

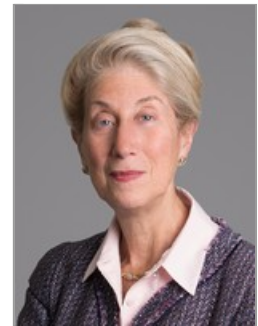


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The Use Of Special Masters In Complex Cases

By Shira Scheindlin

Law360, New York (August 15, 2017, 11:36 AM EDT) -- In the years that I served as a United States district judge, I frequently appointed special masters and made such appointments in a variety of contexts. Although some judges are fans of using special masters, many others have never done so.[1] This is unfortunate. It is my firm view that these appointments are very beneficial in resolving disputes quickly, streamlining discovery, handling delicate settlement negotiations, and — somewhat surprisingly — reducing cost and delay.



Shira Scheindlin

I begin by recalling the appointments I made over the years. I appointed settlement masters in several cases where I knew that settlement negotiations would be protracted and difficult, requiring a time commitment that a judicial officer would be unable to spend.[2] I also appointed discovery masters in several cases, in two distinct scenarios. The first was where discovery issues would recur with alarming frequency or required particular expertise.[3] In these instances a special master was particularly useful in being available on short notice, familiar with the case from prior disputes, and generally able to rule quickly because he or she was not burdened with other courtroom commitments. The special expertise to which I just referred often involves issues surrounding e-discovery. Modern search techniques may be more familiar to experts than to the court or the attorneys. Having a special master with expertise available to help has been extraordinarily useful to the parties. I made such an appointment in a very complicated case involving document requests under the Freedom of Information Act served on several federal agencies that involved millions of documents,[4] and I am aware that several other judges on the court have also made appointments of special masters with expertise in this area.[5] The second circumstance often involved burdensome privilege reviews, which cannot reasonably be handled by a busy district judge or magistrate judge, and surely not by a justice sitting in the Commercial Divisions in New York state courts.[6] A special master who is experienced in the law of attorney-client privilege and work-product protection is ideally suited to quickly review a sample, make preliminary rulings by category, and move the parties toward resolving the remaining claims of privilege or protection.

I also appointed special masters in other circumstances — ones that do not occur as frequently as settlement or discovery but where the appointment helped to move the litigation forward in a prompt and cost-effective manner. I appointed a special master to distribute funds to claimants in a case that had a large settlement fund that needed to be fairly distributed to qualified applicants,[7] and in another case appointed a former bankruptcy judge to resolve disputes during the claims administration process in a securities fraud class action.[8] I also appointed a special master to supervise a disputed union election where each party had claimed irregularities when the first election was held and subsequently voided.[9] On one occasion, I appointed a former magistrate judge to

serve as a special master to supervise depositions on sensitive financial matters that were taken in Hong Kong and New York.[10] Finally, I appointed special masters to report and recommend on dispositive motions in one case that involved a very difficult and unfamiliar subject matter.[11] The parties were satisfied that the special masters were true experts and chose not to challenge their recommendations.

Other judges in the Southern and Eastern Districts have also appointed special masters with some regularity — generally for discovery or settlement — but also to distribute funds from a common fund. Judges in the Eastern District of New York, in particular the renowned Judge Jack B. Weinstein, have often appointed special masters.[12] Indeed, I was appointed by Judge Weinstein to serve as a special master many years ago in the Agent Orange mass tort litigation, resolving all discovery disputes and eventually preparing a report and recommendation as to the attorneys' fees to be awarded to the plaintiffs' attorneys.[13] I also was appointed a special master by a magistrate judge to rule on privilege issues and supervise depositions in a very contentious and high-stakes property damage matter.[14] Judge Weinstein has frequently appointed special masters in mass tort cases to supervise or determine issues with respect to discovery, settlement, distribution of funds, and the award of attorneys' fees.[15]

Judges in the Second Circuit and elsewhere use special masters in circumstances where the sheer size of the case necessitates a full-time neutral working to resolve issues, or where investigation and evaluation of facts is necessary.[16] Courts also appoint special masters in situations where expedited results are necessary. Thus, to expediently administer a settlement in a train disaster case, Judge Legrome D. Davis of the Eastern District of Pennsylvania appointed retired Judges William J. Manfredi and Diane M. Welsh to, in a matter of months, hold hearings and issue a joint preliminary report and recommendation as to the total compensatory damages to be awarded to each plaintiff participating in the settlement.[17] Likewise, masters may be appointed in expedited nonjury antitrust cases under 15 U.S.C. § 25.[18]

While there are judges who have never — or only rarely have — appointed a special master, I believe those judges would make such appointments if the parties jointly made it known that the appointment of a master would be helpful. Even if only one party requested such an appointment, and made a good case for making the request, the judge would likely be amenable to such an appointment.

The question, then, is when should you request the appointment of a special master? You may wish to do so if the expertise you seek is more available outside the court than inside. For example, in the area of electronic discovery, mentioned earlier, it can be invaluable to have someone available to get the parties on the same page with respect to search techniques, scope of search, and a reasonable time frame for accomplishing a search. You may also wish to have a master available to supervise sensitive depositions, where instant rulings can smooth an otherwise contentious encounter. The use of settlement masters in the other contexts I mentioned earlier are also fair grounds for a request.

Having described the various roles of a special master, I will now address the legal apparatus for the appointment of masters in federal court under various procedural mechanisms. I do this using a question-and-answer technique that effectively covers the issues raised.

Q: How does appointment of a special master work in federal court? Are there any limitations, either legal or practical, to the appointment of a master?

A: When Rule 53 of the Federal Rules of Civil Procedure was revised about 10 years ago, the primary goals were to expand the bases for appointments and to make the process more transparent by including the parties in the selection process.

Under current Rule 53(a), the court may appoint a special master to “perform duties consented to by the parties”; “hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by [either] some exceptional condition[] or [] the need to perform an accounting or resolve a difficult computation of damages”; or to address post-trial matters that cannot be effectively and timely addressed by a judge of the court.[19]

The most important expanded basis for an appointment is on consent of the parties, although judge approval is still needed. The second most important is where a pretrial or post-trial matter cannot be effectively and timely addressed by a judge of the court. Notably, appointing on this ground does not require a finding of exceptional circumstances as it once did.

Rule 53(b)(1) addresses notice and transparency. The court must give notice to the parties and an opportunity to be heard before making an appointment, and the rule specifically states that the parties may suggest candidates for an appointment.

Rule 53(b)(2) requires the appointing order to specify the master’s duties; under what circumstances a party may communicate ex parte with a party or with the court; the materials the master must preserve and file as part of the record; the standards for review of a master’s orders or recommendations; and the procedures for the master’s compensation.[20]

The special master’s authority, which may be altered by court order, is set forth in Rule 53 (c). The master has the authority to conduct evidentiary hearings, compel attendance of witnesses, and take and record evidence.[21] A master may recommend a contempt sanction or impose any noncontempt sanction provided in Rules 37 or 45, or may recommend a sanction against a nonparty.[22]

After a special master issues an order or recommendation, the parties may appeal that order to the appointing court, which must give the parties an opportunity to be heard and possibly submit evidence.[23] The court may affirm, adopt, modify or reverse the order or recommendation, or order that the matter be resubmitted to the master. Objections to factual findings must be reviewed de novo unless the parties stipulate that such findings will be reviewed for clear error or agree that the master’s fact findings will be final.[24] Objections to conclusions of law must be reviewed de novo, and procedural matters are reviewed for abuse of discretion.[25]

I recommend that judges raise the issue of referring matters to a special master at the outset of the case. Indeed, this is contemplated by Rule 16(c)(2)(H), which lists as a potential matter for consideration the referring of matters to a master. Judges should also be aware that in addition to Rule 53, courts have used their inherent authority to appoint a special master.[26] Federal Rule of Evidence 706, which provides that a court may appoint an expert witness sua sponte or at the request of a party, has also been a source of appointments, most frequently in patent cases.[27]

Q: Are there any limitations on the appointment of a special master?

A: Really none. The court can appoint a special master for a great variety of tasks, including: managing discovery, resolving discovery disputes, facilitating settlement discussions, performing post-trial or settlement functions (e.g., administration of settlement funds), acting as monitors (e.g., compliance with court orders or consent decrees) or receivers, or resolving fee disputes.

Q: How can or should the relationship between the judge and the special master work?

A: The answer depends on the type of assignment. Usually there is little or no contact between the court and the special master, but in some instances there might be a reason to permit regular contact. Usually the contact, if any, will be done by written communication, such as reports that are filed. Because the appointing judge may be asked to review orders of a special master, ex parte communications may be awkward. However, coordination is often essential so the division of labor between the court and the special master is clear.

Q: How is a special master selected and how is the cost allocated?

A: The court may select on its own or may seek input from the parties. As noted above, Rule 53 states that the court must provide notice to the parties and opportunity to be heard. But not all appointments are made pursuant to Rule 53. In my experience, a judge will likely appoint someone that she knows and in whom she has confidence. This is surely true of other judges who have appointed special masters. Judges and parties must also bear in mind that “[a] master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court’s approval, consent to the appointment after the master discloses any potential grounds for disqualification.”[28]

As for compensation, this can be allocated to one party, both parties, or can change as the matter progresses depending on the circumstances.[29] Parties typically share the costs of special masters,[30] but some courts have assigned all costs to the party whose behavior in some way caused the need for the appointment. Or compensation can be paid from a common fund. Under Rule 53(b)(2)(E), the terms of compensation are required to be in the order of appointment.

Q: What concerns or pitfalls should lawyers be concerned about in the appointment of special masters?

A: The most obvious answer is cost. Some lawyers have argued that this is just an extra step, or layer of quasi-judicial oversight, that merely increases the cost. But others say that if a court officer cannot handle the task assigned to a special master with speed and efficiency, then it is well worth the cost to have speedy access to a decision maker. After all, it is often said that what lawyers want most is a decision — any decision — rather than a delay that causes their case to languish in a judicial no man’s land.

Another concern is access to the court. Some lawyers have expressed concern that if a special master is appointed they will lose access to the judicial officer who will be the ultimate judge presiding over the final resolution of their case. While acknowledging the concern, I do not think it is a real problem. A happy judge is a good judge. You can always challenge the ruling of a special master and appear before the judge; but more likely you will find that the case will be ready for trial less expensively and sooner than it would if it remains on the docket of an overburdened judge for every dispute that could be handled by a special master.

A final concern might be dissatisfaction with the special master. I don’t have a good answer to that concern except to say if all parties are dissatisfied, that can be brought to the attention of the appointing court, which will likely be responsive to the complaint. If it is the view of only one side — well that could well be the case with the rulings of the assigned judge. Many a lawyer believes that the judge favors one side or the other and this can be equally true with a special master. The recourse is the same — the right to review via an appeal.

In conclusion, the judicious use of a special master can be a great benefit to the parties and the court in an appropriate case. While this article focuses on the federal courts, much of its content is equally applicable to state court litigation.[31] I urge you to keep in mind

the benefits that might accrue from the appointment of a special master when the case warrants such an appointment.

Retired U.S. District Judge Shira Scheindlin, now a member of the JAMS panel of neutrals, is a former member of the Judicial Conference Advisory Committee on Civil Rules (1998-2005), former chairwoman of the Rule 53 subcommittee, and a former member of the discovery subcommittee.

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[1] Cf. Thomas E. Willging et al., *Special Masters' Incidence and Activity* (Fed. Jud. Ctr. 2000), at 3, 12-15 (reporting, prior to the amendment of Rule 53 in 2003, that discussion of a special master occurred in only three out of 1,000 federal cases (0.3 percent) and appointments were made in just 60 percent of those cases, meaning that appointments were made in fewer than two cases in 1,000 (0.2 percent)).

[2] See, e.g., Order, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, MDL No. 1358, Master File No. 00-1898 (S.D.N.Y. Mar. 14, 2007) (appointing David Geronemus to serve as special settlement master).

[3] See, e.g., *SEC v. Wyly*, No. 10 Civ. 5760, 2011 WL 3366491 (S.D.N.Y. July 27, 2011) (opinion and order by appointed special master professor Daniel Capra relating to privilege issues); Order, *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, No. 08 Civ. 7508 SAS, (S.D.N.Y. Feb. 4, 2011) (appointing Jonathan Redgrave as special master to resolve discovery disputes); Order, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, MDL No. 1358, Master File No. 00-1898 (S.D.N.Y. June 18, 2004) (appointing Kenneth Warner as special master in consolidated multidistrict mass tort action, in which capacity he has conducted hearings and ruled on discovery disputes among the parties for well over a decade); Order, *In re IPO Secs. Litig.*, No. 21-mc-00092 (S.D.N.Y. Dec. 22, 2003) (appointing professor Daniel Capra to resolve discovery disputes, Jeffrey Rabkin for electronic discovery disputes, and George Socha to serve as a technical consultant to the court and the appointed masters).

[4] *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*, No. 10 Civ. 3488 (S.D.N.Y. 2011) (Maura R. Grossman appointed special master).

[5] See, e.g., *Rio Tinto v. Vale*, No. 14 Civ. 3042, 2015 WL 4367250, at *1 (S.D.N.Y. July 15, 2015) (appointing Maura R. Grossman as special master "to assist with issues concerning Technology Assisted Review (TAR), also known as predictive coding").

[6] See, e.g., *Special Master's Pre-Trial Order No. 38, In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, Master File No. 00-1898, Nos. 04 Civ. 5424, 04 Civ. 2399 (S.D.N.Y. Oct. 29, 2007) (resolving privilege dispute after review of privilege logs containing over 96,000 thousand entries and in camera review of roughly 4,000 documents); *Diversified Grp. Inc. v. Daugerdas*, 217 F.R.D. 152, 162 (S.D.N.Y. 2003) (appointing professor Stephen Saltzburg "as Special Master to quickly — but carefully — examine the Summary Judgment Documents, determine which documents contain privileged attorney-client communications, redact the privileged sections, if any, and provide the Court and the parties with specific findings to support the redactions").

[7] *Denney v. Jenkins & Gilchrist*, No. 03 Civ. 5460, 2004 WL 1197251, at *7 (S.D.N.Y.

May 19, 2004) (appointing Michael D. Young to administer settlement).

[8] See Order, *In re Vivendi Universal, S.A. Sec. Litig.*, 02 Civ. 5571 (S.D.N.Y. July 5, 2012) (appointing Judge Melanie L. Cyganowski (Ret.) and 284 F.R.D. 144, 155 (S.D.N.Y. 2012) (discussing role of special master).

[9] Trustees of Columbia Univ. in *City of N.Y. v. Supporting Staff Ass'n of Coll. of Physicians & Surgeons*, No. 97 Civ. 9334, 1999 WL 13235, at *1 (S.D.N.Y. Jan. 13, 1999) (reflecting appointment of Judge Kathleen A. Roberts (Ret.) as interim trustee and election monitor under the court's "broad equitable powers under the Labor Management Reporting and Disclosure Act of 1959" with the direction "to take action and make recommendations to the Court as necessary to preserve the integrity of the SSA's democratic, financial, and collective bargaining process, and to supervise an election of SSA officers").

[10] See Stipulation and Order Appointing Special Master for China-Based Rule 30(b)(6) Deposition, *Wultz v. Bank of China*, No. 11 Civ. 1266 (S.D.N.Y. Jan. 2, 2013) (appointing Judge Theodore H. Katz (Ret.) as special master in case where family of victims of suicide bombing sued Bank of China ("BOC") alleging violations of the Antiterrorism Act) and 291 F.R.D. 42 (S.D.N.Y. 2013) (rejecting plaintiffs' objection to Judge Katz's ruling on redactions made by BOC to discovery materials); see also Order of Appointment, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (S.D.N.Y. Mar. 26, 2013) (Kaplan, J.) (appointing Judge Katz and Max Gitter as special masters to, among other things, preside over depositions in foreign and domestic jurisdictions).

[11] See *Union Carbide Corp. v. Montell N.V.*, 179 F.R.D. 425 (S.D.N.Y. 1998) (appointing professor Bernard Black of the Columbia University School of Law and the Judge Marvin Frankel special masters pursuant to Rule 53 to make reports and recommendations on motions involving complex issues on expedited basis to preserve trial date); see also *Louis Vuitton Malletier v. Dooney & Bourke Inc.*, 525 F. Supp. 2d 558 (S.D.N.Y. 2007) (adopting, as modified, lengthy report and recommendation prepared by professors Daniel J. Capra of Fordham University School of Law and Barton Beebe of Cardozo School of Law on cross Daubert motions in trademark dispute).

[12] See, e.g., *United States v. City of N.Y.*, No. 07 Civ. 2067, 2013 WL 4042283, at *2 (E.D.N.Y. June 6, 2013) (Garaufis, J.) (describing the role of special master Mary Jo White in development and administration of a new examination for firefighters after decades-long efforts to replace examination found to violate Title VII in 1973) and 2012 WL 4503253, at *1 (E.D.N.Y. Sept. 28, 2012) (explaining that "[i]t is because of the case brought and pursued by these plaintiffs that the court ordered the city to create a fully professionally-prepared exam that would comply with the dictates of federal, state, and local anti-discrimination laws. That order was effectuated by the tireless efforts of Special Master Mary Jo White, who oversaw each step of the process").

[13] See generally *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985).

[14] See Stipulation and Order of Reference, *Chase Manhattan Bank NA v. Turner & Newall PLC*, No. 87 Civ. 4436 (S.D.N.Y. Sept. 10, 1992) (Roberts, M.J.).

[15] See, e.g., Order, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (E.D.N.Y. Apr. 6, 2006) (appointing Kenneth R. Feinberg as a special master for discovery); *In re Joint E. & S. Districts Asbestos Litig.*, 129 F.R.D. 434, 435 (E.D.N.Y. 1990) (Judge Weinstein, along with New York Supreme Court Justice Helen E. Freedman (Ret.), approved joint appointment of Kenneth R. Feinberg as referee and settlement master under CPLR 4301 and Fed. R. Civ. P. 53, respectively); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1369 (E.D.N.Y. 1985) (adopting report of Judge Shira Scheindlin (Ret.) as special master's proposed settlement distribution plan) and *In re Agent Orange Prod. Liab. Litig.*, 597 F.

Supp. 740, 752-53 (E.D.N.Y. 1984) (discussing appointment of special masters during the case for purposes of resolving discovery disputes and settlement).

[16] See Order Appointing Master, *U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc.*, No. 12 Civ. 7322 (S.D.N.Y. Nov. 2, 2016) and 205 F. Supp. 3d 386, 526 (S.D.N.Y. 2016) (Castel, J.) (appointing Hon. Barbara S. Jones (Ret.) as special master to "develop a plan for the timely entry of findings of fact and conclusions of law relating to all loans" in mortgage fraud cases involving thousands of loans); *Handberry v. Thompson*, No. 96 Civ. 6161, 2014 WL 4470535, at *1 (S.D.N.Y. Sept. 8, 2014) (Daniels, J.) (explaining that "Magistrate Judge James C. Francis IV appointed Dr. Peter E. Leone as an expert witness ('Special Master') in this case to 'collect and evaluate facts' that will 'assist the Court in modifying the Injunction in accord with the mandate of the Second Circuit.'"); Case Management Order No. 3, *In re Refco Secs. Litig.*, No. 07 MDL 1902 (S.D.N.Y. Nov. 2, 2009) (Rakoff, J.) (appointing two special masters, professor Daniel Capra and Judge Ronald Hedges (Ret.), to address certain substantive motions (Capra) and discovery-related issues (Judge Hedges)); *In re World Trade Ctr. Disaster Site Litig.*, No. 03 Civ. 00007, 2006 WL 2948821, at *1 (S.D.N.Y. Oct. 17, 2006) (Hellerstein, J.) ("The 3,000 and more cases alleging respiratory injury over which I preside are likely to become unmanageable. ... I envision the appointment of a leading expert or experts in mass torts, probably an academic to provide impartiality as well as expertise, who can devote the time and effort that will be necessary.").

[17] Order Appointing Masters, *In re Amtrak Train Derailment in Philadelphia, Pa.* on May 12, 2015, MDL No. 2654 (E.D. Pa. Mar. 1, 2017).

[18] See, e.g., Order, *United States v. Anthem/Cigna*, 16-cv-1493 (D.D.C. Aug. 12, 2016) (Amy Berman Jackson, J.) (appointing Judge Richard A. Levie (Ret.) to rule on all disputes concerning discovery where antitrust case proceeded to bench trial on an expedited basis.) and Order, *United States v. Aetna/Humana*, 16-cv-1494 (D.D.C. Aug. 11, 2016) (John D. Bates, J.) (same).

[19] Fed. R. Civ. P. 53(a)(1).

[20] Fed. R. Civ. P. 53(b)(2)(A)-(E).

[21] See generally Fed. R. Civ. P. 53(c)(1).

[22] Fed. R. Civ. P. 53(c)(2).

[23] Fed. R. Civ. P. 53(f)(1).

[24] Fed. R. Civ. P. 53(f)(3).

[25] Fed. R. Civ. P. 53(f)(4), (5).

[26] See, e.g., *United States v. Stewart*, No. 02 CR. 395, 2002 WL 1300059, at *10 (S.D.N.Y. June 11, 2002) (Koeltl, J.) (appointing special master to review for privilege documents seized by the government from office of indicted attorney).

[27] In addition, section 2000e-5 of Title 42 of the United States Code permits a judge to appoint a master under Rule 53 to hear Title VII cases under certain circumstances. Section 1104 of the Bankruptcy Code permits the appointment of a trustee or examiner — a species of master. Rule 42 of the Federal Rules of Criminal Procedure authorizes the appointment of a special prosecutor to prosecute a charge of criminal contempt. Section 1345 of Title 18 of the United States Code authorizes the appointment of a temporary receiver when it appears that a fraud has been or is about to be committed in certain circumstances, and Section 3664 authorizes the appointment of a special master in

connection with proposed orders of restitution. See *United States v. Guastella*, No. 98 CR 1325, 2009 WL 1619902 (S.D.N.Y. June 4, 2009) (Scheindlin, J.) (appointing special master to identify victims and determine fair allotment).

[28] Fed. R. Civ. P. 53(a)(2).

[29] See Fed. R. Civ. P. 53(g); 53(b)(2)(E).

[30] See Willging, *Special Masters' Incidence and Activity* at 42 (noting exceptions).

[31] The CPLR authorizes the appointment of "referees" to "determine an issue, perform an act, or inquire and report[.]" CPLR 4001; see CPLR 3104 (authorizing the appointment of a referee to supervise discovery). For example, in the decades-old, multicounty litigation *In re New York City Asbestos Litigation*, No. 40000/88, a special master has been appointed for purposes of discovery and settlement, with Shelley Rossoff Olsen serving in that capacity since 2013. For another example, in the dozens of consolidated mortgage-backed securities cases in Part 60 RMBS Put-Back Litig., 777000/2015 and Part 60 RMBS Monoline Insurer Litig., Justice Marcy S. Friedman of the Commercial Division in New York County appointed Judge Theodore H. Katz (Ret.) as special discovery master pursuant to CPLR 3104(b), with authority to, among other things, make rulings on discovery disputes (which are final unless review is sought) and, on consent of the parties, conduct settlement conferences in individual cases. See also *Joint Order Appointing Special Master, In re Bausch & Lomb Contact Lens Solution Prod. Liab. Litig.*, No. 06-MN-77777, MDL No. 1785 (N.Y. Sup. Ct. & D.S.C. Nov. 26, 2007) (appointing a master to review defendant's privilege claims).

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