

A Tool to Help Courts: Special Masters

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TODAY'S AGENDA



- Why are so many organizations advocating for the use of special masters?
- When should special masters be used?
- What roles do special masters play?
- How are special masters different from mediators? From arbitrators?
- What ethics apply to special masters?
- How do we assure that special masters are accountable – i.e., providing high-quality services to the parties and to the courts?

BUT FIRST...



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What are your questions today?



A Little Background

ABA RESOLUTION



- RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019.
- It is further RESOLVED that Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

ABA WORKING GROUP



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Representatives from

- ABA Judicial Division
- ABA Standing Committee on the American Judicial System
- ABA Business Law Section
- ABA Section of Litigation
- ABA Section of Dispute Resolution
- ABA Section of Intellectual Property Law
- ABA Section of Antitrust Law
- ABA Tort Trial and Insurance Practice Section

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- ABA Judicial Division
 - Merril Hirsch
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 - Hon. Shira A. Scheindlin (ret.)
- ABA Business Law Section
 - Hon. Henry DuPont Ridgely (ret.)
- ABA Section of Litigation
- ABA Section of Dispute Resolution
 - Nancy Welsh
- ABA Section of Intellectual Property Law
- ABA Section of Antitrust Law
- ABA Tort Trial and Insurance Practice Section



ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

Not necessarily in order

When should special masters be used
– for what types of cases and at what
point in the life of a case?

GUIDELINE ONE



It should be an *accepted part* of judicial administration in *complex litigation* (and in other cases that create *particular needs* that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the *outset* of litigation.

What types of cases are “complex” or have “particular needs” that are likely best met by a special master?

- Especially complex or technical area of the law – e.g., patent, antitrust;
- Heightened discovery oversight – e.g., multi-district litigation, over-zealous counsel;
- Fact-intensive non-jury determinations – e.g., accounting, expert-heavy damage measurements;
- Implementation of long post-trial or post-settlement stage – e.g., settlement administration, monitoring compliance with injunctive relief



GUIDELINE THREE

In determining whether a case merits appointment of a special master, courts should weigh the *expected benefit* of using the special master, including reduction of the litigants' costs, against the *anticipated cost* of the special master's services, in order to make the special master's work efficient and cost effective.

What roles do special masters play?
How are special masters different from
mediators? Arbitrators?

GUIDELINE TWO

In considering the possible use of a special master, courts, counsel and parties should be cognizant of the *range of functions* that a special master might be called on to perform and *roles* that a special master might serve.

GUIDELINE FOUR



Participants in judicial proceedings should be made aware that special masters can perform a *broad array of functions* that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:

GUIDELINE FOUR

- a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
- b. facilitating resolution of disputes between or among co-parties;
- c. pretrial case management;
- d. advice and assistance requiring technical expertise;
- e. conducting or reviewing auditing or accounting;

GUIDELINE FOUR

- f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
- g. conducting trials or mini-trials upon the consent of the parties;
- h. settlement administration;
- i. claims administration; and

GUIDELINE FOUR



j. receivership and real property inspection.

In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.



GUIDELINE SEVEN

The referral order appointing the special master should describe the *scope of the engagement*, including, but not limited to, the special master's *duties and powers*, the *roles* the special master may serve, the rates and manner in which the special master will be compensated, *power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court*, and the *extent of permissible ex parte contact* with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

What ethics apply to special masters?
How do we assure that special masters
are accountable – i.e., providing high-
quality services to the parties and to
the courts?

GUIDELINE FIVE



Courts should develop local rules and practices for *selecting, training, and evaluating* special masters, including rules designed to facilitate the selection of special masters from a *diverse pool* of potential candidates.



GUIDELINE SIX

Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that *qualified and appropriately skilled and experienced* candidates are identified and chosen.

GUIDELINE EIGHT



Courts and the bar should develop *educational programs* to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.

GUIDELINE NINE



Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.

ONGOING WORK



- Judicial Division Lawyers Conference Special Masters Committee
 - Outreach Subcommittee
 - Support Subcommittee
 - Ethics Subcommittee
 - Rules Subcommittee

INTERESTED IN MORE?



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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

JANUARY 28, 2019

RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019.

FURTHER RESOLVED, That Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

Consistent with the Federal Rules of Civil Procedure or applicable state court rules:

- (1) It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.**
- (2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**
- (3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.**
- (4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:
 - a. discovery oversight and management, and coordination of cases in multiple jurisdictions;**
 - b. facilitating resolution of disputes between or among co-parties;**
 - c. pretrial case management;**
 - d. advice and assistance requiring technical expertise;**
 - e. conducting or reviewing auditing or accounting;**
 - f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
 - g. conducting trials or mini-trials upon the consent of the parties;**
 - h. settlement administration;**
 - i. claims administration; and**
 - j. receivership and real property inspection.**In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.**
- (5) Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

- (6) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.
- (7) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.
- (8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.
- (9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.

REPORT

Introduction

The American Bar Association (“ABA”) has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution (“ADR”). Today, there is an underutilized dispute resolution tool that could aid in the “just, speedy and inexpensive” resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use.¹ This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.²

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA’s Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership

¹ Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. See Lynn Jokela and David F. Herr “Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool,” WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) “In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters.” *Id.* Courts have also recognized their inherent power to appoint special masters to assist judges in case management. See *id.* at 1302 n. 18. See also n.30, *infra*.

² Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – “special master” – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as “master,” “discovery master,” “settlement master,” “trial master,” “referee,” “monitor,” “technical advisor,” “auditor,” “administrator.” Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct’s officers. For example, a Rule 53 adjunct in Maine is a “referee.” See Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a “master” as “any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts,” suggesting more of a trial function than a pretrial role. See e.g., Mass. R. Civ. P. 53. See also 2006 Kan. Code § 60-253 (“[a]s used in this chapter the word ‘master’ includes a referee, an auditor, a commissioner and an examiner.” These titles may suggest a more limited function.

included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.³

The Working Group also obtained information from other interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center (“FJC”), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including the Academy of Court Appointed Masters (“ACAM”)), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group’s analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

Discussion and Rationale for the Guidelines

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver “a just, speedy, and inexpensive determination of every action and proceeding.” Since December 1, 2015, the Rules have declared that they are to be “employed by the court and the parties to secure” that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.⁴

³ The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O’Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon. J. Stephen Schuster; and Hon. Joseph R. Slights III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. (“Pete”) Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

⁴ See, e.g., Fed. R. Civ. P. 26 Advisory Committee Note: “There has been widespread criticism of abuse of discovery”; 1983: the “first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information”; Rule 26(g) “provides a deterrent to both excessive discovery and evasion”; 1993: “A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner

All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.⁵ Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the parties on fairly resolving the issues in controversy.⁶

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, special masters have time that courts do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them.⁷

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases—particularly complex commercial cases or the practical ability to increase resources when

to achieve those objectives”; 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources “that are accessible only by incurring substantial burdens or costs.” 2015: Amendments that, among other things, expressly limit discovery to be “proportional to the needs of the case”; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be “construed,” but also “administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

⁵ See Merril Hirsh, James M. Rhodes and Karl Bayer, “Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).

⁶ See *id.* at 29-31; Merril Hirsh, “Special Masters: How to Help Judges Extend Their Reach ... And Exceed Their Grasp,” ALTERNATIVES (June 2017), available at <http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx>

⁷ Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider *Brady* obligations, see, e.g., *United States v. McDonnell Douglas*, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, see, e.g., *United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at <https://famguardian.org/Publications/USAttyManual/title9/13mcrm.htm#9-13.420>. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombuds to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using neutrals as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.

such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation (“MDL”), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.⁸ Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bring to bear knowledge of many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Third, the judicial role limits the involvement judges can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.⁹

Federal Rule 16(c)(2)(H) and certain state rules provide that “[a]t any pretrial conference, the court may consider and take appropriate action on...referring matters to a magistrate judge or a master...” As previously noted,¹⁰ however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I).¹¹ Few courts have a practice of regularly considering the appointment of a

⁸ Andrew D. Bradt, “The Long Arm of Multidistrict Litigation,” 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, “Monopolies in Multidistrict Litigation,” 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf

⁹ See Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate Roles in Settlement*, 78 Ohio St. L. J. 73, 105-127 (2018) (describing the ethical, due process and decision-making difficulties that arise when a judge plays both an adjudicative and settlement role in a case); Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 Nev. L. J. 983, 1004-1014, 1018-1023, 1028-35 (2016).

¹⁰ See *supra* nn.5-6 and accompanying text.

¹¹ Rule 16(c)(2)(I) provides as follow: “At any pretrial conference, the court may consider and take appropriate action on... settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule.”

special master when they are preparing a scheduling order.¹²

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.¹³ This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to “rare occasions.”

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.¹⁴

Moreover, as a matter of logic, a concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role. And, unless the parties agree otherwise, a special master’s “adjudication” is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Cost concerns actually animate these Guidelines. Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. Although no scientific study has empirically established that special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.¹⁵ Special masters can also inculcate a culture of compliance with procedural

¹² There are exceptions. See *infra* n.25.

¹³ See, e.g., 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule “extensively to reflect changing practices in using masters” for a broader array of functions that “[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule”); Manual for Complex Litigation 4th, §10.14 at 14 (2004) (“Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving “some exceptional conditions” or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised”).

¹⁴ See n.30 *infra* (discussing inherent authority of courts to appoint special masters to assist their judicial administration). See also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) (“The entitlement to an Article III adjudicator is ‘a personal right’ and thus ordinarily ‘subject to waiver.’ ... But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process”).

¹⁵ See Thomas D. Barton and James P. Groton, “The Votes Are In: Focus on Preventing and Limiting Conflicts,” *DISPUTE RESOLUTION*, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,

rules by strictly monitoring the parties' compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be “proportional to the needs of the case”¹⁶ and requiring objections to “state whether any responsive materials are being withheld on the basis of that objection.”¹⁷ Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by introducing an expanded universe of practitioners to work as neutrals.
- Helping courts to monitor implementation of orders and decrees.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. See also <http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf> at 42

¹⁶ Fed. R. Civ. P. 26(b)(1) (2015).

¹⁷ Fed. R. Civ. P. 34(b)(2)(C) (2015).

- A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
- A concern among parties and their counsel of losing control of the litigation.
- A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court administration or as a practice of individual judges).
- Increased cost and delay.
- The introduction of another layer between the court and counsel.

Regardless of the reason, the failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,¹⁸ the *ad hoc* nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into ways to make the process more predictable and the work of special masters more effective.

Highlights of Specific Recommendations

- (1) It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.**

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

¹⁸ Barbara Meierhoefer, “Special Master Case Studies” (2018) available at https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.authcheckdam.pdf

practice are useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

- (2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review,¹⁹ analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court-appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master's rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

¹⁹ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E. D. La. 2007).

- (3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, and with the view of making the special master's work efficient and cost effective.**

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

- (4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:**
- a. discovery oversight and management, coordination of cases in multiple jurisdictions;**
 - b. facilitating resolution of disputes between or among co-parties;**
 - c. pretrial case management;**
 - d. advice and assistance requiring technical expertise;**
 - e. conducting or reviewing auditing or accounting;**
 - f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
 - g. conducting trials or mini-trials upon the consent of the parties;**
 - h. settlement administration;**
 - i. claims administration; and**
 - j. receivership and real property inspection.**
- In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.**

Special masters can be used creatively and thoughtfully in a wide array of situations. It is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

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- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of neutral involvement while avoiding exchanges of information or *ex parte* contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.
- Trial administration.²⁰
- Monitoring and claims administration.
- Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

- Adjudicative.
- Facilitative.
- Advisory.
- Informatory.
- Liaison.²¹

The role a special master performs in a case is subject to ethical and legal constraints, the court's control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.²²

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that

²⁰ In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct "mini-trials" of specific, perhaps technical, issues. These proceedings differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.

²¹ "Liaison" refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.

²² See n.9 *supra*. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.

might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

- (5) **Courts should choose special masters with due regard for the court’s needs and the parties’ preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.**

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates.²³ As discussed below, see Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties’ perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

- (6) **The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master’s duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order “direct the master to proceed with all reasonable diligence” and 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

²³ See Fed. R. Civ. P. 53(b)(1) (“Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment”).

- (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

The Court should consider adapting these terms (or adding others) consistent with the special master's role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards.²⁴

- (7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters' qualifications or how those qualifications should vary depending upon the role the special master is performing.²⁵

Depending on the appointing court's circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline.²⁶

²⁴ The website of the Academy of Court Appointed Masters includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special masters. See <http://www.courtappointedmasters.org/resource-center/appointing-masters-handbook>. See also Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

²⁵ The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information. <http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf> See also <https://www.discoverypilot.com/> (Seventh Circuit ediscovery pilot program incorporating neutral mediation).

²⁶ For a discussion of how state and federal courts have enabled feedback, see Nancy A. Welsh, Magistrate

While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.²⁷

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

- Developing a diverse pool of persons who qualify for appointment.
- Ensuring the process is properly calibrated to the functions and roles special masters perform.
- Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
- Ensuring the process properly assesses candidates' talents and experience.
- Determining whether subject matter expertise is necessary.
- Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.²⁸ Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the use of special masters. Greater use of special masters will also assist the advancement of

Judges, Settlement and Procedural Justice, 16 NEVADA LAW JOURNAL 983 (2016) and Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin and Archie Zariski, eds., 2013).

²⁷ See American Bar Association Resolution 17M (urging the United States Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the process for selecting *amicus curiae*, special masters, and other counsel).

²⁸ See, e.g., David R. Cohen, "The Judge, the Special Master, and You," LITIGATION v. 20, No. 1 (2015).

appropriate professional standards for the multiple roles they perform.

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.²⁹

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

- (9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.**

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special master.

Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 “does not apply in cases under the [Bankruptcy] Code.” This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 “precludes the appointment of masters in cases and proceedings under the Code”; but the rule purports to instead preclude application of Federal Rule of Civil Procedure 53. Rule 53 is not the sole or

²⁹ See *supra* n.26, *supra* for methods of feedback.

ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their *inherent* power to appoint special masters as a part of case management.³⁰

Moreover, if Rule 9031 actually precluded the use of special masters for cases “under the Code,” it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.³¹ However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules’ preface to the then proposed Rules of Bankruptcy Procedure states that “[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges.*” (Emphasis added)³²

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a “just, speedy and inexpensive determination of every case and proceeding,” which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.³³ Amending Rule 9031 to eliminate this confusing limitation serves this end.

Conclusion

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

Respectfully submitted,

Hon. Toni E. Clarke (ret.)
Chair, Judicial Division
January 2019

³⁰ It “is well-settled that” federal “courts have inherent authority to appoint Special Masters to assist in managing litigation.” *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (citing *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re: Peterson*, 253 U.S. 300, 311 (1920)); see also, e.g., *Reed v. Cleveland Bd. of Educ.*, 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); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.*, No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, “Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,” 67 MO. L. REV. 29, 30-31 (Winter 2002).

³¹ See Paulette J. Delk, *supra* n.30, 67 MO. L. REV. at 40-41 & nn.60-62.

³² See Paulette J. Delk, *supra* n.30, 67 MO. L. REV. at 41-42 & nn.64-65.

³³ See Paulette J. Delk, *supra* n.30, 67 MO. L. REV. at 41-42 & nn.65-68.

General Information Form

1. Summary of Resolution.

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

2. Approval by Submitting Entity.

The Judicial Division (JD) Council voted to co-sponsor this Resolution by electronic vote on August 30, 2018. Pursuant to the JD Bylaws, a majority of the voting members of the JD Council participated, making this a binding action.

3. Has this or a similar Resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice in state and federal courts. This resolution would enhance the ABA's current policy, summarized below:

Support in principle the proposed Dispute Resolution Act, which would provide federal funds to states to create or improve small claims courts and other means of dispute resolution such as mediation and arbitration. (enacted in 1980 but not funded) Also support the increased use of alternative means of dispute resolution by federal administrative agencies consistent with several specified principles. 88A103A

Support continued use of and experimentation with certain alternative dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system in the United States. All alternative dispute resolution techniques should assure that every disputant's constitutional and other legal rights and remedies are protected. 89A114

Recommend that the Council of the Commission for Environmental Cooperation consider the Model Rules of Procedure for Dispute Resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption. 95M117C

Support legislation and programs that authorize any federal, state, territorial or tribal court, including Courts of Indian Offenses, in its discretion, to utilize systems of alternative

dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration. 97M112

Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. Approved. 97M101.

Urges the Supreme Court of the United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for appointment of amicus curiae, special masters, and other counsel. 17M10A

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation (if applicable).

N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Judicial Division, through the Lawyers Conference Special Masters Committee and representatives of the Working Group that drafted the Guidelines will commence several projects to disseminate the guidelines and encourage state and local bars to promote the guidelines and encourage state and federal courts to implement them. Initiatives in discussion and planning area as follows:

(1) Conducting outreach through programs and publications to educate state and local bars, courts, staff and stakeholders in the guidelines and to work with courts around the country to adapt the guidelines to the needs of local courts;

(2) Working to develop model criteria that courts could use to select a diverse group of qualified candidates to rosters of special masters, and a survey instrument that courts could use on a consistent to evaluate the work of special masters, to improve their performance in future cases, and to create data that would be available to researchers to evaluate the effectiveness of special masters and the differing approaches and methods they employ;

(3) Encouraging the appropriate ABA Standing Committees, Commissions, Sections, Divisions and forums to develop a Code of Ethics for Special Masters;

(4) Working with interested parties to develop model rules, particularly for state courts, interested in making more effective and regular use of special masters; and

(5) Urging the amendment of Bankruptcy Rule 9031 to eliminate confusing impediments to using special masters in Bankruptcy proceedings.

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8. Cost to the Association (both indirect and direct costs).

None.

9. Disclosure of Interest.

None.

10. Referrals.

Business Law Section
Lawyers Conference
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Standing Committee on the American Judicial System
Section of Antitrust Law
Section of Dispute Resolution
Section of Intellectual Property Law
Section of Litigation
Solo, Small Firm and General Practice Division
Tort Trial and Insurance Practice Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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11. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when

on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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Executive Summary

1. Summary of Resolution.

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

2. Summary of the issue which the Resolution addresses.

While the ABA has been a leading voice in favor of various forms of ADR, the appointment of special masters is an underutilized dispute resolution tool that could aid in the “just, speedy and inexpensive” resolution of cases. In 2016, the Lawyers Conference of the ABA Judicial Division (JD) formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use. This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.

To solve this problem, the Committee constituted a Working Group across ABA sections, divisions and forums to develop consensus guidelines for the use of special masters. The Working Group was formed in August 2017, included members of the Judicial Division (including the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the Business Law Section, the Standing Committee on the American Judicial System, Section of Antitrust Law, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Section of Litigation and the Tort Trial and Insurance Practice Section, who collectively worked well over 1,000 hours to create these consensus guidelines.

3. An explanation of how the proposed policy position will address the issue.

The best practices described in this Resolution encourage courts to make greater and more systematic use of special masters to assist in civil litigation. These Guidelines provide recommendations concerning the use, selection, administration, and evaluation of special masters.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

There is no known opposition to this Resolution.



A Revolution That Doesn't Offend Anyone

THE ABA GUIDELINES FOR THE APPOINTMENT AND USE OF SPECIAL MASTERS IN CIVIL LITIGATION

By Merrill Hirsh

Stories about special masters always seem to begin with “and then the judge threw up his [or her] hands and said, ‘I don’t have time for all this. Here’s what I’m going to do . . .’” At the American Bar Association’s (ABA’s) Mid-year Meeting in January 2019, the House of Delegates did something to change that. The ABA approved Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. The guidelines are the product of a

remarkable consensus to assist courts and stakeholders in judicial proceedings with the latest thinking on how special masters can be a more useful tool for their judicial administration.¹

It isn’t that special masters cannot help judges who are throwing up their hands in frustration. They can. But a working group of representatives across the ABA devoting well over 1,000 hours across a year considering the issue concluded that waiting to drive judges to the point of frustration is

not the best and highest use either of judges or of special masters. And the Judicial Division Lawyers Conference Special Masters Committee is now working to help judges and courts adapt these new ideas to the needs of cases and dockets.

Unconventional Wisdom

So, what’s so different? The ABA’s working group did not invent special masters. It reinvented the conventional wisdom about them. The conventional wisdom has been

that special masters were . . . well . . . special. Even the name is a problem. As a former United States magistrate judge put it 35 years ago, “[t]he word ‘master’ is its own worst enemy. Embellishing it with the word ‘special’ only serves to aggrandize that which is already repugnant. Its pejorative connotations are practically infinite—slavemaster; headmaster; shipmaster; taskmaster.”² Not only repugnant, but vague and often inapt. The words “special master” refer to a wide and varied array of potential functions—some of which involve facilitative functions in which the parties, and not the neutral, are supposed to be the “master.”³ (The more accurate technical term is “judicial adjunct.” At least it captures the idea that what binds these functions together is that they are performed at the behest and aegis of the court. But that one is pretty ugly too and in even less use than “special master.”)

Even getting past the name, the ABA needed to look at special masters in a new way to appreciate the benefits that could come from making considering the use of a special master a regular part of judicial administration. There is a natural concern that a special master would constitute either a challenge to or abandonment of judicial authority (enabling the parties to pay private adjudicators to do what judges really should be doing for free). There is also a perception that special masters have been appointed not because they truly save costs or improve the administration of justice but because they were friends of the judge, or, worse, that referees who used to handle bankruptcy cases before 1978 were actually referring cases to *themselves* as special masters in order to earn extra money.⁴

It is difficult to sell people on an idea that has both marketing and a bad vibe. It is scarcely surprising that, historically, not only has appointing a special master been rare, but also the conventional wisdom has been that it should be.⁵

The fact that wisdom is conventional, however, does not mean that it is wise, or current. Concerns about special masters largely date from a before-time, when courts generally viewed alternative dispute resolution as truly “alternative.” There was a time when, if what the parties really

wanted was to settle their dispute, courts told them to do this on their own time. If the parties wanted assistance, they would hire a mediator. Behind this was a philosophy that what courts had to offer was not dispute resolution, but rather a particular type of dispute resolution—an umpire who would call the balls and strikes in disputes that the parties had largely fashioned themselves.

For many reasons, that time has long since passed. Courts and practitioners have come to think that, as a matter of course, courts will not merely call balls and strikes, but work to move the case to resolution and (as a means to that end) promote the use of alternatives that do not involve adjudication at all. These days, it is difficult to find a court that will not expect to refer a civil action for some type of attempt at resolution—most commonly one that does *not* involve ever reaching the final merits of the action.

In the guidelines, the ABA recommends that courts and practitioners get beyond the conventional wisdom to make much more effective use of a tool that, when properly used, supplements, not supplants, judicial authority. At the heart of the guidelines are two new messages: (1) think of special masters like a Swiss Army knife, a multipurpose tool that serves judicial needs and should be considered whenever it might help; (2) do it right—don’t appoint special masters merely ad hoc or post hoc at the point of frustration, but instead generally at the outset of litigation as part of a systematic plan to evaluate how special masters might help, to choose a special master well-gearred for the task and make sure the special master does the job.

This article explains how the guidelines came to be, what they advise, and what work is being done to assist courts and stakeholders to take advantage of this new thinking.

How Did the Guidelines Come About?

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning their

use. This committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters. In an effort to see if it was possible to solve this problem, the committee contacted representatives from not only the ABA Judicial Division as a whole, and the Lawyers Conference, but also the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Standing Committee on the American Judicial System, the Business Law Section, the Section of Litigation, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Tort Trial and Insurance Practice Section, and the Section of Antitrust Law. All of these Divisions, Sections, and Forums of the ABA agreed to send representatives to a working group that would discuss the possibility of reaching consensus on guidance that could be presented to the ABA’s House of Delegates for consideration. The working group began its efforts in fall 2017. Approximately a year later, after over 1,000 hours of work, the Judicial Division and each of the other Divisions, Sections, and Forums cosponsored a resolution to the ABA House of Delegates to approve the guidelines. At the January 2019 Midyear Meeting, the House of Delegates approved the resolution on a voice vote with no apparent opposition.⁶



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mittee on Special Masters and served as convener of the working group that developed the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. He can be reached at merril@merrilhirsh.com.

No Apparent Opposition!? A Revolution That Does Not Offend Anyone?

The working group's consensus on a new way of thinking about special masters stands on its head a line in the play and movie *1776*. In *1776*, John Adams watches as the Continental Congress picks apart a draft of the Declaration of Independence. Some members of the Congress are concerned that passages will offend the Parliament; others are concerned that it will offend the king. Finally, Adams yells in frustration (expletive deleted), "This is a revolution . . . ! We're

special masters in the type of cases where they might be useful. Second, courts and litigants should do this at the outset of the litigation, and not just when frustration has reached a boiling point.

In one sense, this is not revolutionary at all. Federal Rule 16(c)(2)(H) and its state counterparts already provide that "[a]t any pretrial conference, the court may consider and take appropriate action on . . . referring matters to a magistrate judge or a master." This clause (H) appears immediately before Rule 16(c)(2)(I), which specifies that "[a]t any pretrial conference, the court

This doesn't sound like much of a revolution, but perhaps it can be a revelation. The idea is that special masters are not just a last alternative to be used when nothing else has helped to manage the case, but that special masters can head off problems long before they occur.

As Guideline 4 (discussed below) details, there are many types of situations in which a special master can be useful. For example, instead of (1) one party demanding every document that relates to every other document that, in turn, relates to something else; (2) the other complaining that this is overbroad and refusing to try to provide anything; and (3) the two fighting in meet and confer sessions, punctuated by emails, until one or both files motions that queue up on a docket before judges who have more important matters to resolve, have a special master look over the parties' discovery in the first place. The immediate effect is that the parties have an incentive and not just an admonishment to be reasonable. No one wants to look unreasonable before a neutral. And if the parties are unreasonable, the special master can cut to the chase—schedule a telephone conference to discuss the production and work through what requests and responses are reasonable.

Do these types of disputes arise on an almost daily basis? Perhaps have a weekly call every Monday to go over and attempt to resolve as many issues as possible.

Does the case involve specialized expertise or turn on disputes about damages? Parties can litigate for years over other issues before getting to the one on which the case actually turns. Consider bringing in someone at the outset to work through these issues before the case bogs down a calendar with other issues.

Guideline 2

The second guideline recommends:

In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

Special masters are not to be used when nothing else has helped, but they can head off problems long before they occur.

going to have to offend somebody!"⁷ The guidelines, however, are a revolution that is designed not to offend anyone. They change the thinking about using special masters, but do not require that anyone—judges, court staff, or participants in litigation—change practices. The guidelines are nine principles that urge that all participants in complex civil litigation *consider* using special masters in ways that revisit the conventional wisdom.

Guideline 1

The first guideline provides:

It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

This guideline contains two concepts. First, it should be routine to consider using

may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." And to look at them, you would think the two would apply similarly in practice.

But the practice under the two is very different. The part of clause (H) that discusses referral to a magistrate judge is not merely something most courts believe they "may consider" at a pretrial conference. In most federal districts, standing orders or trial judges automatically assign magistrate judges for some purpose (including, often, conducting the pretrial conference itself). And in clause (I), it is also routine for federal courts at least to consider some sort of alternative dispute resolution with a view toward resolution—again, some courts and individual judges have standing orders requiring it. But it is rare for courts even to consider the use of special masters.

The guidelines recommend that, in the types of cases most likely to benefit from the use of a special master, the court and the parties should take advantage of Rule 16(c)(2)(H) or similar state rules and consider whether a special master could assist.

Again, it does not seem like much of a revolution to say that people thinking about selecting a special master would think about what the special master might do. But, again, there is more to it. Because the use of special masters is so rare, very few people have thought about what it is special masters do, and even fewer about what role they might play. One of the very common and understandable reactions to the guidelines has been, Okay, I understand that many state courts do not have magistrate judges, but in the federal system, doesn't this just duplicate the magistrate judges? The answer is yes, no, and maybe so.

Yes. United States magistrate judges are often (but not always) given responsibility for managing complex civil cases. Indeed, Federal Rule of Civil Procedure 53(h) recognizes that federal district court judges can refer a matter to a magistrate judge to serve as a special master.

No. As Rule 53 implicitly recognizes, a magistrate judge and a special master are two different things. Some of the roles a special master performs are roles that we would not want to have a magistrate judge perform. For example, special masters have been used in multidistrict litigation to investigate and vet candidates for plaintiffs' lead counsel and to resolve internecine disputes among plaintiffs' lawyers or defense lawyers. That is not a role any judge (whether district judge or magistrate judge) is in a position to play. Another special master may be involved because he or she has particularized expertise in the e-discovery or patent or forensic accounting or others issues involved. A magistrate judge may or may not have that particular expertise.

Maybe so. Even where the role is one a magistrate judge may be in a position to perform, there is still a question of making the best and highest use of the magistrate judge's time. The real benefit a special master provides to case management is not resolving disputes that should be going to the court. It is avoiding disputes that should be resolved without the need for court intervention. The 2015 amendments to the Federal Rules of Civil Procedure reflect a philosophy that not just the court but also "the parties" should construe, administer, and employ the rules "to secure the just,

speedy, and inexpensive determination of every action and proceeding."⁸ But that admonition is not self-executing. And when counsel for whatever reason cannot agree on what is "reasonable," those issues come back to the court in the form of expensive, time-consuming, and contentious motions. The fact that magistrate judges might be able to herd cats does not mean that they are best employed in doing so.

Guideline 3

The third guideline provides:

In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.

Considering a special master does not mean selecting one. The law does not prohibit courts from imposing litigation costs on the parties. Every time a court requires a brief, the court imposes a cost on the parties. But courts should not impose costs on the parties unless the benefit outweighs the cost. And in many cases, the choice on whether to use special masters permits a direct cost-benefit calculus: in general, a special master should earn his or her keep and then some.

In complex cases this is not very difficult to achieve. Save the parties one discovery motion and it could add up to \$100,000. The special master's bill for work avoiding that motion should not be anywhere close to that. And making special masters a more regular part of judicial administration, with a more clearly understood use and role, makes it easier to monitor and control their costs.

Guideline 4

Pursuant to the fourth guideline:

Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial

functions, but assist them. Among the functions special masters have performed are:

- a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
- b. facilitating resolution of disputes between or among co-parties;
- c. pretrial case management;
- d. advice and assistance requiring technical expertise;
- e. conducting or reviewing auditing or accounting;
- f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
- g. conducting trials or mini-trials upon the consent of the parties;
- h. settlement administration;
- i. claims administration; and
- j. receivership and real property inspection.

In these capacities, special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

If you are thinking of buying a Swiss Army knife, you need to know what it can do. Only with special masters, the potential roles are limited more by imagination and custom than they are by any set description. Although special masters usually do have adjudicative functions, they do not need to. A special master can be tasked with gathering information—for example, issuing a report on the type of information contained in 1,000 allegedly privileged documents without actually revealing their content. A special master can be the go-between who provides information while insulating a judge from direct contact that might create a problem for a later decision. A special master can be a facilitator to help codefendants agree on how to allocate expenses among them. A special master can administer a settlement or oversee compliance with a decree. A special master can be the neutral expert who conducts a *Markman* hearing in a patent case or reports to a court on the extent to which experts the parties have

retained meet the elements of *Daubert* or *Frye*. Not all these functions are ones a court will want to use. But knowing they are there empowers courts to be more creative and efficient in resolving disputes.

Guideline 5

The fifth guideline advises:

Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

A huge advantage of rethinking how we use special masters is that we can rethink how they are chosen, trained, and evaluated. With special masters used rarely, very few courts have had occasion to develop a roster that reflects the diversity and talents of our community or a system of vetting, training, or evaluating special masters' work. The upshot has been that some special masters are wonderful, others not, feedback is haphazard, and evaluation is difficult. If courts consider the use of special masters regularly, they can also institute systems to consider and to ensure the quality of candidates.

Guideline 6

The sixth guideline recommends:

Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

Have a better system for selecting special masters, and you have a system better designed to establish legitimacy and instill confidence. Members of the working group that created the guidelines disagreed over the extent, if any, to which courts should defer to party preferences on choosing a special master. Litigators,

by and large, preferred deference. Judges were not so sure. But they all agreed that a process in which the selection is systematized provides much more comfort than one that simply relies on the judge's preference.

Guideline 7

Pursuant to the seventh guideline:

The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

This guideline largely tracks Federal Rule of Civil Procedure 53(b)(2), and it contains a checklist of things to consider in drafting an order. Just as the role of a special master can vary, so the appointing order needs to be clear to craft the special master's responsibilities and limitations. This too helps to instill confidence in the process and ensures checks on what the special master can do.

Guideline 8

The eighth guideline urges:

Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.

Buy-in requires knowledge. Courts and the bar will make better use of special masters if they understand better how they can be used.

Guideline 9

The ninth and final guideline proposes:

Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.

The guidelines are drafted to be consistent with rules. But just as rules govern practice, practice informs rules. And local practice means local rules.

So, What Have You Done for Us Lately?

The guidelines reflect a lot of thought and are important policy. But they will not implement themselves. The Judicial Division Lawyers Conference Special Masters Committee has formed four subcommittees to assist courts and practitioners with implementing these ideas.

The Outreach Subcommittee is focused on writing articles and developing programs designed to assist courts and practitioners in understanding the guidelines. The central focus behind the programs is not just to talk; primarily, it is to listen. Different courts have different needs. A state court judge with a docket of 1,000 cases is not in the same situation as a federal district court judge. A judge presiding over a multidistrict litigation proceeding or class action faces different challenges from one handling single claims. Different areas of the law, such as intellectual property or antitrust, benefit from different types of expertise. E-discovery can be a different issue if the problem is measured in terabytes rather than megabytes. If the guidelines are to be adopted and used, they must be adapted so that each court and even each judge can make them most effective.

The Support Subcommittee is drafting instruments that can be used by courts as part of this process. Among the current projects are drafting criteria and processes for selection of special masters to a roster and drafting a survey instrument that courts could use to obtain evaluations for special masters and researchers can use to compile studies of what techniques are effective.

The Ethics Subcommittee is working on examining what would be needed to articulate model ethics rules for special masters, and coordinating with other committees within the ABA responsible for establishing ethical standards.

The Rules Subcommittee is working on determining whether and to what extent it might be appropriate to reexamine existing rules to implement creative ideas for special masters.

A new project the Special Masters Committee is working on is partnering with law schools to have students assist courts in evaluating whether and how special masters might meet their local needs.

The program offers students access to the work of the Judicial Division and courts and court staff access to help so that courts can consider using special masters without unduly taxing judicial resources.

Conclusion

No one can promise that judges will stop pulling their hair out in frustration over complex civil litigation. But the ABA took a significant step toward helping in adopting the Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. We owe it to our judges and our litigators to make use of every tool that is available to bring

cases to a just, speedy, and inexpensive conclusion. ■

The views expressed in this article are the author's own and not necessarily those of his clients or the members of the working group. The guidelines described in this article are official policy of the American Bar Association, but comments in this article concerning them have not been approved by the ABA. The author wishes to thank Iowa District Court Senior Judge Annette J. Scieszinski and working group and Special Master Committee members William D. Johnston of Young Conaway Stargatt & Taylor, LLP and former Delaware Supreme Court Justice Henry

UNACCOMPANIED MINORS and the AMERICAN LEGAL SYSTEM



Produced by the National Conference of the Administrative Law Judiciary, this **video** is available for purchase through www.shopaba.org.
Product Code: 5230303VID

This video is an extremely valuable and timely resource for attorneys, state and federal courts, and child welfare organizations. It provides:

- Essential information for attorneys and child welfare organizations who represent unaccompanied minors in American courts
- Critical how-to guidance for state and federal courts that must make key findings regarding these minor children

This compelling video uses a basic, step-by-step approach that includes two brief mock hearings and an actual account of an unaccompanied minor who later became a legal resident of the United States. It also includes an all-judge expert panel discussion describing the process for obtaining the required predicate orders in state and local courts to support federal petitions for Special Immigrant Juvenile Status (SIJ petitions).

This video provides vital training that will help participants understand the critical decision-making tasks necessary to decide what is in the best interests of children. It also helps to dispel the "mystery" surrounding the work performed by immigration judges, including what state and local judges must do before the immigration court case can be decided.

Valuable resource materials are also included at the end of the video. Available for licensed viewing at inexpensive rates.

SPECIAL MASTER CASE STUDIES

By

Dr. Barbara Meierhoefer

**American Bar Association Judicial Division, Lawyers
Conference Committee on Special Masters**

February 2018

INTRODUCTION

In November 2016, the American Bar Association’s Judicial Division Lawyers Conference created a committee to study how best to facilitate the use of Special Masters in appropriate cases and circumstances. The Committee adopted a multi-pronged approach that involves both developing educational programs for the bench and bar based on existing resources,¹ and gathering additional information about how Special Masters have been used effectively in the pretrial and trial stages of recent cases.² These “Special Master Case Studies” reflect the first of the Committee’s information gathering activities.

This report includes two case studies:³ The Delta Wing Project 56 litigation in Georgia Superior Court, and two related insurance merger cases—Aetna-Humana and Anthem-Cigna—in U.S. District Court for the District of Columbia. These cases were recommended by Committee members who served as Special Masters in the litigation and who both provided information from the Special Master perspective and smoothed the way for contacting other case participants.

The Committee’s primary research member⁴ interviewed the presiding judges in the case study cases as well as the mediator in the Delta Wing litigation. She also surveyed those attorneys most actively involved in these cases but was able to ascertain the views of only five of the primary attorneys. Their views are included in the case studies, but are neither considered nor presented as representative of the pool of attorneys who were involved at some stage in the litigation. (For more detail on data collection, see Appendix B: Methodology.)

Each case study describes in detail how Special Masters were used during the pretrial phases of these few complex cases, and how their involvement affected the litigation from the judicial and attorney perspectives. The report concludes with a section on “General Observations” about Special Masters from the bench and bar.

¹ Among other projects, the Committee is working with other organizations to develop educational programs and model criteria for selecting Special Masters, and has formed a Working Group with representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, and several other ABA Standing Committee and Sections to develop a proposed “Black Letter” on best practices for Special Masters for consideration by the American Bar Association House of Delegates. For more information about the Committee and its work, contact co-chair Merrill Hirsch at merril@merrilhirsh.com.

² The Committee decided to focus on the role of Special Masters in the pretrial and trial phases of cases because the prospective costs and benefits of these activities to the court and the parties are quite different from those in the Special Master’s better-known role of managing settlements in the post-trial phase after liability has been established.

³ We hope to add more case studies in the future.

⁴ Dr. Barbara Meierhoefer has worked for and consulted with the Research Division of the Federal Judicial Center and is experienced in conducting research on matters of interest to the courts.

CASE STUDY 1

Delta Wing Project 56 LLC vs. Ben Bowlby, et al.,

Jackson County, Georgia Superior Court

13-CV-1184

Delta Wing Project 56 LLC vs. Ben Bowlby, et al.,

Presiding Judge David Motes appointed a Special Master to oversee discovery in the Delta Wing litigation filed in the Superior Court of Georgia. The judge recognized from the original complaint (exceeding 100 pages) that this case presented complex technical and legal issues and involved multiple lawyers from all over the world and would tax judicial time and resources to the limit in his already over-burdened court.⁵

The judge was clear that the purposes of the appointment were to move the case to trial with minimal delay and use of judicial resources. He had not previously used a Special Master, but he had also rarely before had a case with such high stakes and parties who could well-afford to pay for a Special Master to assist the court. Judge Motes indicates that the positive impact of the Special Master exceeded his expectations.

Case Summary⁶

This lawsuit sought “damages and injunctive relief arising out of theft of confidential and proprietary information, misappropriation of trade secrets, breach of contracts, unjust enrichment, fraud, and negligent misrepresentation.” [The dispute was over the design of the innovatively aerodynamic and lightweight Delta Wing racing car.](#) The car was designed by a group of engineers, led by Ben Bowlby, who worked originally for Ganassi Racing and then for its affiliate, Delta Wing LLC, which was formed in 2010 specifically to focus on developing this car.

In June 2011, the Delta Wing was selected by the Le Mans 24 Hours race as it’s “Garage 56” entry for the 2012 race, a slot reserved for the most exciting, innovative entry of the year to test new technology against the rigors of the racing course. Delta Wing Project 56 was formed that month to complete the car’s development and testing in time for the race.

In early 2012, Delta Wing Project 56 entered into an oral technical partner agreement with Nissan under which Nissan, in exchange for advertising and publicity, would provide the engine, sponsor the car and pay racing expenses for the Le Mans race.

The car was strongly associated with Nissan at the race at which it ran flawlessly for 6 hours, a performance thought by its backers to be adequate “proof of concept.” After the Le Mans, however, Nissan backed away, hired Ben Bowlby, the lead engineer, and, in June 2013, rolled out its own car that was quite similar in design to the Delta Wing. Nissan further did not pay a \$2 million sponsorship fee nor did it cover the Le Mans racing expenses.

⁵ The opinions and insights of the judge come from an interview with Judge David Motes on June 26, 2017. His quotes are taken from the set of notes he prepared for the interview and shared with the interviewer.

⁶ Information about the case was taken from interviews with the participants as well as [Stef Schrader, “How Tomorrow’s Race Car Got Bogged in Today’s Lawsuits,” Jalopnik Investigates, \(June 2015\);](#) and [Stef Schrader, “Here’s What Happened with That Bizarre Nissan DeltaWing Lawsuit,” Jalopnik Investigates \(August 2016\),](#)

On November 22, 2013, Delta Wing Project 56, LLC filed a lawsuit in the Superior Court of Georgia against Ben Bowlby, and various components of the Nissan Corporation: Nissan Motor Company (Japanese), Nissan International (Swiss), Nissan North America, and Nissan Motorsports International (Japanese). The plaintiff filed a motion for injunctive relief and the defendants filed motions to dismiss.

The case eventually settled on March 14, 2016.

Appointment of a Special Master

In March 2014, just before the court hearing on the motions to dismiss and for injunctive relief, the judge contacted Mr. Cary Ichter, an experienced Special Master, to see if he might be available to serve as Special Master to manage the Delta Wing discovery process.

The judge had heard Mr. Ichter give a presentation at a judge's seminar in January 2014. The presentation emphasized the pressure that recent budget cuts and expanding dockets placed on judicial resources, and how, subject to court approval, a Special Master could resolve discovery disputes and make findings of fact and rulings. The judge notes that this salient information was "fairly fresh on my mind when this case came to my attention."

When Mr. Ichter expressed an interest, the judge mentioned the possibility of the Special Master appointment at the hearing on March 28. He recalls that the plaintiffs seemed a bit surprised and the defendants did not seem not too happy, but no objections were raised.

Two of the attorneys most actively involved in the case—one representing the plaintiffs, the other the Nissan defendants—both indicated that they were in favor of appointing a Special Master given the complexity of the case and the over-crowded docket in the Georgia Superior Court at the time. The only concern expressed was that none of the attorneys were asked for their suggestions as to who should be selected.⁷

On June 18, 2014, Judge Motes appointed Cary Ichter as Special Master using a very detailed appointment order. The order, which was based on a draft provided by Mr. Ichter, provided detail on numerous important issues including: Special master duties and responsibilities, standards for court review of Special Master products, *ex parte* communication, and rates of payment and party responsibility. (See Appendix A.)

⁷ These two attorneys were interviewed in November 2017 because they were the most active in the key pretrial disputes that were handled by the Special Master. As such, their views are particularly informative but they are not presented as being representative of the upwards of 20 lawyers who were involved in this litigation at some point or another.

Special Master Activities

Communication with Counsel

Immediately after his appointment, Mr. Ichter set up a conference call with the parties to introduce himself and begin development of a case management order to guide the pretrial and discovery process. He asked that the litigants talk and advise him of the issues to be resolved and their preferred timetable; and finalized the case management order on September 15, 2014.

Mr. Ichter brought the attorneys together via teleconference or hearing to air disputes, and always had a court reporter on hand to insure the accuracy of the meeting notes. He held a hearing whenever anyone asked for one and believes that this is an important practice to gain the confidence of the attorneys. It gives the lawyers an opportunity to be heard and assures them that he is on top of the case, has done a “deep dive” into the issues, and will have at hand the detail to support his eventual findings.

Of the two attorneys interviewed for this case study, one was more satisfied than the other with the way that the pretrial process unfolded. Both reported ample opportunity to lay out issues to the Special Master, but one did not feel that there was ample opportunity to approach the judge with concerns. One was positive and the other neutral as to whether the interaction with the Special Master and other attorneys was a productive use of their time and helped to sharpen the issues and avoid misinterpretation. Neither, however, thought that these interactions served to reduce contention among the attorneys. This case involved large sums of money, pride of development, and both corporate and personal reputations. Contention in these circumstances was inevitable, and arose before the Special Master became involved.

Findings

The first order of Special Master business was to address the defendants’ hotly contested motion to dismiss for lack of personal jurisdiction. After reviewing the voluminous material that had been filed in support of and opposition to this motion and holding a number of hearings, Mr. Ichter issued a 34-page Report and Recommendation on January 29, 2015. Surprisingly, given how contentious this issue was, none of the parties filed an objection.

During the following months, Mr. Ichter implemented the case management order. He modified the order, however, on May 18, 2015, which is his usual practice when the parties agree that they need more time. The most contentious disputes involved confidentiality and sanctions. Mr. Ichter generally issued an order if the matter was a non-dispositive discovery dispute, and prepared a Report and Recommendation for dispositive matters and motions for sanctions. Parties who disagreed with either an order or a recommendation could bring it to the court for resolution. One practical difference between these two methods of addressing disputes is the timing of the resolution if there is no objection from the parties. Unlike a Special Master recommendation, an order would take effect *without* the need for further action by the court.

Defendants objected to four of the Special Master’s orders, but Judge Motes ruled against these objections each time.

Both attorneys thought that the Special Master’s findings were clear and well-reasoned, and one further noted that, in his experience, it is difficult to get the court to overturn such findings. As such, he usually does not object if his clients can “live with” the Special Master’s decision, i.e., that its adverse impact on litigation strategy is not worth the added cost and delay.

Time and Cost

Mr. Ichter spent 165 hours on his Special Master duties in the Delta Wing case. He averaged 11¾ hours a month, with a high of 50 hours and lows of a couple of hours.

Both attorneys thought that the Special Master’s rates were reasonable and fairly allocated across parties. One indicated that although he does not recall that his clients objected to the amount *per se*, they did raise the question of why they had to pay anything “for their own judge” when their taxes were funding a public court system.

Multiple Adjuncts: Appointment of a Mediator

In September 2015, Judge Motes referred the case to Mr. Hunter Hughes for mediation. Mr. Hughes is a highly respected attorney in Atlanta, Georgia who has served as a neutral in scores of national class, collective, and mass actions.

Judge Motes made the referral after the parties objected to some of the Special Master’s orders and when, in accordance with the case scheduling order, the discovery period was due to expire. According to the judge, “I knew there would be more costly and time-consuming litigation on those issues, and a mediator might be able to settle the case before the parties had become too entrenched and invested in it.”

In the judge’s view, while the role of the Special Master was to make findings of fact and to issue orders to move the case to trial, the role of the mediator was to get a fresh, disinterested look at the case to induce a settlement by counseling the parties and attorneys. Judge Motes saw these roles as synergistic, with pressure from the Special Master’s rulings and deadlines serving to help the mediator to succeed.

Both Mr. Hughes and Mr. Ichter agree with Judge Motes’ characterization of their respective roles, and confirmed that they worked completely independently, communicating only to convey the status of the mediation as it related to the scheduling order. Mr. Hughes notes that he interacts with any Special Master appointed to a case referred to him for mediation—a relatively rare occurrence⁸—as he would with the judge or magistrate judge assigned to the case.

When asked about the timing of the referral, Mr. Hughes noted that the Delta Wing case was ready for mediation at the time of its referral (approximately 18 months after filing), and could not likely have been referred earlier to advantage. For mediation to be most effective, the parties need first to gain a good feel for how the litigation is likely to proceed absent settlement. In the Delta Wing case, this meant resolution of dispositive motions and, then, of key discovery motions to assess how the rulings were affecting their strategy and to sharpen the issues at dispute.

⁸ Approximately once a year.

In his general experience, Mr. Hughes has noticed no discernable difference in the posture of cases that come to him for mediation based on who—judge, magistrate judge, Special Master, or combination thereof—was managing the pretrial phase of the case.

Impact of Special Master

From the Bench

Judge Motes indicates that appointing Mr. Ichter as Special Master in this case was the “best thing that happened”—for the court, the parties in this case, and the parties in the other cases on the judge’s docket. The judge explained that the biggest difference appointing a Special Master made was to save him untold hours of time spent on discovery disputes, motions hearings, and, eventually trial.

“Having a seasoned, well-respected Special master helped to prevent any over-complication of the issues by the attorneys. The attorneys knew that the Special master had plenty of time to devote to an understanding of the issues and the litigation, and that I had no such time. “

Looking back, the judge said that “the only thing I would do differently would be to appoint the Special Master earlier.”

The judge specifically cited the effectiveness of the case scheduling order (that made the parties realize they were going to trial in 2016) and Mr. Ichter’s availability to hear and decide motions. The judge noted both that the Special Master was quicker than the court could have been, and that his orders were well reasoned and, “in my opinion, correct.”

Although there were some objections to the Special Master’s rulings that the court needed to address, Judge Motes notes:

“These would have come anyway had I been the one to rule and decide. By my having to hear and decide only his rulings, and since only parts of them were objected to, it saved my time and narrowed the issues. The Special Master reduced the scope of the litigation that I had to deal with.”

From the Bar

The two attorneys had opposite views about how involving the Special Master affected their clients in the Delta Wing litigation. One believed that, despite the added cost of paying the Special Master, Mr. Ichter’s availability to make timely decisions reduced his client’s overall costs by moving the case to settlement faster than would otherwise have been anticipated. The other disagreed, arguing that the very availability of the Special Master to make these decisions short-circuited active implementation of the attorneys’ responsibility to “meet and confer” which led, in turn, to more issues being litigated and an associated increase in costs.

Case Study 2

U.S. et al vs. Anthem Inc. and Cigna Corp. (1:16-cv-01493)

U.S. et al vs. Aetna Inc. and Humana Inc. (1:16-cv-01494)

In the U.S. District Court for the District of Columbia:

U.S. et al vs. Anthem Inc. and Cigna Corp. (1:16-cv-01493)
U.S. et al vs. Aetna Inc. and Humana Inc. (1:16-cv-01494)

These related cases were filed in the District Court for the District of Columbia on July 21, 2016. The federal government, joined by a number of plaintiff states, sought to enjoin mergers involving four of the five largest health insurance companies in the United States.

In mid-August, 2016, the presiding judges in the two cases appointed Judge Richard A. Levie (Ret.) to serve as a Special Master to oversee the discovery process within an expedited time frame.

Key to the appointment was the need for concentrated attention to get these cases ready for bench trials given the stakes involved, the anticipated volume of discovery, and the time sensitive nature of the litigation: The expiration dates of the merger contracts were December 31, 2016, for Anthem-Humana and April 30, 2017, for Aetna-Cigna, and each involved “break-up” fees in excess of \$1 billion.

Case Summaries

On July 2, 2015, Aetna Inc. agreed to buy Humana Inc. for \$37 billion and, shortly thereafter, on July 23, 2015, Anthem Inc. agreed to acquire Cigna Corps. for \$54 billion. The United States Department of Justice sued seeking to enjoin the mergers. Each of the four defendants had separate, very experienced antitrust counsel who were active in all aspects of the litigation.

The Government asserted that these mergers would adversely affect competition in violation of Section 7 of the Clayton Act in a number of insurance markets leading to fewer choices, higher cost, and worse service for millions of Americans while removing incentives to create innovative provider collaborations and value-based insurance pricing.⁹

Both cases were originally assigned to Judge John Bates, but after an expedited Status Hearing held August 4, 2016, the Anthem-Cigna case was reassigned to Judge Amy Berman Jackson so that the legal and timing issues unique to each merger could be addressed in separate bench trials.

- Because of its earlier December 31, 2016 “drop dead” merger date, Aetna-Humana proposed a more aggressive trial schedule than that requested in the Anthem-Cigna case and urged that “the trial dates in the two cases be set with both transaction deadlines in mind.”
- The lawsuits focused on different markets which allegedly would be harmed by the post-merger concentration of market share:

⁹ Section 7 of the Clayton Act prohibits mergers “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

- The Aetna-Humana merger cited the Medicare Advantage and commercial health insurance sold on public exchanges as the markets that would be negatively affected by the removal of competition.
- The Anthem-Cigna suit cited four markets: commercial health insurance sold to national accounts, commercial health insurance sold to large groups, commercial health insurance sold on the public exchanges, and the purchase of healthcare services by commercial health insurers. Plaintiffs charged that this merger would not only result in negative consequences downstream among the insured, but also upstream via pressure on providers to comport with the dictates of the insurer.

A 17-day bench trial in Anthem-Cigna began November 21, 2016, and ended January 4, 2017. The merger was enjoined on February 8, 2017. The 13-day bench trial in Aetna-Humana began December 6, 2016, and concluded on December 30. That merger was enjoined on January 23, 2017.

Special Master Appointment

On August 2, 2016, defendants filed with Judge Bates their positions on the timing of proceedings and whether these should be conducted jointly in the two cases. Although arguing that the proceedings should be handled separately, they had no objection to having a single Special Master appointed to facilitate discovery in both.

Judge Bates had presided previously over merger cases and was aware from the outset of the kinds of resources cases like these could consume. For him, the question of whether it was appropriate to appoint a Special Master was: Are these the types of unusual cases in which the litigants could benefit from more concentrated attention than the district judge or magistrate judge would be able to provide? Given the voluminous amount of discovery that was expected on the fast track required to meet the deadlines imposed by the merger contracts, the answer in these cases was “yes.”

When the Anthem case was assigned to Judge Berman Jackson, the two judges discussed the appointment and agreed (1) that appointing a Special Master would benefit both the cases and the court and (2) that it would be more efficient to have the same Special Master for both cases given that there was some overlap in attorneys and in the information to be provided by a number of competitors.

Given the magnitude of the discovery task, the judges opted for an outside Special Master rather than turning to the court’s already-busy magistrate judges¹⁰ of whom only two were working full time at the time. (The third position was in transition.) Additionally, given that each of these mergers involved purchase prices in the tens of billions of dollars and “break-up” fees of over a billion dollars, the relatively small cost to parties of paying the fees and expenses of an outside Special Master was simply not an issue.

The parties were asked to submit Special Master recommendations and six names were put forward.

¹⁰Magistrate judges have their own caseloads and also rotate duty call to handle immediate criminal case responsibilities.

After consulting with one another, the presiding judges selected Judge Richard Levie (Ret.), a full time Alternative Dispute Resolution professional who retired from the District of Columbia Superior Court bench in 2000. They knew him from professional gatherings and of the quality of his work from colleagues on their court who had presided over complex cases on which Judge Levie had served previously as Special Master: the AT&T – T-Mobile merger and the U.S. Air – American Airlines merger.

Upon being contacted, Judge Levie indicated his availability, provided sample appointment orders, and was appointed as Special Master in the Aetna case on August 8 and in the Anthem case on August 11 to oversee discovery, e-discovery, privilege disputes, deposition designation for trial, and scheduling.¹¹ To assist him in his duties, Judge Levie employed a full-time attorney, who underwent a conflict check and was paid by the parties. The attorney procedurally and ethically functioned as a judicial law clerk. The appointment orders in the two cases were the same (see Appendix A) and specified:

- the matters to be handled by the Special Master;
- the time frames and length limitations for attorney submissions, responses, and appeals;
- that matters could be decided on the papers or after a hearing, and that hearings could be conducted in person or by telephone;
- that rulings could be made orally as well as in writing and, except for an order denying a claim of privilege,¹² were final unless, after request and opposition, they were certified by the Special Master for appeal to the court;¹³
- that the Special Master could not communicate *ex parte* with the parties and could communicate *ex parte* with the court only on procedural matters that were not on appeal;
- that the plaintiffs and defendants were to evenly split the Special Master’s compensation and expenses on a monthly basis at rates mutually agreeable to the master and the parties; and
- that status meetings with the Special Master were to be held at least weekly, starting less than two weeks from the dates of the orders.

¹¹The appointment order in Aetna was amended on October 18, 2016, just days before the start of the bench trial, to authorize the Special Master “to resolve any disputes among the parties concerning deposition designations, summary exhibits, and sealing.”

¹² Any challenge to an order denying privilege was to be certified for appeal to the court.

¹³ The parties consented to this provision of the Appointment Order which effectively modified F. R. Civ. P. 53 (f)(1) which gives parties the opportunity to object to any order, report or recommendation of the Special Master.

Special Master Activities

Meeting with Counsel

Judge Levie held in-person status conferences with counsel *at least weekly* to lay out the issues, encourage clear dialog, and defuse confrontation. The meetings for the two cases were usually held back-to-back on Monday mornings, and lasted from one to one-and-one-half hours depending on an agenda that was worked out with counsel beforehand. They were attended by between 14 and 20 attorneys, with out-of-town counsel participating by teleconference.

These meetings were sometimes on the record and sometimes not. Judge Levie indicated that being able to discuss matters off the record often facilitated more open and less contentious exchanges among attorneys.

In addition to the regular meetings, Judge Levie was also available to meet with the attorneys involved in a particular issue of contention at any time, including a number of weekend meetings. For example, when there was a disputed request for the production of documents, he would bring counsel together and ask the requestors to explain exactly what they were looking for. This narrowed the scope, helped to avoid misinterpretation and facilitated the opportunity for the parties to agree on disputed matters.

Three of the attorneys most actively involved in this litigation, representing three of the four defendants, participated in the attorney survey (see Appendix B: Methodology). All strongly agreed that the weekly meetings were a productive use of their time and that they encouraged a clear dialogue to sharpen issues and avoid misrepresentation.¹⁴

Findings

During his service, Judge Levie issued oral and written preliminary findings on disputed issues that parties could either accept or ask for a Special Master Report & Recommendation that could be appealed to the judge. In most instances, the Special Master's findings were accepted by the parties without further recourse to the court. The three responding attorneys either strongly agreed (two) or agreed (one) that the Special Master's findings were well-reasoned

Judge Levie did, though, file 22 Report and Recommendations with the court in Anthem and 11 in Aetna. Only one—the first in Anthem—was appealed; and all were adopted in their entirety by the court. The subject matter included motions to compel, protective orders, motions to quash, motions for sanctions, deposition designations, and numerous party and third-party motions to seal.

¹⁴ With no input from attorneys representing plaintiffs or from one of the defendants, there is no way to know if these views, or the other opinions of these three in this case study, would be shared all sides. (See Appendix B, Methodology.)

Communication with the Court Methodology

The Special Master and the judges (and their law clerks) communicated as needed on procedural issues to coordinate scheduling and to keep the judges up-to-date on the status of the discovery process. As specified in the appointment order, they had no *ex parte* communication on substantive issues or any matters pending before the Special Master that could come to the judge for additional consideration.

In the more time-intensive Anthem-Cigna case, Judge Berman Jackson also took advantage of Judge Levie's specific knowledge of the volume of material involved in the case, as well as his prior experience with large cases, to use him as a sounding board for procedural questions. He, for example, suggested a tier system for categorizing exhibits for trial which helped to focus the court and litigants on the most important material for consideration by the court. Further, given his knowledge of the case and good relationship with the attorneys, she also considered using him to approach counsel about possible settlement had any of the attorneys been interested in pursuing that approach (which, however, they were not).¹⁵

Time Expended

The Special Master spent a total of 193 hours on the Anthem case between his appointment on August 12, 2016 and January 18, 2017, the date of his last Report and Recommendation. In Aetna, he spent 130 hours between August 11, 2016 and February 9, 2017.¹⁶ The vast majority of this time was spent before the start of trial: November 21, 2016, in Anthem and December 5, 2016, in Aetna.

Impact of the Special Master

From the Bench

Both of the presiding judges praised the work of the Special Master in preparing these cases for their expedited trial dates. The judges noted that things worked as anticipated and laid out in the appointment order—a credit to both the Special Master and the litigants, and that Judge Levie was invaluable in getting things resolved during the wide-ranging discovery process. This was attributed both to Judge Levie's constant availability to the attorneys and to the skill with which he brought litigants together, listened to all sides and concerns, and presented reasoned findings.

By managing discovery, the Special Master freed the judges both to keep up with their regular dockets and to concentrate on other aspects of the merger cases. Trial was coming and the judges held a series of status hearings to move things along. While the Special Master was involved with the litigants on an ongoing basis, the judges considered all of the material that the parties were required to exchange with each other and the court, and ruled as needed within the time

¹⁵ Judge Levie did not engage in any substantive discussions with any party about settlement.

¹⁶ The Anthem case involved considerably more work with electronic discovery, sealing motions and third-party issues.

frames established by the case management orders. As Judge Berman Jackson put it, “He did discovery; I did the case.”

From the Bar

The three defendant attorneys who gave their opinions all believed that the costs of involving the Special Master in this case were worth the benefits. All indicated that the involvement of the Special Master facilitated efficient discovery and reduced contention among the parties, and none thought that he added to cost and delay. Only one, however, reported that involving the Special Master *reduced* costs to his client, with the other two “unsure;” and none were sure that the process brought the case to trial faster than they originally anticipated. This was likely due to the fact that it was in all of the parties’ interests to move swiftly to meet the very clear deadlines for resolution in these merger cases.

GENERAL OBSERVATIONS

The judges and attorneys who provided input to the case studies also provided insight into more general aspects of appropriately using a Special Master in the pretrial and trial phases of litigation. The observations that follow will be updated as more case studies are added to the collection.

When to Use a Special Master

All of the judges involved in these case studies had nothing but praise for the professionalism of their Special Masters and were grateful for the assistance they provided in helping to resolve the complex cases at hand and freeing judicial time to concentrate on other aspects of these and the other cases on their dockets.

All, though, also believe that Special Masters should be appointed only rarely where justified by the stakes involved in large, complex cases in which additional assistance is needed to be sure that the parties get the judicial attention they need to address all of the problems likely to arise. These cases are not common. For example, even among these judges who are open to using a Special Master when appropriate, only one had used Special Masters before—also in special, complex cases;¹⁷ and none has appointed one since. As one of the judges said: “In most of my cases the parties do not have the funds to pay for litigation much less for a Special Master.”

The bottom line is that these judges welcome the challenges presented by their diverse caseloads and believe that, *in the normal course of events*, judges should handle matters themselves or use other court resources to resolve the cases filed in their courts by the public.

The attorneys who shared their views echoed these general sentiments. All were in favor of using Special Masters in the pretrial phase of appropriate cases which they—as did the judges—defined as those to which the court would not be able to devote the time required. As examples, they cited both court-specific resource issues and case-specific circumstances such as complex or esoteric procedural and/or legal issues, numerous parties far-flung geographically, voluminous discovery, and/or the need for a particularly speedy resolution.

Selecting a Special Master

In their comments on the case studies, the judges and lawyers alike point to how important it is for the attorneys to have and maintain a high level of respect for the Special Master in order to reap the potential benefits of the appointment. The benefits of

¹⁷ Special Masters—a magistrate judge in one case, an external master in the other—were appointed to assist the judge in determining damages for a large number of plaintiffs in complex cases involving the bombing of the U.S. embassy in Beirut and the bombing of U.S. embassies in Eastern Africa.

freeing judicial time and reducing costs and delay accrue in direct proportion to the litigants' willingness to avoid knee-jerk challenges to all of the Special Master's findings.

This importance of reputation and neutrality was also reflected in the results of the attorney survey (see Appendix B: Methodology). When asked how important a variety of specific factors are when considering the appointment of a Special Master, all five of the attorneys indicated that "Reputation as an impartial neutral" was "very important." None of the other factors—which related to various types of experience and expertise, garnered that level of support. The three factors addressing experience with discovery (i.e., large amounts of discovery, inherently complex material, and e-discovery) were all rated as "very important" by three of the attorneys, with another saying that the importance would vary depending on the nature of the case. The other two factors presented, "Prior experience as a Special Master" and "Expertise in specific subject matter," were seen as less important.

In short, care must be taken to select a Special Master with the requisite knowledge, demeanor, and common sense to command the respect of the attorneys.

Costs and Benefits

All of the judges reported that the involvement of a Special Master reduced burden on the court and moved the litigation to settlement or trial faster than would have otherwise occurred. All but one of the attorneys reported that the benefits of having a Special Master outweighed the costs in the case study cases, but—having litigated a number of cases in which Special Masters were involved, noted that this is not always true.

The attorneys were of two distinct views about how a Special Master can affect cost and delay. Some were of the opinion that a Special Master can reduce a client's overall costs by making decisions to facilitate efficient discovery and move the case along more expeditiously. Others thought that the involvement of a Special Master can make a case more litigious and costly by providing the opportunity for attorneys to short-circuit the "meet and confer" process and instead present issues to the Special Master for decision—issues that may then be re-litigated in court if one side or the other can't live with the Special Master's ruling.

What may actually occur in the individual case may well depend on the level of contentiousness among the parties which could itself be affected by when the Special Master is appointed and how his or her role is laid out in the appointment order. Could appointing a Special Master at the start of a case defuse contention? What is the appropriate breadth of the Special Master's charge? Should this depend on the nature of the litigation or the timing of the appointment? Should she or he be ruling or commenting on the merits without the agreement of the parties? These, and other questions about how to involve a Special Master to maximize the potential benefits for the court and the parties will be the subject of future consideration.

APPENDIX A: APPOINTMENT ORDERS

Georgia Superior Court: Delta Wing vs. Ben Bowlby, et al, pp. 1-6

U.S. District Court for the District of Columbia: U.S. vs. Aetna Inc. et al, pp. 7-10

**IN THE SUPERIOR COURT OF JACKSON COUNTY
STATE OF GEORGIA**

Delta Wing Project 56, LLC,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 13-CV-1184
)	
Ben Bowlby, et al.,)	
)	
Defendants)	

ORDER APPOINTING SPECIAL MASTER

Pursuant to Uniform Superior Court Rule 46, This action is before the Court on the Court’s own motion to appoint Cary Ichter, Esq. as a Special Master in the above-styled case, subject to the terms and conditions set forth herein.

Duties

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

A. Case Management: The Special Master shall have the authority to conduct scheduling conferences, establish case management orders and discovery schedules, and otherwise perform such acts necessary to expeditiously and efficiently move the case through the discovery process. The Special Master shall also be empowered to conduct privilege reviews, make rulings as to privilege issues, and make rulings on issues related to all pleading issues, such as amendments to pleadings, supplementation of pleadings, addition and joinder of parties, and the like. The Special Master is authorized to hear and issue Reports and Recommendations to the Court as to any other matters agreed to by the parties.

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

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

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

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

Conduct of Parties

The parties are instructed to cooperate with the Special Master in all respects, including, but not limited to, making available to the Special Master any facilities, files, databases, documents, or other materials the Special Master may request to fulfill the Special Master's duties hereunder.

Ex Parte Communications

The parties are not permitted to engage in ex parte communication with the Special Master or the Special Master's administrative staff, except as would be permitted with the Court and the Court's staff, or except as such communications may relate to settlement of the case where the Special Master has been added to serve as mediator. The Special Master shall not engage in ex parte communications with the Court, except as may be necessary to address administrative matters. Any communications between the Special Master and the Court shall be had with notice to the parties.

Action on the Special Master's Orders or Reports and Recommendations

Any party may file a motion to reject or to modify the Special Master's Order or Report and Recommendations within twenty (20) days from the date on which such Order or Report and Recommendation is served, unless the Court sets a different time. The Special Master's Order or Report and Recommendation shall be deemed received three days after mailing by United States mail or on the same day if transmitted electronically or by hand-delivery. In the absence of a motion to reject or modify an Order or Report and Recommendation within the time provided, the

Order or Report and Recommendation shall have the force and effect of an order of the Court and any objection shall be deemed waived.

The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties stipulate with the Court's consent that:

(A) the master's findings will be reviewed for clear error, or;

(B) the findings of a master appointed under subsections (A)(1)(a) or (e) of Rule 46, U.S.C.R., will be final.

The Court will review all objections to the Special Master's conclusions of law made or recommended by a master on a de novo basis and will review all procedural issues on an abuse of discretion basis.

Maintenance of Materials and Report to the Court

The Special Master is instructed to maintain all pleadings, correspondence, and other papers submitted by the parties in connection with the case and to forward the entirety of such documents and records to the Court at the conclusion of the Special Master's work on the matter. The parties need not file with the Court a duplicate of the documents submitted to the Special Master. Once the Special Master has discharged all duties assigned pursuant to this Order, the Special Master shall file a report with the Court reasonably detailing the work performed by the Special Master, including all motions filed by the parties, all rulings made on all issues presented to the Special Master, all findings of fact and conclusions of law made by the Special Master, all evidence submitted to the Special Master and all evidentiary rulings made, and such other matters as the Special Master may deem relevant.

Compensation of the Special Master

The Court has considered the fairness of imposing the likely cost of the Special Master on the parties and has taken steps to protect against unreasonable expense and delay. In light of the determined need for the appointment of the Special Master, the court concludes that the parties shall bear the cost of the Special Master on the following terms and conditions: The Special Master shall charge an hourly rate of \$495.00 and shall keep an account of all hours or quarter-hour fractions thereof, and any expenses incurred by the Special Master in the performance of the Special Master's duties hereunder. The Special Master will issue an invoice describing the work performed and the hours attributable to the work performed, plus the expenses incurred by item, to the parties on a monthly basis. The parties shall each pay their *pro rata* [i.e., **if two parties, 50% each; if four parties, 25% each, etc.**] share of the invoice promptly and in no event less than 30 days from the issuance thereof. The Special Master shall have the authority to reapportion the fees when in the Special Master's judgment the facts and circumstances justify it. Any dispute by any party over any aspect of the invoice shall first be raised informally with the Special Master for possible resolution, and if resolution is not agreed, then the party disputing any aspect of the invoice may address such dispute to the Court by motion, to which the Special Master may respond.

Special Master's Affidavit

Prior to the entry of this Order, the Special Master submitted to the Court an affidavit (i) disclosing that there is no ground for disqualification of the Special Master and (ii) certifying that the Special Master shall discharge the duties as required by law and pursuant to the Court's instructions without favor to, or prejudice against any party.

SO ORDERED, this _____ of June, 2014.

David Motes, Judge
Jackson Superior Court

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

AETNA INC., et al.,

Defendants.

Civil Action No. 16-1494 (JDB)

ORDER

With the consent of all parties, and upon consideration of the entire record herein, it is hereby **ORDERED** that:

1. The Hon. Richard A. Levie (Ret.) (“Special Master”) is appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure as Special Master in this action for the purpose of considering matters referred to him as described in Paragraph 2 below.¹ The Special Master shall have the rights, powers, and duties provided in Rule 53 and may adopt such procedures as are not inconsistent with that Rule or with this or other Orders of the Court.

2. The following matters are referred to the Special Master for him to consider and rule upon:

All disputes or matters relating to discovery in the above-captioned case as to the parties and nonparties subject to discovery, including but not limited to claims of privilege, motions to compel, motions for protective order, scheduling (consistent with the Court’s initial scheduling order), e-discovery, expert discovery, and deposition designations for trial.

3. Motions by any party, or by a nonparty subject to discovery, shall be filed with the Special Master following a substantive meet and confer. Responses must be filed within 48 hours

¹ The Special Master has submitted a declaration certifying that there are no grounds for his disqualification under 28 U.S.C. § 455.

after e-mail service on opposing counsel and the Special Master, except that responses to motions filed on Fridays, or Saturdays by 5:00 p.m., shall be due by 5 p.m. on Monday. Unless otherwise ordered by the Special Master, each side shall have a maximum of 750 words per issue for moving and opposing submissions.² Replies shall be limited to 250 words per issue and shall be served no later than 24 hours after receipt of the opposition. Service shall be by e-mail and in Word format, with two hard copies (including copies of all cases and other cited materials) delivered to the Special Master by either hand or overnight delivery. All papers filed for consideration by the Special Master shall also be filed with the Clerk, subject to the terms of any applicable protective order.

4. In light of the expedited schedule for trial of this matter, the Special Master shall in his discretion rule on the papers or hear argument in person or by teleconference. Any party seeking a hearing on any motion shall set forth in the motion or the opposition the reasons why a hearing is necessary. Movants and Respondents shall make counsel available for any hearing or teleconference scheduled by the Special Master. The Special Master shall file with the Clerk copies of all written orders, subject to any applicable protective order. In his discretion, the Special Master may resolve motions orally on the record. Consistent with the Special Master's schedule, it is anticipated that rulings will be made within 3 or 4 days of either the completion of briefing on a motion or a hearing.
5. The rulings of the Special Master on matters referred to him under paragraph 2 shall be final unless the Special Master certifies the ruling for appeal to this Court, in which case the standard of review under Federal Rule of Civil Procedure 53(f) shall apply. Any party or nonparty seeking certification shall submit its reasons, in a writing of no more than 250

² For the purposes of this Order, word limits include the text in related footnotes and endnotes.

words per issue and within 24 hours of the ruling for which certification is sought. Any party or nonparty opposing certification may also submit a writing of no more than 250 words per issue within 24 hours of the certification request. Upon notice of certification by the Special Master, the party or nonparty seeking to appeal shall within 48 hours file a brief of no more than 1,000 words per issue, except upon good cause shown. Responses of similar length shall be filed within 48 hours, except that responses to appeals filed on Fridays, or Saturdays by 5:00 p.m., shall be due by 5 p.m. on Monday. The Special Master shall certify for appeal any order denying any claim of privilege if a party requests him to do so.

6. The Special Master shall not communicate ex parte with the parties. The Special Master may communicate ex parte with the Court on matters of procedure, except as to matters on appeal to the Court.
7. Compensation at rates mutually agreeable to the Special Master and the parties shall be paid to the Special Master on a monthly basis by the parties, together with reimbursement for reasonable expenses incurred including the cost of the Special Master's law clerk(s). Plaintiffs will be jointly responsible for paying one-half of the fees and expenses described herein; Defendants will be jointly responsible for paying the other half of the fees and expenses described herein.
8. The parties shall have weekly in-person or telephonic conferences with the Special Master beginning no later than August 22, 2016, and continuing thereafter every week as scheduled by the Special Master. Counsel with authority as to the matters on the agenda for the conference shall participate in the conference. The Special Master will communicate with the parties regarding procedures for the agendas and conduct of the

weekly conferences. The conferences shall be held on the record at the discretion of the Special Master.

9. In addressing the matters referred to him by this Order, the Special Master shall, wherever appropriate, coordinate these proceedings with the proceedings in United States, et al. v. Anthem, Inc., et al, Civil Action No. 16-1493 (ABJ).

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: August 11, 2016

APPENDIX B: METHODOLOGY

These case studies are based on the input of the presiding judges, Special Masters and key attorneys who were involved. Potential candidates for the case studies were proposed by Special Masters serving on the ABA Special Master’s Committee who both provided the initial overview of the case and facilitated contact with the judges and attorneys.

Judicial Input

Dr. Meierhoefer reviewed publically available case documents and related news articles, circulated draft summary descriptions of the cases to the Special Masters for their review and comment, and revised.

The Special Master then contacted the presiding judges to describe the nature and purpose of the case studies, introduce the researcher, and ask if they would be willing to share their views on the impact of the Special Master on the litigation. All of the judges agreed and were contacted by the researcher shortly thereafter to schedule the interview and provide the draft case summary and the proposed interview questions in preparation. (See Methodology Attachment 1 for interview protocols.)

Attorney Input

Given the large number of attorneys involved in these cases, the Special Masters helped to narrow an “attorney survey pool” by flagging those with whom they worked most actively. These attorneys were contacted by email and asked to share their opinions with the Committee by completing a short survey. The survey presented in Methodology Attachment 2 is generic, with brackets indicating slightly different wording on some questions as appropriate to the circumstances of the case.

The response to the first request—of 22 attorneys in the insurance merger cases—was underwhelming, with only 3 lawyers completing the survey, a dismal 14 percent response rate that did not improve after a follow-up request proposing an interview in lieu of the survey should they be interested. They were not; and we narrowed our expectations for getting attorney views on the Delta Wing case. We contacted only the primary attorney for the defendants and for the plaintiffs, both of whom agreed to participate; one by both survey and interview; the other by interview only.

Methodology Attachment 1

AMERICAN BAR ASSOCIATION SPECIAL MASTERS COMMITTEE

JUDGE INTERVIEW PROTOCOL

Appointment

At what point did you realize that you might require the assistance of a Special Master?

If applicable: What went into your decision to opt for an outside Special Master instead of a Magistrate Judge?

How did you identify potential Special Masters? Did you/how did you screen the candidates for conflicts of interest? Did you consult with your colleagues on the court?

Which considerations were most important to you when making your Special Master selection? [For example: prior experience as a master, expertise in the specific subject matter (e.g., anti-trust, intellectual property), experience with relevant case management concerns (e.g., electronic discovery).]

What were the particular features of *this* case that led you to appoint a Special Master? [For example: nature of case, \$ value of the case, need for expedited processing, hostility among counsel, publicity, technical issues.]

What were your goals in appointing a Special Master? [For example: narrowing issues, facilitating settlement, keeping discovery moving smoothly and quickly, reducing cost & delay, conserving judicial resources.]

Communication and Review

How did you communicate with the Special Master? Were there any issues with *ex parte* communication?

What were your standards for reviewing the Special Master's orders, findings and recommendations?

Effect of Special Master on Cost & Delay

At the beginning of the case, what were your expectations as to how long the litigation would last? Was the litigation faster and/or cheaper because of the Special Master? If so, why? [For example: Faster settlement, narrowing issues.]

How did the appointment of the Special Master affect your interactions with the parties?

Did the appointment make any other difference in the litigation?

Would you do anything differently in terms of the timing or content of the appointment?

Overall, how effective was the Special Master in meeting your goals & expectations?

On the whole, did the benefits of the appointment outweigh any drawbacks or visa versa?

Have you appointed a Special Master in another case?

If yes, describe case & goals.

If no, would you appoint a Special Master in an appropriate case? What would you need to see to deem a case “appropriate?”

Methodology Attachment 2

**AMERICAN BAR ASSOCIATION SPECIAL MASTERS COMMITTEE
ATTORNEY SURVEY**

SPECIAL MASTER APPOINTMENT

1. When the possibility was first raised, were you in favor of having a Special Master appointed to this case? No Yes Neutral
2. When selecting a Special Master, how important do you believe the following should be to the consideration:

	Very Important	Somewhat Important	Not Very Important
a. Prior experience as a Special Master			
b. Expertise in specific subject matter			
c. Experience handling large amounts of discovery			
d. Experience with discovery of inherently complex material			
e. Experience with e-discovery			
f. Reputation as an impartial neutral			
g. Other important considerations: <i>Please specify:</i>			

SPECIAL MASTER’S CONDUCT OF THE DISCOVERY AND PRETRIAL PROCESSES

3. Please indicate the extent to which you agree with the following statements about the way the Special Master went about carrying out [her / his] responsibilities.

	Strongly Agree	Agree	Disagree	Strongly Disagree
a. I had ample opportunity to lay out my issues and concerns to the Special Master.				
b. I had ample opportunity to raise any concerns about the Special Master’s process or findings with the judge.				
c. The [weekly] meetings with the Special Master and other counsel were a productive use of my time.				
d. The process encouraged a clear dialogue to sharpen issues and avoid misinterpretation.				
e. The Special Master’s findings were clear and well-reasoned.				
f. The Special Master was impartial.				

COMMENTS:

SPECIAL MASTER FEES AND EXPENSES

4. Did your client raise any concerns about the additional cost of a Special Master? No Yes
5. Do you think that the Special Master’s fees and expenses were reasonable? No Yes Don’t Know
6. Were the Special Master’s fees and costs allocated equitably among parties? No Yes Don’t Know

COMMENTS:

IMPACT OF THE SPECIAL MASTER

7. In your opinion, did the involvement of the Special Master:

	Yes	No	Unsure
<i>Benefits</i>			
a. Facilitate efficient discovery			
b. Move the case to [trial / settlement] faster than anticipated at the outset of the litigation			
c. Reduce contention among the attorneys			
d. Reduce overall costs to my client			
d. Other Benefits: <i>Please specify:</i>			

<i>Drawbacks</i>			
e. Increase overall cost to my client			
f. Increase attorney burden by adding another layer to case processing			
g. Give authority to the Special Master that was more appropriately exercised by the court			
h. Other Drawbacks: <i>Please specify:</i>			

8. Overall, do you think that the costs of involving the Special Master in this case were worth the benefits? No Yes

COMMENTS: