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The federal courts are over burdened and under staffed. [FN3] The continued expansion of federal caseloads, the technological complexity of the subject matters presented to federal courts, the vast amounts of information available (often as a result of sophisticated computer technology), the number of claimants and the amounts of money involved have all put heavy burdens on the federal judiciary. [FN4] In response, judges have increased their use of “para-judicials”, or judicial assistants, to perform some of the functions usually performed by judges as well as some functions not usually performed by judges. [FN5] Federal Rule of Civil Procedure 53 has been revised to support these efforts by legitimating many of the roles and responsibilities given to special masters in the past and clarifying the array of prerogatives that may be given them in the future.

Federal judges have apparently stepped up their appointments of special masters under Rule 53 to assist with mounting complex litigation, including class actions, and to fostered more efficient case management, alternative dispute resolution and compliance with on-going court orders. The tasks performed for judges by special masters are varied and can be conceptually categorized in several ways — the nature of the function performed (e.g. mediator, monitor), the phase of litigation in which the tasks are performed (pre-trial masters, post trial masters); the type of litigation involved, (institutional reform, patents, mass tort, etc.).

This paper characterizes the roles of masters in accordance with the nature of the functions they perform, regardless of the stage of litigation during which those functions are undertaken or the substantive area of law involved. Thus a master ordered to mediate disputes between the parties in pre-trial discovery or in the framing of remedial relief would be considered here to be a mediator or settlement master throughout the litigation. Similarly, the roles are not mutually exclusive, and many masters find themselves performing the roles of mediator, monitor and investigator simultaneously.

In contrast, the new Rule 53 regulates masters' appointments according to the stage of litigation in which they are asked to perform court-ordered tasks and continues to distinguish between jury trials and non-jury trials, at least for purposes of defining the authority of masters appointed at the trial stage. That division of the subject is useful for determining the powers judges may delegate to their special masters -- so that issues that go to the merits of the litigation remain within the control of an Article III judge. It is not a useful conceptual tool for considering what the attributes of appointments should be when they are made for other purposes. Perhaps recognizing this fact, the new rule provides a cafeteria line from which judges and the parties may select the powers, prerogatives and limitations that are needed in specific cases.

Functionally conceived, special masters have long been appointed under Rule 53, to play a number of different roles — discovery master, settlement master, remedial masters, *6 monitor/investigator and claims administrator. But, the 1938 Rule
regulated only the role of trail masters and failed to address many issues raised by the performance of those roles. When it became clear that the Rule was not useful in defining other legitimate functions, the Federal Judicial Conference of the United States studied the Rule for several years before it completely amended Rule 53, effective December 1, 2003. The new Rule is not based on a functional analysis of what masters do, but does recognizes their pre-trial and post trial performance of all of those roles in the federal courts.

Notably, the new rule acknowledges and legitimates the performance of tasks by masters that are not -- and in some cases could not be -- performed by the judges who appoint them. [FN6] The Committee Note acknowledges the appointment of masters to perform non-judicial functions, saying that their responsibilities may include “duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.” [FN7]

The recent amendment to Rule 53 makes at least four significant changes: first, it rationalizes the contemporary practice of appointing masters to perform pretrial and post-trial functions; second, it eliminates the appointment of trial masters in jury trials, except with the consent of the parties; third, it alters the standard upon which master's recommended findings are reviewed by the appointing court; and fourth, it requires the order of reference to address certain specific issues. Although the new rule became effective December 1, 2003, it is not clear what retroactive effect it will have on existing appointments, particularly the standard of review to be applied to future findings of fact made by masters named before the rule's effective date. [FN8]

Thus, essentially, the new rule regularizes masters' pre-trial and post-trial functions and requires appointing courts to address certain controversial issues in their orders of reference — thereby allowing courts to expressly empower and limit masters in carrying out the traditional functions legitimated by the rule. While some critics of special masters practice might have preferred that the rule prohibit certain activities altogether, such as *ex parte* communication or investigation, the framers preferred to leave the determination of those issues up to federal judges in individual cases. In this way, the rule recognizes the role of the district courts as procedural laboratories where experimentation can continue in the effort to develop efficient and fair procedures to meet the demands of modern litigation and technology.

This paper briefly sets out the basic legal authority for the appointment of special masters by federal courts and describes the roles special masters have played in the past. Second, it describes recent amendments to Rule 53 as they relate to those functions, and finally, it discusses the implications of the amendment for the use of special masters in complex litigation. [FN9] The paper concludes that the amended rule should do much to assure the appearance and reality of fairness and neutrality by requiring more transparency in the selection and empowerment process, though not, perhaps, enough to assure judicial efficiency and reduced litigation expenses. [FN10] Further, by requiring courts to be more explicit about the powers being given to each master, the amended rule should eliminate post appointment disputes about these powers.

Most importantly, in the author's view, the new rule will permit courts to continue to create designer-masters, suited to the needs of individual judges in increasingly complex litigation and able to acquit the enlarged responsibilities being given to modern courts, akin to those of administrative agencies.

II. CONSTITUTIONAL LIMITATIONS ON THE AUTHORITY OF MASTERS.

There are several sources of legal authority for the appointment of masters by the federal courts. Although Federal Rules of Civil Procedure Rule 53 is the principal vehicle for empowering judicial assistants, consent of the parties, the inherent authority of the court, and the Magistrates Act also provide legal bases for the appointment of masters. [FN11] The draftsmen of amended Rule 53 have tapped all of these in re-writing the new rule.

Of course, the outer boundaries of all authority of the federal courts to appoint and empower assistants, including special masters, are established by the Constitution -- Article III, the due process clause of the Fifth Amendment and the Seventh Amendment right to a jury trial. Thus, proceedings before a special master are bounded by constitutional requirements meant to assure a neutral adjudicator, procedural fairness, jury trials and limitations on legislative courts. These limitations have been discussed in legal literature. [FN12]

The Supreme Court has indicated that the exercise of essential judicial functions by personnel who are not Article III judges -- with life tenure and protected salaries — violates the separation of powers doctrine and perhaps the due process clause unless
their actions are strictly controlled by the Article III judge. Thus, non-consensual references to magistrates have been sustained against constitutional attack where they were performed under the “total control and jurisdiction of the district court....”: [FN13]

Nevertheless, the Supreme Court has recognized that in certain situations, the benefits of such delegations -- efficiency and expertise -- outweigh their diminution of Article III values -- neutral, independent adjudication - creating a kind of balancing test. Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245, 3256 (1986); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584 (1985); Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 458 U.S. 50 (1982).

Rule 53 has been the most common basis upon which federal courts have appointed special masters. [FN14] Enacted as part of the Federal Rules of Civil Procedure in 1938, the framers of the rule drew on the use of masters by courts of law and courts of equity. In both traditions, the appointment of masters -- which could mean added expense and delay to the parties -- was justified only in unusual cases. Thus, former Rule 53(b) authorized the appointment of special masters in jury cases, but only when the issues were complicated [FN15] and in non-jury cases only *8 when the matter is one of accounting, difficult computation of damages or one in which some exceptional condition requires it. [FN16]

The Supreme Court has confirmed that as a matter of Congressional intent the traditional rule that the appointment of masters should be the exception and not the rule -- at least where the appointment is to hear the merits of the case. The Court has not held that the Constitution requires such a limitation, but rather has held that Rule 53 did require it. Thus, in interpreting the authority accorded district court judges under the 1938 Rule 53 to try the merits, the Supreme Court in LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) held that calendar congestion, complexity of the issues and the possibility of a lengthy trial were not a showing of “exceptional conditions” sufficient to satisfy the requirements of Rule 53 with regard to a comprehensive reference of the merits. [FN17]

However, some Circuit Courts of Appeals have held that the appointments of special masters to conduct formal evidentiary hearings on the merits of the case violate Article III. [FN18] That is, the courts found that — regardless of exceptional circumstances -- the stage of litigation alone was determinative of Article III limitations on the scope of Rule 53. E.g. Bituminous Coal Operators' Ass'n, Inc. 949 F.2d 1165, 1168 (D.C.Cir. 1991) (reversing reference to special master of non-jury trial of civil case over multi-employer trust fund where district court failed to reserve decision making authority over motions dispositive of the merits of the case). See Generally, 5A MOORE'S FEDERAL PRACTICE P. 53.05[3] at n. 7-11. [FN19] Other Courts of Appeal have found that the adoption of special master findings violate the parties right to a jury trial. See e.g. Middle Tennessee News Corp. V. Charnel of Cincinnati, Inc., 250 F.3d 1077 (7th Cir. 2001).

The court may still appoint a trial master to hear issues going to the merits of a case when the issues are not the kind that are tried to a jury. For example, a trial master may be appointed to hear the merits of a motion for preliminary injunction. [FN20] As discussed above, the new Rule 53, eliminates trial masters in jury trials except with consent of the parties, but retains authority to appoint trial masters — to preside over an evidentiary hearing on the merits — with regard to issues to be decided by the court without a jury. This prerogative, like that of the old rule, is limited to appointments “warranted by some exceptional condition....” -- a congressionally imposed limitation, not a constitutional one. [FN21] However, their determinations are to be reviewed on a de novo standard, rather than given clearly erroneous weight as under the old rule.

The Committee Note advises that the jurisprudence that has grown up around the phrase “exceptional condition” will continue to have precedential effect. [FN22] If so, it has implications for the constitutionality of certain appointments, because in the past, appeals courts have required where disposition of liability is at stake, that the need for expert help in dealing with complex or complicated evidence must be more clearly demonstrated, than if the master were handling non-dispositive pretrial matters. [FN23] Even so, in patent litigation, despite the holding in LaBuy special masters have commonly been required to rule on technical and scientific evidence in order to *9 make recommendations on the merits of infringement claims. [FN24] And in large complex class action suits special masters with special expertise have been appointed to determine factual issues of causation necessary to findings of liability. E.g. McLendon V. Continental Group, Inc., 749 F. Supp. 582 (D.N.J. 1989) aff'd 908 F.2d 1171 (3rd Cir. 1990) (A professor expert in economics and knowledgeable about computers was appointed to settle a pension dispute) [FN25].

THE LEGAL AUTHORITY TO APPOINT SPECIAL MASTERS.
Rule 53 of the Federal Rules of Civil Procedure

Traditional powers of Rule 53 masters.

Special masters appointed under the former Rule 53 were given many of the same powers that a district court judge has to receive and evaluate evidence submitted by the parties. The new Rule 53 preserves these powers as default powers and duties to apply if the court does not provide otherwise in an order of reference. In addition, the new rule requires the appointing court to address certain issues in the order of reference, such as ex parte communication, standards of review, preservation of the record, and the terms of compensation. Thus, unless limited by the order of reference, a special master has broad powers under Rule 53 “to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master’s duties under the order.” Rule 53(c). Because the drafters have used the same language with regard to a Rule 53 master’s default powers, the case law interpreting that term should apply.

With regard to evidentiary hearings, the new rule provides that unless the order of reference provides otherwise, the master may exercise the power to compel, take and record evidence. Rule 53 (d). Thus, the master may require the production of documents and other evidence, rule on the admissibility of evidence, subpoena documents, put witnesses under oath and examine them. It is not clear what other powers, not enumerated in the Rule or within the ambit of the default powers, can be given to masters expressly or are assumed to be given if they are not limited by the Order. The Rule does not require that the Federal Rules of Evidence apply.

A special master’s powers granted by the new rule to enforce his or her orders are consistent with constitutional restraints. The new rule is clear that a master may impose any non-contempt sanction provided by Rule 37 or 45 upon a party to enforce his or her own orders. However, a master may only recommend to the appointing court that contempt sanctions be imposed against a party or that other sanctions be imposed against a non-party. Both can result in loss of liberty or property protected by the Constitution.. Rule 53(c).

The masters' findings and order under Rule 53.

Under the old rule, the effect given to a master's report depended on whether it is rendered in a jury or a non-jury proceeding. Special masters appointed under old Rule 53 were required by the Rule to file with the clerk of the court a report setting forth findings of fact and conclusions of law as required by the order of reference. Fed. R. Civ. P. 53(e)(1). In a proceeding before a jury, the master was treated as a source of evidence to be considered by the jury in its deliberations. In a non-jury trial, the master was treated as a preliminary decision maker, whose recommended findings of fact and conclusions of law stood unless they are clearly erroneous. [FN26] This was true whether the master made findings in the course of settling discovery disputes, [FN27] recommending action on a motion for injunctive relief, [FN28] or supervising implementation of court ordered relief. [FN29] The presumption that masters findings of fact will be given clearly erroneous weight is eliminated by the new rule. Nevertheless, the parties and the court can expressly adopt that standard of review for the purpose of a particular case. That is, the new rule permits the court's order of reference to specify the clearly erroneous standard for the review of reports, orders and recommendations. Rule 53(g)(3)(A). Otherwise, the master's findings of fact must be reviewed de novo when parties object to their adoption by the court. Rule 53(g)(3). Because the rule now permits the appointment of a trial master in a jury trial with the consent of the parties, it would seem that the consenting parties may object to the findings made in the trial master's report. If they do, the court is obliged to hold a de novo hearing on the objections, unless the parties have stipulated, and the court has consented to, a clearly erroneous standard of review or finality. Amended Rule 53(g)(3).

When a master is appointed in a non-jury proceeding, the parties are given the same right to notice, timely objection to the master's order, report, or recommendations findings of fact and de novo review of objections whether the master is appointed to hear the merits or address pretrial and post-trial matters. [FN30] Rule 53,(1)(C) and (g)(2) Thus, in a proceeding in which a master is appointed to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury, all objections to findings of fact made or recommended by the master will be decided de novo by the court upon objection unless the parties and the court have stipulated otherwise. An abuse of discretion standard is adopted for the review of procedural determinations by a master. Rule 53(g)(5).
One can argue that the imposition of de novo review of findings of fact will undermine both the efficiency and the cost effectiveness of master appointments to try the merits with consent of the parties or in non-jury proceedings. That may be, but at the same time, it may have been the intention of the framers of the new rule to correspondingly enhance the efficiency of pretrial and post-trial appointments. In those capacities, many of the special masters determinations will be on procedural matters -- the admission of evidence, privilege, discovery schedules, etc. which the new rule makes clear the court may set aside only for an abuse of discretion. This is a much higher standard which may deter the parties from objecting to pre and post trial master rulings.

Appealing the appointment of a Rule 53 master

Appointments under the old Rule 53(b) could be appealed through the extraordinary writ of mandamus brought immediately upon appointment, in the court of appeals. [FN31] In addition, they could also be appealed through objection and a general appeal of the district court's final judgment based on the master's findings. [FN32] The party objecting to the appointment of a master usually had to make a timely objection either at the time of appointment or promptly thereafter to preserve the assignment of error. [FN33] The amended Rule 53 does not seem to change this procedure.

When challenged by way of mandamus, the appellant must establish that the district court abused its discretion in making the appointment and that challenging it in an end-of-case appeal will not adequately protect the interests at risk. Stauble v. Warrob, 977 F.2d at 692 n.3. [FN34] After judgment, an appeal of the reference to a master is treated as presenting a question of law and plenary review will be exercised. Stauble v. Warrob, 977 F.2d at 692 n.3. Because the standards of review are different, denial of a motion for mandamus setting aside a reference does not preclude a subsequent appeal which raises the issue again. [FN35]

On appeal from a district court ruling adopting, modifying or rejecting a master's recommended findings of fact, the appellant has the usual burden of persuading the court of appeals that the district court erred. In a non-jury trial, a district court finding based on recommendations by the master will also be sustained if the district court - in reviewing objections de novo - did not abuse its discretion in finding the master's report supported by a preponderance. Cf. Williams v. Lane, 851 F.2d 867, 884-85 (7th Cir. 1988). [FN36]

Consent of the Parties.

Early in its history, the Supreme Court recognized that the parties can consent to the disposition of their disputes by non-Article III personnel, Heckers v. Fowler, 69 U.S.(2 Wall.) 123 (1864). This decision provided a separate basis for the appointment of a judicial assistant to adjudicate the parties’ dispute beyond that granted by Congress. [FN37] Commentators seem to agree that references based on the consent of the litigants should not be subject to the same requirements that apply to references made without consent, although they may not contravene applicable legislation or public policy. The new rule 53 builds on that foundation in recognizing the power of the parties to design and consent to their own use of special masters.

*12 The Court's Inherent Authority.

Courts also have inherent power to provide themselves with appropriate instruments for the performance of their duties, including the authority to appoint persons unconnected with the court, such as special masters, examiners and commissioners, with or without consent of the parties, to “simplify and clarify issues and to make tentative findings” Ex parte Peterson, 253 U.S. 300, 314 (1920). Reilly v. United States, 863 F.2d 149, 154, n.4 (1st Cir. 1988).

This inherent power was discussed at some length in Cobell v. Norton, by the District of Columbia Circuit Court of Appeals which held that the exercise of such power must be supported by documentation of historical practice or an irrefutable showing that it was essential to the exercise of an undoubted authority. [FN38] Calling attention to its holding as a narrow one, tied to the facts of the case, the appeals court ruled that the assertion of inherent power was not supported in the case before them, particularly when the government had opposed the appointment as a violation of the separation of powers.

The Magistrates Act.

As expressed by one court, “The functions of special masters and the role of a magistrate are to a large extent parallel. Each may be appointed by a district judge to address pretrial matters.... Each may issue orders on non-dispositive matter that are then subject to review by the district judge.” Convolve, Inc. v. Compaq Computer Corp. 223 FRD 162 (SDNY 2004) Yet, special masters powers and responsibilities can be more easily tailored to the specific needs of a case than ca a magistrate's powers.
Masters may also be appointed because they have more relevant expertise and they can spend more time on their duties than a magistrate with a full docket.

United States Magistrate Judges may be appointed to act as special masters pursuant to three legal authorities: the Magistrates Act (28 U.S.C. 636(b)(2)) the court's inherent authority discussed above, and Rule 53. Under the terms of the Magistrates Act, enacted after Rule 53, special magistrates can be appointed as special masters in under section 636(b)(2), first, when they are appointed under Rule 53, or second, without regard to the provisions of Rule 53, when the parties consent to the appointment. The Civil Rights Act of 1964 also provides that magistrate judges may be used as masters whenever a district court judge cannot schedule a case for trial within 120 days after issue has been joined. Both kinds of magistrate appointments are governed by the provisions of Rule 53, except that where the parties consent to the appointment, the “exceptional condition” requirement does not apply. 28 U.S.C. s 636 The new rule 53 provides that a magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.” — leaving the provision in former Rule 53(f) unchanged. Rule 53(I).

*13* Many of the issues discussed below with regard to special master practice are avoided when the appointment is made to a magistrate. Because magistrates are full time, government paid, generalized judicial surrogates they do not present the same issues that are presented by the appointment of part time, party paid, expert masters appointed under Rule 53.

III. THE LEGITIMATION OF ROLES AND FUNCTIONS OF SPECIAL MASTERS BY AMENDED RULE 53.

Special masters appointed under the old Rule 53(b) and/or the inherent power of the courts have been asked to perform a variety of tasks -- discovery master, settlement master, fact finder, remedial master, investigator and compliance monitor, to name only some. While these roles were not recognized by the old Rule, they all served its underlying purpose -- to give judges the means to discharge in a fair and efficient manner the complex, time consuming duties imposed by modern litigation. See e.g. Jack B. Weinstein, Individual Justice in Mass Tort Litigation 145 (1995).

The following sets out, in general terms, the roles special masters have played under the 1938 Rule 53. The roles are defined by the functions performed for the court, not by the means through which they are accomplished or the stage of litigation during which they are performed. For example, in the roles described below, special masters often use ADR techniques, including mediation and non-binding arbitration, to bring about settlement on the merits, to resolve discovery disputes, to obtain consent to remedial decrees and to settle disputes over compliance with remedial orders. Thus, they are not co-terminus with either the stages of litigation defined in the new rule or jury-non-jury trial distinction made by the old rule.

**Trial Masters**

Based on the pre-1938 equity rules, old Rule 53(b) anticipated the appointment of masters to make recommended factual findings going to the merits of the dispute before the court. Thus, it provides that in actions presenting complicated issues for the jury or exceptional conditions in cases tried before the court, masters could require the production of evidence, hold formal hearings at which the rules of evidence apply, issue subpoenas, administer oaths, and create record for review. Historically, masters were also appointed by courts of equity to carry out tedious tasks necessary to report on evidence and determine the accuracy of accountings and damage calculations. See *Kimberly v. Arms*, 129 U.S. 512, 523 (1889).

Over the years, courts have placed constitutional and other restrictions on the appointment of masters to hear evidence and make recommended findings of facts going to the merits of the dispute when their findings were given clearly erroneous weight. The enhanced weight given to special master's findings in the past has been given as a reason to impose judicial standards of ethics and procedural due process requirements on hearings and evidence upon which findings are based. Now, the clearly erroneous weight formerly accorded special master's findings, in non-jury trials has been eliminated by the new rule, and non-consensual trial masters in jury cases have been eliminated altogether.

This effort to assure neutrality and fairness could be counterproductive, however. Much of the justification for the appointment of trial masters in non-jury cases (or in jury trials with party consent), as well as pre-and post trial masters, has been the fact that they can use less formal, facilitative, unbounded procedures, such as ex parte communication and informal hearings that reduce the cost and delay of litigation. However, if the parties know that the master's findings will be accorded no weight, and that they may object and demand a hearing and de novo review of the master's orders on a record of evidence they may
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be able to make before the judge, there may be significant incentives for parties to treat proceedings before the master as a warm-up for the hearing before the judge on objections — resulting in an added layer of litigation, expense and foot dragging. Thus, abolition of the use of trial masters in jury trials may limit the utility of masters in many complex cases, including class actions and mass tort litigation.

Discovery Masters.

The 2003 amendments to Rule 53 make a fundamental change in the Rule by officially acknowledging the established practice of appointing special masters prior to a trial on the merits. [FN47] There is considerable evidence that there were few masters appointed in equity proceedings to perform pre-trial duties. [FN48] The new rule permits the court to appoint a pretrial master “only to address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district. Amended Rule 53(a)(1)(C). This limitation is meant to imply that such appointments will not be made as a matter of course, but only when other judicial resources are unavailable, i.e., the exception and not the rule.


Where information sought in discovery is scientific, highly technical or complex in nature, there is an even greater ground upon which to find exceptional conditions required for the appointment of a master under Rule 53. United States v. Hardage, 750 F. Supp. 1460 (W.D. Ok. 1990); In re Agent Orange Product Liability Litigation, 94 F.R.D. 173 (E.D.N.Y. 1982). [FN49] Courts often appoint special masters who have special expertise in the subject matter of the suit *15 when discovery motions involve the production of technical information in trade mark, patent, copyright, and product liability cases., The amended Rule 53 would seem to permit the continuation of this practice where the discovery task cannot be handled by available District Court judges or magistrates.

The need for assistance during discovery to handle proffers of scientific expert testimony may be even greater after the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. 113 S. Ct. 2786 (1993). In that case, the Court clarified the trial court's obligation under section 702, of the Federal Rules of Evidence to determine the reliability, as well as the relevance, of scientific evidence upon which expert opinion is based. The Court held that in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity Id. at n. 9.

In order to make these determinations, trial court judges must determine from the outset, pursuant to Federal Rule of Evidence 104(a) whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact. Providing trial courts with a non-exhaustive list of factors to take into account in determining evidentiary reliability, the Supreme Court in Daubert suggested that whether a theory or technique is “scientific knowledge” to which an expert can testify under Rule 702 will depend on at least four factors -- whether the theory or technique can be tested, has been subject to peer review, has an acceptable rate of error, and is accepted in the relevant scientific community. [FN50] At a Rule 104(a) hearing, rules of evidence need not apply, except those with respect to privileges.

The amendments to the Rule permit the appointment of special masters to conduct Rule 104(a) as one way for district courts to hold Daubert hearings without burdening the courts' resources. Because they do not perform the functions of a trial master under the new Rule, their appointment in a jury trial would not seem to require consent of the parties. Not only can a special master devote more time to becoming familiar with the evidence submitted, a master can be selected who has special expertise in the science involved. [FN51]

Case Managers

In some complex cases, judges have needed help in addition to the supervision of discovery. They have obtained this more comprehensive assistance by appointing a master to carry out overall management of the case in its pretrial stage. For example, in the Ohio Asbestos Litigation two special masters were appointed to develop a data collection system, hire experts, and design computer programs to evaluate for settlement purposes all claims (eventually numbering more than 9,000) within a two year period. [FN52] The district court appointed two special masters to develop a case management plan for resolving thousands of
pending cases. [FN53] Thus, in some large and complex suits, the judges have needed expert and technical assistance, not to understand the subject matter of the suit or issues of causation, but to handle massive amounts of non-technical information. [FN54]

*16 Rule 16(c)(8) provides that at any pretrial conference, the court may take appropriate action with respect to “the advisability of referring matters to a magistrate judge or master.” and the amended Rule 53 expressly acknowledges the use of pretrial masters. This change would seem to permit the continuation of the case management practice with regard to the tasks enumerated in Rule 16(c) pertaining to pretrial conference.

Thus, judges are encouraged by the Federal Rules of Civil Procedure to consider involving a master in case management. [FN55] Rule 16(c) makes appropriate the court's consideration of the appointment of a pretrial master to engage in case management and to facilitate settlement. Rules 16(c)(9) and (12) specify as among these tasks appropriate for consideration are “settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.” or the “need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”

Appointment of a pretrial master under Rule 53 to act for the court under Rule 16 would require that the court give the parties notice of its intention to make such a reference and an opportunity to be heard. As discussed below, the order of reference of the pretrial master must comply with other Rule 53 requirements. [FN56]

Mediators, settlement masters and ADR.

Settlement Masters

While most settlement masters fulfill their function through informal procedures, some hold formal hearings in the form of summary or mini-trials, used to evaluate claims for purposes of negotiation. Factual findings of specific causation based on scientific evidence must be made when a master is appointed to evaluate individual claims for purposes of negotiating settlements as well as distributing awards. Findings of causation as a matter of fact in these instances often require the same kind of receipt and evaluation of scientific evidence and witnesses that occur at the liability stage of litigation.

Often, masters appointed to supervise discovery, monitor compliance or make recommended findings of fact on the merits try to promote agreement regarding undisputed facts. In doing so, many have become mediators of differences between the parties regarding either information offered in evidence or scientific facts necessary to findings of liability. [FN57] As just discussed, courts have made this mediation function more explicit, and have expressly appointed special masters to achieve settlements on a variety of pre and post trial issues in complex litigation, especially mass tort cases. [FN58] By 1996 several studies indicated that a significant number of federal district courts were using some form of alternative process to end disputes before trial. [FN59] By 1998, Congress required some form of court annexed ADR in all federal courts through enactment of the Alternative Dispute Resolution Act, 28 U.S.C. sections 651-658. New Rule 53 would seem to provide continued opportunity for the creative development of ADR in the federal courts.

Alternative dispute resolution.

Framers of the new Rule 53 have left federal judges considerable latitude to address some of the major issues currently debated in the professional literature about alternative dispute resolution. [FN60] Some commentators are critical of efforts at the state and professional level to impose structure and standards on alternative processes of dispute settlement. [FN61] They see the 1980s and 1990s as periods when the most productive thinking and experimentation took place, and that there is much still to be learned by trying different dispute resolution techniques in different kinds of cases and with different players. If uniform state acts, professional codes, and federal legislation place limits, set standards and create procedural requirements on the use of alternative process, these scholars and practitioners worry that the advantages of ADR will be lost to a process almost as expensive and time consuming as litigation.

Their counterparts argue that certain standards and uniformity needs to be imposed on the practice so that parties will have reasonable expectations with regard to alternative options and so that those expectations will not be disappointed. Jack M.
Amended Rule 53 accommodates many of these concerns. It does so by requiring the court and the parties to establish their own process consistent with certain requirements. Thus, for instance, the new rule permits voluntary binding arbitration by allowing the parties to agree to a special master who will make final disposition of the dispute. Rule 53(a) and (g)(3)(B). But, because special masters appointed under Rule 53 clearly are assisting the federal judiciary to carry out its functions, their appointments would seem to fall within the state action doctrine regarding constitutional restraints, whether or not the parties agree. [FN62]

Because the facilitation, mediation and arbitration of disputes is often conducted through informal procedures and shuttle diplomacy, Rule 53's recognition that ex parte communications between the master and the parties is a welcome legitimation of this aspect of master practice. Thus, a judge might authorize a special master to engage in ex parte communications with the parties in mediation procedures but not with the judge who might later try the merits. Or, the order of appointment might limit the nature of ex parte communications with the judge in complex suit to administrative and organizational issues. An order of appointment might limit the masters prerogative to disclose communications and documents, ex parte or otherwise, where the nature of the master's role makes confidentiality important to its effectiveness.

*18 The new rule apparently permits the court to require the parties to engage in alternative dispute resolution processes even in a jury case and even without party consent. Although the court cannot appoint a trial master in a jury trial without party consent, it would seem that the court may make a pre-trial or post trial appointment of a special master in a jury case to perform mediation functions if the appointment is warranted by some exceptional condition and not binding with regard to the merits of liability itself. Rule 53(a)(1)(B)(i). In addition, the nature of the mediation process can be carefully crafted to accommodate the reluctance of a party to participate. Further, the court can restrict the use of masters to certain types of cases, routinely requiring ADR in only cases screened for certain characteristics. Jeffery W. Stempel, Beyond Formalism and False Dichotomies: the Need for Institutionalizing a Flexible Concept of the Mediator's Role, 24 Fla. St. U. L. Rev. 949 (1997).

It is appropriate that the revision of Rule 53 accommodates the efforts of the federal judiciary to afford litigants opportunities for alternative dispute resolution, including the the authority to appoint special masters to act as mediators and settlement masters with the powers necessary to play those roles effectively.

Remedial masters.

Much of the justification for the appointment of post-trial masters to help formulate remedial decrees and supervise compliance with complex court orders. [FN63] In institutional reform cases, courts need for assistance in evaluating technical and scientific evidence submitted by the parties or accessed by the master, regarding the management of schools, the treatment of prisoners, mentally retarded persons, and mentally ill persons. [FN64] Expert masters appointed after a finding of liability in environmental and institutional reform litigation often make recommendations for detailed remedial orders or amendments to remedial decrees based on their own expertise. [FN65] Although a federal judge may appoint expert masters to recommend remedial orders, in some cases, judges instead have appointed special masters with authority to employ experts to do so. [FN66]

The new Rule 53 expressly permits the appointment of special masters to perform these functions, but only where a district court judge or magistrate is not available to perform the master's duties in a timely and effective manner. Committee Notes at 174.

Court monitors/investigators

In institutional and other reform litigation, such as suits involving school systems, prisons, nursing homes and mental hospitals, special masters are asked to make findings of fact with regard to the defendant's compliance with orders of the court and other remedial decrees. Often such findings of fact require expert opinion about medical, mental health and penal practices of defendants obtained by the master. [FN67] Thus, as court monitors, these masters are required to find facts regarding defendant compliance, settle disputes over refinement and *19 amendment of remedial orders, and advise the court through their periodic reports and accountings. Some post trial masters monitoring compliance have functioned more as investigators than as experts or judges. Jack B. Weinstein, Improving Expert Testimony, 20 U.RICH.L.REV. 473, 490 (1982). In this investigatory role, masters may employ experts to advise them and the court through them, [FN68] or be experts themselves. [FN69]
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Where parties agree on the need for a monitor, provision for a monitor is usually included in a consent decree and thus is not made pursuant to Rule 53. However, the appointment of masters to monitor compliance with decrees often occurs because the defendant has been unwilling or unable to comply, and the appointment is opposed by the recalcitrant defendant. In such cases, special masters may be selected by the judge, without the approval of both parties.

Reviewing one such appointment, the Second Circuit recently discussed the court's inherent authority to appoint a monitor and the distinction between a monitor and a quasi-judicial special master appointed under former Rule 53 in the context of prison reform litigation. Ratifying the appointment of a monitoring body, the appeals court observed that unlike a special master, in the case before it, the monitor was not appointed to hold hearings, subpoena witnesses, take testimony, or rule upon evidence. Nor was the monitor to prepare or file reports to assist the court's determination of discrete issues of law or fact. And, its periodic, informal reports were not acted upon by the court nor were its factual findings entitled to deference. Instead, the monitoring reports served mainly to facilitate the city's awareness of its compliance with remedial directives Benjamin v. Fraser, 343 F.3d 35 (2d Cir.2003). [FN70] The court adopted "the sound proposition that, in evaluating the legal status of court-appointed agents, we are guided more by their function than by their title." Id.

In contrast, the United States Court of Appeals for the District of Columbia Circuit last year vacated the non-consensual reference of broad investigatory functions to a court monitor/special master appointed under the district court's inherent powers rather than Rule 53. Cobell v. Norton, 334 F.3d 1128 (DC Cir. 2003). After a finding that the United States Department of Interior had breached its fiduciary obligation to beneficiaries of Indian Trust Accounts, the district court had appointed a court monitor with the consent of the parties. The court later found certain defendants in civil contempt and reappointed the court monitor as a special master to monitor further compliance with the court's orders. The government objected to the appointment.

On appeal, the D.C. Circuit Court vacated the non-consensual appointment of the Master/Monitor pursuant to the court's inherent authority to review all of defendants' trust reform activities and report to the court. The monitor was expressly authorized by the district court to engage in ex parte communications, and defendants were directed to provide the master access to any offices or employees to gather information and to pay his hourly fees and expenses. "In short," the appellate court concluded, "the Monitor acted as an internal investigator, not unlike a departmental inspector General except that he reported not to the Secretary but to the district court." The Cobell court addressed the question whether a district court has inherent power to appoint a court monitor except with the consent of the parties. It found,

[I]t was surely impermissible to invest the Court Monitor with wide-ranging extrajudicial duties over the Government's objection. The Monitor's portfolio was truly extraordinary; Instead of resolving disputes brought to him by the parties, he became something like a party himself. The Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system. Id. at 11. [FN71]

Interestingly, the Committee Note to the proposed new Rule 53 acknowledges just such departures as permissible under revised Rule 53. It recognizes that "Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent.... Citation omitted. The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in the adversary system.” Committee Note at 174.

Thus, under the new Rule 53, the non-consensual appointment of a master to act as monitor would seem to be permissible, if the order of reference includes “investigation and enforcement duties” within its directives. Rule 53(b)(2)(A). Such a monitor would have residual authority to regulate proceedings before it and take all appropriate measurers to perform fairly and efficiently its assigned duties, unless expressly limited by the order. Rule 53(c). The order of reference for such a monitor-master might well define the circumstances -- if any -- in which ex parte communications with the parties or the court would be permissible and the standard of review or weight, if any, to be given to its conclusions and recommendations regarding compliance. Rule 53(b)(2). Contrary to the DC Appeals Court 2003 holding regarding inherent authority, the amended Rule seems to permit without consent of the parties, the use of ex parte communications by a compliance monitor carrying out investigatory duties when limited to appropriate circumstances stated in the order.

The D.C. Court of Appeals revisited Rule 53 issues again in the same case, quite recently. On September 14, 2004, the Court of Appeals held that a second Special Master's participation in a contempt proceeding which grew out of the underlying litigation was improper because he had was appointed to play an adjudicative role in the contempt proceedings and his impartiality or the
appearance of impartiality was impugned by his *ex parte* communications and participation as special master in the underlying litigation in which many of the condemners had also participated. As a result, the court held that he should have been recused from the contempt proceeding and his reports should be suppressed. In re Phillip A. Brooks No. 03-5047 (September 14, 2004). [FN72]

*21 Claims Administrators.

As discussed above, special masters have been appointed to provide case management and expertise in evaluating thousands of claims prior to trial, in an effort to facilitate settlement negotiations. [FN73] At the post liability stage, masters are also appointed to develop statistically sound, technically complex means of evaluating the damages of thousands of claimants to limited funds, such as the funds established in the Dalkon Shield and Manville asbestos cases. [FN74] Similarly, the Ninth Circuit Court of Appeals affirmed the award of damages to victims of human rights abuse in a jury trial in which recommendations of special master Sol Schreiber based on a statistically valid sample of claims were introduced and generally accepted by the jury. *Maximo Hilao v. Estate of Ferdinand Marcos*, 1996 U.S. App. Lexis 32974 (Dec. 17, 1996). [FN75]

Courts handling huge numbers of adjudicated claims have also used special masters to administer claims resolution procedures. For example, in *In Re: Holocaust Victim Assets Litigation*, CV 96-4849 (ERK) (E.D.N.Y. December 8, 2000) Judge Korman appointed Paul A. Volker, former Chairman of the Federal Reserve, and Michael Bradfield under Rule 53 to implement a claims resolution plan for the disposition of individual claims to some 4 million accounts in Swiss Banks.

IV. THE REGULATION OF TRADITIONAL MASTERS' JUDICIAL AND NON-JUDICIAL POWERS.

A. Selection of the Master

Former Rule 53 does not indicate how masters were to be chosen by courts, and thus courts have selected masters in various ways. Some judges simply select a master from among professional acquaintances, persons whose professional skills they admire and whose integrity and loyalty they trust. Other courts looked for relevant expertise and experience. For instance, where masters were expected to pass on evidence presented by the parties in formal hearings, and make recommended findings of fact, at any stage of litigation, judicial-like qualifications were often sought and usually found in retired judges, former magistrates, or experienced hearing masters with whom the judge was acquainted. Where courts have sought recognized experts in their fields to observe and make findings regarding scientific or technical facts, they rely less on their personal acquaintances and nominations from the parties, and more on referrals from other judges and scientific or technical professional bodies.

It was not necessary, under the old rule, for the court to hold a hearing before appointing a master. *Gray W v. Louisiana*, 601 F.2d 240 (5th Cir. 1979). Nevertheless, the more recent practice has been to involve the parties in some way — either by asking the parties to suggest candidates or to give them an opportunity to comment of candidates selected by the court. The new Rule 53 assures that the parties will be involved in selection by requiring the court to give the parties notice and an opportunity to be heard before a master is appointed. Rule 53(b)(1).

Further, new Rule 53(b) expressly provides that the parties may suggest candidates for appointment. Formerly, where scientific or technical expert assistance was needed to help the parties arrive at settlement, provide case management, investigate facts, hire experts, and evaluate claims, judges seemed more likely to permit parties to nominate candidates with particular skills. *E.g. BIEC Int'l., Inc. v. Global Steel Services, Ltd.* 791 F. Supp. 489 (E.D. Pa. 1992) (trade secrets determinations referred to Rule 53 master). In BIEC International, each party proposed 10 names of qualified persons to serve as master and the court selected a candidate named by both sides.

Although assuring notice to the parties that a special master will be appointed, the new Rule does not require that the parties either agree to the appointment or approve the selection of a particular person to be the master. In the past, particularly when making pre-trial appointments where settlement seemed possible, some judges have named one or several candidates for appointment and sought the parties’ approval.

The new Rule again assures party involvement in selection, as least where the master has potential bias or conflict of interest. Thus, in addition to notice, the new Rule 53(a)(2) requires the parties to give their consent before the court may appoint a master who does not meet the qualification standard applicable to judges under 28 U.S.C. section 455. That is, the new rule...
subjects masters to the same standards for disqualification as those applying to judges (28 U.S.C. section 455) and prohibits the appointment of a master with disqualifying relationships to the parties, counsel, the action or the court — unless the parties consent after the master has disclosure the potential grounds for disqualification in a written affidavit filed with the court. Amended Rule 53 (a)(2).

Conflict of Interest and Other Ethical Problems.

United States judges are constrained by a body of standards collectively known as judicial ethics which have a number of legal sources, including the Code of Conduct for United States Judges, federal disqualification statutes, financial disclosure requirements, and the judicial oath of office. See 1992 CODE OF CONDUCT. 28 U.S.C. ss 144 to 455 (1988); 5 U.S.C. app. 6 (1992); 1992 CODE OF CONDUCT, CANON 5c; BETH NOLAN, REPORT TO THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL: THE ROLE OF JUDICIAL ETHICS IN THE DISCIPLINE AND REMOVAL OF FEDERAL JUDGES (1992). It has not been clear which of these restrictions do, or should, apply to special masters. While it is appropriate to disqualify candidates from serving as masters where they cannot provide neutral, objective determinations, it may not be appropriate to apply all judicial cannons of ethics to special masters.

*23 When the ethics of masters have been challenged, some courts have reasoned that because masters are subject to control by the court, serve part-time and are needed for their expertise in particular subject matters, masters should not be held to the strict standards of impartiality that apply to judges. Morgan v. Kerrigan, 530 F.2d 401, 426 (1st Cir.), cert. denied, 426 U.S. 935 (1976). Other courts have concluded that because the “clearly erroneous” standard of review required by Rule 53, does not permit the district court plenary control over a master, the special master must be held to the same high standards applicable to the conduct of judges. [FN76] [FN1]. Copyright © 2004.


[FN4]. Cases involving such appointments of masters include Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D.Tax. 1990); In re “Agent Orange Litig.”, 94 F.R.D. 173 (E.D.N.Y.) (appointing master to rule on voluminous document discovery requests); Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 288 (E.D. Tex. 1985) (appointing master to profile the characteristics of claims of 1,000 member class for the jury in asbestos litigation); McLendon v. Continental Group, Inc., 749 F. Supp. 582, 612 (D.N.J. 1989) (appointing master to assist the parties in post liability settlement of damages due 5,000 ERISA claimants, finally agreed to be $415 million). See also A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS, WAYNE D. BRAZIL ET AL. EDS., (1985); Ronald E. McKinstry, Use of Special Masters in Major Complex Cases, in FEDERAL DISCOVERY IN COMPLEX CASES: ANTI-TRUST, SECURITIES AND ENERGY, (1980).


[FN6]. The committee that drafted new Rule 53 noted: “Present Rule 53 addresses only trial masters who hear trial testimony and report recommended findings.... But masters have come to be used increasingly for pretrial and post-trial purposes.... The proposed amendment is designed to reflect contemporary practice and establish a framework to regularize the practice.”

[FN7]. Id. at 172.

[FN8]. Where a pre-amendment reference either expressly provides for clearly erroneous weigh or at the time of the reference the masters findings would have been accorded clearly erroneous weight by operation of old Rule 53, it would seem to be unchanged by the new Rule 53, even as to findings made after the effective date of the amendment. For a thoughtful discussion of the effect of a statutory amendment's post-enactment effect on court appointed agents see Benjamin v. Fraser, 343 F.3d 35 (2d Cir. 2003) (statute providing that the court “may appoint” a special master found entirely prospective). Amended Rule 53 also provides that a court “may appoint a master” only in accordance with the new rule. In addition, the new rule provides that the order appointing a master may be amended at any time after notice and an opportunity to be heard. It may be, then, that an order pre-dating the new rule that is amended after the effective date of the new rule would have to comply with the requirements of amended Rule 53.

[FN9]. This paper is based, in part, on research conducted by the author for the Federal Judicial Center in 1992-93. The analysis, conclusions, and points of view are those of the author.

[FN10]. Section (a)(3) of Rule 53 recognizes the issue and states “In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.”

[FN11]. To the extent that Article III and the doctrine of separation of powers limits references under Rule 53(b), the parties cannot consent to legislative courts (or masters) that violate the separation of powers, though they may waive fairness objections. Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986) and see ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 4.5 (1989).


[FN13]. United States v. Raddatz, 447 U.S. 687 (1980)(appointment upheld where magistrate has no independent authority to enforce orders, and dispositive decisions on the law and the facts were reviewed do novo on the record). Special master appointments can be likened to the appointment of magistrate judges assigned many of the same functions -- deciding pre-trial, non-dispositive motions, trying civil cases with the consent of the parties, and recommending decisions on dispositive motions. Cases upholding the constitutionality of appointments for these purposes include Geras v. Lafayette Display Fixtures, 742 F.2d 1037, 1044-1045 (7th Cir. 1984); Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537, 544 (9th Cir. 1984); Caprera v. Jacobs. 790 F.2d 442, 444 (5th Cir. 1986), Cert. denied, 108 Sp. Ct. 331 (1987).

[FN14]. Former Rule 53(b) provided:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision

[FN15]. In a jury trial, the report and findings of a master appointed under old Rule 53 — but not the evidence upon which they are based -- were admissible as to the facts found. The report was regarded as evidence, to be read to the jury, subject to objections. Thus, parties objecting to the master's report in a jury trial were not entitled to discover the evidence upon which it is based, though much of it could be introduced independently for the jury's consideration. The master could not be examined at
trial. MANUAL OF COMPLEX LITIGATION § 21.52 (2nd Ed. 1985). Thus, unlike a court appointed expert, a special master may not be cross examined on his/her report. Yet, unlike other testimonial evidence which may be disbelieved, the findings of a master present prima facie evidence, which standing alone are sufficient to sustain a directed verdict.


[FN17]. It should be noted that the Court might have found a more limited reference to the master of non-dispositive, pre-trial or remedial matters, justified under Rule 53 in those circumstances

[FN18]. For example, in Stauble v. Warrob, 977 F.2d 690 (1st Cir. 1992) the First Circuit Court of Appeals ruling on a petition for a writ of mandamus reversed a judgment rendered on the basis of a report by a special master to whom the defendants had earlier objected. The Appeals Court found that it could not “forge an ‘exceptional condition’ test for cases of blended liability and damages...[T]he Constitution prohibits us from allowing the non-consensual reference of a fundamental issue of liability to an adjudicator who does not posses the attributes that Article III demands.” Distinguishing the delegation of authority over preparatory and remedy related issues, the court held that where the fundamental determinations of liability are not heard and determined by the district court, the appointment is not within the constitutional limitations that bound Rule 53. Thus the district court lacked authority to refer the case without a provision for de novo review of the master's report.

[FN19]. As noted, old Rule 53(b) required a showing of exceptional conditions to justify the appointment of a special master in non-jury cases.

[FN20]. After stating that the use of a trial master without party consent is abolished as to matters to be decided by a jury, the Committee Notes explains:

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. Committee Note at p. 171.


[FN22]. The Committee Note states, “This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference ‘shall be the exception and not the rule’ [as provided in the present Rule 53] is deleted, its meaning is embraced for this setting by the exceptional condition requirement.” The equity rules upon which the former Rule 53 was based permitted the appointment of trial masters in exceptional circumstances to make recommended findings of fact on the merits in non-jury trials which were subject to a “clearly erroneous” standard of review. Masters appointed to assume pre-trial and post-trial duties that cannot be undertaken by an available judge or magistrate, may hold evidentiary hearings and make recommended findings of fact under amended Rule 53.

[FN23]. For example, in Burlington Northern Railroad Company v. Department of Revenue, 934 F.2d 1064, 1070, 173 (9th Cir. 1991) the court found no exceptional circumstances to support Rule 53 reference of the entire case where reference was made “in the interest of judicial economy” and the master's reported recommendations were affirmed in a one sentence order. Again, in In re ARMCO, 770 F.2d 103 (8th Cir. 1985) circumstances sufficient to support a Rule 53 appointment of pre-trial duties, including disposition of summary judgment and dismissal motions in an environmental suit, were held not sufficient to support master's authority to preside at trial. In Prudential Insurance Co. of American v. United States Gypsum Co., 1993 U.S. App. Lexis 6605 (March 31, 1993) the Third Circuit Court of Appeals granted a mandamus in an asbestosis case withdrawing the appointment of a master who was to rule on nondispositive discovery motions but who was also to hear dispositive legal motions (motions to dismiss and summary judgment motions) and report to the court “all relevant facts and conclusions of law.” The appellate court relied strongly on LaBuy v. Howe, in reversing the reference.
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[FN25]. Similarly, where scientific medical evidence was anticipated in a trial on the merits of an injunctive action against a prison, the court appointed a special master to aid the court in evaluating the quality of medical services and conduct a medical survey of all correctional institutions. Costello v. Wainwright, 387 F. Supp. 324 (M.D.Fla. 1973).

[FN26]. Failure to provide de novo review of the written record filed by a master who had held thirty nine days of hearings on the issue of liability, was the basis for the reversal of a district court judgment and a remand for retrial in a protracted First Circuit case. Stauble v. Warrob, 977 F.2d 690 (1st Cir. 1993).

[FN27]. American Honda Motor Co., Inc. v. Vickers Motors, Inc., 64 F.R.D. 118 (W.D. Tenn. 1974). See also Stone v. City and County of San Francisco, 968 F.2d 850 (9th cir. 1992)(defendants failure to object to master's recommended findings or request an oral hearing held to waive its right to object to the findings on appeal) and Golden Door Jewelry v. Lloyds Underwriters, 8 F.3d 760 (11th Cir. 1993).


[FN29]. Chicago Hous. Auth. v. Austin, 511 F.2d 82 (7th Cir. 1975).

[FN30]. Richmond, 80 F.3d 895 (4th Cir. 1996). 5A Moore Federal P. 53.14. Under the old rule in non-jury trials, master's findings had to be accepted by the district court unless they are clearly erroneous (Rule 53(e)(2)). However, if the parties could agree to accept the masters findings as final, only questions of law raised by the report may be considered by the court. Id. 5A James W. Moore et al., Moore's Federal P. 5314(4) at 53 141 (2nd Ed. 1992). Presumably, the court, too, on its own motion, may review the evidence supporting the master's findings.


[FN32]. E.g. Stauble v. Warrob, 977 F.2d 690 (1st Cir. 1992) (special master appointment reversed on an appeal of the judgment on grounds that trial court exercised insufficient review over the master's findings in a commercial case.); Liptak v. United States, 748 F.2d 1254, 1257 (8th Cir. 1984) (reference to special master found not supported by exceptional circumstances upon review of appeal from summary judgment).


[FN34]. See also In re Fibreboard Corp. 893 F.2d 706, 707 (5th Cir. 1990) (“We are to issue the writ of mandamus only to remedy a clear usurpation of power or abuse of discretion when no other adequate means of obtaining relief is available.” Citations omitted.)

[FN35]. Id. and United States v. Shirley, 884 F.2d 1130, 1135 (9th Cir. 1989); Key v. Wise, 629 F.2d 1049, 1054-55 (5th Cir. 1980), cert. denied, 454 U.S. 1103 (1981).

[FN36]. See 78 COLUM L. REV. 829-30 (1978) observing that remedial masters reports should not be reviewed on clearly erroneous standard because of the absence of procedural safeguards surrounding master's post decretal fact finding.
[FN37]. The Supreme Court elaborated on this concept in *Kimberly v. Arms*, in 1889, an equity action in which the parties had agreed and the court had ordered that a master would be appointed to “hear the evidence and decide all the issues between the parties.” *Kimberly v. Arms*, 129 U.S. 512, 524 (1889). The Supreme Court found that if the parties had not consented to the reference, general equity rules would have precluded the court from referring the entire decision to a master. The idea that the “litigants may waive their personal right to have an Article III judge preside over a civil trial,” was more recently confirmed in *Peretz v. United States*. *Peretz v. United States*, 111 S. Ct. 2661, 2559 (1991). However, where the parties consent to the reference, the master’s determinations must be given the weight to which the parties have stipulated and may not be set aside and disregarded at the discretion of the court. Thus, the Court has recognized the tradition, understood by Congress, that parties can freely consent to refer cases to non-Article III officials for decision.

[FN38]. 334 F3d 1128 (July 18, 2003)


[FN41]. The Notes of the Advisory Committee on the 1983 amendment to Rule 53 regarding magistrates state that “A magistrate serving as a special master under 28 U.S.C. s 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.” The Manual for Complex Litigation, Second, states that “With consent of the parties, the court may designate a magistrate to act as special master in any civil case without regard to the normal limitations of Rule 53.” See MANUAL OF COMPLEX LITIGATION, SECOND, 21.52 (1985).

[FN42]. Section 636(b)(2) is the only section of the Magistrates Act that expressly authorizes the appointment of magistrates as “special masters,” and, as stated above, it requires either “exceptional conditions” or consent of the parties for such appointments. However, several other sections permit courts to assign to magistrates duties that Rule 53 special masters often are asked to perform, without regard to the consent or “exceptional conditions” requirements. Thus, apart from their appointment as special masters, under 8 U.S.C. § 636(b)(1)(A) magistrates may also be assigned, without consent of the parties, to hear and determine any pending pretrial matter, except certain enumerated motions, (i.e. ones which dispose of the merits of the case). and their determinations will be reviewed on a clearly erroneous standard. A general provision, 28 U.S.C. § 636(b)(3), permits magistrates to perform “such additional duties” as are not inconsistent with the laws or Constitution of the United States, with or without party consent. The legislative history of the latter provision indicates that it was intended to be liberally construed. It has been interpreted broadly by the Supreme Court in *Peretz v. United States*, 111 S. Ct. 2661 (1991).

[FN43]. Indeed, the concerns that may have lead the Supreme Court to restrictively interpret Rule 53 in *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) — inexperienced, ad hoc masters, cost to the parties and delay -- may be obviated when the tasks to be performed are assigned to an experienced, full-time, government salaried, accountable U.S. magistrate. Nevertheless, because, like federal district court judges, federal magistrate judges also have heavy caseloads, are generalists and are not skilled in mediation, have little experience in the use of informal procedures and lack substantive expertise, special masters continue to be appointed to handle various aspects of complex litigation.

[FN44]. Against this background, the District of Columbia Circuit Court of Appeals recently vacated the appointment of a special masters on grounds that his appointment was outside the boundaries of the traditional role of federal courts. *Cobell v. Norton*, 334 F.3d 1128 D.C.Cir. 2003) discussed below.

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[FN48]. For a discussion of the legal history of the authority to the appointment masters to supervise discovery see Wayne D. Brazil, Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule, in WAYNE D. BRAZIL, GEOFFREY HAZARD, JR. AND PAUL R. RICE, MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS, 305 (1983).

[FN49]. But See e.g. Caldwell Indus., Inc. v. New York Hospital-Cornell Medical Center, 1993 U.S. Dist. Lexis 2263 n.1 (Feb. 26, 1993) (court denied motion for appointment of master where it found parties' counsel had demonstrated that they were quite capable of explaining difficult medical and scientific materials and theories to an audience unfamiliar with such subjects).

[FN50]. The determination of these factors in a Rule 104(a) hearing may take a substantial amount of the judge's already scarce time and require the judge to become deeply involved in the science underlying the evidence offered. Bourjaily v. United States, 483 U.S. 171 (1987) (offering party must prove preliminary facts necessary for admission of evidence). Similar issues raised by a motion for summary judgment in a product liability case, required a district court to hold five days of hearings and considered extensive post hearing submissions in order to determine the validity of epidemiological data and methods upon which an expert was willing to give his opinion regarding causation. Deluca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3rd Cir. 1990). (Hearings held on motion for summary judgment.)

[FN51]. The National Childhood Vaccine Injury Act permits special masters to fill similar gate-keeping functions applying the Daubert standard.


[FN53]. Id.


[FN55]. Encouraged by the 1983 amendments to Rule 16(a) to facilitate settlement of the case., federal judges are permitted to “take action with respect to ... extraordinary procedures to resolve disputes.” Fed.R.Civ.Proc. 16(a) and (c).

[FN56]. Some courts that also find scientific expertise important to settlement negotiations have appointed experts under Federal Rules of Evidence 706 to advise the parties and the court on settlements and the framing of consent decrees. Such appointments have been rare, however, such a practice is approved in the Report of the Judicial Conference on the 2003 amendments See e.g. San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 34 (N.D.Cal. 1983) (appointment of a “settlement team” of experts pursuant to Rule 706, nominated by the parties and the court to draft consent decrees); cf. Gates v. United States,
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SPECIAL MASTERS IN THE FEDERAL COURTS UNDER..., SM051 ALI-ABA 1

707 F.2d 1141 (10th Cir. 1983) (appointment of a panel of experts under Rule 706 to assist the trial court in understanding complex neurological and epidemiological issues in a swine flu vaccine case).


[FN62]. Although the rule imposes some unalterable requirements on the selection of masters to act as mediators, other selection provisions are default rules in that they can be modified by consent of the parties and approval of the court. For example, special masters are made subject to the ethical and disqualification standards applied to judges contained in 28 U.S.C. section 455, “unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.” New Rule 53 section (a)(2). Similarly, objections to the master's findings of fact must be reviewed do novo by the court, unless the parties stipulate otherwise with the courts consent that the master's findings will be reviewed for clear error or will be final. New Rule 53 (g)(3)(A and B). The master's rulings on procedural matters are to be reviewed only for abuse of discretion. See generally, Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. REV. 949,977 (2000); Margaret G. Farrell, The Function and Legitimacy of Special Masters, 2 WIDENER LAW SYMPOSIUM JOURNAL 236, 289 - 297. (1997).

[FN63]. Committee Notes, at 173 (“[C]ourts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice.”) citing Local 28, Sheet Metal Workers' Internat. Assn. V. EEOC, 478 U.S. 421, 481-482 (1986).

[FN64]. Rule 53 authority has also been used to appoint masters who are an expert in the subject matter of litigation, to act as a neutral advisor to the court during the liability stage of litigation. For example, in United States v. Conservation Chem. Co., 106 F.R.D. 210, 220 (W.D. Mo. 1985) an expert on environmental law was appointed master in a suit to enforce mandatory cleanup of chemical waste disposal site so as to prepare case for trial of liability issues. The court found “[R]ule [53] is broad enough to allow appointment of expert advisors.” Hart v. Community Sch. Bd. Of Brooklyn, N.Y., 383 F. Supp. 699, 764 (S.D.N.Y. 1974) (court appointed expert master to serve investigator and consultative function and advise court in technical areas of
desegregation case so court could approve an effective remedial order). *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 741-44 (6th Cir. 1979); *Pennhurst, N.Y. v. Carey and Ruiz v. Estelle* 679 F.2d 1172 (5th Cir. 1982).


[FN69]. In addition, some post-trial masters are expressly authorized to retain experts and to make informal findings of fact through viewing evidence and *ex parte* interviews. Masters who were appointed to monitor compliance with remedial decrees, although often experts themselves, commonly employed other experts to evaluate the defendants' performance of remedial obligations in specialized areas. For instance, in a suit brought to reform the Puerto Rican prison system, experts were hired by the master with court approval to evaluate compliance with constitutionally required safe and sanitary physical conditions, medical treatment and protection. *Feliciano v. Barcelo*, 672 F. Supp. 591 (D.C.P.R. 1986).

[FN70]. The consequence of the Court of Appeals ruling was that the monitoring body was not limited by the terms of the prison act as it would have been had the court found a Rule 53 appointment.

[FN71]. The appeals court qualified its holding, however, by stating, “When the parties consent to such an arrangement, we have no occasion to inject ourselves into their affairs. When a party has for a non-frivolous reason denied its consent, however, the district court must confine itself (and its agents) to its accustomed judicial role.” Id.

[FN72]. It should be noted that in the criminal contempt proceeding, Special Master Balaran was acting in an adjudicatory capacity at least with regard to the making of a record upon which the merits of the plaintiffs show cause order would be determined by the court. The government argued that he should have been recused from the contempt proceedings under section 455(b)(1) because his ex parte communications with the parties in the trust fund case would taint his neutrality in the contempt proceedings. The appeals court applied section 455 to the special master appointment under Rule 53 (pre-amendment) just as it had in case involving the court's inherent authority. The court reasoned that application of the standard did not depend on whether the master's findings would be given clearly erroneous weight or be reviewed de novo.

Balaran's ex parte communications with the judge in the trust fund proceeding was approved by the court of appeals on the understanding that it went to the administration and organization of the matters before the master, not to the substantive findings of the master. However, the appeals court's reasoning that Balaran's personal knowledge of ex parte information in the underlying proceeding presented an opportunity for “selection bias” i.e. omission of information from the contempt proceeding record would seem to apply to a proceeding in the underlying litigation in which the special master played an adjudicatory role.
[FN73]. Jenkins v. Raymark Indus. 109 F.R.D. 269, 272 (E.D. Tex. 1985) (Francis McGovern appointed special master to profile the claims characteristics of class representatives based on evaluation of medical evidence provided by expert consultants and sound questionnaire methodologies, sampling techniques and statistical analysis). Similarly, t


[FN76]. Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988) (Model Code of Judicial Conduct applied to special master. “Insofar as special masters perform duties functionally equivalent to those performed by a judge, they must be held to the same standards as judges for purposes of disqualification.”); Belfiore v. N.Y. Times Co., 826 F.2d 177, 185 (2d Cir. 1987), cert. denied, 484 U.S. 1067 (1988). And see In re Joint E. & S. Districts Asbestos Litigation, 737 F. Supp. 735, 739 (E. & S.D.N.Y. 1990) (in general, a special master or referee should be considered a judge for purposes of judicial ethics rules). See also In re Gilbert, 276 U.S. 6 (1928) (special masters assume the duties and obligations of a judicial officer).