THE FUNCTION AND LEGITIMACY OF SPECIAL MASTERS

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I. INTRODUCTION

We are all aware that mass production and modern technology have produced a new body of substantive law to assign financial responsibility for the harm they cause — for example, strict products liability laws, implied warranties, and environmental regulation. But, technological progress has also spawned new legal procedures to process the claims it mass produces.1 Modern procedural mechanisms have been developed both to respond to those claims and to use new technology in the effort. These mechanisms have changed, not just the way we seek justice, but her face as well.

Yesterday’s injured claimants brought their pleas to a single, neutral, passive, generalist judge, and sought an equitable result. Today, such litigants face the consolidation of their claims with hundreds or thousands of others in large, complex, multi-district litigation. They confront computer generated questionnaires, video-taped depositions, mass mailings and public notices to countless fellow class members about legal proceedings far from home. They face computerized dockets and filing systems, squads of lawyers jockeying for position, mini-trials and summary trials to foster settlements, and unintelligible scientific testimony. Instead of a single, visible judge, these mass produced plaintiffs encounter a variety of parajudicials, court clerks, law clerks, magistrates, referees, auditors, mediators and sometimes arbitrators. Each performs a part of the adjudication once accomplished largely by a lone judge. These changes obscure the face of justice and make it distant, impersonal and fragmented.

This Article is about those changes. It describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of special masters under Rule 53(b) of the Federal Rules of Civil Procedure.2 Moreover, it evaluates the

1. See, e.g., Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), cert. granted sub nom. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 854 ((No. 96-270) Nov. 2, 1996). The Supreme Court is considering the applicability of Rule 23 class action requirements in a suit brought by millions of claimants against twenty major asbestos manufacturers, which settled for $1.3 billion. Linda Greenhouse, High Court Agrees to Hear Two Cases on Asbestos Exposure, N.Y. TIMES, Nov. 2, 1996, at A8.

2. This Article is based, in part, upon personal interviews with masters and judges in the cases discussed in Part IV and others that were conducted by the author for the Federal Judicial Center. See Margaret G. Farrell, The Role of Special Masters Appointed Under Rule 53(b)(1994 Draft) [hereinafter Farrell, 1994 Draft] (on file with the Widener Law Symposium Journal and the Federal Judicial Center, Washington, D.C.). The views expressed herein are those of the author and not necessarily the Federal Judicial Center. See also MARGARET G. FARRELL, THE FEDERAL JUDICIAL CENTER, SPECIAL MASTERS, MANUAL ON SCIENTIFIC EVIDENCE (1994) [hereinafter FARRELL, SPECIAL MASTERS]; Margaret G. Farrell, Coping with Scientific Evidence, The Role of Special Masters, 43 EMory L.J. 927 (1994) [hereinafter Farrell,
ability of special masters to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of special master practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution.

Not surprisingly, special masters do not function today as they did before technology made new demands upon them. The actual practice of modern special masters differs dramatically from the hearing masters anticipated when Rule 53 of the Federal Rules of Civil Procedure ("Rule 53") was enacted in 1938, and is similar in some respects to that of administrative agencies. Increasingly, courts are asked to entertain non-traditional claims, such as those seeking to impose the social costs of industrial production on its consumers, to reform public institutions and to manage huge anti-trust and financial litigation. Some would argue these tasks are better performed by legislatures, because the relief sought is often prospective and affects large numbers of people much like a regulation or legislative rule. To carry out many of these assignments, courts need flexibility, expertise, informality, investigative authority, administrative capacity, and time, which are qualities usually associated with administrative agencies. Some of these capacities have been provided to courts through the appointment of special masters. Without them, courts would be required to perform their quasi-legislative role in mass toxic tort and other complex litigation without the assistance that legislatures have created in the form of administrative agencies.

Today, masters are appointed to play a number of different roles. They serve as surrogate judge, facilitator, mediator, monitor, investigator and claims processor. In playing these roles, masters perform a variety of traditional, passive judicial functions. They rule on discovery motions, evaluate the testimony of scientific experts, issue subpoenas, rule on the admissibility of evidence, make recommended findings of fact, and propose remedial orders. However, they may also take an activist role and use ad hoc informal procedures, such as information requests, interrogation of the parties, round table meetings, shuttle diplomacy, on-site fact gathering, telephone interviews, meetings with experts, commissioning studies —

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Coping with Scientific Evidence]. Unable, because of the lack of data, to conduct a quantitative study of the use of masters, the Federal Judicial study was based upon anecdotal evidence of their use obtained through personal interviews with experienced masters and the judges who appointed them.

3. For the purposes of this Article, the term "toxic tort litigation" means legal claims, based upon common law, statutory or administratively-imposed duties, seeking compensation for damage to personal and property interests caused by exposure to substances harmful to human health or the environment. See Jean MacChiaroli Eggen, Toxic Torts in a Nutshell 2 (1995).
sometimes, engaging in activities one would be surprised to find a judge pursuing. The fact that the modern use of this historical procedural device deviates from the archetype of our traditional, adversary civil justice system poses ethical and other problems discussed below. Yet, through these flexible and informal procedures, special masters are able to lighten the managerial burdens placed on courts by mass tort and other complex litigation, while restoring some of the personal sensitivity to injured claimants that has characterized our justice system in the past.

Although masters were intended to make complicated, massive tort litigation more efficient and fair, it has been charged that they do neither. Instead, it is argued they cause delay, increase the cost of litigation and jeopardize its impartiality. Critics claim that the continued use of masters, as described in this Article, possesses a trade-off between efficiency and fairness — masters can be efficient only to the extent that we relax requirements of fairness. On what, then, can we base the legitimacy of their use? This Article argues that at bottom, the legitimacy of special masters lies in their compliance with the structural and fairness values underlying Article III.

Part II of the Article describes the special nature of toxic tort litigation and the procedural challenges it presents. Part III sets out the attributes of special masters and the sources of legal authority for their appointments, particularly Federal Rule of Civil Procedure 53(b). Part IV discusses cases in which masters were appointed to perform different functions at various stages of litigation — discovery, case management, fact-finding, settlement and remedial functions. Their performance is described in terms of the primary roles the masters assumed in carrying out their appointments. Part V explores ethical issues presented by the use of masters, including their selection, compensation, \textit{ex parte} communications and conflicts of interest. Finding special masters a valuable tool for contemporary courts, Part VI explores the constitutionality of their modern incarnation.

The Article concludes that masters should be appointed to put a more intimate face on mass justice and to perfect procedural reforms that better use and cope with technology. In many of their roles, masters function like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts. Like administrative agencies, they are justified by their expertise, efficiency and availability. Yet, answerable only to the judges who appoint them, special masters are not bound by an Administrative Procedures Act and are not accountable to the electorate through either the legislative or executive branches. They lack the longevity of agencies and leave no public law legacy in the form of regulations or precedent. Rather, the legitimacy of the use of special masters, as it is described in this Article, lies in their embodiment of the efficiency and fairness values that are part of the jurisprudence of Article III of the United States Constitution, and their ability to humanize modern legal process. The
Article recommends that special master practice be allowed to evolve, unrestrained by rigid limitations on the process they use. In doing so, we can rely on the supervision, discretion and integrity of the district court judges with whom they work, as well as review by the courts of appeals, and the rigors of the adversarial process to curb the potential for abuse.

II. THE SPECIAL DEMANDS OF TOXIC TORT LITIGATION

As new drugs, medical devices, and other consumer products are mass produced, their use causes harm as well as good, and their manufacture releases noxious substances into the environment. Increasingly, large numbers of individuals have sought to recover compensation for personal injuries caused, or likely to be caused, by products such as silicone breast implants, DES, asbestos, the Dalkon Shield, Agent Orange and exposure to toxic wastes—substances claimed to pose an unreasonable risk of such harm. Claims of liability, filed in state and federal courts, are based upon common law tort doctrines of negligence and strict product liability, contract actions for breach of express warranties and implied warranties of merchantability or fitness, and statutory and regulatory obligations such as those imposed by OSHA. The evolution of tort law, permitting recovery against manufacturers of harmful products, has been described by some observers as the result of industrialization, mass economic relationships, national markets and multi-media advertising. The cost of injuries that result from the manufacture or use of new products is spread among all its consumers when legal liability is imposed on producers. These social costs become part of the cost of production and are passed along to consumers as part of the price of the product. The role of tort law in imposing the costs of injuries brought about by industrialization on consumers, rather than permitting allocation of such losses by contract or

5. Restatement (Second) of Torts § 402A (1965).
7. Id. § 2-315.
legislation, has been decried by some and applauded by others. Former Dean Guido Calabresi, and other legal scholars, find the tort allocation of loss economically justified, while other commentators criticize it as an involuntary tax imposed by coercion. Whether it is good social policy or not, the evolution of substantive law and consequent growth of toxic tort litigation has challenged courts to develop more efficient procedures to adjudicate the complex issues and massive information such litigation involves.

In other kinds of civil litigation, federal judges seem increasingly willing to appoint special masters under Rule 53 to assist them in dealing with large, complex cases, and specialized information, by performing a wide variety of tasks. Thus, special masters assist judges by: providing pretrial administration and case management; making recommendations or rulings.

10. Compare Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis 69 (1970) with Peter W. Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277, 278, 290 (1985) (arguing that some public risk is good for the public health and safety, and, therefore, worth the cost). See also George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1525 (1987) (arguing that expanded tort liability was intended as a means of providing insurance to individuals, especially the poor, who have not purchased or cannot purchase insurance themselves).

11. The tasks assigned to masters can be classified according to the stage of litigation in which they are performed and with reference to their purposes: the pretrial, trial, and remedial stage. See United States v. Conservation Chem. Co., 106 F.R.D. 210, 216 (W.D. Mo. 1985); Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. Ill. L. Rev. 269, 301 (1991); see also Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. Pa. L. Rev. 1901, 1916 (1989) (arguing that the social costs of adding personnel such as judges and support staff are smaller than the social costs of frustrating important civil and commercial rights by using procedures to obstruct access to the courts).

In order to determine how Rule 53 special masters have been able to accomplish the purposes for which they are appointed, the Federal Judicial Center undertook a study of a dozen cases in which masters had apparently been able to carry out their assignments effectively. Farrell, 1994 Draft, supra note 2, at 3.

12. To some extent, the stage of litigation and type of function performed overlap. For instance, masters appointed to assist in discovery are appointed necessarily during the pretrial stage of litigation. However, the categories are not coterminous. For instance, a court may appoint settlement or mediation masters during the pretrial stage to facilitate a settlement of the merits or during the post-trial stage to facilitate a settlement regarding claims distribution or the terms of an injunctive decree.

Although masters are appointed to perform case management functions, see, e.g., In re Ohio Asbestos Litig., No. 83-AL, OAL Order No. 6 (N.D. Ohio Dec. 16, 1983), supervision of complex litigation ordinarily should be exercised directly by the judge, even when discovery and other pretrial tasks have been referred to a master. Manual for Complex Litigation, Second §§ 20.13, 20.14 (1985).
on discovery issues;\textsuperscript{13} recommending findings of fact and conclusions of law on the merits;\textsuperscript{14} promoting the joint stipulation of facts;\textsuperscript{15} facilitating settlement negotiations between the parties;\textsuperscript{16} framing remedial orders;\textsuperscript{17} distributing awards from closed judgment funds;\textsuperscript{18} and monitoring the implementa-


16. See, e.g., MANUAL FOR COMPLEX LITIGATION, supra note 12, § 23.12 ("Masters and Experts: Persons outside the judicial system with expertise either in the subject matter of the litigation or in techniques of mediation may be called upon for assistance in the settlement process, either on an informal basis or as special masters under Fed. R. Civ. P. 53. The court should select someone who is respected and trusted by the parties, and the parties should agree on payment of compensation and reimbursement . . ."). See also Thelton E. Henderson, Settlement Masters, in ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 233 (Erika S. Fine ed., 1987) [hereinafter ADR AND THE COURTS]; John W. Cooley, Query: Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?, 68 JUDICATURE 59, 60 (1984); WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 41-53 (1988).


tion of injunctive orders.\textsuperscript{19} In the absence of a master, these are tasks that either the judges themselves would have performed or that would not have been performed at all. Unlike judges, masters rarely perform their assigned tasks through formal evidentiary hearings. Instead, they accomplish their goals through informal proceedings such as round table discussions, conference calls, personal interviews, and correspondence with the parties. Moreover, unlike judges, special masters are sometimes appointed to use their own specialized expertise to address complicated scientific and technological issues or to handle massive amounts of information.\textsuperscript{20}

Several characteristics of toxic tort litigation have challenged the ability of our civil justice system to provide efficient and fair resolution of the substantive issues it presents; thereby, making such litigation particularly suitable for the appointment of special masters. First, proving actual injury is often difficult in toxic tort claims. Claimants may seek redress not only for past injury, but for injuries that have not yet occurred. Exposure to a hazardous substance often takes place over a period of time, but its effects may be latent, and sometimes do not manifest themselves at all at the time of suit. For example, plaintiffs who have contracted asbestosis may claim damages for the future injury to their health likely to result from the disease. In addition, those persons who have not yet become ill, may sue for the increased risk of contracting the disease. Alternatively, they may seek

\textsuperscript{19. See Williams v. Lane, 851 F.2d 867, 884 (7th Cir. 1988) (holding that continued failure to comply with the court order justified appointment of a master to monitor compliance with decree ordering correction of prison conditions); Ruiz v. Estelle, 679 F.2d 1115, 1159-63 (5th Cir.) (appointing master to oversee compliance with the injunctive order correcting prison conditions), \textit{amended in part, vacated in part}, 688 F.2d 266 (5th Cir. 1982); National Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 542 (9th Cir. 1987) (holding, “the prospective of noncompliance is an exceptional condition that justifies reference to a master”); Halderman v. Pennhurst States Sch. Hosp., 612 F.2d 84 (3d Cir. 1979) (appointing master to implement complex equitable decrees concerning individualized treatment for mentally retarded inmates in mental retardation facility), \textit{rev'd on other grounds}, 465 U.S. 89 (1984); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 960 (2d Cir. 1983) (appointing master to supervise compliance with consent order in class action suit against Willowbrook Center for mentally retarded persons); Taylor v. Perini, 413 F. Supp. 189, 193 (N.D. Ohio 1976) (appointing master to supervise compliance with order correcting civil rights violations in prison); Walker v. United States Dep't of Hous. & Urban Dev., 734 F. Supp. 1231, 1241 (N.D. Tex. 1989) (master appointed to monitor compliance with housing suit consent decree). See generally Special Project, \textit{supra} note 14, at 821-28; Vincent M. Nathan, \textit{The Use of Masters in Institutional Reform Litigation}, 10 \textit{Toledo L. Rev.} 418, 429-30 (1979) (holding that courts may use masters to affect compliance with decrees or orders); MANUAL FOR COMPLEX LITIGATION, \textit{supra} note 12, § 21.52, at 101 n.167.

\textsuperscript{20. Farrell, \textit{Coping with Scientific Evidence}, \textit{supra} note 2, at 927."}
medical monitoring and damages for emotional distress.\textsuperscript{21} Evidence to support these claims for future injury often require complex probability determinations, epidemiological studies, statistical analysis and medical evidence.

Second, liability in toxic tort litigation sometimes turns on difficult issues of medical causation, as discussed in this Symposium by Dr. Jack W. Snyder.\textsuperscript{22} Our understanding of legal causation has progressed from a perception of Newtonian causal chains, to a recognition of causation as the complex relationships between a multitude of conditions that are associated within a statistically significant degree of probability.\textsuperscript{23} Legal realists have come to view proximate cause as a legal construct that selects from among a number of probabilistic causes-in-fact, a particular cause for the purpose of imposing legal liability and financial responsibility.\textsuperscript{24} The law's incorporation of these insights has been problematic, producing a heated debate about the use of scientific expert testimony in toxic tort litigation to prove legal causation.\textsuperscript{25}

The subject was recently addressed by the Supreme Court in a product liability case, \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{26} In \textit{Daubert}, two children born with limb deformities sued the manufacturer of Bendectin, an anti-nausea drug, alleging that their mother's ingestion of the drug caused their birth defects.\textsuperscript{27} Defending a motion for summary judgment, the plaintiffs asserted that causation was a disputed issue of fact that should be tried by the jury. In support, plaintiffs submitted the affidavits of eight experts who had reviewed animal, cellular, chemical and reanalyzed

\begin{itemize}
  \item See, \textit{e.g.}, Peter W. Huber, \textit{Galileo's Revenge: Junk Science in the Courtroom} (1991).
  \item 509 U.S. 579 (1993).
  \item Id. at 580.
\end{itemize}
epidemiological studies and concluded that Bendectin can cause birth defects.\textsuperscript{28} One expert concluded that it was the specific cause of plaintiffs' injuries. The district court rejected the plaintiffs' studies based upon animal, cellular, and chemical studies, finding that causation may be shown only through reliance upon epidemiological evidence, and rejected plaintiffs' reanalyzed epidemiological studies because they had not been published in peer reviewed journals.\textsuperscript{29} The Ninth Circuit Court of Appeals affirmed the lower court on the ground that expert testimony regarding causation will be admitted only when it is "generally accepted" as reliable by the relevant scientific community.\textsuperscript{30}

The Supreme Court reversed and remanded, requiring only that the admission of expert opinion testimony under Federal Rule of Evidence 702 ("Rule 702") be based upon principles and methodologies that are scientifically valid, i.e. knowledge that is falsifiable, scrutinized by peers, based upon known and controlled error rates and accepted to a particular degree by a relevant scientific community.\textsuperscript{31} The application of the \textit{Daubert} standard for the admission of scientific expert opinion presents an additional procedural challenge to be met in toxic tort litigation.\textsuperscript{32}

Another common characteristic of toxic tort litigation is that the harms caused by toxic substances are widespread geographically. The national marketing of products such as drugs, asbestos, and silicone breast implants produces effects that are felt by people far from the site of manufacture, who have no relationship to each other, or with a single community, and often have no contractual relationship with the producer. Given far reaching long arm statutes, national manufacturers are subject to suit anywhere they do business and, therefore, toxic tort injuries can generate the filing of legal claims in widely separated state and federal courts simultaneously. Such multiple filings require duplicative efforts in discovery and briefing, and result in burdens on defendants, repetitive evidentiary submissions, findings of fact and redundant or conflicting rules of law. The judicial panel on multi-district litigation has authority to transfer to a single district court suits

\textsuperscript{28} \textit{Id.} at 580-83.
\textsuperscript{30} \textit{Daubert v. Merrell Dow Pharms. Inc.}, 951 F.2d 1128, 1129-30 (9th Cir. 1991) (citing \textit{Frye v. United States}, 293 F. 1013, 1014 (D.C. Cir. 1923)).
\textsuperscript{32} \textit{See} Margaret G. Farrell, \textit{Experts Testify on Expert Testimony}, in \textit{CIVIL JUSTICE REFORM} 213, 215-16 (Larry Kramer & Linda Silberman eds., 1996) (recognizing that \textit{Daubert} has created a need for new procedures and after \textit{Daubert}, the admissibility of scientific testimony must be established before trial at Rule 104(a) hearings).
filed in different federal district courts that involve common issues for pretrial proceedings. As discussed in this Symposium by Professor Francis McGovern, the purpose of the transfer is to promote efficient discovery and case management, where thousands of similar claims are made against the same defendants.

Finally, the number of claimants is often large and their identities unknown. Rule 23 of the Federal Rules of Civil Procedure permits class action law suits on behalf of persons whose claims involve common questions of law or fact. Thus, the rule permits the aggregation of hundreds and thousands of claims of present and future victims for disposition in a single proceeding. The rule requires that class members be notified of the action and be permitted to opt out of any negotiated settlement.

In sum, these characteristics of toxic tort litigation have demanded that courts develop new procedural tools to handle indeterminate parties, massive numbers of claims, difficult issues of causation, staggering amounts of information, multimillion dollar recoveries, and retrospective and prospective remedies. The use of special masters is one such tool.

III. THE AUTHORITY TO APPOINT SPECIAL MASTERS

In our adversarial civil justice system, the judge is a passive generalist, who receives evidence and hears argument only from the parties, applies legal rules and principles, and awards victory to one side or the other. The appointment of special masters can be said to substitute an expert decision-maker for the generalist judge and divide responsibility for fact-finding from adjudication. Often the appointment permits judicial agents to take a more active, investigatory role in acquiring information about the dispute. To the extent this is true, special master appointments depart from our traditional adversary paradigm. However, Rule 53 provides courts with a means to obtain the expertise, time and flexibility necessary to handle their modern caseloads and fashion procedures that meet the idiosyncratic requirements of particular cases, while at the same time allowing generalist judges to exercise ultimate decision-making authority.

35. FED. R. CIV. P. 23(a)(1).
Rule 53(b) is one of several sources of legal authority discussed below that allows federal judges to delegate certain judicial responsibilities to assistants over the objection of a party. Other sources include the consent of the parties; the court's inherent powers; and legislation providing for the appointment of magistrates as masters.

37. See, e.g., Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1864) (upholding reference to a magistrate where the parties had agreed to a reference, stipulating that the referee's report was to have the "same force and effect as a judgment of the court."); Kimberly v. Arms, 129 U.S. 512, 524 (1889); Peretz v. United States, 501 U.S. 923, 933 (1991). See also Mobil Oil Corp. v. Altrech Indus., 117 F.R.D. 650 (C.D. Cal. 1987). Appointments based upon the consent of the litigants should not be subject to the same requirements that apply to references made without their consent. See, e.g., Peter G. McCabe, The Federal Magistrate Act of 1979, 16 HARV. J. ON LEGIS. 343, 374-75 (1979); Linda J. Silberman, Masters and Magistrates Part II: The American Analog, 50 N.Y.U. L. REV. 1297, 1354 (1975) ([hereinafter Silberman II] ("Consensual reference, even to special masters prior to the [Magistrate's] Act, enjoyed a relaxation of the requisite conditions for reference."); MANAGING COMPLEX LITIGATION, supra note 13, at 312-14.

The parties cannot consent to legislative courts (or magistrates) that violate the separation of powers principle of Article III, though they may waive fairness objections. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 4.5 (1989).

38. Courts 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, including special masters, auditors, 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, 312-13 (1920); see also Reilly v. United States, 863 F.2d 149, 154 n.4 (1st Cir. 1988) (stating that it had both statutory and inherent authority to appoint a technical advisor). The court's inherent authority to appoint nonjudicial personnel to assist it in discharging its judicial responsibilities is limited, of course, by the boundaries of Article III. Thus, the Constitution prohibits the nonconsensual reference of a fundamental issue of liability to an adjudicator who does not possess the attributes that Article III demands. See Stauble v. Warrob, 977 F.2d 690, 695 (1st Cir. 1992); In re Bituminous Coal Operators Ass'n, 949 F.2d 1165, 1168 (D.C. Cir. 1991); In re United States, 816 F.2d 1083, 1092 (6th Cir. 1987); Kimberly v. Arms, 129 U.S. 512, 524 (1889). But see In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985) (dictum).

39. United States Magistrate Judges may be appointed to act as special masters pursuant to three legal authorities: (1) the Magistrates Act, 28 U.S.C. § 636; (2) the court's inherent authority discussed above; and (3) Fed. R. Civ. P. 53.

28 U.S.C. § 636(b)(2) provides:

A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts. The Civil Rights Act of 1964 also provides that the court may use a magistrate judge as
Without statutory authorization, special masters were appointed in England to assist chancery judges by reporting on matters of evidence and accounting before, during and after trials. The practice was statutorily recognized in Equity Rules 52 and 62 which were applicable in federal courts before the 1938 enactment of the Federal Rules of Civil Procedure. As in equity, Federal Rule of Civil Procedure 53(b) restricts the use of special masters, requiring except in matters of accounting and difficulty in computing damages, a reference to a special master shall be made only upon a showing that some exceptional condition requires it, or in jury trials only when the issues are complicated. The costs of the master are not borne by the public justice system, but are allocated between the parties as the judge determines.

Those who favor the use of special masters believe such legal authority permits judges to develop and test innovative responses to the demands made on the civil justice system by the increasing number of large and complex cases filed in federal courts. Critics, however, claim that the use of masters produces inequities among litigants by fostering designer procedures that are tailored to the unique factors of individual cases, rather than the development of formal rules applicable to all disputes.


42. FED. R. CIV. P. 53(a) ("The compensation to be allowed a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund . . . as the court may direct.").

43. Francis E. McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. CHI. L. REV. 440, 445-46 (1986); see also Steven Flanders, Blind Umpires a Response to Professor Resnik, 35 HASTINGS L.J. 505 (1984) (discussing the diverse procedures that have been developed by judges to create effective case management).

44. Silberman, Judicial Adjuncts, supra note 40, at 2132 (arguing that formalized procedure and rules are increasingly replaced by individual case-by-case, customized procedures through the use of special masters); James S. DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y.U. L. REV. 800, 803
commentators are concerned that utilizing such agents results in an abdication of judicial responsibilities. They find the use of masters offensive to the principles of Article III and favor adjudication by life-tenured, federal judges selected by Congress or United States magistrate judges supervised by Article III judges.\textsuperscript{45}

\textbf{A. Federal Rule of Civil Procedure 53(b)}

- As Rule 53 expressly states, the appointment of a special master is to be the exception and not the rule.\textsuperscript{46} Thus, unless the matter is one of accounting or difficulty in computing damages,\textsuperscript{47} Rule 53(b) authorizes the appointment of special masters in jury cases only when the issues are complicated, and in nonjury cases only when some "exceptional condition" requires it. Moreover, the Supreme Court made clear in \textit{LaBuy v. Howes Leather Co.},\textsuperscript{48} that calendar congestion, complexity of the issues, and the possibility of a lengthy trial were not exceptional conditions sufficient to satisfy the requirements of Rule 53 with regard to a comprehensive reference of the merits of an antitrust suit to a special master.\textsuperscript{49} Had the reference been to nondispositive, pretrial or remedial matters, the appointment of a

\textsuperscript{45} See, e.g., Judith Resnik, \textit{Managerial Judges}, 96 HARV. L. REV. 374, 425 (1982) ("Judicial management has its own techniques, goals and values, which appear to elevate speed over deliberation, impartiality and fairness.").

\textsuperscript{46} Federal Rule of Civil Procedure 53(b) provides:

\begin{quote}
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.
\end{quote}

\textsuperscript{47} References may be made upon the parties' motions or sua sponte. \textit{In re Pearson}, 990 F.2d 653 (1st Cir. 1993). The legislative authority for the appointment of a special master dates from Parliament's passage of the Superior Courts Officers Act in 1837, \textit{see} Silberman I, \textit{supra} note 40, at 1078, though the appointment of persons acting as masters may go back to the time of Henry VIII. Kaufman, \textit{supra} note 40, at 452, n.1. Until 1983, Rule 53 provided for the appointment of both standing and special masters. However, the creation of full-time magistrate judges was thought to eliminate the need for standing masters. \textit{See} FED. R. CIV. P. 53(a) advisory committee's note (1983).

\textsuperscript{48} 352 U.S. 249 (1957).

\textsuperscript{49} \textit{Id.} at 256; \textit{see also} Hiern v. Sarpy, 161 F.R.D. 332 (D.C. La. 1995) (reference improper where factual issues were quantitative and not intrinsically complex).
master might have been justified under Rule 53 in those circumstances. Thus, despite the restrictive 1957 La Buy decision, special masters have been appointed under Rule 53 in many kinds of complex litigation, including antitrust suits, patent cases, institutional reform litigation, product liability suits, mass tort claims and malpractice cases.

On occasion, special masters are appointed to hear, and make recommended findings regarding facts necessary for liability. When such a reference is made, some courts require a greater showing of exceptional conditions to satisfy the requirements of Rule 53 than would be required to sustain a Rule 53 appointment for assistance in discovery or remedial matters. Thus, perhaps where liability is at issue the need for assistance in

52. See, e.g., Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560 (Fed. Cir. 1988) (special master appointed in patent case); Zenith Radio Corp. v. Dictograph Prods., Co., 6 F.R.D. 597 (D. Del. 1947) (same); Helene Curtis Indus. v. Sales Affiliates, Inc., 105 F. Supp. 886 (S.D.N.Y.), aff'd, 199 F.2d 732 (2d Cir. 1952); see also Madrigal Audio Labs., Inc. v. Cello, Ltd., 799 F.2d 814, 818 (2d Cir. 1986) (holding Article III does not permit a judge who does not understand patent law and "was not about to educate [him]self" to appoint a master to hear and determine the entire case).
53. See, e.g., Ruiz v. Estelle, 679 F.2d 1115, 1160 (5th Cir.), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982); Williams v. Lane, 646 F. Supp. 1379 (N.D. Ill. 1986), aff'd, 851 F.2d 867 (7th Cir. 1988); see also Murray Levine, The Role of Special Master in Institutional Reform Litigation: A Case Study, 8 LAW & POLICY 275, 276 (1986) (stating special masters assist courts in institutional reform litigation in both the development of remedial plans and the implementation of such plans); Nathan, supra note 19, at 419-20 (recognizing that "federal courts, sitting as courts of equity, are relying in increasing numbers upon" special masters to assist them in institutional reform litigation).
55. See, e.g., Jenkins, 109 F.R.D. at 269; DeLuca v. Merrell Dow Pharm. Inc., 911 F.2d 941 (3d Cir. 1990) (action by parents against pharmaceutical company seeking damages for severe birth defects suffered by children, allegedly as a result of a morning sickness drug), aff'd, 6 F.3d 773 (3d Cir. 1993).
56. See, e.g., Burlington N.R.R. Co. v. Department of Revenue, 934 F.2d 1064, 1071, 1073 (9th Cir. 1991) (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), aff'd, 23
dealing with complex or complicated evidence must be demonstrated more clearly. For example, in *Prudential Insurance Co. of America v. United States Gypsum Co.*, the United States Court of Appeals for the Third Circuit granted a writ of mandamus withdrawing the appointment of a master who was appointed to rule on nondispositive discovery motions, hear dispositive legal motions (motions to dismiss and summary judgment motions), and report to the court all relevant facts and conclusions of law. The appeals court found that the district court had not cited any exceptional conditions in the case or specific reasons for the appointment of a master beyond the district court's statement that the volume and breadth of documents, combined with the inherent complexity of an asbestos litigation case, merited the appointment. The court of appeals relied strongly on *La Buy* for the proposition that neither the volume of work generated by a case, nor the complexity of that work, will suffice to meet the exceptional condition standards promulgated by Rule 53.

Several courts have invalidated references on the merits, not because they failed to meet Rule 53 requirements, but because they violated Article III of the Constitution. For example, in *In re Bituminous Coal Operators Ass'n, Inc.*, the D.C. Court of Appeals issued a writ of mandamus directing the district court to vacate an order appointing special masters assigned to conduct formal evidentiary hearings on the merits of a case. The court found that the appointments violated Article III. Apparently, an appointment for fact finding on the merits of liability transgressed Article III limitations on the scope of Rule 53, regardless of whether exceptional circumstances pertained. Similarly, in *Stauble v. Warrob, Inc.*, the First Circuit reversed a judgment rendered on the basis of a report by a special master to whom the defendants had objected earlier by seeking a writ of mandamus. The First Circuit found that it could not forge an exceptional

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57. 991 F.2d 1080 (3d Cir. 1993).
58.  Id. at 1085.
59.  Id.
60.  Id. at 1086-87.
62.  Id. at 1166.
63.  Id. at 1168.
64.  Id.
65.  977 F.2d 690 (1st Cir. 1992).
66.  Id. at 698 (holding that reference of a fundamental issue of liability to special master for adjudication over a party's objection was impermissible under Article III, unless *de novo* review is provided). In *Stauble*, the master was a retired chief judge of the Superior Court of
condition test for cases of blended liability and damages, stating, “the Constitution prohibits us from allowing the nonconsensual reference of a fundamental issue of liability to an adjudicator who does not possess the attributes that Article III demands.” Distinguishing the delegation of authority over preparatory and remedy-related issues from appointments of masters to make recommendations regarding facts necessary to a finding of liability, the First Circuit 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 of Rule 53. Thus, the court held that the district court lacked authority to refer the case to a master without a provision for de novo review of the master’s report. The constitutionality of Rule 53 is discussed further in the last section of this Article. The appointment of special masters under Rule 53(b) may be appealed through the extraordinary writ of mandamus filed in the court of appeals immediately after the appointment is made by the district court. Objection

Massachusetts who had served as discovery master for several years before being appointed for trial on the merits in 1986. The appointment was appealed by way of mandamus and after the district court attested that the record was voluminous, the defendants numerous, the issues complex and the master experienced, the court of appeals denied the motion for mandamus. Id. at 692.

After a 35-day formal hearing and the introduction of 415 exhibits, the master reported in 1990, recommending a $756,000 judgment for the plaintiffs. The district court confirmed the report, accepting the master’s findings and recommendations in their entirety, and awarding $900,000 in attorneys’ fees to Stauble’s attorneys. The Third Circuit reversed the judgment, holding that the master had been improperly appointed over the objection where the trial court did not undertake a de novo review of the master’s findings. The court reasoned that “the Constitution prohibits nonconsensual reference of a fundamental issue of liability to an adjudicator who does not possess the attributes that Article III demands,” distinguishing cases in which pretrial and remedy related issues are delegated to masters. Id. at 695. Thus, finding that the trial court erred in referring the entire case to the master, the court of appeals remanded the case for a new trial (more than fourteen years after it was filed and five years after it had declined to set the appointment aside on mandamus). Id. at 699.

67. Id. at 695.
68. Id. at 696.
69. Id.
70. See La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957); see also In re United States Dep’t of Defense, 848 F.2d 232, 234-35 (D.C. Cir. 1988) (denying mandamus in the absence of a finding of abuse of discretion); In re United States, 816 F.2d 1083, 1091 (6th Cir. 1987) (holding trial court abused its discretion in appointing a master under Comprehensive Environmental Response Compensation and Liability Act); Chicago Hous. Auth. v. Austin, 511 F.2d 82, 83-84 (7th Cir. 1975) (finding no abuse of discretion to support an action for mandamus setting aside a reference); In re Bituminous Coal Operators Ass’n, 949 F.2d 1165 (D.C. Cir. 1971) (reversing reference to special master of nonjury trial of civil case over multi-employer trust fund where district court failed to reserve decision-making authority over
to the appointment can also be made in a general appeal of the district court's final judgment. When challenged by mandamus, the appellant must establish that the district court abused its discretion in making the appointment and that challenging it in an appeal of the judgment will not adequately protect the interests at risk. After judgment, an appeal of reference to a master presents a question of law, and plenary review will be exercised. Because the standard of review on appeal is broader than on mandamus, denial of a motion for mandamus setting aside a reference does not preclude a subsequent appeal which raises the issue again.

Unless limited by the order of reference, a special master has broad powers under Rule 53(c) and (d) to regulate all proceedings in every hearing before him or her, and do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may be authorized to require the production of documents and other evidence, and rule on the admissibility of evidence. However, Rule 53 does motions dispositive of the merits of the case). See generally Moore et al., supra note 14, 53.05[3], 53-71 nn.7-11.

71. Stauble, 977 F.2d at 692 (reversing special master appointment 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, 1255 (8th Cir. 1984) (finding reference to special master not supported by exceptional circumstances upon review of appeal from summary judgment); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 712 (7th Cir. 1984) (Judge Posner, in dicta, objected to the unappealed appointment of a master to evaluate a motion for summary judgment in light of the court's time constraints). The party objecting to the appointment of a master must usually make a timely objection either at the time of appointment or promptly thereafter to preserve the assignment of error. See, e.g., Martin Oil Serv., Inc. v. Koch Refining Co., 718 F. Supp. 1334, 1338 (N.D. Ill. 1989); First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 628 (8th Cir. 1957). See generally Moore et al., supra note 14, §§ 53.05[3], 53-69 nn.1-6.

72. Stauble, 977 F.2d at 693; see also In re Fibreboard Corp., 893 F.2d 706, 707 (5th Cir. 1990) ("We are to issue a 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)).

73. Stauble, 977 F.2d at 693.

74. Id.; see also United States v. Shirley, 884 F.2d 1130, 1135 (9th Cir. 1989) (citing Key v. Wise, 629 F.2d 1049, 1054-55 (5th Cir. 1980)).

75. Federal Rule of Civil Procedure 53(c) provides that the master may be authorized to require the production of documents and subsection (d)(2) provides that the parties may subpoena witnesses. Thus, the rule does not expressly state that the master, as well as the parties, may subpoena witnesses, but neither does it provide that the master may not. The rule provides a nonexhaustive enumeration of powers that may be granted to a master, limited by the intention that masters not be given final adjudicatory authority. See, e.g., Amos v. Board of Sch. Dirs., 408 F. Supp. 765, 823 (E.D. Wis.) (authorizing special master "to exercise range of powers, subject only to the limitations imposed by law and Rule 53(c) of the Federal Rules of Civil Procedure.").

76. See, e.g., 539 F.2d 625 (7th Cir. 1976); Gary
not present this list of powers as exhaustive, and as discussed below, judges have given masters unenumerated authorities as well, such as the power to hire experts, investigate facts, conduct informal and ex parte proceedings, and mediate settlements.

Although the focus of this Article, Rule 53(b) is not the only legal authority for the appointment of special masters. Because Rule 53 restricts the appointment of masters to cases in which there is a showing of some exceptional condition, courts sometimes have relied on these other legal authorities for the appointment of a master where such circumstances did not pertain. Three other sources of legal authority exist for the appointment of special masters by federal district court judges, one is the consent of the parties. Early in its history, the Supreme Court recognized that parties can consent to the disposition of their disputes by non-Article

W. v. Louisiana, 601 F.2d 240, 245 (5th Cir. 1979) (upholding appointment of special master where the district court retained "the authority to reject or modify any recommendation by the Master."); Stauble, 977 F.2d at 690-95 (finding the reference of fundamental issues of liability to special master for adjudication to be impermissible, "[b]ecause Rule 53 cannot retreat from what Article III requires, a master cannot supplant the district judge").

Rules 52 and 62 of the Equity Rules, which the Federal Rules of Civil Procedure replaced, permitted the master to control the mode of proof. The new Federal Rules were intended to change this practice and give control over the mode of proof to the parties. MOORE ET AL., supra note 14, §§ 53.06, 53-80. Thus, Rule 53 eliminated the reference that had been included in Equity Rule 62 to the master’s power to control the mode of proof (except in matters of account), and unlike Equity Rule 52, Rule 53 makes no express reference to the master’s power to subpoena witnesses. As noted in Moore’s treatise, “[t]he change in the Equity Rules] is more likely one of emphasis than one resulting in an actual deprivation of power.” Id. § 53-80 n.29.

76. It has been argued that pre-trial appointment of masters to oversee discovery was not authorized by Rule 53, and therefore the appointment of discovery masters is not subject to its particular restraints. A major unanswered question is whether appellate courts will permit district court judges to do what they are not authorized to do by Rule 53 with their inherent authority. Where the master is assigned duties other than pretrial tasks, it can be argued that any inherent authority of the courts to make such appointments in the absence of exceptional conditions has been preempted by the enactment of Rule 53. However, some courts and commentators have found no such preemption. See, e.g., Kaufman, supra note 40, at 462 (arguing that Rule 53 was enacted to codify the historical practice of courts using their inherent authority to appoint masters to assist them); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir.) (finding Rule 53 does not terminate or modify the district court’s inherent equitable power to appoint a person to assist it in administering a remedy), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982); Hart v. Community Sch. Bd., 383 F. Supp. 699, 762-64 (E.D.N.Y. 1974) (recognizing that the inherent power of a court to appoint special masters to aid it in resolving cases is not open to question. The roots of such inherent power “are as deep as those of our system of justice”), aff’d, 512 F.2d 37 (2d Cir. 1975).
Thus, the Court found one of the modes of prosecuting a suit to judgment is the appointment of arbitrators with the consent of the parties, unless the appointment conflicts with some act of Congress. In addition, courts have been found to possess inherent powers to appoint masters. Although courts had long acted on the assumption that they had general equity powers beyond those specified in the Equity Rules, Justice Brandeis made it expressly clear in *Ex parte Peterson* that a federal district court judge has inherent authority to appoint, over the parties' objections, an auditor to make nonbinding recommendations to aid the court. He observed that courts have inherent power to provide themselves with appropriate instruments to assist them in performing their duties, in order to simplify and clarify issues and to make tentative findings. For example, courts have the authority to appoint persons unconnected with the

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78. Id. The Court elaborated on this concept in 1889 in *Kimberly v. Arms*, an equity action in which the parties agreed, and the court ordered, that a master would be appointed to hear the evidence and decide all the issues between the parties. See *Kimberly v. Arms*, 129 U.S. 512, 524 (1889). The Supreme Court found that had the parties not consented to the reference, general equity rules would preclude the court from referring the entire decision to a master. Id. The idea that the litigants may waive their personal right to have an Article III judge preside over a civil trial, was recently confirmed in *Peretz v. United States*, 111 S. Ct. 2661, 2669 (1991); see also *Mobil Oil Corp. v. Altrech Indus.*, 117 F.R.D. 650 (holding special master could preside over jury trial upon agreement of the parties). However, where the parties consent to the reference, the master's determinations are given the weight to which the parties have stipulated, and the court may not set aside and disregard them at its discretion. See also *DeCosta v. Columbia Broadcasting Sys.*, Inc., 520 F.2d 499, 507 (1st Cir. 1975) (holding that the consented reference to a magistrate of an initial hearing and determination of a civil case did not violate Article III of the Constitution or the pre-1976 Magistrate Act). The court recognized the tradition understood by Congress that parties could freely consent to refer cases to non-Article III officials for decision. Id.
80. Id. Although the Supreme Court has not addressed the question, several lower courts have found that the inherent authority to appoint special masters was not eliminated by the enactment of the Federal Rules of Civil Procedure and Rule 53(b) in 1938. See *Ruiz*, 679 F.2d at 1115; *Connecticut Importing Co. v. Frankfort Distilleries*, 42 F. Supp. 225, 227 (D. Conn. 1940) (stating, "Rule 53 serves but to outline the procedure to be followed when the [court's inherent] power is exercised"). At least, it was not affected with regard to discovery tasks to which the Rule arguably does not extend. See MANAGING COMPLEX LITIGATION, supra note 13, at 364-84 (arguing that Rule 53 was intended to authorize only the kinds of trial stage references that were well-established features of federal equity practice before 1938); *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613 (8th Cir. 1957) (upholding reference to a master in a civil proceeding to supervise depositions and document perception and hold hearings about dispute); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956). For a list of cases in which masters were assigned pretrial tasks in unexceptional cases, see Silberman, *Judicial Adjuncts*, supra note 40, at 2163 n.31.
court, such as special masters, auditors, examiners, and commissioners, with or without consent of the parties. Finally, there is legislation providing for the appointment of magistrates as masters. United States magistrate judges are full-time, salaried, generalist jurists, without life tenure, who often are appointed under Rule 53. However, they usually do not have the special legal, scientific or technical expertise, often needed in toxic tort and other specialized legislation. In contrast, masters often serve part-time and are paid by the parties to the action, not by the court. Because magistrate appointments do not present the same issues that arise from appointment of private, part-time, nonprofessional decision makers, they are not the focus of this Article.

IV. THE ROLES OF SPECIAL MASTERS IN TOXIC TORT LITIGATION

The case studies that follow, describe the experience of special masters who have acted in different roles in toxic tort litigation: master of discovery, case manager, mediator, and remedial master. Each of these roles required the special master to perform a variety of functions. Their effectiveness can be evaluated best in relation to the purposes for which they were appointed, and the ways in which they were able to meet challenges of toxic tort litigation.

81. Pacemaker Diagnostic Clinic v. Instromedix, Inc., 712 F.2d 1305, 1309-10 (9th Cir. 1983) (upholding 28 U.S.C. § 636(c)).
82. See, e.g., New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 960 (2d Cir. 1983) (appointing special master with expertise in mental retardation to assist court in framing remedial order for institutional reform); In re United States Dep't of Defense, 848 F.2d 232, 234 (D.C. Cir. 1988) (appointing intelligence expert in Freedom of Information Act case to review 14,000 documents and summarize arguments that qualified for a national security exemption).
83. FED. R. CIV. P. 53(a).
84. These case studies are based on research and personal interviews with masters and judges conducted by the author at the Federal Judicial Center in 1992-93. The focus of this section is on the overall role that special masters were asked to play in litigation that sometimes required them to perform a combination of functions. For example, a master appointed during the remedial stage of an institutional reform case might perform several functions, such as finding facts related to compliance, recommending additions or modifications to the remedial order, facilitating agreement between the parties on modifications, etc. Yet, in the performance of these functions, the master would act essentially in the role of investigator for the court, taking on an obligation to seek out information needed before the court could determine whether its orders were being obeyed.
A. As Surrogate Judges in Discovery — The Agent Orange Case

The appointment of a master under Rule 53 to preside over discovery is one way judges have tried to handle the complex evidentiary issues, such as indeterminant parties and proof of causation, that arise in toxic tort litigation. Masters appointed to supervise discovery exercise the authority of judges to rule on the legal sufficiency of nondispositive motions, such as motions for document production and privilege questions, determining how the parties will prepare for trial. They also make preliminary findings of fact necessary to support procedural motions, such as the conditions for invocation of an evidentiary privilege. However, while they conditionally exercise the authority of a judge in those circumstances, they are not bound to proceed through formal hearings and argumentation. Instead, they often proceed informally. Discovery masters do not rule on dispositive motions such as motions to dismiss and summary judgment motions, which are reviewed by the trial judge de novo.

Although special masters are often appointed to conduct discovery, there is no clear indication that Rule 53(b) was intended to authorize the appointment of pretrial discovery masters who arguably, therefore, are not subject to the Rule’s constraints. A leading authority on the use of special masters contends that Rule 53 was intended to authorize only the kinds of trial stage references that were well established features of federal equity practice before 1938. Therefore, pretrial appointments are not necessarily subject to its constraints. Nevertheless, in an effort to meet the demands that the 1980 and 1986 amendments to the Federal Rules of Civil Procedure placed upon judges to take a more active case management role despite their heavy caseloads, some courts have used Rule 53(b) for the appointment of masters to rule on discovery motions in complex cases or cases involving complicated issues of fact.

Courts have appointed masters who have special expertise when discovery motions involve the production of scientific, highly technical, or complex information in products liability cases. Although these masters


86. MANAGING COMPLEX LITIGATION, supra note 13, at 306.

87. Id.

88. See generally id.

may hold formal hearings, they often proceed more informally, and make findings on nondispositive motions based upon their own knowledge or information received outside of evidentiary hearings. As discussed below, these masters may also assess the potential qualification of expert witnesses or determine the admissibility of scientific studies.90

As we have seen, the Supreme Court’s recent decision in Daubert v. Merrell Dow Pharmaceuticals, Inc.91 may create a further need for the assistance of expert masters in discovery.92 The Court suggested that trial courts hold preliminary Rule 104(a) hearings to discharge their obligation under Rule 702 of the Federal Rules of Evidence to determine the reliability as well as relevance of scientific evidence.93 In doing so, the trial court must

master where the court 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).

92. The Court held that in a case involving scientific evidence, “evidentiary reliability will be based upon scientific validity.” Id. at 597. 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. Id. at 593. Justice Blackmun’s opinion provided trial courts with a nonexhaustive list of factors to consider in determining evidentiary reliability. However, 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. MCCORMACK ON EVIDENCE, Ch. 6, § 53 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMACK]; Bourjaily v. United States, 483 U.S. 171, 175 (1987) (offering party must prove preliminary facts necessary for admission of evidence). Similar issues raised by a motion for summary judgment in a products liability case required a district court to hold five days of hearings and consider extensive post-hearing submissions in order to determine the validity of epidemiological data and the methods upon which an expert was willing to give his opinion regarding causation. DeLuca v. Merrell Dow Pharms. Inc., 911 F.2d 941 (3d Cir. 1990) (hearings held on motion for summary judgment), aff’d, 6 F.3d 778 (3d Cir. 1993). At a Rule 104(a) hearing, rules of evidence need not apply, except with respect to privileges, and therefore, such hearings may differ from those held by the district court in DeLuca. The appointment of special masters to conduct Rule 104(a) hearings may be one way for district courts to hold Daubert-type hearings without burdening the courts’ resources. Not only can a special master devote more time to becoming familiar with the evidence submitted, but a master can be selected who has special expertise in the science involved. Thus, Rule 53(b) may permit the appointment of a pretrial special master to hold Rule 104(a) hearings and make recommended findings of fact regarding the conditions necessary for the admissibility of expert testimony. Pursuant to Rule 53, these recommended findings would stand unless clearly erroneous.

93. See generally MCCORMACK, supra note 92; Bourjaily, 483 U.S. at 171. Because the fact finder in Rule 104(a) proceedings on matters of admission is always the court, a jury would not consider the master’s report in connection with the four Daubert factors.
determine whether a scientific theory or methodology upon which the experts' testimony is based is scientific knowledge to which an expert can testify under Rule 702. These tasks can be performed by a special master appointed to conduct a hearing under Rule 104(a) to determine if a scientific expert will offer scientific knowledge that is relevant and will assist the trier of fact.

One of the most publicized product liability cases in which special masters were appointed is *In re Agent Orange Product Liability Litigation* ("Agent Orange"). Sol Schreiber and Kenneth Feinberg were appointed by federal district court Judges George C. Pratt and Jack B. Weinstein, respectively, to manage discovery and foster a settlement among Vietnam War veterans, the federal government, and chemical manufacturers. Brought in 1979 in the Eastern District of New York, *Agent Orange* was a consolidation of some 600 suits originally filed by more than 15,000 named individuals into one class action, in which 2.4 million Vietnam War veterans and their dependents sued twenty-four chemical manufacturers and other corporations, in addition to the United States government. The veterans alleged that the manufacture, distribution, and dispensation of certain dioxins as herbicides in Vietnam constituted the distribution of unreasonably dangerous, defective products that caused cancers, birth defects, and various injuries to the plaintiffs and their children.

The role of one special master in *Agent Orange* illustrates the use of a discovery master in toxic tort cases. Appointed to supervise discovery, Sol Schreiber assumed a judicial role by seeking to determine, as an arbitrator, a reasonable basis for the settlement of discovery disputes by positioning the case so that it could be disposed of on motions, tried or settled. Sol Schreiber, a former United States magistrate judge who is an accomplished litigator with a Manhattan law firm, was appointed by Judge Pratt to supervise discovery, prepare a pretrial order and facilitate settlement negotiations. The defendants initiated the appointment of a master to rule on document requests and supervise depositions. The judge agreed to appoint a master if the defendants would pay the costs associated with the appointment.

94. *Daubert*, 509 U.S. at 593.
96. For a full description of the Agent Orange litigation, see SCHUCK, *supra* note 9.
97. *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d at 987, 988-89.
98. SCHUCK, *supra* note 9, at 23.
99. Kenneth Feinberg, on the other hand, who was later appointed in the case to facilitate a settlement on the merits, played the role of mediator by helping the parties themselves negotiate an agreement.
100. SCHUCK, *supra* note 9, at 82.
103. The masters agreed to reduce their fees because of the public interests involved in the case.
chose Schreiber because he previously served as a master in several other large, complex cases. The parties, who were not given an opportunity to object to the appointment, knew that Schreiber enjoyed the confidence of the judge and was an expert on the management of civil litigation. He assisted with settlement negotiations among members of the same class, between separate parties, and between the parties and the judge.\footnote{104}

Schreiber was able to supervise discovery on two levels — evidentiary and procedural. First, with the agreement of the parties and judicial approval, Schreiber was granted security clearance by the Department of Defense allowing him to inspect government documents at the Pentagon for relevance as well as privilege.\footnote{105} In this way, he was able to expedite massive discovery requests and claims of state secret privilege.\footnote{106} Second, Schreiber proposed a procedural compromise that might have ended the suit — defendants would agree to a Rule 23(b)(3) class action with opt outs and pay for notice to the class, while plaintiffs would agree to allow defendants to try the government contract defense separately.\footnote{107} The proposal was not the product of the parties’ negotiations, but of the master’s own judgment based upon positions taken by the parties. Although the proposal was rejected by two key defendants, Schreiber’s effort to promote a procedural compromise established a practice of \textit{ex parte} communications with the express agreement of the parties, which was essential to later settlement negotiations. Schreiber consistently urged the parties to settle their disputes under constant pressure of trial deadlines. The strict enforcement of deadlines, coupled with the parties’ knowledge that the master and the judge communicated \textit{ex parte}, created the framework within which a settlement on the merits finally was effected through the efforts of Schreiber’s successor.

Schreiber believed that a special master was able to “get into the trenches” during discovery in a way that a judge could not. By doing so, he was able to develop sufficient understanding of the case to mediate and, when necessary, arbitrate the parties’ differences reasonably and effectively. Schreiber opined that a master can function as a good arbitrator by moving the parties to accept a determination based upon intimate knowledge of the case. He also maintained that masters can promote more settlements than judges because they can spend the time necessary to do so.\footnote{108} In \textit{Agent Orange}, Schreiber

\begin{footnotes}
\item 104. SCHUCK, \textit{supra} note 9, at 82.
\item 105. \textit{Id.} at 93.
\item 106. \textit{Id.}; see also \textit{In re Agent Orange Prod. Liab. Litig.}, 98 F.R.D. 557, 558 (E.D.N.Y. 1983).
\item 107. SCHUCK, \textit{supra} note 9, at 96-97.
\item 108. Schreiber was appointed special master in the Pan American Lockerbie Litigation by Chief Judge Thomas Platt in 1995. \textit{In re Air Disaster at Lockerbie Scotland}, (MDL 799) 37 F.3d 804 (2d Cir. 1994). Schreiber met with each of the families of victims separately, heard their stories, shared their grief and settled 127 of the 130 cases assigned.
\end{footnotes}
conducted discovery creatively and informally. He felt strongly that the amount of paper produced in litigation should be reduced dramatically, and that detailed reference orders, formal proceedings and reporting requirements were often unnecessary. On the basis of his experience as a magistrate judge, Schreiber believed that magistrates tend to approach discovery and settlement too formally, and like tenured judges are not able to spend the time necessary to become effectively engaged in settlement efforts. Some magistrates may simply lack the talent for mediation and arbitration possessed by some specially qualified masters.

One question at issue is whether special masters’ expertise, experience and ability to advance the pretrial process outweigh the added cost, complexity and delay that results from imposing an additional layer of procedure, i.e., review of the master’s work by the trial judge.¹⁰⁹ Some commentators note that as an agent of the judge, a discovery master needs enough authority to control the pretrial process, but not so much authority that he or she becomes the architect of the case. Yet, Rule 53 provides little guidance about what powers may be exercised by discovery masters.¹¹⁰ Rather than becoming too judge-like, there is concern that the special master in discovery can become too much a party to the proceeding, taking sides with the parties in matters such as the imposition of deadlines.¹¹¹

B. The Master as Pretrial Manager — The Michigan Fishing Rights Case

The 1983 amendments to the Federal Rules of Civil Procedure provide a textual basis for judicial management at the pretrial stages of litigation and for continual judicial monitoring of the progress of a case.¹¹² Proponents of this authorized case management function stress the need for judges to coordinate and monitor preparation of a case, rather than direct it.¹¹³ Critics of the case management function worry that judges do not have sufficient time to learn enough about a case to intelligently guide trial preparation and sharpen the issues. They argue that primary responsibility for defining and structuring a

¹⁰⁹. See, e.g., Harold H. Greene, Introduction to MANAGING COMPLEX LITIGATION, supra note 13, at ix.
¹¹⁰. Concerned about this deficiency, Magistrate Judge Wayne D. Brazil has proposed an amendment to Rule 53, addressing the issues. See MANAGING COMPLEX LITIGATION, supra note 13, at 384-89 (detailing his proposed changes to the Rule).
¹¹¹. Greene, supra note 109, at x-xi.
¹¹². FED. R. CIV. P. 16; see also FED. R. CIV. P. 26(f) (authorizing discovery conferences to discuss discovery issues, schedules, and limitations on discovery). See generally T. WILLING, FEDERAL JUDICIAL CENTER, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES (1985) (discussing how courts use the new federal rules to manage complex asbestos litigation).
case should remain with the parties.\textsuperscript{114} Still others object to judges becoming bureaucratic administrators of a dispute resolution process, thus losing their sense of justice and humanity.\textsuperscript{115}

The appointment of special masters to conduct case management in toxic tort litigation is one response to the 1983 amendments in cases presenting complex discovery and pretrial issues. In addition to ruling on discovery motions, case managers establish schedules for the taking of dispositions, return of interrogatories, and pretrial conferences. This contact provides the master leverage with which to move the case along and gain the respect of the parties. The judge remains available to overturn "clearly erroneous" rulings.

In the \textit{Ohio asbestos litigation}, a case consolidating thousands of asbestos claims, the district court appointed two special masters to develop a case management plan in order to resolve all pending cases.\textsuperscript{116} In addition to supervising discovery, the masters devised a plan for obtaining information on the outcome of similar cases, gathering information about outcome-determinative variables among the members of the class, and developing a system of computerized case-matching that permitted the parties to bargain within estimated settlement ranges.\textsuperscript{117} Rather than simply conducting discovery or making recommended findings of fact, these masters provided technical advice to the court largely about techniques for gathering and analyzing huge amounts of empirical data.

While not a toxic tort case, \textit{United States v. Michigan} ("\textit{Michigan fishing rights case}") is another example of a special master creating new and unique procedures to handle complex environmental issues.\textsuperscript{118} The \textit{Michigan fishing rights case} was brought by three tribes of Native Americans against the State of Michigan seeking to enforce a treaty granting them fishing rights in Lake Michigan. The initial litigation established a zero-sum game in which the parties competed for a limited resource — one party could gain only at the expense of the other parties. The tribes argued that their reduced fish catches resulted in a lower standard of living and increased violence, and they believed fundamental political and economic values were at stake. The treaty provided little guidance on the

\begin{itemize}
\item \textsuperscript{114} Edward Sherman, \textit{The Judge’s Role in Discovery}, 3 REV. LITIG. 89, 102-04 (1982) (suggesting that judges may not always be sufficiently informed about a case to decide when to cut-off discovery, or limit an attorney as to the number of depositions to take).
\item \textsuperscript{115} Resnik, \textit{supra} note 45, at 437 (arguing that creating masters and magistrates to perform managerial tasks, threatens to transform the judiciary into a bureaucracy).
\item \textsuperscript{116} Eventually, the pending cases numbered more than 7,000 within a two year period. \textit{In re Ohio Asbestos Litig.}, No. 96, 1990 WL 135774, at *1 (N.D. Ohio July 16, 1990).
\item \textsuperscript{117} For a full discussion of the case management plan, see McGovern, \textit{supra} note 43, at 478-91.
\end{itemize}
allocation issue, which affected all Michigan citizens because it had an impact on commercial fishing, sport fishing, and tourism. However, rather than presenting a bifurcated issue, the allocation problem was viewed by the court as polycentric. In other words, the solution to any particular aspect of the problem was seen by the court as dependent on the solution reached on other aspects. The court, therefore, encouraged the five parties and litigating amici to exchange information and settle their differences.

In the *Michigan fishing rights* case, Judge Enslen appointed law professor Francis McGovern as special master to provide case management and facilitate possible settlement. The judge recognized that the litigation would require the processing and analysis of vast amounts of economic, scientific and environmental data regarding the spawning and migratory characteristics of different species of fish in the lake. The judge also felt ethically constrained not to become too involved in settlement of the case so that he would prejudge the merits before he tried the matter, if settlement failed. Appointment of the master to oversee trial preparation and mediate differences among the parties permitted the judge to maintain neutrality and still provide the parties every opportunity to settle their differences.

In order to counteract polarization of the parties' positions, McGovern encouraged the parties to bargain over many variables, such as the kinds and quantity of fish to be taken, the fishing gear to be used, the time and place of catches, and the replenishment of fishing beds. At the master's urging, the parties agreed to pool information from their own scientific experts, revealing large areas of agreement between them. The master helped produce a settlement through what he called "integrative bargaining," that maximized the interests of all parties by permitting the parties to offer settlement resources and

119. Prior judicial interpretation had assured the Indians a reasonable living standard.
120. Three Indian tribes and the United States as plaintiffs, and the State of Michigan as defendant.
121. Individually named commercial and sport fisherman and fishing associations.
122. See McGovern, *supra* note 43.
123. BRAZIL, *supra* note 16, at 410. In this capacity, the master sought to obtain agreement between the parties on important scientific facts about the spawning, environmental habitat and migration of fish in the lakes. The master was able to facilitate an agreement between the parties to pool their scientific information and to direct their experts to make consensus recommendations. In addition, the parties agreed to employ a neutral expert in decision modeling to assist the parties biologists and the special master in creating a computer model that would assess proposed settlement plans in terms of five critical variables. *Id.*
commitments that a court would not have had authority to order. By pursuing trial preparation with discovery deadlines and settlement facilitation, the master felt he promoted the sharing of information and the development of consensus recommendations from experts representing all of the parties. The parties' experts cooperated with a hired expert in decision-modeling to create a computer-assisted negotiation process that disclosed general agreement among the biologists about important factual questions, and permitted settlement plans offered by the parties to be evaluated as scorable games. The master even invited representatives of several parties in a similar case in Washington state to speak to the parties in Michigan to describe the outcome of their nonnegotiated judgment and provide incentives to the parties to settle their dispute.125

After three days of negotiation, presided over by the master, the parties settled their differences. McGovern reported that the integrative bargaining process permitted each party to value various aspects of the settlement differently and agree to a combination of factors that maximized their preferences. He felt the process also permitted the parties to shift their focus from concern for the distribution of a limited resource, (fish in the lake) to the inclusion of other resources that could expand the resource (funds to support new hatcheries). Thus, for instance, one party, the United States, was able to offer additional resources to enhance the size of the lake's fisheries as part of the settlement. Although one of the three tribes rejected the negotiated settlement, the court ordered the agreement. After a trial on the merits, no party appealed the court's action. The pretrial process itself was regarded by the parties and the master as a valuable educational experience and a means of respecting the dignity of the participants.

Professor McGovern's ingenious use of integrative bargaining, computerized decision models, scorable games, abbreviated discovery and presentation of litigants in a similar case was far from the traditional adversary model even for managerial judges. Without the authority to conduct case management and secure preparation deadlines, the master might not have been able to utilize these techniques. Such innovations provided information and experience with which to design and refine procedures in other cases.

The use of special masters to provide case management can, however, preserve the courts' ability to do justice, and at the same time provide the parties the guidance of an authority with the time, interest and special knowledge to help them devise creative ways to settle their dispute. In essence, the special master is a surrogate judge free from the structure of formal hearings and crowded calendars.

Thus, management masters can spend the time necessary to understand the issues of a case in detail, and to familiarize themselves with the litigants and their

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attorneys, while leaving the judge enough distance to preside as a neutral decision-maker when deliberation fails. Perhaps as important, the appointment of special masters permits experimentation with innovative techniques for handling complex litigation that judges normally would not have the time or flexibility to devise.

C. As Mediator/Facilitator — The Second Master in Agent Orange Litigation

Especially in mass tort cases, courts have made settlement of the case a major objective of litigation and have appointed special masters expressly for the purpose of mediating such resolutions.126 Rule 16(a) was amended in 1983 to encourage judges to facilitate settlement of cases.127 While courts can appoint masters to promote settlement at any stage of litigation, the appointment of masters at the pretrial stage permits judges to use firm trial dates to remind the parties of the expense of litigation, and create incentives to settle the case if possible. In addition, pretrial appointment of settlement masters allows courts to minimize judicial contact with the parties and eliminate the apparent bias and prejudgment this contact suggests.128 A settlement master may be instructed to promote the settlement of both evidentiary and discovery matters, as in the Agent Orange case, and liability and damage issues as well.

The settlement master differs from the discovery master and case manager in that he or she is appointed only to promote a settlement, not to rule on discovery motions or structure pretrial preparations.129 Because settlement itself requires the agreement of the parties, these appointments of a master are usually made with the initial consent of the parties, and the master’s effectiveness depends on the parties’ continued, and often implicit, agreement. Thus, if the


128. Some judges who want settlement masters with particular scientific or technical expertise appoint them under Rule 53. However, other judges have appointed experts under Federal Rule of Evidence 706 to advise the parties and the court on settlements and consent decrees, though such appointments remain rare. See, e.g., San Francisco NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34, 39 (N.D. Cal. 1983) (appointing a settlement team of experts pursuant to Federal Rule of Evidence 706, which was nominated by the parties and the court to draft a consent decree); cf. Gates v. United States, 707 F.2d 1141, 1142 (10th Cir. 1983) (appointing a panel of experts under Federal Rule Evidence 706 to assist the trial court in understanding complex neurological and epidemiological issues in a swine flu vaccine case).

129. See generally Kenneth R. Feinberg, The Creative Use of ADR: The Court Appointed Special Settlement Master, 59 ALB. L. REV. 881, 886 (1996) (identifying the use of court-appointed settlement masters as being one of the “bolder initiatives implemented by the judiciary” to deal with its increasing workload).
parties object to tactics or practices of the settlement master to which they agreed, they may nullify the master's efforts by refusing to agree to a substantive settlement. However, when consent to the appointment is withheld, it may be important and necessary to appoint a case manager who can use discovery deadlines and rulings to encourage the parties to engage in serious settlement negotiations.

The appointment of settlement masters helps courts deal with the time consuming process of evaluating thousands of claims for disparate injuries and mediating a multiplicity of disputes like those presented by toxic tort litigation. As with case management, some judges do not have the time to educate themselves sufficiently in the facts of a complex suit to act as an effective mediator. In addition, if judges become too involved in settlement, they risk prejudging the case on the merits if settlement fails. Judges also lack the ability to travel freely to pursue settlement negotiations where widespread plaintiffs have sued as a class, or in consolidated cases. The appointment of a special master to mediate a dispute, particularly a complex matter, permits the participation of a facilitator who can spend many hours becoming familiar with the facts and the parties. In a creative move, one federal district court and a state court managed to effectively consolidate asbestos cases filed in the two legal systems by appointing a single person as special master under Rule 53 and as referee under the state's procedural rules. The appointment of settlement masters can also obviate some of the difficult issues surrounding ex parte communications. Parties who agree to the appointment of a settlement master can be asked to consent to informal communications between the master and others. In order to inspire the parties' candor and trust, some settlement masters reported that they make it clear, before the appointment, that all separate communications between the master and a party will be held in strict confidence and will not be communicated to the other party or to the judge. Other masters agreed to share important information with all parties that were received ex parte. Parties that objected to these arrangements could withhold their consent to the master. In addition, because the settlement master is not responsible for case management or discovery, some settlement masters believed it was unnecessary to discuss strategies with the judge while settlement negotiations were being conducted, thus avoiding ex parte communications with the judge.


132. Some settlement masters think it would be improper for a discovery master to communicate ex parte with the parties. See Wayne D. Brazil, Special Masters in the Pretrial Development of Big Cases, in MANAGING COMPLEX LITIGATION, supra note 13, at 16-17.
settlement masters view ex parte communications with the judge as a denial of due process without the expressed or implicit consent of the parties.\textsuperscript{133}

Critics of the use of special masters worry that individuals who receive successive appointments as special masters develop an interest in maintaining their reputations as successful settlement masters (i.e., settling a high number of large cases so they will continue to be appointed). This issue alone does not raise an ethical concern unless it creates incentives for the master to bring about premature settlements to maintain his or her success rate. There is a fear that masters, working with attorneys representing plaintiffs in class action suits and paid on a contingent fee basis, will promote settlements prejudicing the interests of class members who, though notified of the settlement, may not be able to fully defend their future interests. It is possible that judicial supervision of the settlement process and strict fairness hearings on the agreement can adequately address these concerns.\textsuperscript{134}

In addition, some commentators are apprehensive about the use of special masters to preside over mini-trials in which lawyers, accompanied by their clients, make summary presentations of their case and the master thereafter engages in shuttle diplomacy to affect a settlement.\textsuperscript{135} They worry about the expense of such proceedings, particularly where there is an imbalance in the resources of the parties. Others worry that the parties feel coerced to accept the settlement seemingly favored by the master.

The role of the second special master in the \textit{Agent Orange} suit illustrates the effort to meet the challenges of a huge products liability suit through the mediation efforts of a full-time parajudicial. Following five years of discovery and after Judge Pratt’s appointment to the court of appeals, the \textit{Agent Orange} suit was assigned to Judge Jack Weinstein in the Eastern District of New York.\textsuperscript{136} Realizing the symbolic importance of the case to veterans, its economic importance to the defendants, and the problematic issues of causation, Judge Weinstein appointed a new, full-time special master, Kenneth Feinberg, solely for the purpose of devising a settlement plan to propose to the parties.\textsuperscript{137} As an experienced defense attorney and mediator, and a close acquaintance of the judge, Feinberg quickly proposed a list of settlement options for determining the magnitude of an award, its distribution among the plaintiff class and the

\textsuperscript{133} Id.

\textsuperscript{134} See Arguments Before the Court, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996), March 4, 1997 (questioning of Justice Scalia).

\textsuperscript{135} For a discussion of this technique, see A Federal Judge's ADR Technique: Mini-trials with Special Masters, 5 ALTERNATIVES 9 (1987) (describing Judge Sherman Finesilver's use of masters and setting forth a sample order for such appointments).

\textsuperscript{136} SCHUCK, supra note 9, at 110.

\textsuperscript{137} Id. at 144.
allocation of responsibility for its payment among the defendants. Forced by the enormity and imminence of trial, in addition to pressure from the judge who acted as both mediator and decision-maker, the parties agreed to a $180 million settlement, subject to a fairness hearing and the opt out of dissatisfied plaintiff class members.\footnote{138} 

In contrast to Schreiber, who accepted settlement facilitation and arbitration as part of his pretrial discovery duties, Feinberg describes himself as a "settlement master in mature tort cases" (i.e., cases in which liability has been determined but the amount of damages and/or the distribution of limited funds has yet to be determined). Feinberg attempts to settle these matters through mediation, not arbitration. Thus, unlike Schreiber, he did not accept the appointment without first obtaining the prior consent of the parties. Nevertheless, he recognized that parties make few objections to such appointments because they fear the judge's disapproval, or reprisal from the master if the appointment is confirmed. Schreiber was concerned about the appearance of impropriety where conflicts of interest existed\footnote{139} and was willing to take elaborate measures to avoid such an appearance. Feinberg, on the other hand, believed that conflict issues are of less importance when a master is appointed to settle a case. Once parties are aware of a conflict, those who believe they are disadvantaged by it can simply turn down the settlement offer. Therefore, any continued participation and subscription to the settlement agreement on the part of such parties testifies to their waiver of any conflict.

D. An Investigator and Administrator — The Dalkon Shield and the DDT Cases

The remedies sought in toxic tort litigation often involve both retrospective compensation, which may involve the administration of multi-million dollar settlement funds, and prospective, injunctive relief as well, such as medical monitoring and future claims processing. The latter requires the court to retain jurisdiction for many years, establish an administration mechanism to distribute awards and monitor far reaching remedial decrees. Judges sometimes need specialized information to determine the amount of damages suffered by victims of toxic torts — information that is not forthcoming from the parties. Although a federal judge may appoint expert witnesses to provide such technical information, in some cases, judges have granted special masters the authority to employ experts to obtain new information and report to the court.\footnote{140} Masters

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138. Id. at 161.

139. Such as the master's prior involvement with a party or his/her attorneys.

who are authorized to seek out information and hire scientific and technical experts have functioned more as active investigators than as the parties' experts or passive judges. In addition, courts have appointed masters in toxic tort litigation to perform administrative roles, such as proposing remedial plans to the court after liability has been found. In a celebrated environmental case involving pollution of the Boston harbor, the court appointed a Harvard law professor as master to investigate the history and functions of the city's sewage system, and to design a plan of correction for the court.

In other cases, the judges need assistance not to understand the subject matter of the suit or issues of causation, but to handle massive amounts of nontechnical information. The need arises in the pre-trial stages, when damages claims of

(appointing a retired judge as special master with authority under Rule 53 to hire experts familiar with redistricting to advise him in creating a new districting plan); United States v. Michigan, 680 F. Supp. 928, 962 (W.D. Mich. 1987) (using special remedial master as an independent expert to review proposed compliance plans).

141. See Hart v. Community Sch. Bd., 383 F. Supp. 699, 764 (E.D.N.Y.) (appointing urban renewal expert law professor in desegregation suit to "serve an investigation and consultative function among the parties and advise the court in technical cases"), aff'd, 512 F.2d 37 (2d Cir. 1974); Curtis Berger, Away from the Courthouse and into the Field: The Odyssey of a Special Master, 78 COLUM. L. REV. 707, 711 (1978) (explaining that he was "directed...to submit a plan which had no legal status and was meant [instead] to educate the judge as to what he might accomplish").

Thus, as Judge Weinstein has observed, an important distinction exists in the relative ability of trial and appellate courts to induce the production of technical evidence superior to that provided by the parties. The trial courts are able, through the use of technical masters, to develop new evidence. Jack B. Weinstein, Improving Expert Testimony, 20 U. RICH. L. REV. 473, 490 (1986). On the distinction between the adversarial process and the continental inquisitorial process in civil litigation, see James Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 826-30 (1985).

142. See Timothy G. Little, Court-Appointed Masters in Complex Environmental Litigation: City of Quincy v. Metropolitan District Commission, 8 HARV. ENVTL. L. REV. 435, 473-75 (1984). In a D.C. food stamp case, where defendants' noncompliance with a court ordered plan constituted exceptional conditions justifying a Rule 53 master, the master was authorized to direct defendants to conduct such studies as he believed necessary to monitor the defendants compliance. See also BRAZIL, supra note 13, at 414; Franklin v. Kelly, No. 90-3124, 1992 U.S. Dist. LEXIS 14300, at *8 (D.D.C. Sept. 23, 1992) (appointing a special master to "investigate the causes of the defendant's failure to provide food stamp assistance to eligible households in compliance with the Food Stamp Act").

thousands of plaintiffs have to be evaluated for the purpose of settlement negotiations. Similar needs arise after a finding of liability when the damages of thousands of successful claimants have to be determined, so that the award can be distributed, such as the DES Cases and the Marcos mass tort case. Knowledge of sound empirical methods, statistical techniques, and computer technology were needed to perform these tasks.

In addition to acting as investigators, information managers and planners, masters have been cast in the role of post-liability rulemakers when asked by the court to propose remedial decrees governing the conduct of major industry participants. Perhaps recognizing the broad lawmaking function courts play in class action suits that seek injunctive relief, Judge Weinstein has observed that courts which are required to be proactive, should consider the appointment of panels of experts to establish protocols for future safe action by defendants. This kind of expert panel has been used in institutional reform litigation and may be appropriate in some kinds of product liability suits as well.

Similarly, the distribution schemes proposed and supervised by special masters in toxic tort litigation, such as the Dalkon Shield and DDT cases, bear many of the earmarks of administrative rule making. They prescribe certain damage awards for claimants with different categories of injury based upon aggregated information, averaged losses, and general assumptions about the injuries, rather than requiring compensation for each claimant based upon the

144. In re Ohio Asbestos Litig., Ohio Asbestos Litig. Case Management Plan and Case Evaluation and Apportionment Process Order No. 6 (N.D. Ohio Dec. 16, 1983) (using data collection system, experts, and computer programs to evaluate claims for settlement purposes); Jenkins v. Raymark Indus., 109 F.R.D. 269, 288 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986); see also In re United States Dep't of Defense, 848 F.2d 232, 237 (D.C. Cir. 1988) (a master was appointed to evaluate the classified nature of thousands of documents in a freedom of information suit. Rather than undertake an in camera review, the court charged the expert master with selecting a scientifically sound representative sample of withheld documents and summarizing contentions regarding their privileged nature). See generally McGovern, supra note 43.

145. In re DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 910 F. Supp. 1460, 1464 (D. Haw. 1995), aff'd, 103 F.3d 767 (9th Cir. 1996). Judge Real appointed Sol Schreiber to recommend compensatory damage awards to the jury for 10,000 class members who had suffered losses due to torture, execution or disappearance during period of martial law. The master used an expert on statistics to draw a statistically valid random sample of class members, deposed each member of the sample and, as an expert on damages appointed under Federal Rules of Civil Procedure Rule 706, determined their damages. These damages were regarded as representative of the damages to the entire class. Challenged as a violation of constitutional due process and the right to a jury trial, the masters report was held admissible evidence and not violative of the Constitution. The jury was directed to accept, modify or reject the master's report. Id.

circumstances of each individual case. In order to do so, the aggregate value of all claims had to be estimated and payment made in accordance with a court-ordered compensation distribution scheme. Both tasks are complex, time consuming and require technological and analytic expertise.

These estimations can be based upon retrospective or prospective studies. In other words, one could look at the characteristics of the claimants whose claims had been settled for specific amounts and then determine how many of the unsettled claimants shared those characteristics to estimate the likelihood and magnitude of their recoveries. Alternatively, one could do a prospective study and look at the characteristics of the class of unsettled claimants, and wait to see how large the jury awards would be in order to determine which characteristics produced different judgments. Because that would defeat the effort to avoid the time and expense of jury trials by settling the case, the value of claims can be estimated prospectively by conducting “mini-trials,” where summaries of evidence and testimony are presented to jury-like adjudicators and fictional damages awarded. Based upon evidence of the correlation between different variables to different damage awards, an inventory of the significant variables in the entire class can be used to predict eventual jury outcomes and, hence, to value the claims of the class before trial.

A retrospective study technique was used in the Dalkon Shield case. There, women claiming injuries as a result of using a contraceptive device sued the manufacturer, A.H. Robins Co., for damages in state and federal courts. After the payment of approximately 9,000 claims, A.H. Robins sought to effectively consolidate approximately 5,000 unresolved cases, and all future cases, by filing a petition in bankruptcy and obtaining a court ordered “bar date,” by which all personal injury claims against the firm had to be filed. Judge Merhige, in the Eastern District of Virginia, appointed an expert who functioned as a special master to arrive at a fair estimation of all of the claims. Information was gathered from a randomly selected group of the 9,000 claims that had already been settled, using a fifty-page questionnaire sent to 6,000 claimants. The information requested included the length of use, medical problems, medical history, illness or injury claims and financial loss. Party experts then testified as to their estimation of the amount of money necessary to compensate all of the claims, based upon different assumptions regarding the applicability of the

147. WILLIAM W. SCHWARZER, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, CALIFORNIA PRACTICE GUIDE, Ch. 15B (1989) (recognizing that federal courts increasingly use alternative dispute resolution technique methods such as mini-trials to assist in resolving disputes).


150. Id. at 746.

151. Id.
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152 By compiling and analyzing information about claims already settled, it was thought that the value of outstanding claims could be determined using the same information from future claimants. A trust fund of $2.25 billion was created with funds from the Robins American Home merger, Aetna Insurance Company and other sources. Claimants were paid out of the trust fund according to one of three procedural options which they were entitled to choose. These options ranged from quick payment with little individual process, to a more individualized valuation permitting a higher payment.

A different approach was taken in the Alabama DDT case. Instead of establishing payment levels and providing claimants a choice among procedural models, the special master sought to devise a compensation system based upon a prospective analysis of the factors necessary for future awards in accordance with the values of the tort system. Ultimately, thirteen thousand plaintiffs from Northern Alabama settled their claims for fifteen million dollars, as a result of alleged personal injuries and property damage associated with exposure to DDT residue left in the Tennessee River by the Olin Corporation.

The special master convened a consensus group composed of himself, plaintiffs' counsel, a guardian ad litem for minor claimants, and a fund administrator. Together, they designed a claims resolution facility based upon self-reported objective factors: DDT blood levels, residence, exposure history and medical records. Like the tort system, the distribution plan permitted recoveries to persons who: 1) were in the plaintiff class; 2) had elevated DDT blood levels; 3) manifested certain illnesses; 4) lived near the defendant's plant; and 5) sustained losses as a result. Instead of proposing a flat payment (e.g., $10,000 per person), the distribution reflected disparities among the plaintiffs' exposure and blood levels. Using a respected epidemiological study of DDT blood levels in the South as the background risk level, the consensus group adopted a distribution plan which required that the elements of a tort action be demonstrated by: 1) elevated blood levels, as an indication of injury; 2) exposure over time (or living within a certain distance of the polluted river) as an indication of causation and; 3) evidence of certain harms identified by plaintiffs' medical experts as being related to DDT, as an indication of loss. A determination of liability was made unnecessary by the settlement. Finally, masters are also appointed to investigate compliance

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152. Id. at 746-47.
153. Id. at 759.
154. Kenneth R. Feinberg, The Dalkon Shield Claimants Trust, 53 LAW & CONTEMP. PROBS. 79 (1990). Claimants were permitted to choose a flat amount, schedule of benefits, alternative dispute resolution or traditional litigation. Id. at 106-07.
156. Id. at 64.
with remedial decrees in institutional reform suits, which, like toxic tort suits, often involve thousands of class members, complicated factual issues and lengthy remedial phases. Although these masters are often experts themselves, they may employ other experts to evaluate the defendants' performance of remedial obligations in specialized areas. Particularly in the remedial stages of litigation, courts have granted masters broad access to information held by the parties, although some courts have disapproved of such grants. In traditional civil practice, the prevailing parties have been primarily responsible for bringing any violation of the judgment to the court's attention and have been limited by discovery rules in their efforts to obtain information regarding violations. Thus, it can be argued that masters, acting at the remedial stage on behalf of prevailing parties, also should be bound at the remedial stage by the same limitations that pertain to discovery. Nevertheless, some judges believe that without broad authority to employ experts and gain access to information held by unsuccessful, recalcitrant defendants, masters would be unable to supervise the implementation of some remedial decrees.

V. THE VICES AND VIRTUES OF SPECIAL MASTER PRACTICE

While implicit in Rule 53 authority and the cases discussed above, some general observations about the nature of special master practice are needed in order to evaluate their utility in toxic tort litigation and the legitimacy of their use. There are a number of ways in which special masters function differently than judges and these differences have advantages and disadvantages in regard to toxic tort litigation.

157. For instance, in Feliciano v. Romero Barcelo, 672 F. Supp. 591, 623 (D.P.R. 1986), a class action suit brought in 1979 to reform the entire Puerto Rican prison system, more fully discussed below, the master appointed was an expert on prison reform. Nevertheless, he was authorized to hire other experts with court approval to evaluate compliance with constitutionally required safe and sanitary physical conditions, medical treatment, and protection. Id. at 625. Other, more intrusive investigatory authority is sometime given to masters. For instance, the master in the Puerto Rican prison case was also given power to gain unlimited access to any facilities, buildings or premises under the jurisdiction or control of the Correction Administration and no advance notice of any visit or inspection was required. Additionally, masters had unlimited access to the records, files and papers maintained by defendants including all medical records and mental health records. Id. These powers raise questions about the abandonment of traditional adversary process and the delegation of additional powers to masters that judges may not have.


A. Costs and Efficiency

Perhaps most fundamentally, unlike judges, special masters are not recognized and compensated by our justice system as a public good that is necessary for the just resolution of disputes. Rather, in keeping with its historical origins, Rule 53 provides that the costs of special masters are to be paid by the parties. Because of the cost and delay associated with the appointment of masters by courts of equity, and the perception that the parties are provided "justice at a price," special master practice has been limited by the Rule 53 requirement of exceptional circumstances. Some judges prefer appointing magistrate judges to perform the roles of masters, discussed above, in order to minimize the parties' costs. Other judges find that their needs, particularly in large, complex cases, require significant time and special skills, which could not be met by generalist magistrate judges with their own full dockets.

The compensation of the master is set by the court and charged to the parties by the judge as a cost. Courts often allocate the costs of a master between the parties equally. However, the allocation can also be used as a means of redressing an imbalance in resources. One master even suggested that referring a case to a master sometimes is regarded as punishment for parties who are uncooperative. Those parties then have to pay for a service they could have received at no cost. In some suits, where one party was impecunious or the other was blameworthy, judges have allocated the entire cost to one party or divided it among several defendants and even amici.

There is considerable variation in the standards used to determine the rate of compensation for masters. Where the master is a private attorney, some judges have looked to the market in which the master would otherwise sell his or her

160. FED. R. CIV. P. 53(a).
161. See, e.g., Fraver v. Studebaker Corp. 11 F.R.D. 94, 95 (W.D. Pa. 1950) (denying motion for appointment of master in patent suit because of burdensome cost to plaintiff, stating "[t]o exercise the power [to appoint a special master] seems to be a matter of discretion which should only be exercised in exceptional circumstances").
162. FED. R. CIV. P. 53(a).
165. Nebraska v. Wyoming, 504 U.S. 982 (1992). The Supreme Court approved assessment of amicus with costs of master on the theory that they did not object, and that the proceedings were longer and more costly because of their participation. Justice Stevens dissented, finding nonobjection problematic because it was an interim payment and cited Judicial Code sections limiting circumstances in which parties may waive judicial disqualification. Id. at 2267-68.
specialized services. Others have looked to the usual hourly rate for private practitioners in the area of specialty and in the locality where the suit is brought. Still, others have discounted such commercial rates for the public service nature of the case.\(^{166}\) Although academians were sometimes given their usual consulting rate or the prevailing practice rate, more often they were given a rate reflecting the fact that they regularly did not sell their services in a private market and that they enjoyed the low or no risk position of full-time, tenured professors, whose law schools paid for overhead expenses.\(^{167}\)

In some toxic tort cases, such as *Agent Orange*, the judge ordered the creation of a fund to which the parties were required to contribute an amount ordered by the court. In this way, payment of the master was assured before his or her duties were performed.

Indeed, the costs of masters can be high, but often the parties and the courts see them as cost effective — the cheapest way of attaining a particular goal.\(^{168}\) That goal, in the case of toxic tort litigation, is the resolution of a dispute over

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166. See Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (finding that considerations applicable to awarding attorney fees apply to setting fees for masters rate set at the outset at one-half highest rate of local law firms and two-thirds the average rate of experienced local trial attorneys); see also General Motors Corp. v. Circulators & Devices Mfg. Corp., 67 F. Supp. 745, 747-48 (S.D.N.Y. 1946). In *Fox v. Bowen*, 656 F. Supp. 1236 (D. Conn. 1987), Professor Robert Burt's fee was capped at $5,000 for the full five-year appointment so that his service would be recognized as a contribution in the public interest. *Id.* at 1254.

167. The question has been raised whether the use of public facilities such as courtrooms, offices, clerical services, utilities, etc., provided to masters by U.S. courthouses should be charged to the parties as an expense associated with the master's appointment. The General Counsel to the Administrative Office of the United States Courts has indicated that such public facilities should not be used without payment from the parties unless the accommodation: (1) does not interfere with judicial business; (2) can be provided without compromising the independence of the master; and (3) contributes to the accomplishment of the work of the judiciary. Any expenses beyond the fixed cost of maintaining judicial facilities should be paid by the parties through the master. When collected by the court, such funds should be deposited into the general fund of the Treasury. Opinion of David Weiskopf, Deputy General Counsel for Business Administration (Administrative Office of United States Courts 1993).

Some commentators have suggested that judicial salaries should be the benchmark used to compensate masters. The Supreme Court recognized that "[w]hile salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings. However, the Court rejected that suggestion in favor of a higher rate when it adopted the unhelpful standard of "liberal, but not exorbitant," compensation for masters. *Newton v. Consolidated Gas Co.*, 259 U.S. 101, 104 (1922).

responsibility for the harm, as well as the benefits that technology makes possible. Thus, the cost of the master may be more than offset by the efficiency and lower cost of the informal procedures masters use. Nevertheless, it is difficult to determine the total cost of many masterships or whether masters are cost effective. Although there are no costs imposed on the parties directly when discovery, settlement, matters of account, remedial decrees, and the monitoring of orders are not assigned to a master, much higher costs may be incurred by taxpayers when these functions are performed by judges. Furthermore, greater costs may be imposed on the parties indirectly through protracted litigation and unrealized settlements that masters might have brought about. Evaluating these costs and benefits makes the exercise of judicial discretion critical. The achievement of a settlement and the avoidance of litigation results in a further reduction of overall expenses of litigation for the public, as well as the parties.

B. Bias and Impartiality

Individuals who are not judges are assigned judicial tasks under Rule 53, but there are few institutional mechanisms to safeguard the neutrality of special masters and eliminate possible conflicts of interest. Because they are often part-time and do not have tenure, special masters may have other financial interests to consider when they are selected. Practicing attorneys, retired judges, law professors and non-legal experts all have separate livelihoods in which they have reputations and future employment prospects to consider.

Rule 53 establishes no standards for the qualification of masters or procedures for selecting them. Most often, the initial suggestion regarding the need for a special master comes from the judge, and not the parties. The most important

169. See Repetitive Stress Injury Cases v. Northern Telecomm., Inc., 142 F.R.D. 584, 585-86 (E.D.N.Y. 1992) (noting that failure to consolidate cases and take other steps to control litigation through devices like special masters leads to increased transaction costs), vacated, 11 F.3d 368 (2d Cir. 1993).

170. Id.

171. See United States v. American Tel. & Tel. Co., 461 F. Supp. 1314, 1348 (D.D.C. 1978). One method of limiting the tenure of masterships is to specify a termination date in the order of reference. Some masters and judges feel that time-limited appointments, particularly before liability is determined, help promote negotiations and settlement, since the parties are aware that failure to settle will result in the expense of a trial.

172. Prudential Ins. Co. v. United States Gypsum Co., 991 F.2d 1080, 1088-89 n.13 (3d Cir. 1993) (court notes allegations of bias based on law school dean’s academic writings); Mister v. Illinois Cent. Gulf R.R., 790 F. Supp. 1411, 1417 (S.D. Ill. 1992) (where master was plaintiff’s attorney in another suit in which same expert appeared for defense as appeared before him as master); Lister v. Commissioner’s Court, 566 F.2d 490, 493 (5th Cir. 1978) (holding appointment of a special master to devise a reapportionment plan who had testified as an expert witness for the plaintiffs in the same suit improper (citing In re Gilbert, 276 U.S. 6 (1928))).
attribute that a special master must have is the complete trust of the judge, based upon personal friendship, prior experience in appearing before the judge or recommendations from other judges. While these past associations open judges to criticisms of cronyism, it may be difficult for judges to assure the integrity and trustworthiness of masters by other means.

There are several ways in which masters are selected. Some judges simply select acquaintances whose professional talent they admire and whose integrity and loyalty they trust. Other judges appoint such masters without consulting the parties, but, of course, entertain party objections. Additionally, where settlement seems possible, judges may select one or more candidates for appointment, permit the parties to interview the candidates and seek the parties' approval prior to making the appointment. Settlement masters sometimes feel they cannot be effective mediators unless the parties, at least, had agreed to their selection. Finally, where courts have sought recognized experts in scientific and technical fields to observe and make specialized findings of fact, judges have relied less on personal acquaintances and nominations from the parties, and more on referrals from other judges, the scientific community and recognized professional societies. Interviews between the parties and the master provide a necessary forum in which to explore conflict of interest questions.

Sometimes masters are appointed because they have expertise from prior experience with a particular case or similar cases. Thus, some masters have been expert witnesses in the same litigation, or administrators in the kind of institution involved in the litigation. These appointments raise questions about potential conflicts of interest, but have been upheld where the parties agreed to the appointment. In some instances, such conflicts have been placed on the record and expressly waived by the parties. In other cases, a waiver was


174. Id.

175. See United States v. Conservation Chem. Co., 106 F.R.D. 210, 216-26 (W.D. Mo. 1985) (denying motion to revoke the appointment of a special master denied in a chemical waste cleanup case to conduct discovery and prepare a report and recommendations on the issues presented, where there was a request for injunctive relief in suit involving over 250 parties including 154 third party defendants, 14 government defendants and 16 insurance companies, and the master had already served in the pretrial stage and judge reserved authority to make the ultimate determination on all issues).

176. United States v. Suquamish Indian Tribe, 901 F.2d 772, 774 (9th Cir. 1990) (upholding the appointment of special master who had vast experience litigating matters closely related to the subject matter of the suit); Lister v. Commissioners Court, Navarro County, 566 F.2d 490, 493 (5th Cir. 1978) (appointment set aside where appointee had testified as an expert witness for a party in the case).
implied by the parties' agreement to the appointment of the master or to a subsequently negotiated settlement.177

The neutrality of masters is not assured by life tenure, fixed salaries, or even special codes of professional ethics.178 However, where masters perform the same tasks as judges, the cannons of judicial ethics may apply.179 One model of judicial ethics, the disqualification model, prohibits a judge from participating in a matter in which he or she may have an interest, rather than simply prohibiting the retention of the interest in order to eliminate bias. Thus, masters with special interests in a matter will recuse themselves from participating in it.180 Some maintain that if the parties agree to waive an objection to the master based upon bias or conflict of interest, they may do so because it is the parties who are entitled to a fair and neutral decision maker in their case.181 Others maintain that there is a public interest in preserving the appearance of propriety in judicial proceedings,182 that the

177. In one case, a party that subsequently objected to a conflict known at the time of the appointment was estopped from doing so. In re Joint E. & S. Dists. Asbestos Litig., 737 F. Supp. at 742.

178. See generally Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 N.W. U. L. REV. 469, 558 (1994) (arguing that generally, a special master should follow the Model Code of Judicial Conduct, however, because the use of special masters has become so common in mass cases; Weinstein suggests that we may need to "further institutionalize the practice through a code of ethics for special masters."); 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).


181. Most of the judges interviewed for this study permitted the parties to waive any conflict of interest disclosed by the master candidate. In Jenkins v. Sterlacci, 849 F.2d 627, 631-32 (D.C. Cir. 1988), the court held that where a D.C. statute charged the parties with constructive notice of the master's dual roles, the parties were deemed to have waived any later appearance of partiality objection even where the master's failure to disclose a potential conflict had deprived the parties of actual knowledge of the pertinent facts. Id. at 634.

182. MODEL CODE OF JUDICIAL CONDUCT Canon 2A & cmt. (1990) ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities."); see also Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 859-60 (1988) (holding that applying an objective standard scienter is not an element of a violation of § 455(a) and indicating that the purpose of § 455 is the promotion of public confidence in the judiciary).
parties may not waive.\textsuperscript{183} Moreover, some parties may be reluctant to object to conflicts of interests where the proposed master is favored by the judge, who may ultimately pass on the merits.

The cases described above indicate that in this modern use, special masters also perform some tasks that judges do not perform, such as mediating and facilitating settlements through intensive shuttle diplomacy, investigating facts outside the courtroom, commissioning studies, and conducting informal fact finding proceedings. It may be inappropriate to hold masters to some of the ethical restrictions that pertain to judges when they perform such tasks. For example, while it might be improper for a judge to engage in certain \textit{ex parte} communications, it is often thought unobjectionable for a settlement master to do so.\textsuperscript{184}

A second model of judicial ethics assures that judges remain impartial by eliminating interests that may affect their judgment, rather than prohibiting their participation in a matter altogether through disqualification. This model includes ethical restrictions that prohibit judges from earning outside income, engaging in outside employment and receiving gifts and honoraria.\textsuperscript{185} If special masters were subject to this model, appointed masters would be prohibited from retaining or acquiring interests that might affect their judgments. Under this model, both the attorneys for the parties and the proposed masters are asked if they have had any prior contact with each other, or their respective firms. Proposed masters are asked to check their firm's computerized client list for conflicts of interest. If the firm represents clients whose interests are implicated, masters may be asked to create a Chinese wall to insulate themselves from any matter within the firm even remotely related to the matter in which they serve. Because special masters are drawn from private practice, such as masters Schreiber and Feinberg discussed above, many of the best qualified candidates may forego service as a special master, if during that service they were required to abandon their private practices completely. However, masters can be required to eliminate particular interests which might bias or conflict with their performance as special masters. Thus, in one case, the parties asked that the order of reference require that the master not serve as an expert witness for the

\textsuperscript{183} 28 U.S.C. § 455(b) identifies five situations in which disqualification is mandatory: (1) personal knowledge of disputed facts; (2) bias or prejudice; (3) former private or government employment involving the matter; (4) financial interest; and (5) family member with a financial or other interest in the matter. See almost identical provisions in 1990 \textit{Code of Conduct}, Canon 3E(1).

\textsuperscript{184} See \textit{Model Code of Judicial Conduct} Canon 3B(7) (1990) (instructs judges to be uninfluenced by unauthorized \textit{ex parte} communications).

defendant party at any time in the future. Alternatively, the parties may
discuss conflicts of interest during conferences in chambers before the
appointment is made to gain assurance that the conflicts are not
objectionable. If special masters were treated in accordance with the same
interest-elimination model that applies to judges, not only would special
masters be required to disclose their financial interests, they also would be
limited in the amount of income and gifts they could receive, not just
those they might receive from a party or affected interest group.
Some courts have concluded that because Rule 53 requires a clearly
erroneous standard of review that does not allow 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. Yet, it may be inappropriate
to apply all judicial canons of ethics to special masters, such as limitations
on non-judicial income, except perhaps where masters are full-time and
expected to be employed for a significant period of time, such as full-time
settlement masters. The more the tasks performed by the master are the
traditional tasks of tenured judges, the more the application of judicial
ethics principles would seem appropriate. The more the tasks are modern
bureaucratic ones, such as case management, the more appropriate special
ethical codes would seem. In any event, great effort should be made to avoid
potential for conflicts of interest or the appearance of impropriety in each
case.
Instead of salaries, the amount masters are paid is determined by the court
in each case, usually based upon an hourly market rate for such services.
Therefore, aggregate compensation depends on the amount of services

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186. The case was one in which an expert master was appointed to oversee the
compliance of a state mental retardation facility. The parties were willing to waive any
objection on the ground that the master had been hired as an expert witness by the defendants
in the past, but did not want the master to serve unless he agreed not to testify for the
defendants in future cases.

187. Ethics in Government Act of 1978, 5 U.S.C. app. 4 §§ 101-12 (as amended by the
applicable to all three branches of government). The Act requires federal judges to file annual
financial disclosure reports containing a statement of assets, income and liabilities for
themselves, their spouses and their dependent children.


189. See Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988); Belfore v. New York
Times Co., 826 F.2d 177, 184 (2d Cir. 1987); see also In re Joint E. & S. Dists. Asbestos Litig.,
737 F. Supp. 735, 739 (E. & S.D.N.Y. 1990) (arguing that in general, a special master or
referee should be considered a judge for purposes of judicial ethics rules).

190. Judges disagree about whether special masters are to be held to the same ethical
standards and entitled to the same judicial immunity. See In re Gilbert, 276 U.S. 6, 9 (1928)
(likening a special master to a judge, ethically). Cf Morgan v. Kerrigan, 530 F.2d 401, 426 (1st
Cir. 1976); Jenkins, 849 F.2d at 631.
If there is any institutional bias, it is to perpetuate the litigation in order to maximize fees. However, there is little evidence, at least in toxic tort litigation, that special masters have acted with such bias. Furthermore, some masters seek to establish reputations as mediators, able to facilitate settlements quickly and effectively, so that they will be appointed in subsequent cases. Thus, the lack of selection or compensation standards in Rule 53 does not seem to result in cronyism, incompetence or bias, but rather gives judges the flexibility they need to appoint professionals with relevant expertise and, most importantly, to select people in whom they have great confidence.

It is also not clear whether masters are cloaked with judicial immunity against liability for malfeasance. Some special masters appointed to administer multi-million dollar recovery funds find the potential liability so enormous, that they do not even attempt to purchase malpractice liability insurance. Others purchase such insurance to recover the costs of defending such actions.

C. Formality and Fairness

While in non-jury trials, a master's findings on purely factual issues must be accepted unless clearly erroneous, Rule 53 does not require that the special master act only as a passive, generalist judge, ruling in formal hearings on issues of fact, although that may be the decision-making model anticipated by the drafters. Rule 53 specifies certain powers that masters...
may exercise unless limited by orders of reference. Thus, orders of reference can confine masters to performing certain functions and tailor their powers accordingly. However, the rule is crafted in broad, open-ended terms — “to do acts and take all measures necessary or proper for the efficient performance of the master’s duties under the order.” Most masters, regardless of the stage of litigation at which they perform their duties, seem to feel that formal hearings tend to discourage collaboration, deliberation, and cooperation among the parties. Additionally, they see formal hearings as inefficient, time consuming and encouraging posturing and conflict.

Free from formal restrictions, special masters in toxic tort litigation assume roles much different from those usually played by judges. Like Professors McGovern and Green in the Ohio Asbestos litigation, special masters may take an active role in developing the case, and like Kenneth Feinberg in the Agent Orange case, may bring special skills in mediation and settlement negotiation to bear on the issues. Alternatively, they may be selected because they have special scientific or technical expertise.

When informal fact-finding procedures, such as reports from experts, viewings, ex parte information from parties and other witnesses, and ex cathedra information are used, masters often circulate their findings to the parties in draft form before reporting them to the court. Parties are permitted to comment on the draft, and the master is able to include corrections before submitting the report to the court. If a party is dissatisfied with the master’s reported finding, the court can hear the objection and try the issue de novo. At such hearings, the master or his agent can be presented by a party as a fact witness in support of the master’s finding. As in a jury trial, the master’s findings based upon informal fact-finding procedures are given no special weight under a clearly erroneous standards of review; thus, avoiding due process objections. However, unlike the process anticipated by Rule 53, some judges using this procedure in non-jury trials have permitted the master to be cross-examined by the parties with regard to his own observations. This right to proceed de novo before

194. Fed. R. Civ. P. 53 (c) (“Subject to the specifications stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before a 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.”).
195. Id.
196. Berger, supra note 141, at 712.
197. See also Nathan, supra note 19, at 449. See generally Farrell, Coping with Scientific Evidence, supra note 2.
198. Nathan, supra note 19, at 455-61; see Stone v. City and County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992) (parties’ failure to object to special master’s draft reports held a waiver of objections that reports contained factual errors).
Another objection to the procedures used by special masters is that they are developed only to handle the cases before them and are not rules of general application. As idiosyncratic rules specifically designed for the particular situation, they do not provide universal principles. Thus, critics of current special master practice argue that the unique procedures developed by masters like Francis McGovern run counter to the foundational "trans-substantive" premise of the Federal Rules of Civil Procedure — the establishment of a single set of procedural rules to be applied in all types of litigation, without regard to their subject matters.

Yet, Rule 53 has been used in toxic tort litigation to provide designer procedures that are highly successful and efficient. For instance, special master Sol Schreiber was able to develop procedures for his inspection of classified government documents at the Pentagon bearing on government knowledge about the toxicity of Agent Orange, something the judge might have found difficult to do. Similarly, McGovern was able to design and direct studies to produce environmental and ecological information needed by all of the parties to refine their interests and settlement strategies — an unusual role for a judge.

Another difference between the procedures used by judges and those used by masters involves the communications to the parties. Judges, yet special masters can consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding. Proceedings, therefore, will not proceed on communications the judge may not normally entertain them. The Model Code of Judicial Conduct provides that "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, unless the judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." Nevertheless, federal judges have been assigned the non-traditional role of advising and placing the proceedings to a future meeting with the parties who may proceed ex parte or in the master's discretion, as long as the present proceedings are unsuccessful.
functions of case management and settlement facilitation, they have come to accept *ex parte* communications where they are non-prejudicial and more efficient. Thus, Judge Jack Weinstein observed in the New York asbestos litigation that it is standard practice for the presiding judge or magistrate to meet separately with each of the parties for a candid discussion of overall strategy, corporate politics and the needs of the party.\(^{203}\)

Not only may *ex parte* communications be appropriate for the efficient performance of the mediation and remedial tasks given to masters in toxic tort and product liability cases, it may also be essential to the preservation of the judge's neutrality when, and if, it becomes necessary for the judge to try the merits of the case. Critics of the role of special masters in some toxic tort cases are concerned that findings of facts based upon evidence not shared with all of the parties or to which parties have not had an opportunity to respond, works a fundamental unfairness and is contrary to our traditional model of civil justice.\(^{204}\) Yet, judges in massive tort litigation, like the silicone breast implant cases, can preserve their objectivity only if they appoint a master to conduct informal discussions with the parties regarding discovery, conduct of the case and settlement. Furthermore, the prejudicial effects of the *ex parte* practice are mitigated when parties are given *de novo* hearings on recommended findings based upon *ex parte* communication, instead of according such findings clearly erroneous weight as provided by Rule 53.\(^{205}\)

### D. Public Law and the Lack of Precedent

Finally, there is the problem of maintaining equity among persons with similar claims, which is addressed by the principles of judicial precedent and *stare decisis*. The decisions of judges are made on an accessible record,

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204. *Fleming James, Jr., Civil Procedure 1.2*, at 3-4 (1965). *But see* United States v. Conservation Chem. Co., 106 F.R.D. 210, 234-36 (W.D. Mo. 1985) (holding master appointment would not be revoked where master engaged in settlement negotiations *ex parte* with the parties and the record was completely void of any evidence suggesting that the Master's impartiality might reasonably be questioned).

articulated, and followed by other courts of inferior status as precedent. The decisions made by masters, on the other hand, particularly those based on informal proceedings and arguments between the parties, have little precedential value. Thus, the recommended findings of masters, accepted because they are not demonstrated to be clearly erroneous, are not cited by courts or other masters. Only the decision of the district court, if any, accepting the master's report, is available as an element of public law. Like settlements, toxic tort cases submitted to masters may deprive the public of the benefit of understanding what considerations are significant to the resolution of the claims involved, and what might be the predictable result in similar cases in the future. On the other hand, where there are disputed issues of law or recommended facts in such cases that are challenged as clearly erroneous, it is the district court's decision and its appellate review that is determinative and precedential in future cases. In addition, factual proofs of causation and damage can be as idiosyncratic as some toxic tort suits themselves and thus provide little potential as precedents.

E. Time, Expertise, Efficiency and Humanity

To summarize, judges use special masters to meet the special needs presented by toxic tort litigation for several reasons — time, expertise, informality and humanity. First, unlike federal judges, judicial adjuncts can devote enough time to the litigation to become fully acquainted with the parties and extensive information involved. The complicated issues, difficult technical questions and sheer magnitude of information in toxic tort litigation make it almost impossible for a single district court judge with a full docket to handle the case without assistance. Special masters are usually assigned only one case at a time. As illustrated in the case studies set out above, even part-time special masters can afford to, and indeed have a financial incentive to, devote as much time as is necessary to comprehend the complexities of the case.

Second, court-appointed assistants can provide expertise that the judge lacks in a relevant area, and can help bridge the gap created by epistemological differences in law and other disciplines, including epidemiology, toxicology and medicine, which are often called upon to settle issues of causation in toxic tort litigation. Masters, whether they are attorneys or not, can be appointed to evaluate the validity of scientific data to be admitted as evidence if they are themselves experts in some nonlegal

206. See generally Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1082 (1984) (arguing against private settlements as deprivations of the public good created by judicially established legal precedents).
207. Id. at 1083-84.
208. See generally Farrell, Daubert, supra note 31.
field, such as the biological sciences, computer science, statistics, or correctional administration. 209 These expert masters have been appointed under Rule 53 to arbitrate differences between parties concerning specialized evidence, to independently investigate scientific or technical matters and to use their expertise to present nontechnical data in a scientific way. 210

Expert special masters differ from Rule 706 court-appointed experts in several respects. Court-appointed experts commonly submit their reports to the court as evidence, and the experts are then subject to cross-examination. 211 The reports of special masters, and the evidence upon which they are based, become part of the record in bench proceedings and are reviewed under a clearly erroneous standard. 212 In a jury trial, reports of the master are introduced without supporting evidence and are weighed by the jury. Therefore, the cardinal distinction between court-appointed experts and expert masters is that masters may not be cross-examined on their findings, while court-appointed experts can. 213 In addition, special masters can be given other powers, such as the authority to hold formal hearings, subpoena documents and enforce orders that are not commonly associated with expert witnesses appointed under Rule 706.


210. For a more in-depth discussion of the use of special masters appointed under Rule 53 to provide scientific or technical expertise, see FARRELL, SPECIAL MASTERS, supra note 2, at 575-99, (1994).

211. FED. R. EVID. 706 provides that a witness so appointed shall advise the parties of the witness’ findings, if any; the witness’ deposition may be taken by any party; and the witness may be called to testify by the court or any party. See JOSEPH CECIL & THOMAS WILLING, COURT APPOINTED EXPERTS 552 (1993) (stating, “[u]nless the parties agree otherwise, the court-appointed expert must advise the parties of any findings, submit to a deposition by any party, and respond to cross-examination of his or her testimony, if any, at trial”).

212. FED. R. CIV. P. 53(e)(3).

The actual practice of special masters appointed under Rule 53 has been found to vary enormously and be relatively unbounded by the open-ended terms of the Rule. Thus, while some masters, particularly retired judges, conduct formal evidentiary hearings upon which to base findings of fact, most masters seem to use informal proceedings exclusively to gather and evaluate the information upon which their findings are based. As the Michigan fishing case illustrates, special masters find unprecedented ways of framing the issues in the case, investigating factual issues and assessing claims and damages.

Finally, although difficult to describe and weigh, anecdotal evidence supports the notion that by appointing a special master to handle a particular part of a case or assume a particular role, courts provide litigants in large class action suits with a judicial figure who has the time and interest to talk to them, listen to their problems, commiserate where appropriate, and rule with a compassionate understanding of the humanness of the dispute to be resolved. If judges are called upon by modern, large, complex litigation to become judicial bureaucrats, managing huge caseloads and all aspects of litigation, perhaps masters can be seen as the visible judge, whom the parties can approach, knowing that the master has both the information and the responsibility to listen, ponder and appreciate their problems — a decision maker they can know. A process that includes such humanizing factors, respects the dignity of participants and engenders respect for judicial institutions.

VI. THE LEGITIMACY OF SPECIAL MASTER PRACTICE

We can view the increased use of special masters as part of a trend away from the traditional adversary model of civil justice, toward a more diverse process that increasingly includes alternative dispute resolution, more informal procedures such as pre-trial conferences and mini-trials, and new actors — magistrates, masters, court managers, and experts establishing computerized dockets and monitoring caseloads. The trend is a response to tremendous increases not only in toxic tort litigation but suits by and against the government and large corporations. The need is for mass produced justice, and it is achieved through aggregation, computerization, standardization, and statistical analysis.

Having explored this need in toxic tort litigation and the roles that special masters are asked to play in it, we must now consider whether those roles can be accommodated in our scheme of civil justice. Is the way in which the special masters performed in Agent Orange, the DDT case, the Michigan fishing rights case, and Dalkon Shield legitimate in terms of the values

214. For example, by prisoners, environmental suits, and social security cases.
Function and Legitimacy of Special Masters

underlying the American judicial system? The question is not whether their practice conforms to the requirements of Rule 53(b) and if so, whether Rule 53(b) conforms to the requirements of Article III and the due process clause of the Constitution. Rather, the question to be considered here is whether their practices further the objectives of judicial resolution of civil disputes. This functional evaluation depends on the identification of those objectives, or principles which are embodied in positive law, but which transcend it. Thus, we must examine the values that are expressed in the Federal Rules of Civil Procedure and Article III of the Constitution to see the extent to which they are furthered by the modern use of special masters.

A. The Trend Toward Administrative Practice

The shift from individual mass justice is seen by some observers as a move from professionally controlled judicial fiefdoms to courts that function more like modern businesses, and administrative agencies concerned with efficiency, productivity, simplicity and cost effective delivery of judicial services. These are reasonable, perhaps inevitable, changes in process to accommodate not just larger suits but also an increase in the total number of both civil and criminal filings, more complicated suits, more corporate activity and increased urbanization. Yet, it may be that in the process of change, we are seeing traditional decision-making models dissolving in favor of hybrids that are better able to deal with an increasingly complex society

215. By "legitimate," I mean a generally agreed upon reason to respect the action as a permissible intrusion into the affairs of others. Of the legitimacy of judicial action, Justices O'Connor and Kennedy have stated "[t]he Court's power lies... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (joint opinion).

216. To answer such questions, one would look to positive law, which is law consisting of a set of rules that meet a finite set of formal criteria that identify the manner in which authoritative institutions can declare such rules or other standards — declarations of rules by those with political authority to make them, such as courts and legislatures. See George P. Fletcher, Two Modes of Legal Thought, 90 YALE L.J. 970, 974 (1981); H.L.A. Hart, THE CONCEPT OF LAW 181 (1961) (discussing theories of natural law and legal positivism).

217. Those who conceive of law as a set of moral principles outside of positive law which the latter may only approximate, hold that a rule need not be respected as law unless it embodies certain unwritten moral principles. See, e.g., Lon Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 HARV. L. REV. 630, 655-69 (1958); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 847 (1935).


219. Id.
and litigious culture. The oxymorons we use, like "negotiated rule making," "legislative courts," and "administrative law judges," suggest it.

B. Masters and Administrative Agencies

The modern use of special masters in toxic tort litigation may be such a hybrid, a cross between an administrative agency and a court, or mini-agencies within a district court. The special masters participating in toxic tort and other complex litigation are not the historical, ministerial special masters contemplated by Rule 53. Special masters participating in toxic tort litigation do indeed function much like administrative agencies. However, they operate in the judicial branch, not the executive, seeking to carry out generalized justice.

As we have seen in the cases described above, special masters, like administrative agencies, engage in general lawmaking for a large class of people, as opposed to adjudicating cases for individual litigants. To do so, masters use informal procedures, conduct investigations into the private dealings of corporations and public institutions, and in their recommended plans and remedial orders, engage in a kind of prospective rulemaking, defining acceptable conduct for whole industries. In addition, like agencies, special masters may perform the functions of all three branches of government—adjudication, rule making, and enforcement. Furthermore, the independence and neutrality of neither agency adjudicators nor special masters is assured by life tenure and irreducible salaries. Finally, the justification for delegating judicial power to both masters and agencies is primarily their expertise, efficiency and the conservation of judicial resources.

However, masters, even those controlling massive litigation like the silicone breast implant cases, are not like a mini-agency in all respects. Unlike legislative courts and administrative agencies, special masters are not accountable, even indirectly, to the electorate. Administrative agency adjudicators such as those in the Social Security Administration, are selected by a popularly elected executive with congressional confirmation and are removable at will by the executive, while special masters can be dismissed only by the life tenured judges who appoint them. Agencies can initiate their own enforcement actions and some independent agencies can enforce their own orders. Special masters, on the other hand, are entirely dependent on the court for their instructions and for the enforcement of their directives. Finally, administrative agencies are on-going legal institutions that follow their own precedents and create a body of law that is accessible to the public and provides a guide for future conduct. Special masters do not. Their findings have no precedential effect and their decisions are not

compiled in a public registry. Only when objections are made are their findings reviewed by the district court, and only determinations on those objections can be found in a reported decision.

What difference should these similarities and differences make in determining the legitimacy of the special masters’ practice described above? If the delegations of judicial authority which could be exercised by Article III courts are legitimate when made to administrative agencies in the executive branch, are they not legitimate when made to special masters controlled by the judiciary? Thus, the interesting issue may not be how to amend Rule 53 to conform masters’ practice to the traditional model, but how to amend it to permit the varied practice carried on under its authority. In other words, does the Constitution permit the fundamental characteristics of the actual practice and roles of special masters described in Part IV? Additionally, even if the Constitution does permit the flexible, informal process used by modern toxic tort masters, should it be retained?

C. The Constitutionality of Rule 53 Under Article III

Does the Constitution permit an Article III judge to delegate fact-finding to a non-Article III judge or a judicial adjunct, if the findings are reviewable only under a clearly erroneous standard as currently contemplated by Rule 53? Surprisingly, the question has not been answered definitively. The outer boundaries of the authority that can be delegated to a master under Rule 53 are established by both Article III and the due process clauses of the Constitution.221

Article III has been interpreted as protecting two values — the institutional independence of the judiciary, necessary to our system of checks and balances and the neutrality necessary to fair adjudication. Thus, in other contexts, the Supreme Court has indicated that the exercise of the “judicial power of the United States” by personnel who are not judges appointed under Article III, i.e., who are without life tenure and protected salaries, violates the separation of powers doctrine and perhaps the Due Process Clause unless, on balance, the benefits of such delegations — efficiency and expertise — outweigh the diminution of Article III values of structural independence and impartial adjudication.222

221. It should be remembered that the Court in *La Brg v. Howes Leather Co.*, 352 U.S. 249 (1957), did not hold that a reference to the master under the circumstances of that case violated Article III of the Constitution, but only that it was not warranted under the exceptional conditions requirement of Rule 53. See *Cruz v. Hauck*, 515 F.2d 322, 330 (5th Cir. 1975) (holding that the exceptional circumstance limitation results from deficiencies of the master system, rather than from constitutional limitations upon non-Article III judges).

222. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (enumerating the factors the Court looks to when applying the balancing test); *Thomas v.*
Article III of the Constitution requires that the judicial power of the United States be exercised by life tenured judges removable only by impeachment, whose salaries cannot be reduced. The independence of the judiciary thus safeguarded, is supported by considerations of both the structural independence of the judicial branch and procedural fairness. Judges whose salary and tenure cannot be reduced by the other branches will act independently to enforce the institutional checks and balances set forth elsewhere in the Constitution. Furthermore, the neutrality provided by such independence protects the interests of individual litigants in fair, unbiased adjudication of particular disputes.

1. Legislative Courts

Case law under Article III has come to distinguish two types of non-Article III decision-makers that exercise the judicial powers vested in Article III courts. The first type is legislative courts, created by Congress under Article I and not bound by Article III's guarantee of life tenured judges. These include courts martial, the federal tax court, the court of customs and patent appeals, and executive agency determinations of "public right" disputes, or disputes between private citizens and the government. The Constitution does not require judicial review by an Article III court of legislative court decisions. This line of cases has raised concerns that the adjudication of public rights disputes must be constitutionally limited so that the functions of an Article III judiciary cannot be eliminated at Congress' discretion.

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Union Carbide Agric. Prods. Co., 473 U.S. 568, 589-90 (1985) (declining to adopt formalistic and unbending rules in determining whether a delegation is constitutionally permissible); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113 (1982) (White, J. Dissenting) (explaining that Article III should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities). See generally CHEMERINSKY, supra note 37, § 4.5 (discussing the Supreme Court's treatment of when it is constitutionally permissible to place matters reserved to Article III courts before non-Article III tribunals).

discretion. The second category of non-Article III adjudicators is administrative agencies, which serve as adjuncts to Article III courts and adjudicate disputes between private individuals.

The constitutional requirements for judicial review of these two types of decision-makers differ. While legislative courts adjudicating public rights disputes are often subject to judicial review by virtue of their enabling legislation, the Constitution does not require appellate review, on the theory that Congress, having created public rights, can determine the mode of their enforcement. In contrast, the Constitution does require judicial review when there is an adjudication of private rights by a non-Article III tribunal. In *Crowell v. Benson*, the plaintiff challenged the constitutionality of federal legislation creating a workers’ compensation program in maritime cases. The federal legislation provided for the appointment of deputy commissioners, as non-Article III decision-makers authorized to make findings of fact based upon hearings at which the rules of evidence did not apply. The Court noted that in cases defining the liability of one individual to another private individual (which would now include toxic tort litigation):

> [T]here is no requirement that, in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges. ... In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found. ... For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of the most serious burden while preserving their complete authority to insure the proper application of the law.

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232. *Id.* at 51-52 (emphasis added).
2. Judicial Adjuncts

Thus, the legislative scheme in Crowell v. Benson called for the creation of "judicial adjuncts" (deputy commissioners of the compensation commission) who did not have the attributes of Article III judges, but were to assist such judges in the exercise of their judicial powers under the Constitution. The Court held that the scheme was constitutional so long as the Article III judge retained authority over questions of law and authority to review ordinary fact findings de novo on the record before the commission. The Court also held that findings of constitutional facts and facts upon which the commission’s jurisdiction depended required a de novo hearing before the Article III court, at which new evidence could be, presented, though this second holding was later eroded. The workers’ compensation commission was viewed as an adjunct to an Article III court (like a special master) and delegations of essential fact finding authority to such adjuncts was permitted only if Article III federal judges exercised “close supervision,” and the adjunct had no independent authority to enforce its own orders. In this way, the values of Article III — structural separation of powers and the fairness of neutrality — are preserved by requiring review by an Article III court.

While the distinction between private law and public law suggested in Crowell v. Benson has been referred to only occasionally by the Court, its continued importance was suggested by the Supreme Court’s invalidation of the federal bankruptcy statute in Northern Pipeline Construction Co. v. Marathon Pipe Line Co, (“Northern Pipeline”) in 1982. In Northern Pipeline, the Court held that Congress could not assign the power to adjudicate

233. Id. at 63-65.
234. Id.; see also GLEN O. ROBINSON, ET AL., THE ADMINISTRATIVE PROCESS 152 (4th ed. 1986); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (holding constitution required de novo review of essential jurisdictional fact of citizenship in deportation proceedings); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 291 (1920) (holding constitution required de novo review of finding that a rate was confiscatory and therefore a “taking” for due process purposes). These holdings concerning delegations of authority to administrative agencies and the importance of “constitutional” and “jurisdictional facts” have been eclipsed, though not overruled, with the advent of the Administrative Procedures Act and later due process precedent.
235. Crowell, 285 U.S. at 63; see also Grimes v. City and County of San Francisco, 951 F.2d 236 (9th Cir. 1991) (magistrate required to refer contempt charges).
237. See, e.g., Atlas Roofing Co. v. Occupational Safety Comm’n, 430 U.S. 442, 450 (1976) (stating that in cases involving public rights, “the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to a [non-Article III tribunal].”)
private state contract claims to Article I bankruptcy courts because their judges did not have life tenure, even though the bankruptcy court’s determination was subject to review by an Article III court under a clearly erroneous standard. Therefore, the Court struck down the 1978 bankruptcy statute. The holding might suggest that “adjuncts,” like the bankruptcy courts and special masters, who adjudicate private rights must be subject to Article III judicial review in a de novo proceeding under a clearly erroneous standard.

Since Northern Pipeline, the Supreme Court has adopted a balancing test that weighs the benefits of delegations of authority to settle civil disputes (efficiency and expertise) against their diminution of Article III values (fairness to individual litigants based on an independent judiciary and separation of powers).

The Supreme Court’s Article III rulings raise questions about the use of special masters as adjuncts whose findings are reviewed by the Article III district court on a narrow, clearly erroneous standard. Special masters fall into the second category as non-Article III judicial adjuncts when they try cases involving private rights, particularly in toxic tort litigation. However, special masters can also be appointed to determine important issues in institutional reform suits, asserting legislative and constitutional rights against public defendants, and even in toxic tort suits like Agent Orange, where the United States was a defendant because legislation had abrogated its sovereign immunity.

3. Judicial Review

It is fairly clear that Congress cannot authorize judges to delegate adjudicatory authority in criminal cases to parajudicials reviewed under a clearly erroneous standard. In a number of ways, the Constitution requires that criminal process conform to a strict model of procedural fairness. The Bill of Rights, for instance, requires that particular attributes

239. Id. at 87.
240. Id. (holding that the broad grant of jurisdiction to the bankruptcy courts contained, in 28 U.S.C. § 1471 (1976 ed. Supp. IV), was unconstitutional). Later, the Bankruptcy Act was amended to permit de novo review of state law issues by Article III judges and its constitutionality was sustained.
242. Article III, § 1 of the Constitution provides in part: “The judicial Power of the United States shall be vested in one supreme Court and such inferior Courts as the Congress may from time to time ordain and establish. The Judges...shall hold their offices during good [b]ehavior, and shall...receive...[c]ompensation, which shall not be diminished during their [c]ontinuance in [o]ffice.” U.S. CONST. Art. III, § 1.
of the adversary process pertain in criminal proceedings — indictment, double jeopardy, self-incrimination, the right to a speedy and public trial by an impartial jury, notice of the nature and cause of the accusation, confrontation of witnesses, compulsory process for obtaining witnesses and assistance of counsel. Nevertheless, the Supreme Court has held that a federal magistrate judge, who has neither life tenure nor other attributes of an Article III judge, could hear important matters and recommend findings of fact and conclusions of law to the judge in a federal criminal case. Article III requires only that the judge review the transcript of the evidence upon which the magistrate’s decision is based and make its own findings de novo upon objection. The review need not include taking additional testimony and evidence. Thus, the magistrate’s fact-finding role is constitutionally permitted only if a de novo determination (though not necessarily a de novo hearing) will be made by an Article III judge at the request of an objecting party. Nonconsensual references to magistrates have been sustained against constitutional attack in criminal cases only where the magistrate performed under the total control and jurisdiction of the district court. In the case of such references, the magistrate has no independent authority to enforce orders, and dispositive decisions of law and fact are reviewed de novo.

In civil matters, the Constitution may be more permissive. After Crowell v. Benson and the growth of the administrative state, regulatory agencies and welfare agencies conducted much of the federal government’s adjudication, and their decisions were subject to judicial review on a substantial evidence standard. Special masters and magistrates try civil cases with the consent of the parties, and recommend decisions on dispositive motions. Like the magistrates whose role in criminal cases was upheld in United States v. Raddatz, special masters have no independent authority under Rule 53 to enforce their own orders through civil contempt or injunction. However, their factual findings are expressly entitled to clearly erroneous weight rather than subject to de novo review upon objection as upheld in Crowell and Raddatz. Only where the master’s recommended factual findings are based on informal process (sometimes including ex parte communications), have

244. Id. at 682-83.
245. Id. at 675-76.
246. Id. at 674.
247. CHEMERINSKY, supra note 37, § 4.5, at 199.
248. See generally id.
250. See Caprera v. Jacobs, 790 F.2d 442, 444 (5th Cir. 1986); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1041-42 (7th Cir. 1984); Pacemaker Diagnostic Clinic v. Instromedix, Inc., 725 F.2d 537, 542 (9th Cir. 1984).
courts developed the practice of providing *de novo* review, even though it is not provided for in the rule.

Only recently has the constitutionality of non-consensual references to special masters as non-article III adjudicators in private civil litigation been addressed directly. Several courts of appeals have issued writs of mandamus directing district courts to vacate orders appointing special masters assigned to conduct formal evidentiary hearings on the merits of a case, finding that the appointments violated Article III. These courts seemed to find that the stage of litigation (the liability stage) was determinative of Article III limitations on the scope of Rule 53, regardless of exceptional circumstances. In *In re Bituminous Coal Operators Ass'n, Inc.*, the D.C. Circuit held that the reference of the full case, including the merits of liability, to a special master under Rule 53 violated Article III of the Constitution. Presented with a narrower issue, the U.S. Court of Appeals for the First Circuit in *Stauble v. Warrob, Inc.*, reversed a judgment rendered on the basis of a report by a special master to whom the defendants had earlier objected by seeking a writ of mandamus. The First Circuit found that “the Constitution prohibits us from allowing the non-consensual reference of a fundamental issue of liability to an adjudicator who does not possess the attributes that Article III demands.” Distinguishing the delegation of authority over preparatory issues or remedy-related issues, the First Circuit held that the district court lacked authority to refer fundamental determinations of liability without a provision for *de novo* review of the master’s report. In the absence of such a review, the appointment was not within the constitutional limitations of Rule 53 and, therefore, was void. Hence, because the master’s report was of no effect, the case was remanded to the district court for trial.

**D. Due Process**

The Supreme Court has not made clear what factors it will consider in connection with the fairness value of Article III requirements for an
independent judiciary, (i.e. the neutrality in particular cases that is assured by life tenured judges) but it would seem to become a due process analysis at some point. The basic formula used to determine what process is due under the due process provisions of the Fourteenth and Fifth Amendments in the adjudication of private claims against the government is, again, a balancing test.

In Mathews v. Eldridge, the Supreme Court held that the interests to be balanced are the private interest at stake, the likelihood that the procedure at issue will promote more accurate decisions, the expense of such procedures to the government and the government interest at stake in the proceeding. The goal of the balancing exercise is the efficient and accurate application of law to facts. In suits involving private rights, the requirement of Article III review announced in Crowell and subsequently refined, supplies the neutrality that fairness requires.

Nevertheless, due process requires more than structural neutrality. It requires notice and an opportunity to respond, and additional attributes of process where, on balance, they are necessary to the accurate application of law to facts. For example, the practice of ex parte communications with the parties, that some settlement masters adopt, may be said to deprive parties of their due process right to respond to adverse allegations of fact, and therefore obstruct accurate fact finding. It would be harder to argue that the practice violates Article III, because Article III champions the interests of government and the institutional neutrality protected by the separation of powers (process writ large). Due process, on the other hand, can be seen to champion the interests of individual litigants to accurate and fair adjudication of their particular disputes (process writ small). The efficiency supplied by special masters in assisting judges to manage complex litigation, arguably violates the structural principles of Article III that assure institutional neutrality because in Rule 53(b), Congress has authorized Article III judges to delegate their adjudicatory authority to non-Article III decision-makers. Yet, the independence of the judiciary is not threatened.

261. Id.
263. See also Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (setting forth the due process requirements of a predetermination hearing before the state welfare department, including adjudication by an impartial decision-maker).
264. Morrissey v. Brewer, 408 U.S. 471, 483-84 (1972) (finding that certain procedural protections are necessary to avoid the erroneous application of law to facts).
Function and Legitimacy of Special Masters

Congress is unlikely to be advantaged by such authorization, if for no other reason than that the judiciary controls the delegation.

The efficiency versus equity dichotomy may be a false one when considering the fairness values assured by due process. Without at least a certain modicum of procedural efficiency, delay and expense deprive litigants of the fair adjudication of their disputes to which they are entitled by due process. Administrative agency-like parajudicials, such as special masters, may be necessary if federal courts are to carry out their modern, quasi-legislative duties in mass toxic tort and other complex litigation with fairness to the thousands of parties who seek mass justice. The evolving parajudicial model may not fit neatly into our traditional civil justice paradigm based as it is on passive, generalist judges and adversarial truth seeking. Nevertheless, it seems to respect both the structural principles of judicial independence and neutrality, and the fairness required by the spirit, if not also the letter, of the Constitution. Thus, to determine the constitutionality of procedural techniques, both Article III (as interpreted in the Schor and Thomas cases) and the Due Process Clause (as interpreted in Mathews v. Eldridge) we must balance the collective interests in the separation of powers, the cost of the procedure to the public, and the accuracy it would produce, as well as individual interests in neutrality and fairness.

I submit that, at this point in its development, special masters' practice, as it is described in this Article, is supported by such balancing. Collective interests in efficiency, political independence, and the neutrality of the judiciary are preserved in the case of special masters' practice under Rule 53 by the fact that an Article III judge has control over the appointment, the powers, the compensation and the tenure of masters. Individual interests in fairness are protected by procedures that permit the expeditious and inexpensive disposition of the myriad of claims subsumed in toxic tort or other large, complex litigation. Full blown, formal evidentiary hearings on every issue in the interest of fairness may be so costly and time consuming as to be self defeating. Moreover, complete adjudication by a single generalist judge may provide procedural, but not substantive fairness when special expertise is required to understand and digest voluminous, technical evidence. Thus, rather than requiring a choice between efficiency and fairness, both may require that we accept the attributes of special masters' practice described here and continue to permit courts to use this valuable tool to execute their modern responsibilities, trusting the federal judiciary to use the integrity and wisdom it would seem they have.

265. Via the presiding federal court judge.