cir. 1995) (holding that appointment of special master to conduct a hearing and make recommendations on patent validity and infringement rendered trial fatally flawed), *vacated on other grounds*, 520 U.S. 1111 (1997).*

*Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (finding that in review of application for attorney's fees, trial court erred by summarily rejecting the special master's selection of the percentage method for attorney's fees).

*Griffin v. Mich. Dep't of Corr.*, 5 F.3d 186 (6th Cir. 1993) (appointing special master in Title VII gender discrimination case to determine what position plaintiff would have held had she not be subject to gender discrimination).

*In re Joint E. & S. Dists. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (appointing special master to hold hearing to determine extent of defendant's financial assets and impact of potential claims for damages).

*Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992) (finding that appointment of master to make recommendation on fundamental issues of liability over the objection of one party was improper).*

*Burlington N. R.R. Co. v. Dep't of Revenue of Wash.*, 934 F.2d 1064 (9th Cir. 1991) (finding that lower court abused its discretion in referring entire case to a special master because the circumstances of the case were not exceptional).*

*In re U.S. Dep't of Def.*, 848 F.2d 232 (D.C. Cir. 1988) (appointing special master to review allegedly classified documents in FOIA case).*

*Baker Indus., Inc. v. Cerebrus, Ltd.*, 764 F.2d 204 (3d Cir. 1985) (finding that where trial issues were referred to a referee for final decision, party that challenged referee's order had to pay the other side's attorneys fees incurred in defending against the challenge).

*In re Armco Inc.*, 770 F.2d 103 (8th Cir. 1985) (finding that it is an error to refer trial on merits to master, but proper to refer all pretrial matters, as well as to give power to hear and make recommendations on dispositive motions).*

*Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir. 1984) (finding that appointment of master in complex antitrust matter was appropriate, however the court emphasized that in the future, a showing of "some exceptional condition" is required to justify the reference to a master).*

*Dixon v. Sec'y of Dep't of Health & Human Servs.*, 61 Fed. Cl. 1 (Fed. Cl. 2004) (appointing special master to conduct evidentiary hearing).

*Carlson v. FedEx Ground Package Sys*., No. CV-05-85-BU-SHE, 2012 U.S. Dist. LEXIS 144730 (D. Mont. Oct. 5, 2012) (adopting special master's findings and recommendations).

*United States v. City of Detroit*, No. 77-7100, 2012 U.S. Dist. LEXIS 144526 (E.D. Mich. Oct. 5, 2012) (submitting proposed "plan of action" to the court).

*Krys v. Aaron*, No. 08 Civ. 7416, 2012 U.S. Dist. LEXIS 130306 (S.D.N.Y. Sept. 11, 2012) (accepting and adopting special master's report and recommendation).

*In re Refco Inc. Secs. Litig*., No. 07 Civ. 8165, 2012 U.S. Dist. LEXIS 124456 (S.D.N.Y. Aug. 29, 2012) (affirming special master's recommendation that plaintiff's motion to dismiss the indemnity counterclaims be granted in part and denied in part).

*Equal Employment Opportunity Commission v. Local 28 of the Sheet Metal Workers' Int'l Ass'n*, No. 71 Civ. 2877, 2012 U.S. Dist. LEXIS 115947 (S.D.N.Y. Aug. 9, 2012) (determining special master had jurisdiction to hear Amended Affirmative Action complaint).

*Jacks v. Lempke*, No. 09 Civ. 8768, 2012 U.S. Dist. LEXIS 109403 (S.D.N.Y. July 23, 2012) (appointing special master to investigate and report on the veracity of petitioner's various medical complaints).

*MSC.Software Corp. v. Altair Eng'g, Inc.*, No. 07-12807, 2012 U.S. Dist. LEXIS 69107 (E.D. Mich. May 17, 2012) (adopting special master's report and recommendation).

*Reynolds v. Alabama Dep't of Transp.*, Civil Action No. CV–85–T–665–N, 2012 WL 3100768 (N.D. Ala. May 1, 2012) (appointing special master to formulate recommendations and craft procedures for decertification of the hiring class).

*Drazin v. Horizon Blue Cross Blue Shield of N.J*., Inc., Civil Case No. 06-6219, 2012 U.S. Dist. LEXIS 68354 (D. N.J. May 15, 2012) (adopting special master's report and recommendation).

*Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861RSM, 2012 WL 604348 (W.D. Wash. Feb. 24, 2012) (appointing a special master to oversee the conduct of discovery in part, and referred certain discovery issues to a magistrate judge for resolution).

*High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024 (D. Kan Jan. 25, 2012) (appointing special master for in camera review of allegedly privileged documents in a motion to compel).

*United States v. Slade*, No. CR-09-1492-PHX-ROS, 2012 U.S. Dist. LEXIS 18511 (D. Ariz. Jan. 18, 2012) (appointing special master to resolve discovery issues).

*Hobson v. Fischer*, No. 10 Civ. 5512(SAS), 2011 WL 891314 (S.D.N.Y. 2011) (denying plaintiff's request for the appointment of a special master to investigate and monitor the conditions at issue in prison).

*Nat'l Football Ass'n*, 766 F. Supp. 2d 941 (D. Minn. 2011) (appointing special master to determine whether football league was in violation of the settlement and stipulation agreement entered into between the league and the professional football players).

*In re FEMA Trailer*, MDL No. 07-1873 Section "N" (5), 2011 U.S. Dist. LEXIS 122766 (E.D. La. Oct. 24, 2011) (granting joint motion for appointment of special master in multi-district litigation case).*

*N. Natural Gas Co. v. Approximately 9117.53 Acres*, No. 10-1232-WEB, 2011 U.S. Dist. LEXIS 112198 (D. Kan. Sept. 15, 2011) (appointing commission composed of three in land use cases to be sent to site for evidentiary purposes finding that appointment of commission more practical than having a jury on site).*

*Schultz v. United States*, No.: 8:10-cv-1612-T-17MAP, 2011 U.S. Dist. LEXIS 75999 (M.D. Fla. July 14, 2011) (holding that magistrate judge could properly rule on attorney's request to represent himself against fraud charges and that attorney was not permitted to challenge the order on its merits because he did not properly object, thus denying the court the opportunity to review the decision).

*Meds. Co.v. Teva Parenteral Meds., Inc*., No. 09-750-ER, 2011 WL 3290291 (D. Del. June 30, 2011) (referring matter to special master on defendants motion to compel re-designation of non-confidential information regarding motion to leave to file first amended answers and counterclaims; special master granted the motion).

*Deters v. Davis*, No. 3: 11-02-DCR, 2011 U.S. Dist. LEXIS 3836 (E.D. Ky. Jan. 14, 2011) (appointing trial commissioner, while his law partner helped with the prosecution in a license/bar related matter for defendant).*

*Balla v. Idaho State Bd. of Corr*., No. 1:81-cv-1165-BLW, 2011 U.S. Dist. LEXIS 1864 (D. Idaho Jan. 6, 2011) (appointing special master in a prison conditions case where plaintiffs alleged Eighth Amendment violations was the most cost effective and efficient way to investigate, evaluate, and address pending legal issues).*

*Am. Presents, Ltd. v. Hopkins*, 330 F. Supp. 2d 1217 (D. Colo. 2004) (finding that if parties cannot agree on attorney's fees, a special master will be appointed to determine those fees and the cost will be split between the parties).

*Larios v. Cox*, 306 F. Supp. 2d 1214 (N.D. Ga. 2004) (appointing special master to formulate reapportionment plans in a redistricting case).

*United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990) (finding that appointment of special master necessary in CERCLA case due to complexity of the issues, the number of parties, and the need to expedite the matter), *aff'd*, 982 F.2d 1436 (10th Cir. 1992).

*Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 695 F. Supp. 759 (D.N.J. 1988) (reviewing and mostly adopting special master report, by district court).

*United States v. Conservation Chem. Co.*, 106 F.R.D. 210 (W.D. Mo. 1985) (finding that defendant chemical waste company's motion to revoke reference to special master for report and recommendation was untimely when made nine months after order of reference).*

*United States v. Moss-Am., Inc.*, 78 F.R.D. 214 (E.D. Wis. 1978) (appointing special master to supervise the inspection and taking of samples of defendant's soil in pollution case).

*Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975) (appointing panel of non-attorney masters in school desegregation case), *aff'd*, 530 F.2d 401 (1st Cir. 1976).

*Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699 (E.D.N.Y. 1974) (appointing special master to craft remedy in school desegregation case).*

**Special Masters' Fees**

*Kansas v. Nebraska*, 132 S. Ct. 1618 (2012) (granting the special master's motion for allowance of fees and disbursements, and awarding the special master a sum to be allocated between Kansas, Nebraska, and Colorado).

*Louisiana v. Mississippi*, 466 U.S. 921 (1984) (awarding attorney's fees to a special master and his staff, for work in an original proceeding in the court, at contested rates of $125 per hour for a fourth-year associate in a firm, $70 per hour for a first-year associate, and $50 per hour for summer law students).

*In re Gilbert*, 276 U.S. 6 (1928) (observing that accepting appointment as a special master means assuming "the duties and obligations of a judicial officer" and requires return of payments not allowed by order of court).

*Lago Agrio Plaintiffs v. Chevron Corp.*, Nos. 10–4341–cv, 10–4405–cv(CON), 2010 WL 5151325 (2d Cir. 2010) (appointing special master to adjudicate claims of privilege and to recommend to district court an allocation of costs of special master to parties; holding costs of special master were to be divided between petitioners according to formula of their choosing, or in the alternative, formula adopted and directed by district court).

*Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989 (9th Cir. 2003) (holding that special master "has the right to appeal" order that he return certain fees and that compensation of special master did not have to be set according to fee schedule).

*Suchite v. Kleppin*, No. 10–21166–CIV, 2012 WL 1933555 (S.D. Fla. Mar. 23, 2012) (holding that defendants not entitled to reimbursement of special master fees because the master functioned as a special master and not a court-appointed expert, so such fees are not specifically listed as taxable in 28 U.S.C. § 1920).

*Kaplan v. First Hartford Corp.*, No. 05–144–B–H, 2012 WL 425199 (D. Me. Feb. 9, 2012) (reviewing defendant's objection to special master's report regarding attorneys fees and finding that if the lawyers are unable to agree on a fee assessment, FED. R. CIV. P. 54(d)(2)(D) allows the court to refer the fee assessment to the special master).

*Southersby Dev. Corp. v. Borough of Jefferson Hills*, Civ. A. No. 09-208, 2011 WL 6179778 (W.D. Pa. Dec. 13, 2011) (reallocating costs incurred by the special master in determining which documents and/or portions of documents were privileged or should be partially redacted in order to protect the claim of privilege).

*Mallonee v. Fahey*, 122 F. Supp. 472 (S.D. Cal. 1954) (finding that master would be awarded $75,000 and reasonable expenses for services rendered in the turn-back proceedings and $25,000 and reasonable expenses for services rendered in discovery proceedings).

**Conditions Under Which Masters Are Disqualified**

*Savoie v. Martin*, No. 10-6529, 2012 WL 695531 (6th Cir. Mar. 6, 2012) (holding that a judge's failure to recuse himself, although inadvisable, did not violate Tennessee Supreme Court rules).

*Jenkins v. Sterlacci*, 849 F.2d 627 (D.C. Cir. 1988) (finding that because of the "clearly erroneous" standard by which the factual determinations of special masters are reviewed, "the district court's oversight of a special master falls far short of plenary 'control,'" and therefore a "special master must hold himself to the same high standards of recusal applicable to the conduct of judges").

*Hughes v. County of Washoe*, No. 3:12-CV-00179-LRH, 2012 U.S. Dist. LEXIS 94346 (D. Nev. April 23, 2012) (finding special masters entitled to quasi-judicial immunity).

*Stearns Bank Nat'l Assoc. v. Marrick Props., LLC*, No. 8:11-CV-2305-T-30AEP, 2012 WL 1155657 (M.D. Fla. Apr. 5, 2012) (holding no basis for disqualification of proposed special master existed where no judge was available to timely decide the matter and where federal courts routinely appoint special masters to conduct foreclosure sales).

*Lindley v. Hackard & Holt*, No. 3:05-CV-1476-L, 2012 WL 724517 (N.D. Tex. Mar. 6, 2012) (denying motion to disqualify special master).

*Stearns Bank, N.A. v. Farrell Homes, Inc*., No. 8:11-CV-1725-T-17EAJ, 2012 U.S. Dist. LEXIS 12811, 6-7 (M.D. Fla. Feb. 2, 2012) (holding that there was no basis for disqualification of the proposed special master).

**Appealability**

*Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) (finding that order referring an issue to a master is interlocutory and not generally appealable).

*Pierce v. Delmonte*, 474 Fed. App'x 1 (2d Cir. 2012) (holding special master's rejection of officer's claim pursuant to its authority under remedial order issued in ongoing Title VII litigation to review claims of race discrimination was not appealable).

*Redmond v. Lake Cnty. Sheriff's Office*, 414 Fed. App'x 221 (11th Cir. 2011) (citing former Fed. R. Civ. P. 72 that provided, with respect to nondispositive orders issued by magistrate judges, within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made).

*Schaub v. VonWald*, 638 F.3d 905 (8th Cir. 2011) (holding that because this case was tried to the court and a master, by reason of Rule 52(b) [now Rule 52(a)(5)] the plaintiff was not required to raise the question of the sufficiency of the evidence to support the findings in the trial court to lay the foundation for its appeal).

*Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987) (finding that order appointing special master to supervise compliance with consent decree was not an appealable interlocutory order).

*Bays Exploration, Inc. v. PenSa, Inc.*, No. CIV-07-754-D, 2012 WL 4128120 (W.D. Okla. Sept. 18, 2012) (holding that the appointment of a special master would be inappropriate because the record contained sufficient evidence for the court to determine the allocation of charges and the evidence was not overly complex).

*In re Mortgage Foreclosure Cases*, No. 11-MC-88-M-LDA, 2012 WL 3011760 (D.R.I. July 23, 2012) (denying defendant's motion to stay the court's requirement that the parties mediate the cases assigned to the special master's docket without any time or cost limit).

*Doe v. Bd. of Cnty. Commissioners of Craig County*, No. 11-CV-0298-CVE-PJC, 2012 WL 2872790 (N.D. Okla. July 12, 2012) (denying plaintiff's motion for summary judgment in a declaratory judgment action in which the plaintiff was requesting appointment of special master to oversee implementation of policies).

*Hooper v. Workman*, No. CIV–07–515–M, 2011 WL 1935815 (W.D. Okla. 2011) (finding that Hay's refusal to answer questions posed by referee appointed by OCCA was not an affirmative waiver of his right to appeal and failed to address his competency).

**Review of Master's Findings**

*Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (overruling Montana's filed exception to special master's report; special master found that Montana failed to state a claim).

*Kimberly v. Arms*, 129 U.S. 512 (1889) (holding that special master's findings should have been treated as "presumptively correct" and considered binding unless clearly in conflict with the weight of the evidence).

*Language Line Servs., Inc. v. Language Servs. Assocs., Inc.*, No. 11–17757, 2012 WL 4337722 (9th Cir. Sept. 24, 2012) (holding that the trial court erred when it conducted a clear error review of the master's findings of facts and conclusions of law rather than de novo review).

*City of New York v. Mickalis Pawn Shop*, *LLC*, 645 F.3d 114 (2d Cir. 2011) (holding that if special master makes significant decisions without careful review by trial judge, judicial authority is effectively delegated to official who has not been appointed pursuant to Article III of Federal Constitution).

*In re Bayside Prison Litig.*, 419 Fed. App'x 301 (3rd Cir. 2011) (holding that under special master agreement, all findings of fact by special master are binding; special master's report stands).

*John B. v. Goetz*, 626 F.3d 356 (6th Cir. 2011) (discussing claim that master commissioned had ex parte communications with plaintiff).

*Visteon Global Techs., Inc. v. Garmin Int'l, Inc*., No. 10-cv-10578, 2012 U.S. Dist. LEXIS 147448 (E.D. Mich. Oct. 12, 2012) (objecting to special master's claim construction report).

*In re TFT-LCD (Flat Panel) Anti-Trust Litigation*, Nos. M 07–1827 SI, C 10–1064 SI, 2012 WL 4858998 (N.D. Cal. Oct. 11, 2012) (finding the master did not err in ordering deposition of person reasonably involved in the litigation).

*Wells Fargo & Co. v. United States*, No. 09-CV-2764-PJS-TNL, 2012 U.S. Dist. LEXIS 113986 (D. Minn. Aug. 10, 2012) (affirming special master's denial of party's motion for summary judgment).

*A.R. Arena Products, Inc. v. Grayling Indus., Inc.*, No. 5:11CV01911, 2012 WL 2953193 (N.D. Ohio July 19, 2012) (granting plaintiff's request to reallocate costs of special master to defendant because defendant was primarily responsible for involvement of the special master and because defendant had been warned regarding its tactics in discovery).

*Orr v. Reiderer*, No. 10-1303-CM, 2012 U.S. Dist. LEXIS 91759 (D. Kan. July 3, 2012) (granting summary judgment to defendant, a special master).

*U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, No. 06 Civ. 2860, 2012 WL 917367 (S.D.N.Y. Mar. 16, 2012) (holding that special master erred in its conclusion regarding oversight and implementation of settlement, and was therefore permitted to reexamine the issue).

*Grant St. Grp., Inc. v. Realauction.com, LLC*, Civ. A. No. 9-1407, 2012 U.S. Dist. LEXIS 10089 (W.D. Pa. Jan. 27, 2012) (adopting the special master's report to the extent it found de-designation is not appropriate, and not adopting the special master's recommendation for leave to be granted for the disclosure of certain documents).

*Noah Sys. v. Intuit Inc.*, No. 10-CV-1420, 2011 U.S. Dist. LEXIS 140311 (W.D. Pa. Dec. 7, 2011) (adopting the special master's proposed construction of "means for transferring funds from said first entity to said other entities" without change).

*Ammons v. McNeil*, No. 4:08-cv-00208-MP-GRJ, 2011 U.S. Dist. LEXIS 27470 (N.D. Fla., Mar. 15, 2011) (agreeing with the magistrate judge that petitioner never identified to trial counsel the potential witnesses he now claims should have been interviewed).

*McManus v. City of Gainesville*, No. 1:08-cv-00110-MP-GRJ, 2011 WL 240816 (N.D. Fla. Jan. 24, 2011). (agreeing with magistrate judge that plaintiff claims are subject to dismissal for several reasons).

*In re Chevron Corp*., 753 F. Supp. 2d 536 (D. Md. 2010) (discussing party's challenge to special master appointed to assess global damages caused by oil and party's request for discovery, in light of allegations that special master report was ghost written by consultants hired by the plaintiffs and that special master met with plaintiffs' counsel and plaintiffs' consultant prior to his appointment as special master).

*Copeland v. Astrue*, No. 10-4144-JWL, 2010 U.S. Dist. LEXIS 126386 (D. Kan. Nov. 30, 2010) (reviewing of commissioner's decision on Social Security benefits).

*Easy Fly S.A.L. v. Aventura Aviation, Inc.*, No. 10-60247-CIV-LENARD/TURNOFF, 2010 U.S. Dist. LEXIS 126386 (D. Kan. Nov. 30, 2010) (reviewing commissioner's deicison on Social Security benefits).

*In re Bayside Prison Litig.*, Civ. No. 08-5149, 2010 WL 4807049 (D.N.J. Nov. 16, 2010) (holding that under special master agreement, all findings of fact by special master are binding; special master's report stands).

*Montez v.Ritter*, No. 92-CV-870-JLK, 2010 U.S. Dist. LEXIS 140354 (D. Colo. Oct. 22, 2010) (considering motion filed by special master requesting further guidance regarding his jurisdiction over certain matters at issue).

# Selected Cases – State Cases

## State Cases Involving Masters in Various Roles

**Some of the cases that appear in this Appendix were obtained from the Special Master Case Reporter published by David Cohen www.SpecialMaster.biz**

(* = *appointment of masters was at issue*)

**Alabama**

*Gilbert v. Nicholson*, 845 So. 2d 785 (Ala. 2002) (affirming appointment of special master to inspect and oversee roadway construction and affirming special master's findings).

*Blasdel v. Blasdel*, No. 2110032, 2012 WL 4241434 (Ala. Civ. App. Sept. 21, 2012) (holding that the court did not err in denying the appointment of a special master to calculate a spouse's equitable interest in a company in a divorce proceeding where, subsequently, neither party offered expert testimony on the company's value).

*Antoine v. Oxmoor Preservation/One, LLC*, No. 2100839 and 2110139, 2012 WL 2947896 (Ala. Civ. App. July 20, 2012) (remanding case to trial court and ordering the appointment of a special master to oversee further discovery).

*Perry v. Perry*, No. 2100860, 2012 WL 975611 (Ala. Civ. App. Mar. 23, 2012) (appointing special master to hold hearings on pendent lite issues in divorce proceeding).

*Burkett v. Burkett*, No. 2090587, 2011 WL 2508195 (Ala. Civ. App. June 24, 2011) (appointing special master in a divorce proceeding to determine the fair market value of the husband's businesses).

*Grelier v. Grelier*, 44 So. 3d 1092 (Ala. Civ. App. 2009) (reversing trial court's decision that relied on special master's evaluation which was based on erroneous valuation of the husband's closely held business interest).

**Arizona**

*Lund v. Myers ex rel. Cnty. of Maricopa*, No. 1-CA-SA12-0027, 2012 WL 3865054 (Ariz. Ct. App. Sept. 6, 2012) (concluding that a different judge appointed as special master for discovery matters was most appropriate for in camera review of documents).

*Davis v. Davis*, 284 P.3d 23 (Ariz. Ct. App. 2012) (determining that husband's consent to a special master allowed the court to exercise personal jurisdiction over him).

*Jioie v. Hosier*, No. 1 CA-CV 11-0333 A, 2012 WL 606603 (Ariz. Ct. App. Feb. 27, 2012) (appointing special master to divide husband's 401(k) in divorce proceeding; however, the parties' refusal to pay special master allowed him to terminate his appointment before he made a determination, which resulted in family court dividing the money evenly).

*Rye v. Rye*, No. 1 CA-CV 10-0888, 2011 WL 6292216 (Ariz. Ct. App. Dec. 15, 2011) (ordering appellant to appear before a special master for a deposition).

*Sammons v. Peril*, No. 1 CA-CV 09-0664, 2010 Ariz. App. Unpub. LEXIS 1259 (Ariz. Ct. App. Nov. 30, 2010) (affirming superior court appointment of a Parenting Coordinator to help parents in child custody dispute).

*Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 2 P.3d 1276 (Ariz. Ct. App. 2000) (affirming trial court's decision based on the special master's findings concerning a property dispute after hearing three days of testimony and conducting on-site visits).

**Arkansas**

*Givens v. Greene*, No. 11–1114, WL 1036203 (Ark. Mar. 29, 2012) (appointing special master to make recommendation for appropriate sanctions in an attorney discipline matter).

*Gulley v. State*, No. CR11–271, 2012 Ark. LEXIS 343 (Ark. Sept. 6, 2012) (adopting special master's finding of fact regarding attorneys' failure to show cause in contempt proceedings).

*White v. Palo*, No. 10-1085, 2011 Ark. LEXIS 121 (Ark. Mar. 31, 2011) (reviewing a case in which the court appointed two special masters to organize and liquidate all of deceased's property, including the trust at issue).

*Lake View Sch. Dist. No. 25 v. Huckabee*, 144 S.W.3d 741 (Ark. 2004) (appointing special master to examine, evaluate, and report on legislative and executive action taken to comply with court order and the constitutional mandate regarding adequacy of school system funding, infrastructure, and curriculum).

*Ligon v. Dunklin*, No. 04-661, 2004 WL 2036927 (Ark. Sept. 9, 2004) (appointing special master to preside over disbarment proceedings and provide the court with findings of fact).

*HRR Ark., Inc. v. River City Contractors, Inc.*, 87 S.W.3d 232 (Ark. 2002) (noting that the trial court appointed a special master to make an accounting of the company's books, 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).

**California**

*Tarrant Bell Prop., LLC v. Superior Court*, 247 P.3d 542 (Cal. 2011) (finding that the appointment of a referee under the California Code of Civil Procedure Section 638 is permissive, but not mandatory).

*Gay (Kenneth Earl) on H.C.*, No. S130263, 2011 Cal. LEXIS 5338 (Cal. May 18, 2011) (reviewing a decision in which a judge was to be selected as a referee to take evidence and make findings of fact on five questions in the case of People v. Kenneth Early Gay).

*David (Stanley Bernard) on H.C.*, No. S116750, 2011 Cal. LEXIS 616 (Cal. Jan. 19, 2011) (reviewing case in which a presiding judge was relieved as referee and another judge was appointed to serve as referee to take evidence and make findings of fact, and prepare and submit a report of the proceedings, the evidence adduced, and the findings).

*Rand v. Bd. of Psychology*, 142 Cal. Rptr. 3d 288 (Cal. Ct. App. 2012) (upholding revocation of psychologist's license based on his conduct while acting as a special master).

*Parness v. Abrams Garfinkel Margolis Bergson, LLP*, No. B234762, 2012 WL 3297710 (Cal. Ct. App. Aug. 14, 2012) (finding that the trial court should have conducted an independent review of referee's findings and recommendations).

*James E. Adrian v. Carl Wayne Adrian*, No. D058877, 2012 WL 967659 (Cal. Ct. App. Mar. 22, 2012) (appointing referee Andrew Allcroft to oversee the partition of jointly owned real estate).

*In re Stephanie U.*, B234401, 2012 WL 909301 (Cal. Ct. App. Mar. 19, 2012) (quoting case law which states that the order of a juvenile court referee becomes final 10 calendar days after service of a copy of the order, and findings if no timely application for rehearing has been made).

*Yong Pyo Hong v. Life Univ.*, No. B226987, 2012 WL 882518 (Cal. Ct. App. Mar. 15, 2012) (discussing whether the party requesting a discovery referee must bear all fees associated with such referee, or whether fees should be divided between the parties).

*In re Marriage of Satya v. and Lakshmi Reddi*, No. G044888, 2012 WL 833093 (Cal. Ct. App. Mar. 13, 2012) (recommending striking of one party's pleadings for noncompliance with discovery requests by the discovery referee).

*In re Adrian A.*, No. B233960, 2012 WL 681210 (Cal. Ct. App. Mar. 1, 2012) (finding that mother's appeal in a child custody proceeding was untimely because a California statute states that the order of a referee becomes effective without approval of a judge ten days after service of a written copy of the order).

*Tidgewell v. Gentry*, No. G044710, 2012 WL 676729 (Cal. Ct. App Feb. 29, 2012) (quoting case law that provides no settlement for an injured worker is valid unless the Workers' Compensation Appeals Board or a workers' compensation referee approves the settlement).

*Rodriguez v. Burbank Police Dep't*, No. B227414, 2012 WL 646338 (Cal. Ct. App. Feb. 27, 2012) (deciding whether or not certain evidence was privileged was done by the discovery referee).

*In re C.G.*, No. B235724, 2012 WL 599578 (Cal. Ct. App. Feb. 24, 2012) (declaring a presumed father in a paternity dispute case was done by referee).

*Gibson v. GJ Park Assocs.*, No. B224808, 2012 WL 593196 (Cal. Ct. App. Feb. 23, 2012) (awarding of restitution of rents under the unfair competition law was done by referee, after considering the evidence of the case).

*In re J.H.*, No. C065793, 2012 WL 469827 (Cal. Ct. App. Feb. 14, 2012) (reviewing an order made in the juvenile court by referee Peter Helfer that a father have no contact with his children).

*Partridge v. Hott Wings*, No. A130266, 2012 WL 470458 (Cal. Ct. App. Feb. 14, 2012) (appointing a discovery referee to assist with discovery disputes).

*Psychcare v. Windstone Behavioral Health, Inc.*, No. G044449, 2012 WL 293740 (Cal. Ct. App. Jan. 31, 2012) (appointing a referee at the trial court level to hear the motions and make recommendations; but, the referee had not decided the matter by the time the parties completed the briefing in the appeal).

*Ceporius v. Maturo*, No. B228418, 2012 WL 275160 (Cal. Ct. App. Jan. 30, 2012) (affirming referee's monetary award to respondent homeowner).

*In re Alexander L.*, No. B232712, 2012 WL 90094 (Cal. Ct. App. Jan. 12, 2012) (discussing a California rule which states that in matters heard by a referee, a notice of appeal must be filed within 60 days after the referee's order becomes final).

*Okun v. Morton*, No. B227689, 2012 WL 75745 (Cal. Ct. App. Jan. 11, 2012) (reviewing referee's finding that plaintiff was entitled to a share of defendant's business transaction proceeds).

*Sutton v. Richardson*, No. B230590, 2012 WL 76178 (Cal. Ct. App. Jan. 11, 2012) (appointing referee to appraise the assets of an estate in question).

*In re I.G.*, No. DO60290, 2012 WL 12675 (Cal. Ct. App. Jan. 4, 2012) (affirming a judgment of the Superior Court in which juvenile court referee was assigned).

*Johnston v. Kelly*, No. F060909, 2012 WL 8319 (Cal. Ct. App. Jan. 3, 2012) (referring to duties of referees in workers compensation cases).

*Benjamin, Weill & Mazer v. Kors*, 125 Cal. Rptr. 3d 469 (Cal. Ct. App. 2011) (discussing concerns about referees and arbitrators being compromised by economic considerations).

*In re Cabrera*, 198 Cal. App. 4th 1548, (Cal. Ct. App. 2011) (finding that the reviewing court may appoint a referee and order the referee to hold an evidentiary hearing to resolve the factual disputes).

*In re Marriage of Bauer*, No. G043361, 2011 WL 4337093 (Cal. Ct. App. Sept. 16, 2011) (mentioning that the trial court sent the couple to a referee to determine the value of assets when dividing marital property).

*In re M.H. 2011*, No. G044807, 2011 WL 3923546 (Cal. Ct. App. Sept. 7, 2011) (quoting another case to determine that if the court finds material facts in dispute it may appoint a referee and order an evidentiary hearing be held).

*Barrera v. Wells Fargo Bank, N.A.*, No. A129915, 2011 WL 3557318 (Cal. Ct. App. Aug. 12, 2011) (determining that a motion must specify whether the court, a justice, or a special master or referee will take the evidence).

*Rickley v. Goodfriend*, No. B224442, 2011 Cal. Ct. App. Unpub. LEXIS 5975 (Cal. Ct. App. Aug. 9, 2011) (reviewing an appeal of a post-judgment order appointing a remediation supervisor).

*Petrik v. Mahaffey*, No. G042114, 2011 WL 2306149 (Cal. Ct. App. June 9, 2011) (determining that the trial court may appoint a referee to conduct a formal accounting).

*Ben Eisenberg Prop.–New Mart Bldg., Inc. v. Jackson & Wallace*, No. B211714, 2011 WL 1844627 (Cal. Ct. App. May 17, 2011) (referring the dispute to a discovery referee after an extensive discovery dispute).

*Andrade v. Superior Court*, No. H034960, 2011 WL 1782031 (Cal. Ct. App. May 10, 2011) (stating that the referee is empowered to make a conclusive determination without further action by the court under Cal. Code of Civ. P. section 638).

*First Liberty Equities v. Beacon Capital Escrow*, No. D055710, 2011 Cal. Ct. App. Unpub. LEXIS 3012 (Cal. Ct. App. Apr. 21, 2011) (reviewing a case in which, shortly after litigation was initiated, the trial court appointed an accountant as a referee under Cal. Code of Civ. P. section 639, and directed the referee to prepare an accounting of the joint venture's finances. After the accounting was prepared, the trial court conducted an evidentiary hearing based upon it).

*Fletcher v. Bantan*, No. B222418, 2011 WL 1474012 (Cal. Ct. App. Apr. 19, 2011) (affirming trial court order to pay referee costs).

*Walsh v. Adams*, No. B222638, 2011 WL 1459971 (Cal. Ct. App. Apr. 18, 2011) (dismissing appeal of order adopting referee's report).

*Chapman v. Sullivan Motor Cars, LLC*, No. B224885, 2011 WL 438536 (Cal. Ct. App. Feb. 9, 2011) (finding that the referee's award of attorney fees was not an abuse of discretion).*In re Marriage of Petropoulos*, 110 Cal. Rptr. 2d 111 (Cal. Ct. App. 2001) (determining that it is not an unauthorized delegation of judicial power to appoint a special master to determine debts and assets of the parties, income of the parties, and the parties' credibility).

*Beasley v. Superior Court*, No. D057308, 2010 Cal. Ct. App. Unpub. LEXIS 9796 (Cal. App. Dec. 10, 2010) (stating that once a judgment is obtained, the judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information and to aid in enforcement of the money judgment).

*Akmakjian v. Haider*, No. E050146, 2010 Cal. Ct. App. Unpub. LEXIS 9631 (Cal. Ct. App. Dec. 3, 2010) (appointing a referee to manage and sell the property after a partition of the sale of property. The referee then moved for approval of his final accounting and plan for distribution. The costs of partition included the referee's fee and expenses.).

*Truckee Carson Irr. Dist. v. Sierra Pac. Power Co.*, No. C061004, 2010 WL 4461659 (Cal. Ct. App. Nov. 9, 2010) (appointing a referee to decide three different issues; to hear and determine any and all discovery motions and disputes relevant to discovery in the action; and to report findings and make a recommendation).

*Snyder v. Carollo*, No. F059657, 2010 Cal. Ct. App. Unpub. LEXIS 8760 (Cal. Ct. App. Nov. 3, 2010) (stating that the Probate Code consistently uses the terms "appraise" and "appraisal" to describe the work of the probate referee).

*Callan v. CRC Ins. Servs., Inc*., No. B211059, 2010 WL 4305043 (Cal. Ct. App. Nov. 2, 2010) (reviewing a motion for a discovery referee).*

*Kaplan v. Reiner*, No. B220426, 2010 WL 3587401 (Cal. Ct. App. Sept. 16, 2010) (appointing a special master to attend all discovery because of a party's unprofessional behavior during discovery matters).

*Regan Roofing Co. v. Superior Court*, 27 Cal. Rptr. 2d 62 (Cal. Ct. App. 1994) (mentioning court-appointed special master serving as mediator).

**Colorado**

*People v. Adams*, 243 P.3d 256 (Colo. 2010) (deciding that the supreme court may accept a hearing master's findings of fact unless they are clearly erroneous and unsupported by the record).

*Valentine v. Mountain States Mut. Cas. Co*., 252 P.3d 1182 (Colo. App. 2011) (finding that the insurer, who prevailed on cross-claims asserted by insureds in foreclosure action, was not entitled to recover its share of the costs billed by mediator and special master).

**Connecticut**

*In re Petition of Reapportionment Comm'n*, 36 A.3d 661 (Conn. 2012) (accepting report and plan of congressional districting that was designed by special master).

*Broadnax v. City of New Haven*, 851 A.2d 1113 (Conn. 2004) (appointing a special master to oversee promotions within fire department).*

*Liberti v. Liberti*, 37 A.3d 166 (Conn. App. Ct. 2012) (noting that before the hearing on a motion to modify child custody was held, the parties participated in a special master session through which they succeeded in securing an agreement to modify their parenting plan).

*Lynn v. Lynn*, 23 A.3d 771 (Conn. App. Ct. 2011) (appointing a special master to facilitate the sale of the marital home in a marriage dissolution action).

*Yao Gong v. Xuanwei Huang*, 21 A.3d 474 (Conn. App. Ct. 2011) (reviewing a case in which the court appointed a discovery special master to assess the parties' financial statuses in a marriage dissolution action).

*Broadnax v. City of New Haven*, No. NNHCV980412193S, 2012 WL 4123184 (Conn. Super. Ct. Aug. 21, 2012) (assigning a special master of the court to monitor, oversee, and report to the court compliance of the City of New Haven with federal, state and municipal law applicable to promotions within the city of New Haven Fire Department).

*Targowski v. Targowski*, No. FA094011470S, 2011 Conn. Super. LEXIS 3317 (Conn. Super. Ct. Dec. 30, 2011) (noting that the special master held a conference with parties to a divorce proceeding).

*Wittman v. Wittman*, No. FA104048782, 2011 WL 4347857 (Conn. Super. Ct. Sept. 1, 2011) (mentioning that the husband, in a major dissolution action, failed to disclose his purchase of a new home at a special master's pretrial).

*Chambless v. Chambless*, No. FA104013999S, 2011 WL 3930318 (Conn. Super. Ct. Aug. 12, 2011) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Korosidis v. Papanicolaou*, No. FA104013409S, 2011 WL 3891354 (Conn. Super. Ct. Aug. 4, 2011) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Capoccitti v. Capoccitti*, No. FA104013845S, 2011 WL 2536214 (Conn. Super. Ct. June 1, 2011) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Feher v. Feher*, No. FA084010491S, 2011 WL 1888197 (Conn. Super. Ct. Apr. 27, 2011) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Klein v. Bratt*, No. FSTCV055000502S, 2011 WL 1028004 (Conn. Super. Ct. Feb. 18, 2011) (stating that a special master's pre-trial was unable to resolve financial differences between two cohabiting adults who terminated their romantic relationship).

*Korab v. Ridgeway*, No. FA104012889S, 2011 WL 783609 (Conn. Super. Ct. Feb. 14, 2011) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Webb v. Warden*, No. CV000003239S, 2011 WL 724774 (Conn. Super. Ct. Jan. 25, 2011) (ordering the bifurcation of the petitioner's claim alleging that racial bias infects Connecticut's capital punishment procedures and transferring said claim to the authority of the special master appointed to coordinate the scheduling of hearings of all racial disparity claims in death penalty cases).

*Bushnell v. Bushnell*, No. FA064005252S, 2011 WL 263186 (Conn. Super. Ct. Jan. 4, 2011) (mentioning that special masters met with the children in a child custody case).

*Newman v. Newman*, No. FA094012578S, 2010 WL 5646052 (Conn. Super. Ct. Dec. 30, 2010) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Carter v. Carter*, No. FA094012225S, 2010 WL 5573754 (Conn. Super. Ct. Dec. 14, 2010) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

*Mahaney v. Mahaney*, No. FSTFA104018517S, 2010 WL 5573708 (Conn. Super. Ct. Dec. 8, 2010) (deferring a ruling on a motion to appoint a special master until after an update and further report by the parties on the status of discovery).

*Mercer v. Blanchette*, No. HHBCV105014999, 2010 WL 5493506 (Conn. Super. Ct. Dec. 8, 2010) (mentioning that a federal district court appointed monitors in the nature of special masters and delegated to them the function of overseeing the remedies that had been put in place as part of the court order in the Doe v. Meachum litigation, another case in which the plaintiff was involved).

*Farrington v. Farrington*, No. FA104013052S, 2010 WL 5188441 (Conn. Super. Ct. Nov. 30, 2010) (following a special master's conference, the trial court held a final hearing on the marriage dissolution).

**Delaware**

*Plummer v. R.T. Vanderbilt Co., Inc.*, 49 A.3d 1163 (Del. 2012) (holding that order dismissing complaint became final when trial court entered order for dismissal, not the date that the special master, unaware of the court's disposition, granted an omnibus motion to dismiss).

*Danenberg v. Fitracks, Inc.*, 2012 Del Ch. LEXIS 53, 4-5 (Del. Ch. Mar. 5, 2012) (refusing to appoint a special master to review fees).

*Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. Super. Ct. 2011) (affirming special master's finding that the motion to amend was futile).

**District of Columbia**

*Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2010) (finding that the rule governing special masters authorized the trial court to appoint a parenting consultant in a high-conflict custody proceeding where it awarded joint custody).

**Florida**

*Moriber v. Dreiling*, 95 So. 3d 449 (Fla. Dist. Ct. App. 2012) (following speical master's recommendation to deny motion finding that defendant did not obtain an unfair advantage when he inadvertently received plaintiff's confidential mediation statement).

*In re Drummond*, 69 So.3d 1054 (Fla. Dist. Ct. App. 2011) (reviewing the magistrate's report resolving an exception in contested involuntary placement proceedings under the Baker Act).

*Cnty. of Orange v. Ligatt*, 46 So. 3d 130 (Fla. Dist. Ct. App. 2010) (reversing circuit court decision rejecting the special master's finding that a structure was not a "dock" within the meaning of county ordinance).

*TID Servs. v. Dass*, 65 So. 3d 1 (Fla. Dist. Ct. App. 2010) (reviewing the circuit court's appointment of a special magistrate to take immediate possession of and sell a property in accordance with Fla. State section 64.061(4) (2008)).

*Brooks v. State*, 816 So. 2d 199 (Fla. Dist. Ct. App. 2002) (denying appeal of trial court decision based on special master's findings after conducting an evidentiary hearing regarding petitioner's entitlement to a belated 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).

*Leo's Gulf Liquors v. Lakhani*, 802 So. 2d 337 (Fla. Dist. Ct. App. 2001) (mentioning that the trial court appointed a special master to monitor protracted discovery, which took place over three years).

*Gaton v. Health Coal., Inc.*, 774 So. 2d 59 (Fla. Dist. Ct. App. 2000) (determining that a court may, at its discretion, order an *in camera* hearing by a special master to inspect the materials in question).

**Georgia**

*In re Peterson*, 725 S.E.2d 252 (Ga. 2012) (departing from special masters recommendation of twelve month sanction in lawyer disciplinary action).

*Small v. Irving*, 729 S.E.2d 323 (Ga. 2012) (holding that the trial court erred in adopting the special master's finding that plaintiff not entitled to recover mense profits in an ejectment proceeding).

*In re Gammage*, 721 S.E.2d 902 (Ga. 2012) (accepting special master's recommendation that the court accept the petition for the voluntary surrender of attorney's license).

*In re Maccione*, 720 S.E.2d 646 (Ga. 2012) (accepting special master's recommendation that court accept Defendant's voluntary surrender of his attorney's license).

*In re Wathen*, 721 S.E.2d 899 (Ga. 2012) (acting on the default report and recommendation of the special master, the court held attorney's conduct warranted disbarment).

*Washington v. Brown*, 722 S.E.2d 65 (Ga. 2012) (adopting special master's finding that Brown was the owner of a piece of property in a quiet title action).

*In re Peterson*, Nos. S11Y0423, S11Y0424, 2012 WL 904681 (Ga. Mar. 19, 2012) (adopting special master's findings that an attorney had committed misconduct and should be disciplined).

*In re Wisenbaker*, No. S12Y0932, 2012 WL 952229 (Ga. Mar. 19, 2012) (accepting special master's recommendation that the court accept the petition for the voluntary surrender of attorney's license).

*Goodson v. Ford*, No. S11A1740, 2012 WL 685802 (Ga. Mar. 5, 2012) (presuming special master's factual findings were supported by the evidence).

*In re Davis*, Nos. S12Y0401, S12Y0402, 2012 WL 603273 (Ga. Feb. 27, 2012) (adopting findings and conclusions of special master, who recommended disbarment of attorney).

*Gotel v. Thomas*, 592 S.E.2d 78 (Ga. 2004) (affirming a final judgment adopting the report of the special master in an action to quiet title and noting that the appellate court could not review special master's consideration of an argument first raised on appeal because no transcript of the hearing before the special master was available).

*Simmons v. Bearden*, 596 S.E.2d 136 (Ga. 2004) (holding that if no demand for a jury trial is requested prior to the time that the special master hears the evidence, "the special master is the arbiter of law and fact and decides all issues in the case unless the master 'on his own initiative . . . [requires] a trial by a jury of any question of fact'").

*Watkins v. Hartwell R.R. Co.*, 597 S.E.2d 377 (Ga. 2004) (reversing superior court's decision to deny a jury trial and adopt special master's conclusion resolving a right-of-way dispute between railroad and property owner).

*In re Rutherford*, 569 S.E.2d 840 (Ga. 2002) (accepting special master's recommendation that the court accept attorney's voluntary surrender of attorney's license).

*McKemie v. City of Griffin*, 537 S.E.2d 66 (Ga. 2000) (reviewing trial court determination based on special master's finding regarding evidence as to the fair market value of property sought to be condemned).

*Patel v. Epps*, 731 S.E.2d 62 (Ga. Ct. App. 2012) (dismissing direct appeal of special master's findings for lack of jurisdiction because appealling the decision of a special master appointed under Georgia's auditor statute requires following the appeal procedure listed in OCGA § 5–6–35).

*Standard Bldg. Co., Inc. v. Schofield Interior Contractors, Inc.*, 726 S.E.2d 760 (Ga. Ct. App. 2012) (holding Superior Court's referral of defendants' motion for a new trial or judgment notwithstanding the verdict to a special master did not constitute an abuse of discretion).

*Alston & Baird, LLP v. Mellon Ventures II, L.P.*, 706 S.E.2d 652 (Ga. Ct. App. 2010) (determining that in a legal malpractice action, the trial court had inherent authority to appoint a private attorney as a special master to submit a written report making recommendations as to evidentiary disputes and as to disposition of parties' motions for partial summary judgment).

*Pounds v. Brown*, 695 S.E.2d 66 (Ga. Ct. App. 2010) (affirming in part and reversing in part the trial court's decision which, itself, reversed the findings of the special master who was appointed to consider an emergency motion to enforce a settlement agreement in a derivative suit), *aff'd in part, rev'd in part*, 711 S.E.2d 646 (Ga. 2011).

*Res. Life Ins. Co. v. Buckner*, 698 S.E.2d 19 (Ga. Ct. App. 2010) (affirming trial court appointment of special master to determine whether sanctions should be applied against plaintiff for failure to disclose information during discovery, and ultimately the special master's findings).

**Idaho**

*City of Pocatello v. Idaho*, 275 P.3d 845 (Idaho 2012) (finding the city failed to preserve its claims for appellate review because city did not challenge the special master's recommendations).

*In re SRBA*, 237 P.3d 1 (Idaho 2010) (affirming special master's denial of a motion to alter or amend did not change the period allowable for filing a challenge despite stated confusion on behalf of the party of the deadline, and holding that the special master had the requisite authority to hear and recommend the city's motion for attorney fees and costs despite the argument that fees cannot be determined until the case is concluded by the judge and not the master).

*City of Pocatello v. Idaho*, No. 37723-2010, 2012 WL 987518 (Idaho 2012) (affirming special master's findings of fact and conclusions of law in water rights dispute).

*Idaho Sch. for Equal Educ. Opportunity v. State*, 97 P.3d 453 (Idaho 2004) (reviewing a case in which a special master was appointed to investigate the conditions of the school buildings during school funding reform).

**Illinois**

*Molony v. Ill. Dep't of Emp. Sec.*, No.1–10–1872, 2012 Ill. App. LEXIS 1560 (Ill. App. Ct. June 28, 2012) (holding that referee acted properly in taking an active role in developing the evidence and ascertaining the positions of the parties, who were unrepresented by counsel).

*City of Chi. v. St. John's United Church of Christ*, 935 N.E.2d 1158 (Ill. App. Ct. 2010) (appointing a special master to "advise and assist the court" in a lawsuit brought by a class of people with property interests in a cemetery to prevent the city from condemning the cemetery).

**Indiana**

*Long v. State*, 962 N.E.2d 671 (Ind. Ct. App. 2012) (holding that judicially appointed master commissioner lacked authority to enter a final judgment on defendant's sentence where commissioner did not preside over the criminal trial).

*Lees Inns of Am., Inc. v. William R. Lee Irrevocable Trust*, 924 N.E.2d 143 (Ind. Ct. App. 2010) (holding that trial court did not abuse its discretion by denying corporation's motion to appoint a special master or appraiser regarding the valuation of a corporation).

**Iowa**

*In re T.E.*, No. 12–0034, 2012 WL 4513877 (Iowa Ct. App. Oct. 3, 2012) (holding that a "hospitalization referee" has no jurisdiction in cases involving the involuntary hospitalization of minors).

*In re Marriage of Ryan*, 801 N.W.2d 33 (Iowa Ct. App. 2011) (reviewing a case in which a special master was appointed to value certain property, conduct an accounting, and pay certain of the parties' outstanding obligations).

*C. Line, Inc. v. Malin*, No. 10-1600, 2011 WL 6058580 (Iowa Ct. App. Dec. 7, 2011) (affirming court-appointed special master's findings on license appeal of adult cabaret business).

*Armstrong v. Armstrong*, 791 N.W.2d 428 (Iowa Ct. App. 2010) (finding that the lower court properly modified the master's report to account for taxes that became due between the report and final judgment; master was appointed to assist in resolving disputes regarding real property and business interests owned by siblings and their spouses).

**Kansas**

*Wilson v. Jenkins*, 268 P.3d 11 (Kan. Ct. App. 2012) (appointing special master for fact finding in a case involving the dissolution of a family partnership).

*In re Twilleger*, 263 P.3d 199 (Kan. Ct. App. 2011) (reviewing district court's decision not to appoint an examiner).

*Westar Energy, Inc. v. Wittig*, 235 P.3d 515 (Kan. Ct. App. 2010) (affirming trial court decision to appoint special master to decide the reasonableness of legal fees and sort through the large volume of legal bills from both firms, and later deciding to accept additional documentation after both parties objected to the master's findings).

**Kentucky**

*Greene v. Commonwealth*, 349 S.W.3d 892 (Ky. 2011) (holding that limited waiver of sovereign immunity for negligence in performance of ministerial acts under Board of Claims Act did not apply to claim against former county master commissioner for intentional conversion of judicial sale proceeds for his personal use).

*Hall v. Swan Fork Land Co., Inc.*, No. 2009-CA-001815-MR, 2011 Ky. App. Unpub. LEXIS 482 (Ky. Ct. App. May 27, 2011) (granting master commissioner authority to execute deed if parties failed to execute quit claim deed within timeframe).

**Lousiana**

*Watters v. Dep't of Soc. Servs.*, 2011–1174 (La. App. 4 Cir. 4/14/12); 2012 WL 860386 (appointing special master to distribute settlement funds).

*Ambush v. Mount Zion Baptist Church, Inc. ex rel. its Bd. of Trustees*, 11–1028 (La. App. 3 Cir. 2/22/12); 2012 WL 555151 (appointing special master to conduct a church's election of its board of trustees).

*Ficarra v. Ficarra*, 11–569 (La. App. 5 Cir. 2/14/12); 2012 WL 469891 (appointing special master to determine assets and liabilities of the community, reimbursement claims, and appellant's earnings for child support purposes).

*Adams v. CSX R.R.*, 2011–0286 (La. App. 4 Cir. 12/14/11); 2011 WL 6225172 (appointing special master to recommend distributions of settlement money).

*Hightower v. Hightower*, 2010-1352 (La. App. 1 Cir. 12/22/10); 57 So. 3d 605 (reviewing special master's findings with regard to division of property).

*Pollard v. Alpha Technical, Chevron U.S.A., Inc.*, 2008–1486, 2009–0266 to 2009–0273 31 So. 3d 576 (La. App. 4 Cir. 1/28/10) (affirming trial court appointment of special master to conduct evidentiary hearing on issue of class certification, and its decision to deny class certification based on special master's recommendation).

*Palmisano v. Tranchina*, 44,948 (La. App. 2 Cir. 1/27/10); 31 So. 3d 543 (finding that a magistrate was entitled to absolute immunity from action for damages based on allegations of lack of professionalism and misuse of role as special master, since magistrate was a court-appointed expert performing in a quasi-judicial capacity as a special master at the time the allegations occurred).

*Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 2001–2634 (La. App. 3/19/04); 878 So. 2d 522 (reversing the appointment of a special master to oversee marshland restoration project), *rev'd on other grounds*, 893 So. 2d 789 (La. 2005).*

**Maine**

*Boschetti v. Anderson*, No. Oxf-10-473, 2011 Me. Unpub. LEXIS 76 (Me. May 17, 2011) (holding that referree's findings of fact and conclusions of law, as adopted by the court, were not clearly erroneous).

*Bar Harbor Hous. Auth. v. Staples*, 8 A.3d 622 (Me. 2010) (holding that objections to referee's findings are necessary to preserve issues for appeal; objections to referee's report must be decided by a justice who has not heard testimony, nor been given the opportunity to appraise credibility of witnesses).

*Gorman v. Gorman*, 10 A.3d 703 (Me. 2010) (holding that appeal from a referee's report will not be entertained unless a proper objection was made in the court that appointed the referee, and that husband and wife did not have authority to agree to bypass the requirement of filing objections to referee's report in trial court prior to appeal).

*Young v. Hayward*, No. RE-01-35, 2003 WL 21957120 (Me. Super. July 31, 2003) (denying summary judgment and stating that a referee must be appointed to determine the cause of water contamination).

*Sandler v. Lalone*, No. CV-10-443, 2011 Me. Super. LEXIS 126 (Me. Super. June 29, 2011) (holding that divorce agreement containing language asserting that that it did not supersede the Referee's Report and Divorce Judgment did not incorporate the Report and Divorce Judgment into the agreement).

**Maryland**

*Dep't of Human Res. v. Mitchell*, 12 A.3d 179 (Md. 2011) (discussing child support hearings conducted by special master).

*Friolo v. Frankel*, 28 A.3d 752 (Md. 2011) (holding that plaintiff is responsible for special master's fees as a litigation expense).

*Neustadter v. Holy Cross Hosp. of Silver Spring, Inc*., 13 A.3d 1227 (Md. 2011) (appointing special master to resolve parties' ongoing discovery disputes).

**Massachusetts**

*Blonde v. Antonelli*, No. SJC-11197, 2012 Mass. LEXIS 683 (Mass. July 27, 2012) (appointing a special master to sell parties' former marital home in divorce proceedings).

*Adams v. Adams*, 945 N.E.2d 844 (Mass. 2011) (appealing order adopting special master's valuation of marital estate in divorce action, among others).

*Perez v. Boston Hous. Auth.*, 400 N.E.2d 1231 (Mass. 1980) (affirming that the housing board's mismanagement necessitated the appointment of a temporary receiver to assume functions of the Boston Housing Authority).*

*Tatarinov-Levin v. Tatarinov-Levin*, No. 10-P-309, 2012 Mass. App. Unpub. LEXIS 890 (Mass. Ct. App. July 13, 2012) (appointing special master to sell parties' marital home in divorce proceedings).

*Ronayne v. Rancourt*, No. 11-P-1508, 2012 Mass. App. Unpub. LEXIS 529 (Mass. Ct. App. Apr. 26, 2012) (appointing special master to sell parties' marital home in divorce proceedings).

*Spero v. Johnson*, 948 N.E.2d 919 (Mass. App. Ct. 2011) (appealing family court order adopting report of special master in divorce action).

*Savage v. Oliszczak*, 928 N.E.2d 995 (Mass. App. Ct. 2010) (affirming trial court appointment of special master to review the motion for summary judgment concerning the triggering of an in terrorem clause in a trust and adoption of the special master's recommendation. Plaintiffs appealed claiming that the special master failed to conduct a hearing and the motion judge failed to hear objections to the master's report).

*Yankee Adver. Co. v. Outdoor Adver. Bd.*, 464 N.E.2d 410 (Mass. App. Ct. 1984) (reviewing decision of special master appointed to review property dispute case arising under the state's administrative procedure act).

*Perez-Vasquez v. Smith-Rivera*, No. 3D03-3256, 2003 WL 23006699 (Mass. Dist. Ct. Dec. 23, 2003) (quashing the order of the appointment of special master without the consent of the parties).*

**Michigan**

*Davenport v. Mosholder*, 792 N.W.2d 339 (Mich. 2011) (discussing referee's evidentiary recommendations in family law action).

*Great Wolf Lodge of Traverse City, LLC v. Pub. Serv. Comm'n*, 799 N.W.2d 155 (Mich. 2011) (discussing use of referee where owner of waterpark resort filed complaint with Public Service Commission challenging utility rate increases and seeking a refund of overpayments).

*Schreur v. Dep't of Human Servs*., 795 N.W.2d 124 (Mich. 2011) (discussing referee's dismissal of plaintiff's petition for an administrative hearing).

*Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality*, 793 N.W.2d 596 (Mich. 2010) (discussing use of referee in action against energy company and the Department of Environmental Quality alleging violations of surface-water law, riparian law, and the Michigan Environmental Protection Act).

*Ilankamban v. Twp. of Pittsfield*, No. 303113, 2012 Mich. App. LEXIS 431 (Mich. Ct. App. Mar.13, 2012) (referee was appointed to oversee a tax valuation matter. Referee determined plaintiff did not meet their burden to challenge tax determination).

*Ulloa v. Lafave*, No. 301955, 2012 Mich. App. LEXIS 321 (Mich. Ct. App. Feb. 23, 2012) (referee appointed in a family dispute. The court goes through the requirements for reviewing or using a referee's proposed order in a domestic case).

*Wuebben v. Twp. of Franklin*, No. 299573, 2011 Mich. App. LEXIS 2342 (Mich. Ct. App. Dec. 22, 2011)(referee appointed to review tax valuations, order was modified by the trial court).

*Mitan v. New World Television, Inc.*, No. 225530, 2002 WL 31928598 (Mich. Ct. App. Nov. 12, 2002) (upholding circuit court's appointment of a special master for discovery, and various discovery sanctions imposed by the master and adopted by the circuit court, because both parties stipulated to the appointment), *rev'd*, 669 N.W.2d 813 (Mich. 2003).*

**Minnesota**

*Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860 (Minn. 2010) (holding that statute governing powers and duties of commissioners in eminent domain proceedings does not require that contamination evidence be admitted or that contaminated property be valued as contaminated; evidence before court-appointment of commissioner can be considered).

*U.S. Bank Nat'l Ass'n v. Cold Spring Granite Co*., 802 N.W.2d 363 (Minn. 2010) (discussing valuation and other findings of special master appointed in case arising from reverse stock split in which minority shareholders were forced to accept cash in exchange for shares).

*Holmes v. Holmes*, No. 27-FA-08-3313, 2012 Minn. App. Unpub. LEXIS 896 (Minn. Ct. App. Sept. 17, 2012) (appealing special master's recommendation in divorce proceedings).

*Effrem v. Effrem*, No. 27CV0823808, 2012 Minn. App. LEXIS 55 (Minn. Ct. App. June 18, 2012) (reviewing special master's recommendations about the appropriate value of attorney's lien).

*Cnty. of Dakota v. Cameron*, A11-1273, 2012 Minn. App. LEXIS 27 (Minn. Ct. App. Mar. 26, 2012) (appointing three commissioners to oversee an eminent domain case).

*City of Moorhead v. Red River Valley Coop. Power Ass'n*, A11-705, 2012 Minn. App. LEXIS 13 (Minn. Ct. App. Jan. 30, 2012) (appointing commissioners to determine damages between two utility companies).

*Keystone Redev. Partners, LLC v. Pa. Gaming Control Bd.*, 788 N.W.2d 160 (Minn. Ct. App. 2010) (appointing special master to value stock and determine the propriety of both the stock split and redemption of fractional shares).

*Murrin v. Mosher*, No. A09-314, 2010 WL 1029306 (Minn. Ct. App. Mar. 23, 2010) (holding that a special master has the authority, without any further action of the district court, to impose binding, non-contempt sanctions).

*Buller v. Minn. Lawyers Mut.*, 648 N.W.2d 704 (Minn. Ct. App. 2002) (affirming district court's adoption of the special magistrate's finding of fact that respondent's insurance policy did not provide coverage for malpractice claim).

*In re Temp. Funding of Core Functions of the Exec. Branch of Minn.*, No. 62-CV-11-5203, 2011 WL 2556036 (Minn. Dist. Ct. June 29, 2011) (appointing special master to oversee requests for budgetary funding during the temporary state shutdown in June 2011).

*Edwards v. Long Beach Mortg. Co.*, No. CT 02-16446, 2004 WL 2137824 (Minn. Dist. Ct. July 22, 2004) (determining that it was advisable to appoint a special master to work with parties on discovery and class notice).

**Mississippi**

*Miss. Bar v. Brown*, No. 2012-BD-00540-SCT, 2012 Miss. LEXIS 474 (Miss. Oct. 4, 2012) (appointing special master to investigate and report on fraudulent actions of attorney).

*Lewis v. Lewis*, 54 So.3d 216 (Miss. 2011) (holding that complex, sizable marital estate that involved alleged transfers from trusts and tax transfers warranted consideration of appointment of special master experienced in business valuation).

*Zweber v. Zweber*, No. 2010-CA-01629-COA, 2012 WL 453117 (Miss. Ct. App. Feb. 14, 2012) (appointing special master to oversee a divorce proceeding to determine how much each parent would be responsible for in tuition costs for child).

*Broome v. Broome*, 75 So. 3d 1132 (Miss. Ct. App. 2011) (appointing special master to determined the value of business and obligations of the parties).

*Delta Hous. Dev. Corp. v. Johnson*, 48 So. 3d 573 (Miss. Ct. App. 2010) (affirming the chancery court's holding that the special master's findings of the true boundary line between the two properties was valid and Delta waived any objection to such finding when it failed to object to the finding in the chancery court).

*Penton v. Penton*, No. 2007-CA-02046-COA, 2010 WL 1444537 (Miss. Ct. App. Apr. 13, 2010) (reviewing appeal of a decision based on a special master's findings regarding an inventory of assets and debts to determine equitable distribution in divorce).

*Wallin (Drewery) v. Drewery*, 783 So. 2d 786 (Miss. Ct. App. 2001) (affirming decision that special master did not have a conflict of interest).

**Missiouri**

*McMahon v. Geldersma*, 317 S.W.3d 700 (Mo. Ct. App. 2010) (appointing special master to hear issues raised in discovery and report conclusions to the court).

*Libby v. Vachon*, No. CV-02-651, 2004 WL 1433690 (Mo. Ct. App. Apr. 22, 2004) (holding that a referee's factual finding must be adopted unless they are clearly erroneous).

*Lasker v. Johnson*, 123 S.W.3d 283 (Mo. Ct. App. 2003) (appointing a special master to hear evidence because matter and discovery disputes in child support case presented exceptional conditions).

*Shaner v. Sys. Integrators, Inc.*, 63 S.W.3d 674 (Mo. Ct. App. 2001) (deciding that the accountant's report is a nullity not to be considered on remand where appellant had no notice that accountant was appointed special master; the accountant did not take an oath or meet with parties; and appellant had no opportunity to make record or challenge report).*

**Montana**

*Conner v. City of Dillon*, 270 P.3d 75 (Mont. 2012) (reversing special master's finding that no contract existed between the parties because plaintiff's water use was not illegal).

*In re Marriage of Alderson & Bargmeyer*, No. DA 11–0204, 2012 WL 555193 (Mont. Feb. 21, 2012) (affirming District Court's finding that special master's decision apportioned marital debt inequitably).

*Mont. Trout Unltd. v. Beaverhead Water Co*., 255 P.3d 179 (Mont. 2011) (discussing court's power to appoint "water masters").

*BNSF Ry. Co. v. Mont. Eighth Judicial Dist. Court*, No. OP 11-0114, 2011 Mont. LEXIS 285 (Mont. Mar. 17, 2011) (discussing standard of review to be applied by district courts when reviewing the discovery rulings of a special master).

*Judicial Stds. Comm'n v. Not Afraid*, 245 P.3d 1116 (Mont. 2010) (discussing appointment of masters).

**Nebraska**

*State ex rel. Counsel for Discipline of Neb. Supreme Court v. Ellis*, 808 N.W.2d 634 (Neb. 2012) (upholding the findings of a referee regarding attorney misconduct).

*State ex rel. Counsel for Discipline of the Neb. Supreme Court v. Herzog*, 805 N.W.2d 632 (Neb. 2011) (appealing findings of referee regarding attorney misconduct).

*State ex rel. Counsel for Discipline of the Neb. Supreme Court v. Shirk*, 803 N.W.2d 518 (Neb. 2011) (appealing findings of referee regarding attorney misconduct).

*State ex rel. Counsel for Discipline of the Neb. Supreme Court v. Thew*, 794 N.W.2d 412 (Neb. 2011) (appealing referee's finding of misconduct in attorney disbarment hearing).

*State ex rel. Counsel for Discipline of the Neb. Supreme Court v. Carter*, No. S–10–811, 2011 WL 5008559 (Neb. Oct. 21, 2011) (discussing report of referee favoring disbarment).

*Bd. of Trs. of the Neb. State Colls. v. State Coll. Educ. Ass'n*, 787 N.W.2d 246 (Neb. 2010) (affirming the Commission of Industrial Relations' holding that the Bargaining Act does not permit additional evidence to be submitted to the Commission after an order is issued by the special master, and restating that the Commission should give great deference to the findings of the special master).

*Nebraska v. State Code Agencies Teachers Ass'n*, 788 N.W.2d 238 (Neb. 2010) (holding that the special master had jurisdiction to resolve the dispute under the Bargaining act; the parties in a labor contract dispute cannot present additional evidence to the commission after the special master's hearing; the commission was within its powers when it affirmed the special master's decision to include some school districts for comparable wages; and it was not erroneous for the commission to give deference to the special master's decision concerning the negotiation of a contract despite sufficient salary data being unavailable at the time).

**Nevada**

*In re Endoscopy Ctr. & Associated Buss.*, No. 53676, 2010 WL 5550541 (Nev. Dec. 22, 2010) (challenging district court's order affirming special master's order authorizing discovery as to petitioner).

*S. Nev. Health Dist. v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, No. 57056, 2010 WL 5276811 (Nev. Dec. 14, 2010) (appealing district court's affirmation of special master's order authorizing discovery).

*Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of Nev.*, 41 P.3d 327 (Nev. 2002) (denying petition to the extent that it challenges the district court's decision to refer the lien foreclosure proceedings to special master, but granting petition with respect to the scope of the district court's referral order and its review of the special master's recommendations).

**New Hampshire**

**New Jersey**

*In re Wigenton*, No. D-131 September Term 2010, 2012 N.J. LEXIS 375 (N.J. Apr. 3, 2012) (reviewing special master's finding that special master reasonably, but mistakenly, believed he was entitled to the funds in the misappropriation charges pled).

*Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011) (authorizing special master to entertain any evidence as he sees fit).

*State v. Henderson*, 27 A.3d 872 (N.J. 2011) (holding that courts generally defer to a special master's credibility findings regarding the testimony of expert witnesses).

*Toll Bros. v. Twp. of W. Windsor*, 803 A.2d 53 (N.J. 2002) (appointing special master to determine how many affordable housing units a certain property could yield).

*Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) (stating that the special master's recommendation is consistent with whole-school reform's focus on early childhood education initiatives), *clarified by*, 751 A.2d 1032 (N.J. 2000).

*S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 456 A.2d 390 (N.J. 1983) (determining that trial court may appoint special master to assist municipal officers in developing constitutional zoning and land use regulations).

*N.J. Dep't of Envtl. Prot. v. Occidental Chem. Corp.*, No. A-4620-10T2, 2012 N.J. Super. Unpub. LEXIS 899 (N.J. Ct. App. Apr. 24, 2012) (accepting special master's findings and recommendations).

*In re Integrity Ins. Co./John Crane, Inc.*, 2012 WL 952251 (N.J. Super. Ct. App. Div. Mar. 22, 2012) (special master appointed to resolve disputes arising from the integrity liquidation proceedings and decision of the special master was affirmed).

*Hebern v. Am. Cyanamid Co*., No. L-7530-09, 2011 WL 135779 (N.J. Super. Ct. App. Div. Jan. 13, 2011) (holding that special master's decisions are reviewable by the Federal Claims Court; petitioner may elect to withdraw a petition if special master has not made decision within 240 days; special master erred in his interpreation of the Vaccine Act).

**New Mexico**

*Charter Bank v. Francoeur*, No. 30,551, 2012 N.M. App. LEXIS 47 (N.M. Ct. App. May 15, 2012) (reviewing special master's sale of defendant's property at a public action in default judgment action).

*State ex. re. Office of the State Eng'r v. Elephant Butte*, No. 30,584, 2012 N.M. App. LEXIS 35 (N.M. Ct. App. Apr. 26, 2012) (reviewing special master determination of abandonment and forfeiture of water rights in irrigation rights case).

*Behles Law Firm, P.C. v. Hanlen*, 2012 WL 874747 (N.M. Ct. App. Feb. 23, 2012) (holding that it was improper for the District Court to treat issues relating to the special master's fees as separate from the underlying merits of the claim).

**New York**

*Yatauro v. Mangano*, 927 N.Y.S.2d 868 (N.Y. Sup. Ct. 2011) (appointing a special master to formulate a remedial districting plan after the county commission formulated a plan and presented a final recommendation and report, which the Board of Supervisors failed to adopt).

*Lipco Elec. Corp. v. ASG Consulting Corp.*, 789 N.Y.S.2d 345 (N.Y. Sup. Ct. 2004) (designating a special referee, pursuant to N.Y. C.P.L.R. 3104 (McKinney 2011), to hear and determine all discovery issues raised in the motion and the case generally).

*In re Cox*, 89 A.D.3d 147 (N.Y. App. Div. 2011) (appointing special master to monitor respondent's practice for two years in attorney disciplinary action).

*United Cos. Lending Corp. v. Candela*, 740 N.Y.S.2d 543 (N.Y. App. Div. 2002) (instructing trial court to appoint a referee to determine outstanding mortgage balance in a foreclosure action).

**North Carolina**

*Cleveland Constr. v. Ellis-Don Constr.*, 709 S.E.2d 512 (N.C. Ct. App. 2011) (holding that where exceptions are taken to a referee's findings of fact and law, it is the duty of the trial judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law).

*Dobson v. Substitute Tr. Servs., Inc*., 711 S.E.2d 728 (N.C. Ct. App. 2011) (leaving open plaintiff's motion requesting appointment of a referee).

*Edgecomb Cnty. Dept. of Soc. Servs. v. Hickman*, 712 S.E.2d 209 (N.C. Ct. App. 2011) (holding that plaintiff failed to except to any specific findings of fact as made and adopted by the ESC; therefore, referee's findings are presumed correct).

*Honeycutt Contractors v. Otto*, 703 S.E.2d 857 (N.C. Ct. App. 2011) (determining that trial court acted within its discretion by imposing discovery sanction after the plaintiff failed to "cooperate fully and completely with [two] referees").

*Rushing v. Aldridge*, 713 S.E.2d 566 (N.C. Ct. App. 2011) (reviewing Rule 53(a), which provides that (1) upon consent of the parties, (2) upon application of one of the parties, or (3) upon its own motion, a trial court may order that a referee determine issues of fact raised by the pleadings and evidence; and that the rule does not require that the referee conduct a hearing, examine witnesses, receive evidence, or make findings of fact unless the order of reference so directs).

*Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ.*, 715 S.E.2d 625 (N.C. Ct. App. 2011) (denying defendant's request for an appointment of a referee to provide an accounting of the number of students and applicable revenues involved in the controversy in a case in which both parties sought judgments regarding funding for the school).

*Tri-Arc Food Sys., Inc. v. Towns*, 712 S.E.2d 747 (N.C. Ct. App. 2011) (affirming trial court's decision reversing in part and affirming in part the appeals referee's finding of fact and decision).

**North Dakota**

*Eberhardt v. Eberhardt*, 672 N.W.2d 659 (N.D. 2003) (sending child support question to a judicial referee).*

**Ohio**

*Sate ex rel. Kobly v. Youngstown City Council*, 132 Ohio St.3d 1405, 2012-Ohio-2425, 968 N.E.2d 488 (Ohio 2012) (appointing a new special master for the purpose of receiving and ruling on evidence).

*State ex rel. Bell v. Pfeiffer*, 961 N.W.2d 181 (Ohio 2012) (upholding appellate court's adoption of magistrate's decision denying writ of prohibition).

*Boron v. Boron*, No. 11 CO 25, 2012 WL 4097277 (Ohio Ct. App. Sept. 11, 2012) (dismissing appeal in which defendant claimed the court lacked statutory authority to appoint a special master).

*In re J.N.N.Z.*, No. 12AP–51, 2012 WL 3200827 (Ohio Ct. App. Aug. 7, 2012). (discussing the

appointment of special master to find biological mother and father of infant in adoption proceeding).

*State ex rel. Culbert v. Indus. Comm'n*, No. 11AP-172, 2012 WL 986760 (Ohio Ct. App. Mar. 22, 2012) (upholding magistrate's denial of a writ of mandamus).

*Toliver v. Duwel*, No. 24768, 2012 WL 691730 (Ohio Ct. App. Mar. 2, 2012) (holding that the magistrate was not required to hold an oral hearing on motions for summary judgment, but could issue decision based on written submissions).

*Yoel v. Yoel*, No. 2009-L-063, 2012 WL 553453 (Ohio Ct. App. Feb. 21, 2012) (upholding that the father failed to establish bias on part of two magistrates to whom the child custody matter was referred; any removal of magistrates was left to the discretion of the appointing judge).

*In re E.W.*, No. 14-10-31, 2012 WL 258263 (Ohio Ct. App. Jan. 30, 2012) (upholding magistrate's decision regarding custody and child support).

*Yeckley v. Yeckley*, No. 96873, 2012 WL 112608 (Ohio Ct. App. Jan. 12, 2012) (stating that the court did not have jurisdiction to hear appeal on an interlocutory order issued by a magistrate until there is a final order entered).

*Carpenter v. Johnson*, No. 24128, 2011 WL 4424942 (Ohio Ct. App. Sept. 23, 2011) (holding that magistrates do not constitute a judicial tribunal independent of the court that appoints them, but are instead adjuncts of their appointing courts, which remain responsible to critically review and verify the work of the magistrates they appoint).

*Miller v. Miller*, No. 10 CAF 09 0074, 2011 WL 2175905 (Ohio Ct. App. May 26, 2011) (voiding judgment where Magistrate signed judge's name to judgment entry decree of divorce).

*Fields v. Brackney*, No. 23852, 2011 WL 846700 (Ohio Ct. App. Mar. 11, 2011) (clarifying that Ohio R. Civ. P. 53(E)(4)(b) contemplates a de novo review of any issue of fact or law that a magistrate has determined when an appropriate objection is timely filed; that the trial court may not properly defer to the magistrate in the exercise of the trial court's de novo review; and that the magistrate is a subordinate officer of the trial court, not an independent officer performing a separate function).

*Seminatore v. Climaco, Climaco, Seminatore, Lejkowitz & Garofoli, Gen. P'ship*, 774 N.E.2d 1233 (Ohio Ct. App. 2002) (referring winding-up of a partnership to a special master).

**Oklahoma**

*In re Okla. Code of Judicial Conduct*, No. 5704, 2010 WL 5129087 (Okla. Jan. 11, 2011) (discussing judge's authority under Rule 2.13 to appoint counsel, referees, commissioners, special masters, and receivers; and guardians, clerks, secretaries, and bailiffs).

*In re Okla. Code of Judicial Conduct*, SCBD No. 5704, 2010 WL 5129087 (Okla. Dec. 13, 2010) (discussing Oklahoma Code of Judicial Conduct Rule 2.13 regarding appointees of a judge including special masters, and that consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A)).

*Hough v. Hough*, 92 P.3d 695 (Okla. 2004) (appointing special master to control all matters relating to discovery, valuation, and preservation of the parties' marital estate, and holding that an order requiring husband to pay special master's fees was in nature of support to wife and thus, non-dischargeable in bankruptcy, and that special master was not entitled to appeal-related attorney's fees).

**Pennsylvania**

*Pennsylvania State Ass'n. of Cnty. Comm'rs v. Commonwealth*, No. 112 WM 1992, 2012 WL 4374214 (Pa. Sept. 26, 2012) (denying a motion to enforce special master's recommendations when the legislature essentially "effectuated the first phase of the master's recommendations").

*Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1 (Pa. 2011) (holding that there was no compelling reason to believe that individual damages could not be calculated at further class proceedings or at a proceeding before a special master).

*Commonwealth v. Banks*, 29 A.3d 1129 (Pa. 2011) (holding that where court appoints trial judge to essentially act as master while retaining jurisdiction, the standard of review is de novo).

*Jackson v. Hendrick*, 321 A.2d 603 (Pa. 1974) (affirming appointment of a master to assist parties in formulating plan to eliminate unconstitutional prison conditions).*

*Goodemote v. Goodemote*, 44 A.3d 74 (Pa. Super. Ct. 2012) (discussing special master's valuation of marital property in dissolution proceeding).

*Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012) (discussing special master's recommendation that frozen pre-embryos in a divorce proceeding be awarded to the wife).

*Childress v. Bogosian*, 12 A.3d 448 (Pa. Super. Ct. 2011) (appointing master in a divorce case to determine alimony and division of property).

*Wetzel v. Heiney*, 17 A.3d 405 (Pa. Super. Ct. 2011) (dismissing appeal of trial court's decision to approve and enter master's order dealing with appraisals and discovery, and tentatively scheduling a settlement conference).

*Spigelmyer v. Comm'r Dep't. of Transp*., 41 A.3d 941 (Pa. Commw. Ct. 2012) (discussing fees related to court appointed masters).

*Fisher v. Cranberry Twp. Hearing Bldg.*, 819 A.2d 181 (Pa. Commw. Ct. 2003) (appointing a referee to conduct hearings, review evidence, and make findings of fact regarding property rezoning).

*Warren v. Eckert Seamans Cherin & Mellott*, 45 Pa. D.&C.4th 75, (Allegheny Cnty. Ct. 2000) (appointing an expert with initial duties as a judicial tutor and also, if necessary, as a witness at trial on a patent issue).

**Rhode Island**

*Hazard v. E. Hills, Inc.*, 45 A.3d 1262 (R.I. 2012) (holding that the trial court did not err in confirming the master's report).

*Krivitsky v. Krivitsky*, 43 A.3d 23 (R.I. 2012) (holding that the trial court was entitled to facilitate a sale of property through a commissioner in a divorce proceeding).

*Gordon v. State*, 18 A.3d 467 (R.I. 2011) (briefly mentioning that the special master set the amount of restitution to be paid).

*In re D'Ambrosio*, 29 A.3d 1241 (R.I. 2011) (ordering special master to take possession of all of respondent's client files and accounts, to inventory them, and to take whatever steps are necessary to protect the clients' interests).

*Hazard v. E. Hills, Inc*., No. WC 2007-0533, 2011 R.I. Super. LEXIS 28 (R.I. Super. Ct. Feb. 23, 2011) (upholding special master's determination of chain of title with respect to a property in dispute as not clearly erroneous).

**South Carolina**

*S.C. Dep't of Transp. v. Horry Cnty.*, 705 S.E.2d 21 (S.C. 2011) (affirming special referee's finding that SCDOT did not hold a valid easement with respect to property at issue).

*Skinner v. Westinghouse Elec. Corp.*, 716 S.E.2d 428 (S.C. 2011) (reversing special referee's findings).

*Linda Mc Co., Inc. v. Shore*, 703 S.E.2d 499 (S.C. 2010) (holding that appellate court must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings).

*Allen v. Pinnacle Healthcare Sys., LLC*, 715 S.E.2d 362 (S.C. Ct. App. 2011) (holding that when reviewing an action at law referred to a master or special referee for final judgment with direct appeal to the Supreme Court or the Court of Appeals, the Court of Appeals' jurisdiction is limited to correcting errors of law, and the Court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence).

*Major v. Penn Cmty. Servs., Inc*., 717 S.E.2d 70 (S.C. Ct. App. 2011) (holding that when some or all of the causes of action in a case are referred to a master-in-equity or special referee, the master or referee shall enter final judgment as to those causes of action and an appeal from an order or judgment of the master or referee must be to the supreme court or the court of appeals).

*Neeltec Enters., Inc. v. Long*, 705 S.E.2d 57 (S.C. Ct. App. 2011) (holding that special referee's order granting a substitution was not immediately appealable because the order on appeal is not final, nor does the order fit within a statutory exception permitting an appeal from an interlocutory order).

*Pendarvis v. Cook*, 706 S.E.2d 520 (S.C. Ct. App. 2011) (reversing findings of special referee regarding use of property).

*Scalise Dev., Inc. v. Tidelands Invs., LLC*, 707 S.E.2d 440 (S.C. Ct. App. 2011) (affirming special referee's decision to grant partial motion for summary judgment).

*Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 713 S.E.2d 650 (S.C. Ct. App. 2011) (affirming special referee's denial of motion for sanctions).

**South Dakota**

*In re Discipline of Russell*, 797 N.W.2d 77 (S.D. 2011) (holding that if referee's findings are supported by the evidence, they will not be disturbed by the reviewing court, but that reviewing courts need not give any particular deference to a referee's recommended sanction).

**Tennessee**

*State ex rel. Junghanel v. Hernandez*, No. E2011-02619-COA-R3CV, 2012 WL 4465865 (Tenn. Ct. App. Sept. 26, 2012) (vacating and remanding the trial court's order for a hearing on defendant's objections to the Special Master's report).

*Univ. Corp. v. Wring*, No. W2011-01126-COA-R3CV, 2012 WL 4078517 (Tenn. Ct. App. Sept. 18, 2012) (reversing and remanding trial court's holding which was based on special master's findings).

*Town of Middleton v. City of Bolivar*, No. W2011-01592-COA-R3CV, 2012 WL 2865960 (Tenn. Ct. App. July 13, 2012) (discussing the Chancery court's entry of judgment based on amounts calculated by the special master).

*Nasgovitz v. Nasgovitz*, No. M2010-02606-COA-R3CV, 2012 WL 2445076 (Tenn. Ct. App. June 27, 2012) (discussing the involvement of a special master determining possession of marital residence, parenting plan, and child support).

*Edwards v. Edwards*, No. M2010-02223-COA-R3CV, 2012 WL 2337535 (Tenn. Ct. App. June 19, 2012) (discussing the special master's distribution of monies in a divorce proceeding).

*Delta Dev. Corp. v. F. Fani Gulf Int'l*, No. M2010-02437-COA-R3CV, 2012 WL 1142304 (Tenn. Ct. App. Apr. 3, 2012), appeal denied (Aug. 16, 2012) (affirming special master's and trial court's findings).

*Metro. Gov't of Nashville & Davidson Cnty. v. BFI Waste Servs., LLC*, No. M2011-00586-COA-R3-CV, 2012 WL 1018946 (Tenn. Ct. App. Mar. 22, 2012) (appointing special master to oversee discovery proceedings).

*Neal v. Hayes*, No. E2011-00898-COA-R3-CV, 2012 WL 260005 (Tenn. Ct. App. Jan. 30, 2012) (appointing special master to oversee custody dispute).

*Sanders v. Breath of Life Christian Church, Inc.*, No. W2010-01801-COA-R3-CV, 2012 WL 114279 (Tenn. Ct. App. Jan. 13, 2012) (appointing special master to determine all issues of damages beyond base contract damages).

*FILMtech, Inc. v. McAnally*, No. E2011-00659-COA-R3-CV, 2011 WL 6780176 (Tenn. Ct. App. Dec. 22, 2011) (appointing special master to conduct a hearing to take proof on all issues and to report to the Court on all matters, including findings of fact and conclusions of law).

*Furlong v. Furlong*, No. E2010–02456–COA–R3–CV, 2011 WL 4864344 (Tenn. Ct. App. Oct. 14, 2011) (reviewing special master's finding that husband violated Order of Protection).

*In re Green*, No. M2011-00069-COA-R3-CV, 2011 WL 4582485 (Tenn. Ct. App. Oct. 4, 2011) (affirming trial court's authority to direct special master to screen filings and adoption of special master's recommendations regarding nonpayment of court costs).

*Schroer v. Schroer*, No. M2010–01478–COA–R3–CV, 2011 WL 3793499 (Tenn. Ct. App. Aug. 25, 2011) (discussing trial court's decision to affirm special master's findings and recommendations in divorce action).

*State ex rel. Creighton v. Creighton*, No. M2010–01171–COA–R3–CV, 2011 WL 1344638 (Tenn. Ct. App. Apr. 7, 2011) (clarifying that "Substitute Judge" of record was actually a special master).

*Cooper v. Tabb*, 347 S.W.3d 207 (Tenn. Ct. App. 2010) (appointing special master to hear numerous discovery disputes).

*Davis v. Goodwin*, No. W2010–01340–COA–R3–CV, 2010 WL 5449844 (Tenn. Ct. App. Dec. 23, 2010) (discussing trial court's affirmance of special master's report).

*In re Alexandra J.D.*, No. E2009-00459-COA-R3-JV, 2010 WL 5093862 (Tenn. Ct. App. Dec. 10, 2010) (discussing special master's presiding over a Order of Protection hearing).

*McQuade v. McQuade*, No. M2010-00069-COA-R3-CV, 2010 WL 4940386 (Tenn. Ct. App. Nov. 30, 2010) (discussing trial court's finding that special master's calculation of income was incorrect).

*Hollow v. Ingrim*, No. E2010-00683-COA-R3-CV, 2010 WL 4861430 (Tenn. Ct. App. Nov. 29, 2010) (confirming sale of property by special master).

*Fox v. Fox*, No. M2009-01884-COA-R3-CV, 2010 WL 4244356 (Tenn. Ct. App. Oct. 26, 2010) (discussing trial court's approval of special master's report in an absolute divorce case).

*Nicholson v. Nicholson*, No. M2010-00042-COA-R3-CV, 2010 WL 4065605 (Tenn. Ct. App. Oct. 15, 2010) (affirming in part and vacating in part trial court's decision, which relied in part on special master's report in divorce action).

*Hall v. Hall*, No. E2009-01889-COA-R3-CV, 2010 WL 3893763 (Tenn. Ct. App. Oct. 5, 2010) (reviewing findings of special masters in numerous hearings over the course of several years).

*Simmons v. KC Constr. & Consulting, Inc.*, No. E2009-01005-COA-R3-CV, 2010 WL 1221429 (Tenn. Ct. App. Mar. 30, 2010) (affirming appointment of special master to handle the issues surrounding a potential breach of contract claim and trial court's adoption of special master's report after plaintiff's repeated motions for continuance were denied by the special master).

*Houston v. Mounger*, No. E2002-00779-COA-R3-CV, 2003 WL 22415363 (Tenn. Ct. App. Oct. 23, 2003) (appointing a special master as a surveyor and fact-finder in a property boundary line dispute).

**Texas**

*In re Puig*, 351 S.W.3d 301 (Tex. 2011) (discussing county court's appointment of master to act as attorney-in-fact for purposes of executing a special warranty deed).

*In re Keller*, No. 10-0001, 2010 WL 4840863 (Tex. Oct. 11, 2010) (appointing special master to conduct a hearing on evidence and make a report to the State Commission on Judicial Conduct on appeal of an Order of Public Warning made against a Judge).

*Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347 (Tex. App. 2012) (discussing the appointment of a special master in a court-ordered receivership).

*Lesikar v. Moon*, No. 14-11-01016-CV, 2012 WL 3776365 (Tex. App. Aug. 30, 2012) (concluding that the trial court did not abuse its discretion in admitting the trial master's report for the purposes of determining attorney's fees).

*In re Pierce*, No. 13-12-00125-CV, 2012 WL 3525638 (Tex. App. Aug. 10, 2012) (discussing an order which incorporated recommendations from a court appointed special master).

*In re D & KW Family, L.P.*, No. 01-11-00276-CV, 2012 WL 3252683 (Tex. App. Aug. 9, 2012) (denying the petition for writ of mandamus because petitioner failed to demonstrate that the court clearly abused its discretion in a case in which a special tax master was utilized).

*HSBC Bank USA, N.A. v. Watson*, No. 05-10-00676-CV, 2012 WL 2217037 (Tex. App. June 15, 2012) (discussing the involvement of a court-appointed special master in an unrelated case).

*Smith v. Aldridge*, No. 14-11-00673-CV, 2012 WL 1071246 (Tex. App. Mar. 29, 2012) (affirming trial court's refusal to appoint a special master).

*Khan v. Gbak Props., Inc.*, No. 01-10-00238-CV, 2012 WL 1065879 (Tx. Ct. App. Mar. 29, 2012) **(**finding that court-appointed receiver and special master in a court-ordered receivership of GBAK, conveyed the interest held by GBAK to Parkway Crossing).

*Swallow v. QI, LLC*, No. 14-10-00859-CV, 2012 WL 952246 (Tex. App. Mar. 20, 2012), review denied (July 13, 2012) (mentioning the appointment of a special master "because of the length and volume of discovery").

*Lackey v. State*, No. PD-1621-10, 2012 WL 716023 (Tex. Ct. App. Mar. 7, 2012) **(**appointing special master at trial court level to preside over hearing to demonstrate harm).

*Bailey v. Gallagher*, 348 S.W.3d 322 (Tex. Ct. App. 2011) (discussing settlement awards made by special master, who placed each plaintiff on a grid based upon objective medical criteria).

*Leighton v. Rebeles*, 343 S.W.3d 270 (Tex. Ct. App. 2011) (vacating trial court's temporary injunction order including the appointment of a special master for failure to adhere to statutory requirements unrelated to appointment).

*Cortez v. Mann Bracken, LLP*, No. 03–09–00615–CV, 2011 WL 4424293 (Tex. Ct. App. Sept. 22, 2011). (appointing master in chancery).

*PRSI Trading Co. LP v. Astra Oil Trading NV*, No. 01–10–00517–CV, 2011 WL 3820817 (Tex. Ct. App. Aug. 25, 2011) (discussing appointment of special master to hear discovery disputes).

*In re Holmes*, No. 09–11–00153–CV, 2011 WL 1312317 (Tex. Ct. App. Apr. 5, 2011) (affirming trial court's appointment of special master with authority to make recommendations for docket control, to require production of evidence, and to rule upon admissibility of evidence).

*Bahar v. Lyon Fin. Servs., Inc.*, 330 S.W.3d 379 (Tex. Ct. App. 2010) (holding that court of appeals lacks jurisdiction to review an order appointing a master in chancery).

*In re Harris*, 315 S.W.3d 685 (Tex. Ct. App. 2010) (holding that trial court abused its discretion by appointing forensic examiner as special master).

*In re Stern*, 321 S.W.3d 828 (Tex. Ct. App. 2010) (holding that trial court abused its discretion in appointing special master and forensic examiner with power to search attorney's hard drive).

*Mendoza v. Ramirez*, 336 S.W.3d 321 (Tex. Ct. App. 2010) (addressing question of whether a special master's report is the same as a district court judgment for purposes of res judicata).

*In re Marriage of Robbins*, No. 06-10-00019, 2010 WL 3168402 (Tex. Ct. App. Aug. 12, 2010) (affirming trial court's holding, which used the special master's finding that a bank account was community property, and stating that the court would not review the master's findings. The court also found that the appellant did not meet the burden of showing that the decision was manifestly unfair.).

*City of Garland v. Walnut Villa Apts., LLC*, No. 05-01-00234-CV, 2001 WL 789298 (Tex. Ct. App. July 12, 2001) (appointing a special master to hear evidence regarding temporary injunctive relief in a property dispute).

*Tollett v. Carmona*, 915 S.W.2d 562 (Tex. Ct. App. 1995) (stating that trial courts may appoint discovery masters only in exceptional cases, for good cause, and a mere showing that a case is complicated or time-consuming or that the court is busy does not support exceptional circumstances).*

*Lackey v. State*, 364 S.W.3d 837 (Tex. Crim. App. 2012) (discussing the appointment of a special master in an unrelated criminal case and the impact the special master had on that trial court's holding).

**Utah**

*ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 245 P.3d 184 (Utah 2010) (discussing district court's appointment of a special master to assist with extensive discovery because of ongoing disputes between the parties).

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

*Taylor v. Taylor*, 263 P.3d 1200 (Utah Ct. App. 2011) (appointing special master for determininations on "further proceedings," after trial court entered a bifurcated divorce decree).

*Wright v. Wright*, 268 P.3d 861 (Utah Ct. App. 2011) (holding trial court had authority under Utah R. Civ. P. 53(c) to grant a special master the limited power to resolve disputes between divorcing parties regarding the implementation of parent time orders).

*Failor v. MegaDyne Med. Prods.*, 213 P.3d 899 (Utah Ct. App. 2009) (holding that the trial court did not err in overruling the objections to the special master's procedures because the special master's actions were either harmless error or were not improper; and declining to review objections to the special master's report given that the objections had not yet been ruled on by the trial court).

*Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 928 P.2d 1047 (Utah Ct. App. 1996) (noting that a special master might be helpful in determining the value of improvements to a water system).

**Vermont**

*McNally v. Dep't of Health*, 31 A.3d 333 (Vt. 2011) (holding that the Supreme Court reseves the right in appeals to retain a master to review factual disputes over attorney fees).

*Price v. Bowen*, No. 651-10-00, 2010 Vt. Super. Lexis 96 (Vt. Super. Ct. Nov. 24, 2010) (remanding case to trial court for evidentiary hearing as to defendant's understanding of the role, consequences, and power of a special master).

**Virginia**

*Piney Meeting House Invs., Inc. v. Hart*, 726 S.E.2d 316 (Va. 2012) (holding that sufficient evidence supported the commissioner's finding that a well and propane tank, as modified, would not unreasonably interfere with dominant estate owner's use of easement).

*Carlson v. Wells*, 705 S.E.2d 101 (Va. 2011) (appealing the awarding of the fees for commissioner in chancery).

**Washington**

*McCleary v. State*, 269 P.3d 227 (Wash. 2012) (holding that the court could possibly retain jurisdiction or appoint a special master to monitor implemenation of learning goals in current Washington law).

*Schnall v. AT&T Wireless Servs. Inc.*, 259 P.3d 129 (Wash. 2011) (dissenting, "the trial court abused its discretion by determining that a nationwide class was not feasible without first considering whether state law differences could be managed by subclasses and special masters.").

*In re Marriage of Ganjaie*, No. 65813-1-I, 66410-7-I, 66710-6-I, 2012 Wash. App. LEXIS 1443 (Wash. Ct. App. June 11, 2012) (holding a trial court had the authority to order the sale of a house by special master in a divorce proceeding).

*Johnson v. Chevron U.S.A., Inc.*, 244 P.3d 438 (Wash. Ct. App. 2011) (appointing special master to address pretrial discovery issues).

*Fallahzadeh v. Ghorbanian*, 82 P.3d 684 (Wash. Ct. App. 2004) (reversing trial court decision which included appointment of a special master to determine minimum rent due, and a judgment based on special master's finding).

*Peterson v. Koester*, 92 P.3d 780 (Wash. Ct. App. 2004) (appointing special master to serve as Architectural Control Committee governing a subdivision).

**West Virginia**

*Renner v. Bonner*, 709 S.E.2d 733 (W. Va. 2011) (holding that the commissioners' recommendation failed to make findings of fact necessary to demonstrate why the subject property could not be partitioned in kind, and reversing lower court's decision).

*State ex rel. Justice v. Bd. of Educ.*, 539 S.E.2d 777 (W. Va. 2000) (accepting special master's findings that a county board of education failed to fully comply with its legal duty to provide special educational services to the petitioner's child).

**Wisconsin**

*Ottman v. Town of Primrose*, 796 N.W.2d 411 (Wis. 2011) (noting that statute allowed court to appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute part of the proceedings upon which the court's determination shall be made).

*Lawton & Cates, S.C. v. Alswager*, Appeal No. 2010AP2638, 2012 Wisc. App. LEXIS 50 (Wis. Ct. App. Jan. 19, 2012) (finding that Wisconsin statute allows costs and fees for all the necessary disbursements and fees allowed by law, including the compensation of referees).

*Jahimiak v. Long*, 800 N.W.2d 958 (Wis. Ct. App. 2011) (noting that court may appoint referee when it is unable to find a suitable location for a partition line).

*Acevedo v. City of Kenosha*, 793 N.W.2d 500 (Wis. Ct. App. 2010) (noting that statute allowed court to appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute part of the proceedings upon which the court's determination shall be made).

*Kruse v. Walworth Cnty. Dep't of Land Use & Res. Mgmt*., 794 N.W.2d 928 (Wis. Ct. App. 2010) (noting that statute allowed court to appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute part of the proceedings upon which the court's determination shall be made).

# Academy of Court-Appointed Masters

# Appointing Special Masters and Other Judicial Adjuncts

*A Handbook for Judges and Lawyers*
*January 2013*

## Appendices

## Appendix 1
# Checklist of Items to Include in Appointment Orders

| ✓ | Step | Provision for Appointment Order | Section of Rule 53 | Mandatory to Include in Appointment Order According to Federal Rules? |
|---|---|---|---|---|
| ☐ | 1 | Direct master to "proceed with all reasonable diligence" | Rule 53(b)(2) | Yes |
| ☐ | 2 | Identify the master's duties | Rule 53(b)(2)(A) | Yes |
| ☐ | 3 | Identify when *ex parte* communication may occur | Rule 53(b)(2)(B) | Yes |
| ☐ | 4 | Identify what records the master must maintain | Rule 53(b)(2)(C) | Yes |
| ☐ | 5 | Describe how the master's rulings will be received and reviewed | Rule 53(b)(2)(D) | Yes |
| ☐ | 6 | Describe clearly how the master will be compensated | Rule 53(b)(2)(E) | Yes |
| ☐ | 7 | Statement that appoint-ment of a master is appropriate | Rule 53(a)(l) | No, but good practice |
| ☐ | 8 | Identify source of authority for appointment (Rule 53, or other source) | | No, but good practice |
| ☐ | 9 | Modify master's authority to impose sanctions for failure to cooperate | *See* Rule 53(c) | No, but default standard set out in Rule 53(c) will apply unless modified. |
| ☐ | 10 | List hearing procedures and location | Optional | Optional |
| ☐ | 11 | Describe how documents submitted by parties/ lawyers may be provided to master | Optional | Optional |
| ☐ | 12 | Describe scope of discretion and authority of master not previously covered in Step 2 | Optional | Optional |

| ✓ | Step | Provision for Appointment Order | Section of Rule 53 | Mandatory to Include in Appointment Order According to Federal Rules? |
|---|---|---|---|---|
| ☐ | 13 | Certification, Oath, or Bond may need to be included under state law | Optional | Optional |
| ☐ | 14 | Include any stipulations agreed to by parties and approved by court relating to special master | Optional | May be included in separate Order |
| ☐ | 15 | Include disclosure affidavit | Rule 53(b)(3) | No, but the rule requires that an affidavit be filed. It is good practice to either attach the affidavit to the appointment order or reference its filing in the appointment order. |

## Appendix 2

# Checklist of Ethical Considerations and Practical Concerns

| | Step | Issue | Notes |
|---|---|---|---|
| ☐ | 1 | Conflicts of Interest | |
| ☐ | 2 | Relationship with the Judge | |
| ☐ | 3 | Relationship with the Parties | |
| ☐ | 4 | Relationships among Neutrals | |
| ☐ | 5 | Gifts and Favors | |
| ☐ | 6 | Interactions with Press | |
| ☐ | 7 | Interactions with Legislative and Investigative Bodies | |
| ☐ | 8 | Political Activity | |
| ☐ | 9 | Timekeeping and Compensation | |
| ☐ | 10 | Outside Work | |

## Appendix 3
# Sample Appointment Orders

Sample 1: Where Special Master Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

Sample 2: Where Master Will Supervise Discovery in a Criminal Case

Sample 3: Where Master Will Serve as Monitor in a Class Action

*Pigford v. Glickman,* No. 97-1978 (D.D.C. Jan. 4, 2000) (available at http://www.pigfordmonitor.org/orders/20000104order.pdf)

Sample 4: Where Master Will Serve as a Conference Judge in a Criminal Case

Sample 5: Where Master Will Serve Various Roles in Multi-District Litigation

*In re: Welding Rod Prods. Liab. Litig.,* 2004 WL 3711622 (N.D. Ohio Nov. 10, 2004).

Form Order: Includes language to fit most situations.

## Sample Appointment Order 1:
## Where Special Master Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

After reviewing the progress of mediation in this action before _____, and with the consent of all parties, this Court finds that the appointment of a Special Master for purposes of further mediation and settlement is justified and necessary.

Pursuant to Federal Rule of Civil Procedure 53 it is **ORDERED** that the current mediator, _____, is appointed as Special Master for purposes of mediation and settlement.

The Special Master shall have the following authority, which he shall exercise with all reasonable diligence in accordance with Rule 53:

1. To direct and facilitate the settlement negotiations among the parties and their insurers.
2. To schedule mediation sessions, telephone conference calls, and other forms of communication among the parties, and to require the parties, counsel, expert consultants, and insurers to attend and participate in mediation sessions and/or other communications. The Special Master will make reasonable efforts to take into consideration the convenience of attendees when selecting locations for mediation sessions.
3. To require that parties and their insurers appear at and participate in mediation sessions with full authority to negotiate in a good faith effort to reach a settlement.
4. To take all appropriate measures to perform fairly and efficiently the responsibilities of a mediator in an effort to effectuate a complete settlement of this action.
5. To report to the Court at regularly scheduled status conferences the progress and status of the settlement negotiations.

[ADR administrator] shall charge $__/hour for _____'s services as Special Master, plus the normal [ADR administrator] administrative fee of 10% of the professional charges. [Add details about what the master will/will not charge for.]

Pursuant to the parties' agreement, the parties shall pay the charge for the Special Master's service [add details about how the parties will share responsibility for paying these charges.] If any party is added to or removed from the case, the pro rata shares shall be reallocated as the parties agree or by order of the Court. At the request of any party, the Court shall review and approve the charges for the Special Master's services.

The parties may have *ex parte* communications with the Special Master as to all matters related in any way to the mediation process. The Special Master may communicate *ex parte* with the Court as he and the Court deem necessary concerning the status of the mediation process, but shall not disclose to the Court the specifics of any party's settlement position without the consent of that party.

The Special Master need not preserve any record of his activities.

The clerk is directed to add Special Master _____to the court's electronic service list at _____.

IT IS SO ORDERED.

## Sample Appointment Order 2:
## Where Master Will Supervise Discovery in a Criminal Case

Upon consideration of [motions, objections, etc.], it is hereby:

1. ORDERED, that _____, a member of the bar of _____, is hereby appointed a Special Master; and it is

2. FURTHER ORDERED, that, in the execution of this reference the Special Master shall possess and may exercise all powers conferred upon Special Masters in like cases; shall likewise possess and may exercise, to the extent permitted by law and the Constitution, all powers conferred upon U.S. Magistrate Judges by 28 U.S.C. § 636; including all powers to make such orders as may be necessary and appropriate to fulfill the duties assigned to the Special Master under this Order, subject to review by the Court; and it is

3. FURTHER ORDERED, that the Special Master shall supervise and issue orders and reports appropriate and necessary to resolve all discovery disputes in this case, including but not limited to: _____ [include itemized list, where appropriate] (all referred to as "discovery"); and it is

4. FURTHER ORDERED, that the Special Master shall take all steps necessary, including issuing scheduling orders, issuing orders to compel, holding periodic hearings, and recommending sanctions as may be appropriate, to ensure that discovery in this case is thorough and complete in accordance with all the requirements of the Rules of Criminal Procedure, the Orders of this Court, and the law; and it is

5. FURTHER ORDERED, that the Special Master shall report to the Court on all matters within his or her jurisdiction within 60 days of the date of this Order, and shall periodically report to the Court on the progress of discovery in this case; and it is

6. [For cases involving a Protective Order:] FURTHER ORDERED, that the Special Master shall apply to and be processed by the Court Security Officer for the necessary security clearance, shall sign the Memorandum of Understanding and be bound by the Court's Protective Order. Upon fulfilling these requirements, the Special Master shall be provided with and shall review any classified portions of the pleadings of each party filed with the Court and shall review the underlying documents submitted therewith to determine whether those documents or any portion thereof are properly discoverable under either Federal Rule of Criminal Procedure 16 or *Brady;* and it is

7. FURTHER ORDERED, that the Government shall submit to the Special Master any other relevant classified documents, to the extent they are not submitted directly to the defendants. The Special Master shall review those classified documents and determine the extent to which those classified documents are to be provided to the defendants, including the appropriateness and adequacy of any substitutions or redactions proposed by the Government; and it is

8. FURTHER ORDERED, that within 30 days of the date of this Order, the Government shall provide to the defendants all materials that the defendants have requested under *Brady* as well as any other materials that fall within the ambit of *Brady.* If there is any question as to whether particular materials fall within the ambit of *Brady,* those materials are to be submitted to the Special Master within 30 days of this Order for the Special Master's review and recommendation as to whether those documents are to be produced to the defendants. In

addition, if the Government, after the initial production of materials to the defendants or the Special Master under this section of this Order, comes into possession of materials or determines that any materials that have not been previously produced may fall within the ambit *of Brady,* it shall provide those materials to the defendants or the Special Master, as is appropriate, immediately after such acquisition or determination is made. The Special Master shall review any documents so provided and determine, within 30 days of the submission, whether they contain material properly discoverable by the defendants under *Brady;* and it is

9. FURTHER ORDERED, that any party may object to any order or report issued by the Special Master by filing such objection with the Court within 7 days of the issuance of such order or report. Any response to such objection must be filed within 7 days of the filing of the objection. The Court will determine whether, based on the reasons provided in the party's objection, it is appropriate to review the Special Master's orders or report under a *de novo* or other appropriate standard, and whether the objection is well founded; and it is

10. FURTHER ORDERED, that this referral is limited to the duties specified herein unless the Court shall expand the Special Master's duties. This reference shall terminate upon submission by the Special Master of his Final Report, unless extended by further order of the Court; and it is

11. FURTHER ORDERED, that the Special Master shall receive compensation for his services herein at the hourly rate of $ _____. The Special Master's fee and other costs incurred by the Special Master in connection with this reference shall be borne by the Government pursuant to United States Attorneys Manual § 3-8.400; and it is

FURTHER ORDERED, that this Order is subject to amendment by the Court *sua sponte,* or upon application of the parties or the Special Master. Jurisdiction of this action is retained by the Court.

IT IS SO ORDERED.

**Sample Appointment Order 3:**
**Where Master Will Serve as Monitor in a Class Action**

The Consent Decree entered in this case on [date], provided for the appointment of an Independent Monitor to carry out certain enumerated duties. Those duties are listed in paragraph ___ of the Consent Decree. The Consent Decree, negotiated by the parties, provides a limited, clearly defined role for the Monitor. On [date], this Court issued an Order appointing [name] as the Independent Monitor in this case.

In accordance with the terms of the Consent Decree and its remedial purposes, [and any other grounds], and pursuant to the Court's inherent power, it is hereby

ORDERED that the Monitor, as an agent and officer of the Court, shall have the responsibilities, powers, and protections as set forth in the Consent Decree and in this Order of Reference; it is

FURTHER ORDERED that the Monitor shall have the full cooperation of the parties, their counsel, and the Facilitator, Adjudicator and Arbitrator, who shall promptly provide any and all documentation and information requested by the Monitor, whether requested orally or in writing, and in whatever form requested, provided that the Monitor is authorized to request only non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable her to perform her duties; and it is

FURTHER ORDERED that:

1. The Monitor shall have *ex parte* access to this Court without prior notice to or consultation with the parties.

2. The Monitor shall have the right to confer and conduct confidential working sessions informally and on an *ex parte* basis with the parties and with the Facilitator, Adjudicator and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree.

3. The Monitor shall have authority to make informal suggestions to the parties in whatever form the Monitor deems appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court and shall have the authority to make recommendations to the Court.

4. As an agent and officer of the Court, the Monitor shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.

5. In addition to the power and authority granted elsewhere in this Order, the Monitor shall have all the responsibilities and powers enumerated in the Consent Decree. Specifically, as set forth in paragraph 12 of the Consent Decree, the Monitor shall:

   a. Make periodic written reports (not less than every six months) to the Court, the Secretary of Agriculture, Class Counsel, and Government Counsel on the good faith implementation of the Consent Decree;

   b. Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;

   c. Direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

d. Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

If the Monitor is unable within thirty (30) days to resolve a problem brought to her attention pursuant to subparagraph (b), above, she may file a report with the parties' counsel, any of whom may, in turn, seek enforcement of the Consent Decree pursuant to paragraph 13 of the Decree.

6. In carrying out her duties under paragraph l2(b)(i) of the Consent Decree (issuance of written reports), the Monitor shall make such reports available to the public upon request. The Monitor shall not include in her reports any information that is prohibited from disclosure by the Privacy Act.

7. In carrying out her duties under paragraph 12(b)(ii) of the Consent Decree (resolving class members' problems), the Monitor has broad authority to work with claimants [and any others] through correspondence, by telephone, and, if necessary, in person to attempt to resolve class members' problems, including problems involving injunctive relief (defined in paragraph ____ of the Consent Decree) [and any other specifically enumerated problems]. To fully carry out her duties, the Monitor is encouraged to establish a mechanism through which her office can meet with claimants personally when necessary.

In carrying out her duties under paragraph ____ of the Consent Decree (directing reexamination of claims), upon the filing of a Petition for Monitor Review, the Monitor shall review relevant materials and decide whether to order reexamination in accordance with the following procedures:

a. Standard of Review. Pursuant to paragraph 12(b)(iii) of the Consent Decree, the Monitor may direct reexamination only when the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.

b. Reexamination Only. When the Monitor finds that the standard noted above has been met, the Monitor may direct the Facilitator, Adjudicator, or Arbitrator to reexamine the claim. The Monitor does not have the power to reverse any decision.

c. Filing of Petitions. Claimants or the government may file Petitions for Monitor Review by sending the Monitor a letter that explains why the Petitioner believes that the decision of the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims only, claimants or the government may include with the Petition for Monitor Review any documents that help the Petitioner to explain or establish that an error occurred. Petitions for Monitor Review should be sent to the following address:

[address]

Claimants are encouraged to seek the assistance of counsel in preparing their Petitions for Monitor Review, but they are not required to have the assistance of counsel. Claimants may obtain such assistance at no charge from Class Counsel. Claimants may contact Class Counsel by writing or telephoning:

[name & address]

Petitions must be filed in writing, and the Monitor's review of the Petition will be a paper-only review, that is, it will not be supplemented by a personal or telephone interview.

d. Filing of Responses to Petitions. The non-petitioning party may file a response to any Petition for Monitor Review and, with respect to petitions regarding Track A

claims, the non-petitioning party may include documents as described in paragraph 8(e)(i), below. The Monitor shall establish a system for notifying the non-petitioning party of the pendency of the Petition and for forwarding to the non-petitioning party copies of the Petition and any additional materials submitted by the Petitioner. The non-petitioning party shall have thirty (30) days to file a response, after which the right to file a response shall be waived.

e. Materials Constituting Basis of Monitor Review. Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review.

(i) Review of Track A Claims. The Monitor may consider additional materials submitted by the claimant or by the government with a Petition for Monitor Review of a Track A claim or with a response to such a Petition only when such materials address a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed. The decision to consider additional materials regarding this flaw or mistake and to permit those materials to be made part of the record for review upon reexamination by the Facilitator or Adjudicator is within the discretion of the Monitor.

(ii) Review of Track B Claims. The Consent Decree provides for the development of a more comprehensive record in Track B than is possible Track A. Therefore, in Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination.

(f) Communication Regarding Reexamination. When the Monitor directs the Facilitator, Adjudicator, or Arbitrator to reexamine a claim, the Monitor shall send to the Facilitator, Adjudicator or Arbitrator a brief written explanation of the basis of her decision to direct reexamination (reexamination letters), which shall be attached to the Petition for Monitor Review. The explanation will clearly specify the error(s) identified by the Monitor. The Monitor will promptly forward to the claimant (and his or her counsel, if any) and to USDA copies of all reexamination letters with the attached Petitions for Monitor Review and any additional materials admitted into the record by the Monitor pursuant to paragraph 8(e)(i). These materials will become part of the record for purposes of the Facilitator's, Adjudicator's or Arbitrator's reexamination.

9. Contacting the Monitor. In carrying out her duties under paragraph ____ of the Consent Decree, the Monitor will be available to class members and to the public through the following toll-free telephone number: _____.

10. Where to Direct Communications. Inquiries, petitions and pleadings in this case should be directed as follows:

a. Inquiries regarding the status of Track A adjudication claims and regarding the timing of payments of approved claims should be directed to the Claims Facilitator at _____.

b. Motions seeking review of non-final rulings by an arbitration panelist, including issues relating to discovery and scheduling, should be directed to _____.

c. Petitions for Monitor Review of final decisions in both Track A and Track B claims should be directed to the Monitor's office as explained in paragraph 8(c) above.

d. Inquiries regarding problems with injunctive relief or with other aspects of the Consent Decree should be directed to the Monitor's office as explained in paragraph 9 above.

e. Pleadings regarding attorneys' fees should be directed to the Court. None of the matters described in subparagraphs (a) - (d), above, shall be filed with, or otherwise presented to, the Court.

11. Monitor Staff. The Monitor shall have the authority to employ and/or contract with all necessary attorney, paralegal, administrative, and clerical staff within a budget cap approved by the Court. The staff and contractors of the Office of the Monitor shall have whatever access to records and documents the Monitor believes is necessary to fulfill the staff or contracting role; however, the staff and contractors shall be given access only to non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable the Monitor to perform her duties under the Consent Decree.

12. Fees and Expenses. Pursuant to paragraph 12(a) of the Consent Decree, the United States Department of Agriculture ("USDA") shall pay the fees and expenses of the Monitor and the salaries of her staff.

13. Approval of Budgets. The Monitor shall submit budgets to the Court for approval. Each budget shall cover a period of at least three (3) months but not more than twelve (12) months. Copies of each budget shall be made available to USDA and class counsel, who will have a period of ten (10) working days from their receipt of the budget within which they may file with the Court, with copies to the Monitor and the opposing party, written objections to the budget. Any party that does not object to a budget within these ten (10) days shall be deemed to have waived any objection permanently. At the end of the ten (10) days, the Court will enter an order approving a total budget amount for the relevant time period.

14. Timing of Budget Submissions. The Monitor generally will submit proposed budgets to the Court one (1) month in advance of the beginning of the budget period.

15. Invoicing. The Monitor shall submit a statement to the Court approximately monthly for approval of her fees and expenses with copies to counsel for both parties. Objections to the statement shall be filed with the Court, with copies to the Monitor and to the opposing party, within ten (10) days of the submission of the statement. Any party that does not object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently. At the conclusion of the 10-day period, the Court will enter an order directing payment of any sums approved. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

16. Records. The Monitor shall keep a complete record of all of her fees and expenses, which shall be made available at the Court's or the parties' request for their inspection.

17. Payment into Court Registry. Within fifteen (15) days after the Court's approval of the first budget, USDA shall deposit with the Clerk of Court, United States District Court for the District of Columbia, the pro-rata portion of the approved budget for the month of April, 2000. Within the first fifteen (15) days of May, 2000, and within the first fifteen (15) days of each month thereafter during the Monitor's tenure, USDA shall deposit with the Clerk of Court a sum equal to a pro-rata month's portion of the approved budget. All deposits made by USDA shall be placed by the Clerk of Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to payment of future fees and expenses of the Monitor.

18. Refund of Surplus. At such point as the Monitor's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded to USDA. If the Court determines at any time that the Monitor will require supplemental funds, the Court may so order USDA to make additional deposits.

## Sample Appointment Order 4:
## Where Master Will Serve as a Conference Judge in a Criminal Case

The Court, having considered this cause appropriate for referral to an Alternative Dispute Resolution (ADR) process pursuant to [relevant Rules or Code, if any], ORDERS that the case be so referred for an ADR process to be conducted with [name of adjunct], a dispute resolution organization as defined in [relevant rules] (if necessary), and that [name of adjunct] is appointed as an impartial third party to conduct the ADR process and to facilitate settlement negotiations among the parties.

Unless written objections to this order are filed in accordance with [relevant rules], the parties are directed to communicate with [name of adjunct], located at [address] within ten (10) days from the date of this order to make arrangements regarding: (1) the payment of the expenses of the proceeding; and (2) the date, time, and place the proceeding will be conducted. Unless the parties otherwise agree, all fees and expenses shall be borne equally by the parties. [Or: The fees of [name of adjunct] shall be paid by the Court as Court Costs subject to reimbursement by the defendant.]

All counsel and all parties (or their duly authorized representatives with settlement authority) are directed to attend and participate in the proceeding.

The Court recognizes that Defendant has the right to remain silent and relies on his 5th Amendment Rights under the United States Constitution against self-incrimination even though he will participate in this process. It is therefore ORDERED, ADJUDGED, AND DECREED that no statement, utterance, or conduct of Defendant during the proceeding will be used at any subsequent trial against him.

Unless the parties agree in writing to waive their right of confidentiality, all matters, including the conduct and the demeanor of the parties and their counsel during the settlement process, will remain confidential and will not be disclosed to anyone, including this Court. Upon completion of this proceeding, the conference judge is directed to advise the Court when the process was conducted, whether the parties and their counsel appeared as ordered, and whether a settlement resulted.

## Sample Appointment Order 5:
## Where Special Master Will Serve Various Roles in Multi-District Litigation

On [date], [parties] in this matter filed a motion for appointment of a Special Master. The parties having had notice and an opportunity to be heard, that motion is GRANTED and, with the advice and consent of the parties, the Court now APPOINTS as Special Master [name and address].

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court.[1] As Rule 53 requires, the Court sets out below the duties and terms of the Special Master and reasons for appointment, and ORDERS the Special Master to "proceed with all reasonable diligence," Rule 53(b)(2).

I. BACKGROUND.

[Description of how Multi-District Litigation came into being and the specific reasons that appointment of a Special Master is appropriate].

It is clear that this MDL presents many difficult issues and will require an inordinate amount of attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Special Master was appropriate to help the Court with various pretrial, trial, and post-trial tasks.[2] Indeed, the appointment of a Special Master in

---

[1] "Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making references to Masters, a Federal District Court has `the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States,* 232 F.2d 855, 865 (8th Cit. 1956) *(quoting In re: Peterson,* 253 U.S. 300, 311 (1920)); *see Ruiz v. Estelle,* 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd of Edu.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power). The Court's inherent power to appoint a Special Master, however, is not without limits. *See Cobell v. Norton,* 334 F.3d 1128, 1 142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does extend to allow appointment of Special Master to exercise "wide-ranging extrajudicial duties" such as "investigative, quasi-inquisitorial, quasi-prosecutorial role[s]").

This Court first discussed with the parties the advisability of appointing a Special Master during a case management conference on [date]. *See* Fed. R. Civ. P. 16(c)(8, 12) ("At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (8) the advisability of referring matters to a magistrate judge or master; [or] . . . (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems").

[2] *See, e.g., In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.,* 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and "facilitate the timely remand of individual civil actions to their respective transferor courts;" the court later broadened the Special Master's duties to include oversight and administration of the settlement trust funds); *In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig.,* Order at 3-5, docket no. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (available at www.insd.uscourts.gov/Firestone) (appointing a Special Master to assist the court with all phases of the litigation, from "formulating a governance structure of [the] MDL" in its earliest stage to assisting with "attorneys fees" issues and "settlement negotiations" during the latter stages of the litigation); *In re: Baycol Products Liab. Litig.,* 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Special Master early in the case and assigning him all available "rights, powers, and duties provided in Rule 53;" the court has since appointed two additional masters to assist the first Special Master); *In re: Propulsid Products Liab. Litig_,* 2004 WL 1541922 (E.D. La. June

cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Special Master to assist the Court in both effectively and expeditiously resolving their disputes.

II. RULE 53(B)(2).

Rule 53 was amended on December 1, 2003, and now requires an order of appointment to include certain contents. *See* Fed. R. Civ. P. 53(b)(2). The following discussion sets forth the matters required.

A. Master's Duties.

Rule 53(a)(1)(A) states that the Court may appoint a master to "perform duties consented to by the parties." [If applicable: The parties in this case consented to having a Special Master: 1) assist the Court with legal analysis of the parties' submissions; and 2) perform any and all other duties assigned to him by the Court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution. The parties [further] request, however, that the Court retain sole authority to issue final rulings on matters formally submitted for adjudication. Motion for appointment at 2.][3] The Court has reviewed recent legal authority addressing the duties of a Special Master that are permitted under the "Federal Rules of Civil Procedure and Article III of the Constitution."[4] Consonant with this legal authority, the currently-anticipated needs of the court, and the parties' broad consent, the Court states that the Special Master in these proceedings shall have the authority to:[5]

1. assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;
2. establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;
3. oversee management of docketing, including the identification and processing of matters requiring court rulings;

---

25, 2004) (MDL No. 1355) (appointing a Special Master and setting out a variety of duties).

[3] In addition, the Court may appoint a master to: (1) "address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district;" and (2) "hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury," if warranted by certain conditions. Rule 53(a)(1)(B, C).

[4] *See, e.g.,* Fed. R. Civ. P. 53, advisory committee's notes (discussing the range of duties and authority of the Special Master). *See also* Mark Fellows & Roger Haydock, *Federal Courts Special Masters: A Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev.1269 (2005); David Ferleger, *Masters in Complex Litigation and Amended Rule 53,* Special Masters Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished); Margaret Farrell, *Special Masters in the Federal Courts Under Revised Rule 53: Designer Roles,* Special Masters Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished). These three articles, written by federal-court-appointed Special Masters, note the increasing use and need for such appointments, and discuss the range of duties and limits of appointment. The articles are on file with the Advanced Dispute Resolution Institute at the William Mitchell College of Law, and are contained in reference materials distributed at the October, 2004 National Special Masters Conference.

[5] This list is meant to be illustrative, not comprehensive.

4. compile data and assist with, or make findings and recommendations with regard to, interpretation of scientific and technical evidence;

5. assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and make recommended findings of fact and conclusions of law;

6. assist with responses to media inquiries;

7. help to coordinate federal, state and international litigation;

8. direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make findings and recommendations on remedial action if required;

9. interpret any agreements reached by the parties;

10. propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary;

11. propose structures and strategies for attorneys fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as may become necessary;

12. administer, allocate, and distribute funds and other relief, as may become necessary;

13. adjudicate eligibility and entitlement to funds and other relief, as may become necessary;

14. monitor compliance with structural injunctions, as may become necessary;

15. make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and

16. communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties. *See* discussion below.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth "the circumstances—if any—in which the master may communicate ex parte with the court or a party." The Special Master may communicate ex parte with the Court at the Special Master's discretion, without providing notice to the parties, in order to "assist the Court with legal analysis of the parties' admissions" (e.g., the parties' motions). Motion for appointment at 2. The Special Master may also communicate ex parte with the Court, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. The Court may later limit the Special Master's ex parte communications with the Court with respect to certain functions, if the role of the Special Master changes.[6]

[6] If, for example, the Court later finds it desirable to use the Special Master as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Special Master that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. *See, e.g., In re: Propulsid Products Liab. Litig.,* 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Special Master was given additional mediation duties, the scope of his ex parte communications with the parties and the Court, as well as his record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits on ex parte communications does not necessarily require amendment of this Order.

The Special Master may communicate ex parte with any party or his attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Special Master may engage in ex parte communications with a party or his attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.[7]

C. Master's Record.

Rule 53(b)(2)(c) states that the Court must define "the nature of the materials to be preserved and filed as a record of the master's activities." The Special Master shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. See also section II.E of this Order, below. If the Court asks the Special Master to submit a formal report or recommendation regarding any matter, the Special Master shall either submit such report or recommendation in writing, for electronic filing on the case docket. The Special Master need not preserve for the record any documents created by the Special Master that are docketed in this or any other court, nor any documents received by the Special Master from counsel or parties in this case. The Court may later amend the requirements for the Special Master's record if the role of the Special Master changes.[8]

D. Review of the Special Master's Orders.

Rule 53(b)(2)(D) directs the Court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." The Special Master shall either: (1) reduce any formal order, finding, report, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing ("ECF"); or (2) issue any formal order, finding, report, or recommendation on the record, before a court reporter. Pursuant to Rule 53(g)(2), any party may file an objection to an order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master's orders, findings, reports, or recommendations.[9] Absent timely objection, the orders, findings, reports, and recommendations of the Special Master shall be

---

[7] To the extent it may be considered a "substantive issue," the Special Master may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections.

[8] *See, e.g., In re: Propulsid Products Liab. Litig.,* 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

[9] Rule 53(g)(2) provides that parties may file objections "no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time." The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in his order, finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears warranted.

deemed approved, accepted, and ordered by the Court, unless the Court explicitly provides otherwise.

As provided in Rule 53(g)(4, 5), the Court shall decide de novo all objections to conclusions of law made or recommended by the Special Master; and the Court shall set aside a ruling by the Special Master on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Special Master enters an order, finding, report, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; see Rule 53(g)(3). Failure to meet this deadline results in permanent waiver of any objection to the Special Master's findings of fact.

E. Compensation.

Rule 53(b)(2)(E) states that the Court must set forth "the basis, terms, and procedure for fixing the master's compensation;" see also Rule 53(h) (addressing compensation). The Special Master shall be compensated at the rate of [$ per hour], with the parties bearing this cost equally (50% by the plaintiffs and 50% by the defendants). The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order, or such other Orders as the Court may issue. Within 14 days of the date of this Order, the parties shall **REMIT** to the Special Master an initial, one-time retainer of [$____] (50% by the plaintiffs and 50% by the defendants); the Court will not order additional payments by the parties to the Special Master until the retainer is fully earned. The Court has "consider[ed] the fairness of imposing the likely expenses on the parties and [has taken steps to] protect against unreasonable expense or delay." Rule 53(a)(3).

From time to time, on approximately a monthly basis, the Special Master shall submit to the Court an Itemized Statement of fees and expenses, which the Court will inspect carefully for regularity and reasonableness. Given that, at this juncture in the litigation, one of the duties of the Special Master is to assist the Court with legal analysis of the parties' submissions, the Court expects these Itemized Statements will reveal confidential communications between the Special Master and the Court. Accordingly, the Court shall maintain these Itemized Statements under seal, and they shall not be made available to the public or counsel. The Special Master shall attach to each Itemized Statement a Summary Statement, which shall not reflect any confidential information and shall contain a signature line for the Court, accompanied by the statement "approved for disbursement." If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Special Master their half-share of any Court-approved amount, within 20 calendar days of Court approval.[10]

Finally, the Special Master shall not seek or obtain reimbursement or compensation for support personnel, absent approval by the Court.[11]

---

[10] The Court adopts this procedure from Judge Sarah Evans Barker, who used it in *In re: Bridgestone/Firestone. See* www.insd.uscourts.gov/Firestone/, docket no. 593 ("Entry concerning fees of Special Master").

[11] *Cf. Triple Five of Minnesota, Inc. v. Simon,* 2003 WL 22859834 at *2 (D. Minn. Dec. 1, 2003) (authorizing the Special Master to "hire accountants, real estate consultants, attorneys, or others as necessary to assist him in carrying out his duties under this Order" and further stating: "The special master shall be compensated at the rate of $400.00 per hour. Additionally, the parties shall pay the usual and customary rates for work which the special master

F. Other Matters.

1. Affidavit.

Rule 53(b)(3) notes that 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." See also Rule 53(a)(2) (discussing grounds for disqualification). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Special Master may, if appropriate, "impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." As an agent and officer of the Court, the Special Master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions.[12] The parties will make readily available to the Special Master any and all facilities, files, databases, and documents which are necessary to fulfill the Special Master's functions under this Order.

IT IS SO ORDERED.

---

delegates to others.."). In light of the complexity of this litigation, and depending on how it proceeds, it may become appropriate for the Special Master to retain consultants or otherwise obtain assistance.

[12] *See Atkinson-Baker & Associates, Inc. v. Kolts,* 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Master).

AFFIDAVIT OF [NAME]
TENDERED PURSUANT TO FED. R. CIV. P. 53

STATE OF _____ )
) ss. AFFIDAVIT
COUNTY OF _____ )

[name], being first duly sworn according to law, states the following:

I am an attorney at law, duly licensed to practice law in the States of [____]. My bar admissions are as follows:

[list]

1. I have thoroughly familiarized myself with the issues involved in the Multi-District Litigation captioned [__]. As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Special Master in the captioned matter.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Sworn to before me and subscribed in my presence this day of _____, 20__.

_____
Notary Public

**Sample Form Order:**
**(includes language to fit most situations)**

This matter was submitted to the undersigned upon *[choose one:* the joint request of the parties / the consent of the parties / the motion of _____ / the Court's own initiative].

Counsel appearances were:

Based upon the *[recite in some detail the basis of the Court's authority for appointment, such as the consent of the parties, the press of business, the unusual needs of the case, or other unusual circumstances]:*

IT IS HEREBY ORDERED:

1. [Name of Special Master] of [Address] is appointed Special Master for the purpose of *[specify scope of Special Master's role in detail; options include the following:*

a. Directing, managing, and facilitating settlement negotiations among the parties. *[Settlement Master]*

b. Managing and supervising discovery and resolving discovery disputes. *[Discovery Master]*

c. Coordinating activity on the case as follows _____ *[Coordinating Master]*

d. Hearing evidence on [specify issue(s)] and issuing [choose one: findings and recommendations / a final decision *NOTE: The second option is available only with the parties' consent]*. *[Trial Master]*

e. Compiling and interpreting *[specify the technical, voluminous, or complex evidence that is in need of review]* and issuing findings and recommendations for the Court regarding _____. *[Trial Master*

f. Advising the Court on the subject of . *[Expert Master]*

g. Managing and supervising discovery involving electronic information or data. *[Technology Master]*

h. Serving as Monitor as described in paragraph _ *of [choose one:* the Consent Decree / this Court's Order dated _____]. *[Monitor]*

i. [Drafting / implementing] a notice to the class. *[Class Action Master]*

j. Supervising a hearing regarding the fairness of the Settlement Agreement to the class and issuing findings and recommendations for the Court. *[Class Action Master]*

k. Administering the distribution of [settlement / damage] payments to Plaintiffs. *[Claims Administrator]*

l. Providing an accounting of *[sped evidence]*. *[Auditor]*

m. Acting as a receiver for *[identify the subject of the receivership]* pending the resolution of this dispute. *[Receiver]*

*[The following provision is required in federal court:]* The Special Master is directed to proceed with all reasonable diligence to complete the tasks assigned by this order.

2. [Special Master's Name] shall have the sole discretion to determine the appropriate procedures for resolution of all assigned matters and shall have the authority to take all appropriate measures to perform the assigned duties. The Special Master may by order impose

upon a party any sanction other than contempt and may recommend a contempt sanction against a party and contempt or any other sanction against a non-party.

3a. Alternative 1: No ex parte contact. The parties shall not engage in any ex parte discussions with the Special Master and the Special Master shall not engage in any ex parte discussions with any of the parties. [Fed. R. Civ. P. 53(b)(2)(B)]

3b. Alternative 2: Limited ex parte contact permitted. Because *[specify reasons],* the Special Master shall be allowed to engage in ex parte conversations with counsel for the parties only in conjunction with duly convened settlement conferences.

3c. Alternative 3: Ex parte contact on the record. Because *[specify reasons],* the Special Master shall be allowed to engage in ex parte conversations with counsel for the parties in order to permit full consideration of the issues. Any ex parte conversation will be conducted on the record in order to permit appropriate review by the undersigned or the appellate courts.

4. The parties shall file with the Clerk all papers filed for consideration by the Master. The Special Master shall also file with the Clerk all reports or other communications with the undersigned. [Fed. R. Civ. P. 53(b)(2)(C)].

5. Any party seeking review of any ruling of the Special Master shall [specify appeal procedure and timing; in the absence of special considerations, the default procedures of Rule 53(g) may be implemented, either by reference to the rule or incorporation of them].

5a. Alternative 1: comply with the procedures and within the time limits specified in Fed. R. Civ. P. 53(g).

5b. Alternative 2: object to any provision of such a ruling or may move the court to adopt or modify the Special Master's order, report or recommendations within 20 days from the date of such ruling is served on the parties. Fact findings of the Special Master *[Choose one:* will be reviewed for clear error / will be final *NOTE: The second option is available only with the parties' consent.]*. All legal conclusions of the Special Master will be reviewed de novo and all procedural rulings of the Special Master will be reviewed only for an abuse of discretion.

6. The Special Master shall be paid $ ____ per hour for work done pursuant to this Order, and shall be reimbursed for all reasonable expenses incurred. The Special Master shall bill the parties on a monthly basis for fees and disbursements, and those bills shall be promptly paid [50% by the plaintiffs and 50% by the defendants / *or identify an alternative arrangement]*. As to any particular portion of the proceedings necessitated by the conduct of one party or group of parties, the Special Master can assess the costs of that portion of the proceedings to the responsible party or parties. The Court will determine at the conclusion of this litigation whether the amounts paid to the Special Master will be borne on the 50/50 basis or will be reallocated.

7. The Special Master is authorized to hire _____ to assist in completion of the matters referred to the Special Master by this Order. The reasonable fees of _____ shall be paid by the parties in accordance with the procedure set forth in Paragraph 6, above.

Dated this ____day of _____, 20___.

_____

Judge

## Appendix 4
# Fed. R. Civ. P. 53

**FEDERAL RULES OF CIVIL PROCEDURE**
**VI. TRIALS**

## Rule 53. Masters

(a) APPOINTMENT.

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) *Disqualification.* A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING MASTER.

(1) *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) *Contents.* The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) The master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) *Issuing.* The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) *Amending.* The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) MASTER'S AUTHORITY.

(1) *In General.* Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) *Sanctions.* The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) MASTER'S ORDERS. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) MASTER'S REPORTS. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) ACTION ON THE MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.

(1) *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 with instructions.

(2) *Time to Object or Move to Adopt or Modify.* A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 21days after a copy is served, unless the court sets a different time.

(3) *Reviewing Factual Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Reviewing Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Reviewing Procedural Matters.* Unless the appointing order 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.

(g) COMPENSATION.

(1) *Fixing Compensation.* Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) *Payment.* The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocating Payment.* The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) APPOINTING A MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

**HISTORY:**

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Other provisions:

**Notes of Advisory Committee on Rules.** *Subdivision (a).* This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

*Subdivision (b).* This is substantially the first sentence of former Equity Rule 59 Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

*Subdivision (c).* This is former Equity Rules 62 (Powers of Master) and 65 (Claimants before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

*Subdivision (d).* (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

*Subdivision (e).* This contains the substance of former Equity Rules 61 (Master's Report--Documents Identified but not Set Forth), 61 1/2 (Master's Report--Presumption as to Correctness--Review), and 66 (Return of Master's Report--Exceptions--Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v Stuart,* 144 US 104, 12 S Ct 585, 36 L Ed 363 (1892); *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

**Notes of Advisory Committee on 1966 amendments.** These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

**Notes of Advisory Committee on 1983 amendments.** *Subdivision (a).* The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior

provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with *28 U.S.C. § 636(b)(2),* authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., *Gautreaux v. Chicago Housing Authority,* 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied sub nom., *Chicago Housing Authority v. Austin,* 511 F.2d 82 (7th Cir. 1975); *Avco Corp. v. American Tel. & Tel. Co.,* 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

*Subdivision (b).* The provisions of 28 U.S.C. § 636(6)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when private masters who are not magistrates are appointed with the consent of the parties. See Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

*Subdivision (c).* The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

*Subdivision (f).* The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under *28 U.S.C. § 636(b)(I)(A)* and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

**Notes of Advisory Committee on 1987 amendments.** The amendments are technical. No substantive change is intended.

**Notes of Advisory Committee on 1991 amendment.** The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

**Notes of Advisory Committee on 1993 amendments.** This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

**Notes of Advisory Committee on 2003 amendments.** Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Winging, Hooper, Leary, Miletich, Reagan, & Shapard, Special Masters' Incidence and Activity (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

*Subdivision (a)(1).* District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or posttrial duties.

*Consent Masters.* Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

*Trial Masters.* Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James,* 272 U.S. 701 [1 L. Ed. 2d 290] (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

*Pretrial and Post-Trial Masters.* Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or posttrial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

*Magistrate Judges.* Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(6)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

*Pretrial Masters.* The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint and to regulate the use of pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

*Post-Trial Masters.* Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(l)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC,* 478 U.S. 421, 481-482 [92 L. Ed. 2d 344, 391-392] (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

*Expert Witness Overlap.* This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

*Subdivision (a)(2), and (3).* Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety-consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing

judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

*Subdivision (b).* The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence

considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, and recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 *U.S.C. § 455*. If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

*Subdivision (c).* Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

*Subdivision (d).* The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

*Subdivision (e).* Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

*Subdivision (f).* Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be

assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access—a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

*Subdivision (g).* The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to- or seeking adoption or modification of—a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. 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 consent, that the findings will be reviewed for clear error or—with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may or reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

*Subdivision (h).* The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important--parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

*Subdivision (i).* Rule 53(i) carries forward unchanged former Rule 53(f).

**NOTES:**

**Related Statutes & Rules:**

Clerks of courts being ineligible to appointment as masters, 28 USCS § 957.

Appointment of master by single judge in three judge court, 28 USCS § 2284.

Pretrial determination as to preliminary reference, USCS Federal Rules of Civil Procedure, Rule 16.

Adoption of master's findings by court, USCS Federal Rules of Civil Procedure, Rule 52(a).

Judgment not being required to recite report, USCS Federal Rules of Civil Procedure, Rule 54(a).

## Appendix 5

# 28 U.S.C. § 455
# Disqualification of Justice, Judge, or Magistrate Judge

**Section 455. Disqualification of justice, judge, or magistrate judge**

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

## Appendix 6
# Model Rule of Professional Conduct
# Rule 1.12

### *CLIENT-LAWYER RELATIONSHIP*
### RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

## Appendix 7
# Code of Conduct for United States Judges

CODE OF CONDUCT
FOR UNITED STATES JUDGES[1]
(Effective July 1, 2009)

**Introduction**

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

202-502-1100

[1] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." Since then, the Judicial Conference has made the following changes to the Code:

March 1987: deleted the word "Judicial" from the name of the Code;
September 1992: adopted substantial revisions to the Code;
March 1996: revised part C of the Compliance section, immediately following the Code;
September 1996: revised Canons 3C(3)(a) and 5C(4);
September 1999: revised Canon 3C(1)(c);
September 2000: clarified the Compliance section;
March 2009: adopted substantial revisions to the Code

[2] Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, 202-502-1100.

## CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

## CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

**Canon 2A.** An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

**Canon 2B.** Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

**Canon 2C.** Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely

private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

## CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material

witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

**Canon 3A(3).** The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

**Canon 3A(4).** The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

**Canon 3A(5).** In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

**Canon 3A(6).** The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a

litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

**Canon 3B(3).** A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

**Canon 3B(5).** Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

**Canon 3C.** Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

**Canon 3C(1)(c).** In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

**Canon 3C(1)(d)(ii).** The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

## CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities.*

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

**Canon 4.** Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization

dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

**Canon 4A.** Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board. Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

**Canon 4A(4).** This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

**Canon 4A(5).** A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

**Canon 4B.** The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

**Canon 4C.** A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

**Canon 4D(1), (2), and (3).** Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family

business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

**Canon 4D(5).** The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

**Canon 4E.** Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

**Canon 4F.** The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

**Canon 4H.** A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

## CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. *Part-time Judge.* A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. *Judge Pro Tempore.* A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. *Retired Judge.* A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

## APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

# Appendix 8
# Code of Conduct for Judicial Employees*

CHAPTER II. CODES OF CONDUCT FOR JUDICIAL EMPLOYEES

A. Code of Conduct for Judicial Employees.

Introduction

This Code of Conduct applies to all employees of the Judicial Branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and Federal Public Defender offices.[1] As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(l), and 5B, a member of a judge's personal staff means a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff.[2]

Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[3] (e.g., receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

---

* U.S. Courts, http://www.uscourts.gov/guide/vol2/ch2a.html.

1 Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges. Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees. When Actually Employed (WAE) employees are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.

2 Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

3 *See Guide to Judiciary Policies and Procedures,* Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

Adopted September 19, 1995
by the Judicial Conference of the United States
Effective January 1, 1996[4]

## CANON 1 A JUDICIAL EMPLOYEE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY AND OF THE JUDICIAL EMPLOYEE'S OFFICE

An independent and honorable Judiciary is indispensable to justice in our society. A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public. Judicial employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by court order, or by the appointing authority.

## CANON 2: A JUDICIAL EMPLOYEE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.

## CANON 3: A JUDICIAL EMPLOYEE SHOULD ADHERE TO APPROPRIATE STANDARDS IN PERFORMING THE DUTIES OF THE OFFICE

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the judicial employee's appointing authority, the following standards apply:

A. A judicial employee should respect and comply with the law and these canons. A judicial employee should report to the appropriate supervising authority any attempt to induce the judicial employee to violate these canons.

Note: A number of criminal statutes of general applicability govern federal employees' performance of official duties. These include:

18 U.S.C. § 201 (bribery of public officials and witnesses);
18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
18 U.S.C. § 285 (taking or using papers relating to government claims);
18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
18 U.S.C. § 508 (counterfeiting or forging transportation requests);
18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
18 U.S.C. § 643 (failing to account for public money);
18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);
18 U.S.C. § 1001 (fraud or false statements in a government matter);

[4] Canon 3F(4) was revised at the March 2001 Judicial Conference.

18 U.S.C. § 1719 (misuse of franking privilege);
18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
31 U.S.C.§ 1344 (misuse of government vehicle);
31 U.S.C. § 3729 (false claims against the government).

In addition, provisions of specific applicability to court officers include:
18 U.S.C. §§ 153, 154 (court officers embezzling or purchasing property from bankruptcy estate);

18 U.S.C. § 645 (embezzlement and theft by court officers);
18 U.S.C. § 646 (court officers failing to deposit registry moneys);
18 U.S.C. § 647 (receiving loans from registry moneys from court officer).

This is not a comprehensive listing but sets forth some of the more significant provisions with which judicial employees should be familiar.

B. A judicial employee should be faithful to professional standards and maintain competence in the judicial employee's profession.

C. A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the judicial employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control. A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner. A judicial employee should never influence or attempt to influence the assignment of cases, or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

D. A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures. A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

E. A judicial employee should not engage in nepotism prohibited by law.

Note: See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

F. Conflicts of Interest.

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter, or he, she, or such lawyer has been a material witness;

(iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding;

(iv) he or she, a spouse, or a person related to either within the third degree of relationship,[5] or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;

(v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) has an interest that could be substantially affected by the outcome of the proceeding; or (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the Code of Conduct for United States Judges may require the judge to recuse.

(c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:

(i) he or she has a personal bias or prejudice concerning a party;

[5] As used in this code, the third degree of relationship is calculated according to the civil law system to include the following relatives: parent, child, grandparent, grandchild, great grandparent, great grandchild, brother, sister, aunt, uncle, niece and nephew.

(ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;

(iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

(4) A judicial employee who is subject to canon 3F(2) should keep informed about his or her personal, financial and fiduciary interests and make a reasonable effort to keep informed about such interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

## CANON 4: IN ENGAGING IN OUTSIDE ACTIVITIES, A JUDICIAL EMPLOYEE SHOULD AVOID THE RISK OF CONFLICT WITH OFFICIAL DUTIES, SHOULD AVOID THE APPEARANCE OF IMPROPRIETY, AND SHOULD COMPLY WITH DISCLOSURE REQUIREMENTS

A. Outside Activities. A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the

judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code.

B. Solicitation of Funds. A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

(1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities.

(1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.

(2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial employee's family residing in the household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: See 5 U.S.C. § 7353 (gifts to federal employees). See also 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).

(4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

D. Practice of Law. A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, and may provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

(1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);

(2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;

(3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

Note: See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law).

E. Compensation and Reimbursement. A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incur[r]ed by a judicial employee and, where

appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). See also 5 U.S.C. App. §§ 501 to 505 (outside earned income and employment).

**CANON 5: A JUDICIAL EMPLOYEE SHOULD REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY**

A. Partisan Political Activity. A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

B. Nonpartisan Political Activity. A member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

Note: See also 18 U.S.C. Chapter 29 (elections and political activities).

## Appendix 9

# The Code of Ethics for Arbitrators in Commercial Disputes

American Bar Association/American Arbitration Association

*Approved by the American Bar Association House of Delegates on February 9, 2004*
*Approved by the Executive Committee of the Board of Directors of the AAA*

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2003Revision have been approved and recommended by both organizations.

*Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

*Note on Neutrality*

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should *serve* as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

*Note on Construction*

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X

from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

## CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;
(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
(3) that he or she is competent to serve; and
(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

*Comment to Canon I*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
(2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose

any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) The nature and extent of any prior knowledge they may have of the dispute; and

(4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in *any* of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
   (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
   (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the

case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to paragraph G*

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C., An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for

arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

*Comment to Canon VIII*

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

## CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations under Canon I* Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations under Canon III* Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
(4) Canon X arbitrators may not at any time during the arbitration:
    (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
    (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
    (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV* Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V* Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI* Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII* Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII* Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX* The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

## Appendix 10

# National Arbitration Forum
# Code of Conduct for Arbitrators

*Portions of this Code have been modeled after or taken from the Code of Ethics for Arbitrators in Commercial Disputes, prepared, approved and recommended by a Special Committee of the American Bar Association.*

**PREAMBLE**

This Code of Conduct applies to all the National Arbitration Forum proceedings in which disputes or claims are submitted to one or more Arbitrators. The National Arbitration Forum expects its Arbitrators to observe fundamental standards of ethical conduct. Various aspects of the conduct of Arbitrators, including some matters covered by this Code of Conduct, may be governed by agreements of the parties, by rules to which the parties have agreed or by applicable law. This Code of Conduct does not take the place of, or supersede, any such agreements, rules, and laws, and does not establish any new or additional grounds for judicial review of arbitration awards. While this Code of Conduct is intended to provide ethical guidelines, it does not form part of the arbitration rules or the Code of Procedure of the National Arbitration Forum or of any other organization.

**CANON ONE**

An Arbitrator should uphold the integrity and fairness of the dispute resolution process.

A. An Arbitrator should recognize a responsibility to the parties whose rights will be decided, to other participants in the proceeding, to the integrity and fairness of the process itself, and to the public.

B. An Arbitrator should perform duties diligently, conduct a proceeding as effectively and economically as possible, and conclude a case as efficiently and promptly as the circumstances reasonably permit. Arbitrators should treat all parties equally and conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self interest.

C. An Arbitrator should be patient and courteous to the parties, to their lawyers and to the participants, and should encourage similar conduct by all participants in the proceedings.

D. An Arbitrator should comply with applicable procedures and rules, and should neither exceed authority nor do less than is required to exercise authority completely.

E. An Arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties by other participants or other abuses or disruption of the process.

F. The ethical obligations of an Arbitrator begin upon appointment and continue throughout all stages of the proceeding.

**CANON TWO**

An Arbitrator should disclose any interest or relationship which affects impartiality or which creates an unfavorable appearance of partiality or bias.

A. An Arbitrator should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which adversely affects impartiality or which might reasonably create the unfavorable appearance of partiality or bias. For a reasonable period of time after a case, Arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the unfavorable appearance that they had been influenced by the anticipation or expectation of the relationship or interest.

B. Persons who are requested to serve as Arbitrators should, before accepting, disclose:

(1) Any financial, personal or material interest in the outcome of the arbitration;

(2) Any existing or past material, financial, business, professional, family or social relationships which affect impartiality or which might reasonably create an unfavorable appearance of partiality or bias. Persons requested to serve as Arbitrators should disclose any such relationships which they personally have with any Party or lawyers, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving immediate members of their families or their current employers, partners or business associates.

C. Arbitrators should make a reasonable effort to inform themselves of any interests or relationships described above.

D. The obligation to disclose interests or relationships described above is a continuing duty which requires an Arbitrator to disclose, at any stage of the proceeding, any such interests or relationships which may arise, or which are recalled or discovered.

E. Disclosure should be made to all parties and to any other Arbitrator.

F. In the event that an Arbitrator is requested by all parties to withdraw because of prejudice or bias, the Arbitrator should do so. In the event that an Arbitrator is requested to withdraw by fewer than all of the parties because of prejudice or bias, the Arbitrator should withdraw unless either of the following circumstances exists:

(1) Other applicable rules exist determining challenges; or

(2) If the Arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, that the Arbitrator can act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another Party or would be contrary to the ends of justice.

**CANON THREE**

An Arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety.

A. An Arbitrator should not discuss a case with any Party in the absence of each other Party, except in any of the following circumstances

(1) Discussions may be had with a Party concerning such matters as setting the time and place of proceedings or making other arrangements for the conduct of the proceedings or procedural questions. The Arbitrator should not make any final determination concerning the matter discussed before giving each absent Party an opportunity to respond.

(2) If a Party fails to be present at a proceeding after having been given due notice, the Arbitrator may discuss the case with any Party who is present.

(3) If all parties request or consent that such discussion take place.

(4) Unless otherwise provided in applicable rules or in an agreement of the parties.

B. Whenever an Arbitrator communicates in writing with one Party, the Arbitrator should at the same time send a copy of the communication to each other Party.

**CANON FOUR**

An Arbitrator should be honest and trustworthy and maintain confidentiality.

A. An Arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. Unless otherwise agreed by the parties, or required by applicable rules or law, an Arbitrator shall keep confidential all matters relating to the proceedings and shall not disclose to anyone except the parties at any time confidential awards or settlements.

C. Arbitrators should avoid bargaining with parties over the amount of payments or engaging in negotiations concerning payments which would create an appearance of coercion or other impropriety. Matters concerning fees should be handled by the Director.

**CANON FIVE**

An Arbitrator should make decisions in a just, independent, and deliberate manner.

A. An Arbitrator should, after careful deliberation, decide all issues submitted for determination and not other issues.

B. An Arbitrator should not delegate the duty to decide to any other person.

C. In the event that all parties agree upon a settlement of the issues in dispute and request an Arbitrator to embody that agreement in an award, an Arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of the agreement. Whenever an Arbitrator embodies a settlement by the parties in an award, the Arbitrator should state in the award that it is based on an agreement of the parties.

## Appendix 11
## JAMS
# Arbitrators Ethics Guidelines



**Introduction**

A. The purpose of these Ethics Guidelines is to provide basic guidance to JAMS Arbitrators regarding ethical issues that may arise during or related to the Arbitration process. Arbitration is an adjudicative dispute resolution procedure in which a neutral decision maker issues an Award. Parties are often represented by counsel who argue the case before a single Arbitrator or a panel of three Arbitrators, who adjudicate, or judge, the matter based on the evidence presented.

B. Arbitration – either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute contract clause – is generally binding. By entering into the Arbitration process, the Parties have agreed to accept an Arbitrator's decision as final. There are instances when an Arbitrator's decision may be modified or vacated, but they are extremely rare. The Parties in an Arbitration trade the right to full review for a speedier, less expensive and private process in which it is certain there will be an appropriately expeditious resolution.

C. Other sets of ethics guidelines for Arbitrators exist, such as those promulgated by the National Academy of Arbitrators and jointly by the American Arbitration Association and the American Bar Association. An Arbitrator may wish to review these for informational purposes.

D. These Guidelines are national in scope and are necessarily general. They are not intended to supplant applicable state or local law or rules. An Arbitrator should be aware of applicable state statutes or court rules, such as laws concerning disclosure that may apply to the Arbitrations being conducted. In the event that these Guidelines are inconsistent with such statutes or rules, an Arbitrator must comply with the applicable law.

E. In addition, most states have promulgated codes of ethics for judges and other public judicial officers. In some instances, these codes apply to certain activities of private judges, such as court-ordered Arbitrations. Arbitrators should comply with codes that are specifically applicable to them or to their activities. Where the codes do not specifically apply, an Arbitrator may choose to comply voluntarily with the requirements of such codes.

F. The ethical obligations of an Arbitrator begin as soon as the Arbitrator becomes aware of potential selection by the Parties and continue even after the decision in the case has been rendered. JAMS strongly encourages Arbitrators to address ethical issues that may arise in their cases as soon as an issue becomes apparent, and where appropriate to seek advice on how to resolve such issues from the National Arbitration Committee.

G. The Guidelines in Articles I through IX apply to neutral Arbitrators regardless of the method by which they may have been selected. Article X is intended to apply to Party-appointed Arbitrators who are non-neutral. Many Arbitration agreements provide for the appointment of an Arbitrator by each Party and the appointment of the third Arbitrator by the two Party-appointed Arbitrators. Party-appointed Arbitrators should be presumed to be neutral, unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.

1. Where the Party-appointed Arbitrator is expected to be non-neutral, some of the Guidelines applicable to neutral Arbitrators do not apply or are altered to suit this process. For example, while non-neutral Arbitrators must disclose any matters that might affect their independence, the opposing Party ordinarily may not disqualify such person from service as an Arbitrator.

2. It is appropriate for the party appointed arbitrators to address the status of their service with the party that appointed them, with each other and with the neutral arbitrator and to determine whether the Parties would prefer that they act in a neutral capacity.

3. *Note regarding international Arbitrations.* Tripartite Arbitrations in which the Parties each appoint one Arbitrator are common in international disputes; however, all Arbitrators, by whomever appointed, are expected to be independent of the Parties and to be neutral. They are sometimes expected to communicate *ex parte* with the Party that appointed them solely for purposes of the selection of the chairman and not otherwise.

H. These Guidelines do not establish new or additional grounds for judicial review of Arbitration Awards.

**GUIDELINES**

**I. ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE OFFICE OF THE ARBITRATION PROCESS.**

An Arbitrator has a responsibility to the Parties, to other participants in the proceeding, and to the profession. An Arbitrator should seek to discern and refuse to lend approval or consent to any attempt by a Party of its representative to use Arbitration for a purpose other than the fair and efficient resolution of a dispute.

**II. AN ARBITRATOR SHOULD BE COMPETENT TO ARBITRATE THE PARTICULAR MATTER.**

An Arbitrator should accept an appointment only if the Arbitrator meets the Parties' stated requirements in the agreement to arbitrate regarding professional qualifications. An Arbitrator should prepare before the Arbitration by reviewing any statements or documents submitted by the Parties. An Arbitrator should refuse to serve or should withdraw from the Arbitration if the Arbitrator becomes physically or mentally unable to meet the reasonable expectations of the Parties.

## III. AN ARBITRATOR SHOULD INFORM ALL PARTIES OF THE ROLE OF THE ARBITRATOR AND THE RULES OF THE ARBITRATION PROCESS.

A. An Arbitrator should ensure that all Parties understand the Arbitration process, the Arbitrator's role in that process, and the relationship of the Parties to the Arbitrator.

B. An Arbitrator may encourage the Parties to mediate their dispute but should not suggest that the Arbitrator serve as the mediator. In the event that, prior to or during the Arbitration, all Parties request an Arbitrator to participate in discussions of settlement or to combine the Arbitration with another dispute resolution process, the Arbitrator should explain how the Arbitrator's role and relationship to the Parties may be altered, including the impact such a shift may have on the willingness of the Parties to disclose certain information to the Arbitrator serving in the settlement-related role. Nothing in these Guidelines is intended to prevent an Arbitrator from acting as a neutral in another dispute resolution process in the same case, if requested to do so by all Parties and if an appropriate written waiver is obtained. The Parties should, however, be given the opportunity to select another neutral to conduct any such process.

## IV. AN ARBITRATOR SHOULD MAINTAIN CONFIDENTIALITY APPROPRIATE TO THE PROCESS.

A. Unless otherwise agreed by the Parties, or required by applicable rules or law, an Arbitrator should keep confidential all matters relating to the Arbitration proceedings and decisions.

B. An Arbitrator should not discuss a case with persons not involved directly in the Arbitration unless the identity of the Parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.

C. An Arbitrator may discuss a case with another member of the Arbitration panel hearing that case, whether or not all panel members are present.

D. An Arbitrator should not use confidential information acquired during the Arbitration proceeding to gain personal advantage or advantage of others, or to affect adversely the interest of another. An Arbitrator should not inform anyone of the decision in advance of giving it to all Parties. Where there is more than one Arbitrator, an Arbitrator should not disclose to anyone the deliberations of the Arbitrators.

E. An Arbitrator should not participate in post-Award proceedings, except (1) if requested to make a correction to or clarification of an Award, (2) if required by law or (3) if requested by all Parties to participate in a subsequent dispute resolution procedure in the same case.

## V. AN ARBITRATOR SHOULD ENSURE THAT HE OR SHE HAS NO KNOWN CONFLICT OF INTEREST REGARDING THE CASE, AND SHOULD ENDEAVOR TO AVOID ANY APPEARANCE OF A CONFLICT OF INTEREST.

A. An Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other

information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality.

B. An Arbitrator may establish social or professional relationships with lawyers and members of other professions. There should be no attempt to be secretive about such relationships but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

C. An Arbitrator should not proceed with the process unless all Parties have acknowledged and waived any actual or potential conflict of interest. If the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver.

D. An Arbitrator's disclosure obligations continue throughout the course of the Arbitration and require the Arbitrator to disclose, at any stage of the Arbitration, any such interest or relationship that may arise, or that is recalled or discovered. Disclosure should be made to all Parties, and the Arbitrator should accept such work only where the Arbitrator believes it can be undertaken without an actual or apparent conflict of interest and after a written waiver of conflict has been obtained from the other Parties to the pending Arbitration. Where more than one Arbitrator is appointed, each should inform the others of the interests and relationships that have been disclosed.

E. An Arbitrator should avoid conflicts of interest in recommending the services of other professionals. If an Arbitrator is unable to make a personal recommendation without creating a potential or actual conflict of interest, the Arbitrator should so advise the Parties and refer them to a professional service, provider or association.

F. After an Award or decision is rendered in an Arbitration, an Arbitrator should refrain from any conduct involving a Party, insurer or counsel to a Party to the Arbitration that would cast reasonable doubt on the integrity of the Arbitration process, absent disclosure to and consent by all the Parties to the Arbitration. This does not preclude an Arbitrator from serving as an Arbitrator or in another neutral capacity with a Party, insurer or counsel involved in the prior Arbitration, provided that appropriate disclosures are made about the prior Arbitration to the Parties to the new matter.

G. Other than agreed fee and expense reimbursement, an Arbitrator should not accept a gift or item of value from a Party, insurer or counsel to a pending Arbitration. Unless a period of time has elapsed sufficient to negate any appearance of a conflict of interest, an Arbitrator should not accept a gift or item of value from a Party to a completed Arbitration, except that this provision does not preclude an Arbitrator from engaging in normal, social interaction with a Party, insurer or counsel to an Arbitration once the Arbitration is completed.

H. Where relevant state or local rule or statute is more specific than these Guidelines as to Arbitrator disclosure, it should be followed.

## VI. AN ARBITRATOR SHOULD ENDEAVOR TO PROVIDE AN EVENHANDED AND UNBIASED PROCESS AND TO TREAT ALL PARTIES WITH RESPECT AT ALL STAGES OF THE PROCEEDINGS.

A. An Arbitrator should remain impartial throughout the course of the Arbitration. Impartiality means freedom from favoritism either by word or action. The Arbitrator should be aware of and avoid the potential for bias based on the Parties' backgrounds, personal attributes or conduct during the Arbitration, or based on the Arbitrator's pre-existing knowledge of or opinion about the merits of the dispute being arbitrated. An Arbitrator should not permit any social or professional relationship with a Party, insurer or counsel to a Party to an Arbitration to affect his or her decision-making. If an Arbitrator becomes incapable of maintaining impartiality, the Arbitrator should withdraw.

B. An Arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit. An Arbitrator should be courteous to the Parties, to their representatives and to the witnesses, and should encourage similar conduct by all participants in the proceedings. An Arbitrator should make all reasonable efforts to prevent the Parties, their representatives, or other participants from engaging in delaying tactics, harassment of Parties or other participants, or other abuse or disruption of the Arbitration process.

C. Unless otherwise provided in an agreement of the Parties, (1) an Arbitrator should not discuss a case with any Party in the absence of every other Party, except that if a Party fails to appear at a hearing after having been given due notice, the Arbitrator may discuss the case with any Party who is present; and (2) whenever an Arbitrator communicates in writing with one Party, the Arbitrator should, at the same time, send a copy of the communication to every other Party. Whenever an Arbitrator receives a written communication concerning the case from one Party that has not already been sent to each Party, the Arbitrator should do so.

D. When there is more than one Arbitrator, the Arbitrators should afford each other full opportunity to participate in all aspects of the Arbitration proceedings.

## VII. AN ARBITRATOR SHOULD WITHDRAW UNDER CERTAIN CIRCUMSTANCES.

A. An Arbitrator should withdraw from the process if the Arbitration is being used to further criminal conduct, or for any of the reasons set forth above - insufficient knowledge of relevant procedural or substantive issues, a conflict of interest that has not been or cannot be waived, the Arbitrator's inability to maintain impartiality, or the Arbitrator's physical or mental disability. In addition, an Arbitrator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the Arbitration process.

B. Except where an Arbitrator is obligated to withdraw or where all Parties request withdrawal, an Arbitrator should continue to serve in the matter.

## VIII. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. An Arbitrator should, after careful deliberation and exercising independent judgment, promptly or otherwise within the time period agreed to by the Parties or by JAMS Rules, decide all issues submitted for determination and issue an Award. An Arbitrator's Award should not be influenced by fear or criticism or by any interest in potential future case referrals by any of the Parties or counsel, nor should an Arbitrator issue an Award that reflects a compromise position in order to achieve such acceptability. An Arbitrator should not delegate the duty to decide to any other person.

B. If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator should comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she may inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

## IX. AN ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE ARBITRATION PROCESS IN MATTERS RELATING TO MARKETING AND COMPENSATION.

An Arbitrator should avoid marketing that is misleading or that compromises impartiality. An Arbitrator should ensure that any advertising or other marketing to the public conducted on the Arbitrator's behalf is truthful. An Arbitrator may discuss issues relating to compensation with the Parties but should not engage in such discussions if they create an appearance of coercion or other impropriety and should not engage in *ex parte* communications regarding compensation.

## X. ETHICAL GUIDELINES APPLICABLE TO NON-NEUTRAL ARBITRATORS.

These Guidelines are applicable to non-neutral Arbitrators, except as follows:

Guideline III: A non-neutral Arbitrator should ensure that all Parties and other Arbitrators are aware of his or her non-neutral status.

Guideline V: A non-neutral Arbitrator is obligated to make disclosures of any actual or potential conflicts of interest, although a non-neutral Arbitrator is not obligated to withdraw if requested to do so only by the party who did not appoint him or her.

Guideline VI:

1. A non-neutral Arbitrator may be predisposed toward the Party who appointed him or her but in all other respects is obligated to act in good faith and with integrity and fairness.

2. A non-neutral Arbitrator may engage in *ex parte* communication with the Party that appointed him or her, but should disclose to the Parties and the other Arbitrators the

fact that such communications are occurring and should honor any agreement reached with the Parties and the other Arbitrators regarding the timing and nature of such communications.

Guideline IX: The compensation arrangements between a non-neutral Arbitrator and the Party that appointed him or her usually is treated as confidential but may be disclosed in connection with any fee application in the Arbitration proceeding.

For more information, please call your local JAMS office at 1-800-352-5267.

## Appendix 12

# Links to JAMS' Comprehensive Arbitration Rules & Procedures and to the National Arbitration Forum's Code of Procedure

JAMS' Comprehensive Arbitration Rules & Procedures:
http:/wwwjamsadr.com/rules/comprehensive.asp

National Arbitration Forum's Code of Procedure:
http://www.arb-forum.com/programs/code_new/index.asp

## Appendix 13
# Relevant Academic Literature

1. ***2004 Special Masters Conference: Transcript of Proceedings,* 31 WM. MITCHELL L. REV. 1193 (2005), *available at* http://www.courtappointedmasters.org/resource_articles.asp.**

Westlaw Abstract: A historic gathering of special masters occurred on October 15th and 16th, 2004 in Saint Paul, Minnesota. Federal and state court-appointed masters from around the country met for the first time to share their experiences as special masters and to form a national association of court appointed masters. This issue of the William Mitchell Law Review contains articles presented at the conference and the transcript of faculty presentations.

Citing Reference:

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges (2007) (ALI-ABA & Federal Judicial Center Continuing Legal Education Course of Study, materials available on Westlaw as SN009 ALI-ABA 1911).

Westlaw Abstract: This bench book is designed to help federal and state court judges: (1) decide whether and when to appoint a master; (2) draft effective appointment orders; and (3) anticipate and effectively address ethical issues and practical concerns that arise in special master work. These materials may also be helpful to prospective adjuncts and to parties considering whether to request the appointment of a judicial adjunct. All courts have the power to appoint a special master or other type of judicial adjunct to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of masters in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance.

Many federal and state court judges use masters…Judicial adjuncts can provide courts, parties, and lawyers with essential services without tapping into court resources. Masters can act as mediators and settle civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement. An adjunct can markedly reduce the burden on a judge, the judge's staff, and even the court's administrative staff. Parties and lawyers recognize that in some cases the appointment of a master can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced masters know how valuable they can be to case handling and resolution.

Section 1 of this bench book summarizes the various roles judicial adjuncts can serve. Section 2 covers appointment orders…several appendices provide checklists, sample appointment orders, listings of court decisions relevant to the use of judicial adjuncts, and a bibliography of academic articles about the use of judicial adjuncts. Finally, additional

appendices contain the texts of various statutes, codes, and other rules that may govern the conduct of judicial adjuncts.

***See also*** Academy of Court-Appointed Masters, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges (2006), available free online at: www.courtappointedmasters.org/ACAM%20Benchbook%20Master%20FINAL%20combined.pdf)
(This appears to be an earlier version of the same document above)(No abstract available).

2. **Richard H. Agins, Comment: 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 (2003).**

Westlaw Abstract: The volume and volatility of computer generated data present novel problems of evidentiary discovery, requiring the employment of a neutral party with the requisite technical, legal, and business experience to provide effective oversight and management. A special master, referred to serve as an impartial officer of the court pursuant to Rule 53 of the Federal Rules of Civil Procedure, can bring a greater level of specialized knowledge, flexibility, involvement, and efficiency to pretrial discovery of electronically generated and stored data ("electronic data") than can most trial court judges burdened with managing a full docket.

Citing References:

David Herr, Ann. Manual Complex Lit. § 13.1 Trial Judge's Role: Use of Special Masters (2009).

David Ferleger, Special Masters under Rule 53: A Welcome Evolution, ABA-ALI CLE, available on Westlaw as SN040 ALI-ABA 1 (2007).

From Article Introduction: In recent years, and increasingly since the amendment of Rule 53 in 2003, courts turn to special masters in constitutional, commercial, mass tort and other litigation for assistance at all stages in the adjudication process. Masters may be appointed pre-trial, to preside over trials, and in the post-trial monitoring and compliance phases of a suit. The use of masters has been constructive and beneficial to litigants and to the courts. Few administrative difficulties have been reported.

Federal Rule of Civil Procedure 53 has been a primary support for this approach. However, even post-amendment, courts continue to declare their inherent authority to appoint masters "beyond the provisions" of Rule 53. Pre-amendment, appointment of a master was reserved to the "exceptional case" and there was significant dispute in particular instances over whether a case was sufficiently exceptional to warrant a master. The 2003 rule in effect abandoned the notion that appointment of a master is disfavored, and many features of the rule are now designed to facilitate expanded use of masters. This article describes the early use of masters, the functions to which courts have put masters, and a selection of issues regarding the appointment and operation of masters. [Westlaw]

Lynn Jokela & David Herr, Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool, 31 Wm. Mitchell L. Rev. 1299 (2005).

Abstract from article: 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." 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. 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.

**3. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725.**

LexisNexis Abstract: The court's powers to enforce a consent decree include interpreting the decree, issuing injunctions to implement the decree, granting supplemental relief, delegating authority to a special master, and holding a party in contempt of court. ... A court emphasizes the contractual nature of consent decrees when it undertakes to resolve disputes over the meaning of certain provisions. ... The actual experiences of attorneys, judges, and monitors in the research cases reveal a pervasive pattern of [non-adjudicative] techniques for making consent decrees work; reported cases rarely reveal such techniques. ... Written reports would have been helpful because they would have provided the parties a clear record upon which to determine in what areas defendants were not complying and how the parties had resolved various issues. ... One way the monitor responded to this situation was simply to order upper-level mental health agency officials to attend meetings to discuss areas of noncompliance. ... A lenient judicial posture toward requests for substantive modification would introduce uncertainty and therefore discourage voluntary settlement and increase litigation over implementing consent decrees. ... The economy improved, a newly elected administration was strongly committed to implementation of the decree, and the legislature fully funded all the community programs.

Citing Reference:

Ellen E. Deason, Managing the Managerial Expert, 1998 U. Ill. L. Rev. 341

Westlaw Abstract: While most lawyers think of court-appointed experts as witnesses, judges increasingly appoint experts for managerial roles. For instance, court-appointed experts evaluate pretrial discovery; they play key roles in encouraging settlements and helping judges decide whether or not those settlements should be approved; they determine complex damages; they advise judges on remedial orders and monitor compliance and implementation. Professor Deason analyzes the proliferation of court-appointed experts for these indispensable functions in the absence of any explicit authority or procedures for their appointment. She argues that the current Federal Rules of Evidence and Federal Rules of Civil Procedure do not contemplate managerial functions for court-appointed expert witnesses or special masters and hence their limitations on appointments and their procedures are inadequate. Moreover, the other

source of appointment authority, inherent judicial power, has ambiguous boundaries and offers courts little guidance. Thus, Professor Deason suggests the development of new appointment authority tailored to the legitimate needs of the courts for managerial assistance, designed to encourage the maximum effectiveness in the use of experts, and constructed to prevent unnecessary interference with party autonomy.

4. **Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006).**

Lexis Abstract: Less than two weeks after the collapse of the World Trade Center, a unified Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA, or "the Act"), a bill intended to help stabilize the economy by protecting the airlines from an avalanche of litigation. ... As noted above, the Act provides the airline industry with a range of benefits, including federal loan guarantees of up to ten billion dollars; compensation of up to five billion dollars for "direct losses incurred ... as a result of any Federal ground stop order;" compensation for "incremental losses" from September 11 to December 31, 2001; reimbursement for any increase in the cost of insurance through October 1, 2002; and a cash flow benefit from the deferral of the deposit of excise taxes. ... The architecture of the Fund was based in part on the Agent Orange settlement compensation scheme, and the Special Master was based on the Agent Orange court-appointed Special Master. Before Congress enacted the ATSSSA, David Crane, one of Senator Trent Lott's congressional staffers, drafted a model of the Special Master which Congress soon incorporated into the statute. ... A comparison with other victim compensation funds emphasizes the failure of the ATSSSA to provide for a suitable tort option. ... Suddenly, any Fund-eligible parties considering the tort option would find themselves vying to litigate with a host of new parties.

Citing References:

Judge John G. Farrell, Administrative Alternatives to Judicial Branch Congestion, 27 J. Nat'l Ass'n Admin. L. Judiciary 1 (Spring 2007)

Lexis Summary: ... Workers' Compensation Law (originally called "Workmen's Compensation Law") involved a new legal concept: liability without fault. ... Many more workers were assured a recovery for a work accident than were assured under the tort litigation system. ... In addition to providing compensation to the victims, the legislation was also intended to save the airline industry from bankruptcy and the U.S. economy from collapse. ... Under the legislation, a monetary fund was created and the attorney general appointed a special master, Kenneth Feinberg, a respected attorney with considerable experience with giant class-action lawsuits. ... There are some very limited exceptions which allow certain tort actions in court. ... Strictly speaking, I note that adoption of such programs is not always motivated solely to relieve judicial congestion or delays. ... I believe that both emerging technologies of nanotechnology and biotechnology are extremely likely to bring with them environmental risks which could result in injuries and illnesses with long latency periods and difficult causation issues, involving multiple plaintiffs, all of which are problematic under traditional common law

tort schemes. ... It is my belief that carefully crafted administrative alternatives in these areas could help to provide fair and rapid relief to the victims. [LexisNexis]

5. **Samuel J. Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543 (1979).**

Wiley Abstract: Litigation concerning conditions in institutions such as prisons or mental hospitals does not stop at the issuance of a remedial decree. Steps must be taken to assure implementation. Increasingly, the courts are resorting to special masters to assist them in implementing such institutional reform. While the use of masters by courts is a firmly established tradition, the role assigned to masters in the institutional context is often an extraordinarily broad and intrusive one. As a result, serious questions have arisen about this new extra-traditional master role and about the applicability, the sufficiency, of the traditional rationales and restraints. This article is among the first in a small but developing body of literature that begins to examine the new master role and the questions concerning it. [Wiley InterScience - http://bit.ly/1LFKfL]

6. **Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).**

Westlaw Abstract: In recent years, courts have used special masters to help manage complex civil cases. But this use has raised serious questions of efficacy and ethics. This paper first identifies the needs and ambitions that inspire courts to appoint masters, in order to demonstrate why recourse to this tool can be so rich in potential yet so controversial. Then, in describing some recent roles masters have played, it assays their potential contributions as well as the risks attending their use. It concludes that as masters are used more ambitiously, the potential benefits and risks increase. Masters can bring significant new skills and flexibility to bear on cases whose complexity threatens to overwhelm our traditional system. However, a correlative danger exists that using masters will fundamentally alter that system in ways we find troubling: by making adjudication too informal, by removing it from public scrutiny and challenge, and by encouraging judges to rely on masters to a degree incompatible with appropriate exercise of the judicial function. [Westlaw]

Citing References:

Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 Brook. L. Rev. 659 (Fall 1993)

Introduction: This Article assesses the landscape of litigation reform activity and the current political tension between continuing commitment to open access to the courts and a desire for faster, less expensive dispute resolution. It will also examine the state of the reform process but refrain from evaluating specific proposals. Part I describes major recent and current activities affecting American litigation. Part II then analyzes current debates about litigation by identifying the leading schools of thought on both litigation practice and litigation reform. It attempts to situate current litigation issues in a broader inquiry: whether the perceived post-1938 consensus attending adjudicatory procedure and civil litigation reform has merely come unglued (in whole or in part) or, rather, whether it

has been supplanted by a new consensus, a "new paradigm," reflecting an altered vision of the litigation process. Finally, Part III proposes a more integrated and deliberate method to govern civil litigation reform as a means of thwarting troublesome recent tendencies. [Westlaw]

Irving R. Kaufman, Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, 59 Fordham L. Rev. 1 (October 1990).

INTRODUCTION: Many observers see the courts on the verge of buckling under the strain; one view from the trenches sees the problem of delay as "'beyond the crisis stage."' The problem is not merely one of harried judges. Litigants, people with grievances, are being denied meaningful access to the courts. [FN7] Delay prevents the courts from doing their job— resolving people's disputes at reasonable costs so that they may return to their normal lives... Flexibility, experimentation and a willingness to innovate are essential if the administration of justice is to keep up with the society we serve. What follows is a brief examination of proposed changes in judicial administration, stressing those that hold the greatest promise to reduce the major costs of justice— expense and delay. [Westlaw]

7. **Wayne D. Brazil, *Special Masters in the Pre-trial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 289 (1982).**

Abstract: This article explores the advantages and disadvantages of referring discovery matters in complex cases to special masters. In the first section Brazil explains how the results of his earlier research into the discovery system exposed problems that the appointment of masters might help solve. He then describes the kinds of pretrial tasks and roles federal courts have assigned to special masters and the ways that using a master can expedite and rationalize the case development process. In the second half of the article, the author assesses the major objections to delegating judicial responsibilities to masters and the problems that frequent appointments might cause. Along the way, Brazil offers practical suggestions to judges about how to avoid potential difficulties and how to maximize the effectiveness of this increasingly popular procedure. [Wiley InterScience - http://www3.interscience.wiley.com/journal/119606547/abstract?CRETRY=1&SRETRY=0 ]

8. **Wayne D. Brazil, Geoffrey C. Hazard Jr. & Paul R. Rice, *Managing Complex Litigation: A Practical Guide to the Use of Special Masters*, American Bar Foundation (1983).**

Abstract from 63 Tex. L. Rev. 721: Professors Geoffrey Hazard and Paul Rice provide an illuminating case study of the management techniques that worked for them as special masters in the massive United States v. ... The purposes of pretrial conferences as stated in the new rule include concerns for efficiency such as "establishing early and continuing control so that the case will not be protracted because of lack of management," "discouraging wasteful pretrial activities," "improving the quality of the trial through more thorough preparation," and facilitating settlement. ... They believe that a full-time position is not likely to offer the pay and status needed to attract persons whose mastery of the subject and intellectual prowess will enable them to work well with the able and aggressive attorneys usually involved in complex cases. Instead, the authors recommend the use of co-special masters, one with day-to-day management functions and the other with duties related to subject matter expertise. ... Judges

should hold a conference with counsel and the master to discuss the tasks and powers being delegated and the procedures to be followed. ... Brazil, Hazard, and Rice's Proposals The Brazil-Hazard-Rice book is concerned primarily with discovery management and addresses these administrative matters in much more detail than does Schwarzer. ... In that case, all discovery demands were required to be filed with the masters, thus rejecting the Federal Rules' view that the attorneys should generally conduct discovery without court involvement. ... According to Hazard and Rice, "The end product was a combined narrative stipulation, pretrial order of issues in dispute, and a tentative order of proof."

9. **Victoria E. Brieant, *Techniques and Potential Conflicts in the Handling of Depositions*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and States Courts, Chicago, Ill. 2005.**

   Abstract: Part 1 of this article addressed the use of depositions in the United States and the rules that govern them. Topics included deposition techniques, sanctions, the limitations of depositions, objections, instructions not to answer, Rule 30(c)(2), special masters and magistrate judges, discovery of documents reviewed by deponents, videotaped depositions, the form of questions, witness preparation, non-party subpoenas, and authentication of electronic evidence. These topics are, however, of utility only when you can actually take the deposition. Getting to take a deposition is the United States is relatively easy. Despite variations in rules among the states, the fundamentals tend to be consistent. Taking the deposition of non-citizens or outside the U.S., on the other hand, can pose some serious problems. [The study materials for this CLE can be found on LexisNexis or Westlaw (For more detail: Part 1 is found at http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT0811-Brieant_thumb.pdf and Part 2 is found at http://www.stroock.com/SiteFiles/Pub695.pdf)]

10. **Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002).**

    Lexis Abstract: However, the arcane procedures and delegations of authority used by the Court in executing its original jurisdiction—where the Supreme Court functions as a trial court—have garnered newfound attention of late. ... The precedent that guides the Special Master, particularly in boundary dispute cases, is a fragile body of specialized federal common law, pasted together from international law treatises, property concepts, contract law, and sovereignty principles... " New Jersey initiated the first boundary dispute with New York in 1829, a suit in which New Jersey conceded that New York had obtained jurisdiction over Ellis Island, Staten Island, and neighboring islands by adverse possession. ... Other possible solutions include creating a specialized federal court, establishing concurrent original jurisdiction in the federal district courts, delineating procedures applicable to original jurisdiction cases, and institutionalizing the prior practice of appointing senior or retired Article III judges... Third, a specialized court likely would be better equipped to standardize the procedures applicable to original jurisdiction cases, given their continued exposure to cases raising similar procedural difficulties. ... The United States Court of Federal Claims and the United States Tax Court are specialized Article I courts; the United States bankruptcy courts are specialized federal courts, but they are considered "units" of the federal district

courts, and their judges are not subject to the appointment provisions or protections of Article III. [LexisNexis]

Citing References:

Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. 1181 (July 2005)

Westlaw Abstract: Professor Kessler suggests… that some of the worst abuses of modern litigation--and, in particular, our discovery practice--can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework. By rediscovering our lost inquisitorial history, she argues, we can learn how our botched marriage of inquisitorial and adversarial traditions resulted in much of the inefficiency and unfairness of modern civil litigation, and we can begin self-consciously and systematically to develop the inquisitorial framework necessary to remedy our adversarial excesses.

To facilitate procedural reform, Professor Kessler challenges our conception of inquisitorial procedure as alien to and incompatible with our commitment to due process.. this transformation in equity procedures led in the early twentieth century to a reconfiguring of the inquisitorial master as a trial master. She suggests that the subsequent rise of increasingly complex litigation during the second half of the twentieth century, and especially the structural injunction suit of the Civil Rights era, led to a re-emergence of the master's inquisitorial role, but that scholars have mistakenly viewed this role as a new phenomenon. Professor Kessler then posits that much of the inefficiency and unfairness of modern civil litigation--and, most especially, of the pretrial discovery process--results from integrating equity procedures into an adversarial context that permits parties to abuse powerful devices that were once controlled by the courts. Finally, she points to recent French procedural reforms to suggest that we can adopt more inquisitorial procedures without violating the core values of due process. [Westlaw]

**11. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983 (1979).**

Abstract from 1983 Duke L.J. 1265: The proposals are those made by Judge Frank M. Coffin, who has suggested major procedural changes to accommodate the exigencies of organizational change litigation. [135] He is prepared to permit an "outside expert judge" to sit in on the remedial phase, since ex parte "influence would not seem to be of as much concern at the remedial stage as when liability is at issue." [136] Judge Coffin also recommends that appellate judges "sit in on critical arguments [in the trial court], absorb the atmosphere, gain a better appreciation of the problem, and help inform the court of appeals so that it could play a more sensitive role." [137] Likewise, Judge Coffin would sanction conferences between trial and appellate judges before the trial judge decides on a remedy, [138] and he advocates the participation of the trial judge as "a resource person" [*1302] at the appellate argument. [139] He is ready to adapt existing institutions in dramatic ways to make possible inquisitorial procedures by trial judges and to make available to them "the help of proven experts." [140] Frustration with the inadequacy of the courts to cope with organizational change litigation has thus generated a willingness to tinker with procedure in quite fundamental ways, with very

little awareness that such changes might redound to the disadvantage of the system as a whole.

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

Abstract: In addition to performing traditional trial-stage tasks, masters often participate extensively in the pretrial phase by overseeing discovery proceedings and conducting settlement conferences. ... By contrast, if the order of reference appointing a special master to implement a remedial decree is unclear, she has little guidance. ... A court may use its inherent authority or its authority under Rule 53 to appoint an expert as a special master to advise the court. ... Despite the appointment of an expert special master, the *Lanzaro* court retained substantial responsibility for the ultimate resolution of the case. ... The appointment of a biased special master thus restricts the court's inquiry even further and escalates exponentially the potential for abuse when accompanied by the ability to proceed ex parte, the authority to conduct broad discovery, and a deferential standard of review. ... For example, in *Toussaint v. McCarthy,* the order of reference granted the special master broad discovery and ex parte powers as well as the power "[t]o review the placement and retention of prisoners in segregation, and to require the release of prisoners assigned to segregation without sufficient basis, in accordance with the provisions of . . . the Permanent Injunction." ... When stated in the order of reference, the master shall have the ability to monitor the defendant's compliance with the court's decree. ... [LexisNexis]

Citing References:

Thomas L. Creel & Thomas McGahren, Use of Special Masters in Patent Litigation: A Special Master's Perspective, 26 AIPLA Q.J. 109 (Spring 1998).

> INTRODUCTION: Are there unique aspects of patent infringement trials that make the use of a special master of particular benefit to the judge and the litigants? Yes, is the answer from many judges who have used them. The unanimous decision of the Supreme Court in Markman v. Westview Instruments, Inc. lends credence to the use of special masters. In Markman, the Supreme Court stated that claim construction is exclusively for the court in a jury trial. Thus, the judge is to construe the claim for the jury much like a statute, and the jury then decides infringement of the claim so construed. Because claim construction is a matter of law, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") reviews the construction under a de novo, not clearly erroneous, standard. As a result, a judge who is untutored in the science of the patented invention and in the vagaries of patent law is required to make a claim construction that can be reversed without regard to findings of fact. Such a reversal could negate a potentially lengthy trial and necessitate a re-trial. A judge may wish for help in making this cornerstone decision… This paper also explores the legal and practical requirements for the appointment and use of special masters. For example, Rule 53 of the Federal Rules of Civil Procedure only allows the appointment of a special master in non-jury trials in "exceptional conditions" and in jury trials where the issues are "complicated."

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008)

Westlaw Abstract: This article suggests that courts should appoint special masters to large-scale animal abuse cases. The work of special masters in two recent high profile cases, Sarah v. PPI and Vick, demonstrate that special masters can help advance the goals of the animal protection movement in three ways. First, special masters can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint special masters to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court appointed special masters may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for special master appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing special masters to large-scale animal abuse cases.

R. Spencer Clift, III, Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?, 31 U. Mem. L. Rev. 353 (Winter 2001)

From Article Introduction: This article attempts to justify the utilization and appointment of special masters in appropriate and rare bankruptcy cases and proceedings by explaining the unique case management role special masters contribute in exceptional circumstances. Specifically, this article calls for an amendment to the Federal Rules of Bankruptcy Procedure to provide expressly that United States district and bankruptcy courts may appoint a special master in a highly complex and rare bankruptcy case or proceeding. Notwithstanding the appropriateness of the appointment of a special master, Federal Rule of Bankruptcy Procedure 9031, a procedural rule, currently prohibits the appointment of a special master by both the United States district and bankruptcy courts in any "case" under the Bankruptcy Code ("Code"). This article focuses on the distinctive need for special masters to be appointed and authorized to participate in appropriate and rare bankruptcy "cases" and "proceedings." … Concomitantly, this article respectfully suggests that the Federal Rules of Bankruptcy Procedure should be amended pursuant to the Rules Enabling Act to expressly authorize the appointment of a special master by United States district and bankruptcy courts in appropriate and rare bankruptcy cases and proceedings. This article also respectfully requests the current United States Judicial Conference Advisory Committee on Bankruptcy Rules to reconsider its two prior declinations and thereafter recommend and transmit to the United States Judicial Conference Standing Committee on Rules of Practice and Procedure a proposed amendment to the Federal Rules of Bankruptcy Procedure providing that United States bankruptcy and district courts have the express authority to appoint special masters in highly complex and rare bankruptcy cases and proceedings.

Allison Glade Behjani, Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings, 2007 Utah L. Rev. 823 (2007).

From Article Introduction: Child-custody proceedings are an intricate, dramatic, and multi-faceted area of the family law system… judges increasingly appoint mental-health professionals as special masters and delegate to them fact-finding authority in order to inform their determination of the child's best interests. Use of special masters, however, may be problematic. Special masters in custody cases contribute to efficiency and provide family courts with psychological insights. Yet, the lack of professional and educational guidelines coupled with the power such an expert can wield over the court might ultimately harm the fragile nature of child-custody proceedings. To avoid this negative outcome, courts need clearer professional and judicial guidelines to ensure that special masters can continue to provide valuable assistance to family courts.

The Sanction of Special Masters: In Search of a Functional Standard, SN040 American Law Institute-American Bar Association 35 (2007)

INTRODUCTION: Under amended Rule 53, Masters are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to authorize masters to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of special masters in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which masters are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold masters to judicial standards of conduct when they are not full time judges and perform non-judicial functions. Further, it notes that masters need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to masters. [Westlaw]

**13. Margaret G. Farrell, *Special Masters in the Federal Courts under Revised Rule 53: Designer Roles*, ALA-ABA Course of Study: The Art and Science of Special Masters, Chicago, Ill. (2005).**

Lexis Abstract: The federal courts are over burdened and under staffed. The continued expansion of federal caseloads, the technological complexity of the subject matters presented to federal courts, the vast amounts of information available (often as a result of sophisticated computer technology), the number of claimants and the amounts of money involved have all put heavy burdens on the federal judiciary. In response, judges have increased their use of "para-judicials", or judicial assistants, to perform some of the functions usually performed by judges as well as some functions not usually performed by judges. Federal Rule of Civil Procedure 53 has been revised to support these efforts by legitimating many of the roles and responsibilities given to special masters in the past and clarifying the array of prerogatives that may be given them in the future. [LexisNexis]

**14. Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternative Dispute Resolution*, SJ034 ALI-ABA 261 (2003).**

Lexis Abstract: Rule 53 of the Federal Rule of Civil Procedure, which permits the appointment of special masters, has been completely replaced by an amended rule that will become effective December 1, 2003. This paper explores the ways in which the new rule may or may not facilitate the use of alternative dispute resolution techniques in the federal courts. Faced with growing dockets, more complex litigation and the information explosion, federal judges have urgently sought ways to enhance their effectiveness. Their efforts have given rise to at least two developments. First, judges have increased their appointments of special masters under Rule 53 to assist in complex litigation, including class actions; and second they have fostered the growth of alternative dispute resolution as encouraged by Congress, to reduce the number of cases going to trial. This paper examines the convergency of these trends. [LexisNexis]

**15. Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, ALI-ABA Course of Study: Civil Practice and Litigation Technique in the Federal Courts, SG046 ALI-ABA 1005 (2002).**

Lexis Abstract: In the last decade, judges have increasingly sought the assistance of special masters in handling complex litigation. The expansion of federal caseloads, the technological complexity of the subject matters presented, the vast amounts of information available (often as a result of computer technology), and the number of claimants and amounts of money involved have put heavy burdens on the federal judiciary. n2 The appointment of special masters is one of several procedures, including the use of magistrates, court appointed experts and technical advisors, available to judges to extend their effectiveness. [LexisNexis]

**16. Margaret G. Farrell, *Experts Testify on Expert Testimony*, Civil Justice Reform 213 (Larry Kramer & Linda Silberman eds., 1996) (No Abstract Available).**

**17. Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMPOSIUM J. 235 (1997).**

Westlaw Abstract: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of special masters under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of special masters to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of special master practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution. [Westlaw]

Citing References:

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008).

Abstract: This article suggests that courts should appoint special masters to large-scale animal abuse cases. The work of special masters in two recent high profile cases, Sarah v. PPI and Vick, demonstrate that special masters can help advance the goals of the animal protection movement in three ways. First, special masters can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint special masters to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court appointed special masters may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for special master appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing special masters to large-scale animal abuse cases.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005)(No abstract available).

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006)(No abstract available).

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges, ALI-ABA Course of Study: Civil Practice and Litigation Techniques in Federal and State Courts, SN009 ALI-ABA 1911 (2007).

Michael Dore, Special Problems in Toxic Tort Discovery: Use of Special Masters, 2 Law of Toxic Torts § 22:25 (2009)(No abstract available).

**18. Margaret G. Farrell, *The Judicial Alternative: Special Masters in Federal Practice*, 1994 Practical Litigator 37 (ABA-ALI, 1994)(No abstract available).**

**19. Margaret G. Farrell, *Extraordinary Procedures: Special Masters, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, The Federal Judicial Center (1994)(No abstract available).**

**20. Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994).**

Lexis Abstract: As discussed in Part III, the use of masters to provide scientific expertise to our generalist judges deviates significantly from each of the major elements of our traditional adversary model. ... In order to illustrate ways in which masters have been helpful in meeting the needs of judges for expert scientific assistance, the following discussion characterizes masters with reference to both their tasks and the stage of litigation at which they are appointed. ... While most settlement masters fulfill their function through informal

procedures, some hold more formal hearings in the form of [mini-trials] used to evaluate claims for purposes of settlement negotiations. Thus, it provides that in actions involving complicated issues tried before a jury or exceptional conditions in bench trials, masters may require the production of evidence, hold formal hearings in which the rules of evidence apply, issue subpoenas, administer oaths, and create a record for review. ... Finally, like masters appointed to recommend remedial decrees, some court monitors were authorized to seek out scientific and technical experts and make findings of fact based on their own viewings of institutional conditions and ex parte interviews with party and nonparty witnesses. ... Some expert masters, like some lay masters, saw themselves as knowledgeable facilitators, not [decision makers], who moved the parties to find areas of agreement about scientific and technical facts and develop agreed upon procedures for settling their factual disputes. ... Thus, issues which go to the propriety of the appointment itself--conflicts of interest, ex parte communications, scope of authority--might well be addressed expressly in the order of reference, while more procedural issues--the discovery process, the appointment of experts, formal hearing procedures--might be left to negotiation between the master and the parties after the appointment. ... When masters perform these same functions, it is believed they, too, may engage properly in ex parte communications. ... Some masters and judges feel that time-limited appointments, particularly before liability is determined, help promote negotiations and settlement, since the parties are aware that failure to settle will result in the expense of a trial. [LexisNexis]

Citing References:

United States v. Hines, 55 F.Supp.2d 62 (1999).

Lexis abstract: Handwriting analysis testimony was admissible as to similarities or dissimilarities but could not extend to an ultimate conclusion, and accuracy of cross-racial identification was a relevant issue. Defendant, charged with bank robbery, moved to exclude expert testimony comparing his handwriting to the robbery note. The prosecution moved to exclude expert testimony on the subject of cross-racial identification. The court granted defendant's motion in part because the field of handwriting analysis was not sufficiently reliable to permit an expert to render an ultimate opinion as to authorship. Handwriting analysis evidence was admissible for the limited purpose of assisting the jury in evaluating similarities, if any. The court denied the prosecution's motion, holding that because a witness of another race identified defendant, expert testimony citing scientific studies of decreased accuracy of cross-racial identification would provide the jury with relevant and useful information.

Joe S. Cecil and Thomas E. Willging, The Randolph W. Thrower Symposium: Scientific and Technological Evidence: Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995 (1994).

From the article introduction: In brief, we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court system that values, and generally anticipates, adversarial presentation of evidence. Even judges who have appointed experts view such appointments as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts. Section IV discusses the problems

that arise in identifying and appointing a suitable expert. Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointed experts. As a result, judges may not recognize the need for such assistance until the eve of trial and may have difficulty identifying and instructing an expert without disrupting the trial schedule. Section V discusses communication with the appointed experts. Communication between the judge and the expert is sometimes inhibited, especially in instances in which ex parte communication with the expert is sought by the judge. Also, we found that the testimony or report presented by an appointed expert exerts a strong influence on the resolution of the issue addressed by the expert. Section VI discusses sources of compensation of appointed experts and the problems that arise when one party is indigent. Finally, in Section VII we suggest possible changes to Rule 706 and outline a pretrial procedure that facilitates the early identification of disputed issues arising from scientific and technical evidence, clarifies and narrows disputes, and eases appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005).

From the Article: Deciding if [a child witness] interview was so suggestive that the child's memory is irreparably distorted and the child should not be allowed to testify in court is a difficult decision that will often turn on a multitude of subtle technical issues. A special master, trained in these issues, is better equipped to decide, and should decide, such an issue when so much hangs in the balance. The possibility exists that an untrained judge might exclude a valid interview based on the testimony from an expert for the defense or that an untrained judge might admit into evidence an interview conducted suggestively. Part II of this Comment consists of background information and a historical overview of the problem of the suggestibility of children in the investigative setting. Part III details the psychological research in the area of suggestibility of children during interviews. Part III also sets forth real-world examples of the effects of suggestive questioning of children. Part IV provides an analysis of the various proposed solutions to the problem of suggestibility of children, including the response of psychological scholars and courts. Part V concludes that New Jersey's solution of taint hearings should be conducted by specially trained adjudicators. Part V also outlines the procedure that should be followed for the appointment of such an adjudicator.

**21. Kenneth R. Feinberg, *What is Life Worth?: The Unprecedented Effort to Compensate the Victims of 9/11*, Public Affairs (2005).**

Abstract: As head of the 9/11 Victim Compensation Fund, Kenneth Feinberg was asked to do the impossible: calculate the dollar value of over 5,000 dead and injured as a result of the 9/11 terrorist attacks.

Just days after September 11, 2001, Kenneth Feinberg was appointed to administer the federal 9/11 Victim Compensation Fund, a unique, unprecedented fund established by Congress to compensate families who lost a loved one on 9/11 and survivors who were physically injured in the attacks. Those who participated in the Fund were required to waive their right to sue the airlines involved in the attacks, as well as other potentially responsible entities. When the

program was launched, many families criticized it as a brazen, tight-fisted attempt to protect the airlines from lawsuits. The Fund was also attacked as attempting to put insulting dollar values on the lives of lost loved ones. The families were in pain. And they were angry.

Over the course of the next three years, Feinberg spent almost all of his time meeting with the families, convincing them of the generosity and compassion of the program, and calculating appropriate awards for each and every claim. The Fund proved to be a dramatic success with over 97% of eligible families participating. It also provided important lessons for Feinberg, who became the filter, the arbitrator, and the target of family suffering. Feinberg learned about the enduring power of family grief, love, fear, faith, frustration, and courage. Most importantly, he learned that no check, no matter how large, could make the families and victims of 9/11 whole again. [Public Affairs - http://www.publicaffairsbooks.com/publicaffairsbooks-cgi-bin/display?book=9781586483234]

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

Lexis Abstract: ... In disputes involving protracted mass torts, such as asbestos, DES, and the Dalkon Shield, as well as in many environmental insurance coverage disputes, Special Masters can enter the fray and efficiently resolve trial-ready disputes by coordinating settlement negotiations using case values long recognized by the parties themselves. ... After each of the co-defendant companies and plaintiff class counsel argued their cases separately to the Special Master, all parties agreed to ask the court for its view concerning final settlement terms. ... In analyzing the role of court-appointed Special Settlement Masters, it is useful to highlight other functions which are often overlooked once settlement is achieved. ... In mass tort litigation such as the "Agent Orange" and Dalkon Shield cases, resolution between plaintiffs and defendants is only the first step, and the serious obstacle of determining eligibility criteria for payment of limited amounts to a wide variety of plaintiffs claiming a wide ranging series of illnesses and adverse medical conditions remains to be dealt with. ... Docket control requires innovative case management techniques and the court-appointed Special Settlement Master is one example of innovative use of limited judicial resources. [LexisNexis]

Citing References:

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006).

> From the article: As authorized by the [Air Transportation Safety and System Stabilization Act], the Special Master singlehandedly controls all operations of the Fund, wields broad power to create procedural and substantive rules, adjudicates claims exempt from judicial or administrative review, and manages an unlimited budget with no cap on expenditures. Congress failed to set bright-line rules, enunciate exclusionary definitions, or articulate a principled system of compensation. There is simply no "rationale, restraint, ethic or coherence" in the definition of awards, leaving the Special Master unilaterally responsible for filling in nearly every detail of the program.

In certain respects, the power the Act entrusts to the Special Master is sensible. Significant judicial review or congressional oversight generally slows the process of compensation. Furthermore, a single individual, especially one with expertise like the Special Master, is better suited to issue appropriate awards through a uniformly administered compensation scheme and can promptly construct a reliable and efficient procedure providing more immediate closure to the victims. Notwithstanding these benefits, the role granted to the Special Master is highly problematic and represents a significant defect in the Act. The ATSSSA's Special Master is a powerful decision maker vested with unfettered discretion to craft and run the Fund. All of our traditions, constitutional, doctrinal, and otherwise, militate against such authority being concentrated in a single individual. Moreover, previous congressional experience with national compensation schemes warns against the vesting of such discretion in a single individual. "The September 11th Fund will remain controversial because the source of the definition of its awards-- however able and committed--is not in any sense democratic."

More disconcerting is the effect the Fund might have on future policy. Some argue that because the Fund was a unique response to a national crisis of extraordinary proportions, the Fund will not shape succeeding compensation schemes, and the role of the Special Master will not present a model for the future.

**23. Kenneth R. Feinberg, *The Dalkon Shield Claimant Trusts*, 53 LAW & CONTEMP. PROB. 79 (1990).**

Westlaw Abstract: The purpose of this article is to examine such methods of resolving mass tort litigation. It is intended as a road map of issues that must be considered in attempting an aggregate settlement of a mass tort litigation and in developing a viable, efficient administrative system for delivering compensation.

The remainder of the article is divided into three sections. The first section discusses the issues involved in attempting a comprehensive, aggregate settlement in the mass tort context. The second section examines the development of a mechanism for distributing funds to individual plaintiffs. The article concludes with a case history of the Dalkon Shield litigation, which provides an illustrative example of the issues involved in aggregating claims and of various options for distributing compensation through an administrative mechanism.
In each of these areas, the intent of this article is to raise the various issues that will arise in attempting an aggregate settlement of a mass tort controversy and, where appropriate, to offer some options that might be considered in addressing these issues. Although each case will present new and unique issues, it is hoped that this article will help guide parties who find themselves embroiled in such a controversy to a fair and effective resolution of the matter. [Westlaw]

**24. Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVTL. AFF. L. REV. 809 (1991).**

Lexis Abstract: The Court limited the sulphur content percentage permitted in defendant's waste fumes and specified the maximum allowable amount of emissions. ... Historically, the special master was a frequently employed agent of the equity courts. ... Traditionally, the

special master was the most benign of an equity court's agents. Appointed by nineteenth-century courts to relieve the judge of the courts' most routine duties, the special master originally performed clerical functions. ... Judge La Buy had appointed a special master to make both factual determinations and conclusions of law in resolving two antitrust actions. ... Another plaintiff, a citizens' action committee, requested that a special master examine the factual circumstances surrounding the defendant's admittedly noncompliant activities. ... By its terms, Rule 53 allows a reference to a special master in an "exceptional condition." ... [LexisNexis]

Citing References:

United States v. Alisal Water Corp., 326 F. Supp. 2d 1010, 2002 U.S. Dist. LEXIS 27504 (N.D. Cal. 2002).

Lexis Overview: The court found that the adjudicated violations were serious and included falsification of records designed to protect public health under 42 U.S.C.S. § 300g-3(b), and that defendants had a decade long history of such violations. The court further observed that defendants had adopted an inordinately combative stance against legitimate regulatory oversight and had repeatedly failed to accept responsibility for their conduct, seeking to shift blame to others including the regulators themselves. Specifically, the court found that defendants not only failed to monitor and report results of water samples, but also reported numerous false results, at best with gross negligence and at worst with conscious intent to deceive. The court added that defendants lacked the managerial competence to operate compliant drinking water systems and lacked access to the significant financial resources to operate compliant drinking water systems. Accordingly, the court found that the usual remedies were inadequate and that imposition of an equitable receivership was necessary to manage defendants' water systems consistent with the objective of providing maximum feasible protection of the public health.

Charles M. Haar, The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: Boston Harbor: A Case Study, 19 B.C. Envtl. Aff. L. Rev. 641 (1992).

Lexis Summary: These conditions have made it harder than ever to develop and implement solutions for the widespread environmental degradation that is one of the most enduring legacies of the Soviet state. ... The Boston Harbor litigation was unusual even in the United States and is of interest chiefly for its innovative use of a special master. ... THE POLLUTION OF BOSTON HARBOR: HISTORY AND LITIGATION ... Nonetheless, for years the agencies responsible for environmental protection in Massachusetts failed to take effective action to address this pollution. ... Some Soviet environmental law experts have recognized that the introduction of citizen suit provisions and a judicial system capable of responding meaningfully to such suits is a necessity for the continued development of environmental protection in the new republics. ... In determining the causes of the pollution in Boston Harbor and the measures necessary to alleviate it and then preparing his report, the special master consulted many scientific and other experts. ... The case demonstrates that the courts cannot replace the legislature in dealing with environmental protection, nor should they, but that problems such as the Boston Harbor, which require complex and long-term solutions, can benefit from the

courts and the legislature working together. ... Even now, the problems of the pollution of Boston Harbor are far from solved...

Elizabeth F. Mason, Comment: Contribution, Contribution Protection, and Nonsettlor Liability Under Cercla: Following Laskin's Lead, 19 B.C. Envtl. Aff. L. Rev. 73 (1991).

Lexis Summary: In reality, courts using the comparative fault approach in CERCLA cases have not first allocated PRP fault according to proportional share of the harm, then imposed joint and several liability, and then allowed contribution actions based on the court's initial allocation of fault. ... The EPA incorporated the UCATA approach into its 1985 settlement policy in order to enable the government to settle with some of the PRPs at a site and then pursue the nonsettling PRPs for the balance of the cleanup costs, even if that amount exceeded the nonsettlors' "fair share" of the cleanup costs. ... Second, according to the Rohm & Haas court, the UCFA approach is inconsistent with SARA's goals of minimizing litigation and promoting voluntary settlements.

Jason Feingold, Comment: The Case for Imposing Equitable Receiverships Upon Recalcitrant Polluters, 12 UCLA J. Envtl. L. & Pol'y 207 (1993).

Lexis Summary: As a result of the attorney general's actions, the widget factory pays a substantial fine and pledges to bring its facility into compliance with the terms of its pollution discharge permit. ... In Langdell, the attorney general secures environmental compliance without threatening the viability of the defendant's enterprise. ... The authority of a court of equity to impose a remedial receivership on a recalcitrant polluter is "founded in the broad range of equitable powers available to [a] court to enforce and effectuate its orders and judgements." ... The importance to the community of preserving the enterprise can also be characterized as supporting the advisability of imposing receivership, since persistent noncompliance is likely to inflict severe harm on the defendant in the form of cumulative environmental fines, contempt penalties, and civil judgements. ... However, if environmental receivership is viewed as primarily a remedial, rather than punitive, measure, the goal of achieving environmental compliance will be well served by imposing receivership in cases lacking bad faith, if the defendant exhibits persistent inability to comply with the law. ... Another tactic for avoiding losses during the receivership is to restrict the receiver's powers to only those aspects of the enterprise which affect environmental compliance.

Michael B. Gerrard et al., 2-7 Environmental Impact Review in New York §7.17 (2008)(No abstract available).

**25. 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 (2005), *available at* http://www.courtappointedmasters.org/resource_articles.asp.**

Lexis Abstract: The need for their services will continue to increase, making special master appointments more common and important in the years ahead. ... " Courts provided a strict interpretation of exceptional conditions, making it clear that neither the congestion of the court docket nor the complexity of the litigated issues were sufficient to justify a special master appointment. ... As a response, the revised rule delineates three specific roles to be

filled by a special master appointment: pre-trial masters, post-trial masters, and consent masters. ... 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. ... It is clear that the order of appointment should prescribe ex parte communication guidelines for the settlement master that both facilitate settlement processes and preserve an unbiased forum for judicial dispute resolution. ... Such guidelines would alert judges, parties and masters to possible future conflict situations and help judges prescribe appropriate ex parte communications rules in special master appointment orders. ... Support staff reductions above a certain level clearly could reduce judicial capacity to handle increased caseloads - especially complex cases with a large load of filings. [LexisNexis]

Citing References:

Jeffrey W. Stempel, F. Hodge O'Neal Corporate and Securities Law Symposium: Mutual Funds, Hedge Funds, and Institutional Investors: Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes, 83 Wash. U. L. Q. 1127 (2005)

> From the article: The type of hearing master/special master use I advocate has been common as part of class action or mass tort settlements. Agent Orange, asbestos, discrimination, and securities claims all provide examples. In my view, this approach has worked well, so well that we should not insist on settlement as a prerequisite to such use of judicial adjuncts to make preliminary factfinding on individual damages questions within a class. To be sure, incorporation of this approach in a settlement has certain advantages because the parties can agree to be bound by the master's findings, thereby eliminating the additional cost and uncertainty of de novo challenge to the master's work. But if the master-managed damages processing is done well, de novo challenges (or at least de novo challenges that are taken very far) should be relatively few in number. This appears to have been the experience with court-annexed arbitration, where litigants appear either to accept their awards or to file for de novo trial only to have some negotiating leverage, eventually resolving the matter well short of trial.

**26. David Ferleger, *Masters in Complex Litigation & Amended Rule 53* (2005), *available at* http://www.courtappointedmasters.org/resource_articles.asp.**

Abstract: This article is in three parts, the first two of which appear here. Part 1 reviews the functions of special masters in complex and structural litigation, including extensive citation resources intended to assist practitioners and courts. Part 2 details the new landscape established by the 2003 revision to Federal Rule of Civil Procedure 53. Part 3 will focus on challenging questions which arise when courts utilize masters such as overlap of the master role with the expert witness role, whether masters may be called as witnesses, ex parte communication between masters and the court or parties.
[http://www.courtappointedmasters.org/Ferleger_master_ARTICLE.pdf]

**27. David Ferleger, *Masters in Disability Litigation & Amended Rule 53*, 29 MENTAL & Physical DISABILITY L. REP. 157 (American Bar Association 2005).**

In the past 25 years, many court orders enforcing the rights of people with physical and mental disabilities have been managed for courts by judicial adjuncts who, in the federal system, are typically special masters appointed by the responsible court. These include cases involving such issues as community placements from institutions,[1] special education,[2] early childhood screening,[3] annuities,[4] prison mental health care,[5] hospital barrier removal,[6] housing access,[7] and employment.[8]

Disability litigation often results in "structural injunctions,"[9] which are highly complex; require development of multiple plans and establishment of policies, procedures, and safeguards; and typically necessitate mid-course refinements. Such litigation may involve years of active post-judgment oversight by the court. Sometimes, defendant government officials "succumb to political pressures to shirk their constitutional responsibilities."[10] Commitments in consent decrees or court-approved plans may not be met. Individual cases may also involve sufficiently diverse tasks to be appropriate for use of a master to conserve judicial resources.

Courts typically do not have the time or expertise to oversee decrees without the assistance of an adjunct. For vulnerable people with disabilities, it is often a matter of some urgency when they turn to the court for relief under existing injunctions. In such situations, a master's availability may be essential to affording adequate and timely relief. As one court observed, "time is of the essence with these motions. When the physical or emotional health and safety of a [disabled] child is threatened, the matter cannot wait for the Court's calendar to clear."[11]

This article describes the variety of functions that masters perform and explains the major changes wrought by the recent amendment to the federal rule on masters. The extensive endnotes may serve as a resource for courts and counsel considering the use of masters.

[Hein Online – http://www.heinonline.org.proxy.wmitchell.edu/HOL/Page?handle=hein.journals/menphydis29&id=1&size=2&collection=journals&index=journals/menphydis ]

**28. Clayton Gillette, *Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem*, 49 ST. LOUIS. U. L.J. 499 (2005).**

Abstract: ... While this may be a "cute" phenomenon among children in everyday life, it is certainly not "cute" when the child is a witness to a serious crime or is alleged to be a witness to a serious crime. ... However, it would be virtually impossible to eliminate the researcher's and child's awareness of the reason for the encounter. ... There are obviously extremes on either side of the false positive/false negative argument. ... The Supreme Court of New Jersey addressed the issue of whether or not a particular interview (or battery of interviews) of a child (or children) was suggestive in Michaels, holding that a pretrial taint hearing should be conducted wherein the trial court can make a ruling on the suggestiveness of the interview and

thereby decide if the transcript of the interview (and other evidence of the interview) should be excluded from trial and even if the child should be excluded from testifying at trial. ... " The Court based this decision to exclude, in part, on the suggestive interview techniques used by the interviewer. ... Appointment of a court-appointed expert will lead to undue delay during a taint hearing because the expert will need to take the time to educate a judge on the issues, while a special master could simply decide the issues based on the technical knowledge already possessed by the special master. ... [MLV: LexisNexis]

Citing References:

Gregory M. Bassi, Comment: Invasive, Inconclusive, and Unnecessary: Precluding the Use of Court-Ordered Psychological Examinations in Child Sexual Abuse Cases, 102 Nw. U.L. Rev. 1441 (2002).

Lexis Summary: ... Before we can answer this question, we must examine the legal history of compelled psychological examinations, the empirical research regarding the effectiveness of children as witnesses, and the role of mental health experts in child sexual abuse cases. ... Osgood, the Supreme Court of South Dakota listed a series of factors: 1 The victim's age; 2 the nature of the examination requested and whether it might further traumatize the victim; 3 whether the prosecution employed a similar expert; 4 whether the evidence already available to the defendant suffices for the purpose sought in the examination; 5 whether there is a reasonable basis for believing that the child's mental or emotional state may have affected the child's veracity; 6 whether evidence of the crime has little or no corroboration beyond the testimony of the victim; 7 whether there is other evidence available for the defendant's use; and 8 whether the child will testify live at the trial. ... Bruck and Ceci's amicus brief used the extreme facts of the investigation in Michaels's case to highlight weaknesses in the reliability of child victim witnesses. ... In addition to evidence of previous false allegations, the defendant may also impeach the credibility of the witness by providing the jury with existing records of the victim's previous medical and psychological examinations, supplemented by expert testimony to explain their contents. ... Such a special standard for child victims of sex crimes places those victims in a significantly subordinate legal position to victims of other crimes. ... In sum, a categorical ban on compelled psychological examinations of complainant witnesses in child sex abuse cases would give effect to strong public policies that favor victims' welfare and rights. ... Abbott and Nobrega exemplify the divide among jurisdictions regarding how to balance the victim's welfare and right to be free of burdensome discovery techniques against the defendant's right to a fair trial.

Tamar R. Birckhead, The Age of the Child: Interrogating Juveniles After Roper v. Simmons, 65 Wash & Lee L. Rev. 385 (2008).

Lexis Summary: ... It explains how Simmons can inform a new approach by both law enforcement and the courts to the questioning of juvenile suspects, one that is consistent with what recent studies have revealed about the ways in which adolescents experience interrogation and is also consistent with the law's approach to the questioning of minors who are witnesses or alleged victims of crime. ... That Kennedy began the opinion by recounting the rather harrowing facts of the murder of Shirley Crook speaks to the question of whether capital jurors should have the discretion to decide which juvenile

offenders should be executed as well as to the matter of the proper weight that a defendant's youth should be given in the death penalty calculus. ... In order to demonstrate Simmons's applicability to the questioning of adolescent suspects, it is necessary first to explain how interviewer bias combines with the Reid Technique, the widely utilized interrogation strategy of police investigators, to produce statements from suspects that are false or inaccurate. ... Simmons for why juveniles could not be classified among the worst offenders in the context of capital punishment also serve to explain, at least in part, why children and adolescents are particularly vulnerable in the context of interrogation. ... Alvarado: Privileging "Objective" Standards Pre-Simmons As discussed in Part II, one of the most significant aspects of Justice Kennedy's opinion in Roper v. ... Relying on past precedent-from cases in which the suspects were adults, not juveniles-Kennedy found that seventeen-year-old Michael Alvarado was not in custody when he confessed to the murder of a truck driver after two hours of interrogation without Miranda warnings.

**29. Ronald J. Hedges, *Discovery of Digital Information*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005( No abstract available).**

**30. Ronald J. Hedges, *Complex Case Management*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) ( No abstract available).**

**31. Ronald J. Hedges, *Mediation Developments and Trends*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) ( No abstract available).**

**32. Ronald J. Hedges, *Punitive Damages*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) ( No abstract available).**

**33. Lonny S. Hoffman, *November 2005 Caselaw Update (to Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*), ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) ( No abstract available).**

**34. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265.**

Abstract from Lexis: ... The defendants have been such governmental bodies as school systems, prison officials, welfare administrations, mental hospital officials, and public housing authorities. ... The decree that purports to reform a public institution often injects the courts into the public budgeting process. ... In institutional reform cases, the operational meaning of the American equity tradition is to legitimize detailed affirmative decrees having a long life, in the name of insuring that equity does not suffer a wrong without a remedy. ... Underlying these developments is a growing recognition that institutional reform litigation has

requirements different from those of earlier, more conventional, if protracted, litigation, requirements that justify extraordinary procedural flexibility. ... Just as institutional reform litigation comprises a small but highly significant minority of cases on the federal docket, so judges who have engaged in attempts to supervise organizational change comprise only an important minority of all federal judges. ... Institutional reform litigation may be different, and it may be difficult, but it is not impossible. ... The assumptions carried by the traditional model into institutional reform litigation are easily stated. ... Among the more common devices is appointment of a special master, a monitor, a review committee, or, in more extreme cases, a receiver to take over administration of the agency. ... In a Rhode Island prison case, a master was empowered to monitor compliance with the decree.

Citing References:

Chris H. Miller, The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation, 72 Alb. L. Rev. 117 (2009).

Lexis Abstract: Unless the expected return from the classed mass tort claims, net of the costs of litigating ... exceeds the return expected from competing sporadic claims, plaintiff attorneys would admit the sporadic and exclude the mass tort claims from the system... Indeed, nearly all legal models have normative underpinnings and their authors frequently articulate normative reactions and prescriptive suggestions to those models. ... They also accounted for important changes by revising inherited models to more accurately reflect contemporary features of the legal system and provide an adequate framework for understanding and describing legal issues and processes... Also, although Chayes briefly gestures at "outsiders" as a common feature of public law litigation, for Horowitz, Federal Rule 53's provision of a special master is "the most significant procedural device" recently applied by the courts. ... At any rate, the underlying similar, and at times identical, features of the two models describe essentially the same transitional phenomenon - the judicial movement from adjudication of private disputes to ongoing and widespread relief of government entitlement failures. ... In this respect, legal scholars have probably overstated the degree of difference present in the transition from Chayes' public law litigation to Horowitz and Resnik's managerial litigation. ... Other critics challenge alternative forms of adjudication on grounds that they violate the constitutional separation-of-powers doctrine and argue that judicial policymaking encroaches on the policymaking responsibilities of the legislature.

**35. Johnson, *Equitable Remedies: An Analysis of Judicial Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161 (1976).**



This comment deals with the problems posed by recent applications of neoreceiverships. Because current use of receiverships involves substantial shifts from earlier applications, the law of receivership is best understood developmentally. Thus, this comment traces the development of receivership law through three major phases. Initially, receivers were used to protect private property for the benefit of one party to the litigation: for example, the creditor or the trustee.[11] Section Two of this comment[12] illustrates the use of receiverships to protect private property and outlines the particular equitable characteristics which made the remedy functional. Second, receivership was used to protect private property interests where such protection was essential to preserve the public welfare: for example, in railroad reorganization[13] and in municipal default.[14] Section Three of the comment[15] illustrates that the American experience with use of receiverships to preserve the public welfare has centered on two specific equitable characteristics of the remedy: its inherent flexibility and its coercive potential. The final phase of receivership development involves abandonment of the protection of property interest as a requirement for using equitable powers and extends receiverships to protection of constitutional rights of private individuals. Section Four of the comment[16] discusses the expansion of the traditional receivership concept to include protection of nonproperty rights and argues for the legitimacy of such expansion. Section Five[17] addresses further the problems surrounding the current application of neoreceiverships, focusing on implementation procedure, remedial propriety, receivership duties, and other related problems. This section illustrates that the remedy is favored where extraordinary circumstances exist and where remedial adaptation to these conditions is essential because other forms of relief are impractical, unavailable, or unsuccessful. Furthermore, this remedy is favored where control of a local institution is mandated, requiring specific administrative and supervisory skills in order to effectuate internal organizational change, or where judicial coercion is essential to accomplish a particular result.

11. SMITH, *supra* note 3, at § 4(a)-(d).
12. *See* text accompanying notes 18-45 *infra*.
13. See T. FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION IN BANKRUPTCY (1937) [hereinafter cited as FINLETTER] for a general history of corporate reorganization; *see also* Rosenberg, *Reorganization—The Next Step*, 22 COLUM. L. REV. 14 (1922); Glenn, *The Basis of the Federal Receivership*, 25 COLUM. L. REV. 434 (1925); Finletter, *Federal Consent Receiverships*, 15 PA. B. ASS'N. Q. 1 (1933); Note, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 19 IOWA L. REV. 540 (1934); MOORE, FEDERAL PRACTICE § 66.06[2], for specific applications to railroads.
14. See C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOL. VI: RECONSTRUCTION AND REUNION 1864-88 chs. 12, 13 (P. Freund ed. 1971) for a detailed history of federal court involvement in municipal bond disputes.
15. *See* text accompanying notes 46-90 *infra*.
16. *See* text accompanying notes 91-207 *infra*.
17. *See* text accompanying notes 208-74 *infra*.





**36. Frank. M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981)(No abstract available).**

**37. 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 (2005), *available at* http://www.courtappointedmasters.org/resource_articles.asp.**

Abstract: 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." 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. 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.

Citing References:

Scott Paetty, Complex Litigation in California and Beyond: Classless not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts, 41 Loy. L.A. L. Rev. 845 (2008).

Lexis Abstract: Ultimately, the flexibility of federal summary judgment procedures, which allow judges to dispense with individual issues in a cause of action, better serves the principles of effective case management than CCCS summary judgment procedures, which only permit summary judgment on entire causes of action. ... For example, the Northridge Earthquake litigation highlighted the CCCS's successful resolution of thousands of insurance claims brought in the wake of the 1994 disaster. ... Given the inherent complexity of cases in the CCCS, the need to "get it right" in the initial determination of coordination is of paramount importance. ... While the use of special masters has not disappeared, CCCS judges tend to limit them to provisionally complex cases or construction defect actions where complicated discovery issues necessitate special care... This Part provides a brief overview of the different definitions of consolidation, describes the various rules that govern consolidation in the CCCS and the federal courts, and shows the ways that coordination and consolidation blend when discussing complex case management... CCCS judges can dispense with the actions by settlement, dismissal with prejudice, summary judgment, judgment after trial, or remand of individual cases to their original courts.... After pretrial proceedings are concluded, however, the transferee judge sends the case back to the MDL Panel for remand to the court from which it was first transferred.... If our hypothetical case were filed in the CCCS, the judge could order counsel for Joe Writer and BYDA to propose jury instructions on an element of the cause of action two weeks into proceedings.

**38. Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958) (No abstract available).**

**39. Ron Kilgard, Discovery Masters: When They Help – and When They Don't, 40 ARIZ. ATT'Y 30 (2004).**

Abstract: 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.

**40. David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L. J. 141 (1985).**

Lexis Abstract: ... The Article discusses four standards that federal courts have recently considered for setting masters' fees: First, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court of the United States in 1922, that compensation should be "liberal but not exorbitant"; third, basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, basing the fee on some variation of the lodestar method of setting attorney's fees. ... Retiring masters collaborated with the Lord Chancellor, who actually made the appointments, to obtain payments from the new master in exchange for the appointment. ... Calculating Masters' Fees Fees for Work Done as Special Master From the preceding discussion, four different approaches to the problem of calculating special masters' fees can be discerned, particularly in the institutional reform setting: first, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court in Newton, that compensation should be "liberal but not exorbitant"; third, the Hart/Reed II & IV method of basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, the Reed III approach of basing the fee on some variation of the lodestar method of setting attorney's fees. ... Thus, an academic institution does not expect a professor to perform outside work that will generate income for the institution; the institution encourages and supports faculty public service endeavors by a variety of services and overhead expenses, such as office space, secretarial and student research assistance, library books, stationery, and telephone service. ... It is not clear, however, if all of these modified Johnson factors should apply to a special master who is compensated using a lodestar rate. [LexisNexis]

Citing References:

Jackson v. Nassau County Bd. Of Supervisors, 157 F.R.D. 612 (E.D.N.Y. 1994).

The court considered Fed. R. Civ. P. 53(a) and the award of attorney fees determined by the lodestar method and other methods. The court found that a computer print-out delineating the time charges submitted by the special master adequately set forth the amount of time spent by the special master and certain attorneys working on this case. The only specific dollar objections by the county that the court found valid were the arithmetic errors in the tabulation of daily time records, which amounted to an overcharge of 3.75 hours in the sum of $ 937.50, a specific entry for 2.75 hours of work, in the sum of $ 269.50, that did not describe what was performed during that time, and the time charged for time spent at meals. The court excluded the time and costs of meals. Further,

the rates charged for the work of summer interns, paralegals and other support staff were excessive. The court rejected the county's objections regarding the fees and disbursements of a doctor. Because of the nature of the case, namely, one involving public institutional relief and service to the public, a twenty-five percent reduction of the special master's fee application was appropriate.

Cordoza v. Pac. States Steel Corp., 320 F.3d 989 (9th Cir. 2003).

Lexis Overview: The appellate court lacked jurisdiction to consider the appeal because even though the special master had a right to appeal a district court order setting his compensation, the district court orders at issue were not final judgments under 28 U.S.C.S. § 1291. The district court's orders disqualifying the special master and ordering disgorgement were intertwined with the corpus of the litigation in that they determined what share of an existing pool of money went to him and what share went to the plaintiffs in the underlying litigation. Although the compensation issue was important to the special master, his interest was not weightier than the societal interest in a final judgment in the underlying litigation. Treating the request as a mandamus petition, the special master was not entitled to relief as the trial judge had not abused her discretion in entering the orders. Mandamus was also not warranted under 28 U.S.C.S. § 455 because the trial judge's evaluation of the special master's performance of his duties was part and parcel of her supervisory duties and her receipt of limited information ex parte was done in order to preserve the integrity of the judicial process.

LeRoy L. Kondo, Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases, 2002 UCLA J.L. & Tech. 1 (2002).

Lexis Summary: Topics for discussion include (1) the specialist/generalist court debate over increased specialization within the judiciary; (2) the effects of specialization within the federal court system on uniformity, determinancy, accuracy, precision, and predictability of judgment--with particular focus placed upon the Federal Circuit, a stabilizing semi-specialized tribunal; (3) criticisms of the Federal Circuit and federal courts for indeterminancy due to "panel dependency," doctrinal vagueness in claim interpretation, and inexperienced lay jury panels; (4) the impact of specialization in prevention of forum shopping through the uniformity of nationwide application of intellectual property law; (5) judicial efficiency and economy resulting from specialization in attempts to relieve the crisis in volume plaguing the federal courts; and (6) the effects of a more specialized judiciary on the protection of American business interests, promotion of research and development, with discussion of countervailing policy considerations. ... The Federal Circuit's Impact On Patent Law Policy Transformation And The CAFC's Role In Protection Of United States' Business Interests Notwithstanding its lack of specific expertise, the Federal Circuit has significantly advanced the delineation of patent law doctrine over the past three decades, due, at least in part, to its semi-specialized jurisdiction and focus. ... ICANN effectively utilizes its authority and URDP policies to resolve domain name disputes at low cost and within a short two-month time frame. ... Since federal courts have historically deployed primarily generalist judges, and since specialized judges have primarily resided in state courts (e.g., family court, drug court) having lower status and compensation, specialization has been unfairly stigmatized as being inferior. ... Thus, specialized judges, with technical training

and calendars dedicated to intellectual property matters, would possess both the ability and time to become "expert judges" in the intricacies, nuances and subtleties of complex areas of law. ... Lack of uniformity of application of patent laws historically led to rampant forum shopping, with bitterly fought battles in the circuits over patent infringement cases. ... § 1835, experts under Rule 706, and special masters under Rule 53 to permit greater comprehension of complex technical/legal issues; (2) the Federal Circuit's own use of technical advisors in its appellate review of PTO and District Court decisions; (3) recommended court reform thorough increased use of specialist judges and adjudicators in the Federal Circuit, PTO, and federal district courts; (4) establishment of specialized divisions within the Federal Circuit, PTO, or District court; (5) the deployment of professional or educated "blue ribbon" juries in the resolution of complex issues of fact, with discussion of the shortcomings of the existing lay jury system in high technology cases; and (6) establishment of federal high technology judicial or administrative courts. ... Rich, the "elder statesman of the patent bar" recently died, Richard Linn, a former patent attorney from Foley & Lardner, replaced him as the newest appointment to the twelve-member Federal Circuit. ... Another progressive specialization proposal would be to establish the Federal Circuit as an entirely specialized high technology court staffed by panels of specialized adjudicators, attorneys and juries that would hear cases involving their respective fields of specialization, such as biotechnology, engineering, telecommunications, computer science, business methods, and Internet law. ... However, high technology proponents, such as those in Internet and other newly evolving arenas, may look optimistically towards increased specialization in the federal courts and in international forums as a means for solving the complexity problem--at least in part.

**41. David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).**



The issues in the debate over the authority to appoint remedial special masters can be briefly summarized. First, does rule 53, with its prominent references to trial-stage appointments of special masters, give courts that have already decided upon the liability of the defendants authority to appoint special masters to perform complex tasks up to and including running a state institution such as a prison or a mental hospital? Second, does rule 70, with its language referring to the appointment of "some other person" to perform specific acts on behalf of a party, authorize courts to appoint remedial special masters to perform complex tasks? The term "master" does not even appear in the rule, and the rule expressly mentions only limited tasks such as conveyances of property. Finally, do courts have inherent power to appoint remedial special masters and, if so, what is the relationship between that power and these two rules, which may fully regulate those appointments?

This Article discusses the ongoing controversy over the adequacy of these sources of authority, which federal courts have used to appoint special masters to assist in the development and implementation of institutional reform decrees.[10] Each source of authority will be discussed in light of an important but largely unknown and unpublished primary source concerning the intent of the original Advisory Committee on Rules for Civil Procedure, the drafters of the Federal Rules of Civil Procedure.[11] This source is the extensive collection of papers maintained by Charles E. Clark, then Dean of the Yale Law School and Reporter for the original Advisory Committee. To understand fully the intent of the drafters, which was to preserve existing tradition and practice, this Article then discusses, in the context of rules 53 and 70, the use of special masters for remedial purposes in the period prior to the promulgation in 1938 of the Federal Rules of Civil Procedure.[12] This Article draws the implications of this history for the appointment of remedial special masters in modern institutional reform cases.[13] Finally, to preserve expressly the clear intent of the drafters, this Article proposes some clarifying amendments to rules 53 and 70 to confirm the authority of the courts under the federal rules to appoint remedial special masters.[14]

---

Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

[10] *See infra* text accompanying notes 15-43, 107-15.

[11] *See infra* text accompanying notes 63-89, 116-30.

[12] *See infra* text accompanying notes 94-106, 131-38.

[13] *See infra* text accompanying notes 198-242.

[HeinOnline (Right from the Text)]

Citing References:

Vikramaditya Khanna & Timothy L. Dickinson, The Corporate Monitor: The New Corporate Czar?, 105 Mich. L. Rev. 1713 (2007).

Lexis Summary: Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. ... The corporate monitor of today can be traced to the special masters of the past... As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 Prudential Securities case in which the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the company as per a DPA. ... Monitors often have more expertise than

management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. ... A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. ... However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor... Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors.

**42. Michael K. Lewis, *The Special Master as Mediator*, 12 SETON-HALL LEGIS. J. 75 (1988).**

**THE SPECIAL MASTER AS MEDIATOR**

***Michael K. Lewis***

***Introduction***

Courts have increasingly begun to use special masters to aid in the implementation of complex institutional reform orders or consent decrees as well as to aid in the settlement process. The use of special masters in either circumstance raises significant questions. This paper discusses some of those questions and focuses on those issues peculiar to the special master as mediator.

[HeinOnline (Right from Text)]

**43. Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).**

Lexis Abstract: In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. ... These efforts have focused upon the problems of excessive transaction costs, delayed access to courts, lack of horizontal equity in outcomes, and the overall challenges to the legitimacy of the judicial process in the resolution of mass torts. ... The institutional cooperative strategy is thus a hybrid approach, attempting to accentuate the strengths of the case-by-case model of litigation and federalism, while minimizing the model's inefficiencies and inequities. ... Finally, there is a small group of law firms capable of pursuing any strategy - boutique, class action, or wholesale - depending upon the opportunities presented by each mass tort. ... If the MDL panel made it explicit that the transferee judge is not to engage in aggregation other than discovery until the mass tort matured in the marketplace of state court litigation, there would still be some duplicative discovery. ... A strategy of cooperation at the institutional level - taking advantage of the state courts to create a marketplace of litigation and the federal courts to coordinate discovery and promote a national settlement - can create otherwise unobtainable joint gains.

From Article's Introduction: "Judges are now players in the mass tort game. Whatever approach any judge takes in managing a mass tort, judicial input is a critical factor in the ultimate progress of the litigation. To certify or not to certify, for example, is a question that must be answered with profound results for the outcome of the mass tort. Recognizing the role of judges, recent legal literature has suggested that the ubiquity and massness of the tort

should lead to cooperation among judges. Through cooperation, judges can promote efficiency and horizontal equity in the adjudication.

"Cooperation" among judges has been promoted in multiple and often confusing forms; "cooperation" has varyingly meant communication, coordination, collaboration, or cooperation in the negotiation sense of seeking joint gains. In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. This strategy has critical weaknesses that limit its ultimate value. It has behavioral, structural, and political impediments; it can conflict with an appreciation of the maturity and elasticity of mass torts, and it may run contrary to recent Supreme Court jurisprudence. There is an alternative cooperative strategy that has significantly more potential for benefiting judges, litigants, and the legal system as a whole. The alternative strategy can be implemented de jure or de facto and focuses at the institutional, rather than individual, level and suggests complimentary, rather than competing, roles for state and federal courts.

Citing References:

Beko Reblitz-Richardson, Lockheed Martin and California's Limits on Class Treatment for Medical Monitoring Claims, 31 Ecology L.Q. 615 (2004).

> From the article: In Lockheed Martin, the court considered class certification for individuals seeking medical monitoring damages based on exposure to harmful chemicals in their local water source... This Note focuses on the question of whether or not medical monitoring claims, and more specifically the chemical exposure claims at issue in Lockheed Martin, are suitable for class treatment. ... In Lockheed Martin, the court not only considered class certification for medical monitoring claims, but did so with environmental pollution claims... A medical monitoring program nonetheless places certain burdens on the court. For example, a court implementing a medical monitoring program will need to appoint a commission or a special master to determine who is covered, how payments should be made, and the scope of the program. Monitoring programs require an ongoing involvement by the court in the administration of the fund, a level of judicial involvement distinct from traditional models of compensation. In response to these considerations, different jurisdictions have embraced or rejected such medical monitoring claims.

**44. Gregory P. Miller, *How to Develop a Special Master Practice*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).**

**45. Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL.L.REV. 419 (1979).**



The purpose of this article is to explore the developing use of masters by federal courts in institutional reform litigation. It commences with a review of the sources of authority for the appointment of such an agent. While it is generally recognized that masters may be appointed pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure, one of the theses of this article is that this rule is not the sole source of the appointing court's authority; nor are all functions assigned to masters contemplated by Rule 53. Indeed, it will be urged that such appointments may be made under Rule 70 of the Federal Rules of Civil Procedure, in accordance with the Federal Magistrates Act, and, in spite of the adoption of Rule 53, through the exercise of the inherent power that resides in federal courts. The author then will move to a consideration of the authority and precedent for the appointment of a master in the specific context of institutional litigation. Within this setting, the advantages and disadvantages of a reference, the objectives of the court in appointing a master, and issues relating to the selection of such an agent, his powers, and the ethical and professional constraints upon his activities will be discussed. The article concludes with an examination of the effectiveness of the reference technique in the setting of institutional reform litigation.

*The sources of authority for the appointment of a master.* Historically

[HeinOnline (directly from the text)]

**46. Martin Quinn, *Outline of Ethical Issues for a Special Master*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).**

**47. Randi I. Roth, *Monitor Work in* Pigford v. Johanns: *Lessons Learned About Claims Processing Judicial Adjunct Work*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).**

**48. Jerry Sandel & Sherry Wetsch, *Mediation of Criminal Disputes in the 278th Judicial District*, 25 IN CHAMBERS 3 (1998).**

From the Article: Alternative dispute resolution (ADR) mechanisms - mediation and arbitration - often offer a quicker, less expensive, and more conciliatory way to settle a dispute than litigation. Potential litigants are using these alternatives more, particularly to resolve family law, consumer law, personal injury, and employment law disputes. Many state and federal laws and policies now promote or even mandate ADR.

Resorting to arbitration or mediation is faster and costs less than traditional litigation methods. In addition, litigation is public, while ADR mechanisms generally enable the parties to preserve their privacy. Although it usually helps to have a lawyer present during arbitration or mediation, it is not uncommon for parties to represent themselves, because the procedures are much more informal and flexible than those used in a court hearing. Alternative dispute resolution can produce better and more creative results for the parties, and possibly even

preserve an amicable relationship between them. On low dollar and simple cases, the parties may consider a telephone hearing.

Legal assistance attorneys are finding that mandatory mediation or arbitration provisions are often embedded in many contracts, including standard consumer purchase agreements, credit card contracts, insurance contracts, leases, utility contracts, and contracts involving securities. These clauses are also commonly included in employment contracts.4 Many contractual arbitration clauses specify binding arbitration as the only means to resolve any future disputes arising out of the contracts.

Almost any kind of dispute may be suitable for ADR, and legal assistance practitioners may find it advantageous for their clients to affirmatively seek out ADR services, particularly in divorce, child custody, or other family disputes. This article offers a practical introduction to mediation and arbitration and identifies several web resources. In addition, it includes some useful observations and insights into ADR from an experienced neutral. [Copy available at: http://adr.navy.mil/docs/jun2000talwetsch.pdf ]

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

From the Article: The modern practice and use of special masters gradually evolved from a strict and limited role for trial assistance prescribed by Rule 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice. The result is a new rule (effective Dec. 1, 2003) that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context. [Westlaw]

Citing References:

Frederick B. Lacey & Jay G. Safer, Magistrate Judges and Special Masters: The Authority, Roles, Responsibilities, and Utilization of Special Masters, 3 Bus. & Com. Litig. Fed. Cts. § 28:33 (2d ed.) 2008.

Summary: Fed. R. Civ. P. 53 generally governs the appointment and compensation of special masters, references to special masters, powers of special masters, proceedings before special masters and reports of special masters, when the appointment of the special master is made under Rule 53. The full text of Rule 53 is set out at the end of this section.

William L. McAdams & Sherry R. Wetsch, Alternative Dispute Resolution of Criminal Disputes in the 12th Judicial District, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, San Francisco, CA 2006 (No abstract available).

Margaret G. Farrell, The Sanction of Special Masters: In Search of a Functional Standard, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Washington, D.C., 2007.

From the Article: Under amended Rule 53, Masters are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to authorize masters to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This

article examines the use of special masters in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which masters are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold masters to judicial standards of conduct when they are not full time judges and perform non-judicial functions. Further, it notes that masters need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to masters.

**50. 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 (Jan. 2004).**

From the Article: The modern practice and use of special masters in federal courts gradually evolved from a strict and limited role for trial assistance prescribed by Federal Rule of Civil Procedure 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice.

The result is a new rule, effective as of December 1, 2003, that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context. In general, the changes provide more flexibility in the use of special masters, permitting them to be used on an as-needed basis with the parties' consent or by court order when exceptional conditions apply.

This article reviews the history of Rule 53, the evolution of the use of special masters in practice, and the significant new provisions of Rule 53. [Westlaw]

**51. Shira A. Scheindlin & Jonathan M. Redgrave, *Mastering Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).**

**52. James K. Sebenius, Ehud Eiran, Kenneth R. Feinberg, Michael Cernea, and Francis McGovern, *Compensation Schemes and Dispute Resolution Mechanisms: Beyond the Obvious*, 21 NEGOTIATION J. 231 (Apr. 2005).**

Wiley Abstract: Because compensation and dispute resolution lie at the core of most resettlement proposals, this panel had two main objectives: to get an accurate grasp of the current Israeli approach to these challenges and to glean insights from relevant experiences in other settings. Before reading our panelists' presentations, one might be forgiven for reasonably thinking that "compensation equals cash" and "dispute resolution equals court." As our panelists discussed, however, such a straightforward view is simply inadequate to the needs of the resettlement problem — a much richer view of compensation and dispute

resolution is required. [From http://www3.interscience.wiley.com/journal/118656713/abstract]

**53. Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).**

From the article: This birthday celebration of the Federal Rules is a time to marvel at the enduring character of the 1938 Federal Rules of Civil Procedure. Given the dramatic changes that have taken place in litigation over these decades, it is no surprise that the proponents of the philosophy of uniform and trans-substantive rules believe that time has proved their case. I want to suggest, however, as indeed others already have, [FN1] that trans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules. One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts, who customize procedure for particular and individual cases. This example supports those who call for a different approach to federal rulemaking.

The judicial adjuncts to whom I refer are primarily masters and magistrates. There are also the newly created arbitrators in court-annexed arbitration used in a number of districts, but that experience is relatively new, and I bypass them for purposes of present discussion. There is no doubt that the use of judicial adjuncts has been extremely valuable in processing our expanding and complicated contemporary litigation caseload, and thus I intend my comments less as an attack on the use of masters and magistrates than as an example of why more dramatic procedural reform is in order. In short, I think delegations of judicial power to masters and magistrates have become the substitute for a more precise and specialized procedural code. To some extent then, the debate can be seen as one between those who are satisfied with an individual case-by-case customized procedure put in place by judicial adjuncts versus those who advocate more formal rules that do not slavishly adhere to a uniform and trans-substantive format. These divisions are also not as sharp as I first described them because I think the development and customization of specialized procedures under the present judicial adjunct models actually provide some of the building blocks on which a more formal system of particularistic rules can be erected.

Thus, the case study I present has a two-fold purpose. First, I make the claim that a close examination of modern judicial adjuncts exposes the myth that there is in fact a single set of 'federal rules of civil procedure,' and I advocate establishing formal alternative procedural tracks for processing different types of cases. Second, and on a less ambitious note, I believe that given the way special masters are now being used, specific revisions in Rule 53 itself are necessary. Because both of these proposals have more to do with the use of special masters than magistrates, my emphasis will be on the use of special masters. But it is worth looking at both models for points of contrast. [Westlaw]

Citing References:

Edward V. Di Lello, Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level, 93 Colum. L. Rev. 473 (1993).

Westlaw Abstract: It is by now a common complaint that litigation in federal court takes too long and costs too much. The sheer number of parties and the complexity of their relationships in large cases have, in themselves, created new administrative problems.

Court calendars are backlogged and trial judges are burdened today in ways never imagined a generation ago. Technical expert testimony is a major cause of this delay, cost, and complexity, and as scientific advances and new technologies find their way into the courtroom with increasing frequency, these trends will worsen. Recognizing the need to expedite, de-mystify, and where necessary curb or eliminate so-called "battles of experts" involving technical subject matter, this Note proposes the creation of a new adjunct judicial office for magistrate judges who are specialists in technical fields, and the adoption of certain related procedural reforms. Annexed to federal district courts, these judicial adjuncts would bring about better, faster, more efficient and less expensive adjudication of factual issues involving technical evidence. Empowering expert magistrate judges to perform a number of flexible adjudicative functions would induce litigants to reduce their reliance on expert evidence and to focus and improve its presentation. Part I of this Note examines the problems associated with technical expert testimony and argues that such testimony is unreliable, costly, time-consuming, confusing and of questionable admissibility. Part II analyzes currently available methods of dealing with these problems--special masters and court-appointed experts--and exposes their short-comings. Part III examines the historical evolution of the Court of Appeals for the Federal Circuit, a court with specialized jurisdiction in a small number of legal areas, as an example of the expertise that accrues to judges and the judicial system as a result of specialization. Part IV proposes the creation of a new federal judicial office bearing the title "Magistrate Judge (Expert)" ("MJE") and explores adjunct judicial functions MJEs could perform to make possible more efficient and effective determinations of fact in technical cases. This Part also anticipates possible criticisms and examines the feasibility of the proposal.

Samuel H. Jackson, Technical Advisors Deserve Equal Billing with Court Appointed Experts in Novel and Complex Scientific Cases: Does the Federal Judicial Center Agree?, 28 ENVTL. L. 431 (1998).

Westlaw Introduction: In the wake of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., courts are struggling to understand the full scope of their new role as "gatekeepers" of good science. In particular, the debate over the appropriate use of scientific experts under Federal Rules of Evidence 706, and the use of court-appointed experts under the courts' inherent power, has been renewed by recent developments in product liability, toxic tort, and environmental cases. This Comment explores the historical development of court-appointed expert witnesses and technical advisors culminating in the Federal Judicial Center's recently drafted Reference Manual on Scientific Evidence. Mr. Jackson uses this historical framework to discuss appropriate applications of these increasingly necessary judicial resources. Several procedural safeguards are discussed in addressing the concerns that have been expressed by critics of these resources. Mr. Jackson concludes that in many cases, technical advisors are equally valid, and possibly more effective, alternatives to court-appointed experts in dealing with the exceedingly complex scientific issues presented in current litigation trends. Two recent cases in the Ninth Circuit are discussed as models for the appropriate use of such experts.

Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683 (1992).

From the Article: The burden of this Article, therefore, is to demonstrate that an inquiry into the form of complex litigation provides a useful perspective on the hydra-headed problem of complex litigation. Part I begins the inquiry by describing the practical and theoretical factors that have led various courts and commentators to label particular types of litigation "complex." Although all the definitions provide important data about the nature of complex litigation, none capture its full breadth. Thus, the task of the Article's next two Parts is to develop a formal and inclusive definition. Part II builds the theoretical framework for the definition by describing the form of adjudication and the positive assumptions of modern civil litigation. Next, Part III demonstrates that complex litigation arises from the friction between the real-world problems outlined in Part I and the theoretical framework developed in Part II. Part III argues that all complex cases initially involve at least one of four different modes of complexity: the attorneys have difficulty in amassing, formulating, or presenting relevant information to the decisionmaker; the factfinder has difficulty in arriving at an acceptably rational decision; the remedy is difficult to implement; or there exist procedural and ethical impediments to joinder. The unifying attribute of these four modes is that the dispute can be resolved rationally only through the accretion to the federal judiciary of powers traditionally assumed by the other "actors" (parties, lawyers, jurors, and state courts) in the litigation enterprise. This attribute alone, however, constitutes an overbroad definition of complex litigation; such cases, although "complicated," are not truly complex. Complex litigation also contains a second fundamental attribute: The increase in judicial power needed to deal with these complications threatens to overrun the deep-seated assumption of modern civil litigation that similarly situated claims, parties, and legal theories should be treated in procedurally similar ways. … Part IV applies the insights gained from Part III to the future of civil procedure. Complex litigation stands in the crossroads of the thorniest issues in modern civil procedure: case management; trans-substantivism; adversarialism; the wisdom of equitably based procedural codes; the relationship between procedure and the law and economics movement; and the involvement of courts in politically charged controversies. Part IV demonstrates that these issues, and consequently the direction of procedural reform, can be understood only against the backdrop of the four categories of cases (routine, complicated, complex, and polycentric) developed from the definition of complex litigation.

Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712 (1994).

Westlaw Abstract: Many federal judges do not have time for their civil dockets. The amount of time the average district judge devotes to civil trials has declined steadily in the last ten years. Simultaneously, the criminal dockets have grown too large and become too complex for the district judges to spend sufficient time tending to civil cases which by law have lower priority. Congress continues to create more federal crimes despite urgent entreaties not to do so. The President and Senate have moved slowly to fill district court vacancies, and many believe that adding more judges is an unacceptable solution. The ever-increasing pressures on the district judges have resulted in two trends in the handling of civil cases. The first is the increasing use of judicial "adjuncts" such as

magistrates, bankruptcy judges, law clerks, staff attorneys, interns, externs, and the other ingredients of "bureaucratic justice." The second development, more aptly called a movement, has been to direct civil cases away from adjudication to alternative forms of dispute resolution such as arbitration, mediation, early neutral evaluation, and summary jury trials… The two developments converge when judicial adjuncts, particularly magistrates, mediate civil cases.…The trend toward using magistrates as mediators is no accident. To understand why, one must first understand what prevents parties from settling without assistance. Part II of this Article examines this question and concludes that parties increasingly need more information than the attorneys can provide. In addition, the parties also need a more satisfying and structured forum than lawyer-to-lawyer negotiation. One must then compare different forms of mediation to see how each meets those needs. Part III makes those comparisons with respect to mediation by private lawyers, trial judges, and magistrates. It concludes that magistrates are being used to mediate cases more because they are in a unique position to do so effectively…. This Article explains why magistrates can and should mediate more civil cases.

Lois Bloom & Helen Hershkoff, Federal Courts, Magistrate Judges, and the Pro Se Plaintiff, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475 (2002).

From the Article: In Part I, we explore what one commentator calls "the flood of unrepresented litigants" in courts nationwide and the various approaches that federal courts have taken to deal with the pressures that pro se cases generate. In Part II, we focus on the Eastern District of New York and its decision to designate a special magistrate judge to oversee pro se matters. In Part III, we examine the advantages and disadvantages of the single magistrate judge approach for the processing and disposition of pro se matters, recognizing that the work of this office is still at an early stage of institutional development and that additional lessons will be learned with experience and practice.

R. Lawrence Dessem, The Role of the Federal Magistrate Judge in Civil Justice Reform, 67 St. John's L. Rev. 799 (1993).

From the Article: This Article considers the role of the United States magistrate judge in civil justice reform and, more specifically, the role that the early implementation districts envision for magistrate judges within their own districts. Part I briefly considers the evolution of the office of magistrate judge prior to the enactment of the Judicial Improvements Act of 1990.

Richard A. Posner, Coping with the Caseload: A Comment on Magistrates and Masters, 137 U. Pa. L. Rev. 2215 (1989).

From the article: Linda Silberman's paper for this conference [discusses two methods by which the federal court system and Congress have tried to cope with the enormous increase in the federal judicial caseload in recent times]. The first is the expanded use of magistrates; the second is the expanded use of special masters. Silberman is more sanguine about the former than about the latter, in major part because the use of magistrates is more regularized by statute than the use of special masters. Regarding magistrates, she is concerned mainly that their availability to supervise pre-trial discovery makes it easier for that monster to flourish; hard-pressed district judges would perforce

rein it in more. Regarding special masters, she is concerned about expense, potential conflicts of interest, lack of clear rules governing their use, and lack of institutional commitment (special masters are ad hoc recruits from private practice, not employees of the judicial branch). I, too, am concerned about the growing use by the federal courts of judicial adjuncts, including magistrates and masters.

Margaret G. Farrell, The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts, 2-Fall Widener L. Symp. J. 235, (1997).

From the article: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of special masters under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of special masters to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of special master practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution.

Not surprisingly, special masters do not function today as they did before the new demands engendered by technology were made upon them. The actual practice of modern special masters differs dramatically from the hearing masters anticipated when Rule 53 of the Federal Rules of Civil Procedure ("Rule 53") was enacted in 1938… To carry out many of these assignments, courts need flexibility, expertise, informality, investigative authority, administrative capacity, and time, which are qualities usually associated with administrative agencies. Some of these capacities have been provided to courts through the appointment of special masters. Without them, courts would be required to perform their quasi-legislative role in mass toxic tort and other complex litigation without the assistance that legislatures have created in the form of administrative agencies.'

Today, masters are appointed to play a number of different roles. They serve as surrogate judge, facilitator, mediator, monitor, investigator and claims processor. In playing these roles, masters perform a variety of traditional, passive judicial functions….

The article concludes that masters should be appointed to put a more intimate face on mass justice and to perfect procedural reforms that better use and cope with technology. In many of their roles, masters function like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts. Like administrative agencies, they are justified by their expertise, efficiency and availability. Yet, answerable only to the judges who appoint them, special masters are not bound by an Administrative Procedures Act and are not accountable to the electorate through either the legislative or executive branches. They lack the longevity of agencies and leave no public law legacy in the form of regulations or precedent. Rather, the legitimacy of the use of special masters, as it is described in this article, lies in their embodiment of the efficiency and fairness values that are part of the jurisprudence of Article III of the United States Constitution, and their ability to humanize modern legal process. The article recommends that special master practice be allowed to evolve unrestrained by rigid limitations on the process they use. In doing so, we can rely on the supervision, discretion and integrity of the district court judges with whom they work, as well as review by the courts of appeals, and the rigors of the adversarial process to curb the potential for abuse.

**54. Clarence J. Sundram, *Exit Planning and Phased Conclusion in the Remedial Phase of Systems Reform Litigation*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.**

From the article: You have become the Special Master in the remedial phase of a lawsuit requiring structural reform of the complex governmental activity and are now responsible for supervising the implementation of a series of court orders requiring significant changes in the way in which governmental services are delivered. The services in question may involve the operation of state institutions like prisons, mental hospitals, or mental retardation facilities; they may involve services delivered by private organizations which are licensed, certified, supervised or funded one or more government agencies; they may involve some aspect of a public service like housing or education.

While each of these areas present their own subject matter complexity, in the remedial phase of the litigation they present some common challenges to a special Master. One of the most common is a long and unsuccessful history of implementation efforts to comply with the court orders, a history which has probably necessitated the appointment of the Special Master in the first place. I have been involved in a number of these cases over the years, including the Wyatt litigation in Alabama, originally commenced in 1970; the Willowbrook litigation in New York commenced in 1972; Gary W. in Louisiana in the 1980s; Evans v. Williams in Washington DC, which has been going on since the mid-1970s and CAB v. Nicholas in Maine which is about the same age.

In examining a number of such cases, which have been open for a long time, it seems that they all run through a fairly typical lifecycle. I don't know if this is true of commercial litigation as well. [Westlaw: SL083 ALI-ABA 753]

**55. Clarence J. Sundram, *Memorandum Regarding Certification of Compliance Process*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.**

From the article: The following documents may be useful to an understanding of how the process of certification of compliance works.

1. Certification Procedure – This document sets out a fairly "bare-bones" procedure for the Defendant's to certify compliance with discrete provisions of the Court Orders, along with a summary of the supporting evidence. It provides the plaintiffs with access to the evidence as well as further discovery, if needed. It lays out a process for resolving factual disputes about the status of compliance before the Special Master prepares a report and recommendation to the Court.
2. Certification Document regarding ISCs. This is an example of the type of certification expected from the Defendant and the specific factual issues the certification should address.
3. Special Master's Report and Recommendation to the Court regarding Compliance. (This document, when filed with the Court, is accompanied by Exhibits containing the supporting evidence *766 submitted by both parties, and the record of the case before the Special Master.)
4. The Court Order accepting the Special Master's report and endorsing the recommendations. [Westlaw: SL083 ALI-ABA 763]

**56. George M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdictions; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).**

**57. Thomas E. Willging, Laura L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, John Shapard, *Special Masters' Incidence and Activity* (Federal Judicial Center 2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf.**

Executive Summary: This report examines how pretrial and posttrial special master activity can take place under a rule designed to limit special master appointments to trial-related fact-finding in exceptional cases.8 In commissioning the Federal Judicial Center to conduct this study, the Judicial Conference Advisory Committee on Civil Rules' Subcommittee on Special Masters indicated its awareness that special master activity had expanded beyond its traditional boundaries. The subcommittee expressed an interest in learning how that phenomenon occurred in the face of a static and restrictive rule.

More specifically, the subcommittee wanted to know how often and under what authority judges appointed special masters to serve at the pretrial and posttrial stages of litigation, whether any special problems arose in using special masters, how courts' use of special masters compared with their use of magistrate judges, and whether rule changes are needed. We responded to the subcommittee's request by examining docket entries and documents in a random national sample of closed cases in which appointment of a special master was considered. We followed up with interviews of judges, attorneys, and special masters in a select subset of that sample.

Citing References:

Georgene Vairo, Why Me? The Role of Private Trustees in Complex Claims Resolution, 57 Stan. L. Rev. 1391 (2005).

Westlaw Abstract: This Article explores whether private persons, as opposed to a judge or, perhaps, another governmental official, should have the authority to exercise a high degree of discretion in developing standards for compensation and determining compensation awards for claimants. It is important to look directly at this issue because the question whether administrative trusts are an appropriate alternative to litigation cannot be answered without a discussion about the private persons who develop the compensation standards and administer an administrative trust and how they should be selected.

Academy of Court Appointed Masters

***ACAM is an independent organization of experienced masters and judicial adjuncts who serve in both federal and state courts. Our mission is to provide judges, lawyers, parties, and other judicial adjuncts with useful information about masters, including this Handbook.***

***Judicial Adjuncts can serve as:***

**SETTLEMENT MASTERS**

**DISCOVERY MASTERS**

**TRIAL MASTERS**

**COMPLIANCE AND MONITOR MASTERS**

**COORDINATING MASTERS**

**TECHNOLOGY MASTERS**

**EXPERT MASTERS**

**MDL/CLASS ACTION MASTERS**

**ELECTRONIC INFORMATION MASTERS**

**CRIMINAL CASE MASTERS**

**ETHICS MASTERS**

**APPELLATE MASTERS**

***View our website: www.courtappointedmasters.org***

ISBN 0-9786438-0-1

## VI. Mediators

A. Introduction.[1]

1. The final topic for this discussion addresses the use of a neutral as a mediator rather than a court appointed new party to an insolvency matter. Unlike Bankruptcy Trustees or receivers, who are a newly created party to a case with their own independent standing to seek relief from the court; or examiners and special masters, who appear in court to offer independent observations, reports and recommendations to the judge, a mediator virtually never has any involvement with the court and the mediation process is a confidential, non-judicial process which seeks a negotiated solution agreeable to all parties.

2. There is no downside to mediation aside from the time and comparatively low cost compared to a litigated judgment. Many times even unsuccessful mediation will ultimately facilitate a settlement.

3. Mediation or Alternative Dispute Resolution ("ADR") programs have been in use for some time. Indeed, many bankruptcy courts have established ADR programs with panels of neutrals who are well versed in bankruptcy law. For example, in my home Court of the Northern District of Oklahoma, the Bankruptcy Court maintains a panel of experienced Bankruptcy attorneys and

[1] This article relied heavily upon an excellent and comprehensive discussion of mediation in bankruptcy by Matthew W. Kavanaugh and Randye B. Soref, Business Workouts Manual § 23, West Publishing. The full article is recommended reading for a more in depth discussion than is permitted herein.

some sitting Bankruptcy Judges who act as “settlement judges” (a fancy name for mediator) who serve at no cost to the parties. The parties need merely to ask for the appointment of a settlement judge and the Court’s virtually always accommodate. In the alternative if the parties identify a particular member of the panel, then the Court will usually appoint the choice of the parties.

4. Mediation is not the same as judicial settlement conference as discussed by in Factors Influencing A Successful Mediation, Constr. Law., SUMMER 2002, at 18

a) Mediation is a much more sophisticated process than it may appear on the surface. It should not be confused with the judicial pretrial settlement conference, the most common experience most lawyers have with the use of neutrals. Mediation puts a primary emphasis on the client as decision maker and should be designed to address the expectations, fears, and emotional needs of the client. Judicial settlement conferences place primacy on the lawyer-advocate and the judge.

b) In mediation, the client is exposed to the important facts of the case and makes an assessment of risks and rewards without those facts being filtered through the bias of an advocate lawyer. Competent lawyers may have an emotional attachment to their client's cause, which can interfere with their ability to objectively assess the probabilities of success. In judicial settlement conferences, the stakeholders may not even be present.

c) In mediation, lawyers and their clients are able to engage in a confidential dialogue with the mediator about their economic needs without the fear of disclosure of information or a fear that the disclosed information will adversely affect the outcome if the case is not settled. Neither party subsequently can call the mediator to testify in court or at arbitration. Parties are often unwilling to be frank to a judge who may try their case. If the settlement judge is not the trial judge, he or she often lacks persuasive powers.

d) Judicial settlement conferences usually occur after costly discovery has occurred. In a mediation, the outcome-determinative facts are cooperatively shared between the parties without the need for costly formal discovery. This is often a side benefit of mediation that would not come out of a meeting with a settlement judge. Many lawyers believe that they can learn enough from a failed mediation to try a case with a minimal amount of additional discovery.[footnotes omitted]

5. It is important the parties have confidence in the person appointed to act as mediator, so that knowledge of commercial finance, bankruptcy, secured transactions, financing and ancillary agreements and as well as the substantive legal areas. Not all of the panelists have broadly based business finance experience; however, there seems to be a lack of uniformity as to ADR programs.

6. Outside of Bankruptcy, the use of ADR programs varies widely from state to state, particularly in foreclosures and commercial lending disputes as well as

consumer credit cases. Many states have enacted consumer foreclosure mediation statutes, as summarized in Appendix 1[2]. There are any other state laws requiring mediation, particularly in consumer matter. One must research the particular matter in the relevant state to determine if there is a mandatory mediation requirement in your particular case.

7. Clearly, the use of mediators is very common in many types of debtor-creditor cases that often lead to bankruptcy filings.

## VII. Mediation vs Arbitration

A. This paper does not attempt to cover mandatory arbitration which is often contractually mandated in many types of debtor-creditor matters. Indeed, the enforceability of mandatory arbitration proceedings are the subject of the Federal Arbitration Act and a number of reported Circuit and Supreme Court cases. The topic of arbitration is far beyond the scope of this seminar section, therefore this section will focus solely upon the use of neutrals in the role of mediator. To focus or discussion, it is important to understand the difference between mediation and arbitration. Briefly, the difference between mediation and arbitration was well summarized Reaching the Settlement[3] § 2:7

B. There is a big difference between *mediation* and *arbitration*. Mediation is the process by which an independent and neutral professional oversees the negotiation process and tries to bring the parties to a voluntary resolution. That is, the mediator is an

[2] Courtesy of the Nation Consumer Law Center.
[3] Negotiating and Settling Tort Cases: Reaching the Settlement, March 2018 Update, Guy O. Kornblum, Esq. West Publishing.

intermediary between the parties who tries to obtain an agreed upon resolution of a dispute to avoid the matter being decided by a court, jury or arbitrator. That resolution does not occur unless the parties agree. The mediator has experience and training in the negotiation process and facilitates a dialogue between the disputants in an effort to find an acceptable compromise. It is important to understand that mediation is a process of *compromise*. In order to have a hope of a resolution, the parties must be willing to negotiate through the mediator and participate in the give and take of negotiation. But again, nothing happens unless the parties agree to a resolution. If they do not, the matter continues through the dispute resolution process, either in court or through an alternative manner, such as arbitration.

C. *Arbitration* is <u>not</u> a process of negotiation. It involves a neutral who decides the case, much like a judge would do. This neutral is either agreed upon by the parties, or is chosen by a local judge. Sometimes a contract will provide for three arbitrators with each side to choose one, and the two party arbitrators select a neutral who serves as the presiding officer for the arbitration hearing.

D. Participants in mediation typically include a neutral, the parties themselves, and the respective parties attorneys. Through a series of meetings with the parties, some of which are joint and some of which are caucuses with the individual parties, a mediator is often able to facilitate resolution of a dispute that is acceptable to all parties where the parties have been unable to reach a resolution on their own. The mediator assists the parties facilitating communications, guiding the parties to focus on their real underlying interests, and attempting to find a mutually acceptable solution for all.

E. Compared to traditional court litigation, it is usually much faster and far less expensive. Court litigation in commercial matter is generally open to the world, while mediation private and confidential. Court litigation tends to increase the level of animosity while galvanizing the parties opposing views and position, none of which helps when the parties attempt to negotiation an agreement on their own.

F. On the other hand, the parties to a mediation rather than a court retain control over the process. Mediation offer an environment which foster a creative resolution that is more creative than the winner take all outcome common in litigated decision. The mediation process allows the parties to vent their emotions before a third party, and sometimes each other, in effect have a "day in court"; yet, because mediation is confidential, consensual, and takes place in a less formal environment than a courtroom but with a neutral third party present, animosity usually subsides and many times the parties relationships can be preserved. Because clients are more directly involved in the mediation process as compared to court litigation, the business interests are more readily identified and tend to focus the process of reaching of business-oriented solutions.

**VIII. Starting the process.**

A. Mediation usually begins in one of two ways. Either the parties agree to participate in mediation or the court mandates participation. Agreements to participate in mediation may arise at the inception of the parties relationship by the inclusion of contractual provisions requiring the parties to mediate disputes between them prior to commencing litigation. In the alternative where there is not such contractual mediation process, then when a dispute arises, the parties may agree at any time, either before or after litigation commences, to mediate the dispute.

B. Additionally, the courts sponsor mediation programs. Although these programs often lack the flexibility of voluntary mediation, and in particular, may inhibit the parties' abilities to retain a mediator with the skills and qualifications necessary to resolve the disputed issues, many courts now as part of the pretrial process order mediation.

C. The ground rules for mediation by agreement are set forth completely in the mediation agreement entered into by the parties. These agreements ordinarily include the following terms[4]:

- The mediation process is voluntary.
- The mediation process is nonbinding.
- Either party may withdraw from the mediation at any time.
- The mediator shall be neutral and impartial.
- The mediator shall be agreed on by the parties.
- The mediator has complete discretion to control the mediation process.
- The mediator is free to meet and communicate separately with each party.
- The parties may not communicate with each other regarding the dispute without the consent of the mediator.
- The parties may but need not be represented by an attorney.
- The mediation process will be conducted expeditiously.
- At least one person with authority to resolve the dispute will be present on behalf of each party during the mediation.
- The mediator will not provide any information from a party to any other party unless expressly authorized to do so.
- The parties will not litigate during the mediation process.

[4] Business Workouts Manual § 23:18

- The mediator may not be called as a witness or consultant in any pending or future investigation or litigation.
- All information provided in the mediation is strictly confidential.
- The parties and the mediator agree not to disclose to any person information obtained in the mediation process.
- The parties jointly agree to pay the costs of the mediation.

D. Federal court mediation programs are authorized under Rule 16 of the Federal Rules of Civil Procedure. Rule 16(a)(5) states that facilitating settlement is one of five objectives of a pretrial conference. Under Rule 16, many federal courts have developed ADR processes including mediation orders or local rules that facilitate voluntary mediation. For bankruptcy cases, Bankruptcy Rule 7016 incorporates Federal Rule of Civil Procedure 16 for all adversary proceedings. For contested matters under Rule 9014 that are not adversary proceedings under Rule 7001, mediation is authorized through district court rules promulgated under Bankruptcy Rule 9029. Pursuant to these provisions, numerous district courts have adopted mediation procedures for bankruptcy proceedings.

## IX. Why use a neutral/mediator?

A. The primary reason to use mediation is that it frequently is an efficient means to resolve a dispute. Why is this true? Unlike court litigation, mediation does not mandate a "win-lose" outcome common with court disposition where the result is typically money judgment based on notions of right and wrong. Mediation affords an opportunity for a business-oriented resolution with highly flexible terms based on the business needs of the parties. In mediation, the parties have far greater flexibility to fashion a solution that works for all.

B. An additional significant factor is that the clients are far more involved in mediation than in court litigation. Court litigation is regulated by a complex set of rules usually understood only by the lawyers who must resolve the case through the discovery process and a court decision after summary judgment or trial. It seems pretty common that a money judgment for one side does not really solve the problem at hand. On the other hand, in mediation, the clients and their counsel with the aid of a mediator often sit face to face across a conference table which frequently facilitates a business solution which actually solves a business problem.

C. Lastly, the mediation process is in and of itself focused on reaching an agreed resolution of a dispute whereas court ligation is focused on presenting facts to achieve prima facie case under a particular statute or common law claim for relief. The goal of mediation is for the parties to negotiate an agreed resolution. “The process is designed to allow them to vent their emotions, face the realities of their positions, focus on their true underlying business interests as opposed to merely "winning," and arrive at a solution that satisfies business as opposed to legal or emotional goals. This process is far less hostile and adversarial than litigation. Witness examinations in depositions and in court and other, often burdensome discovery that create hostility and harden the parties' positions do not occur in mediation. Because mediation is more low key, and much more focused on resolving a dispute rather than winning the case, anger and tension are minimized and the parties are more able to arrive at a creative business-oriented solution.

Thus, mediation allows parties to satisfy their business interests in a direct, efficient way."[5]

## X. What is the role of a mediator?

A. The role of a mediator is quite different when compared to a judge in court litigation. Judges focus on the procedural rules of pleadings and discovery to move the case to a posture when it can be disposed of based on the relevant law applied to the facts, either by a trial or summary judgment. The mediator has a different set of tasks to accomplish.

B. The process of mediation, when conducted by an experienced mediator offers a much broader range of options to the table. On the other hand, a judge typically has a much more limited range of options and is often time left with merely declaring a winner and loser. The skilled mediator frequently will ascertain options the parties would have never considered thereby promoting a wider range of optional solutions for the parties which often results in a better solution.

C. Initially, the mediator will inquire into both sides' positions to bring to light the underlying business interests of each side. This process will assist each party to highlight their primary interests rather than just trying to win in court and thereby assist the parties in attaining a acceptable business solution.

D. Once the mediator understands the position of the parties, then they can facilitate the parties understanding or the opposition's business interests viewed through the objective lens of the mediator. By so doing, the mediator facilitates a mutual

[5] Business Workouts Manual § 23:20

understanding of the competing interests of the opposing parties and thereby facilitate more reasoned negotiation of the respective parties actual interests, rather that the posturing and saber rattling that goes on in a typical court proceeding. Along these same lines, the mediator seeks to diffuse and deescalate the animosity and conflict that attends most lawsuits to create an environment of reasonable negotiation rather than the chess moves attendant to litigation.

E. An experienced mediator often is able to temper the expectations of the parties. Many times, the client has only heard their attorney's predictions as to the outcome of a trial. The mediator is able to offer a honest and confidential evaluation of the parties case necessary to bring an unreasonable parties or one with an unrealistic opinion of their case back to reality to facilitate a to a reasonable resolution of a dispute.

## XI. Use of mediation in Bankruptcy Cases.

A. The use of mediation in bankruptcy cases appears to be both increasing and evolving. Mediation is often used in virtually any type of adversary proceeding or contested matter in the bankruptcy courts. Adversary proceedings are for the most part a civil suit conducted by the Bankruptcy Court and involve the many varied legal issues often touching on both bankruptcy and non-bankruptcy law issues. Adversary proceedings are appropriate for mediation just like any other sort of civil litigation.

B. Although contested matters are by their nature more narrow in scope and proceed on a more abbreviated time line that adversary proceedings, but often times still merit consideration for mediation in the certain cases.

C. For example, motions for relief from stay are often brought early in Chapter 11 cases. In larger or more complex cases star relief motion can be outcome determinative for the entire case and are usually the subject of substantial dispute. Such motions, either directly or tangentially, usually involve issues relating to the value of a creditor's collateral, the value of the debtor's other assets, and the rights of other creditors and third parties in that collateral and assets. Moreover, behind most relief-from-stay proceedings lies the issue of whether the debtor has a reasonable possibility of proposing a confirmable plan of reorganization. Such a motion typically involves discovery, expert witnesses and multi-day hearings which can result in substantial fees and expenses for all parties to the dispute. A negotiated resolution of such a motion is often times considerably better for everyone that a court decision to terminate the stay or deny such relief. Consequently, a hotly contested motion for relief from stay in a complex case is well suited for mediation and frequently results in a solution that grants the Debtor a chance to get a plan confirmed, but on terms and conditions not found in the Bankruptcy Code.

D. Mediation-appropriate issues are not limited solely to relief-from-stay proceedings but can also be very helpful in the plan confirmation process. The process of obtain plan confirmation is . Similar issues arise in various proceedings in Chapter 11 cases, ranging from the initial cash collateral battles to the confirmation hearing itself. Indeed, throughout a Chapter 11 case, disputes arise that may determine, directly or indirectly, whether the debtor can continue in business and whether the debtor can reorganize. Therefore, each of these disputes, from the initial cash collateral proceeding through the confirmation hearing, may affect many or all of the parties that have interests

in the Chapter 11. Because these many interests may be affected, mediation is an appropriate way to deal with the disputes among them and has been described as a process whereby each constituent group is given a stick, then locked in a room to beat each other until they come to an agreement[6]. The legal and factual basis for Chapter 11 Plan, plus the substantial creativity of good debtor's counsel when opposed by equally creative creditors' counsel generate very complex disputes which beg for a solution based on economics and business considerations. As such, disputed plan confirmations are well suited to mediation.

## XII. When to mediate?

A. Mediation is appropriate at the earliest stage in a bankruptcy case, or any other case for that matter, when it becomes apparent the parties are going to have an active dispute. Early mediation can help avoid the expense of litigating disputes and help introduce an atmosphere of cooperation into as otherwise disputed bankruptcy case.

B. As the case progresses, mediation may also become very useful when "holdout" parties surface. The confidential and non-adversarial mediation environment when coupled with an experienced mediation can be particularly effective in reaching an agreement with parties who have unrealistic expectations or who perceive themselves to be in a blocking position for the case to proceed. Mediation may also be needed in presenting a workout plan in difficult and complicated cases where a plan suggested by a neutral third party is the only plan not perceived of as favoring particular interests.

[6] This statement has been attributed to Ken Klee, although verification was not successful.

## XIII. Selection of mediator.

A. To have any chance of success, the person chosen to act as mediator must be completely neutral as a matter of fact and perception. In this context, the best test is that they must be a "disinterested person" as that term is defined in 11 U.S.C. §101(14). The best practice is to select a person who is also experienced in mediation generally and with particular experience and training in bankruptcy matters. A mediator who meets these standards will be in the best position for reality checking, credible position analysis, and creative exploration of options available to the parties individually and as a group.

B. A thoughtful and detailed discussion of the selection of a mediator is found in Factors Influencing A Successful Mediation, Constr. Law., SUMMER 2002, at 18, 18–19

1. The choice of the appropriate mediator can be a very important factor affecting the outcome of the mediation. The parties' lawyers usually make the selection. Unfortunately, that selection is often based only on superficial information gathered through inquiries to colleagues and acquaintances. Typically the inquiry is simply: "Is anyone familiar with Mediator X?" The answer is often the equally general, "Yes, Mediator X is good." Often mediators are selected because they have been a judge or arbitrator.

2. The parties, however, should engage in a more exhaustive and sophisticated investigation. A more proper inquiry would probe the following factors:

a) Is the mediator a respected authority for the business and technical situation in dispute? Are accounting, scheduling, or insurance issues important to

the outcome, and if so, how capable is this mediator of handling those issues? It is a common view that subject matter expertise is not an important mediator characteristic. However, expertise in the subject matter of the dispute can be important to give credibility to the mediator when assisting the parties in evaluating the strengths and weaknesses of their positions.

b) What kind of training in mediation technique has the mediator received? This is a particularly important criterion for former judges who often are overly evaluative in style. Effective training puts the mediator in touch with his or her natural biases and old habits.

c) Does the mediator understand why process design is the first and most important step? What kinds of procedures does the mediator utilize to encourage the exchange of information prior to a formal mediation session? Good mediators ask the parties for confidential memos that probe the unique factors of the dispute. These are followed up by telephone conversations with the lawyers to ensure that the necessary parties attend the mediation and that all the decision makers understand the important facts in dispute.

d) What are the interpersonal skills of the mediator? Is he or she good at "reading" people? Can the mediator understand any cultural differences at play? Good mediators can glean what people really mean and not merely rely on what they say. For example, where there are major personality clashes, an experienced mediator may determine that traditional public sessions may be unwise and offer an alternative method.

e) What is the mediator's track record? Most mediators will supply references. Arbitrators can do a good job of describing their qualifications on paper, but paper credentials are not fully revealing of the skills and styles of a mediator.

f) Is the mediator optimistic by nature? Optimistic mediators set the tone of mediation toward a successful resolution. Does the mediator work hard and is he or she willing to put in long hours if necessary? It is not unusual for settlement breakthroughs to occur late in the day of the mediation. If so, it is often better to continue the mediation into the evening, rather than send the parties home to return another day. The mediator must commit to the process and convince the lawyers and parties to do likewise.

g) Is the mediator creative? Often cases settle because the facts are put in a new light by the mediator. The mediator may help the parties explore noncash considerations as a medium of exchange, such as future work, discounts, or referrals. Innovative mediators are constantly on the lookout for ideas to break impasses.

h) What is the mediator's style? A common misconception is that a mediator should have either a “facilitative” or “evaluative” style. Facilitative mediators do not express an opinion on the merits of the disputes. Evaluative mediators view their role much like that of a judge— they hear a summary of the arguments and then express an opinion as to who wins and who loses. Mediators who are overly evaluative should be avoided in construction mediation. Good mediators do form

opinions. However, they view their role as one of educating and guiding the parties to an understanding of how a judge, jury, or arbitrator may view the facts and the law of their case. These mediators offer evaluations only with the consent of the parties and after other tactics have failed.

i) It is not unusual that lawyers making the selection of the mediator do not understand the best style of mediator for their clients. The parties choose mediation because they think that they can convince an evaluative style mediator, such as a former judge, of the correctness of their position. They believe that such an opinion will cause the case to settle. The reality is if that opinion is obtained, and it is adverse to the client, the client finds ways to rationalize not accepting the opinion. The party adversely affected by such a public evaluation often loses trust in the mediator and faith in the mediation process.[footnotes omitted].

C. Thoughtful consideration of the person to serve as mediator is well worth the time and effort as well as greatly increasing the odds of a successful resolution.

**XIV. Conclusion.**

When used with a carefully selected person to serve as mediator, the process of mediation can often result in a cost effective means to reach a more practical and ultimately satisfactory solution to many bankruptcy issues.