The Judge, the Special Master, and You

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You did not see this curveball coming.

Until now, the court's case management conference was fairly routine. You and opposing counsel agreed on some points and argued over others. You were prepared to address the issues that arose, including some highly contentious ones. The judge was fair, meaning each side won and lost its share.

But then, the curveball.

"Given how things stand," the judge says, "I'm thinking of appointing a special master. It seems appropriate, in the circumstances of this case."

The judge pauses and turns to face you. "I'd prefer to have your consent, although I'm not sure I need it. Counsel, what is your position?"

Your opponent looks just as surprised as you do.

Questions flash through your mind. Why does the judge think we need a special master? What would a special master do? How will this affect litigation costs?

Will a special master increase or decrease our chances of winning? Whom does the judge have in mind? What role will the judge continue to play?

If my client does not consent, will the judge hold it against us? And is this going to ruin my vacation plans?

The answers to those questions (including the last one) will make a real difference in your case. But your litigation map—the one you prepared by hand, based on your long professional experience—carries no sign suggesting the best path to take at this unexpected crossroad.

Should you turn left and agree to what the judge wants? Turn right and argue against appointment of a special master? Go straight and take whatever position contradicts opposing counsel?

To gather your thoughts and divine some direction, you trot out the litigator's favorite time-buying phrase: "Judge, I'll have to confer with my client to see what her position is on this."

Then you follow that with the old but effective technique of answering a question with a question: "Can I tell her what the court's reasons are for suggesting appointment of a special master?"

The judge leans back and starts to explain.

That's good. You've stepped out of the batter's box briefly and may gain some insight into the judge's thinking, before the next pitch.

Still, it would have been nice to be better prepared, if only with more focused questions for the judge, instead of having to dodge and improvise.

Perhaps you need to update your litigation road map. The rules and practices relating to special masters give good directions for how you should navigate and address the questions that flashed through your mind and that continue to arise even after you leave court.

Published in *Litigation*, Volume 40, Number 4, Summer 2014.

Why didn't I see that curveball coming?
Forgive yourself for not being ready and waiting on this one. According to a 2000 report by the Federal Judicial Center, in only 3 federal cases out of 1,000 does the docket show that the court formally considered appointing a special master.

That ratio surely has increased over the last 14 years, and inclusion of informal consideration not reflected on the docket might triple it. Further, the ratio is much higher in certain types of cases, such as patent disputes, antitrust matters, multidistrict litigation, and class actions. Regardless, special master appointments remain exceptional.

Where did the judge get this crazy idea anyway?
Actually, the idea is not so crazy; in fact, the judge may be on to something good. The Federal Judicial Center offers this firm endorsement of the use of special masters:

> [A]ll judges and almost all attorneys [surveyed] thought that the benefits of appointing the masters outweighed any drawbacks and [all] said they would, with the benefit of hindsight, still support the appointments. Attorneys said this regardless of how the special masters' appointments initially came about, and even regardless of whether the masters' involvement benefited their clients.

Put simply, both judges and litigants almost never regret the appointment of a special master. Litigants sometimes start out fearing the unknown additional cost, and judges sometimes initially are apprehensive about what they assume is a ceding of their authority. But neither of those concerns proves valid.

What's so "special" about this case that it requires a special master?
In every case in which a judge appoints a special master or is receptive to that suggestion from counsel, there is at least one common and overriding background circumstance—"excessive use of limited judicial resources." That simply means a judge and his or her staff have only so much time and only so much energy available, and your lawsuit is requiring, or threatens to consume, disproportionate attention.

Thus, a court is more likely to obtain help from a special master if the case (1) involves an especially complex, technical, or specialized area of the law, such as a patent or antitrust dispute; (2) requires heightened, time-consuming discovery oversight, such as in multidistrict litigation or when counsel are ever-bickering and over-zealous; (3) calls for fact-intensive non-jury determinations, such as an accounting, awards of attorney fees, assessments of sanctions, or expert-heavy damages measurements; or (4) entails a long post-trial or post-settlement stage, such as class-action settlement administration, or monitoring

Illustration by Jim Starr

and compelling compliance with injunctive relief.

If one of those factors or attributes describes your case, look for the curveball.

Are courts using special masters more frequently?
The short answer is yes. And judicial resources are becoming more limited, which suggests appointment of special masters is likely to become even more common. Statistics compiled by the Federal Judicial Center are revealing. Twenty-five years ago, in 1990, each federal district judge, on average, received about 380 new civil cases and 85 new criminal cases, totaling about 465 new cases that year.

> Judicial resources are becoming more limited, suggesting that appointment of special masters will become even more common.

Today, we have over 100 more district judges than in 1990, but growing caseloads outstripped that judicial gain. In 2011, each district judge, on average, received about 545 new cases, an increase of 17 percent. That's like stuffing another two months' worth of work into every district judge's year. And statistics published at by the Administrative Office of the U.S. Courts (www.USCourts.gov) show that, when cases are weighted for complexity, the workload increase is actually higher.

State courts also are seeing larger caseloads, often aggravated by serious financial cutbacks to their judiciary. Ultimately, judges are being asked to do more with less. In response, judges more frequently get the help they need by appointing special masters. And litigants more often are suggesting to judges they should do so.

Why not refer my case to a magistrate judge, instead of appointing a special master?
Two reasons: First, the same strain on judicial resources felt by district judges is being felt by magistrate judges. In 1990, there were 470 magistrate judges and they terminated a total of about 4,600 consent cases. In 2012, there were 570 magistrate judges who terminated a total of over 15,000 consent cases. That's just one hundred more magistrate judges, yet over three times as many consent case terminations.

Between 2002 and 2012 alone, total matters disposed of by magistrate judges rose over 20 percent. Increasingly, courts are concluding that the solution to higher caseloads is not simply to give magistrate judges more work. Rather, both district judges *and* magistrate judges are more frequently appointing special masters to get the help that they need.

Second, magistrate judges will candidly confirm there are certain kinds of tasks that are more appropriately assigned to special masters. Those include administering settlements, monitoring consent decree compliance, addressing technical issues requiring special expertise, reviewing massive document libraries for privilege, and even overseeing discovery where the disputes are especially frequent and highly contentious.

What about the cost?
This is a big question, for both counsel and clients. Of course, a special master costs money. Except in post-trial appointments, when the master oversees remedies imposed on a defendant already found liable, the parties normally split the master's fees. Those fees can meaningfully exacerbate the cost of already expensive litigation. Federal Rule of Civil Procedure 53 warns that, when appointing a special master, the court "must consider the fairness of imposing the likely expenses." So it is reasonable for you and your judge to be wary of the cost of a special master.

Indeed, in the large majority of cases, imposing on the parties the cost of a special master is simply not justified. The court could 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 those cases, judges are more likely to invoke Rule 53 and obtain help.

In the first type of case, the litigation is expensive or the financial stakes are high. Antitrust, patent, securities, and mass tort cases are examples, although there are many others. In these cases, it is not unusual for each side to spend hundreds of thousands of dollars, or even millions.

Compared with expert witness fees, deposition travel expenses, and invoices for platoons of brief-writing attorneys, special masters are a good value. Judges and parties cheat themselves if, for fear of the cost, they don't obtain the good help available from a special master when the expense is actually low or reasonable in the context of the case.

In the second type of case, the parties' actions are driving up the cost of litigation unnecessarily. Sometimes, discovery disputes are truly excessive. Write a few $5,000 or $10,000 discovery letters to the court, and then consider the costs and benefits of having a special master. The master's fees to settle those initial disputes will be substantially less, and the judge's exasperation

would be relieved rather than intensified.

Indeed, there are total-cost *savings* for the clients on both sides when the parties can obtain immediate access to efficient and inexpensive dispute resolution instead of filing motions and briefs and writing more letters. Further, the case becomes trial-ready more swiftly, so it reaches quicker resolution and disappears from the judge's docket earlier than it otherwise would have.

In the third type of case, resolution of certain issues requires either time or expertise that the court simply lacks. 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. Use of 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; special masters often help judges by recommending *Markman* rulings. The same is true of technical expert witness reports and *Daubert* proceedings, monitoring compliance with complex consent decrees, and compelling adherence to an order granting injunctive relief.

In all three types of cases, having a special master distill the parties' positions and supply recommended rulings allows the judge and chambers staff to shorten tremendously their time spent deciding an issue, while still achieving finely tuned merits-based results. Judges who practice good work-management know they must delegate tasks that otherwise would require excessive consumption of scarce judicial resources. Appointing a special master provides the parties with more personal attention and quicker results. The price of that bespoke service is easily worth it.

One last thought about cost. Judges will compare your case with the rest of their docket and consider whether it is equitable for your case to devour so much of the court's time. The axiom that the more people use a resource, the more they should pay for it makes sense for electricity; not so much for the court system. But judicial resources *are* finite. At some point, increasing caseloads detrimentally affect the level of service—and the correctness of justice—that a judge can provide. If not using a special master means a judge has less time for other cases, then effectively it's those other litigants who pay the price.

Thus, when a judge "considers the fairness of imposing the likely expenses" of a special master, the judge may also be considering the systemic fairness of *not* imposing those expenses.

What will the special master actually do?

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 non-jury trials involving "exceptional conditions."

Over time, the focus of the federal rule expanded beyond conducting trials. The rule now gives judges great flexibility regarding pretrial, trial, and post-trial tasks that the court may delegate to a special master. 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.

Of course, that's the practical meaning of the rule. 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; (2) "address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district," even without party consent; (3) conduct trial and "make findings of fact" in non-jury matters, if warranted by some "exceptional condition," even without party consent; (4) perform "difficult" accountings or damage computations, again, even without party consent.

The importance of the first prong cannot be overstated. If a judge tells the parties he or she wants help and asks them to consent to appointment of a special master, then usually the parties will 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 courts with a simple solution and practical advice: Don't be afraid to ask for help, Judge.

Similarly, if the parties come to the judge with a joint proposal that the court appoint a special master, the judge may well appreciate the offer of assistance. Further, by raising the idea in advance and by coupling it with joint consent, instead of reacting to the court's sua sponte suggestion, the parties may achieve more control over precisely which tasks or issues the master will address and who the master will be.

But, as your judge observed during your case management conference, your consent may not even be required. The second, third, and fourth prongs are fairly broad, explaining that consent is not necessary if matters that arise before, during, or after trial are especially difficult, complex, or time-consuming. When resolution of an issue requires disproportionate consumption of scarce judicial resources, the court may obtain help proactively. For examples of issues that fit that description, see *Appointing Special Masters and Other Judicial Adjuncts: A Benchbook for Judges* (5th ed. 2013) (available at www.SpecialMaster.biz).

Some examples are obvious, such as negotiation and oversight of multiparty e-discovery protocols, deciding motions involving intricate and arcane facts or law, ensuring 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.

Of course, the potential breadth of Rule 53 does not mean judges should invoke it 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 Rule 53 is an important and increasingly used case-management tool, most frequently to address complicated or fact-intensive matters.

Ultimately, the answer to the question *What will the special master do?* is this: Judges may appoint a special master to help with almost any aspect of the case, and the parties may consent to the special master's oversight of almost any aspect of the case. Most frequently, special masters are assigned to help with the most difficult parts, and the judge retains final say on everything.

What kind of review or oversight of the special master should be expected from the judge?

Rule 53 addresses how the roles of the judge and the special master intersect. In many respects, the relationship is similar to that of district judge and magistrate judge. The special master will issue a recommended ruling; the parties can object within a certain time, and the court will rule on any objections, applying de novo standards to both findings of fact and conclusions of law.

Alternatively, the parties can agree that the special master's findings of fact will be reviewed for clear error or will be final. The court reviews procedural matters, such as a ruling on who gets deposed first, for abuse of discretion.

Most of the time, the parties accept the special master's rulings without objection; and, most of the time, the court overrules objections to the special master's rulings. Yet, all of us who serve as special masters have experienced being "reversed" by the appointing judge.

Further, most of the rulings that special masters recommend do not address case-dispositive matters. The net effect is that the judge is presented with fewer controversies, the controversies the judge does address are concentrated and refined, the parties obtain fully considered rulings much more quickly, and the judge remains the final arbiter on the merits of the case.

How do the judge, the special master, and the parties communicate with each other?

In addition to setting out the formal aspects of how the court will review the special master's work, Rule 53 also requires the court to establish how it and the parties may interact with the master. Specifically, the court must set out "the circumstances, if any, in which the master may communicate ex parte with the court or a party."

Some judges prefer very formal special master relationships, requiring virtually all communications to be written, similar to the distance between trial courts and appellate courts. Other judges prefer more intimate and informal connections with their special master, allowing the master to serve as a conduit between the parties and the court, like a combined battlefield reporter and military lieutenant.

Further, the particularities of the lawsuit and the master's role will dictate the extent to which the court and the special master can engage ex parte. For example, a special master appointed to a mediative role will engage in more ex parte communications with the parties and fewer with the court. The opposite may be true when the special master is appointed to enforce an injunction the court has imposed on a defendant.

Most commonly, appointment orders say something like this:

> The Special Master may communicate ex parte with the Court at the Special Master's discretion, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters only. The Special Master may communicate ex parte with any party or his attorney, as the Special Master deems appropriate, for the purpose of ensuring the efficient administration and management of this case, and for the purpose of mediating or negotiating a resolution of the case or any disputes related thereto. The Special Master shall not communicate to the Court any substantive matters shared by the parties during a mediation.

Still, remember, it is probably a safe bet that, even when the judge and special master have the most formal of relationships, the special master receives occasional intimate direction from the judge, and the judge sometimes obtains casual intelligence from the special master.

Is the judge abdicating responsibility by appointing a special master?

No, absolutely not. There is a critical difference between ceding authority and delegating authority. Regardless of whether you are delighted or dismayed that your case was assigned to your judge or that your judge then appointed a special master, the appointment itself is highly unlikely to change the final outcome of your case.

In a sense, judicial jurisdiction may be defined as the right and power to interpret and apply the law. Judges are rightly proud—and protective—of their jurisdiction and the capacity to act on their authority. To resolve conflicts by uttering "It is so ordered" is an awesome responsibility; so, appropriately, judges resist ceding any authority entrusted to them.

But a judge does not *cede* authority to a special master; rather, a judge *delegates* authority. And delegation actually increases

authority. Who has more power—the cop on the beat or the chief of police? A computer programmer or the chief executive officer? Through their delegation of authority the police chief and the CEO actually increase their reach, taking proper advantage of information and effort supplied by others.

The same relationship applies to a judge and a special master. 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 between the parties and with the court, ferreting out details and explaining them to the court in streamlined fashion, and in every instance freeing up the judge's time.

Good special masters think of themselves as servants and helpers supporting and strengthening the judge. And, as Rule 53 makes clear, the judge retains all final authority over every aspect of every matter assigned.

And that is key. A special master will affect the case because the court and the parties will achieve resolution more quickly and perhaps with finer detail, but any final result still rests with the judge, not with the special master. How the case resolves still depends on the merits of the claims and the skill of counsel, and that will stay essentially the same.

Here is how the Federal Judicial Center puts it:

> [J]udges . . . reported that the special master helped them understand the complex issues, saved the parties' money, made the case settle faster, or saved the appointing judge's time. Several attorneys told us that although the judge could have performed the master's pretrial or trial-related activities, the appointment saved judicial resources in that the master was able to handle the activities more efficiently—and in some cases more effectively—than a judge because the master had the time to devote to them.

In sum, district judges and magistrate judges who appoint a special master leverage their own power; they don't diminish it. They don't lose any control or any 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.

As one judge put it, reflecting on the special master's work and role, "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."

Who gets to decide who the special master will be?
Ultimately, it's the judge who decides. The deeper question is the extent to which the judge will consider your input. Judges take a variety of approaches. Some simply appoint a specific individual as special master, without any consultation from the parties. Others may announce the intention to appoint a certain individual as special master but invite comment or allow the filing of objections (which might carry risks similar to those involved in filing a motion for recusal). Still others announce the intention to appoint a special master and ask the parties to suggest names, and then the court chooses.

In the latter circumstance, sometimes the parties will agree on a specific individual, in which case the court almost always adopts the parties' mutual choice. If one or both parties move for appointment of a special master—meaning, the idea does not originate with the court—then there is a greater chance that the court will entertain the parties' input on who the master will be.

Judges who appoint a special master leverage their own power; they don't diminish it.

Is this going to affect my vacation plans?
That's not a trivial question. Practicing law is difficult, being a litigator is especially stressful, and court-ordered deadlines often conflict or interfere with life's other plans. It is reasonable to wonder how the appointment of a special master might affect not only your case but also the other parts of your life.

The most common approach taken by special masters is compassionate. A good special master understands that the job is to make the appointing judge more successful by providing superior service to the court and to the parties. Superior service to the parties is not achieved by simply furnishing fair and accurate legal analysis. It also requires maintaining easy accessibility, treating the parties with kindness and respect, serving without any hidden agenda, and applying rulings consistently.

Doing all those things reflects well on the appointing judge and encourages the parties to treat each other with more respect, too. And all of that means that disputes are concluded less painfully, final resolution is reached more quickly, and the special master shares in this success. ■