MASTERS IN COMPLEX LITIGATION & AMENDED RULE 53

PART 1: MASTERS' WORK
PART 2: THE AMENDED RULE

David Ferleger, JD[1]

This article is in three parts, the first two of which appear here. Part 1 reviews the functions of special masters 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 masters such as overlap of the master role with the expert witness role, whether masters may be called as witnesses, ex parte communication between masters and the court or parties.

PART 1: MASTERS' WORK

I. INTRODUCTION

Complex and systemic litigation often results in what have been called "structural injunctions"[2] 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."[3] On occasion, commitments in consent decrees or court-approved plans are not met and defendants are found in contempt. Similar compliance challenges occur in commercial, mass tort and other litigation.

In the past twenty-five years, court orders enforcing the rights of people with physical and mental disabilities, as well as other structural injunctions, have often been managed for courts by judicial adjuncts who, in the federal system, are typically special masters appointed by the responsible court.

---

[1] Mr. Ferleger has been Special Master in United States v. State of Connecticut (D. Conn.) since 1997. He provides judicial adjunct services and consultation in complex litigation. He is founder of Summit Solutions, Innovative Arbitration, Mediation & Alternative Dispute Resolution, 10 Presidential Blvd, Bala Cynwyd, PA 19004, http://www.summitsolutions.us. Email davidferleger@summitsolutions.us.

[2] The term originates in Owen Fiss, Injunctions 415-82 (1972).

[3] Johnson, The Role of the Federal Courts in Institutional Litigation, 32 Ala. L. Rev. 271, 273, 279 (1981). See Coffin. The Frontier of Remedies: A Call for Exploration, 67 Calif. L. Rev. 983, 985 (1979).

Federal Rule of Civil Procedure 53, substantially amended in 2003, has been the primary support for this approach. The new rule in effect abandons the notion that appointment of a master is disfavored, and many features of the rule are now designed to facilitate expanded use of masters.[4]

I come to this subject from experience with Rule 53. For the past eight years, I have been Special Master for United States District Judge Ellen Bree Burns in United States of America v. State of Connecticut, 931 F.Supp. 974 (D.Conn. 1996), appeal dism'd, 1997 U.S. App. LEXIS 21006 (2d Cir., June 13, 1997). Previously, I served a Florida federal court in Johnson v. Bradley as appointed co-monitor. I have been counsel for both plaintiffs and defendants state officials in systemic reform litigation nationally.

II. EARLY USE OF MASTERS IN FEDERAL COURT

The use of special masters, originated in English chancery practice, continued in federal equity practice, and was introduced into the federal rules in 1938.[5] The Supreme Court very early confirmed the propriety of the use of special masters in federal court, noting that masters have been used "since the commencement of our Government."[6] It has long been understood, even absent a rule on masters, that parties may consent to judgment based on a master's ruling.[7] In 1920, in an opinion by Justice Brandeis, the Court explained that courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties,

---

[4] For the "notion," see La Buy v. Howes Leather Co., 352 U.S. 249, 257-258 (1957) (appointment is disfavored; masters should be used only in rare cases). The amended Rule 53 has not yet been interpreted by the courts or analyzed by commentators. Scheindlin & Redgrave, Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation, N.Y. State Bar Assn J. (Jan. 2004). Judge Shira A. Scheindlin chaired the subcommittee on Rule 53 for the Advisory Committee and is co-author of this short article summarizing the changes. On the former rule, see Farrell, Margaret, Civil Practice and Litigation Techniques in the Federal Court, sponsored with the cooperation of the Federal Judicial Center, The Role of Special Masters in Federal Litigation, October 14, 1993 (Westlaw at C842 ALI-ABA 931).

[5] See Silberman, Masters and Magistrates Part I: The English Model, 50 N.Y.U. L. Rev. 1071, 1075-1079 (1975); Silberman, Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure, 137 U. Pa. L. Rev. 2131, 2134 (1989); Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452, 452 & n. 4 (1958); Levine, Calculating Fees of Special Masters, 37 Hastings L. J. 141, 144-45 (1985).

[6] Ex parte Peterson, 253 U.S. 300, 312 (1920); Kimberly v. Arms, 129 U.S. 512, 524-25 (1889) (where reference to master was by consent, findings are "taken as presumptively correct").

[7] Peretz v. United States, 501 U.S. 923, 936 (1991) ("litigants may waive their personal right to have an Article III judge preside over a civil trial"); Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 127-128 (1864); Baker Indus., Inc., v. Cerebrus, Ltd., 764 F.2d 204, 206, 210-211 (3d Cir. 1985).

as they may arise in the progress of a cause."[8]

In the nineteenth century, special masters performed essentially clerical duties for courts, but those duties expanded and, by the late nineteenth century, masters routinely were authorized to take evidence and make non-binding recommendations to courts.[9] The federal equity rules in 1912 restrained the use of masters, with Equity Rule 59 establishing the requirement, now in Federal Rule of Civil procedure 53(b), that references to masters be justified by an "exceptional condition." State court rules and caselaw also provide for appointment of masters and other adjuncts.[10]

Rule 53's 2003 amendment recognizes the tremendous expansion of the use of masters in the last three decades and supports judicious use of masters to perform the many duties previously identified by the courts. The view of the Advisory Committee on the 2003 Amendments reflects today's reality: "Courts have come to rely on masters to assist in framing and enforcing complex decrees."

III. MASTERS' FUNCTIONS

The new rule, like the former one, does not enumerate characteristics which qualify a person to be a master. Attorneys, law professors, and retired judges are often appointed. Increasingly individuals who are expert in specific legal[11] or non-legal[12] issues have been appointed. Non-lawyer experts in the relevant field are often utilized.[13] On occasion, courts appoint multiple masters in a single case,

---

[8] Ex parte Peterson, 253 U.S. 300, 364-65 (1920). Accord, Ruiz v. Estelle, 679 F.2d 1115, 1161 (power to appoint master to supervise implementation has long been established), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. den., 460 U.S. 1042 (1983); Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452, 462 (1958) ("there has always existed in the federal courts an inherent authority to appoint masters.").

[9] See citations at note ___ supra. See also Feldman, Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation, 18 Environmental Affairs 809, 819 (1991).

[10] See, for example, Jackson v. Hendrick, 457 Pa. 405; 321 A.2d 603 (1974), tracing the history of appointment of masters and other judicial supports in Pennsylvania.

[11] United States v. Conservation Chem. Co., 106 F.R.D. 210, 224 n.5 (W.D. Mo. 1985) (expert in land use and environmental law); United States v. AT&T Co., 461 F. Supp. 1314, 1320 n.15 (D. D.C. 1978) (law professor experts in evidentiary privilege on discovery motions).

[12] McLendon v. Continental Group, Inc., 749 F. Supp. 582, 612 (D.N.J. 1989), aff'd on other grounds, 908 F.2d 1171 (1990) (ERISA case; legal and economics expertise); Monmouth County Corr. Inst. Inmates v. Lanzaro, 695 F. Supp. 759, 761 n.2 (D.N.J. 1988) (attorney with expertise in prison reform issues); Mallonee v. Fahey, 122 F. Supp. 472, 475 (S.D. Cal. 1954) (attorney with expertise in banking and building and loan business); In re United States Dep't of Defense, 848 F.2d 232, 239 (D.C. Cir. 1988) (attorney with security clearance and expertise in intelligence matters in FOIA case).

[13] Morgan v. Kerrigan, 530 F.2d 401, 425-427 (1st Cir. 1976) (panel of non-attorney masters appointed in school desegregation suit); Arthur Murray, Inc. v. Reserve Plan, Inc., 364 F.2d 28, 30 (8th Cir. 1966) (accountant to compute damages); Reilly v. United States, 863 F.2d 149, 154 n.4 (1st Cir.

typically where the issues are especially complex or require more than one area of expertise.[14]

"Because the functions performed by special masters, monitors and receivers vary in their intrusiveness into a defendants' operations, these agents occupy places along a spectrum that lacks bright line boundaries."[15] The amended Rule 53 specifies for the first time three categories of masters: trial masters, pretrial masters and post-trial masters. The Advisory Committee provides this example of how the functions might overlap: "A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance."

In the discussion below I utilize the typology adopted by the amended Rule 53: pretrial, trial and post-trial. The fourth described category – the augmented special master (a term I have coined) – is alluded to by the Advisory Committee and is a subset of the post-trial mastership.

A. Pretrial Masters

With the district court's authority hovering over the process, a master can be very effective in case management duties such as supervision of discovery or narrowing the issues with the parties. A master may be appointed to assist the parties to settle the case. This may be accomplished through mediation, facilitating settlement talks, early evaluation of the merits, or as a consequence of preliminary findings or recommendations by the master. Also, this use of the master permits exchange and examination of positions and facts which, in some instances, it may be preferable to shield from the court.

Perhaps for lack of experience in litigation settings which more commonly use pretrial masters (e.g., mass torts, corporate litigation, class damages), disability law counsel have thus far rarely used pretrial

---

1988) (economist as "technical advisor" on calculation of damages; Rule 53 noted); United States v. Cline, 388 F.2d 294, 295 (4th Cir. 1968) (surveyor; both master and expert witness); Fox v. Bowen, 656 F. Supp. 1236, 1253-1254 (D. Conn. 1987) (master employed medical experts re Medicare); New York Ass'n for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165, 1192-1194 (E.D.N.Y. 1982) , rev'd in part on other grounds, 706 F.2d 956, 960 (2d Cir. 1983) (expert master to monitor compliance with consent decree was also empowered to hire assistants with experience in mental retardation); Halderman v. Pennhurst State Sch. and Hosp., 612 F. 2d 84 (3d Cir. 1979) (mental retardation expert); Alberti v. Klevenhagen, 660 F. Supp. 605, 613-618 (S.D. Tex.1987) (three jail experts, one with expertise in medical areas and one in jail conditions, appointed to monitor prison remediation), modified on other grounds, 688 F. Supp. 1210 (S.D. Tex. 1987), aff'd in part, rev'd in part on other grounds, 903 F.2d 352 (5th Cir. 1990).

[14] Morgan v. Kerrigan, 530 F.2d 401, 425-427 (1st Cir. 1976) (panel of masters in school desegregation suit); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1143 (D.N.J. 1979) , aff'd on other grounds, 647 F.2d 388 (1981) (three-person masters panel appointed in class action sex discrimination suit with more than 10,000 potential claims); In re Murphy, 560 F.2d 326, 331 (8th Cir. 1977) (three-person panel appointed to review documents and conduct discovery in patent suit); United States v. AT&T Co., 461 F. Supp. 1314, 1348 (D.C. Cir. 1978) (two masters in large antitrust suit).

[15] Feldman, Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation, 18 Environmental Affairs 809, 818 (1991).

masters. Using masters early in a lawsuit, however, can result in extensive savings in cost and time, and can narrow the issues to be resolved at trial. The stage may also be set for the almost-inevitable settlement discussions on the merits.

Examples of functions of pretrial masters are:

- Mediation and settlement[16]
- Evaluation of claims[17]
- Case management generally[18]
- Discovery supervision[19]

---

[16] Lewis, The Special Master as Mediator, 12 Seton-Hall Legis. J. 75, 75-79 (1988); Goodrich Corp. v. Town of Middlesbury, 311 F.3d 154, 161 (2d Cir. 2002) , cert. den., -- U.S. --, 156 L. Ed. 2d 621 (2003) (master to mediate, and if that failed, to hold hearings and file report); United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1084 (1st Cir. 1994) (supervision of settlement discussions in CERCLA case); In re Austrian & German Bank Holocaust Litig., 317 F.3d 91, 93 (2d Cir. 2003) (facilitation of settlement between banks and putative class of Holocaust survivors); Hemely v. United States, 122 F.3d 204, 206 (4th Cir. 1997) (settlement supervision in ERISA case); Cook v. Niedert, 142 F.3d 1004, 1009 (7th Cir. 1998) (settlement oversight in ERISA case); Active Prods. Corp. v. A.H. Choitz & Co., 163 F.R.D. 274, 282-283 (N.D. Ind. 1995) (master worked 500 hours on settlement, more time than judge could have spent); Mayberry v. United States, 151 F.3d 855, 857 (8th Cir. 1998) (post-summary judgment assistance in settlement of damages); United States v. Montrose Chem. Corp., 50 F.3d 741, 745 (9th Cir. 1995) (supervision of discovery and settlement).

[17] In re Joint E. & S. Dists. Asbestos Litig., 14 F.3d 726, 729 (2d Cir. 1993) (determination of defendant's funds); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 712-713 (7th Cir. 1984) (evaluation of claims, including summary judgment motion); Hilao v. Estate of Marcos, 103 F.3d 767, 782-784 (9th Cir. 1996) (dual positions of master and court-appointed expert witness; supervised taking depositions in Philippines of 137 randomly selected claimants of human rights violations, reviewed claim forms submitted by all 9,541 opting-in members of class, and recommended compensatory damages for three subclasses; master testified to his efforts and conclusions and submitted report to jury). See Adrogue & Ratliff, The Independent Expert Evolution: From the "Path of Least Resistance" to the "Road less Traveled?," 34 Tex. Tech L. Rev. 843 (2003)

[18] In re Armco, Inc., 770 F.2d 103, 104-105 (8th Cir. 1985) (supervise and guide pretrial matters); Active Products Corp., v. A.H. Choitz & Co. Inc., 163 F.R.D. 274 (N.D. Ind. 1995) (appointment of master as chair of a panel of masters to manage complex multiparty litigation); United States v. Hardage, 750 F.Supp. 1460, 1471-72 (W.D. Ok. 1990) (reviewing master role during liability phase); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 72 F. 3d 857 (Fed. Cir. 1995) (referral of complex technological case to master upheld). See Brazil, Special Masters in the Pre-trial Development of Big Cases: Potential and Problems, 1982 Am. B. Found. Res. J. 289, 294-317; Brazil, Hazzard & Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983); P. Shuck, Agent Orange on Trial 82-83 (enlarged ed. 1987).

- Preliminary rulings on privilege[20]
- Interpretation of a settlement agreement[21]
- Coordination of parallel or related multiple cases[22]

B. Trial Masters

The definition of "trial master" is not as crisp as the words themselves imply. Rule 53 masters may be assigned trial duties and masters may be appointed to act as experts, and to testify as such. Parties may agree to have their dispute heard by a master, either for final decision or subject to review by the court. The court may refer trial of matters to a master for findings and recommendations. Exactly what combination of activities the new Rule 53 intends to be covered by "trial master" is uncertain. Except where parties waive their right to review by the court, the court maintains some involvement and ultimate control over acceptance of the master's work.

There are at least two functions which straddle the fence between pretrial and trial functions and which appear to be countenanced by the amended rule: a) taking and interpretation of technical or complex

---

[19] Omnium Lyonnais D'Etancheite Et Revetement Asphalte v. Dow Chemical Co., 73 F.R.D. 114 (C.D. Cal 1997) (discovery in complex action); Aird v. Ford Motor Co., 86 F.3d 216, 218-219 (D.C. Cir. 1996) (oversight of discovery); National Assoc. of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Ca. 1987) (supervision of discovery after document destruction); Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890, 904 (7th Cir. 1981) (master to oversee discovery where counsel engaged in obstructionist tactics); First Iowa Hydro Electric Coop., F. A. E. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 626 (8th Cir. 1957) (potential for oppression during discovery due to parties' animosity); 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); Kilgard, Discovery Masters: When They Help – and When They Don't, 40 AZ Attorney 30 (2004).

[20] In re United States Dep't of Defense, 848 F.2d 232, (D.C. Cir. 1988) (production of 14,000 documents in FOIA case was proper; master to review documents in connection with national security privilege to save court's time); United States v. AT&T Co., 461 F. Supp. 1314, 1346-1349 (D.D.C. 1978) (500 voluminous documents; master assisted in defining issues and making recommendations on privilege and relevance).

[21] Schaefer Fan Co. v. J&D Mfg, Inc., 265 F.3d 1282, 1284 (Fed. Cir. 2001) (interpretation of ambiguous term in settlement agreement).

[22] In re United States, Misc. Dkt. No. 569, 1998 U.S. App. LEXIS 33191, (Fed. Cir. Dec. 23, 1998) (coordination of dockets of related cases). See Federal Judicial Center, Manual For Complex Litigation, Third, §§ 31.31, 33.23; (Matthew Bender 1995); see also Schwarzer, Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689 (1992) (federal and state coordination).

evidence[23] and b) compilation of data[24]

Another role, "technical advisor," may not fall strictly within the contemplation of amended Rule 53, but it is a role with a fine pedigree and one long accepted as within a court's inherent authority. The technical advisor to the court is a judicial tutor and provides guidance on complex or specialized subject matter.[25] When an advisor is utilized, the trial court conducts the trial with support from the advisor.[26]

Disability litigation is a prime candidate for both a court's use of technical advisor expertise and for trial masters. Many courts are unfamiliar with the disability world, the nature of treatment, habilitation, reasonable accommodation, and the like, or with the complexities of regulations, guidelines, funding streams, and other elements which comprise the discipline. Both plaintiffs and defendants may benefit greatly from reference of some or all of a dispute to a trial master.

---

[23] E.g., Domingo v. T.K., 289 F.3d 600, 604-605 (9th Cir. 2002) (trial court appointed "technical advisor" to evaluate proffered expert testimony under Daubert). In Daubert, the Court required trial courts acting under Evidence Rule 702 to assure that scientific expert testimony is relevant and reliable before admitting it. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-594 (1993).

[24] Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 289 (E.D. Tex. 1985), aff'd on other grounds, 782 F.2d 468 (5th Cir. 1986) (master to profile claims of 1,000 member class for jury).

[25] Reilly v. United States, 863 F.2d 149 (1st Cir. 1988) (no abuse of discretion to appoint technical advisor to assist in calculating damages in medical malpractice case; Rule 53 noted but not relied upon); Reed v. Cleveland Board of Education, 607 F.2d 737 (6th Cir. 1979) (technical advisor to assist special master); Beth V. v. Carroll, 155 F.R.D. 529 (E.D. Pa 1994) (review of consent decrees and class certification by master). A court may appoint an advisor simply for the court's education in a technical field. In Xilinx, Inc. v. Altera Corp., 1997 WL 581426 (N.D.Cal. 1997) (NO. 93-20409 SW, 96-90922 SW), a patent case, the Court explained:

> Here, the Court finds it appropriate to appoint an independent technical advisor to assist the Court in understanding the relevant technology. The technical advisor will not contribute evidence or render conclusions of law. See Reilly v. U.S., 863 F.2d 149, 154-61 (1st Cir. 1988). Rather, the Court will appoint an electrical engineer, who is not a lawyer, to help the Court educate itself on programmable logic devices.

Accord, Danville Tobacco Ass'n v. Bryant- Buckner Assoc., Inc., 333 F.2d 202, 208 (4th Cir. 1964) (appointee did not serve as a master; rather, the "Court chose him as an expert for its guidance."); Scott v. Spanger Bros., Inc., 298 F.2d 928, 930 (2d Cir. 1962) ("Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances, to aid it in the just disposition of a case."); In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F.Supp. 572 (D.N.J. 1997) (appointment of technical advisor).

[26] In these circumstances, it would be important for the court to define the nature and manner of intended receipt of the technical advice, so that the parties can structure their presentations appropriately.

C. Post-trial Masters

Rule 53's amendment in 2003 caps several decades of intensified use of special masters and other adjuncts in the post-judgment period. Administration of both monetary judgments and structural injunctions can involve complexities far beyond the resources of individual federal judges to superintend. When one adds the months or years of attention these cases require, and the possibility of enforcement activity post-judgment, it is not surprising that the use of masters has become commonplace in such cases, with both litigants and courts appreciatively turning to adjuncts to ensure that justice is served, even though the former Rule 53 did not specifically describe the use of masters post-judgment.[27]

Disability law advocates and defendants are more familiar with masters in the post-trial phase of litigation, than in earlier phases. A settlement or other court order may require monitoring or supervision. A master is likely to have both more time and more expertise than the federal judge to attend to the often daily needs of the parties in the suit. A master can spend time with the parties, and on site at facilities or programs. It is often the case that, over years, many dozens of disputes must be mediated or resolved otherwise; a court is not in a position to provide the needed time to such efforts.

Among the post-trial functions of masters are:

- Drafting opinions;[28]
- Administration and distribution of settlement or judgment funds;[29]
- Monitoring of compliance with structural injunctions, especially those involving employment or other organizational change,[30] or requiring reform in government services agencies;[31]

---

[27] Scheindlin & Redgrave, Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation, N.Y. State Bar Assn J. (Jan. 2004).

[28] Amgen, Inc. v. Hoechst Marion Roussel, Inc., 339 F. Supp. 2d 202 (D.Mass. 2004) (master appointed to assist in research and drafting opinion).

[29] McLendon v. Continental Group, Inc., 749 F. Supp. 582, 612 (D.N.J. 1989) (master to aid in post-liability settlement of damages for 5,000 claimants); Brock v. Ing, 827 F.2d 1426 (10th Cir. 1987); Whitehouse v. LaRoche, 277 F.3d 568, 571 (1st Cir. 2002) (master to oversee establishment and use of settlement fund for new sewage treatment facility); In re Holocaust Victim Assets Litig., Nos. 00-9595(CON), 00-9597(CON), 2001 U.S. App. LEXIS 17343, (2d Cir. July 26, 2001) (master to oversee allocation and distribution of proceeds in case alleging that Swiss banks profited from Holocaust). See Federal Judicial Center, Manual For Complex Litigation, Third, § 30.41 (Matthew Bender 1995); Feinberg, The Dalkon Shield Claimants Trusts, 53 Law & Contemp. Prob. 79 (1990).

[30] Griffin v. Michigan Dep't of Corrections, 5 F.3d 186, 188 (6th Cir. 1993) (master to monitor compliance re promotions of victims of gender discrimination in employment).

[31] Labor/Community Strategy Ctr. v. Los Angeles County Metro. Trans. Auth., 263 F.3d 1041, 1045

- Neutral observer within defendant's entity;[32]
- Recommendations to defendant regarding compliance techniques;[33]
- Analysis of the continuing efficacy of a decree;[34]
- Investigation;[35]

(9th Cir. 2001), cert. den., 535 U.S. 951 (2002) (oversight of compliance with settlement agreement). "The equitable monitor surveys the defendant's remedial efforts and, through its findings, facilitates judicial evaluation of the defendant's capacity and willingness to comply with a decree." Feldman, Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation, 18 Environmental Affairs 809 (1991) (note omitted).

"In contrast to the referee or special master, the monitor's sole authority is to gather information, assess the extent to which defendants are complying with the decree, report to the court, and offer assistance in resolving minor disputes." Anderson, Implementation of Consent Decrees in Structural Reform Litigation, 1986 Univ. Ill. L. Rev. 725, 733. Morgan v. Kerrigan, 401 F.Supp. 216, 248, 265-67 (D. Mass. 1975), aff'd, 530 F.2d 401 (1st Cir.), cert. den., 426 U.S. 935 (1976); Gary W. v. State of Louisiana, 861 F.2d 1366 (5th Cir. 1988) (master to monitor compliance re state treatment of children with retardation placed in out of state institutions); Juan F. v. Weicker, 37 F.3d 874, 876 (2d Cir. 1994) (master to oversee defendants' compliance with court-ordered improvements in child welfare system); Harris v. Philadelphia, 137 F.3d 209, 214 (3d Cir. 1998) (master to monitor city's compliance with consent decree); Alexander S. v. Boyd, 113 F.3d 1373, 1378 (4th Cir. 1997) (master to oversee state's implementation of court-ordered improvements in conditions at juvenile detention facilities); In re Scott, 163 F.3d 282, 283 (5th Cir. 1998) (master to monitor implementation of judgments and injunction re conditions in state prisons); Thomas S. v. Flaherty, 902 F.2d 250, 255-256 (4th Cir. 1990) (master to oversee decree requiring reforms at state psychiatric hospital); Ruiz v. Estelle, 679 F.2d 1115, 1159-1163 (5th Cir. 1982) (prisons consent decree); Bogard v. Wright, 159 F.3d 1060, 1062 (7th Cir. 1998) (compliance with consent decree re treatment at state mental hospitals); Inmates of D.C. Jail v. Jackson, 158 F.3d 1357, 1359 (D.C. Cir. 1998) (jail conditions); Hook v. Arizona, 120 F.3d 921, 926 (9th Cir. 1997) (prison reform decree); Jones v. Wittenberg, 73 F.R.D. 82, 85-86 (N.D. Ohio 1976) (master has power to hold hearings, access prison files, hold confidential interviews with personnel and inmates, request show cause orders from the court).

[32] Newman v. Alabama, 559 F.2d 283, 190 (5th Cir.), reh'g den., 564F.2d 97 (5th Cir. 1977), rev'd in part, 438 U.S. 781 (1978).

[33] Morales v. Turman, 364 F.Supp. 166, 179 (E.D. Tex. 1973), rev'd, 535F.2d 864 (5th Cir.), reh'g den., 539 F.2d 710 (5th Cir. 1976), rev'd, 430 U.S. 322 (1977); Morgan v. Kerrigan, 401 F.Supp. at 265-77.

[34] In re Pearson, 990 F.2d 653, 659-660 (1st Cir. 1993) (master to investigate continuation of consent decree re treatment center in light of changed operations and legislation); United States v. Miami, 2 F.3d 1497, 1506 (11th Cir. 1993) (master to consider continued need for decree in employment discrimination case which had been in effect for 20 years).

- Issuance of binding recommendations.;[36]
- Review of fee applications.[37]

D. The Augmented Master

The "augmented master" or "robust master" function, while not described as such in Rule 53, describes the flavor of a mastership when when a court is faced with repeated non-compliance or a very uncooperative defendant. The drafters of the amended rule anticipated the need for strong mastership authority when necessary to rein in difficult defendants. The augmented master's emphasis is at the vigorous enforcement end of the continuum of masters' functions.

I stress that in the ordinary case there is no need for anything beyond the typical Rule 53 master whose work is often in the neutral problem-solving, reporting or investigation domains. Most defendants seek to comply with court orders in good faith, and most disputes can be resolved quickly by the court or through the usual dispute resolution methods incorporated into settlements.

Even a critic of the unbridled use of masters in an ad hoc manner agrees that "a referral often is an appropriate solution to counter noncompliance with a court's previous orders."[38] Where defendants become intransigent, courts may find it necessary to consider tough enforcement activity, both to accomplish the purposes of the decree and to vindicate the court's authority. The augmented master fits the bill in such situations.[39]

---

[35] United States v. Moss-American, 78 F.R.D. 214 (E.D. Wis. 1978) (master appointed to supervise the taking of samples of defendant's soil).

[36] Larios v. Cox, 2004 U.S. Dist. LEXIS 3446 (N.D. Ga., Mar. 2, 2004) (master's role is to forumlate reapportionment plans); Taylor v. Perini, 413 F.Supp. 189, 193 (N.D. Ohio 1976) (master empowered with "authority to state to the defendant . . . the actions required to be taken by them . . . to effectuate full compliance with the Court's order . . . ."). In New York Ass'n for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980), under a consent decree regarding a retardation institution, a Review Panel of experts had authority to make recommendations which bound the parties unless the court overruled such recommendations. After the state legislature refused to fund the Review Panel, the court of appeals held that the district judge did not have authority to compel the Governor to reinstate funding of the Panel.

[37] In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions, 278 F.3d 175, 184 (3d Cir. 2002); Charter Oak Fire Ins. Co. v. Hedeen & Cos., 280 F.3d 730, 734 (7th Cir. 2002); Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000); Gottlieb v. Barry, 43 F.3d 474, 486-487 (10th Cir. 1994).

[38] DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y.U. L. Rev. 800, 810 (1991) (notes omitted).

[39] The term "augmented master" is intended to convey the concept of a traditional Rule 53 master/monitor, with added authority under the amended Rule 53, Rule 70, perhaps the All Writs Act and the court's inherent powers.

Amended Rule 53 accepts that there are situations which demand heightened policing. Masters do not have the authority themselves to compel government or other defendants to comply with court orders.[40] However, as the Supreme Court has recognized, some level of interference with target Some level of interference with the offending party's systems is inevitable and appropriate "to put an end to petitioners' discriminatory ways." Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 482 (1986). Citing Local 28, the Advisory Committee's note to the amended Rule 53 cites this case in observing the appropriateness of the use of a master "when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent."

Whether for the traditional master or the augmented robust master, a court may appoint an adjunct under one or a combination of sources of authority other than the inherent power and Rule 53. Federal Rule of Civil Procedure 70, mentioned rarely,[41] permits a master to take specific action which defendants have failed to take.[42] The rule would most appropriately be invoked where the action is specifically defined in a prior court order or other enforceable obligation. The All Writs Act is another source of a court's power to draft remedial orders including consideration of a master or other adjunct. Under the All Writs Act, 28 U.S.C. §1651(a), in addition to its use to support the master, a court may issue a Writ of Assistance to compel non-cooperating entities to assist in ensuring compliance to judicial directives.[43] Rule 66 acknowledges the existence and participation of receivers in federal litigation.

---

[40] E.g., Toussaint v. McCarthy, 597 F.2d 1388 (N.D. Cal. 1984), aff'd in part, rev'd in part, vacated in part, 801 F.2d 1080 (9th Cir. 1986), cert. den., 481 U.S. 1069 (1069) (in prison case, order of reference allowed master to "require the release of prisoners assigned to segregation without sufficient basis;" on appeal, noted that this raised "serious questions"); National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545 (9th Cir. 1987) (master could monitor and act as hearing officer post-judgment, but could not direct activities of defendant government agents) ("Masters may not be placed in control of governmental defendants for the purpose of forcing them to comply with court orders.") (emphasis in original); United States v. City of Parma, 661 F.2d 562, 578-79 (6th Cir. 1981) (appointment of master with broad oversight powers in housing case reversed; failure to use least intrusive method), cert. den., 456 U.S. 926 (1982).

[41] See 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, 779-88 (1984); Nathan, The Use of Masters in Institutional Reform Litigation, 10 U. Tol.L.Rev. 419, 433 (1979); Brakel, Special Masters in Institutional Litigation, 1979 Am. B. Found. Res. J. 543, 552 (1979).

[42] Rule 70 provides:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

[43] See National Organization for Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 544 (9th Cir. 1987) (master appointed to monitor cooperative state and federal law enforcement organization); E.g., United States v. New York Tel. Co., 434 U.S. 159 (1977) (district court order directing telephone

Sometimes defiance of the law is so ingrained in a party that the court's intrusiveness cannot be avoided. "Courts correctly perceive, either initially or after years of noncompliance, that the underlying causes of the legal violation disable the defendants from complying with a general directive to cease violation the law."[44] A master can assist the court in moving beyond general directives. Masters have been appointed to consider recommendations for contempt, for example.[45]

As the non-compliance level rises, or the periods of non-compliance increase, so does the court's power to respond with supervision, enforcement actions or contingent plans.[46] In a case involving community services for people with retardation, one court ordered contingent $10,000 per day fines both with regard to treatment issues regarding individual class members, and systemic failure to make or implement plans; a special master was appointed as well.[47] In another case, the master was empowered to define the contours of compliance.[48] In yet another case, the court was faced with a

---

company to provide law enforcement officials with assistance to implement court order authorizing use of pen registers; such order is authorized by All Writs Act); Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974) (writ of assistance to deliver joint possession in joint use area to excluded Indian tribe, under All Writs Act); United States v. 63-39 Trible Rd., 860 F.2d 72 (E.D. N.Y. 1994) (All Writs Act supports order empowering marshal to enter and take possession of premises, and to evict all occupants and property, and to dispose of premises in accordance with earlier forfeiture decree).

[44] Sturm, A Normative Theory of Public Law Remedies, 79 Georgetown L. J. 1355, 1363 (1991) (note omitted).

[45] Accusoft Corp. v. Palo, 237 F.3d 31, 38 (1st Cir. 2001) (findings on contempt for violation of settlement agreement); Shafer v. Army & Air Force Exch. Serv., 277 F.3d 788, 790 (5th Cir. 2002) (contempt for violating decree in earlier employment discrimination action).

[46] Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465, 491 (1980) (arguing that detailed supervision is needed due to case complexity and defendants' intransigence).

[47] Halderman v. Pennhurst State School and Hospital, 154 F.R.D. 594 (E..D. Pa. 1994). Holding state and local defendants in contempt for violation of a 1985 consent decree, the court there ordered creation and implementation of plans for such things as abuse/neglect investigations and medical care, and appointed a special master who was empowered to approve the plans. Other plans have since been ordered based on the master's recommendations. The $10,000 daily fines are contingent; they would not be imposed unless there is further non-compliance.

[48] Taylor v. Perini, 413 F.Supp. 189, 193 (N.D. Ohio 1976) (special master empowered with "authority to state to the defendant . . . the actions required to be taken by them . . . to effectuate full compliance with the Court's order . . . ."). See Juan F. v. Weicker, 37 F.3d 874 (2d Cir. 1994) (dependent and neglected children; court monitor empowered to take any and all action to effect timely compliance was a special master, albeit by another name); Hook v. Arizona, 120 F.3d 921, 926 (9th Cir. 1997) (compliance with prison reform decree; state had been recalcitrant in complying with decree).

second effort by plaintiffs to obtain a contempt citation and appointment of a master; the court had rebuffed an earlier effort to provide more time for defendants to implement required changes on their own. Focusing on the a school district's failures both to develop and implement effective plans, the court concluded that a special master was essential to help defendants "fashion coherent and precise goals and plans;" the master would be "someone to direct its resources for it."[49]

The augmented special master may be conceived as one step short of appointment of a receiver for a recalcitrant defendants.[50] Judicial power to ensure that violations of court orders does not automatically support receivership or other drastic remedies, of course.[51] It is "an extraordinary step warranted only by the most compelling circumstances."[52] Federal courts do not, and should not, assume control of institutions "in the absence of substantial evidence"[53] that defendants have flouted their obligations for compliance with the court's orders.[54] While some commentators elide the

---

[49] Duane B. v. Chester-Upland School District, 1994 U.S. Dist. LEXIS 18755, 1994 WL 724991 (E.D. Pa., Dec. 29, 1994):

> If General Eisenhower had planned and implemented D-Day the same way these defendants go about assaulting the District's many problems, we would still be waiting for the first parachute to pop open. * * * When fashioning a remedy for civil contempt, the court seeks to coerce future compliance with its orders and to remedy past noncompliance. United States v. United Mine Workers, 330 U.S. 258, 302-04 (1947). Fining the defendants will not achieve either goal. In order to move toward compliance, the District needs an individual who can help it fashion coherent and precise goals and plans. It needs someone to direct its resources for it. The Department refuses to take a managerial, hands-on approach to the Remedial Orders. Fed.R.Civ.Proc. 53(b) provides that courts may appoint masters in cases involving exceptional circumstances.

Ten years after the Duane B. case was filed and after the master had completed his work, defendants were purged of contempt. See Duane B., 2002 U.S. Dist. LEXIS 24497 (E.D. Pa., Dec. 20, 2002).

[50] On receivership, see Gross v. Missouri & A.Ry., 74 F.Supp. 242, 244 (W.D. Ark. 1947) (inherent authority to appoint receiver); Levin v. Garfinkle, 514 F.Supp. 1160, 1163 (E.D.Pa. 1981) (inherent power to appoint bankruptcy receiver); Perez v. Boston Housing Auth., 379 Mass. 703, 400 N.E.2d 1231 (1980) (approving appointment of receiver to take over housing authority); Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994) (Governor appointed receiver in case challenging elections held by State Board of Agriculture).

[51] See Wright v. City of Emporia, 407 U.S. 451, 477 (1972) (Burger, C.J., dissenting); Hoptowit v. Ray, 682 F.2d 1237, 1263 (9th Cir. 1982) (placing master in control of state prison would have been error).

[52] Morgan v. McDonough, 540 F.2d 527, 535 (1st Cir. 1976), cert. den., 429 U.S. 1042 (1977).

[53] The phrase is from Bell v. Wolfish, 441 U.S. 520, 548 (1979).

[54] James DeGraw, who argues generally against permitting special masters to substitute their

differences between a master and a receiver,[55] there is definitely a difference in how the roles of these two court adjuncts have been conceived. While monitors and masters generally aid a court in adjudication and implementation, a receiver is responsible for custody and management of an entity to prevent harm to a parties' rights.[56] Just as with special masters, receivers have been appointed post-judgment to assist in implementation. Receiverships have been used to protect civil rights from state infringement and in environmental cases.[57]

There are limits to the efficacy and advisability of the use of a receiver. A master's effectiveness may be decreased if he or she becomes a receiver with authority over all aspects of the defendant facility's or system's operations.[58] Also, the court -- rather than the defendants -- may be blamed for failures to comply. Finally, receivership raises complex questions of how post-receivership contempt liability can be determined and remedied.

Where a court is faced with intransigent defendants, the augmented special mastership is consistent with the post-trial roles accepted in the caselaw and permitted under the amended Rule 53. This mastership has the advantage of support in Rule 53, and avoids the challenges of receivership which should continue to be reserved for extreme situations.

The following elements might be among those in an order for an "augmented mastership:"

---

discretion for those of government officials, nevertheless agrees that "'[s]ubstantial evidence' indicating recalcitrance by institution officials justifies placing the institution into receivership." DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y.U. L. Rev. 800, 832 n. 208 (1991) (note omitted).

[55] For example, receivers may be lumped together with masters and mediators. DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y.U. L. Rev. 800 n. 4. (1991) ("In the institutional reform context, upon which this Note focuses, special masters are referred to as administrators, masters, mediators, monitors, ombudsmen, and receivers.").

[56] Johnson, Equitable Remedies: An Analysis of Judicial Neoreceiverships to Implement Large Scale Institutional Change, 1976 Wis. L. Rev. 1161.

[57] Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976), cert. den., 429 U.S. 1042 (1977); Turner v. Goolsby, 255 F.Supp. 724, 730 (S.D. Ga. 1966) (community school board); United States v. City of Detroit, 476 F.Supp. 512 (E.D. Mich. 1979) (receivership imposed on city agency, on advice of court's monitor, to facilitate compliance with EPA orders and consent decrees). In Detroit, the mayor was appointed the receiver, thereby freeing him from political constraints and immunizing his decisions from review by city council and state government. See, Note, "Mastering" Intervention in Prisons, 88 Yale L. J. 1062 (1979).

[58] DiIulio, The Old Regime and the Ruiz Revolution: The Impact of Judicial Intervention on Texas Prisons, in Courts, Corrections and the Constitution 62-63 (J. DiIulio ed. 1990) (staff confusion and negative effect on morale); Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L. J. 1265, 1299 (giving orders to staff on operational matters raises questions of organizational accountability and lines of authority).

- Specific findings of contempt, including willful disobedience and/or conscious decisions to violate or ignore prior orders;

- Citation of all possible bases for authority for the special master, including: court's inherent power, Rules 53 and 70 of the Federal Rules of Civil Procedure (perhaps also to Rule 66), the All Writs Act, and the court's powers to sanction contempt and to vindicate its own authority;

- Power to plan, organize, direct, supervise and monitor the implementation of the court's orders[59]

- Use of substantial contingent fines, including daily or other periodic fines, for non-performance of specific tasks and/or non-achievement of specific goals.[60]

- Emphasis on the judicial role of master with regard to making recommendations for contempt.[61]

- Provisions that any interference with the exercise by the master, or any staff or consultant of the master, of the powers and duties of the master under the order constitutes contempt of the court.

- Expedite litigation of issues by requiring that no compliance issues or evidence may be raised to the court unless first presented to the master.[62]

---

[59] See, e.g., Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3d Cir. 1979) (powers to "plan, organize, direct, supervise and monitor" upheld) (prior & subsequent history omitted); Taylor v. Perini, 413 F.Supp. 189, 193 (N.D. Ohio 1976) (special master empowered with "authority to state to the defendant . . . the actions required to be taken by them . . . to effectuate full compliance with the Court's order . . . ."); Cobell v. Norton, 2004 U.S. App. LEXIS 25473 (D.C. Cir., Dec. 10, 2004) (court may not prescribe specific compliance steps government must take absent government actions (or inactions) which breached a legal duty and that the ordered steps constituted an essential remedy).

[60] Contingent fines were included in the 1994 Pennhurst contempt orders. Note also the apparently approving description of threatened contingent fines by the Supreme Court in Spallone v. United States, 493 U.S. 265, 277 (1990) in an "important remedial order," the district court "had secured compliance" by a threat of fines in a "schedule of contempt fines" which would have resulted in "imminent bankruptcy for the city;" later "the same day" there was compliance) (emphasis in original).

[61] Possible language might be: "Any interference with the exercise by the master, or any staff or consultant of the master, of the powers and duties of the master under this Order constitutes contempt of this Court."

[62] Possible language might be:

> a. The court will entertain no objection to any report or recommendation by the master, unless it is shown as a preliminary matter that an identical objection was submitted to the master in the form of a specific written objection.

- Direction to master to request orders, including writs of assistance, from the court with respect to need for action by both parties and non-parties to obtain assistance or compliance.

PART 2: THE AMENDED RULE

Effective December 31, 2003, Rule 53 was extensively revised for the explicit purpose of reflecting "changing practices in using masters."[63] For the first time since its 1938 origins, the rule specifically recognizes that masters may be appointed to perform both pretrial and post-trial functions, in addition to the trial function emphasized by the prior rule.[64]

Rule 53's language has now caught up to Rule 53 in practice. The expansive functions described in Part 1 of this article stretched any literal interpretation of the rule. Now, the rule and the Advisory Committee's accompanying commentary, recognize that modern litigation needs require full-bodied masterships and that it need no longer be the exceptional case which can benefit from a master.

The amended rule clarifies provisions on appointment of a master (both with consent and without consent), and on his or her functions, specifying for the first time a 'table of contents' for the order of reference. In a major change, the rule modifies the standard of review for findings of fact made or recommended by a master.

The following changes are noteworthy in the systemic litigation context:

E. Appointment

The amended rule accepts the practice under the former rule of appointment of masters to functions agreed to by the parties.[65] So long as the appointment meets with the court's approval, and the master is not to preside at a jury trial, the parties can consent to a master performing any specified duties.[66]

> b. Any evidence not previously presented to the master in the course of the formal hearing preceding the master's report will be admitted at a hearing before the court only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the master.

[63] Advisory Committees note to 2003 Amendment of Rule 53. On the range of masters' activities, see Willging, et al., Special Masters' Incidence and Activity (Federal Judicial Center 2000).

[64] Scheindlin & Redgrave, Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation, N.Y. State Bar Assn J. (Jan. 2004). Judge Shira A. Scheindlin chaired the subcommittee on Rule 53 for the Advisory Committee.

[65] The former rule did not provide for appointment of a master with the parties' consent, although courts routinely did so.

[66] Fed. R. Civ. P. 53(a)(1) ("a court may appoint a master ... to: (A) perform duties consented to by the parties"); Advisory Committee Note of 2003 ("Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment."). The Advisory Committee notes that "in no circumstances may a master be appointed to preside at a jury trial." This restriction

A master may also be appointed under Rule 53 without the parties' consent, whether for trial proceedings or to make findings of fact in non-jury cases.[67] Without consent, the master may not be delegated the power to preside over a trial or make dispositive decisions, although the pretrial steps up to that point may be administered by a master.[68]

F. Partial Elimination of Exceptional Condition Requirement

The former Rule 53 permitted a master only under an "exceptional condition," regardless of the purpose of the master. The new Rule 53 applies this limit only to trial masters. Pretrial and post-trial masters can be appointed even absent an "exceptional condition."

Appointment of pre- and post-trial masters requires only that the matter at hand "cannot be addressed effectively and timely by an available district judge or magistrate judge of the district." This standard is case-specific and judge-specific and is substantially lower than the former rule. The new standard recognizes that masters may be able to act more effectively and rapidly than judges. Dropping the exceptional condition requirement effectively opens the door to flexible utilization of masters where time, attention or need for special expertise is an issue.

The rule and the Advisory Committee's notes recognize that masters may be involved in "investigation or enforcement," two common duties in structural litigation which were never explicitly acknowledged in the prior rule. The Committee also notes as a possible duty the "administration of an organization" in addition to settlement talks and investigations. "The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system."[69] In discussing another topic (sealing of reports), the Committee alludes to two other roles for masters, i.e., settlement efforts and formulation of decrees.

G. Review of Appointment Order

An appointment order is interlocutory and, therefore, is not subject to immediate appellate review.[70] It

---

ensures that jury trials remain in the domain of Article III judges.

[67] Rule 53(a)(1)(B). In re Pearson, 990 F.2d 653, 659 (1st Cir. 1993) (parties' consent not required for master to determine whether 20-year old consent decree should remain in effect); United States v. Miami, 2 F.3d 1497, 1506 (11th Cir. 1993) (master may be appointed without parties' request or consent to investigate whether termination of consent decree is appropriate).

[68] In re Armco Inc., 770 F.2d 103, 105 (8th Cir. 1985) (constitutionally improper to refer trial on merits to master. It is proper to refer all pretrial matters, including discovery, production, arrangement of exhibits, stipulations of fact, as well as power to hear and make recommendations on dispositive motions).

[69] Advisory Committee Note to 2003 Amendment to Rule 53.

[70] Deckert v. Independence Shares Corp., 311 U.S. 282, 290-291, 291 n.4, (1940); Sierra Club v. Browner, 257 F.3d 444, 448 (5th Cir. 2001); Hook v. Arizona, 120 F.3d 921, 925 (9th Cir. 1997); Thompson v. Enomoto, 815 F.2d 1323, 1327 (9th Cir. 1987);

may be challenged immediately only through the extraordinary mandamus writ or appealed within an appeal of either a trial court order on a master's report or when the appointment is intertwined with another order on appeal.[71]

H. Order of Reference

The prior rule was essentially silent on the content of the order of reference. The amended rule requires that the order direct the master "to proceed with all reasonable diligence" and the order "must state" terms in five areas (Rule 53(b)(2):

> (2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:
>
> (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
>
> (B) the circumstances -- if any -- in which the master may communicate ex parte with the court or a party;
>
> (C) the nature of the materials to be preserved and filed as the record of the master's activities;
>
> (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
>
> (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

I. Court's Actions

The amended rule provides 20 days for parties to object to, or move to adopt or modify, a master's order, report or recommendation. Rule 53(g)(2). The prior rule's time period was 10 days, a quite difficult deadline in a complex case.

The amended rule requires an opportunity to be heard (which may be on papers or in person) and provides that the court "may" receive evidence and "may" act in a variety of ways: affirm, adopt, modify, wholly or partly reject or reverse, or resubmit to the master with instruction. Rule 53(g)(1). While courts have always felt free to show such flexibility, the delineation of these options is useful and may also assist parties in suggesting to the court how it might proceed.

J. Standard of Review

---

[71] Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1096 (3d Cir. 1987) (appeal from final court order provided court of appeals with jurisdiction over previous appeal from interlocutory order of reference to master); Burlington N. R.R. Co. v. Department of Rev. of Wash., 934 F.2d 1064, 1071 (9th Cir. 1991) (order appointing master was indivisible from denial of preliminary injunction; both can be reviewed).

Probably the most striking change in the new rule is the abandonment of the long-established "clearly erroneous" standard for review of a master's fact findings. The former rule's clearly erroneous standard applied only to trial master's findings in nonjury cases, but the courts applied the standard to the findings of all Rule 53 masters.[72]

Instead of the deference which district courts had been required to give to fact findings (similar to the deference which an appellate court gives to a trial court's fact findings), the amended Rule 53 mandates that the court undertake his or her own review of the facts and decide "de novo" all objections to such findings. However, with the court's consent, the parties may stipulate to the former "clear error" standard or that the master's findings will be final.[73]

"The court must decide de novo all objections to findings of fact made or recommended by a master." Rule 53(g)(3). This requirement undermines a major rationale for appointment of masters, especially those with expertise in the subject matter. If a court must consider anew every factual finding, then tremendous time and energy will be required whenever a party objects to a master's report. This new standard is quite difficult to apply since the court will not have heard witnesses, assessed their demeanor, and, especially in the enforcement or other post-trial situation, may not have the intricate knowledge of systemic issues or the background of the suit, or the technical information, to make a sound de novo decision. Also, this standard may multiply proceedings since courts may now be requested to hold hearings to receive further evidence and to ensure a full record for de novo review.

It is likely that courts will respond to the new review standard by clarifying that the right to de novo review is to a review on the record as it exists before the master, and not to an automatic retrial with presentation of the same evidence. While courts have the authority to receive additional evidence, they are likely to require parties to make some showing justifying (or explaining) the failure to present that evidence before the master. This prerequisite would go far to avoid a party's abusive or strategic use of presentation of additional evidence. Absent some parameters, a party might be tempted to wait until after the master's ruling to present certain evidence the party might think would be more influential with the trial judge.

Because courts appoint masters in order to receive the benefit of their special experience and attention to a case, courts are likely to continue to defer, to some extent at least, to the conclusions of masters who write well-reasoned and fully-supported decisions.

K. Procedural Decisions

Procedural decisions are upheld absent "abuse of discretion" by the master. Rule 53(g)(5). This

---

[72] E.g., Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, 80 F.3d 895, 902 (4th Cir. 1996) (clear error standard for factual findings); Shafer v. Army & Air Force Exch. Serv., 277 F.3d 788 (5th Cir. 2002) (post-trial master investigating compliance with employment discrimination decree); Labor/Community Strategy Ctr. v. Los Angeles County Metro. Trans. Auth., 263 F.3d 1041, 1049 (9th Cir. 2001), cert. Den., 535 U.S. 951 (2002) (clear error standard re monitoring of defendant's compliance with consent decree).

[73] Rule 53(g)(3).

reasonable standard expedites proceedings before a master and ensures that, in all but exceptional departures from required process, the master will be able to proceed with his or her work without undue interruption.

IV. CONCLUSION

Judicial use of masters and other adjuncts dates back to the English chancery origins of American equity practice. For hundreds of years court have recognized that there are situations in which an aide or specialist can serve the court to resolve litigation with less delay and with heightened effectiveness.

Rule 53's 2003 amendment builds on – and strongly supports -- the intensive and expansive use of masters by the federal courts over the last several decades. Masters are utilized extensively pre-trial both in discovery and in functions which facilitate settlement and other dispute resolution. Masters preside over trials, often with greater speed than the appointing judge who must juggle a large caseload and must priortize criminal cases. Where parties are extremely uncooperative, an augmented special master, whose authority is robust, is appropriate within the rules. Authority for an adjunct's appointment other than Rule 53 may also be utilized.

Courts are actively engaged in attempting to remedy violations of constitutional and statutory norms in complex organizational settings. The traditional adversary conception of adjudication has proven inadequate to the task of structuring remedies and promoting compliance in these settings. In response, lawyers, judges, and litigants are employing a variety of innovative roles and processes that do not conform to the traditional adjudicative ideal. Both pretrial and remedial activity in this variety of litigation frequently entails negotiation, informal dialogue, *ex parte* communication, broad participation by actors who are not formally liable for the legal violations, and involvement of court-appointed officials to assist in implementation.

Amended Rule 53's embrace of a menu of mastership functions is likely to encourage courts and litigants to continue creative approaches to both the process and substance of litigation. The use of masters will multiply, ultimately to the benefit of both those who seek and those who administer justice.

END

/////