

Academy of Court-Appointed Masters

Section 4

Managing the Unmanageable: Special Masters A Special Solution

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

The ABA recently approved Guidelines for the Appointment and Use of Special Masters, recognizing that the use of special masters should become a more common part of the litigation process. The ABA Report that accompanied the Guidelines concluded that the use of special masters enhanced the litigation process by:

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

These Guidelines and Conclusions recognize the growing acceptance in practice of masters. Those of us who serve as masters reflect the value we provide to our justice system. In our conversations with lawyers and our debriefing of parties after the conclusion of cases, we have learned how masters provided efficient, effective, and affordable services and results.

Empirical research is hard to come by in the world of litigation, and it is always difficult to perform a comparative analysis of the path taken and the bypassed path. For that reason, empirical analysis of the benefits that special masters visit upon litigation is difficult to come by—particularly given the infrequency of published judicial opinions regarding masters. But the research that has been performed, anecdotal, as much of it may be, strongly points to the fact that the use of masters brings efficacy to the litigation process and generally enhances the quality of litigation outcomes.

For all these reasons, the Guidelines provide that, in all appropriate cases, courts should consider the appointment of masters. We, as members of the Academy dedicated to the use of masters, wholeheartedly agree.

The History of the ABA Guidelines

A few years ago, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to encourage and promote research and education concerning masters and to make proposals concerning their appointment and use. The Committee concluded

that one of the difficulties faced by both courts and practitioners is the lack of standardization in connection with the appointment and use of masters.

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA’s Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership included current and former federal and state judges, members of the Academy of Court Appointed Masters (ACAM), ADR professionals, academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.

The Working Group also gathered information from a wide variety of interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center (FJC), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including ACAM), litigators, and in-house counsel.

This Working Group produced a set of Guidelines, appearing in Appendix 2, which were adopted by the ABA House of Delegates in 2019, declaring that the use of special masters should be considered at the outset of litigation in all complex litigation and in cases involving facts or situations that would make the use of a master advantageous to the court and the parties. The Guidelines also recite many of the functions that can be performed by masters to make litigation more cost-effective and efficient. The Guidelines also encouraged courts to develop rules and practices for selecting, training and evaluating masters and encouraged courts and, where appropriate, legislatures to make changes to laws and rules to effectuate the purposes of the Guidelines.

The Rationale for Using Masters: Solutions to Problems

In addition, the Working Group’s presentation to the House of Delegates included a detailed discussion of the rationale for the Guidelines and for the expanded use of special masters in civil litigation, referred to herein as the “Report.” As the Report noted, none of the rules that govern litigation and litigants are self-executing. Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires judicial case management, which is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the attention of the parties on fairly resolving the issues in controversy.

The appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, masters have the time that judges do not. The goal of these guidelines is not to detract in any way from the role of judges,

including magistrate judges. It is to assist them and serve the ends of justice.

The Report discusses issues the courts can face in providing effective case management, particularly in complex and highly resource-consuming matters. For example, courts often lack sufficient resources to manage certain cases—particularly complex commercial cases—or the practical ability to increase resources when such cases are encountered. Resources allocated to a single case can consume resources that would otherwise be available for other cases. Masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Additionally, certain cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation (“MDL”), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.¹ Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

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

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

Everyone Sometimes Needs a Nudge

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

A concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role, and unless the parties agree otherwise, a master’s

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

“adjudication” is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. There is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution. Masters can also inculcate a culture of compliance with procedural rules by strictly monitoring compliance by the parties and lawyers with the rules and ensuring that no one gains leverage or advantages from non-compliance.

The failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or the use of masters and, frequently, after cases have already experienced management problems. Reliable evidence indicates that courts and parties are generally satisfied with their experiences with special masters. courts and commentators will continue to thoroughly address basic issues, such as: what qualifications masters should possess, how those qualifications reflect the role the master is performing, what best practices for masters should be, and what ethical rules should govern the conduct of masters. The Guidelines take an initial step in addressing these issues and encourage other stakeholders to continue to work on the adoption of standards for the appointment of masters. As the court use masters on a more consistent and regular basis, there will be greater opportunities for research and analysis on ways to make the work of masters more efficient and effective.

Acknowledgements

If every moving thing has at least one source of propulsion, the source of propulsion for this initiative and the Work Group was the Group’s Convener, Merrill Hirsh. It is fair to say that Mr. Hirsh was not only the Group’s leader and official task master, he was also the driving force the brought about a successful end to the Group’s work. We all owe him our heartfelt thanks.

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