Academy of Court-Appointed Neutrals
Section 6
Articles, Books, Websites, and Literature About Neutrals

A variety of sources contain information and materials on neutrals. The following resources contain references to the use of court-appointed neutrals, or explain their roles, or describe their work. Please contact ACAN to include other sources not listed in this Section. See Table of Contents.

BOOKS

1. **David Herr and Roger Haydock, *Fundamentals of Litigation Practice*, Chapter 6 (Thomson Reuters).**

2. **Roger S. Haydock and David F. Herr, *Discovery Practice,* Chapter 2 (Wolters Kluwer).**

3. **David F. Herr and Roger S. Haydock, *Motion Practice*, Chapter 2 (Wolters Kluwer).**

4. **Roger Haydock and John Sonsteng, *Trial Advocacy: Before Judges, Jurors, and Arbitrators*, Chapter 3 (West Academic).**

5. **Roger S. Haydock and Peter B. Knapp, *Lawyering: Practice and Planning*, Chapter 1 (West Academic).**

6. **Roger Haydock, David Herr, and Jeffrey Stempel, *Fundamentals of Pretrial Litigation,* Chapter 1 (West Academic).**

ARTICLES

7. ***2004 Special Masters Conference: Transcript of Proceedings,* 31 WM. MITCHELL L. REV. 1193 (2005), *available at* https://www.courtappointedneutrals.org/ACAN/assets/file/public/articles/SpecialMastersTranscript.pdf**

   Westlaw Abstract: A historic gathering of neutrals occurred on October 15th and 16th, 2004 in Saint Paul, Minnesota. Federal and state court-appointed neutrals from around the country met for the first time to share their experiences as neutrals and to form a national association of court-appointed neutrals. This issue of the William Mitchell Law Review contains articles presented at the conference and the transcript of faculty presentations.

Citing Reference:

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges (2007) (ALI-ABA & Federal Judicial Center Continuing Legal Education Course of Study, materials available on Westlaw as SN009 ALI-ABA 1911)

> Westlaw Abstract: This bench book is designed to help federal and state court judges: (1) decide whether and when to appoint a neutral; (2) draft effective appointment orders; and (3) anticipate and effectively address ethical issues and practical concerns that arise in neutral work. These materials may also be helpful to prospective adjuncts and to parties considering whether to request the appointment of a judicial adjunct. All courts have the power to appoint a neutral or other type of judicial adjunct to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of neutrals in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance.
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> Many federal and state court judges use neutrals…Judicial adjuncts can provide courts, parties, and lawyers with essential services without tapping into court resources. Neutrals can act as mediators and settle civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement. An adjunct can markedly reduce the burden on a judge, the judge's staff, and even the court's administrative staff. Parties and lawyers recognize that in some cases the appointment of a neutral can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced neutrals know how valuable they can be to case handling and resolution.

8. Richard H. Agins, Comment: An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery, 23 PACE L. REV. 689 (2003).

Westlaw Abstract: The volume and volatility of computer-generated data present novel problems of evidentiary discovery, requiring the employment of a neutral party with the requisite technical, legal, and business experience to provide effective oversight and management. A neutral, referred to serve as an impartial officer of the court pursuant to Rule 53 of the Federal Rules of Civil Procedure, can bring a greater level of specialized knowledge, flexibility, involvement, and efficiency to pretrial discovery of electronically generated and stored data ("electronic data") than can most trial court judges burdened with managing a full docket.

Citing References:

David Herr, Ann. Manual Complex Lit. § 13.1 Trial Judge's Role: Use of Special Masters (2009).

David Ferleger, Special Masters under Rule 53: A Welcome Evolution, ABA-ALI CLE, available on Westlaw as SN040 ALI-ABA 1 (2007).

> From Article Introduction: In recent years, and increasingly since the amendment of Rule 53 in 2003, courts turn to neutrals in constitutional, commercial, mass tort and other litigation for assistance at all stages in the adjudication process. Neutrals may be appointed pre-trial, to preside over trials, and in the post-trial monitoring and compliance phases of a suit. The use of neutrals has been constructive and beneficial to litigants and to the courts. Few administrative difficulties have been reported.
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> Federal Rule of Civil Procedure 53 has been a primary support for this approach. However, even post-amendment, courts continue to declare their inherent authority to appoint neutrals "beyond the provisions" of Rule 53. Pre-amendment, appointment of a neutral was reserved to the "exceptional case" and there was significant dispute in particular instances over whether a case was sufficiently exceptional to warrant a neutral. The 2003 rule in effect abandoned the notion that appointment of a neutral is disfavored, and many features of the rule are now designed to facilitate expanded use of neutrals. This article describes the early use of neutrals, the functions to which courts have put neutrals, and a selection of issues regarding the appointment and operation of neutrals. [Westlaw]

Lynn Jokela & David Herr, Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool, 31 Wm. Mitchell L. Rev. 1299 (2005).

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

9. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725.

LexisNexis Abstract: The court's powers to enforce a consent decree include interpreting the decree, issuing injunctions to implement the decree, granting supplemental relief, delegating authority to a neutral, and holding a party in contempt of court. ... A court emphasizes the contractual nature of consent decrees when it undertakes to resolve disputes over the meaning

of certain provisions. ... The actual experiences of attorneys, judges, and monitors in the research cases reveal a pervasive pattern of [non-adjudicative] techniques for making consent decrees work; reported cases rarely reveal such techniques. ... Written reports would have been helpful because they would have provided the parties a clear record upon which to determine in what areas defendants were not complying and how the parties had resolved various issues. ... One way the monitor responded to this situation was simply to order upper-level mental health agency officials to attend meetings to discuss areas of noncompliance. ... A lenient judicial posture toward requests for substantive modification would introduce uncertainty and therefore discourage voluntary settlement and increase litigation over implementing consent decrees. ... The economy improved, a newly elected administration was strongly committed to implementation of the decree, and the legislature fully funded all the community programs.

Citing Reference:

Ellen E. Deason, Managing the Managerial Expert, 1998 U. Ill. L. Rev. 341

> Westlaw Abstract: While most lawyers think of court-appointed experts as witnesses, judges increasingly appoint experts for managerial roles. For instance, court-appointed experts evaluate pretrial discovery; they play key roles in encouraging settlements and helping judges decide whether or not those settlements should be approved; they determine complex damages; they advise judges on remedial orders and monitor compliance and implementation. Professor Deason analyzes the proliferation of court-appointed experts for these indispensable functions in the absence of any explicit authority or procedures for their appointment. She argues that the current Federal Rules of Evidence and Federal Rules of Civil Procedure do not contemplate managerial functions for court-appointed expert witnesses or neutrals and hence their limitations on appointments and their procedures are inadequate. Moreover, the other source of appointment authority, inherent judicial power, has ambiguous boundaries and offers courts little guidance. Thus, Professor Deason suggests the development of new appointment authority tailored to the legitimate needs of the courts for managerial assistance, designed to encourage the maximum effectiveness in the use of experts, and constructed to prevent unnecessary interference with party autonomy.

10. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006).

Lexis Abstract: Less than two weeks after the collapse of the World Trade Center, a unified Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA, or "the Act"), a bill intended to help stabilize the economy by protecting the airlines from an avalanche of litigation. ... As noted above, the Act provides the airline industry with a range of benefits, including federal loan guarantees of up to ten billion dollars; compensation of up to five billion dollars for "direct losses incurred ... as a result of any Federal ground stop order;" compensation for "incremental losses" from September 11 to December 31, 2001; reimbursement for any increase in the cost of insurance through October 1, 2002; and a cash

flow benefit from the deferral of the deposit of excise taxes. ... The architecture of the Fund was based in part on the Agent Orange settlement compensation scheme, and the Special Master was based on the Agent Orange court-appointed Special Master. Before Congress enacted the ATSSSA, David Crane, one of Senator Trent Lott's congressional staffers, drafted a model of the Special Master which Congress soon incorporated into the statute. ... A comparison with other victim compensation funds emphasizes the failure of the ATSSSA to provide for a suitable tort option. ... Suddenly, any Fund-eligible parties considering the tort option would find themselves vying to litigate with a host of new parties.

Citing References:

Judge John G. Farrell, Administrative Alternatives to Judicial Branch Congestion, 27 J. Nat'l Assn Admin. L. Judiciary 1 (Spring 2007)

> Lexis Summary: ... Workers' Compensation Law (originally called "Workmen's Compensation Law") involved a new legal concept: liability without fault. ... Many more workers were assured a recovery for a work accident than were assured under the tort litigation system. ... In addition to providing compensation to the victims, the legislation was also intended to save the airline industry from bankruptcy and the U.S. economy from collapse. ... Under the legislation, a monetary fund was created and the attorney general appointed a neutral, Kenneth Feinberg, a respected attorney with considerable experience with giant class-action lawsuits. ... There are some very limited exceptions which allow certain tort actions in court. ... Strictly speaking, I note that adoption of such programs is not always motivated solely to relieve judicial congestion or delays. ... I believe that both emerging technologies of nanotechnology and biotechnology are extremely likely to bring with them environmental risks which could result in injuries and illnesses with long latency periods and difficult causation issues, involving multiple plaintiffs, all of which are problematic under traditional common law tort schemes. ... It is my belief that carefully crafted administrative alternatives in these areas could help to provide fair and rapid relief to the victims. [LexisNexis]

11. Samuel J. Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543 (1979).

Wiley Abstract: Litigation concerning conditions in institutions such as prisons or mental hospitals does not stop at the issuance of a remedial decree. Steps must be taken to assure implementation. Increasingly, the courts are resorting to neutrals to assist them in implementing such institutional reform. While the use of neutrals by courts is a firmly established tradition, the role assigned to neutrals in the institutional context is often an extraordinarily broad and intrusive one. As a result, serious questions have arisen about this new extra-traditional neutral role and about the applicability, the sufficiency, of the traditional rationales and restraints. This article is among the first in a small but developing body of literature that begins to examine the new neutral role and the questions concerning it. [Wiley Inter Science - http://bit.ly/1LFKfL]

12. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* 53 U. CHI. L. REV. 394 (1986).

Westlaw Abstract: In recent years, courts have used neutrals to help manage complex civil cases. But this use has raised serious questions of efficacy and ethics. This paper first identifies the needs and ambitions that inspire courts to appoint neutrals, in order to demonstrate why recourse to this tool can be so rich in potential yet so controversial. Then, in describing some recent roles neutrals have played, it assays their potential contributions as well as the risks attending their use. It concludes that as neutrals are used more ambitiously, the potential benefits and risks increase. Neutrals can bring significant new skills and flexibility to bear on cases whose complexity threatens to overwhelm our traditional system. However, a correlative danger exists that using neutrals will fundamentally alter that system in ways we find troubling: by making adjudication too informal, by removing it from public scrutiny and challenge, and by encouraging judges to rely on neutrals to a degree incompatible with appropriate exercise of the judicial function. [Westlaw]

Citing References:

Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 Brook. L. Rev. 659 (Fall 1993)

> Introduction: This Article assesses the landscape of litigation reform activity and the current political tension between continuing commitment to open access to the courts and a desire for faster, less expensive dispute resolution. It will also examine the state of the reform process but refrain from evaluating specific proposals. Part I describes major recent and current activities affecting American litigation. Part II then analyzes current debates about litigation by identifying the leading schools of thought on both litigation practice and litigation reform. It attempts to situate current litigation issues in a broader inquiry: whether the perceived post-1938 consensus attending adjudicatory procedure and civil litigation reform has merely come unglued (in whole or in part) or, rather, whether it has been supplanted by a new consensus, a "new paradigm," reflecting an altered vision of the litigation process. Finally, Part III proposes a more integrated and deliberate method to govern civil litigation reform as a means of thwarting troublesome recent tendencies. [Westlaw]

Irving R. Kaufman, Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, 59 Fordham L. Rev. 1 (October 1990).

> Introduction: Many observers see the courts on the verge of buckling under the strain; one view from the trenches sees the problem of delay as "'beyond the crisis stage.'" The problem is not merely one of harried judges. Litigants, people with grievances, are being denied meaningful access to the courts. Delay prevents the courts from doing their job—resolving people's disputes at reasonable costs so that they may return to their normal lives... Flexibility, experimentation and a willingness to innovate are essential if the administration of justice is to keep up with the society we serve. What follows is a brief

examination of proposed changes in judicial administration, stressing those that hold the greatest promise to reduce the major costs of justice—expense and delay. [Westlaw]

13. Wayne D. Brazil, *Special Masters in the Pre-trial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 289 (1982).

Abstract: This article explores the advantages and disadvantages of referring discovery matters in complex cases to neutrals. In the first section Brazil explains how the results of his earlier research into the discovery system exposed problems that the appointment of neutrals might help solve. He then describes the kinds of pretrial tasks and roles federal courts have assigned to neutrals and the ways that using a neutral can expedite and rationalize the case development process. In the second half of the article, the author assesses the major objections to delegating judicial responsibilities to neutrals and the problems that frequent appointments might cause. Along the way, Brazil offers practical suggestions to judges about how to avoid potential difficulties and how to maximize the effectiveness of this increasingly popular procedure. [Wiley InterScience.

14. Wayne D. Brazil, Geoffrey C. Hazard Jr. & Paul R. Rice, *Managing Complex Litigation: A Practical Guide to the Use of Special Masters*, American Bar Foundation (1983).

Abstract from 63 Tex. L. Rev. 721: Professors Geoffrey Hazard and Paul Rice provide an illuminating case study of the management techniques that worked for them as neutrals in the massive United States v. ... The purposes of pretrial conferences as stated in the new rule include concerns for efficiency such as "establishing early and continuing control so that the case will not be protracted because of lack of management," "discouraging wasteful pretrial activities," "improving the quality of the trial through more thorough preparation," and facilitating settlement. ... They believe that a full-time position is not likely to offer the pay and status needed to attract persons whose neutrality of the subject and intellectual prowess will enable them to work well with the able and aggressive attorneys usually involved in complex cases. Instead, the authors recommend the use of co-neutrals, one with day-to-day management functions and the other with duties related to subject matter expertise. ... Judges should hold a conference with counsel and the neutral to discuss the tasks and powers being delegated and the procedures to be followed. ... Brazil, Hazard, and Rice's Proposals The Brazil-Hazard-Rice book is concerned primarily with discovery management and addresses these administrative matters in much more detail than does Schwarzer. ... In that case, all discovery demands were required to be filed with the neutrals, thus rejecting the Federal Rules' view that the attorneys should generally conduct discovery without court involvement. ... According to Hazard and Rice, "The end product was a combined narrative stipulation, pretrial order of issues in dispute, and a tentative order of proof."

15. Victoria E. Brieant, *Techniques and Potential Conflicts in the Handling of Depositions*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and States Courts, Chicago, Ill. 2005.

Abstract: Part 1 of this article addressed the use of depositions in the United States and the rules that govern them. Topics included deposition techniques, sanctions, the limitations of

depositions, objections, instructions not to answer, Rule 30(c)(2), neutrals and magistrate judges, discovery of documents reviewed by deponents, videotaped depositions, the form of questions, witness preparation, non-party subpoenas, and authentication of electronic evidence. These topics are, however, of utility only when you can actually take the deposition. Getting to take a deposition is the United States is relatively easy. Despite variations in rules among the states, the fundamentals tend to be consistent. Taking the deposition of non-citizens or outside the U.S., on the other hand, can pose some serious problems.

16. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002).

Lexis Abstract: However, the arcane procedures and delegations of authority used by the Court in executing its original jurisdiction—where the Supreme Court functions as a trial court—have garnered newfound attention of late. ... The precedent that guides the Neutral, particularly in boundary dispute cases, is a fragile body of specialized federal common law, pasted together from international law treatises, property concepts, contract law, and sovereignty principles... " New Jersey initiated the first boundary dispute with New York in 1829, a suit in which New Jersey conceded that New York had obtained jurisdiction over Ellis Island, Staten Island, and neighboring islands by adverse possession. ... Other possible solutions include creating a specialized federal court, establishing concurrent original jurisdiction in the federal district courts, delineating procedures applicable to original jurisdiction cases, and institutionalizing the prior practice of appointing senior or retired Article III judges... Third, a specialized court likely would be better equipped to standardize the procedures applicable to original jurisdiction cases, given their continued exposure to cases raising similar procedural difficulties. ... The United States Court of Federal Claims and the United States Tax Court are specialized Article I courts; the United States bankruptcy courts are specialized federal courts, but they are considered "units" of the federal district courts, and their judges are not subject to the appointment provisions or protections of Article III. [LexisNexis]

Citing References:

Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. 1181 (July 2005)

> Westlaw Abstract: Professor Kessler suggests… that some of the worst abuses of modern litigation--and, in particular, our discovery practice--can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework. By rediscovering our lost inquisitorial history, she argues, we can learn how our botched marriage of inquisitorial and adversarial traditions resulted in much of the inefficiency and unfairness of modern civil litigation, and we can begin self-consciously and systematically to develop the inquisitorial framework necessary to remedy our adversarial excesses.
>
> To facilitate procedural reform, Professor Kessler challenges our conception of inquisitorial procedure as alien to and incompatible with our commitment to due process.. this transformation in equity procedures led in the early twentieth century to a

reconfiguring of the inquisitorial neutral as a trial neutral. She suggests that the subsequent rise of increasingly complex litigation during the second half of the twentieth century, and especially the structural injunction suit of the Civil Rights era, led to a re-emergence of the neutral's inquisitorial role, but that scholars have mistakenly viewed this role as a new phenomenon. Professor Kessler then posits that much of the inefficiency and unfairness of modern civil litigation--and, most especially, of the pretrial discovery process--results from integrating equity procedures into an adversarial context that permits parties to abuse powerful devices that were once controlled by the courts. Finally, she points to recent French procedural reforms to suggest that we can adopt more inquisitorial procedures without violating the core values of due process. [Westlaw]

17. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983 (1979).

Abstract from 1983 Duke L.J. 1265: The proposals are those made by Judge Frank M. Coffin, who has suggested major procedural changes to accommodate the exigencies of organizational change litigation. [135] He is prepared to permit an "outside expert judge" to sit in on the remedial phase, since ex parte "influence would not seem to be of as much concern at the remedial stage as when liability is at issue." [136] Judge Coffin also recommends that appellate judges "sit in on critical arguments [in the trial court], absorb the atmosphere, gain a better appreciation of the problem, and help inform the court of appeals so that it could play a more sensitive role." [137] Likewise, Judge Coffin would sanction conferences between trial and appellate judges before the trial judge decides on a remedy, [138] and he advocates the participation of the trial judge as "a resource person" [*1302] at the appellate argument. [139] He is ready to adapt existing institutions in dramatic ways to make possible inquisitorial procedures by trial judges and to make available to them "the help of proven experts." [140] Frustration with the inadequacy of the courts to cope with organizational change litigation has thus generated a willingness to tinker with procedure in quite fundamental ways, with very little awareness that such changes might redound to the disadvantage of the system as a whole.

18. James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800 (1991).

Abstract: In addition to performing traditional trial-stage tasks, neutrals often participate extensively in the pretrial phase by overseeing discovery proceedings and conducting settlement conferences. ... By contrast, if the order of reference appointing a neutral to implement a remedial decree is unclear, she has little guidance. ... A court may use its inherent authority or its authority under Rule 53 to appoint an expert as a neutral to advise the court. ... Despite the appointment of an expert neutral, the *Lanzaro* court retained substantial responsibility for the ultimate resolution of the case. ... The appointment of a biased neutral thus restricts the court's inquiry even further and escalates exponentially the potential for abuse when accompanied by the ability to proceed ex parte, the authority to conduct broad discovery, and a deferential standard of review. ... For example, in *Toussaint v. McCarthy,* the order of reference granted the neutral broad discovery and ex parte powers as well as the power "[t]o review the placement and retention of prisoners in segregation, and to require the

release of prisoners assigned to segregation without sufficient basis, in accordance with the provisions of . . . the Permanent Injunction." ... When stated in the order of reference, the neutral shall have the ability to monitor the defendant's compliance with the court's decree. ... [LexisNexis]

Citing References:

Thomas L. Creel & Thomas McGahren, Use of Special Masters in Patent Litigation: A Special Master's Perspective, 26 AIPLA Q.J. 109 (Spring 1998).

> Introduction: Are there unique aspects of patent infringement trials that make the use of a neutral of particular benefit to the judge and the litigants? Yes, is the answer from many judges who have used them. The unanimous decision of the Supreme Court in Markman v. Westview Instruments, Inc. lends credence to the use of neutrals. In Markman, the Supreme Court stated that claim construction is exclusively for the court in a jury trial. Thus, the judge is to construe the claim for the jury much like a statute, and the jury then decides infringement of the claim so construed. Because claim construction is a matter of law, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") reviews the construction under a de novo, not clearly erroneous, standard. As a result, a judge who is untutored in the science of the patented invention and in the vagaries of patent law is required to make a claim construction that can be reversed without regard to findings of fact. Such a reversal could negate a potentially lengthy trial and necessitate a re-trial. A judge may wish for help in making this cornerstone decision… This paper also explores the legal and practical requirements for the appointment and use of neutrals. For example, Rule 53 of the Federal Rules of Civil Procedure only allows the appointment of a neutral in non-jury trials in "exceptional conditions" and in jury trials where the issues are "complicated."

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008)

> Westlaw Abstract: This article suggests that courts should appoint neutrals to large-scale animal abuse cases. The work of neutrals in two recent high profile cases, Sarah v. PPI and Vick, demonstrate that neutrals can help advance the goals of the animal protection movement in three ways. First, neutrals can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint neutrals to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court-appointed neutrals may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for neutral appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing neutrals to large-scale animal abuse cases.

R. Spencer Clift, III, Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special

Master in an Appropriate and Rare Bankruptcy Case or Proceeding?, 31 U. Mem. L. Rev. 353 (Winter 2001)

> From Article Introduction: This article attempts to justify the utilization and appointment of neutrals in appropriate and rare bankruptcy cases and proceedings by explaining the unique case management role neutrals contribute in exceptional circumstances. Specifically, this article calls for an amendment to the Federal Rules of Bankruptcy Procedure to provide expressly that United States district and bankruptcy courts may appoint a neutral in a highly complex and rare bankruptcy case or proceeding. Notwithstanding the appropriateness of the appointment of a neutral, Federal Rule of Bankruptcy Procedure 9031, a procedural rule, currently prohibits the appointment of a neutral by both the United States district and bankruptcy courts in any "case" under the Bankruptcy Code ("Code"). This article focuses on the distinctive need for neutrals to be appointed and authorized to participate in appropriate and rare bankruptcy "cases" and "proceedings." … Concomitantly, this article respectfully suggests that the Federal Rules of Bankruptcy Procedure should be amended pursuant to the Rules Enabling Act to expressly authorize the appointment of a neutral by United States district and bankruptcy courts in appropriate and rare bankruptcy cases and proceedings. This article also respectfully requests the current United States Judicial Conference Advisory Committee on Bankruptcy Rules to reconsider its two prior declinations and thereafter recommend and transmit to the United States Judicial Conference Standing Committee on Rules of Practice and Procedure a proposed amendment to the Federal Rules of Bankruptcy Procedure providing that United States bankruptcy and district courts have the express authority to appoint neutrals in highly complex and rare bankruptcy cases and proceedings.

Allison Glade Behjani, Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings, 2007 Utah L. Rev. 823 (2007).

> From Article Introduction: Child-custody proceedings are an intricate, dramatic, and multi-faceted area of the family law system… judges increasingly appoint mental-health professionals as neutrals and delegate to them fact-finding authority in order to inform their determination of the child's best interests. Use of neutrals, however, may be problematic. Neutrals in custody cases contribute to efficiency and provide family courts with psychological insights. Yet, the lack of professional and educational guidelines coupled with the power such an expert can wield over the court might ultimately harm the fragile nature of child-custody proceedings. To avoid this negative outcome, courts need clearer professional and judicial guidelines to ensure that neutrals can continue to provide valuable assistance to family courts.

The Sanction of Special Masters: In Search of a Functional Standard, SN040 American Law Institute-American Bar Association 35 (2007)

> Introduction: Under amended Rule 53, Neutrals are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to

authorize neutrals to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of neutrals in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which neutrals are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold neutrals to judicial standards of conduct when they are not full-time judges and perform non-judicial functions. Further, it notes that neutrals need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to neutrals. [Westlaw]

19. Margaret G. Farrell, *Special Masters in the Federal Courts under Revised Rule 53: Designer Roles*, ALA-ABA Course of Study: The Art and Science of Special Masters, Chicago, Ill. (2005).

Lexis Abstract: The federal courts are overburdened and understaffed. The continued expansion of federal caseloads, the technological complexity of the subject matters presented to federal courts, the vast amounts of information available (often as a result of sophisticated computer technology), the number of claimants and the amounts of money involved have all put heavy burdens on the federal judiciary. In response, judges have increased their use of "para-judicials", or judicial assistants, to perform some of the functions usually performed by judges as well as some functions not usually performed by judges. Federal Rule of Civil Procedure 53 has been revised to support these efforts by legitimating many of the roles and responsibilities given to neutrals in the past and clarifying the array of prerogatives that may be given them in the future. [LexisNexis]

20. Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternative Dispute Resolution*, SJ034 ALI-ABA 261 (2003).

Lexis Abstract: Rule 53 of the Federal Rule of Civil Procedure, which permits the appointment of neutrals, has been completely replaced by an amended rule that will become effective December 1, 2003. This paper explores the ways in which the new rule may or may not facilitate the use of alternative dispute resolution techniques in the federal courts. Faced with growing dockets, more complex litigation and the information explosion, federal judges have urgently sought ways to enhance their effectiveness. Their efforts have given rise to at least two developments. First, judges have increased their appointments of neutrals under Rule 53 to assist in complex litigation, including class actions; and second they have fostered the growth of alternative dispute resolution as encouraged by Congress, to reduce the number of cases going to trial. This paper examines the convergency of these trends. [LexisNexis]

21. Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, ALI-ABA Course of Study: Civil Practice and Litigation Technique in the Federal Courts, SG046 ALI-ABA 1005 (2002).

Lexis Abstract: In the last decade, judges have increasingly sought the assistance of neutrals in handling complex litigation. The expansion of federal caseloads, the technological complexity of the subject matters presented, the vast amounts of information available (often as a result of computer technology), and the number of claimants and amounts of money involved have put heavy burdens on the federal judiciary. The appointment of neutrals is one of several procedures, including the use of magistrates, court-appointed experts and technical advisors, available to judges to extend their effectiveness. [LexisNexis]

22. Margaret G. Farrell, *Experts Testify on Expert Testimony*, Civil Justice Reform 213 (Larry Kramer & Linda Silberman eds., 1996) (No Abstract Available).

23. Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMPOSIUM J. 235 (1997).

Westlaw Abstract: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of neutrals under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of neutrals to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of neutral practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution. [Westlaw]

Citing References:

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008).

> Abstract: This article suggests that courts should appoint neutrals to large-scale animal abuse cases. The work of neutrals in two recent high-profile cases, Sarah v. PPI and Vick, demonstrate that neutrals can help advance the goals of the animal protection movement in three ways. First, neutrals can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint neutrals to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court-appointed neutrals may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for neutral appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing neutrals to large-scale animal abuse cases.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005) (No abstract available).

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006) (No abstract available).

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges, ALI-ABA Course of Study: Civil Practice and Litigation Techniques in Federal and State Courts, SN009 ALI-ABA 1911 (2007).

Michael Dore, Special Problems in Toxic Tort Discovery: Use of Special Masters, 2 Law of Toxic Torts § 22:25 (2009) (No abstract available).

24. Margaret G. Farrell, *The Judicial Alternative: Special Masters in Federal Practice*, 1994 Practical Litigator 37 (ABA-ALI, 1994) (No abstract available).

25. Margaret G. Farrell, *Extraordinary Procedures: Special Masters, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, The Federal Judicial Center (1994) (No abstract available).

26. Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994).

Lexis Abstract: As discussed in Part III, the use of neutrals to provide scientific expertise to our generalist judges deviates significantly from each of the major elements of our traditional adversary model. ... In order to illustrate ways in which neutrals have been helpful in meeting the needs of judges for expert scientific assistance, the following discussion characterizes neutrals with reference to both their tasks and the stage of litigation at which they are appointed. ... While most settlement neutrals fulfill their function through informal procedures, some hold more formal hearings in the form of [mini-trials] used to evaluate claims for purposes of settlement negotiations. Thus, it provides that in actions involving complicated issues tried before a jury or exceptional conditions in bench trials, neutrals may require the production of evidence, hold formal hearings in which the rules of evidence apply, issue subpoenas, administer oaths, and create a record for review. ... Finally, like neutrals appointed to recommend remedial decrees, some court monitors were authorized to seek out scientific and technical experts and make findings of fact based on their own viewings of institutional conditions and ex parte interviews with party and nonparty witnesses. ... Some expert neutrals, like some lay neutrals, saw themselves as knowledgeable facilitators, not [decision makers], who moved the parties to find areas of agreement about scientific and technical facts and develop agreed upon procedures for settling their factual disputes. ... Thus, issues which go to the propriety of the appointment itself--conflicts of interest, ex parte communications, scope of authority--might well be addressed expressly in the order of reference, while more procedural issues--the discovery process, the appointment of experts, formal hearing procedures--might be left to negotiation between the neutral and the parties after the appointment. ... When neutrals perform these same functions, it is believed they, too, may engage properly in ex parte communications. ... Some neutrals and judges feel that time-limited appointments, particularly before liability is determined, help promote negotiations

and settlement, since the parties are aware that failure to settle will result in the expense of a trial. [LexisNexis]

Citing References:

United States v. Hines, 55 F.Supp.2d 62 (1999).

> Lexis abstract: Handwriting analysis testimony was admissible as to similarities or dissimilarities but could not extend to an ultimate conclusion, and accuracy of cross-racial identification was a relevant issue. Defendant, charged with bank robbery, moved to exclude expert testimony comparing his handwriting to the robbery note. The prosecution moved to exclude expert testimony on the subject of cross-racial identification. The court granted defendant's motion in part because the field of handwriting analysis was not sufficiently reliable to permit an expert to render an ultimate opinion as to authorship. Handwriting analysis evidence was admissible for the limited purpose of assisting the jury in evaluating similarities, if any. The court denied the prosecution's motion, holding that because a witness of another race identified defendant, expert testimony citing scientific studies of decreased accuracy of cross-racial identification would provide the jury with relevant and useful information.

Joe S. Cecil and Thomas E. Willging, The Randolph W. Thrower Symposium: Scientific and Technological Evidence: Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995 (1994).

> From the article introduction: In brief, we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court system that values, and generally anticipates, adversarial presentation of evidence. Even judges who have appointed experts view such appointments as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts. Section IV discusses the problems that arise in identifying and appointing a suitable expert. Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointed experts. As a result, judges may not recognize the need for such assistance until the eve of trial and may have difficulty identifying and instructing an expert without disrupting the trial schedule. Section V discusses communication with the appointed experts. Communication between the judge and the expert is sometimes inhibited, especially in instances in which ex parte communication with the expert is sought by the judge. Also, we found that the testimony or report presented by an appointed expert exerts a strong influence on the resolution of the issue addressed by the expert. Section VI discusses sources of compensation of appointed experts and the problems that arise when one party is indigent. Finally, in Section VII we suggest possible changes to Rule 706 and outline a pretrial procedure that facilitates the early identification of disputed issues arising from scientific and technical evidence, clarifies and narrows disputes, and eases appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005).

> From the Article: Deciding if [a child witness] interview was so suggestive that the child's memory is irreparably distorted and the child should not be allowed to testify in court is a difficult decision that will often turn on a multitude of subtle technical issues. A neutral, trained in these issues, is better equipped to decide, and should decide, such an issue when so much hangs in the balance. The possibility exists that an untrained judge might exclude a valid interview based on the testimony from an expert for the defense or that an untrained judge might admit into evidence an interview conducted suggestively. Part II of this Comment consists of background information and a historical overview of the problem of the suggestibility of children in the investigative setting. Part III details the psychological research in the area of suggestibility of children during interviews. Part III also sets forth real-world examples of the effects of suggestive questioning of children. Part IV provides an analysis of the various proposed solutions to the problem of suggestibility of children, including the response of psychological scholars and courts. Part V concludes that New Jersey's solution of taint hearings should be conducted by specially trained adjudicators. Part V also outlines the procedure that should be followed for the appointment of such an adjudicator.

27. Kenneth R. Feinberg, *What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11*, Public Affairs (2005).

Abstract: As head of the 9/11 Victim Compensation Fund, Kenneth Feinberg was asked to do the impossible: calculate the dollar value of over 5,000 dead and injured as a result of the 9/11 terrorist attacks. Just days after September 11, 2001, Kenneth Feinberg was appointed to administer the federal 9/11 Victim Compensation Fund, a unique, unprecedented fund established by Congress to compensate families who lost a loved one on 9/11 and survivors who were physically injured in the attacks. Those who participated in the Fund were required to waive their right to sue the airlines involved in the attacks, as well as other potentially responsible entities. When the program was launched, many families criticized it as a brazen, tight-fisted attempt to protect the airlines from lawsuits. The Fund was also attacked as attempting to put insulting dollar values on the lives of lost loved ones. The families were in pain. And they were angry.

Over the course of the next three years, Feinberg spent almost all of his time meeting with the families, convincing them of the generosity and compassion of the program, and calculating appropriate awards for each and every claim. The Fund proved to be a dramatic success with over 97% of eligible families participating. It also provided important lessons for Feinberg, who became the filter, the arbitrator, and the target of family suffering. Feinberg learned about the enduring power of family grief, love, fear, faith, frustration, and courage. Most importantly, he learned that no check, no matter how large, could make the families and victims of 9/11 whole again. [Public Affairs - https:/www.law.upenn.edu/live/files/5012-feinberg-what-is-life-worth-151-191pdf

Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996).

Lexis Abstract: ... In disputes involving protracted mass torts, such as asbestos, DES, and the Dalkon Shield, as well as in many environmental insurance coverage disputes, Neutrals can enter the fray and efficiently resolve trial-ready disputes by coordinating settlement negotiations using case values long recognized by the parties themselves. ... After each of the co-defendant companies and plaintiff class counsel argued their cases separately to the Neutral, all parties agreed to ask the court for its view concerning final settlement terms. ... In analyzing the role of court-appointed Special Settlement Neutral, it is useful to highlight other functions which are often overlooked once settlement is achieved. ... In mass tort litigation such as the "Agent Orange" and Dalkon Shield cases, resolution between plaintiffs and defendants is only the first step, and the serious obstacle of determining eligibility criteria for payment of limited amounts to a wide variety of plaintiffs claiming a wide-ranging series of illnesses and adverse medical conditions remains to be dealt with. ... Docket control requires innovative case management techniques and the court-appointed Special Settlement Neutral is one example of innovative use of limited judicial resources. [LexisNexis]

Citing References:

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006).

> From the article: As authorized by the [Air Transportation Safety and System Stabilization Act], the Neutral singlehandedly controls all operations of the Fund, wields broad power to create procedural and substantive rules, adjudicates claims exempt from judicial or administrative review, and manages an unlimited budget with no cap on expenditures. Congress failed to set bright-line rules, enunciate exclusionary definitions, or articulate a principled system of compensation. There is simply no "rationale, restraint, ethic or coherence" in the definition of awards, leaving the Neutral unilaterally responsible for filling in nearly every detail of the program.
>
> In certain respects, the power the Act entrusts to the Neutral is sensible. Significant judicial review or congressional oversight generally slows the process of compensation. Furthermore, a single individual, especially one with expertise like the Neutral, is better suited to issue appropriate awards through a uniformly administered compensation scheme and can promptly construct a reliable and efficient procedure providing more immediate closure to the victims. Notwithstanding these benefits, the role granted to the Neutral is highly problematic and represents a significant defect in the Act. The ATSSSA's Neutral is a powerful decision maker vested with unfettered discretion to craft and run the Fund. All of our traditions, constitutional, doctrinal, and otherwise, militate against such authority being concentrated in a single individual. Moreover, previous congressional experience with national compensation schemes warns against the vesting of such discretion in a single individual. "The September 11th Fund will remain controversial because the source of the definition of its awards-- however able and committed--is not in any sense democratic."
>
> More disconcerting is the effect the Fund might have on future policy. Some argue that because the Fund was a unique response to a national crisis of extraordinary

proportions, the Fund will not shape succeeding compensation schemes, and the role of the Neutral will not present a model for the future.

28. Kenneth R. Feinberg, *The Dalkon Shield Claimant Trusts*, 53 LAW & CONTEMP. PROB. 79 (1990).

Westlaw Abstract: The purpose of this article is to examine such methods of resolving mass tort litigation. It is intended as a road map of issues that must be considered in attempting an aggregate settlement of a mass tort litigation and in developing a viable, efficient administrative system for delivering compensation.

The remainder of the article is divided into three sections. The first section discusses the issues involved in attempting a comprehensive, aggregate settlement in the mass tort context. The second section examines the development of a mechanism for distributing funds to individual plaintiffs. The article concludes with a case history of the Dalkon Shield litigation, which provides an illustrative example of the issues involved in aggregating claims and of various options for distributing compensation through an administrative mechanism.
In each of these areas, the intent of this article is to raise the various issues that will arise in attempting an aggregate settlement of a mass tort controversy and, where appropriate, to offer some options that might be considered in addressing these issues. Although each case will present new and unique issues, it is hoped that this article will help guide parties who find themselves embroiled in such a controversy to a fair and effective resolution of the matter. [Westlaw]

29. Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVTL. AFF. L. REV. 809 (1991).

Lexis Abstract: The Court limited the sulphur content percentage permitted in defendant's waste fumes and specified the maximum allowable amount of emissions. ... Historically, the special master was a frequently employed agent of the equity courts. ... Traditionally, the neutral was the most benign of an equity court's agents. Appointed by nineteenth-century courts to relieve the judge of the courts' most routine duties, the special master originally performed clerical functions. ... Judge La Buy had appointed a neutral to make both factual determinations and conclusions of law in resolving two antitrust actions. ... Another plaintiff, a citizens' action committee, requested that a neutral examine the factual circumstances surrounding the defendant's admittedly noncompliant activities. ... By its terms, Rule 53 allowed a reference to a special master in an "exceptional condition." ... [LexisNexis]

Citing References:

United States v. Alisal Water Corp., 326 F. Supp. 2d 1010, 2002 U.S. Dist. LEXIS 27504 (N.D. Cal. 2002).

Lexis Overview: The court found that the adjudicated violations were serious and included falsification of records designed to protect public health under 42 U.S.C.S. § 300g-3(b), and that defendants had a decade long history of such violations. The court

further observed that defendants had adopted an inordinately combative stance against legitimate regulatory oversight and had repeatedly failed to accept responsibility for their conduct, seeking to shift blame to others including the regulators themselves. Specifically, the court found that defendants not only failed to monitor and report results of water samples, but also reported numerous false results, at best with gross negligence and at worst with conscious intent to deceive. The court added that defendants lacked the managerial competence to operate compliant drinking water systems and lacked access to the significant financial resources to operate compliant drinking water systems. Accordingly, the court found that the usual remedies were inadequate and that imposition of an equitable receivership was necessary to manage defendants' water systems consistent with the objective of providing maximum feasible protection of the public health.

Charles M. Haar, The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: Boston Harbor: A Case Study, 19 B.C. Envtl. Aff. L. Rev. 641 (1992).

Lexis Summary: These conditions have made it harder than ever to develop and implement solutions for the widespread environmental degradation that is one of the most enduring legacies of the Soviet state. ... The Boston Harbor litigation was unusual even in the United States and is of interest chiefly for its innovative use of a neutral. ... THE POLLUTION OF BOSTON HARBOR: HISTORY AND LITIGATION ... Nonetheless, for years the agencies responsible for environmental protection in Massachusetts failed to take effective action to address this pollution. ... Some Soviet environmental law experts have recognized that the introduction of citizen suit provisions and a judicial system capable of responding meaningfully to such suits is a necessity for the continued development of environmental protection in the new republics. ... In determining the causes of the pollution in Boston Harbor and the measures necessary to alleviate it and then preparing his report, the neutral consulted many scientific and other experts. ... The case demonstrates that the courts cannot replace the legislature in dealing with environmental protection, nor should they, but that problems such as the Boston Harbor, which require complex and long-term solutions, can benefit from the courts and the legislature working together. ... Even now, the problems of the pollution of Boston Harbor are far from solved...

Elizabeth F. Mason, Comment: Contribution, Contribution Protection, and Nonsettlor Liability Under Cercla: Following Laskin’s Lead, 19 B.C. Envtl. Aff. L. Rev. 73 (1991).

Lexis Summary: In reality, courts using the comparative fault approach in CERCLA cases have not first allocated PRP fault according to proportional share of the harm, then imposed joint and several liability, and then allowed contribution actions based on the court's initial allocation of fault. ... The EPA incorporated the UCATA approach into its 1985 settlement policy in order to enable the government to settle with some of the PRPs at a site and then pursue the nonsettling PRPs for the balance of the cleanup costs, even if that amount exceeded the nonsettlors' "fair share" of the cleanup costs. ... Second, according to the Rohm & Haas court, the UCFA approach is inconsistent with SARA's goals of minimizing litigation and promoting voluntary settlements.

Jason Feingold, Comment: The Case for Imposing Equitable Receiverships Upon Recalcitrant Polluters, 12 UCLA J. Envtl. L. & Pol'y 207 (1993).

> Lexis Summary: As a result of the attorney general's actions, the widget factory pays a substantial fine and pledges to bring its facility into compliance with the terms of its pollution discharge permit. ... In Langdell, the attorney general secures environmental compliance without threatening the viability of the defendant's enterprise. ... The authority of a court of equity to impose a remedial receivership on a recalcitrant polluter is "founded in the broad range of equitable powers available to [a] court to enforce and effectuate its orders and judgements." ... The importance to the community of preserving the enterprise can also be characterized as supporting the advisability of imposing receivership, since persistent noncompliance is likely to inflict severe harm on the defendant in the form of cumulative environmental fines, contempt penalties, and civil judgements. ... However, if environmental receivership is viewed as primarily a remedial, rather than punitive, measure, the goal of achieving environmental compliance will be well served by imposing receivership in cases lacking bad faith, if the defendant exhibits persistent inability to comply with the law. ... Another tactic for avoiding losses during the receivership is to restrict the receiver's powers to only those aspects of the enterprise which affect environmental compliance.

Michael B. Gerrard et al., 2-7 Environmental Impact Review in New York §7.17 (2008)(No abstract available).

30. **Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005), *available at* https://www.courtappointedneutrals.org/ACAN/assets/file/public/articles/FellowsHaydock.pdf**

Lexis Abstract: The need for their services will continue to increase, making neutral appointments more common and important in the years ahead. ... " Courts provided a strict interpretation of exceptional conditions, making it clear that neither the congestion of the court docket nor the complexity of the litigated issues were sufficient to justify a neutral appointment. ... As a response, the revised rule delineates three specific roles to be filled by a neutral appointment: pre-trial neutrals, post-trial neutrals, and consent neutrals. ... Even in the era of the restrictive La Buy exceptional condition standard for neutral appointments, reference of the management and supervision of discovery in complex cases was relatively uncontroversial. ... It is clear that the order of appointment should prescribe ex parte communication guidelines for the settlement neutral that both facilitate settlement processes and preserve an unbiased forum for judicial dispute resolution. ... Such guidelines would alert judges, parties and neutrals to possible future conflict situations and help judges prescribe appropriate ex parte communications rules in neutral appointment orders. ... Support staff reductions above a certain level clearly could reduce judicial capacity to handle increased caseloads - especially complex cases with a large load of filings. [LexisNexis]

Citing References:

Jeffrey W. Stempel, F. Hodge O'Neal Corporate and Securities Law Symposium: Mutual Funds, Hedge Funds, and Institutional Investors: Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes, 83 Wash. U. L. Q. 1127 (2005)

> From the article: The type of hearing neutral use I advocate has been common as part of class action or mass tort settlements. Agent Orange, asbestos, discrimination, and securities claims all provide examples. In my view, this approach has worked well, so well that we should not insist on settlement as a prerequisite to such use of judicial adjuncts to make preliminary fact finding on individual damages questions within a class. To be sure, incorporation of this approach in a settlement has certain advantages because the parties can agree to be bound by the neutral's findings, thereby eliminating the additional cost and uncertainty of de novo challenge to the neutral's work. But if the neutral-managed damages processing is done well, de novo challenges (or at least de novo challenges that are taken very far) should be relatively few in number. This appears to have been the experience with court annexed arbitration, where litigants appear either to accept their awards or to file for de novo trial only to have some negotiating leverage, eventually resolving the matter well short of trial.

31. David Ferleger, ***Neutrals in Complex Litigation & Amended Rule 53*** **(2005),** ***available at*** **https://www.courtappointedneutrals.org/ACAN/assets/file/public/articles/Ferleger.pdf**

Abstract: This article is in three parts, the first two of which appear here. Part 1 reviews the functions of neutrals in complex and structural litigation, including extensive citation resources intended to assist practitioners and courts. Part 2 details the new landscape established by the 2003 revision to Federal Rule of Civil Procedure 53. Part 3 will focus on challenging questions which arise when courts utilize neutrals such as overlap of the neutral role with the expert witness role, whether neutrals may be called as witnesses, ex parte communication between neutrals and the court or parties.

32. David Ferleger, *Neutrals in Disability Litigation & Amended Rule 53*, 29 MENTAL & Physical DISABILITY L. REP. 157 (American Bar Association 2005).

In the past 25 years, many court orders enforcing the rights of people with physical and mental disabilities have been managed for courts by judicial adjuncts who, in the federal system, are typically special masters appointed by the responsible court. These include cases involving such issues as community placements from institutions,[1] special education,[2] early childhood screening,[3] annuities,[4] prison mental health care,[5] hospital barrier removal,[6] housing access,[7] and employment.[8]

Disability litigation often results in "structural injunctions,"[9] which are highly complex; require development of multiple plans and establishment of policies, procedures, and safeguards; and typically necessitate mid-course refinements. Such litigation may involve years of active post-judgment oversight by the court. Sometimes, defendant government officials "succumb to political pressures to shirk their constitutional responsibilities."[10] Commitments in consent decrees or court-approved plans may not be met. Individual cases may also involve sufficiently diverse tasks to be appropriate for use of a master to conserve judicial resources.

Courts typically do not have the time or expertise to oversee decrees without the assistance of an adjunct. For vulnerable people with disabilities, it is often a matter of some urgency when they turn to the court for relief under existing injunctions. In such situations, a master's availability may be essential to affording adequate and timely relief. As one court observed, "time is of the essence with these motions. When the physical or emotional health and safety of a [disabled] child is threatened, the matter cannot wait for the Court's calendar to clear."[11]

This article describes the variety of functions that masters perform and explains the major changes wrought by the recent amendment to the federal rule on masters. The extensive endnotes may serve as a resource for courts and counsel considering the use of masters.

[Hein Online – http://www.heinonline.org.proxy.wmitchell.edu/HOL/Page?handle=hein.journals/menphydis29&id=1&size=2&collection=journals&index=journals/menphydis]

33. Clayton Gillette, *Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem*, 49 ST. LOUIS. U. L.J. 499 (2005).

Abstract: ... While this may be a "cute" phenomenon among children in everyday life, it is certainly not "cute" when the child is a witness to a serious crime or is alleged to be a witness to a serious crime. ... However, it would be virtually impossible to eliminate the researcher's and child's awareness of the reason for the encounter. ... There are obviously extremes on either side of the false positive/false negative argument. ... The Supreme Court of New Jersey addressed the issue of whether or not a particular interview (or battery of interviews) of a child (or children) was suggestive in Michaels, holding that a pretrial taint hearing should be conducted wherein the trial court can make a ruling on the suggestiveness of the interview and

thereby decide if the transcript of the interview (and other evidence of the interview) should be excluded from trial and even if the child should be excluded from testifying at trial. ... " The Court based this decision to exclude, in part, on the suggestive interview techniques used by the interviewer. ... Appointment of a court-appointed expert will lead to undue delay during a taint hearing because the expert will need to take the time to educate a judge on the issues, while a neutral could simply decide the issues based on the technical knowledge already possessed by the neutral. ... [MLV: LexisNexis]

Citing References:

Gregory M. Bassi, Comment: Invasive, Inconclusive, and Unnecessary: Precluding the Use of Court Ordered Psychological Examinations in Child Sexual Abuse Cases, 102 Nw. U.L. Rev. 1441 (2002).

> Lexis Summary: ... Before we can answer this question, we must examine the legal history of compelled psychological examinations, the empirical research regarding the effectiveness of children as witnesses, and the role of mental health experts in child sexual abuse cases. ... Osgood, the Supreme Court of South Dakota listed a series of factors: 1 The victim's age; 2 the nature of the examination requested and whether it might further traumatize the victim; 3 whether the prosecution employed a similar expert; 4 whether the evidence already available to the defendant suffices for the purpose sought in the examination; 5 whether there is a reasonable basis for believing that the child's mental or emotional state may have affected the child's veracity; 6 whether evidence of the crime has little or no corroboration beyond the testimony of the victim; 7 whether there is other evidence available for the defendant's use; and 8 whether the child will testify live at the trial. ... Bruck and Ceci's amicus brief used the extreme facts of the investigation in Michaels's case to highlight weaknesses in the reliability of child victim witnesses. ... In addition to evidence of previous false allegations, the defendant may also impeach the credibility of the witness by providing the jury with existing records of the victim's previous medical and psychological examinations, supplemented by expert testimony to explain their contents. ... Such a special standard for child victims of sex crimes places those victims in a significantly subordinate legal position to victims of other crimes. ... In sum, a categorical ban on compelled psychological examinations of complainant witnesses in child sex abuse cases would give effect to strong public policies that favor victims' welfare and rights. ... Abbott and Nobrega exemplify the divide among jurisdictions regarding how to balance the victim's welfare and right to be free of burdensome discovery techniques against the defendant's right to a fair trial.

Tamar R. Birckhead, The Age of the Child: Interrogating Juveniles After Roper v. Simmons, 65 Wash & Lee L. Rev. 385 (2008).

> Lexis Summary: ... It explains how Simmons can inform a new approach by both law enforcement and the courts to the questioning of juvenile suspects, one that is consistent with what recent studies have revealed about the ways in which adolescent’s experience interrogation and is also consistent with the law's approach to the questioning of minors who are witnesses or alleged victims of crime. ... That Kennedy began the opinion by

recounting the rather harrowing facts of the murder of Shirley Crook speaks to the question of whether capital jurors should have the discretion to decide which juvenile offenders should be executed as well as to the matter of the proper weight that a defendant's youth should be given in the death penalty calculus. ... In order to demonstrate Simmons's applicability to the questioning of adolescent suspects, it is necessary first to explain how interviewer bias combines with the Reid Technique, the widely utilized interrogation strategy of police investigators, to produce statements from suspects that are false or inaccurate. ... Simmons for why juveniles could not be classified among the worst offenders in the context of capital punishment also serve to explain, at least in part, why children and adolescents are particularly vulnerable in the context of interrogation. ... Alvarado: Privileging "Objective" Standards Pre-Simmons As discussed in Part II, one of the most significant aspects of Justice Kennedy's opinion in Roper v. ... Relying on past precedent-from cases in which the suspects were adults, not juveniles-Kennedy found that seventeen-year-old Michael Alvarado was not in custody when he confessed to the murder of a truck driver after two hours of interrogation without Miranda warnings.

34. Ronald J. Hedges, *Discovery of Digital Information*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005(No abstract available).

35. Ronald J. Hedges, *Complex Case Management*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

36. Ronald J. Hedges, *Mediation Developments and Trends*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

37. Ronald J. Hedges, *Punitive Damages*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

38. Lonny S. Hoffman, *November 2005 Caselaw Update (to Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*), ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

39. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265.

Abstract from Lexis: ... The defendants have been such governmental bodies as school systems, prison officials, welfare administrations, mental hospital officials, and public housing authorities. ... The decree that purports to reform a public institution often injects the courts into the public budgeting process. ... In institutional reform cases, the operational meaning of the American equity tradition is to legitimize detailed affirmative decrees having a

long life, in the name of insuring that equity does not suffer a wrong without a remedy. ... Underlying these developments is a growing recognition that institutional reform litigation has requirements different from those of earlier, more conventional, if protracted, litigation, requirements that justify extraordinary procedural flexibility. ... Just as institutional reform litigation comprises a small but highly significant minority of cases on the federal docket, so judges who have engaged in attempts to supervise organizational change comprise only an important minority of all federal judges. ... Institutional reform litigation may be different, and it may be difficult, but it is not impossible. ... The assumptions carried by the traditional model into institutional reform litigation are easily stated. ... Among the more common devices is appointment of a neutral, a monitor, a review committee, or, in more extreme cases, a receiver to take over administration of the agency. ... In a Rhode Island prison case, a neutral was empowered to monitor compliance with the decree.

Citing References:

Chris H. Miller, The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation, 72 Alb. L. Rev. 117 (2009).

> Lexis Abstract: Unless the expected return from the classed mass tort claims, net of the costs of litigating ... exceeds the return expected from competing sporadic claims, plaintiff attorneys would admit the sporadic and exclude the mass tort claims from the system... Indeed, nearly all legal models have normative underpinnings and their authors frequently articulate normative reactions and prescriptive suggestions to those models. ... They also accounted for important changes by revising inherited models to more accurately reflect contemporary features of the legal system and provide an adequate framework for understanding and describing legal issues and processes... Also, although Chayes briefly gestures at "outsiders" as a common feature of public law litigation, for Horowitz, Federal Rule 53's provision of a neutral is "the most significant procedural device" recently applied by the courts. ... At any rate, the underlying similar, and at times identical, features of the two models describe essentially the same transitional phenomenon - the judicial movement from adjudication of private disputes to ongoing and widespread relief of government entitlement failures. ... In this respect, legal scholars have probably overstated the degree of difference present in the transition from Chayes' public law litigation to Horowitz and Resnik's managerial litigation. ... Other critics challenge alternative forms of adjudication on grounds that they violate the constitutional separation-of-powers doctrine and argue that judicial policymaking encroaches on the policymaking responsibilities of the legislature.

40. Johnson, *Equitable Remedies: An Analysis of Judicial Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161 (1976).

This comment deals with the problems posed by recent applications of neoreceiverships. Because current use of receiverships involves substantial shifts from earlier applications, the law of receivership is best understood developmentally. Thus, this comment traces the development of receivership law through three major phases. Initially, receivers were used to protect private property for the benefit of one party to the litigation: for example, the creditor or the trustee.[11] Section Two of this comment[12] illustrates the use of receiverships to protect private property and outlines the particular equitable characteristics which made the remedy functional. Second, receivership was used to protect private property interests where such protection was essential to preserve the public welfare: for example, in railroad reorganization[13] and in municipal default.[14] Section Three of the comment[15] illustrates that the American experience with use of receiverships to preserve the public welfare has centered on two specific equitable characteristics of the remedy: its inherent flexibility and its coercive potential. The final phase of receivership development involves abandonment of the protection of property interest as a requirement for using equitable powers and extends receiverships to protection of constitutional rights of private individuals. Section Four of the comment[16] discusses the expansion of the traditional receivership concept to include protection of nonproperty rights and argues for the legitimacy of such expansion. Section Five[17] addresses further the problems surrounding the current application of neoreceiverships, focusing on implementation procedure, remedial propriety, receivership duties, and other related problems. This section illustrates that the remedy is favored where extraordinary circumstances exist and where remedial adaptation to these conditions is essential because other forms of relief are impractical, unavailable, or unsuccessful. Furthermore, this remedy is favored where control of a local institution is mandated, requiring specific administrative and supervisory skills in order to effectuate internal organizational change, or where judicial coercion is essential to accomplish a particular result.

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11. SMITH, *supra* note 3, at § 4(a)-(d).
12. *See* text accompanying notes 18-45 *infra*.
13. See T. FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION IN BANKRUPTCY (1937) [hereinafter cited as FINLETTER] for a general history of corporate reorganization; *see also* Rosenberg, *Reorganization—The Next Step*, 22 COLUM. L. REV. 14 (1922); Glenn, *The Basis of the Federal Receivership*, 25 COLUM. L. REV. 434 (1925); Finletter, *Federal Consent Receiverships*, 15 PA. B. ASS'N. Q. 1 (1933); Note, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 19 IOWA L. REV. 540 (1934); MOORE, FEDERAL PRACTICE § 66.06[2], for specific applications to railroads.
14. See C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOL. VI: RECONSTRUCTION AND REUNION 1864-88 chs. 12, 13 (P. Freund ed. 1971) for a detailed history of federal court involvement in municipal bond disputes.
15. *See* text accompanying notes 46-90 *infra*.
16. *See* text accompanying notes 91-207 *infra*.
17. *See* text accompanying notes 208-74 *infra*.

41. Frank. M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981)(No abstract available).

42. Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299 (2005), *available at* http://www.courtappointedneutrals.org/resource_articles.asp.

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

Citing References:

Scott Paetty, Complex Litigation in California and Beyond: Classless not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts, 41 Loy. L.A. L. Rev. 845 (2008).

> Lexis Abstract: Ultimately, the flexibility of federal summary judgment procedures, which allow judges to dispense with individual issues in a cause of action, better serves the principles of effective case management than CCCS summary judgment procedures, which only permit summary judgment on entire causes of action. ... For example, the Northridge Earthquake litigation highlighted the CCCS's successful resolution of thousands of insurance claims brought in the wake of the 1994 disaster. ... Given the inherent complexity of cases in the CCCS, the need to "get it right" in the initial determination of coordination is of paramount importance. ... While the use of neutrals has not disappeared, CCCS judges tend to limit them to provisionally complex cases or construction defect actions where complicated discovery issues necessitate special care... This Part provides a brief overview of the different definitions of consolidation, describes the various rules that govern consolidation in the CCCS and the federal courts, and shows the ways that coordination and consolidation blend when discussing complex case management... CCCS judges can dispense with the actions by settlement, dismissal with prejudice, summary judgment, judgment after trial, or remand of individual cases to their original courts.... After pretrial proceedings are concluded, however, the transferee judge sends the case back to the MDL Panel for remand to the court from which it was first transferred.... If our hypothetical case were filed in the CCCS, the judge could order counsel for Joe Writer and BYDA to propose jury instructions on an element of the cause of action two weeks into proceedings.

43. Irving R. Kaufman, *Neutrals in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958) (No abstract available).

44. Ron Kilgard, Discovery Neutrals: When They Help – and When They Don't, 40 ARIZ. ATT'Y 30 (2004).

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

45. David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L. J. 141 (1985).

Lexis Abstract: ... The Article discusses four standards that federal courts have recently considered for setting neutrals' fees: First, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court of the United States in 1922, that compensation should be "liberal but not exorbitant"; third, basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, basing the fee on some variation of the lodestar method of setting attorney's fees. ... Retiring neutrals collaborated with the Lord Chancellor, who actually made the appointments, to obtain payments from the new neutral in exchange for the appointment. ... Calculating Neutrals' Fees for Work Done as a Neutral From the preceding discussion, four different approaches to the problem of calculating neutrals' fees can be discerned, particularly in the institutional reform setting: first, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court in Newton, that compensation should be "liberal but not exorbitant"; third, the Hart/Reed II & IV method of basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, the Reed III approach of basing the fee on some variation of the lodestar method of setting attorney's fees. ... Thus, an academic institution does not expect a professor to perform outside work that will generate income for the institution; the institution encourages and supports faculty public service endeavors by a variety of services and overhead expenses, such as office space, secretarial and student research assistance, library books, stationery, and telephone service. ... It is not clear, however, if all of these modified Johnson factors should apply to a neutral who is compensated using a lodestar rate. [LexisNexis]

Citing References:

Jackson v. Nassau County Bd. Of Supervisors, 157 F.R.D. 612 (E.D.N.Y. 1994).

> The court considered Fed. R. Civ. P. 53(a) and the award of attorney fees determined by the lodestar method and other methods. The court found that a computer print-out delineating the time charges submitted by the neutral adequately set forth the amount of time spent by the neutral and certain attorneys working on this case. The only specific dollar objections by the county that the court found valid were the arithmetic errors in the tabulation of daily time records, which amounted to an overcharge of 3.75 hours in the sum of $ 937.50, a specific entry for 2.75 hours of work, in the sum of $ 269.50, that did not describe what was performed during that time, and the time charged for time spent at meals. The court excluded the time and costs of meals. Further, the rates charged for the

work of summer interns, paralegals and other support staff were excessive. The court rejected the county's objections regarding the fees and disbursements of a doctor. Because of the nature of the case, namely, one involving public institutional relief and service to the public, a twenty-five percent reduction of the neutral's fee application was appropriate.

Cordoza v. Pac. States Steel Corp., 320 F.3d 989 (9th Cir. 2003).

Lexis Overview: The appellate court lacked jurisdiction to consider the appeal because even though the neutral had a right to appeal a district court order setting his compensation, the district court orders at issue were not final judgments under 28 U.S.C.S. § 1291. The district court's orders disqualifying the neutral and ordering disgorgement were intertwined with the corpus of the litigation in that they determined what share of an existing pool of money went to the neutral and what share went to the plaintiffs in the underlying litigation. Although the compensation issue was important to the neutral, the interest was not weightier than the societal interest in a final judgment in the underlying litigation. Treating the request as a mandamus petition, the neutral was not entitled to relief as the trial judge had not abused discretion in entering the orders. Mandamus was also not warranted under 28 U.S.C.S. § 455 because the trial judge's evaluation of the neutral's performance of duties was part and parcel of supervisory duties and the receipt of limited information ex parte was done in order to preserve the integrity of the judicial process.

LeRoy L. Kondo, Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases, 2002 UCLA J.L. & Tech. 1 (2002).

Lexis Summary: Topics for discussion include (1) the specialist/generalist court debate over increased specialization within the judiciary; (2) the effects of specialization within the federal court system on uniformity, determinacy, accuracy, precision, and predictability of judgment--with particular focus placed upon the Federal Circuit, a stabilizing semi-specialized tribunal; (3) criticisms of the Federal Circuit and federal courts for indeterminacy due to "panel dependency," doctrinal vagueness in claim interpretation, and inexperienced lay jury panels; (4) the impact of specialization in prevention of forum shopping through the uniformity of nationwide application of intellectual property law; (5) judicial efficiency and economy resulting from specialization in attempts to relieve the crisis in volume plaguing the federal courts; and (6) the effects of a more specialized judiciary on the protection of American business interests, promotion of research and development, with discussion of countervailing policy considerations. ... The Federal Circuit's Impact On Patent Law Policy Transformation And The CAFC's Role In Protection Of United States' Business Interests Notwithstanding its lack of specific expertise, the Federal Circuit has significantly advanced the delineation of patent law doctrine over the past three decades, due, at least in part, to its semi-specialized jurisdiction and focus. ... ICANN effectively utilizes its authority and URDP policies to resolve domain name disputes at low cost and within a short two-month time frame. ... Since federal courts have historically deployed primarily

generalist judges, and since specialized judges have primarily resided in state courts (e.g., family court, drug court) having lower status and compensation, specialization has been unfairly stigmatized as being inferior. ... Thus, specialized judges, with technical training and calendars dedicated to intellectual property matters, would possess both the ability and time to become "expert judges" in the intricacies, nuances and subtleties of complex areas of law. ... Lack of uniformity of application of patent laws historically led to rampant forum shopping, with bitterly fought battles in the circuits over patent infringement cases. ... § 1835, experts under Rule 706, and neutrals under Rule 53 to permit greater comprehension of complex technical/legal issues; (2) the Federal Circuit's own use of technical advisors in its appellate review of PTO and District Court decisions; (3) recommended court reform thorough increased use of specialist judges and adjudicators in the Federal Circuit, PTO, and federal district courts; (4) establishment of specialized divisions within the Federal Circuit, PTO, or District court; (5) the deployment of professional or educated "blue ribbon" juries in the resolution of complex issues of fact, with discussion of the shortcomings of the existing lay jury system in high technology cases; and (6) establishment of federal high technology judicial or administrative courts. ... Rich, the "elder statesman of the patent bar" recently died, Richard Linn, a former patent attorney from Foley & Lardner, replaced him as the newest appointment to the twelve-member Federal Circuit. ... Another progressive specialization proposal would be to establish the Federal Circuit as an entirely specialized high technology court staffed by panels of specialized adjudicators, attorneys and juries that would hear cases involving their respective fields of specialization, such as biotechnology, engineering, telecommunications, computer science, business methods, and Internet law. ... However, high technology proponents, such as those in Internet and other newly evolving arenas, may look optimistically towards increased specialization in the federal courts and in international forums as a means for solving the complexity problem--at least in part.

46. David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

The issues in the debate over the authority to appoint remedial special masters can be briefly summarized. First, does rule 53, with its prominent references to trial-stage appointments of special masters, give courts that have already decided upon the liability of the defendants authority to appoint special masters to perform complex tasks up to and including running a state institution such as a prison or a mental hospital? Second, does rule 70, with its language referring to the appointment of "some other person" to perform specific acts on behalf of a party, authorize courts to appoint remedial special masters to perform complex tasks? The term "master" does not even appear in the rule, and the rule expressly mentions only limited tasks such as conveyances of property. Finally, do courts have inherent power to appoint remedial special masters and, if so, what is the relationship between that power and these two rules, which may fully regulate those appointments?

This Article discusses the ongoing controversy over the adequacy of these sources of authority, which federal courts have used to appoint special masters to assist in the development and implementation of institutional reform decrees.[10] Each source of authority will be discussed in light of an important but largely unknown and unpublished primary source concerning the intent of the original Advisory Committee on Rules for Civil Procedure, the drafters of the Federal Rules of Civil Procedure.[11] This source is the extensive collection of papers maintained by Charles E. Clark, then Dean of the Yale Law School and Reporter for the original Advisory Committee. To understand fully the intent of the drafters, which was to preserve existing tradition and practice, this Article then discusses, in the context of rules 53 and 70, the use of special masters for remedial purposes in the period prior to the promulgation in 1938 of the Federal Rules of Civil Procedure.[12] This Article draws the implications of this history for the appointment of remedial special masters in modern institutional reform cases.[13] Finally, to preserve expressly the clear intent of the drafters, this Article proposes some clarifying amendments to rules 53 and 70 to confirm the authority of the courts under the federal rules to appoint remedial special masters.[14]

Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

[10] *See infra* text accompanying notes 15-43, 107-15.

[11] *See infra* text accompanying notes 63-89, 116-30.

[12] *See infra* text accompanying notes 94-106, 131-38.

[13] *See infra* text accompanying notes 198-242.

[HeinOnline (Right from the Text)]

Citing References:

Vikramaditya Khanna & Timothy L. Dickinson, The Corporate Monitor: The New Corporate Czar?, 105 Mich. L. Rev. 1713 (2007).

> Lexis Summary: Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. ... The corporate monitor of today can be traced to the neutrals of the past... As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 Prudential Securities case in which the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the

company as per a DPA. ... Monitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. ... A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. ... However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor... Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors.

47. Michael K. Lewis, *The Special Master as Mediator*, 12 SETON-HALL LEGIS. J. 75 (1988).

THE SPECIAL MASTER AS MEDIATOR

Michael K. Lewis

Introduction

Courts have increasingly begun to use special masters to aid in the implementation of complex institutional reform orders or consent decrees as well as to aid in the settlement process. The use of special masters in either circumstance raises significant questions. This paper discusses some of those questions and focuses on those issues peculiar to the special master as mediator.

[HeinOnline (Right from Text)]

48. Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

Lexis Abstract: In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. ... These efforts have focused upon the problems of excessive transaction costs, delayed access to courts, lack of horizontal equity in outcomes, and the overall challenges to the legitimacy of the judicial process in the resolution of mass torts. ... The institutional cooperative strategy is thus a hybrid approach, attempting to accentuate the strengths of the case-by-case model of litigation and federalism, while minimizing the model's inefficiencies and inequities. ... Finally, there is a small group of law firms capable of pursuing any strategy - boutique, class action, or wholesale - depending upon the opportunities presented by each mass tort. ... If the MDL panel made it explicit that the transferee judge is not to engage in aggregation other than discovery until the mass tort matured in the marketplace of state court litigation, there would still be some duplicative discovery. ... A strategy of cooperation at the institutional level - taking advantage of the state courts to create a marketplace of litigation and the federal courts to coordinate discovery and promote a national settlement - can create otherwise unobtainable joint gains.

From Article's Introduction: "Judges are now players in the mass tort game. Whatever approach any judge takes in managing a mass tort, judicial input is a critical factor in the ultimate progress of the litigation. To certify or not to certify, for example, is a question that must be answered with profound results for the outcome of the mass tort. Recognizing the role

of judges, recent legal literature has suggested that the ubiquity and massness of the tort should lead to cooperation among judges. Through cooperation, judges can promote efficiency and horizontal equity in the adjudication.

"Cooperation" among judges has been promoted in multiple and often confusing forms; "cooperation" has varyingly meant communication, coordination, collaboration, or cooperation in the negotiation sense of seeking joint gains. In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. This strategy has critical weaknesses that limit its ultimate value. It has behavioral, structural, and political impediments; it can conflict with an appreciation of the maturity and elasticity of mass torts, and it may run contrary to recent Supreme Court jurisprudence. There is an alternative cooperative strategy that has significantly more potential for benefiting judges, litigants, and the legal system as a whole. The alternative strategy can be implemented de jure or de facto and focuses at the institutional, rather than individual, level and suggests complimentary, rather than competing, roles for state and federal courts.

Citing References:

Beko Reblitz-Richardson, Lockheed Martin and California's Limits on Class Treatment for Medical Monitoring Claims, 31 Ecology L.Q. 615 (2004).

> From the article: In Lockheed Martin, the court considered class certification for individuals seeking medical monitoring damages based on exposure to harmful chemicals in their local water source... This Note focuses on the question of whether or not medical monitoring claims, and more specifically the chemical exposure claims at issue in Lockheed Martin, are suitable for class treatment. ... In Lockheed Martin, the court not only considered class certification for medical monitoring claims, but did so with environmental pollution claims... A medical monitoring program nonetheless places certain burdens on the court. For example, a court implementing a medical monitoring program will need to appoint a commission or a neutral to determine who is covered, how payments should be made, and the scope of the program. Monitoring programs require an ongoing involvement by the court in the administration of the fund, a level of judicial involvement distinct from traditional models of compensation. In response to these considerations, different jurisdictions have embraced or rejected such medical monitoring claims.

49. Gregory P. Miller, *How to Develop a Special Master Practice*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

50. Vincent M. Nathan, *The Use of Neutrals in Institutional Reform Litigation*, 10 U. TOL.L.REV. 419 (1979).

The purpose of this article is to explore the developing use of masters by federal courts in institutional reform litigation. It commences with a review of the sources of authority for the appointment of such an agent. While it is generally recognized that masters may be appointed pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure, one of the theses of this article is that this rule is not the sole source of the appointing court's authority; nor are all functions assigned to masters contemplated by Rule 53. Indeed, it will be urged that such appointments may be made under Rule 70 of the Federal Rules of Civil Procedure, in accordance with the Federal Magistrates Act, and, in spite of the adoption of Rule 53, through the exercise of the inherent power that resides in federal courts. The author then will move to a consideration of the authority and precedent for the appointment of a master in the specific context of institutional litigation. Within this setting, the advantages and disadvantages of a reference, the objectives of the court in appointing a master, and issues relating to the selection of such an agent, his powers, and the ethical and professional constraints upon his activities will be discussed. The article concludes with an examination of the effectiveness of the reference technique in the setting of institutional reform litigation.

The sources of authority for the appointment of a master. Historically

[HeinOnline (directly from the text)]

51. Martin Quinn, *Outline of Ethical Issues for a Special Master*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Neutral in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

52. Randi I. Roth, *Monitor Work in* Pigford v. Johanns: *Lessons Learned About Claims Processing Judicial Adjunct Work*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

53. Jerry Sandel & Sherry Wetsch, *Mediation of Criminal Disputes in the 278th Judicial District*, 25 IN CHAMBERS 3 (1998).

From the Article: Alternative dispute resolution (ADR) mechanisms □□mediation and arbitration □□often offer a quicker, less expensive, and more conciliatory way to settle a dispute than litigation. Potential litigants are using these alternatives more, particularly to resolve family law, consumer law, personal injury, and employment law disputes. Many state and federal laws and policies now promote or even mandate ADR.

Resorting to arbitration or mediation is faster and costs less than traditional litigation methods. In addition, litigation is public, while ADR mechanisms generally enable the parties to preserve their privacy. Although it usually helps to have a lawyer present during arbitration or mediation, it is not uncommon for parties to represent themselves, because the procedures are much more informal and flexible than those used in a court hearing. Alternative dispute resolution can produce better and more creative results for the parties, and possibly even

preserve an amicable relationship between them. On low dollar and simple cases, the parties may consider a telephone hearing.

Legal assistance attorneys are finding that mandatory mediation or arbitration provisions are often embedded in many contracts, including standard consumer purchase agreements, credit card contracts, insurance contracts, leases, utility contracts, and contracts involving securities. These clauses are also commonly included in employment contracts.4 Many contractual arbitration clauses specify binding arbitration as the only means to resolve any future disputes arising out of the contracts.

Almost any kind of dispute may be suitable for ADR, and legal assistance practitioners may find it advantageous for their clients to affirmatively seek out ADR services, particularly in divorce, child custody, or other family disputes. This article offers a practical introduction to mediation and arbitration and identifies several web resources. In addition, it includes some useful observations and insights into ADR from an experienced neutral. [Copy available at: http://adr.navy.mil/docs/jun2000talwetsch.pdf]

54. Shira A. Scheindlin & Jonathan M. Redgrave, *The Evolution and Impact of the New Federal Rule Governing Special Masters* 51 FED. LAW. 34 (Feb. 2004).

From the Article: The modern practice and use of neutrals gradually evolved from a strict and limited role for trial assistance prescribed by Rule 53 to a more expanded view, with duties and responsibilities of neutrals extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice. The result is a new rule (effective Dec. 1, 2003) that differs markedly from its predecessor and sets forth precise guidelines for the appointment of neutrals in the modern context. [Westlaw]

Citing References:

Frederick B. Lacey & Jay G. Safer, Magistrate Judges and Special Masters: The Authority, Roles, Responsibilities, and Utilization of Special Masters, 3 Bus. & Com. Litig. Fed. Cts. § 28:33 (2d ed.) 2008.

> Summary: Fed. R. Civ. P. 53 generally governs the appointment and compensation of masters, references to neutrals, powers of neutrals, proceedings before neutrals and reports of neutrals, when the appointment of the neutral is made under Rule 53. The full text of Rule 53 is set out at the end of this section.

William L. McAdams & Sherry R. Wetsch, Alternative Dispute Resolution of Criminal Disputes in the 12th Judicial District, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, San Francisco, CA 2006 (No abstract available).

Margaret G. Farrell, The Sanction of Special Master: In Search of a Functional Standard, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Washington, D.C., 2007.s

> From the Article: Under amended Rule 53, Neutrals are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to authorize neutrals to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of neutrals in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which neutrals are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold neutrals to judicial standards of conduct when they are not full time judges and perform non-judicial functions. Further, it notes that neutrals need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to neutrals.

55. Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. St. B.J. 18 (Jan. 2004).

From the Article: The modern practice and use of neutrals in federal courts gradually evolved from a strict and limited role for trial assistance prescribed by Federal Rule of Civil Procedure 53 to a more expanded view, with duties and responsibilities of neutrals extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice.

The result is a new rule, effective as of December 1, 2003, that differs markedly from its predecessor and sets forth precise guidelines for the appointment of neutrals in the modern context. In general, the changes provide more flexibility in the use of neutrals, permitting them to be used on an as-needed basis with the parties' consent or by court order when exceptional conditions apply.

This article reviews the history of Rule 53, the evolution of the use of neutrals in practice, and the significant new provisions of Rule 53. [Westlaw]

56. Shira A. Scheindlin & Jonathan M. Redgrave, *Neutraling Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).

57. James K. Sebenius, Ehud Eiran, Kenneth R. Feinberg, Michael Cernea, and Francis McGovern, *Compensation Schemes and Dispute Resolution Mechanisms: Beyond the Obvious*, 21 NEGOTIATION J. 231 (Apr. 2005).

Wiley Abstract: Because compensation and dispute resolution lie at the core of most resettlement proposals, this panel had two main objectives: to get an accurate grasp of the current Israeli approach to these challenges and to glean insights from relevant experiences in other settings. Before reading our panelists' presentations, one might be forgiven for reasonably thinking that "compensation equals cash" and "dispute resolution equals court." As our panelists discussed, however, such a straightforward view is simply inadequate to the needs of the resettlement problem — a much richer view of compensation and dispute resolution is required. [From http://www3.interscience.wiley.com/journal/118656713/abstract]

58. Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

From the article: This birthday celebration of the Federal Rules is a time to marvel at the enduring character of the 1938 Federal Rules of Civil Procedure. Given the dramatic changes that have taken place in litigation over these decades, it is no surprise that the proponents of the philosophy of uniform and trans-substantive rules believe that time has proved their case. I want to suggest, however, as indeed others already have, [FN1] that trans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules. One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts, who customize procedure for particular and individual cases. This example supports those who call for a different approach to federal rulemaking.

The court-appointed neutrals to whom I refer are primarily neutrals and magistrates. There are also the newly created arbitrators in court annexed arbitration used in a number of districts, but that experience is relatively new, and I bypass them for purposes of present discussion. There is no doubt that the use of court-appointed neutrals has been extremely valuable in processing our expanding and complicated contemporary litigation caseload, and thus I intend my comments less as an attack on the use of neutrals and magistrates than as an example of why more dramatic procedural reform is in order. In short, I think delegations of judicial power to neutrals and magistrates have become the substitute for a more precise and specialized procedural code. To some extent then, the debate can be seen as one between those who are satisfied with an individual case-by-case customized procedure put in place by court-appointed neutrals versus those who advocate more formal rules that do not slavishly adhere to a uniform and trans-substantive format. These divisions are also not as sharp as I first described them because I think the development and customization of specialized procedures under the present court-appointed neutral models actually provide some of the building blocks on which a more formal system of particularistic rules can be erected.

Thus, the case study I present has a two-fold purpose. First, I make the claim that a close examination of modern court-appointed neutrals exposes the myth that there is in fact a single set of 'federal rules of civil procedure,' and I advocate establishing formal alternative procedural tracks for processing different types of cases. Second, and on a less ambitious note, I believe that given the way special neutrals are now being used, specific revisions in Rule 53 itself are necessary. Because both of these proposals have more to do with the use of neutrals than magistrates, my emphasis will be on the use of neutrals. But it is worth looking at both models for points of contrast. [Westlaw]

Citing References:

Edward V. Di Lello, Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level, 93 Colum. L. Rev. 473 (1993).

> Westlaw Abstract: It is by now a common complaint that litigation in federal court takes too long and costs too much. The sheer number of parties and the complexity of their relationships in large cases have, in themselves, created new administrative problems. Court calendars are backlogged and trial judges are burdened today in ways never imagined a generation ago. Technical expert testimony is a major cause of this delay, cost, and complexity, and as scientific advances and new technologies find their way into the courtroom with increasing frequency, these trends will worsen. Recognizing the need to expedite, de-mystify, and where necessary curb or eliminate so-called "battles of experts" involving technical subject matter, this Note proposes the creation of a new adjunct judicial office for magistrate judges who are specialists in technical fields, and the adoption of certain related procedural reforms. Annexed to federal district courts, these court-appointed neutrals would bring about better, faster, more efficient and less expensive adjudication of factual issues involving technical evidence. Empowering expert magistrate judges to perform a number of flexible adjudicative functions would induce litigants to reduce their reliance on expert evidence and to focus and improve its presentation. Part I of this Note examines the problems associated with technical expert testimony and argues that such testimony is unreliable, costly, time-consuming, confusing and of questionable admissibility. Part II analyzes currently available methods of dealing with these problems- neutrals and court-appointed experts--and exposes their short-comings. Part III examines the historical evolution of the Court of Appeals for the Federal Circuit, a court with specialized jurisdiction in a small number of legal areas, as an example of the expertise that accrues to judges and the judicial system as a result of specialization. Part IV proposes the creation of a new federal judicial office bearing the title "Magistrate Judge (Expert)" ("MJE") and explores adjunct judicial functions MJEs could perform to make possible more efficient and effective determinations of fact in technical cases. This Part also anticipates possible criticisms and examines the feasibility of the proposal.

Samuel H. Jackson, Technical Advisors Deserve Equal Billing with Court-Appointed Experts in Novel and Complex Scientific Cases: Does the Federal Judicial Center Agree?, 28 ENVTL. L. 431 (1998).

> Westlaw Introduction: In the wake of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., courts are struggling to understand the full scope of their new role as "gatekeepers" of good science. In particular, the debate over the appropriate use of scientific experts under Federal Rules of Evidence 706, and the use of court-appointed experts under the courts' inherent power, has been renewed by recent developments in product liability, toxic tort, and environmental cases. This Comment explores the historical development of court-appointed expert witnesses and technical advisors culminating in the Federal Judicial Center's recently drafted Reference Manual on Scientific Evidence. Mr. Jackson uses this historical framework to discuss appropriate

applications of these increasingly necessary judicial resources. Several procedural safeguards are discussed in addressing the concerns that have been expressed by critics of these resources. Mr. Jackson concludes that in many cases, technical advisors are equally valid, and possibly more effective, alternatives to court-appointed experts in dealing with the exceedingly complex scientific issues presented in current litigation trends. Two recent cases in the Ninth Circuit are discussed as models for the appropriate use of such experts.

Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683 (1992).

From the Article: The burden of this Article, therefore, is to demonstrate that an inquiry into the form of complex litigation provides a useful perspective on the hydra-headed problem of complex litigation. Part I begins the inquiry by describing the practical and theoretical factors that have led various courts and commentators to label particular types of litigation "complex." Although all the definitions provide important data about the nature of complex litigation, none capture its full breadth. Thus, the task of the Article's next two Parts is to develop a formal and inclusive definition. Part II builds the theoretical framework for the definition by describing the form of adjudication and the positive assumptions of modern civil litigation. Next, Part III demonstrates that complex litigation arises from the friction between the real-world problems outlined in Part I and the theoretical framework developed in Part II. Part III argues that all complex cases initially involve at least one of four different modes of complexity: the attorneys have difficulty in amassing, formulating, or presenting relevant information to the decision maker; the factfinder has difficulty in arriving at an acceptably rational decision; the remedy is difficult to implement; or there exist procedural and ethical impediments to joinder. The unifying attribute of these four modes is that the dispute can be resolved rationally only through the accretion to the federal judiciary of powers traditionally assumed by the other "actors" (parties, lawyers, jurors, and state courts) in the litigation enterprise. This attribute alone, however, constitutes an overbroad definition of complex litigation; such cases, although "complicated," are not truly complex. Complex litigation also contains a second fundamental attribute: The increase in judicial power needed to deal with these complications threatens to overrun the deep-seated assumption of modern civil litigation that similarly situated claims, parties, and legal theories should be treated in procedurally similar ways. … Part IV applies the insights gained from Part III to the future of civil procedure. Complex litigation stands in the crossroads of the thorniest issues in modern civil procedure: case management; trans-substantivism; adversarialism; the wisdom of equitably based procedural codes; the relationship between procedure and the law and economics movement; and the involvement of courts in politically charged controversies. Part IV demonstrates that these issues, and consequently the direction of procedural reform, can be understood only against the backdrop of the four categories of cases (routine, complicated, complex, and polycentric) developed from the definition of complex litigation.

Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712 (1994).

> Westlaw Abstract: Many federal judges do not have time for their civil dockets. The amount of time the average district judge devotes to civil trials has declined steadily in the last ten years. Simultaneously, the criminal dockets have grown too large and become too complex for the district judges to spend sufficient time tending to civil cases which by law have lower priority. Congress continues to create more federal crimes despite urgent entreaties not to do so. The President and Senate have moved slowly to fill district court vacancies, and many believe that adding more judges is an unacceptable solution. The ever-increasing pressures on the district judges have resulted in two trends in the handling of civil cases. The first is the increasing use of judicial "adjuncts" such as magistrates, bankruptcy judges, law clerks, staff attorneys, interns, externs, and the other ingredients of "bureaucratic justice." The second development, more aptly called a movement, has been to direct civil cases away from adjudication to alternative forms of dispute resolution such as arbitration, mediation, early neutral evaluation, and summary jury trials… The two developments converge when court-appointed neutrals, particularly magistrates, mediate civil cases.…The trend toward using magistrates as mediators is no accident. To understand why, one must first understand what prevents parties from settling without assistance. Part II of this Article examines this question and concludes that parties increasingly need more information than the attorneys can provide. In addition, the parties also need a more satisfying and structured forum than lawyer-to-lawyer negotiation. One must then compare different forms of mediation to see how each meets those needs. Part III makes those comparisons with respect to mediation by private lawyers, trial judges, and magistrates. It concludes that magistrates are being used to mediate cases more because they are in a unique position to do so effectively…. This Article explains why magistrates can and should mediate more civil cases.

Lois Bloom & Helen Hershkoff, Federal Courts, Magistrate Judges, and the Pro Se Plaintiff, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475 (2002).\

> From the Article: In Part I, we explore what one commentator calls "the flood of unrepresented litigants" in courts nationwide and the various approaches that federal courts have taken to deal with the pressures that pro se cases generate. In Part II, we focus on the Eastern District of New York and its decision to designate a special magistrate judge to oversee pro se matters. In Part III, we examine the advantages and disadvantages of the single magistrate judge approach for the processing and disposition of pro se matters, recognizing that the work of this office is still at an early stage of institutional development and that additional lessons will be learned with experience and practice.

R. Lawrence Dessem, The Role of the Federal Magistrate Judge in Civil Justice Reform, 67 St. John's L. Rev. 799 (1993).

> From the Article: This Article considers the role of the United States magistrate judge in civil justice reform and, more specifically, the role that the early implementation districts

envision for magistrate judges within their own districts. Part I briefly considers the evolution of the office of magistrate judge prior to the enactment of the Judicial Improvements Act of 1990.

Richard A. Posner, Coping with the Caseload: A Comment on Magistrates and Neutrals, 137 U. Pa. L. Rev. 2215 (1989).

From the article: Linda Silberman's paper for this conference [discusses two methods by which the federal court system and Congress have tried to cope with the enormous increase in the federal judicial caseload in recent times]. The first is the expanded use of magistrates; the second is the expanded use of neutrals. Silberman is more sanguine about the former than about the latter, in major part because the use of magistrates is more regularized by statute than the use of neutrals. Regarding magistrates, the author is concerned mainly that their availability to supervise pre-trial discovery makes it easier for that monster to flourish; hard-pressed district judges would perforce rein it in more. Regarding special neutrals, she is concerned about expense, potential conflicts of interest, lack of clear rules governing their use, and lack of institutional commitment (special neutrals are ad hoc recruits from private practice, not employees of the judicial branch). I, too, am concerned about the growing use by the federal courts of court-appointed neutrals, including magistrates and neutrals.

Margaret G. Farrell, The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts, 2-Fall Widener L. Symp. J. 235, (1997).

From the article: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of neutrals under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of neutrals to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of neutral practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution.

Not surprisingly, neutrals do not function today as they did before the new demands engendered by technology were made upon them. The actual practice of modern neutrals differs dramatically from the hearing neutrals anticipated when Rule 53 of the Federal Rules of Civil Procedure ("Rule 53") was enacted in 1938… To carry out many of these assignments, courts need flexibility, expertise, informality, investigative authority, administrative capacity, and time, which are qualities usually associated with administrative agencies. Some of these capacities have been provided to courts through the appointment of neutrals. Without them, courts would be required to perform their quasi-legislative role in mass toxic tort and other complex litigation without the assistance that legislatures have created in the form of administrative agencies.'

Today, neutrals are appointed to play a number of different roles. They serve as surrogate judge, facilitator, mediator, monitor, investigator and claims processor. In playing these roles, neutrals perform a variety of traditional, passive judicial functions….

The article concludes that neutrals should be appointed to put a more intimate face on mass justice and to perfect procedural reforms that better use and cope with technology. In many of their roles, neutrals function like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts. Like administrative agencies, they are justified by their expertise, efficiency and availability. Yet, answerable only to the judges who appoint them, neutrals are not bound by an Administrative Procedures Act and are not accountable to the electorate through either the legislative or executive branches. They lack the longevity of agencies and leave no public law legacy in the form of regulations or precedent. Rather, the legitimacy of the use of neutrals, as it is described in this article, lies in their embodiment of the efficiency and fairness values that are part of the jurisprudence of Article III of the United States Constitution, and their ability to humanize modern legal process. The article recommends that neutral practice be allowed to evolve unrestrained by rigid limitations on the process they use. In doing so, we can rely on the supervision, discretion and integrity of the district court judges with whom they work, as well as review by the courts of appeals, and the rigors of the adversarial process to curb the potential for abuse.

59. Clarence J. Sundram, *Exit Planning and Phased Conclusion in the Remedial Phase of Systems Reform Litigation*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.

From the article: You have become the Neutral in the remedial phase of a lawsuit requiring structural reform of the complex governmental activity and are now responsible for supervising the implementation of a series of court orders requiring significant changes in the way in which governmental services are delivered. The services in question may involve the operation of state institutions like prisons, mental hospitals, or mental retardation facilities; they may involve services delivered by private organizations which are licensed, certified, supervised or funded one or more government agencies; they may involve some aspect of a public service like housing or education.

While each of these areas present their own subject matter complexity, in the remedial phase of the litigation they present some common challenges to a Neutral. One of the most common is a long and unsuccessful history of implementation efforts to comply with the court orders, a history which has probably necessitated the appointment of the Neutral in the first place. I have been involved in a number of these cases over the years, including the Wyatt litigation in Alabama, originally commenced in 1970; the Willowbrook litigation in New York commenced in 1972; Gary W. in Louisiana in the 1980s; Evans v. Williams in Washington DC, which has been going on since the mid-1970s and CAB v. Nicholas in Maine which is about the same age.

In examining a number of such cases, which have been open for a long time, it seems that they all run through a fairly typical lifecycle. I don't know if this is true of commercial litigation as well. [Westlaw: SL083 ALI-ABA 753]

60. Clarence J. Sundram, *Memorandum Regarding Certification of Compliance Process*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.

From the article: The following documents may be useful to an understanding of how the process of certification of compliance works.

1. Certification Procedure – This document sets out a fairly "bare-bones" procedure for the Defendant's to certify compliance with discrete provisions of the Court Orders, along with a summary of the supporting evidence. It provides the plaintiffs with access to the evidence as well as further discovery, if needed. It lays out a process for resolving factual disputes about the status of compliance before the Neutral prepares a report and recommendation to the Court.
2. Certification Document regarding ISCs. This is an example of the type of certification expected from the Defendant and the specific factual issues the certification should address.
3. Neutral's Report and Recommendation to the Court regarding Compliance. (This document, when filed with the Court, is accompanied by Exhibits containing the supporting evidence *766 submitted by both parties, and the record of the case before the Neutral.)
4. The Court Order accepting the Neutral's report and endorsing the recommendations. [Westlaw: SL083 ALI-ABA 763]

61. George M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdictions; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).

62. Thomas E. Willging, Laura L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, John Shapard, *Special Masters' Incidence and Activity* (Federal Judicial Center 2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf.

Executive Summary: This report examines how pretrial and post-trial neutral activity can take place under a rule designed to limit neutral appointments to trial-related fact-finding in exceptional cases.8 In commissioning the Federal Judicial Center to conduct this study, the Judicial Conference Advisory Committee on Civil Rules' Subcommittee on Neutrals indicated its awareness that neutral activity had expanded beyond its traditional boundaries. The subcommittee expressed an interest in learning how that phenomenon occurred in the face of a static and restrictive rule.

More specifically, the subcommittee wanted to know how often and under what authority judges appointed neutrals to serve at the pretrial and post-trial stages of litigation, whether any special problems arose in using neutrals, how courts' use of neutrals compared with their use of magistrate judges, and whether rule changes are needed. We responded to the subcommittee's request by examining docket entries and documents in a

random national sample of closed cases in which appointment of a neutral was considered. We followed up with interviews of judges, attorneys, and neutrals in a select subset of that sample.

Citing References:

Georgene Vairo, Why Me? The Role of Private Trustees in Complex Claims Resolution, 57 Stan. L. Rev. 1391 (2005).

Westlaw Abstract: This Article explores whether private persons, as opposed to a judge or, perhaps, another governmental official, should have the authority to exercise a high degree of discretion in developing standards for compensation and determining compensation awards for claimants. It is important to look directly at this issue because the question whether administrative trusts are an appropriate alternative to litigation cannot be answered without a discussion about the private persons who develop the compensation standards and administer an administrative trust and how they should be selected.

63. Linda DeBene, *Creative Case Management Techniques in the Face of Looming Budget Cuts*, (2012), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/debene-creative-management-2012.pdf

64. David Ferleger, *Masters in Complex Litigation & Amended Rule 53* (2005), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/ferleger.pdf

65. Francis McGovern, *Mediation of the Snake River Basin Adjudication* (2006), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/mediation-of-the-snake-river-basin-adjudication.pdf

66. Edward F. Sherman, *Judicial Supervision of Attorney Fees in Aggregate Litigation: The American Vioxx Experience as Example for Other Countries*, (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/4cedwardsherman.pdf

67. Edgar C. Gentle III, *Administration of the 2003 Tolbert PCB Settlement in Anniston, Albama: An Attempted Collaborative and Holistic Remedy*, (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/tolbertpcb.pdf

68. Daniele B. Garrie, Esq., Edwin A. Machuca, Esq., *E-Discovery Mediation & the Art of Keyword Search,* (2000), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/e-discovery_article_cardozacac209.pdf

69. Martin Quinn, *Managing Discovery in Patent Cases: Best Practices* (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/quinn.pdf

70. **The Honorable Shira A. Scheindlin, Jonathan M. Redgrave, *Special Masters and E-Discovery: The Interesction of two Recent Revisions to The Federal Rules of Civil Procedure,* (2008), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/scheindlin_30_2.pdf**

71. **Howard R. Marsee, *Utilizing Special Masters in Florida: Unanswered Questions, Pracical Considerations and the Order of Appointment* (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/marsee.pdf**

72. **Lynn Jokela, David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool* (2005), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/jokelaherr.pdf**

73. **Jay P. Kesan, Ph.D., Gwendolyn G. Ball, Ph.D., *A Study of the Role and Impact of Special Masters in Patent Cases* (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/specmapa.pdf**

74. **Recent Articles Leading Up to and Concerning the ABA Guidelines**

- Merril Hirsh and Sylvia Mayer, "Time To Stop Hamstringing Bankruptcy Judges: Amending Bankruptcy Rule 9031 To Recognize and Permit the Use of Court-Appointed 'Masters,'" ABA Judicial Division JUDGES JOURNAL, V. 61 NO. 4 (Fall 2022) 22. Available at www.courtappointedneutrals.org/acam/assets/file/public/resources/it%20is%20way%20past%20time%20to%20allow%20bankruptcy%20judges%20to%20use%20court-appointed%20masters.pdf

- So What Is A "Special Master" Anyway?, THE COURT MANAGER (Nov. 2022)

- "Bad Branding for a Great Idea: Making More Effective Use of Special Magistrates (Masters) in Florida, THE COMMON GROUND (Summer 2022).

- Interviewed in Lloyd Lui, "The Invaluable Role of Special Masters," Washington Lawyer 46 (July/Aug. 2022).

- "Necessity and Invention: Seven Steps for Using Special Masters to Help Courts with the Pandemic Caseload," American Bar Association Judicial Division, JUDGES JOURNAL, v.60, No. 3 at 18 (Summer 2021)

- "A Revolution That Doesn't Offend Anyone: The ABA Guidelines on the Appointment and Use of Special Masters in Civil Litigation," American Bar Association Judicial Division JUDGES JOURNAL (Fall 2019) at 30.

- "Special Masters: A Consensus Proposal for a New Approach to Civil Litigation," ALTERNATIVES (International Institute for Conflict Prevention and Resolution) (December 2018) 169.

- "Special Masters: Helping Judges' Reach Exceed Their Grasp," ALTERNATIVES (International Institute for Conflict Prevention and Resolution) (June 2017), available at http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx

- "Special Masters: A Different Answer to a Perennial Problem," ABA THE JUDGES JOURNAL (with James Rhodes and Karl Bayer), v. 55 No. 2 (Spring 2016) at 26, available at http://www.troutmansanders.com/files/Uploads/Documents/JJ_SP16_v55n02_HirshRhodesBayer.pdf

WEBSITES

75. https://www.courtappointedneutrals.org/resource-center/articles/ Curated website with articles added.

76. American Bar Association, Judicial Division, Lawyers Conference Court-Apointed Neutrals Committee
https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/court-appointed-neutrals/

This website provides information and resource materials on the American Bar Association's Guidelines on the Appointment and Use of Special Masters in Court-Appointed, articles about the Guidelines and the use court-appointed neutrals, video resources, recommended criterial for the creation of a roster of court-appointed neutrals, a discussion draft of a model state rule on court-appointed neutrals and other materials.

77. Special Masters: How To Make the Best of Both Worlds (multi-part posting on Karl Bayer's Disputing blog, beginning November 2014)
http://www.disputingblog.com/special-masters-how-to-make-the-best-of-both-worlds-part-i/