

## Masters of Our Fate

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**M**asters can help resolve issues in a timely and efficient manner, but maintain awareness of and be proactive to avoid potential pitfalls.

# Navigating the Use of Masters in Complex Litigation

Federal courts have the power to appoint private individuals, called masters, to assist the court with a variety of tasks, including investigation, resolution, or enforcement of specific issues. Justice Brandeis has stated “[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.... This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.” *Ex parte Peterson*, 253 U.S. 300, 312 (1920).

Under the Federal Rules of Civil Procedure, Rule 53 provides federal courts with the power to appoint masters, outlines the permissible purposes and functions, and addresses review of a master’s rulings. Rule 53 makes clear that masters should only be appointed in the rare situation where neither the district court judge nor magistrate could appropriately address the issue—due to a lack of expertise, time, or other resources. Given the inherent complexities of multidistrict litigation, courts are likely to view the appointment of a master as appropriate and potentially helpful in these types of cases. While masters can provide benefits to courts and parties, there are a variety of potential pitfalls that should be taken into consideration when navigating litigation involving a master.

## Appointing Masters – Role, Scope, Purpose, and Limitations

### Changing Terminology and Changing Roles

In 2003, Rule 53 was “revised extensively to reflect changing practices in using masters.” Fed. R. Civ. P. 53, Advisory Committee’s Note (2003). Pre-2003, the term “special master” was used; the change to “master” reflects the expanded role from trial functions to inclusion of a variety of pre- and post-trial functions. *Id.* See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters’ Incidence and Activity* (Federal Judicial Center 2000). In various state courts, such individuals appointed by the court to assist on specific tasks are often referred to as “referee.” See, e.g., NY CPLR § 4301 (New York statute addressing “referees”). While each jurisdiction may vary its terminology and the specific authority and limitations on the use of a master, special master, and/or referee, the use of private individuals appointed by the court to assist the court in performing specified tasks, typically limited by rule or statute, is relatively ubiquitous.

### Scope of Duties of the Master

Rule 53 authorizes appointment of four types of masters: 1) consent masters; 2) trial masters; 3) pretrial masters; and 4) post-trial masters. Fed. R. Civ. P. 53(a)(1). Although masters may only be appointed under Rule 53 for these purposes, masters may be appointed for other purposes if authorized by another authority, rule, or

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statute. For example, Rule 54 authorizes appointment of a master for attorney fee issues. Fed. R. Civ. P. 54(d)(2)(D). By Rule 53's plain language, even where use of a master is authorized, it is not mandatory, and the trial court has discretion. Fed. R. Civ. P. 53(a) ("a court *may* appoint a master") (emphasis added); *id.* at Advisory Committee's Note (2003) ("the court retains unfettered discretion to refuse appointment," even where both parties consent); *Garcia-Rubiera v. Fortuno*, 727 F.3d 102, 114 (1st Cir. 2013) (appointment of a master is within trial court's discretion); *Sukumar v. Direct Focus, Inc.*, 349 F. App'x 163, 165 (9th Cir. 2009) ("The district court has discretion whether to appoint a special master and to decide the extent of his duties.").

In a 2017 article, a former District Court Judge for the Southern District of New York suggested that appointments of special masters "are very beneficial in resolving disputes quickly, streamlining discovery, handling delicate settlement negotiations, and – somewhat surprisingly – reducing cost and delay." Hon. Shira Scheindlin, *The Use of Special Masters in Complex Cases*, Law360 (August 15, 2017, available at <https://www.law360.com/articles/950395/the-use-of-special-masters-in-complex-cases>). Given the demands of judicial dockets and the rise in complex litigation, including the increasing number of individual actions in MDL proceedings, masters may provide significant support to the court and parties throughout litigation. For example, a master may have

more availability on short notice than a federal judge to resolve frequent discovery disputes, have expertise in a niche area (e.g., e-discovery), and help streamline discovery processes. *Id.*

However, some practitioners remain skeptical and have reported substantial challenges navigating cases with an appointed master. A master adds a layer of quasi-judicial oversight, which requires compensation to the master that would not be due to a judge, and it may not increase efficiency. Further, counsel should not feel pressured to sacrifice their client's interests in the name of collaboration and efficiency when working with a master in the beginning stages of litigation. Some practitioners have expressed concern that masters can usurp the traditional meet and confer process, leading to more issues being litigated and increasing costs. Dr. Barbara Meierhoefer, *Special Master Case Studies*, American Bar Association Judicial Division, Lawyers Conference Committee on Special Masters, 7 (February 2018). Finally, issues can arise when special masters exceed the original scope of their appointment, or are given authority that is more appropriate for the court or governed by rules of civil procedure.

#### Consent Masters

Courts may appoint masters to perform duties "consented to by the parties." Fed. R. Civ. P. 53 (a)(1)(A). Parties may consent to a master's performance of nearly every task, but a master may not conduct a jury trial unless the parties choose to waive their

right to a jury trial and consent to a bench trial before the master. Fed. R. Civ. P. 53, Advisory Committee's Note (2003).

#### Advice and Practice Tips:

- For any complex litigation where the issue is likely to arise, know the client's position on consent to masters before the court raises the issue. Some clients refuse to consent to special masters under any circumstances, and some will consent only within very narrow confines.
- Consider consent very carefully. Consent cannot typically be withdrawn once parties consent to appointment of a special master and the terms of the appointment.
- However, even when consent has been given, objections can be raised to any expansion of the master's duties beyond the consent given, or if changed circumstances warrant revoking the appointment of a master. See *United States v. Michigan*, 234 F.R.D. 636, 639–40 (E.D. Mich. 2006).

#### Trial Masters

Rule 53 authorizes appointments of special masters for trial when there are "exceptional conditions," or to perform an accounting or resolve complex damages computations. Fed. R. Civ. P. 53(a)(1)(B). Trial proceedings also include any evidentiary hearing on the merits of claims or defenses, preliminary injunctions, and damages. *Id.* at Advisory Committee's Note (2003). The use of masters to conduct trial proceedings is generally disfavored because

litigants have the right to present the merits of their case to the judge, and the “exceptional conditions” clause will be construed narrowly. *See Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 440–41 (3d Cir. 2005); *Sierra Club v. Clifford*, 257 F.3d 444, 447 (5th Cir. 2001); *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546, 550-51 (10th Cir. 1967). The Supreme Court has expressly held that congested dockets, complexity of issues, and an extensive amount of time required for trial do not constitute exceptional conditions justifying appointment of a master. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957) (unusual complexity of antitrust litigation was an “impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work”).

Appointing trial masters for accounting/damages is not held to the same “except-

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tional conditions” standard because such tasks do not require “any peculiar judicial talent or insight.” Fed. R. Civ. P. 53 (a)(1)(B)(ii), Advisory Committee’s Note (2003). However, at least one court has found that equitable apportionment of damages was a “quintessentially judicial endeavor” that did not equate to a difficult computation of damages as contemplated by the rule. *Beazer E.*, 412 F.3d at 441.

#### Advice and Practice Tips:

- Because “exceptional conditions” is construed narrowly, be prepared to raise that objection if the court is considering appointing a trial master for issues other than accounting/damages.

#### Pretrial Masters

Perhaps the most common use of masters in most litigation, and certainly in the MDL context, is for pretrial matters. Pretrial masters may be appropriately appointed under Rule 53 when neither the judge nor a magistrate in the same district have the time or resources to efficiently and effectively address complex pretrial matters – most commonly, some aspect of discovery. *See, e.g., Glover v. Wells Fargo Home Mortg.*, 629 F. App’x 331, 338 (3d Cir. 2015) (appointing master to oversee discovery of electronically-stored information (“ESI”)); *Rohrbough v. Harris*, 549 F.3d 1313, 1315 (10th Cir. 2008) (master appointed to oversee sealed discovery in Columbine school shooting litigation); *Jones v. Tauber & Balser, P.C.*, 503 B.R. 510, 519-20 (N.D. Ga. 2013) (court’s intention to appoint a discovery master); *Commissariat à l’Energie Atomique v. Samsung Elecs. Co.*, 245 F.R.D. 177, 180 (D. Del. 2007) (appointing master to determine if French law shielded documents from discovery); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 112 (D.N.J. 2006) (appointing master to monitor compliance with discovery where defendant’s behavior had already required an “unprecedented” amount of time and effort of the trial court and the magistrate judge).

Unlike a trial master, “exceptional conditions” are not needed, but a pretrial master should be appointed “only when the need is clear.” *See* Fed. R. Civ. P. 53, Advisory Committee’s Note (2003). *Equal Emp’t Opportunity Comm’n v. W. Distrib. Co.*, No. 16-CV-01727-WJM-STV, 2019 WL 2208512, at \*3 (D. Colo. May 22, 2019) (stating that appointment of discovery master is “the exception, not the usual or common practice” but finding it warranted in that case); *Montgomery v. Comey*, 300 F. Supp. 3d 158, 170 (D.D.C. 2018), *aff’d as modified*, 752 F. App’x 3 (D.C. Cir. 2019). Under Rule 53, it is preferred that the matter be referred to a magistrate judge if possible. Fed. R. Civ. P. 53, Advisory Committee’s Note (2003); *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d 1080, 1087 (3d Cir. 1993) (discussing preference for assigning matter to a magistrate judge rather than appointing a special master).

For example, in the *Vioxx* MDL, the district court appointed a master and

special counsel (to assist the master), given the Fifth Circuit’s concern that the district court’s prior individualized review of two million documents “proved to be inadequate” and could have amounted to an “abuse of discretion.” *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 813 (E.D. La. 2007) (citing *In re Vioxx Prods. Liab. Litig.*, No. 06-30378. 2006 WL 1726675, at \*2 (5th Cir. May 26, 2006)).

#### E-Discovery

Given massive volumes of information that are stored electronically, particularly by corporations, it is not surprising that it is becoming increasingly common for courts to appoint e-discovery masters in complex litigation. E-discovery disputes can be protracted and extremely costly to clients facing the possibility of gathering, reviewing, and potentially producing millions of documents in complex litigation. An e-discovery master with the legal and technical expertise to understand the intricacies of digital data may be better equipped to decide e-discovery issues in a way that is less likely to impose undue burden or expense on the producing party. E-discovery masters often have more in-depth knowledge of technology and IT matters and can help the parties understand the complexities of collecting ESI to foster cooperation and potentially reach a compromise without the need for protracted briefing.

#### Advice and Practice Tip:

- Make sure that any e-discovery master being discussed has the necessary legal and technical expertise.
- Consider the experience and knowledge level of the assigned judge and/or magistrate related to ESI disputes. Appointment of a master with more ESI and e-discovery expertise may significantly increase efficiencies and potentially decrease e-discovery costs.

#### Privilege Issues

Privilege concerns are another extremely common issue for which courts commonly appoint masters, particularly in cases with high volumes of documents, or those that require particular substantive expertise. *In re Search Warrant dated Nov. 5, 2021*, No. 21 MISC. 813 (AT), 2021 WL 5845146, at \*2 (S.D.N.Y. Dec. 8, 2021) (journalistic



privilege and attorney-client privilege); *United States v. Stewart*, No. 02 CR. 395 JGK, 2002 WL 1300059, at \*9 (S.D.N.Y. June 11, 2002) (attorney work product, and attorney-client privilege and applicable exceptions, such as crime-fraud exception); *United States v. Abbell*, 914 F. Supp. 519, 519 (S.D. Fla. 1995) (attorney-client privilege and attorney work product); *In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) (attorney-client and executive privilege) (“under certain exceptional circumstances, the appointment of a special master to review materials seized from an attorney may be appropriate. Those circumstances may exist where... the attorney represents the President of the United States such that any search may implicate not only the attorney-client privilege but the executive privilege.”). *Pearlshire Capital Grp., LLC v. Zaid*, 490 F. Supp. 3d 1299, 1302 n.1 (N.D. Ill. 2020) (noting practice of appointing masters to conduct lengthy privilege reviews).

#### Master of the Mar-a-Lago Documents

In the fall of 2022, discussion of a particular pretrial master dominated the news. On August 22, 2022, former President Donald Trump filed a lawsuit in the Southern District of Florida, seeking to block the government from reviewing documents seized from his Florida residence, or requesting appointment of a master to review the documents. *Trump v. United States*, No. 22-81294-CIV, 2022 WL 4015755 (S.D. Fla. Sept. 5, 2022), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022). On September 5, 2022, District Court Judge Aileen Cannon held that the court could exercise equitable jurisdiction over Mr. Trump’s motion, and that appointment of a master was necessary due to “the volume of seized materials and the parties’ expressed desire for swift resolution” to review for attorney-client and executive privileges. *Id.* at \*9. Judge Cannon appointed Raymond Dearie as the master (recommended by Trump and approved by the DOJ). As master, Dearie requested proof of Mr. Trump’s claims that the documents had been declassified, and that certain documents were planted by the FBI during the raid. However, Judge Cannon ruled on

September 29, 2022, that the appointment order did not contemplate the master obligating Mr. Trump to present evidence prior to the review of the documents. On October 14, 2022, the DOJ filed an appeal with the Eleventh Circuit calling for an end to the master review, saying that it was “unwarranted” because Mr. Trump had “no plausible claim of executive privilege... and no plausible claim of personal attorney-client privilege.” On December 1, 2022, the Eleventh Circuit reversed the order for the master’s review. *Trump v. United States*, 54 F.4th 689 (11th Cir. 2022). Although the Eleventh Circuit’s decision did end the master review, it is important to note that the appellate court’s ruling was based only on the district court’s lack of jurisdiction to hear the action and did not determine whether a special master review was or was not appropriate based on the facts presented. *Id.*

#### Post-Trial Masters

Post-trial masters are often used to “assist in framing and enforcing complex decrees.” (Fed. R. Civ. P. 53, Advisory Committee’s Note (2003); *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011) (“The power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established.”). Courts typically utilize this option to monitor compliance with an order, where a party has resisted the ordered change, and to resolve claims for attorneys’ fees or other post-trial concerns.

#### Other Advice and Practice Tips for Avoiding Potential Pitfalls

The use of various types of masters in complex litigation can have both potential benefits and pitfalls. A master may have more availability than the court to help the parties resolve disputes more quickly and efficiently, have more experience in a niche area (like ESI) which can streamline discovery, can step into the shoes of a mediator and assist in settlement negotiations, and can enforce a settlement agreement, all of which can reduce cost and delay for the parties. However, masters also introduce a new cost to litigation that would not be paid to a judge or magistrate, which can become excessive, especially if not restricted by the appointment order.

Masters may not always increase efficiency, and they have very broad authority. Below are some additional practice pointers to help navigate potential issues that may arise with the use of a master in complex litigation.

#### 1. Know the role of the parties.

- Prior to appointment of a master, the court must give parties notice and opportunity to be heard (written submissions are sufficient) regarding appointment and terms of the appointment of a master. Fed. R. Civ. P. 53(b)(1); *id.* at Advisory Committee’s Note (2003).
- Parties may suggest candidates. Fed. R. Civ. P. 53(b)(1). Consider discussion of masters early at preliminary status conferences, 26(f) conferences, etc., and be ready to provide suggestions for individuals if seeking appointment of a master.
- Parties may object to either the appointment of a master or the terms of the appointment, but failure to timely raise the specific objection could result in waiver of that objection. *See Ohio Midland, Inc. v. Proctor*, No. 20-3720, 2021 WL 2926120, at \*3 (6th Cir. 2021); *In re: Deepwater Horizon*, 824 F.3d 571, 579 (5th Cir. 2016); *Burlington N. R. Co. v. Dep’t of Revenue of State of Wash.*, 934 F.2d 1064, 1069 (9th Cir. 1991) (discussion of need for and timing of objections, but finding no waiver in that case).

#### 2. Appointment orders are critical and the first line of defense for avoiding some pitfalls.

- Insist that the order contains detailed inclusions that are as specific as possible. This is the first and best opportunity to define and limit the scope of the master, define procedures to be used, and set clear guidelines and expectations for compensation to prevent runaway costs.
- Rule 53(b)(2) requires that the appointment order be “as precise as possible” (Advisory Committee’s Note (2003)) and specify, at a minimum, the following:
  - i. the master’s duties, including any investigation or enforcement duties;

- ii. limits on the master's authority;
- iii. the extent to which the master may communicate *ex parte* with the court or the parties;
- iv. the record that the master must file with the court;
- v. the method for filing the record with the court;
- vi. time limits for the master to complete the assigned duties;
- vii. the standards for the trial court's review of the master's orders; and
- viii. the master's compensation.

**3. Masters have very broad discretion over the procedures used. If the parties want the master to be bound by certain rules (including Federal Rules of Civil Procedure and Evidence), the appointment order must provide for this. Otherwise, masters have broad authority to use any procedures as long as they are reasonable, appropriate, and consistent with the appointment order. Fed. R. Civ. P. 53(c)(1).**

- *United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1160–61 (9th Cir. 2004) (holding that a master is not required to follow the Federal Rules of Civil Procedure or Federal Rules of Evidence: “In light of a special master’s broad discretion to regulate the manner in which he will complete his duties... simply because a court may call upon a master to aid the judge in the performance of specific judicial duties, does not mean that a special master is required to follow the Federal Rules of Evidence or Civil Procedure, absent a reference order that so requires.”) (internal quotation omitted);
- *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, 567 F. App’x 533, 534 (9th Cir. 2014) (master was not required to have a court reporter record testimony where appointment order did not specify that transcript of testimony needed to be part of the record);

**4. Request that the appointment order provides specific limits and guidelines regarding *ex parte* communication between the master and the court, or between the master and the parties.**

- While Rule 53 does require that the subject of *ex parte* communication be

addressed in the appointment order, it provides broad discretion to the appointing judge because the Rule discourages, but does not prohibit, communication between the master and the court or the parties. Fed. R. Civ. P. 53, Advisory Committee’s Note (2003) (stating that although appointment orders should typically include prohibitions on the master having *ex parte* communications with the court or parties, such communications may be necessary depending on the circumstances of the case, particularly when the master is facilitating settlement or conducting *in camera* review of privileged documents); *C.D.S., Inc. v. Zetler*, 254 F. Supp. 3d 625, 633 (S.D. N.Y. 2017) (finding that circumstances warranted authorizing *ex parte* communications between the master and the court).

**5. A master appointment order can be modified – so do not hesitate to request a change if something is not working. Fed. R. Civ. P. 53(b)(4).**

- The court must give notice to the parties and an opportunity to be heard for any modification. *Id.* As the Advisory Committee’s notes explain, “The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment.”

**6. Preserve the deadline to object to a master’s order, report, or recommendations—21 days after a copy is served. Fed. R. Civ. P. 53(f)(2).**

- A party can file a motion to adopt or modify the master’s order or report or objections. However, the court may consider untimely motions or objections because the time limit is not jurisdictional. Fed. R. Civ. P. 53(f)(2), Advisory Committee’s Note (2003). See *Petties v. District of Columbia*, 291 F.R.D. 1, 3 (D.D.C. 2013).
- Failure to object does not result in automatic adoption of the report or order because the court must review all conclusions of law and findings of fact *de novo*, but such failure may

waive the objection for purposes of appeal. See *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1131 (Fed. Cir. 2011).

- Procedural matters are reviewed for an abuse of discretion, unless otherwise provided in the appointment order.

**7. Although orders appointing or declining to appoint masters are generally interlocutory and not immediately appealable, a party seeking to vacate an order of appointment may seek a writ of mandamus.**

- *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (allowing review via writ of mandamus for appointment of a special master when the entitlement to relief is apparent and the party has no other way to obtain relief); *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d 1080, 1083 (3d Cir. 1993) (“mandamus has become an accepted means to challenge a district court’s order referring matters to a special master under Rule 53”).

## Conclusion

Complex litigation, especially in the context of multidistrict litigation, presents significant and unique challenges. Accordingly, attorneys practicing in this area must be prepared to navigate certain difficulties that may arise if the court appoints a special master. Given that masters have extremely broad discretion to determine the procedures used, attorneys should be aware of the scope, purpose, and limitations of masters, and seek inclusion of any specific procedural or evidentiary requests in the appointment order. Masters may only perform tasks as permitted by the appointment order, so it is of paramount importance to be well-informed and ready to raise appropriate objections to protect clients’ interests and maintain control of a case. Masters can help resolve issues in a timely and efficient manner, but maintain awareness of and be proactive to avoid potential pitfalls.

