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Civil Special Masters: Aid in an Era of High Court Caseloads and Low State Budgets

By Thomas D. Jensen

Many states by procedural rule or stature have included provisions allowing for the appointment of special masters in civil cases that tracked the former Rule 53 of the Federal Rules of Civil Procedure. See Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 Wm. Mitchell L. Rev. 1299, 1325-30 (2005). In 2003 the federal rule was overhauled to encourage use of special masters. The rule revisions contemplated enhanced use of masters as lawsuit complexity has increased, as courts became more familiar with the utility of special master appointments, and as federal judicial vacancies mounted causing delay. Many states followed suit and amended their rules to track the federal lead. See, e.g., Minn. R. Civ. P. 53.01. This article reviews the scope of the amended rules in civil trial practice generally, encourages special master appointments, comments upon their increasing efficacy in the face of dwindling state judiciary budgets, and encourages ADR neutrals to get involved.

In my state in the last decade, for example, Minnesota's state court system has seen its workload increase by over 10%, including a 42% increase in major criminal cases. Today, more than 2 million cases are filed each year, with Minnesota judges handling 8,000 cases annually. Fourth Jud. Dist., Strategies and Priorities for Fourth Judicial District, Focus on the Future, FY 2007-FY 2009, at 4 (May 2007). Adding to the judges' workload is the 2008-2009 Minnesota Legislature's budget cuts affecting state trial courts. Service cutbacks will delay civil cases and reduce the number of civil trials, and this is before expected future shortfalls are announced. See Barbara L. Jones, *State Court Must Deal With a $3.8M Budget Cut*, Minnesota Lawyer, May 26, 2008, at 1.

Your state is no different. According to *Stateline.org*, a nonprofit, non-partisan online state news site, at least 25 state court systems face budget cuts this fiscal year. New Hampshire suspended jury trials for a month. Utah's chief justice warned of court personnel furloughs. Massachusetts' chief justice declared the judiciary budget a "crisis." Court workers were laid off in Florida. The chief public advocate in Kentucky warned that financial cuts could cause the system to unravel. Public defender funding in several states is precarious. Unpaid leaves for court personnel have been ordered in Iowa and Vermont. See John Gramlich, *Court Cuts Trigger Blunt Warnings*, www.Stateline.org (February 18, 2009). Another observer recently reported that courts in 29 states could face a combined budget shortfall of $48 Billion. Michael Buenger, *State Courts and Legislatures: A Funding Crisis Renewed*, National Center for State Courts (2008). These chronic (and now acute) state budget crises are limiting individuals'

access to the courts. Jokela & Herr, supra, at 1314-18. Given this background of state court cutbacks, it is obvious that special master appointment opportunities are present for ADR neutrals. See Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev. 1269, 1270 (2005) (noting that special master appointments will be "more common and important in the years ahead").

Overview of the Revised Federal Rule

Most states follow the federal special master model and are expected to re-visit their rules in light of the federal rule's amended (and expansive) lead. Amended Federal Rule 53(a) provides that a court may appoint a master to: (1) perform duties consented to by the parties; (2) try issues and make or recommend factual findings in non-jury cases in exceptional circumstances or where an accounting or difficult damages computations are necessary, or (3) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge. Rule 53(b)(1) adds that the court must give the parties notice and an opportunity to be heard before appointing a master, and the parties may suggest candidates for appointment. Assuming no conflict of interest or other ground for disqualification exists, the order appointing the master must state: (1) the master's specific duties and authority limitations; (2) the circumstances in which the master may communicate *ex parte* with the court or a party, (3) the nature of materials to be preserved and filed as the record of the master's activities (4) time limits and other procedural requirements of seeking review of the master's decisions; and (5) details relating to the master's compensation. Fed. R. Civ. P. 53(b)(2).

Upon appointment the master may "take all appropriate measures" to perform the assigned duties, including imposing noncontempt sanctions and recommending contempt sanctions. Fed. R. Civ. P. 53(c)(2). In conducting evidentiary hearings, the master may exercise the court's power to compel, take and record evidence. Fed. R. Civ. P. 53(c)(1)(C). On review of master's decisions, the court may adopt, affirm, modify, reject or resubmit the matter. *De novo* review is mandated on findings of fact objections and legal conclusion objections. Review of procedural rulings, however, is subject to the abuse of discretion standard. Fed. R. Civ. P. 53(f).

"Free Judge" Versus "Paid Master" Cost Tension

Rule 53(g) relates to master compensation and requires that it be fixed by the court, and allocated and paid as set forth in the appointing order. The rule triggers the inevitable question" is master involvement and added case overhead worth it? Rule 53(a)(3) addresses the question in part by noting that the court must consider "the fairness of imposing the likely expense on the parties and must protect against unreasonable expense... ." The cost of litigation is reduced when a master's work facilitates settlement and thus avoids the time, expense and risk of trial. Expenses are avoided when cases settle faster by a master's effort to expedite the case. Thomas E. Willging, *et al., Report to the Judicial Conference's Advisory Committee on Civil Rules and its Subcommittee on*

Special Masters, at 9, 29 (Fed. Jud. Center 2000). In multi-party litigation in which the master's time is allocated *per capita*, individual party costs are lessened to perhaps a more palatable degree.

The federal rule respects the cost tension inherent in master appointment. As noted above, in court ordered contexts, a master may only be appointed in "exceptional" situations, in "difficult" accounting or damages calculation situations, or to handle matters that "cannot be addressed effectively and timely" by the district judge. Fed. R. Civ. P. 53(1). In these situations it may be difficult for the district court to process the complexities involved in these disputes in compliance with case dispositional requirements. Thus, when masters are appointed to facilitate pretrial and post-trial proceedings, one study found that all judges and almost all attorneys thought the benefits of the master's appointment exceeded the drawbacks. Willging, *supra*, at 9, 61. Accordingly, state courts under analogous special master rules should take greater advantage of the discretion allowed under the rules and appoint masters to difficult matters. Jokel & Herr, *supra*, at 1307.

Scope of Master Activity
Historically, Rule 53 was designed to help judges resolve fat-intensive cases. The process involved having a master review facts, organize the information, and prepare a comprehensive report to assist the judge or jury. Modern use of masters, however, covers a full spectrum of civil case management and fact finding at the pretrial, trial and post-trial stages. Willging, *supra*, at 4. These uses may include:

Pretrial Proceedings

- ? Resolving privilege disputes in discovery
- ? Providing call access during deposition skirmishes
- ? Making *forum non conveniens* recommendations
- ? Making *Daubert* admissibility recommendations
- ? Managing class action procedures
- ? Resolving discovery disputes generally
- ? Recommending protective order provisions
- ? Proposing case management orders
- ? Hearing motions to quash
- ? Sorting through e-discovery minutiae
- ? Addressing document discovery scope disputes
- ? Handling *in camera* document reviews
- ? Coordinating discovery sequencing plans
- ? Making class certification recommendations
- ? Coordinating separate venue or consolidation procedures
- ? Considering attorney disqualification disputes
- ? Recommending court approval of settlements

- Enforcing discovery limitations imposed by the court
- Processing *pro hac vice* applications
- Recommending orders in non-dispositive motions
- Deciding pleading amendment motions
- Addressing *in limine* motions
- Determining spoliation of evidence motions
- Managing mass tort claim aggregations
- Blessing/imposing document depository arrangements
- Determining reliability of survey evidence
- Addressing prior discovery concerns of later-joined parties
- Imposing order on document production/use chaos
- Imposing evidence preservation protocols
- Prohibiting expert depositions and precluding undisclosed opinions
- Imposing e-discovery format/media coordination exchanges
- Requiring [Fed.] R. Evid. 1006 summary preparation
- Addressing foreign party discovery complications in treaty contexts
- Recommending orders in dispositive motions
- Serving in settlement capacities
- Recommending peremptory strike allocations
- Resolving claim or party intervention disputes
- Setting rules for contacts with former employees or parties
- Limiting "sitter" deposition appearances with protections
- Presiding over joint mock jury trials
- Handling inadvertently produced document disputes
- Imposing cost shifting obligations for unusually expensive discovery
- Limiting numbers of depositions and examination time limits
- Solving multi-track deposition problems

Trial-Related Proceedings

- Making *Daubert* admissibility recommendations
- Recommending conclusions of law
- Enforcing preparation of joint statements of undisputed facts
- Recommending choice of law decisions
- Making damages recommendations
- Calculating accounting and damages data
- Proposing factual findings in non-jury cases
- Enhancing court understanding of unusually complex subject matters
- Deciding trial deposition objections
- Ruling on sensitive evidence objections in court trials to avoid judge review of excluded evidence
- Resolving evidence foundation issues

Post-Trial Proceedings

- Monitoring decree compliance and enforcement
- Adjudicating mass damages recoveries
- Managing social service benefits entitlements
- Processing corporate governance issues
- Deciding taxable cost disputes
- Allocating settlement proceeds in mass claimant contexts
- Dealing with ongoing divorce disputes
- Overseeing business entity dissolutions
- Establishing claims procedures
- Overseeing environmental enforcement procedures
- Sorting out attorneys fee disputes/applications
- Administering injunction ramifications

Notwithstanding the amended rule's expansive scope as reflected by these lists, certain subjects beyond the obvious jury trial right require trial judge involvement. For example, issues affecting the court's calendar (e.g., severance and separate trial motions, stay motions, and deadline extension motions) obviously require trial judge involvement. Whether calendar-affecting motions ought to be solely a subject of trial judge involvement, or may be considered first by the master (in consultation with the court) obviously are questions for the judge. Similarly, emergency applications (e.g., injunctions) or out-of-the-chute Rule 12 dismissal or *forum non conveniens* motions generally should be the subjects of trial judge determination regardless of master involvement.

Whether masters ought to consider dispositive motions is another issue obviously for decision by the judge. Rule 53(c) gives masters wide authority "to regulate all proceedings" and "take all appropriate measures" to perform his or her duties unless the appointing order otherwise directs. Some judges or parties may wish to have masters consider dispositive motions initially for subsequent *de novo* review by the court. The process is analogous to "tentative" rulings by courts in some jurisdictions that allow for additional input by counsel before final decisions are made. E.g., Cal. R. Ct. 3.1308. Others will fairly feel that dispositive motions are exclusively within the purview of the court. In any event court involvement in the case ought to be triggered from time-to-time through status conferences or otherwise so file familiarity is present if the matter returns for eve of trial decision-making.

Court/Master Communications Sensitivities

Questions are raised over the extent to which the master and trial judge ought to communicate about the master's experience with the matter. As noted above, Rule 53(b)(2)(B) requires this subject to be addressed in the appointing order. Some communication is inevitable. Reporting on case progress and issues arising over the scope of the master's jurisdiction will occur. But consideration needs to be given about the extent to which these communications ought to occur. Rightly or wrongly, litigators all

develop an impression of the judge's case viewpoints. Few cases present with equal *bona fides* on each side and rulings – in the absence of any bias whatsoever – may affect a party's perception of the court's case outcome views.

Therefore, the extent to which masters communicate with the trial judge ordinarily should be limited. Trial judges do not communicate with appellate judges in pending appeals. The party appealing a master's determination must feel that trial judge review truly involves a fresh look. Perceptions of unfairness may exist if information learned by the master is given to the trial judge that a party may believe (erroneously) is affecting the court's rulings in the matter. Under no circumstances should a party sense that the party is paying for a master to affect adversely the court's independent review of the case.

Suggestions for Appointment Consideration

In states having early pretrial conference rules similar to Fed. R. Civ. P. 16, or any similar first-look court consideration of the matter, the subject of special master appointment consideration may be raised. Filing forms may be amended to include reference to master appointment suitability. Raising master consideration prominence by form references – much like as has occurred with form references to ADR generally – will help instill in the advocates routine evaluation of its availability. If interest is expressed a teleconference among the court and counsel may be scheduled to determine if master appointment is warranted and, if so, to encourage party recommendations for master selection. Parties may then evaluate master candidacies following investigation of: (1) the scope of proposed master expertise, (2) whether conflicts of interest exist, and (3) whether proposed master compensation is acceptable. Upon recommendation of the parties of a master's candidacy, or on the court's own motion if appropriate, an order appointing the master may issue.

In addition to those matters required by Fed. R. Civ. P. 53(b)(2) or analogous state rules, the appointing order should also:

- Require the master and parties to meet, confer, and reach agreement as to the manner in which master procedure may be streamlined, unburdened, and informal to secure the speedy and inexpensive determination of the action pursuant to Rule 1 of the Rules of Civil Procedure.
- Require thoughtful at-the-outset review by the master of the canons, comments and annotations of the applicable Code of Judicial Conduct.
- Make clear that a party has 20 days in which to file objections to a master's order, report or recommendations. (*E.g.*, Fed. R. Civ. P. 53(f)(2)).

Following appointment, faster access to discovery dispute resolution leads the list of reasons supporting master involvement. Cost control considerations should prompt the master and parties into agreements imposing limits on discovery motion practice. Consideration should be given to: (1) page limit legal memorandum restrictions more onerous than applicable state rules, (2) page limit record restrictions, (3) elimination of

reporting on and transcription of discovery motion hearings, (4) setting time limits on oral advocacy, (5) requiring teleconferencing as the hearing mechanism, (6) requiring non-movants attending the hearing to pay a share of the costs, (7) barring submission of reply memoranda, and (9) establishing mandatory deadlines by which masters must rule. History shows that argument time and page limits, and supporting record bulk limits, reduce costs of motion practice. Other procedural shortcuts should also be embraced at the master's level, since rule-compliant process remains fully available on review by the trial judge even though the standard of review is abuse of discretion unless modified. *E.g.*, Fed. R. Civ. P. 53.07(e).

In conclusion, time will tell if recent revisions to special master rules will find greater acceptance among the bench and bar. In this era of enormous trial court caseloads, increasing filings of complex civil matters, and budgetary constraints affecting prompt processing of the work, one would think master involvement will rise. Although relatively few cases qualify for master consideration, the sizes of those that do may in a proportional sense overuse the court's time. With rigorous attention to cost constraints, clear delineation of authority, and faster movement of the file toward the settlement goal line, special master rules may fulfill the hopes of their promulgators in reducing caseloads weighing down our trial court judges. ADR practitioners with experience as neutrals are ideally situated to take advantage of practice enhancing opportunities present in each state's special master rules in these times of judiciary budget restrictions.

Thomas D. Jensen
Minneapolis, Minnesota
thomasjensen@lindjensen.com