ADOPTED

AMERICAN BAR ASSOCIATION

JUDICIAL DIVISION
NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES
NATIONAL CONFERENCE OF STATE TRIAL JUDGES
STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM
BUSINESS LAW SECTION
SECTION OF LITIGATION
SECTION OF DISPUTE RESOLUTION
SECTION OF INTELLECTUAL PROPERTY LAW
TORT TRIAL AND INSURANCE PRACTICE SECTION
SECTION OF ANTITRUST LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019; and

FURTHER RESOLVED, That Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

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

Consistent with the Federal Rules of Civil Procedure or applicable state court rules:

(1) It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.

(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:

a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
b. facilitating resolution of disputes between or among co-parties;
c. pretrial case management;
d. advice and assistance requiring technical expertise;
e. conducting or reviewing auditing or accounting;
f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
g. conducting trials or mini-trials upon the consent of the parties;
h. settlement administration;
i. claims administration; and
j. receivership and real property inspection.

In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

(5) Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

(6) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

(7) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.

(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.

REPORT

Introduction

The American Bar Association ("ABA") has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution ("ADR"). Today, there is an underutilized dispute resolution tool that could aid in the "just, speedy and inexpensive" resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use.[1] This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.[2]

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

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[1] Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. *See* Lynn Jokela and David F. Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool," WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) "In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters." *Id.* Courts have also recognized their inherent power to appoint special masters to assist judges in case management. *See id*. at 1302 n. 18. *See also* n.30, *infra.*

[2] Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – "special master" – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as "master," "discovery master," "settlement master," "trial master," "referee," "monitor," "technical advisor," "auditor," "administrator." Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct's officers. For example, a Rule 53 adjunct in Maine is a "referee." *See* Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a "master" as "any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts," suggesting more of a trial function than a pretrial role. *See* e.g., Mass. R. Civ. P. 53. *See also* 2006 Kan. Code § 60-253 ("[a]s used in this chapter the word 'master' includes a referee, an auditor, a commissioner and an examiner." These titles may suggest a more limited function.

included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.[3]

The Working Group also obtained information from other 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 the Academy of Court Appointed Masters ("ACAM")), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group's analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

Discussion and Rationale for the Guidelines

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver "a just, speedy, and inexpensive determination of every action and proceeding." Since December 1, 2015, the Rules have declared that they are to be "employed by the court and the parties to secure" that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.[4]

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[3] The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril 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. Slights 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 Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

[4] *See, e.g.*, Fed. R. Civ. P. 26 Advisory Committee Note: "There has been widespread criticism of abuse of discovery"; 1983: the "first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information"; Rule 26(g) "provides a deterrent to both excessive discovery and evasion"; 1993: "A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner

All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.[5] Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management 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 parties on fairly resolving the issues in controversy.[6]

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, 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, special masters have time that courts 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.[7]

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases–particularly complex commercial cases or the practical ability to increase resources when

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to achieve those objectives"; 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources "that are accessible only by incurring substantial burdens or costs." 2015: Amendments that, among other things, expressly limit discovery to be "proportional to the needs of the case"; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be "construed," but also "administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

[5] *See* Merril Hirsh, James M. Rhodes and Karl Bayer, "Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).

[6] *See id.* at 29-31; Merril Hirsh, "Special Masters: How to Help Judges Extend Their Reach … And Exceed Their Grasp," ALTERNATIVES (June 2017), available at http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx

[7] Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider *Brady* obligations, *see, e.g., United States v. McDonnell Douglas*, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, *see, e.g., United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at https://famguardian.org/Publications/USAttyManual/title9/13mcrm.htm#9-13.420. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombuds to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using neutrals as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.

such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some 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.[8] 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 bring to bear knowledge of 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.

Third, the judicial role limits the involvement judges 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.[9]

Federal Rule 16(c)(2)(H) and certain state rules provide that "[a]t any pretrial conference, the court may consider and take appropriate action on…referring matters to a magistrate judge or a master…." As previously noted,[10] however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I).[11] Few courts have a practice of regularly considering the appointment of a

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[8] 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

[9] *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L. J. 73, 105-127 (2018) (describing the ethical, due process and decision-making difficulties that arise when a judge plays both an adjudicative and settlement role in a case); Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 Nev. L. J. 983, 1004-1014, 1018-1023, 1028-35 (2016).

[10] *See supra* nn.5-6 and accompanying text.

[11] Rule 16(c)(2)(I) provides as follow: "At any pretrial conference, the court may consider and take appropriate action on… settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule."

special master when they are preparing a scheduling order.[12]

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.[13] This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to "rare occasions."

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.[14]

Moreover, as a matter of logic, 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 special master's "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.

Cost concerns actually animate these Guidelines. 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. Although no scientific study has empirically established that special masters reduce the cost of litigation, 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.[15] Special masters can also inculcate a culture of compliance with procedural

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[12] There are exceptions. *See infra* n.25.

[13] *See, e.g.*, 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule "extensively to reflect changing practices in using masters" for a broader array of functions that "[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule"); Manual for Complex Litigation 4th, §10.14 at 14 (2004) ("Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving "some exceptional conditions" or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised)").

[14] *See* n.30 *infra* (discussing inherent authority of courts to appoint special masters to assist their judicial administration). *See also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) ("The entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver.' … But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process").

[15] *See* Thomas D. Barton and James P. Groton, "The Votes Are In: Focus on Preventing and Limiting Conflicts, DISPUTE RESOLUTION, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,

rules by strictly monitoring the parties' compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be "proportional to the needs of the case"[16] and requiring objections to "state whether any responsive materials are being withheld on the basis of that objection."[17] Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions 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.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

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academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. *See also* http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf at 42

[16] Fed. R. Civ. P. 26(b)(1) (2015).

[17] Fed. R. Civ. P. 34(b)(2)(C) (2015).

- A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
- A concern among parties and their counsel of losing control of the litigation.
- A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court administration or as a practice of individual judges).
- Increased cost and delay.
- The introduction of another layer between the court and counsel.

Regardless of the reason, 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 use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,[18] the *ad hoc* nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into ways to make the process more predictable and the work of special masters more effective.

Highlights of Specific Recommendations

(1) It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

[18] Barbara Meierhoefer, "Special Master Case Studies" (2018) available at https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.authcheckdam.pdf

practice are useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review,[19] analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court-appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master's rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

[19] *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E. D. La. 2007).

(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, and with the view of making the special master's work efficient and cost effective.

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:

a. discovery oversight and management, coordination of cases in multiple jurisdictions;
b. facilitating resolution of disputes between or among co-parties;
c. pretrial case management;
d. advice and assistance requiring technical expertise;
e. conducting or reviewing auditing or accounting;
f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
g. conducting trials or mini-trials upon the consent of the parties;
h. settlement administration;
i. claims administration; and
j. receivership and real property inspection.

In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

Special masters can be used creatively and thoughtfully in a wide array of situations. It is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of neutral involvement while avoiding exchanges of information or *ex parte* contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.
- Trial administration.[20]
- Monitoring and claims administration.
- Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

- Adjudicative.
- Facilitative.
- Advisory.
- Informatory.
- Liaison.[21]

The role a special master performs in a case is subject to ethical and legal constraints, the court's control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.[22]

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that

[20] In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct "mini-trials" of specific, perhaps technical, issues. These proceeding differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.

[21] "Liaison" refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.

[22] *See* n.9 *supra*. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.

might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

(5) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates.[23] As discussed below, *see* Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties' perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

(6) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order "direct the master to proceed with all reasonable diligence" and 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

[23] *See* Fed. R. Civ. P. 53(b)(1) ("Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment").

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

The Court should consider adapting these terms (or adding others) consistent with the special master's role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards.[24]

(7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters' qualifications or how those qualifications should vary depending upon the role the special master is performing.[25]

Depending on the appointing court's circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline.[26]

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[24] The website of the Academy of Court Appointed Masters includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special masters. *See http://www.courtappointedmasters.org/resource-center/appointing-masters-handbook*. *See also* Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

[25] The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information. http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf *See also* https://www.discoverypilot.com/ (Seventh Circuit ediscovery pilot program incorporating neutral mediation).

[26] For a discussion of how state and federal courts have enabled feedback, *see* Nancy A. Welsh, Magistrate

While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.[27]

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

- Developing a diverse pool of persons who qualify for appointment.
- Ensuring the process is properly calibrated to the functions and roles special masters perform.
- Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
- Ensuring the process properly assesses candidates' talents and experience.
- Determining whether subject matter expertise is necessary.
- Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.[28] Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the use of special masters. Greater use of special masters will also assist the advancement of

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Judges, Settlement and Procedural Justice, 16 NEVADA LAW JOURNAL 983 (2016) and Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin and Archie Zariski, eds., 2013).

[27] *See* American Bar Association Resolution 17M (urging the United States Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the process for selecting *amicus curiae*, special masters, and other counsel).

[28] *See, e.g.*, David R. Cohen, "The Judge, the Special Master, and You," LITIGATION v. 20, No. 1 (2015).

appropriate professional standards for the multiple roles they perform.

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.[29]

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special masters.

Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 "does not apply in cases under the [Bankruptcy] Code." This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 "precludes the appointment of masters in cases and proceedings under the Code," the rule purports to instead preclude

[29] *See supra* n.26, supra for methods of feedback.

application of Federal Rule of Civil Procedure 53. Rule 53 is the sole or ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their *inherent* power to appoint special masters as a part of case management.[30]

Moreover, if Rule 9031 actually precluded the use of special masters for cases "under the Code," it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.[31] However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules' preface to the then proposed Rules of Bankruptcy Procedure states that "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges*." (Emphasis added) [32]

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a "just, speedy and inexpensive determination of every case and proceeding," which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.[33] Amending Rule 9031 to eliminate this confusing limitation serves this end.

Conclusion

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

Respectfully submitted,

Hon. Toni E. Clarke (ret.)
Chair, Judicial Division
January 2019

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[30] It "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation." *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (*citing Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) *(quoting In re: Peterson, 253 U.S. 300, 311 (1920)); see also, e.g., Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.,* No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, "Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031," 67 MO. L. REV. 29, 30-31 (Winter 2002).

[31] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 40-41 & nn.60-62.

[32] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 41-42 & nn.64-65.

[33] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 41-42 & nn.65-68.

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General Information Form

1. **Summary of Resolution.**

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

2. **Approval by Submitting Entity.**

The Judicial Division (JD) Council voted to co-sponsor this Resolution by electronic vote on August 30, 2018. Pursuant to the JD Bylaws, a majority of the voting members of the JD Council participated, making this a binding action.

3. **Has this or a similar Resolution been submitted to the House or Board previously?**

No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

The ABA has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice in state and federal courts. This resolution would enhance the ABA's current policy, summarized below:

Support in principle the proposed Dispute Resolution Act, which would provide federal funds to states to create or improve small claims courts and other means of dispute resolution such as mediation and arbitration. (enacted in 1980 but not funded) Also support the increased use of alternative means of dispute resolution by federal administrative agencies consistent with several specified principles. 88A103A

Support continued use of and experimentation with certain alternative dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system in the United States. All alternative dispute resolution techniques should assure that every disputant's constitutional and other legal rights and remedies are protected. 89A114

Recommend that the Council of the Commission for Environmental Cooperation consider the Model Rules of Procedure for Dispute Resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption. 95M117C

Support legislation and programs that authorize any federal, state, territorial or tribal court, including Courts of Indian Offenses, in its discretion, to utilize systems of alternative

dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration. 97M112

Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. Approved. 97M101.

Urges the Supreme Court of the United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for appointment of amicus curiae, special masters, and other counsel. 17M10A

5. **If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A.

6. **Status of Legislation (if applicable).**

N/A.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The Judicial Division, through the Lawyers Conference Special Masters Committee and representatives of the Working Group that drafted the Guidelines will commence several projects to disseminate the guidelines and encourage state and local bars to promote the guidelines and encourage state and federal courts to implement them. Initiatives in discussion and planning area as follows:

(1) Conducting outreach through programs and publications to educate state and local bars, courts, staff and stakeholders in the guidelines and to work with courts around the country to adapt the guidelines to the needs of local courts;

(2) Working to develop model criteria that courts could use to select a diverse group of qualified candidates to rosters of special masters, and a survey instrument that courts could use on a consistent to evaluate the work of special masters, to improve their performance in future cases, and to create data that would be available to researchers to evaluate the effectiveness of special masters and the differing approaches and methods they employ;

(3) Encouraging the appropriate ABA Standing Committees, Commissions, Sections, Divisions and forums to develop a Code of Ethics for Special Masters;

(4) Working with interested parties to develop model rules, particularly for state courts, interested in making more effective and regular use of special masters; and

(5) Urging the amendment of Bankruptcy Rule 9031 to eliminate confusing impediments to using special masters in Bankruptcy proceedings.

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8. **Cost to the Association (both indirect and direct costs).**

None.

9. **Disclosure of Interest.**

None.

10. **Referrals.**

Business Law Section
Lawyers Conference
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Standing Committee on the American Judicial System
Section of Antitrust Law
Section of Dispute Resolution
Section of Intellectual Property Law
Section of Litigation
Solo, Small Firm and General Practice Division
Tort Trial and Insurance Practice Section

11. **Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)**

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12. **Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)**

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Executive Summary

1. **Summary of Resolution.**

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

2. **Summary of the issue which the Resolution addresses.**

While the ABA has been a leading voice in favor of various forms of ADR, the appointment of special masters is an underutilized dispute resolution tool that could aid in the "just, speedy and inexpensive" resolution of cases. In 2016, the Lawyers Conference of the ABA Judicial Division (JD) formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use. This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.

To solve this problem, the Committee constituted a Working Group across ABA sections, divisions and forums to develop consensus guidelines for the use of special masters. The Working Group was formed in August 2017, included members of the Judicial Division (including the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the Business Law Section, the Standing Committee on the American Judicial System, Section of Antitrust Law, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Section of Litigation and the Tort Trial and Insurance Practice Section, who collectively worked well over 1,000 hours to create these consensus guidelines.

3. **An explanation of how the proposed policy position will address the issue.**

The best practices described in this Resolution encourage courts to make greater and more systematic use of special masters to assist in civil litigation. These Guidelines provide recommendations concerning the use, selection, administration, and evaluation of special masters.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

There is no known opposition to this Resolution.