by David R. Cohen

Special Masters Versus Magistrate Judges: No Contest

I am about to make a provocative assertion.

I make my living as a special master. So I was honored when *The Federal Lawyer* asked if I would submit an article comparing special masters with magistrate judges. Because when you examine the value of the two roles, there is no contest.

Surprise: that last statement is *not* the provocative assertion. I do not think special masters are better than magistrate judges, nor vice versa. That would be like saying a hammer is better than a screwdriver—it makes no sense. There is no contest because both varieties of judicial adjuncts serve federal courts, although in different ways. District judges and attorneys need them both. Special masters and magistrate judges are not rivals; they are on the same team.

So I still owe you a provocative assertion.

Here it is: in my opinion, many district judges, magistrate judges, and the lawyers who appear before them do not understand when or why to use a special master. As a result, they sometimes use a screwdriver to hammer in a nail. It can work, but it is not the best tool for the job. Even worse, district judges and magistrate judges tell me they are sometimes actually afraid to use a special master. I repeat: *afraid*. That is a shame, since the federal judiciary can use all the good help it can get.

In a moment, I will offer support for my assertion that many district judges and magistrate judges are inappropriately timid about using special masters. But first, I must tell you my agenda.

Putting My Cards on the Table

Whenever I read an opinion piece, I wonder if the author has a hidden agenda. So let me give you a quick personal background, and you can decide. I will tell you three important things about me.

First, I believe the difficult job of bringing justice into the world is one of the highest callings. I have an enormous amount of respect for federal judges, especially the ones on the "front line"—that is, magistrate judges and district judges. Judging is hard; when done well, it is a thing of beauty.

Second, I excel at being a right-hand man. I can be a good leader, but for me, helping top decision-makers make important, difficult, and meaningful choices is even more gratifying.

And third, these two traits have led me to my life's work. I have spent my entire legal career helping judges with their most difficult cases—first as a law clerk to three district judges and now, for the last 10 years, as a special master with numerous judicial appointments. The really difficult lawsuits—patent, antitrust, mass torts, class actions, structural injunctions, multiparty disputes—are the most fun for me. I'm a law geek, so I enjoy resolving hairy e-discovery disputes as a case begins, issuing recommended rulings on difficult issues as a case progresses, overseeing complex claims administration as a settled case ends, and every nuanced thing in between. Ultimately, my job is to make my judge more successful, by providing superior service to the court and the parties.

So I do have an overarching agenda—urging federal judges and the lawyers who practice before them to take better advantage of an overlooked and underused resource. Our district judges and magistrate judges should be getting more help from special masters.

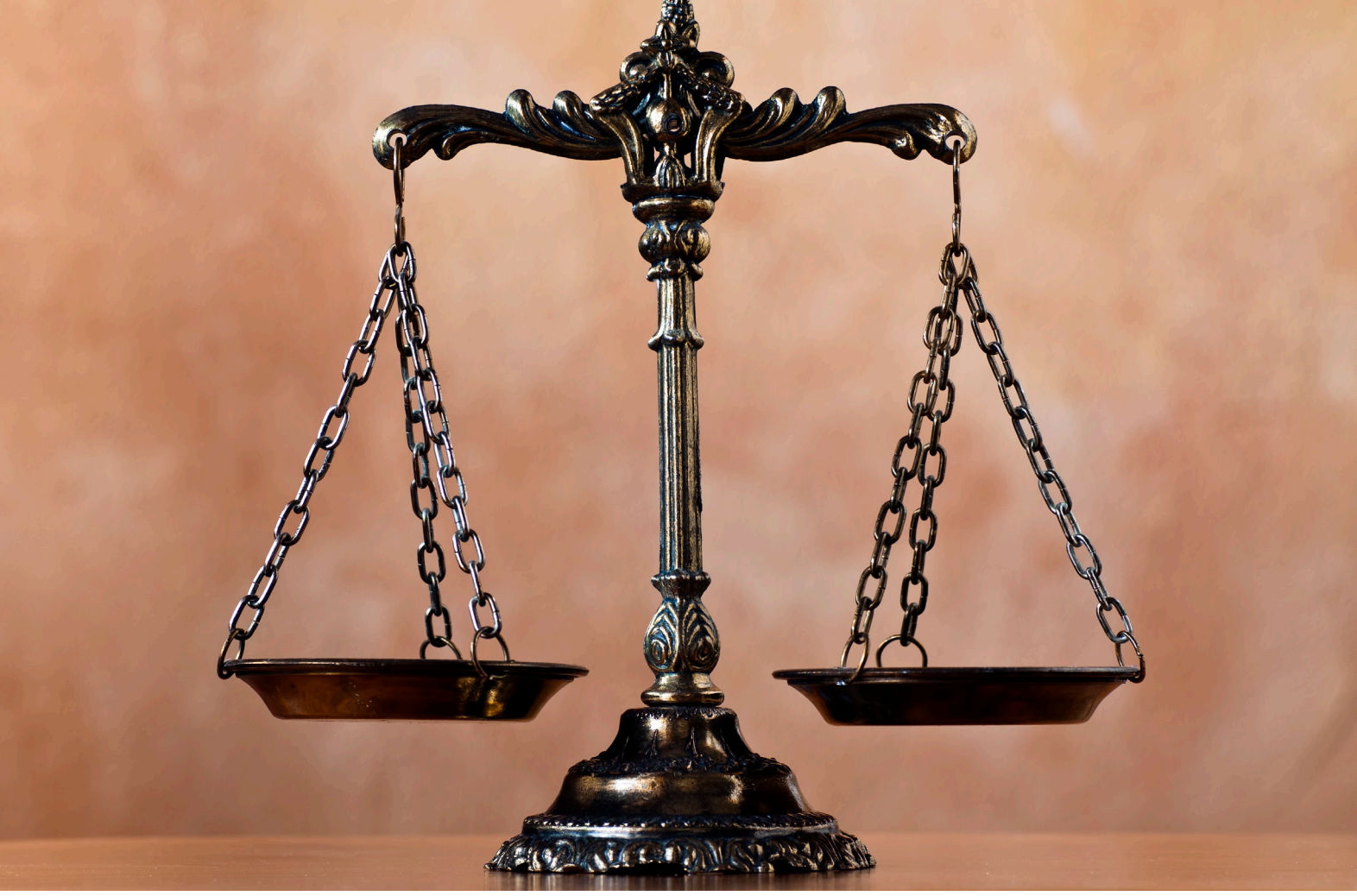
And They Do Need Help

It is clear that federal judges do, in fact, need more help, which is why I believe they should ask for it more often. Just take a look at the numbers.

In 1990, each district judge received 379 new civil cases and 84 new criminal cases on average, totaling 463 new cases that year. The number of judges today adds more than 100 district judges to the total of 1990, but increasing caseloads outstripped that judicial gain. In 2011, each district judge received 543 new cases on average—427 civil and 116 criminal, or an increase of 17 percent. That's like stuffing another *two months*' worth of work into a district judge's year. Furthermore, statistics published at www.USCourts.gov show that, when cases are weighted for complexity, this caseload increase is actually higher.

Meanwhile, federal judges still have the same amount of chambers staff today as in 1990. Personnel levels in offices of clerks of court have decreased. And Chief Justice John Roberts

David R. Cohen is the immediate past-president of the Academy of Court-Appointed Masters. He publishes Cohen's Special Master Case Reporter, available at www.SpecialMaster.biz. The website also offers free downloads of Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges *(5th ed. 2013). Cohen oversees a national practice from Cleveland, Ohio.* *© 2014 David R. Cohen. All right reserved.*



begs Congress every year to make funding cuts to the judiciary less drastic.

The calculus is inescapable—district judges are being asked to do more with less. They need help. It is available. They, and the lawyers practicing before them, should take advantage of it.

One Enormous Source of Help—Magistrate Judges

History proves that district judges have long received terrific and invaluable help from magistrate judges.

Beginning in 1968, Congress authorized creation of the position of magistrate to help ease the workload of district judges. The title was officially changed to magistrate judge in 1990, in recognition of the increasing importance of their work. Congress has gradually expanded the magistrate judge's authority by amending 28 U.S.C. §636 several times, and district judges have expanded that same authority in practice, by referring to magistrate judges more matters of more importance. As a result, magistrate judges now conduct a wide range of judicial proceedings, expediting disposition of both civil and criminal cases. Without the support of magistrate judges, district judges would certainly be overwhelmed.

But remember those caseload statistics I cited earlier? All of the support provided by our magistrate judges doesn't change the calculus. In 1990, there were 470 magistrate judges, and they terminated a total of 4,598 consent cases. In 2012, there were 570 magistrate judges who terminated a total of 15,049 consent cases, a 227 percent increase. Both district judges *and* magistrate judges are increasingly being asked to do more with less.

For 45 years, magistrate judges have given district judges tremendous help. But as the federal caseload increases, the solution is not simply to give magistrate judges more work, nor for district judges to grin and bear it. So I repeat my refrain. Our federal judges on the front line need help. It is available, and they should ask for it. And lawyers practicing before them should help them get it.

Good Help Is There for the Asking

Even before Congress passed the Federal Magistrates Act of 1968, the Federal Rules of Civil Procedure gave judges a powerful tool to obtain trusted support. Adopted in 1937, Rule 53 originally authorized district judges to appoint a special master to conduct complicated jury trials or to make findings of fact and conclusions of law in nonjury trials involving exceptional conditions.

Over time, the focus of the rule expanded beyond conducting trials. Boiled down to its essence, Rule 53 now says: "Judge, if you are faced with a complex or difficult matter that will take up too much of your valuable time, then you can appoint a personal aide and get help, with or without consent from the parties."

Am I oversimplifying? Well, here is what Rule 53(a)(1) actually says. The court may appoint a special master to: (1) perform any duties to which the parties consent; OR (2) "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district" (even without party consent); OR (3) conduct trial and "make findings of fact" in nonjury matters, if warranted by some

"exceptional condition" (even without party consent); OR (4) perform "difficult" accountings or damage computations (again, even without party consent). The common denominator underlying the latter three nonconsent prongs is, if an issue requires disproportionate consumption of scarce judicial resources, then the judge can proactively obtain help.

The importance of prong one cannot be overstated. If a federal judge tells the parties he or she wants help and asks them to agree to appointment of a special master, the parties will often agree. When a district judge or magistrate judge is faced with a case, or even just a discrete issue, that requires inordinate attention, Rule 53 provides a simple solution: don't be afraid to ask for help.

Prongs two through four are also fairly broad, explaining that consent is not even necessary if matters that arise before, during, or after trial are especially difficult and time-consuming. Examples of issues that may fit this description are described in a Benchbook I helped to write, *Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges* (5th ed. 2013) (available free at www.SpecialMaster.biz). Some examples are obvious, such as negotiation and oversight of multiparty e-discovery protocols, deciding motions involving intricate facts or law, assuring ongoing compliance with sophisticated consent judgments, resolving internecine disputes between plaintiffs over fees, or administering a settlement claims process. Others arise less frequently, such as addressing ethical issues raised in sanctions motions, or managing *Brady* materials in large criminal cases.

I do not mean to suggest federal judges or parties should seize upon Rule 53 in every case. The Supreme Court has warned that judges should use special masters "to aid in the performance of specific judicial duties … and not to displace the court." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957). Further, docket "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master." *Id.* at 259.

But, as the statistics reveal, federal judges do need more good help. So we have a dilemma. Using a special master must not be nearly as routine as a referral by a district judge to a magistrate judge. On the other hand, Rule 53 makes clear that both district judges and magistrate judges who could use help should avail themselves, including by seeking party consent. Is there some indicator that reveals whether judges are underutilizing special masters?

Rule of Thumb

When district judges attend what they call "baby judge's school"—officially known as the Orientation Seminar for Newly Appointed District Judges—one of their first sessions addresses federal jurisdiction. They are each told that, "at this very moment, you have at least three cases on your docket you can close for lack of federal jurisdiction." The judges I have worked with say this invariably turns out to be true; the parties just never raised the jurisdictional issue.

There is a similar rule of thumb regarding Rule 53. On average, every district judge and magistrate judge works on at least two cases every year in which appointment of a special master is appropriate. These cases have complex issues that require inordinate amounts of judicial attention, forcing the judge to give less consideration to the rest of his or her docket. Ask any federal judge whether they recently worked on a case that was especially painful or time-consuming because of complicated issues or difficult parties. I assure you, several cases will come to mind. In at least two of those cases, a reasonable judicial response would have been to procure outside help.

Yet many federal judges have never taken advantage of Rule 53 to obtain relief. Why?

Here is where we return to my provocative assertion.

Conversations I have had with federal judges suggest many have not used Rule 53 simply because it never occurred to them. Essentially, they have overlooked one of the tools in their toolbox. But some judges go further and confess they know the tool is there, but they are afraid to use it. Specifically, judges are afraid of: (1) the cost and (2) loss of authority.

Neither of these fears withstands analysis.

The Cost Is a Bargain

Special masters cost money. Normally, the parties must split the master's fees. This can exacerbate the cost of already-expensive litigation. Rule 53 itself warns that, when appointing a special master, the court "must consider the fairness of imposing the likely expenses." So it is reasonable for judges to be wary of the cost of a special master.

Indeed, in the large majority of cases, imposing the cost of a special master on the parties is not justified. The court can handle the matter itself just fine.

But there are three types of cases in which the benefits of appointing a special master clearly exceed the costs. In these cases, judges should not hesitate to invoke Rule 53 and obtain help.

The first type of case is when the litigation is normally expensive. Antitrust, patent, and mass tort cases are examples, although there are many others. In these cases, it is not unusual for each side to spend many hundreds of thousands, even millions, of dollars. Once, when I told an attorney I felt slightly guilty about the parties having to pay my fees, he laughed—compared to expert witness fees, deposition travel expenses, and paying platoons of brief-writing attorneys, his client's half-share of my cost was "a rounding error." Meanwhile, the litigation spawned issues weekly, requiring a disproportionate amount of attention. Ultimately, the benefits my work provided to the parties and the court were a bargain. Judges cheat themselves if they don't obtain available help for fear of the cost, when that cost is actually low in the context of the case.

The second type of case is when the parties' actions are driving up the cost of litigation unnecessarily. In one case, I was appointed special master because the discovery disputes were excessive. Upon receiving the case file, I found the parties had written numerous $10,000 letters to the court. The fees I charged to settle those initial disputes (and relieve the judge's exasperation!) were substantially less. Indeed, I continued to *save* money for the clients on both sides as the litigation progressed, because the parties obtained immediate access to dispute resolution instead of filing motions and writing more letters. Further, the case became trial-ready more quickly, so it disappeared from the judge's docket many months earlier than it would have otherwise.

The third type of case is when resolution of certain issues

requires either time or expertise the court simply does not have. Reviewing thousands of documents for privilege, or assessing numerous attorney fee petitions, is not the best use of a judge's or law clerk's time. A special master frees the court to focus on larger matters. It can also take an undue amount of time to read and understand patents and construe claims; accordingly, I have helped judges by recommending *Markman* rulings. The same is true with technical expert witness reports and *Daubert* rulings, and with monitoring compliance with complex consent decrees. Distilling the parties' positions in these cases and supplying recommended rulings allows a judge (and chambers staff) to shorten tremendously their time spent deciding an issue, while still achieving finely tuned results. Judges who practice good time management must sometimes delegate tasks that would otherwise require excessive consumption of scarce judicial resources.

Speaking of judicial resources, I offer this final thought regarding a special master's cost. It is an overstatement to say it is only fair that the more people use a resource, the more they should pay for it. This axiom makes sense regarding electricity; not so much regarding the federal court system. But judicial resources are finite. At some point, increasing caseloads detrimentally affect the level of service—and the correctness of justice—that our federal judges provide. If *not* using a special master means a judge has less time for other cases, then those other litigants effectively pay the price. Thus, when a court "considers the fairness of imposing the likely expenses" of a special master, that consideration should include the systemic fairness of *not* imposing those expenses, too.

A Special Master Increases Judicial Authority

Just as judges must be cognizant, but not afraid, of the cost of using a special master, so should they be circumspect, but not jealous, about delegating their authority.

Jurisdiction may be defined as "the right and power to interpret and apply the law." Federal judges are rightly proud of their jurisdiction and the capacity to enforce their authority. To resolve conflicts by uttering, "It is so ordered," is an awesome responsibility. So it is appropriate for federal judges to be reticent to cede any authority entrusted to them by Congress and the Constitution.

But there is a critical difference between ceding authority and delegating authority. Delegation actually *increases* authority. Think of it this way: who has more power, the cop on the beat or the chief of police? A Google programmer or the CEO? Through delegated authority, the police chief and CEO increase their reach, taking proper advantage of information and effort supplied by others.

The same relationship applies to special master and judge. A special master helps leverage the judge's power by taking judicial direction, enforcing judicial policy, providing the judge with formal and informal feedback, supplying highly focused legal analysis, facilitating communication among the parties and the court, and freeing up the judge's time. I think of myself as servant, a help-mate, supporting and strengthening my judge. And, as Rule 53 makes clear, my judge retains final authority over every aspect of every matter assigned.

In sum, district judges and magistrate judges who appoint a special master leverage their own power. They don't lose any control or authority over their case. Indeed, in the Rule 53 appointment order, judges define and control the very nature of their relationship with the special master. And besides, as one judge who appointed me put it: "It was good having another brain working on this. It would have taken a lot longer without you, and it was a lot more fun with you."

Tools in the Toolbox

To a large extent, carpenters are only as good as the contents of their toolbox. Building a fine cabinet requires first obtaining the right tools and then using the best tool for each part of the project. If a carpenter does not know an appropriate tool is in the toolbox, or is afraid to use that tool when the job calls for it, then the cabinet drawers may stick and the project will take longer than it should. Moreover, the greater the number of cabinets the carpenter must build, the more likely these problems will appear.

The analogy is clear: district judges and magistrate judges obtain the best results when they remember and use all available resources, including the powerful, flexible support mechanism known as Rule 53. Judges should appoint special masters when circumstances call for it, and increasing caseloads indicate those occasions are arising more and more frequently.

Special masters may work for magistrate judges, alongside them, or to relieve them, but their goal is the same: providing invaluable support to district judges and the attorneys who appear before them. No contest. ⊙

The Federal Lawyer strives for diverse coverage of the federal legal profession, and your contribution is encouraged to maintain this diversity. Writer's guidelines are available online at www.fedbar.org/TFLwritersguidelines. Contact Managing Editor Sarah Perlman at tfl@fedbar.org or (571) 481-9102 with topic suggestions or questions.