

## **THE ROLE OF SPECIAL MASTERS IN MASS LITIGATION AND SETTLEMENT**

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The Court's case management conference started out as routine. Then came the curve ball. "Given how things stand," the Judge says "I am thinking of appointing a special master. It seems appropriate, in the circumstances of this case." The Judge turns toward you. "I'd prefer to have your consent, although I'm not sure I need it. Counsel, what is your position?"

Questions flash through your mind. Why does the Judge believe we need a special master? How will this affect litigation costs? Will a special master change our chance of winning? Whom does the Judge have in mind? If we don't consent, will the Judge hold it against us? And, is this going to ruin my vacation plans?

The answers to these questions (including the last one) will make a real difference in your case. This article provides some possible insight into the Judge's thinking.

### **Where did the Judge get this idea?**

Actually, the idea is not so unusual. The Federal Judicial Center offers this firm endorsement of special masters: All judges and almost all attorneys [surveyed] thought the benefits of appointing a special master outweighed any drawbacks and [all] said they would, with the benefit of hindsight, still support the appointments. Attorneys said this regardless of how the special master's appointment initially came about, and even regardless of whether the master's involvement benefitted their clients. Special Masters: Incidence and Activity, Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters (Federal Judicial Center 2000) ("Special Master Report"), Thomas E. Willging, et al at p. 9.

### **How often does this happen?**

The Special Master Report, supra, found that 7% of Federal District Court mass cases have special masters.

### **What's so "special" about this case that it requires a special master?**

Every case where a Judge appoints a special master usually shares one overriding feature: excessive use of limited judicial resources. This simply means a Judge and her staff have only so much time and energy available, and your lawsuit is consuming disproportionate attention.

Thus, a Court is more likely to appoint a special master if the case: (1) involves an especially complex or technical area of the law, such as patent or antitrust; (2) requires heightened, time-consuming discovery oversight, such as in Multi-District Litigation ("MDL") or when counsel are ever-bickering and over-zealous; (3) calls for fact-intensive non-jury determinations, such as an accounting, allocating damages among many claimants, awards of attorney fees, assessments of sanctions, or expert-heavy damage measurements; or (4) entails a long post-trial or post-settlement stage, such as class-action or aggregate settlement administration, or monitoring and compelling compliance with injunctive relief.

### **Why not refer my case to a Federal Magistrate Judge instead?**

Two reasons: First, the same strain on judicial resources felt by Federal District Judges is also felt by Federal Magistrate Judges. Second, Magistrate Judges will usually confirm that there are certain kinds of tasks that are more appropriately assigned to special masters. These include administering settlements, monitoring consent decree compliance, addressing technical issues requiring special expertise, reviewing massive document libraries for privilege, and even overseeing discovery where the disputes are especially frequent, time consuming and highly contentious.

**Alternatives to a Special Master Appointment: Is it better for the Court to appoint its own expert under Federal Rule of Evidence 706 or a Technical Advisor instead of a Special Master?**

Unlike a special master, a Court appointed expert is subject to cross-examination and challenge like any other expert. Fed. R. Evid. 706. You might consider whether a Court appointed expert is more likely to strengthen or undermine the opinions of your experts. If, as counsel, you feel that your experts are more likely to make a favorable impression on the Court than those of your opponent, your client may be better served by opposing the appointment of a Court expert.

Rule 706 allows the Court to appoint an expert *sua sponte*, while Rule 53, governing the appointment of special masters, usually does not allow the Court to appoint a Special Master without consent of the parties absent “exceptional conditions,” with the most celebrated case on this topic being La Buy v. Howes Leather Seal, 352 U.S. 249 (1957). Note: Although party consensus to appoint a special master is usually required by Rule 53 and commonly followed in practice, the Court may *sua sponte* appoint a Special Master without there being exceptional conditions to (i) perform an accounting; or (ii) address pretrial matters when the Federal District Judge and Magistrate are covered up. Rule 53(1)(B)(ii) and (C).

Perhaps, the most troublesome of these three potential Court appointees is a Court Technical Advisor, who does not present evidence or offer opinions on his ultimate findings in the case and is not subject to the same scrutiny by the parties as a special master or a Court expert. Therefore, the parties may not even have knowledge of the advice given by the Technical Advisor to the Judge.

Here are a couple of Federal cases approving Technical Advisors:

(1) Reilly v. United States, 863 F. 2d 149, 154-155 (1<sup>st</sup> Cir. 1988) (Trial court has inherent authority to appoint Technical Advisor to assist it in technically complex cases.); and

(2) Association of Mexican-American Educators v. California, 231 F. 3d 572, 590 (9<sup>th</sup> Cir. 2000) (In those rare cases in which outside technical expertise would be helpful to a District Court,

the Court may appoint a technical advisor.).

The role of a Technical Advisor is distinguishable from a special master under Fed. R. Civ. P. 53 or a Court appointed Expert under Fed. R. Evid. 706. A Technical Advisor's role is purely advisory or tutorial. See, 9, Moore's Federal Practice (3d Ed. 2006) §53.02[4] ("Moore's").

Unlike a Court appointed Expert, the parties do not have the right to cross-examine a Technical Advisor, nor does the Technical Advisor have to produce a report to the parties like a special master. Association of Mexican-American Educators, 231 F.3d. 572 (9<sup>th</sup> Cir. 2006) at 591.

### **What about the cost of a Special Master?**

In the majority of cases, imposing on the parties the cost of a special master is simply not justified. The Court could handle the matter itself just fine. But there are three types of cases where the benefits of appointing a special master clearly justify the cost.

The first is when litigation is expensive or the financial stakes are high, and each side is spending with no end in sight. Compared to expert witness fees, deposition travel expenses, and invoices for platoons of brief-writing attorneys, special masters are a good value.

The second is when the parties' actions are driving up the cost of litigation unnecessarily. Sometimes, discovery disputes are truly excessive. Write a few \$5,000 or \$10,000 discovery dispute letters to the Court, and then consider the costs and benefits of having a special master. The master's fees to settle these disputes may be substantially less, and the Judge's exasperation may be relieved rather than intensified. Indeed, there may be total *cost savings* for the clients *on both sides* when the parties can obtain immediate access to efficient and inexpensive dispute resolution instead of filing motions and writing more letters.

The third type of case is when resolution of certain issues requires time and expertise the

Court simply lacks. Reviewing thousands of documents for privilege, or dividing up a settlement pie among thousands of claimants, or assessing numerous attorney fee petitions, or combing through a patent's history is not the best use of a Judge's time. A special master frees the court to focus on other matters.

The Special Master's Report, supra, found special master rates in 2000 to average \$200 per hour. Today, I have found them to average between \$250 and \$1,000 per hour. There are some outliers, such as mediators that charge tens of thousands of dollars per day. However, as an advocate for your client, you should try to negotiate with the special master on his fee if you think it is excessive. Typically, the Court has the parties split the fees, although the decision might be revisited depending on how the case resolves.

### **What will the special master actually do?**

Federal Rule of Civil Procedure 53 gives Judges great flexibility regarding tasks the Court may delegate to a special master. Boiled down to its essence, Rule 53 says: Judge, if you are faced with a complex or difficult matter that will take up too much of your valuable time, then you can appoint a special master as your personal aide and get help.

When a special master is assigned a specific task, he or she is required to submit a report under Rule 53, whether you are in federal or state court. However, the deadline for a party to object to the findings of the report differs in Alabama, depending on whether you are in federal or state court.

In Jones v. Moore, 215 Ala. 579, 112 So. 207 (1927), the failure to except to the master's report at the trial level was considered an admission of its correctness. Federal construction of Rule 53 in conjunction with Rule 52(b) has reached a different result. Under Federal Rule 52(b), a party

is permitted to raise, for the first time on appeal, a question of the sufficiency of evidence to support the findings of the trial court in a non-jury proceeding. In Bingham Pump Co. v. Edwards, 118 F. 2d 338 (9<sup>th</sup> Cir. 1941), cert. den. 314 U.S. 656, 62 S. Ct. 107, 86 L. Ed. 525, the appellant failed to except to the master's report and the trial court thereupon approved the master's report. Applying Rule 52(b) the Ninth Circuit permitted the objection to the findings of the master to be raised for the first time on appeal. See, 5A Moore's ¶ 53.11.

### **How do the Judge, the special master, and the parties communicate with each other?**

Some Judges prefer very formal special master relationships, requiring virtually all communications to be written, similar to the relationship between trial courts and appellate courts. Other Judges prefer more intimate and informal communications with their special master, allowing the master to serve as a conduit between the parties and the Court, like a combined battlefield reporter and military lieutenant. The amount of *ex parte* communications allowed between the parties and the special master may also depend on the nature of the lawsuit.

It is a safe bet that, even when the Judge and special master have the most formal of relationships, the special master receives occasional intimate direction from the Judge, and the Judge sometimes obtains casual intelligence from the special master.

Rule 53 is silent on whether the special master and the parties, or whether the special master and the Judge, may communicate *ex parte* during the course of the litigation. Usually, *ex parte* communications routinely occur. Overall, Judges, attorneys and special masters surveyed in the Special Master Report did not see an explicit rule prohibiting *ex parte* communications between a special master and a Judge or between the Special Master and the parties as either necessary or desirable. However, almost all seemed to think rules clarifying this murky area might be useful.

Special Master Report, supra at p. 7-8. This could be approved in the Order appointing the special master at the request of the parties.

### **Who decides who will be the special master?**

Ultimately, it's the Judge who decides. The deeper question is the extent to which the Judge will consider your input. Some Judges simply appoint a specific individual as special master without any consultation from the parties. Others may announce the intention to appoint a certain individual but invite comment or allow objections (which might carry risks similar to filing a motion for recusal). Still other Courts announce the intention to appoint a special master, and ask the parties for suggestions, and then the Court chooses. In the latter circumstance, the parties may agree on a specific individual, in which case the Court almost always adopts the parties' mutual choice.

Technically, under the La Buy case *supra*, the special master cannot displace the Trial Court as the decision maker for the more complex issues of law and fact. "On the contrary, we believe that this is a compelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work." La Buy, *supra*, at 259. According to the Eighth Circuit Court, "beyond matters of account, difficult computations of damages, and unusual discovery, it is difficult to conceive of a case that will meet the rigid standards (special circumstances) of the La Buy decision." In re Armco, Inc., 770 F. 2d. 103 at 105 (8<sup>th</sup> Cir. 1985).

Thus, it is more likely than not that a special master will only be appointed by consent of the parties, so that they should have input in whether there is to be one, and if so, who it will be.

### **Is this going to affect my vacation plans?**

That's not a trivial question. It is reasonable to wonder how appointment of a special master



might affect not only your case, but also other parts of your life.

The most common approach of special masters is compassionate. A good special master understands his job is to make the appointing Judge more successful by providing superior service to the Court and to the parties. This is not achieved by simply furnishing fair and accurate legal analysis. It also requires maintaining easy accessibility, treating the parties with kindness and respect, serving without any hidden agenda, and applying rulings consistently as a neutral.

Doing all those things reflects well on the appointing Judge and fosters the parties' treating each other with more respect, too. Thus, disputes may be concluded less painfully, final resolution may be reached more quickly, and Court and the parties may share in the success.

#### **What tips should the special master be given to succeed?**

The Judge has appointed a special master. What advice should you, as counsel for a party, provide him? First, in order to build trust, the special master should try to put the parties at ease by taking a collaborative approach to problem solving in a non-dogmatic way. At the same time, whining by a party might gently be discouraged. Second, the special master should be accessible and should be organized. There should be an ongoing level of communications between the special master and the parties to resolve conflicts as they arise. Next, if you are comfortable with the special master, you might encourage him or her to provide you with feedback from the Court, which is facilitated by frequent Special Master/Court communications. Third, the special master should not go on a frolic, by exceeding the terms of the appointment Order. Finally, the special master should try to be as impartial as possible, which is difficult for any human being, just like a Judge. Levity, however, is often important too. For one thing, it helps relieve stress in a case prior to the firmness of a Court or special master's decision.

### **Will the special master usurp some of the Court's authority?**

This fear has been expressed by many authors. See, for example, Special Mastering Complex Cases: Extending the Judiciary or Reshaping Adjudication? Wayne D. Brazil, 53 Chicago Law 393 (1986). As an advocate for your client, you need to decide, on a case by case basis, whether certain special master activities on behalf of the Court help or hurt your client. Advocacy extends to interfacing with the special master to address this issue.

### **Can I get rid of the special master if I don't like him or her?**

What if the special master runs amuck, and my client wants him fired? A special master is subject to the same conflicts of interest and disqualification standards as that of a Federal District Judge under 28 U.S.C. 455, with the most salient portions being:

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child

residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

However, the parties, with Court approval, may still consent to a special master appointment after disclosure of the grounds for such disqualification, according to Rule 53(a)(2). Because a special master is not a public judicial officer, a Court may find it appropriate to permit the parties to consent to a special master appointment when circumstances would otherwise require Judges to disqualify themselves. The Advisory Committee note to the 2003 Amendments to Federal Rule 53. However, a special master is usually very sensitive to recusal rules and, if there is a valid one, will usually recuse. If the special master no longer serves by party consensus, that, alone, has been a good reason to step aside. The task of a special master is mastering collaboration of the parties.

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