A Revolution That Doesn't Offend Anyone

THE ABA GUIDELINES FOR THE APPOINTMENT AND USE OF SPECIAL MASTERS IN CIVIL LITIGATION

By Merril Hirsh

Stories about special masters always seem to begin with "and then the judge threw up his [or her] hands and said, 'I don't have time for all this. Here's what I'm going to do . . .'" At the American Bar Association's (ABA's) Midyear Meeting in January 2019, the House of Delegates did something to change that. The ABA approved Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. The guidelines are the product of a remarkable consensus to assist courts and stakeholders in judicial proceedings with the latest thinking on how special masters can be a more useful tool for their judicial administration.[1]

It isn't that special masters cannot help judges who are throwing up their hands in frustration. They can. But a working group of representatives across the ABA devoting well over 1,000 hours across a year considering the issue concluded that waiting to drive judges to the point of frustration is not the best and highest use either of judges or of special masters. And the Judicial Division Lawyers Conference Special Masters Committee is now working to help judges and courts adapt these new ideas to the needs of cases and dockets.

Unconventional Wisdom

So, what's so different? The ABA's working group did not invent special masters. It reinvented the conventional wisdom about them. The conventional wisdom has been

that special masters were . . . well . . . special. Even the name is a problem. As a former United States magistrate judge put it 35 years ago, "[t]he word 'master' is its own worst enemy. Embellishing it with the word 'special' only serves to aggrandize that which is already repugnant. Its pejorative connotations are practically infinite—slavemaster; headmaster; shipmaster; taskmaster."[2] Not only repugnant, but vague and often inapt. The words "special master" refer to a wide and varied array of potential functions—some of which involve facilitative functions in which the parties, and not the neutral, are supposed to be the "master."[3] (The more accurate technical term is "judicial adjunct." At least it captures the idea that what binds these functions together is that they are performed at the behest and aegis of the court. But that one is pretty ugly too and in even less use than "special master.")

Even getting past the name, the ABA needed to look at special masters in a new way to appreciate the benefits that could come from making considering the use of a special master a regular part of judicial administration. There is a natural concern that a special master would constitute either a challenge to or abandonment of judicial authority (enabling the parties to pay private adjudicators to do what judges really should be doing for free). There is also a perception that special masters have been appointed not because they truly save costs or improve the administration of justice but because they were friends of the judge, or, worse, that referees who used to handle bankruptcy cases before 1978 were actually referring cases to *themselves* as special masters in order to earn extra money.[4]

It is difficult to sell people on an idea that has both marketing and a bad vibe. It is scarcely surprising that, historically, not only has appointing a special master been rare, but also the conventional wisdom has been that it should be.[5]

The fact that wisdom is conventional, however, does not mean that it is wise, or current. Concerns about special masters largely date from a before-time, when courts generally viewed alternative dispute resolution as truly "alternative." There was a time when, if what the parties really wanted was to settle their dispute, courts told them to do this on their own time. If the parties wanted assistance, they would hire a mediator. Behind this was a philosophy that what courts had to offer was not dispute resolution, but rather a particular type of dispute resolution—an umpire who would call the balls and strikes in disputes that the parties had largely fashioned themselves.

For many reasons, that time has long since passed. Courts and practitioners have come to think that, as a matter of course, courts will not merely call balls and strikes, but work to move the case to resolution and (as a means to that end) promote the use of alternatives that do not involve adjudication at all. These days, it is difficult to find a court that will not expect to refer a civil action for some type of attempt at resolution—most commonly one that does *not* involve ever reaching the final merits of the action.

In the guidelines, the ABA recommends that courts and practitioners get beyond the conventional wisdom to make much more effective use of a tool that, when properly used, supplements, not supplants, judicial authority. At the heart of the guidelines are two new messages: (1) think of special masters like a Swiss Army knife, a multipurpose tool that serves judicial needs and should be considered whenever it might help; (2) do it right—don't appoint special masters merely ad hoc or post hoc at the point of frustration, but instead generally at the outset of litigation as part of a systematic plan to evaluate how special masters might help, to choose a special master well-geared for the task and make sure the special master does the job.

This article explains how the guidelines came to be, what they advise, and what work is being done to assist courts and stakeholders to take advantage of this new thinking.

How Did the Guidelines Come About?

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning their use. This committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters. In an effort to see if it was possible to solve this problem, the committee contacted representatives from not only the ABA Judicial Division as a whole, and the Lawyers Conference, but also the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Standing Committee on the American Judicial System, the Business Law Section, the Section of Litigation, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Tort Trial and Insurance Practice Section, and the Section of Antitrust Law. All of these Divisions, Sections, and Forums of the ABA agreed to send representatives to a working group that would discuss the possibility of reaching consensus on guidance that could be presented to the ABA's House of Delegates for consideration. The working group began its efforts in fall 2017. Approximately a year later, after over 1,000 hours of work, the Judicial Division and each of the other Divisions, Sections, and Forums cosponsored a resolution to the ABA House of Delegates to approve the guidelines. At the January 2019 Midyear Meeting, the House of Delegates approved the resolution on a voice vote with no apparent opposition.[6]

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No Apparent Opposition!? A Revolution That Does Not Offend Anyone?

The working group's consensus on a new way of thinking about special masters stands on its head a line in the play and movie *1776*. In *1776*, John Adams watches as the Continental Congress picks apart a draft of the Declaration of Independence. Some members of the Congress are concerned that passages will offend the Parliament; others are concerned that it will offend the king. Finally, Adams yells in frustration (expletive deleted), "This is a revolution . . . ! We're going to have to offend *some*body!"[7] The guidelines, however, are a revolution that is designed not to offend anyone. They change the thinking about using special masters, but do not require that anyone—judges, court staff, or participants in litigation—change practices. The guidelines are nine principles that urge that all participants in complex civil litigation *consider* using special masters in ways that revisit the conventional wisdom.

Guideline 1

The first guideline provides:

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

This guideline contains two concepts. First, it should be routine to consider using special masters in the type of cases where they might be useful. Second, courts and litigants should do this at the outset of the litigation, and not just when frustration has reached a boiling point.

In one sense, this is not revolutionary at all. Federal Rule 16(c)(2)(H) and its state counterparts already provide that "[a]t any pretrial conference, the court may consider and take appropriate action on . . . referring matters to a magistrate judge or a master." This clause (H) appears immediately before Rule 16(c)(2)(I), which specifies that "[a]t any pretrial conference, the court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." And to look at them, you would think the two would apply similarly in practice.

But the practice under the two is very different. The part of clause (H) that discusses referral to a magistrate judge is not merely something most courts believe they "may consider" at a pretrial conference. In most federal districts, standing orders or trial judges automatically assign magistrate judges for some purpose (including, often, conducting the pretrial conference itself). And in clause (I), it is also routine for federal courts at least to consider some sort of alternative dispute resolution with a view toward resolution—again, some courts and individual judges have standing orders requiring it. But it is rare for courts even to consider the use of special masters.

The guidelines recommend that, in the types of cases most likely to benefit from the use of a special master, the court and the parties should take advantage of Rule 16(c)(2)(H) or similar state rules and consider whether a special master could assist. This doesn't sound like much of a revolution, but perhaps it can be a revelation. The idea is that special masters are not just a last alternative to be used when nothing else has helped to manage the case, but that special masters can head off problems long before they occur.

As Guideline 4 (discussed below) details, there are many types of situations in which a special master can be useful. For example, instead of (1) one party demanding every document that relates to every other document that, in turn, relates to something else; (2) the other complaining that this is overbroad and refusing to try to provide anything; and (3) the two fighting in meet and confer sessions, punctuated by emails, until one or both files motions that queue up on a docket before judges who have more important matters to resolve, have a special master look over the parties' discovery in the first place. The immediate effect is that the parties have an incentive and not just an admonishment to be reasonable. No one wants to look unreasonable before a neutral. And if the parties are unreasonable, the special master can cut to the chase—schedule a telephone conference to discuss the production and work through what requests and responses are reasonable.

Do these types of disputes arise on an almost daily basis? Perhaps have a weekly call every Monday to go over and attempt to resolve as many issues as possible.

Does the case involve specialized expertise or turn on disputes about damages? Parties can litigate for years over other issues before getting to the one on which the case actually turns. Consider bringing in someone at the outset to work through these issues before the case bogs down a calendar with other issues.

Guideline 2

The second guideline recommends:

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

Special masters are not to be used when nothing else has helped, but they can head off problems long before they occur.

Again, it does not seem like much of a revolution to say that people thinking about selecting a special master would think about what the special master might do. But, again, there is more to it. Because the use of special masters is so rare, very few people have thought about what it is special masters do, and even fewer about what role they might play. One of the very common and understandable reactions to the guidelines has been, Okay, I understand that many state courts do not have magistrate judges, but in the federal system, doesn't this just duplicate the magistrate judges? The answer is yes, no, and maybe so.

Yes. United States magistrate judges are often (but not always) given responsibility for managing complex civil cases. Indeed, Federal Rule of Civil Procedure 53(h) recognizes that federal district court judges can refer a matter to a magistrate judge to serve as a special master.

No. As Rule 53 implicitly recognizes, a magistrate judge and a special master are two different things. Some of the roles a special master performs are roles that we would not want to have a magistrate judge perform. For example, special masters have been used in multidistrict litigation to investigate and vet candidates for plaintiffs' lead counsel and to resolve internecine disputes among plaintiffs' lawyers or defense lawyers. That is not a role any judge (whether district judge or magistrate judge) is in a position to play. Another special master may be involved because he or she has particularized expertise in the e-discovery or patent or forensic accounting or others issues involved. A magistrate judge may or may not have that particular expertise.

Maybe so. Even where the role is one a magistrate judge may be in a position to perform, there is still a question of making the best and highest use of the magistrate judge's time. The real benefit a special master provides to case management is not resolving disputes that should be going to the court. It is avoiding disputes that should be resolved without the need for court intervention. The 2015 amendments to the Federal Rules of Civil Procedure reflect a philosophy that not just the court but also "the parties" should construe, administer, and employ the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding."[8] But that admonition is not self-executing. And when counsel for whatever reason cannot agree on what is "reasonable," those issues come back to the court in the form of expensive, time-consuming, and contentious motions. The fact that magistrate judges might be able to herd cats does not mean that they are best employed in doing so.

Guideline 3

The third guideline provides:

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

Considering a special master does not mean selecting one. The law does not prohibit courts from imposing litigation costs on the parties. Every time a court requires a brief, the court imposes a cost on the parties. But courts should not impose costs on the parties unless the benefit outweighs the cost. And in many cases, the choice on whether to use special masters permits a direct cost-benefit calculus: in general, a special master should earn his or her keep and then some.

In complex cases this is not very difficult to achieve. Save the parties one discovery motion and it could add up to $100,000. The special master's bill for work avoiding that motion should not be anywhere close to that. And making special masters a more regular part of judicial administration, with a more clearly understood use and role, makes it easier to monitor and control their costs.

Guideline 4

Pursuant to the fourth guideline:

> Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:
> a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
> b. facilitating resolution of disputes between or among co-parties;
> c. pretrial case management;
> d. advice and assistance requiring technical expertise;
> e. conducting or reviewing auditing or accounting;
> f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
> g. conducting trials or mini-trials upon the consent of the parties;
> h. settlement administration;
> i. claims administration; and
> j. receivership and real property inspection.

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

If you are thinking of buying a Swiss Army knife, you need to know what it can do. Only with special masters, the potential roles are limited more by imagination and custom than they are by any set description. Although special masters usually do have adjudicative functions, they do not need to. A special master can be tasked with gathering information—for example, issuing a report on the type of information contained in 1,000 allegedly privileged documents without actually revealing their content. A special master can be the go-between who provides information while insulating a judge from direct contact that might create a problem for a later decision. A special master can be a facilitator to help codefendants agree on how to allocate expenses among them. A special master can administer a settlement or oversee compliance with a decree. A special master can be the neutral expert who conducts a *Markman* hearing in a patent case or reports to a court on the extent to which experts the parties have

retained meet the elements of *Daubert* or *Frye*. Not all these functions are ones a court will want to use. But knowing they are there empowers courts to be more creative and efficient in resolving disputes.

Guideline 5

The fifth guideline advises:

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

A huge advantage of rethinking how we use special masters is that we can rethink how they are chosen, trained, and evaluated. With special masters used rarely, very few courts have had occasion to develop a roster that reflects the diversity and talents of our community or a system of vetting, training, or evaluating special masters' work. The upshot has been that some special masters are wonderful, others not, feedback is haphazard, and evaluation is difficult. If courts consider the use of special masters regularly, they can also institute systems to consider and to ensure the quality of candidates.

Guideline 6

The sixth guideline recommends:

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

Have a better system for selecting special masters, and you have a system better designed to establish legitimacy and instill confidence. Members of the working group that created the guidelines disagreed over the extent, if any, to which courts should defer to party preferences on choosing a special master. Litigators, by and large, preferred deference. Judges were not so sure. But they all agreed that a process in which the selection is systematized provides much more comfort than one that simply relies on the judge's preference.

Guideline 7

Pursuant to the seventh guideline:

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

This guideline largely tracks Federal Rule of Civil Procedure 53(b)(2), and it contains a checklist of things to consider in drafting an order. Just as the role of a special master can vary, so the appointing order needs to be clear to craft the special master's responsibilities and limitations. This too helps to instill confidence in the process and ensures checks on what the special master can do.

Guideline 8

The eighth guideline urges:

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

Buy-in requires knowledge. Courts and the bar will make better use of special masters if they understand better how they can be used.

Guideline 9

The ninth and final guideline proposes:

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

The guidelines are drafted to be consistent with rules. But just as rules govern practice, practice informs rules. And local practice means local rules.

So, What Have You Done for Us Lately?

The guidelines reflect a lot of thought and are important policy. But they will not implement themselves. The Judicial Division Lawyers Conference Special Masters Committee has formed four subcommittees to assist courts and practitioners with implementing these ideas.

The Outreach Subcommittee is focused on writing articles and developing programs designed to assist courts and practitioners in understanding the guidelines. The central focus behind the programs is not just to talk; primarily, it is to listen. Different courts have different needs. A state court judge with a docket of 1,000 cases is not in the same situation as a federal district court judge. A judge presiding over a multidistrict litigation proceeding or class action faces different challenges from one handling single claims. Different areas of the law, such as intellectual property or antitrust, benefit from different types of expertise. E-discovery can be a different issue if the problem is measured in terabytes rather than megabytes. If the guidelines are to be adopted and used, they must be adapted so that each court and even each judge can make them most effective.

The Support Subcommittee is drafting instruments that can be used by courts as part of this process. Among the current projects are drafting criteria and processes for selection of special masters to a roster and drafting a survey instrument that courts could use to obtain evaluations for special masters and researchers can use to compile studies of what techniques are effective.

The Ethics Subcommittee is working on examining what would be needed to articulate model ethics rules for special masters, and coordinating with other committees within the ABA responsible for establishing ethical standards.

The Rules Subcommittee is working on determining whether and to what extent it might be appropriate to reexamine existing rules to implement creative ideas for special masters.

A new project the Special Masters Committee is working on is partnering with law schools to have students assist courts in evaluating whether and how special masters might meet their local needs. The program offers students access to the work of the Judicial Division and courts and court staff access to help so that courts can consider using special masters without unduly taxing judicial resources.

Conclusion

No one can promise that judges will stop pulling their hair out in frustration over complex civil litigation. But the ABA took a significant step toward helping in adopting the Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. We owe it to our judges and our litigators to make use of every tool that is available to bring cases to a just, speedy, and inexpensive conclusion. ■

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Endnotes

1. The guidelines are available at https://www.americanbar.org/news/reporter_resources/midyear-meeting-2019/house-of-delegates-resolutions/100.

2. John W. Cooley, *Query: Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?*, 68 Judicature 59 (1984).

3. Statutes, rules, and practice have described these persons with numerous titles, such as "master," "discovery master," "settlement master," "trial master," "referee," "monitor," "technical advisor," "auditor," and "administrator." Even states whose rules mirror the Federal Rules of Civil Procedure use different titles to describe the court adjunct's officers. For example, a Rule 53 adjunct in Maine is a "referee." *See* Me. R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a "master" as "any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts," suggesting more of a trial function than a pretrial role. *See, e.g.*, Mass. R. Civ. P. 53; *see also* Kan. Stat. Ann. § 60-253 ("As used in this chapter, 'master' includes a referee, an auditor, a commissioner and an examiner."). These titles may suggest a more limited function.

4. *See* Paulette J. Delk, *Special Masters in Bankruptcy: The Case against Bankruptcy Rule 9031*, 67 Mo. L. Rev. 29 (2002).

5. *See, e.g.*, Fed. R. Civ. P. 53 advisory committee's note to 2003 amendment (noting, even as it revised the rule "extensively to reflect changing practices in using masters" for a broader array of functions, that "[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule"); Manual for Complex Litigation (Fourth) §10.14, at 14 (2004) ("Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving 'some exceptional conditions' or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment" (footnote omitted).)

6. The resolution also urges that Bankruptcy Rule 9031 be amended to permit courts to use special masters in bankruptcy proceedings in the same way as they are used in other federal civil cases.

7. Peter Stone, 1776, at 112 (1969); 1776 (Columbia Pictures 1972).

8. Fed. R. Civ. P. 1.