

**ABA-JUDICIAL DIVISION SPECIAL MASTERS COMMITTEE  
CHECKLIST FOR MAKING USE OF SPECIAL  
MASTERS TO HELP DEAL WITH THE NEW NORMAL**

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- **How can use of Special Masters address case delay and increase court responsiveness?**

Special Masters can provide adjunct judicial services to handle matters usually handled by judges or other full-time judicial officers. To maximize court responsiveness courts can consider:

What court services are currently suspended or substantially delayed?  
What backlogs or delays can be eased with the assistance of a Special Master.

Examples of the types of proceedings in which special masters may help are: facilitating cooperation between parties to minimize motion practice, modifications to visitation or temporary child custody, pre-trial preparation, discovery scheduling and dispute resolution, resolution of disputes concerning the use of experts or evidentiary issues, and providing expertise that can be used to clarify or simplify disputes, or providing mediation services to assist in resolving disputes. The current demands may give rise to other ways special masters can assist courts – such as assisting in reviewing case files to suggest efficient management.

Authority for the use of “special masters” and even what they are called varies among the jurisdictions. Federal district courts have been found to have inherent authority to appoint special masters, with Federal Rule Civil Procedure 53 addressing the terms of the appointment. The resource list below includes a reference to authority by state.

Special Master appointments will vary depending on local law, court needs and the Special Master’s role in the proceeding. Both the length of the appointment and the degree that parties are involved will differ as well. Special Masters can be appointed for entire cases or can be appointed for specific tasks. So too, Special Masters may be appointed for a specific length of time.

Laws and procedures in some jurisdictions may require that parties consent to the use of a Special Master. The scope of that consent will also differ. Even where party consent is not required, courts may wish to involve the parties in defining the scope of the appointment and choosing

the Special Master. Parties can also be consulted about other alternative approaches to a speedy resolution.

- **How do we find qualified Special Masters?**

The skills to look for in Special Masters should be adapted to the task they perform. Depending on the task, certified arbitrators, former judges, hearing officers, lawyers with case management, settlement or other relevant skills and experience are all potential Special Masters.

Those jurisdictions with judicial selection bodies may want to use their selection criteria to assist in evaluating the qualifications of Special Masters. Jurisdictions with existing court-based ADR rosters may want to explore using individuals already qualified for those rosters. There are also individuals who have already served as special masters in local, regional and national capacities. Resources listed below may assist in identifying experienced Special Masters available to assist your court.

Special training for expanded use of Special Masters could take place in conjunction with existing Bar CLE programs or other judicial training programs. The ABA is also exploring the interest and resources available for creating a training program.

Courts also need either to establish a system, or to use some existing system, of vetting to ensure that the special masters chosen have the appropriate temperament and skills for the job and, as a group, bring to it the appropriate diversity of experience.

- **Informed consent and public accountability when using Special Masters**

Use of Special Masters should enhance and not lessen the quality of justice services. To that end, where use of Special Masters is by direct court appointment, the appointing authority has the obligation to ensure that the Special Master will comply with relevant Codes of Conduct, are appointed on the basis of qualifications and not favoritism, and with consideration of diversity.

Where parties will need to consent to use of a Special Master, ideally the parties will be given a list of qualified names to choose from. For parties of limited means, pro bono Special Masters or Special Masters paid through public funds may be needed.

A Special Master coordinator who is part of the court administration can oversee the appointment process and the compensation structure for the Special Master program.

Proceedings presided over by Special Masters must comply with court procedures, including accessibility to the public. Accessibility can be accomplished by use of technology. Where the court system does not have adequate technological resources, use of private Special Masters may have the benefit of having access to technology that the courts do not.

Those who serve as Special Masters must do conflict checks with their law practice and disclose any potential conflicts to the court and the parties consistent with the rules applicable to Special Masters.

## **Resource List**

### *Resource List:*

ABA Resolution 100 (adopting Guidelines for the Appointment and Use of Special Masters in Federal and State Court Civil Litigation), January 28, 2019, *especially* Guidelines 2, 3, 5

<https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/100.pdf>

Professor Nancy Welsh and Merrill Hirsh, “A Tool To Help Courts: Special Masters, recorded presentation for the Ohio Supreme Court 2020 Dispute Resolution Conference, Columbus, Ohio (Mar. 10, 2020)

[https://www.youtube.com/watch?v=kF9CJUvMgQo&list=PLMMZAktESmQrN3Qd9F5ZHL\\_5wiAh55ml&index=3&t=0s](https://www.youtube.com/watch?v=kF9CJUvMgQo&list=PLMMZAktESmQrN3Qd9F5ZHL_5wiAh55ml&index=3&t=0s)

### **General Compendium of Information on Authority, Issues for Appointment, Use of Special Masters and Ethics**

Academy of Court Appointed Masters, “Appointing Special Masters and Other Judicial Adjuncts,”

[https://www.courtappointedmasters.org/acam/assets/File/public/handbook/web\\_final\\_acam\\_benchbook\\_jan\\_2020.pdf](https://www.courtappointedmasters.org/acam/assets/File/public/handbook/web_final_acam_benchbook_jan_2020.pdf)

See *also id.* at 23-67 (compiling books and articles up to 2005 on the use of special masters).

See *also id.* at 69-83 (including sample orders for the appointment of special masters).

### **Authority for the use of special masters in various jurisdictions.**

Inherent authority of federal courts and its limits: See, e.g., *Ruiz v. Estelle*, 679 F.2d 1115, 116 n.240 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956); *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at \*3 (D. Kan. Nov. 29, 2016); *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). See *also Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does not extend to allow appointment of a special master to exercise “wide-ranging extrajudicial duties” such as “investigative, quasi-inquisitorial, quasi-prosecutorial role[s]”).

Academy of Court Appointed Masters Benchbook:

[https://www.courtappointedmasters.org/acam/assets/File/public/handbook/web\\_final\\_acam\\_benchbook\\_jan\\_2020.pdf](https://www.courtappointedmasters.org/acam/assets/File/public/handbook/web_final_acam_benchbook_jan_2020.pdf) at 44 (chart of state laws and rules concerning special masters).

**On the uses of special masters and other adjuncts and the philosophy behind their use:**

Hon. Shira A. Scheindlin (ret.), “How Courts and Litigants Can Benefit from Special Masters,” available at <https://www.law360.com/articles/1231761/how-courts-and-litigants-can-benefit-from-special-masters>

Merril Hirsh, A Revolution That Doesn’t Offend Anyone: The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation, ABA JUDGES JOURNAL 30 (Fall 2019) available at <https://merrilhirsh.com/wp-content/uploads/2020/03/ABA-Judges-Journal-Article-on-Special-Master-Guidelines-01088654.pdf>

Nancy A. Welsh, Magistrate 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).

**On Ethics for Special Masters**

Academy of Court Appointed Masters Benchbook

[https://www.courtappointedmasters.org/acam/assets/File/public/handbook/web\\_final\\_acam\\_benchbook\\_jan\\_2020.pdf](https://www.courtappointedmasters.org/acam/assets/File/public/handbook/web_final_acam_benchbook_jan_2020.pdf) beginning at 22.