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Civil Rule 53: An Enabling Act Challenge

Edward H. Cooper*

The Judicial Conference of the United States is charged by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," recommending desirable changes to the Supreme Court.[1] The Rules Enabling Act,[2] which describes the Supreme Court's role, further provides that the Judicial Conference is to be assisted in this task by a "standing committee on rules of practice, procedure, and evidence";[3] the standing committee in turn reviews "each recommendation of any other committees" appointed to advise it.[4]

Charles Alan Wright has been directly involved in the rulemaking process for much of his life. As with so many other things, he cares passionately about it. He cares that it be done carefully, and that the products be as good as they can be made. This Symposium contribution is designed to ask others to lend a hand with one small and discrete part of the larger enterprise.

The first part of this paper introduces a Reporter's draft of a revised Civil Rule 53. The purpose is in large part to stimulate interest in the draft. It is important to gain advice on the questions whether revision of Rule 53 should be undertaken during the next several years, and whether this first draft moves in the right directions. But a secondary purpose is

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1. 28 U.S.C. § 331 (1994). The relevant portion of the statute states:

> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Id.

2. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2072-2074 (1994)).

3. *Id.* § 2073(b).

4. *Id.* Section 2075 includes a parallel provision for adopting bankruptcy rules. *See id.* § 2075.

to use the draft to illustrate how daunting is the Judicial Conference's task to carry on a continuous study of the Civil Rules. If it is safe to assume that the Rule 53 endeavor could avoid some of the most disturbing perils that beset other rule topics, it nevertheless encounters other difficulties that are all too common.

At the outset, it is important to emphasize that this draft is exactly what it purports to be, a Reporter's draft. It has been considered by the Civil Rules Advisory Committee only as an illustration of issues that might be addressed by a revised Rule 53. The Committee has not reviewed any of these questions, much less approved any of the answers even for tentative advancement. And, as will be reflected in these introductory comments, even the Reporter is far from confident about many of the positions taken with all the seeming authority of dispositive drafting. The central purpose of this exercise is to seek advice, not to advance this draft as a perfected model.

The Advisory Committee was prompted to study Rule 53 by suggestions from advisory groups formed to develop Civil Justice Expense and Delay Reduction plans.[5] The common core of the suggestions was that district courts have come to rely on special masters in many circumstances not clearly covered by Rule 53, and that Rule 53 should be amended both to legitimate and to encourage these practices.[6] The Committee reacted cautiously. Noting that masters seem to be used for general pretrial purposes and for settlement, to manage discovery, and to help in implementing or even formulating complex decrees, the Committee considered the possibility of adding special master provisions to Rule 16, to the discovery rules, and to the rules governing judgments. A draft Rule 16.1 governing pretrial masters was prepared.[7] The Rule 16.1 draft led in turn

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5. 28 U.S.C. §§ 471-482 provided for implementation of a "civil justice expense and delay reduction plan" by "each United States district court." *Id.* § 471. Sections 472 and 478 required appointment of an advisory group in each district. *Id.* §§ 472, 478. Almost all of these provisions expired on December 1, 1997. Sections 471 and 476 continue to he in effect by virtue of Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997).

6. As the Civil Rules Advisory Committee reported in May 1993:

> Advisory groups for at least two Civil Justice Expense and Delay Reduction plans have suggested changes in Rule 53 to encourage use of special masters. The District of New Jersey believes that the Rule 53(b) provision that references are to be the exception, not the rule, unduly limits innovative use of masters to resolve complicated and protracted discovery disputes. Use of masters should be encouraged so that judges and magistrate judges can tend to other matters. The Northern District of Georgia wants to encourage use of masters to try cases, to clarify the power of the court to initiate appointment of a master in complex cases, and to establish a pilot program under which the master would be paid out of government funds if the parties agreed to select a master from a court-approved list.

Judicial Conference of the United States, Agenda Item V-B of the Civil Rules Advisory Committee 10 (May 3-5, 1993) (on file with the *Texas Law Review*).

7. *See* Judicial Conference of the United States, Agenda Item VIII of the Civil Rules Advisory Committee (April 28-29, 1994) (on file with the *Texas Law Review*).

HeinOnline -- 76 Tex. L. Rev. 1608 1997-1998

to a draft that generated a revised Rule 53 governing trial masters and new Rules 53.1 and 53.2 dealing with pretrial and post-trial masters. These approaches were consolidated in the draft Rule 53 that is set out below.

The general topic and successive drafts were considered at four successive Advisory Committee meetings.[8] The range of topics covered by the discussions is reflected in the scope of the draft Rule 53 and the draft Note. In the end, it was concluded that there is no apparent need for imminent action. The draft remains an information-study item that may become the foundation for further development if the need should become more apparent.

The Rule 53 experience points up in several ways the difficulty of carrying on a continuous study of the Civil Rules. One of the most important tasks is to find out what is actually happening in contemporary practice. There is ample anecdotal information suggesting that masters are used much more often for pretrial and post-trial purposes than for the trial functions contemplated by Rule 53. An amusing illustration was provided by the reactions of several of the law professors who were asked to review the draft—they were surprised to discover that masters ever are used for trial purposes. It is difficult, however, to put this information in anything like rigorous form. Particular difficulty arises from exotic practices that combine the role of court-appointed expert witness with the master role, appoint an expert as an adviser to the judge, or explore still different roles. Not only is the information indistinct, it also is sufficiently diffuse to challenge anyone who might undertake empirical study. The Federal Judicial Center, in its role as research arm of the federal judiciary, has undertaken many helpful studies in support of Advisory Committee inquiries. Before it can be asked to design a study, however, the nature and scope of the inquiry must be determined. And framing an empirical study of special master practices is likely to be a major undertaking.

Putting aside the more adventurous uses of masters and similar judicial adjuncts, even a confident judgment that masters are frequently appointed for purposes not contemplated by Rule 53 need not dictate revision. Revision, to be sure, can regularize and legitimate present practice. Revision, however, can mistakenly eliminate desirable practices and choke off development of new practices. There is much to be said for moving with caution when there are few signs that serious problems demand correction. The law of unintended consequences offers ample reason. No matter how carefully present practice is studied, and no matter how

8. *See* Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 19-22 (Oct. 20-21, 1994) (on file with the *Texas Law Review*); Judicial Conference of the United States, Minutes of the Advisory Committee on Rules of Civil Procedure 26-28 (Apr. 28-29, 1994) (on file with the *Texas Law Review*); Judicial Conference of the United States, Minutes of the Advisory Committee on Rules of Civil Procedure 13-17 (Oct. 21-23, 1994) (on file with the *Texas Law Review*).

HeinOnline -- 76 Tex. L. Rev. 1609 1997-1998

carefully a rule is constructed and reviewed throughout the very careful rulemaking process,[9] adversary lawyers will seek to bend every possible nuance to their own purposes. In addition, the Civil Rules have been much changed of late.[10] The Committee is frequently advised that bench and bar find it difficult to absorb constant changes. This advice has been taken to heart, and provides another reason for reluctance in approaching Rule 53.

If these common problems support a cautious approach, other frequent problems do not seem to bedevil Rule 53 revision. The Advisory Committee has not been shy about approaching issues that are highly

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9. The ordinary pace of the rulemaking process can be measured by working back from the provision in 28 U.S.C. § 2074(a) that the Supreme Court is to transmit a proposed rule to Congress "not later than May 1 of the year in which" the rule is to "become effective." The rule takes effect "no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." 28 U.S.C. § 2074(a) (1994). The Judicial Conference regularly meets in September and March. Because a March recommendation would leave only a few weeks for Supreme Court consideration before the May 1 deadline, ordinarily a matter of any importance should be placed on the September Judicial Conference agenda, more than one year before the proposed effective date.

At this point, it is useful to go back to the beginning of the process. The process is described in the Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure. *See, e.g.*, Judicial Conference of the United States, Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure by the Committee on Rules of Practice and Procedure 83-90 (Aug. 1997) (on file with the *Texas Law Review*). The Advisory Committee must recommend a proposed rule to the Standing Committee for publication. The period for public comment and one or more hearings ordinarily is six months. After the period concludes, the Advisory Committee considers the comments and testimony. If the conclusion is that the proposed rule can go forward in a form that has not been so much changed as to require a second round of publication and comment, it can be recommended for adoption. The Standing Committee then reviews the recommendation. The Advisory Committees ordinarily meet in the fall and spring. The Standing Committee ordinarily meets in the winter and late spring, gearing its schedule to the Judicial Conference schedule. All of this translates into a schedule in which, moving at the fastest ordinary speed, the Advisory Committee could consider and recommend a rule at a meeting in March or April. The Standing Committee could approve publication in June. Publication likely would occur in August, closing the comment period at the end of January or in February. The Advisory Committee could consider the comments and testimony at its March or April meeting. The Standing Committee could approve in June. The Judicial Conference could recommend the rule to the Supreme Court in September, the Court could transmit the rule to Congress by May 1, and Congress could allow the rule to take effect on December 1, more than two and one-half years after initial consideration by the Advisory Committee.

Of course many proposals require lengthier initial consideration by the Advisory Committee, and some require more than one round of publication. Revision of Rule 23, the class-action rule, is an illustration. The Advisory Committee began to study Rule 23 in 1991. In June 1997 it recommended two changes to the Standing Committee, which submitted one change to the Judicial Conference and remanded the other for further consideration by the Advisory Committee. *See* Judicial Conference of the United States, Minutes of the Advisory Committee on Rules of Practice and Procedure 16-21 (June 19-20, 1997) (on file with the *Texas Law Review*). If all goes well, the one change—creation of a permissive interlocutory appeal procedure for orders granting or denying class certification—can take effect on December 1, 1998. Any further changes will require still further years of effort.

10. Supreme Court Orders amending the Rules in 1991, 1993, 1995, 1996, and 1997 are set out in 134 F.R.D. 525 (1991), 146 F.R.D. 401 (1993), 161 F.R.D. 149 (1995), 167 F.R.D. 209 (1996), and 171 F.R.D. 679 (1997).

HeinOnline -- 76 Tex. L. Rev. 1610 1997-1998

controversial within the bench and bar, and occasionally beyond. The lengthy study of class actions is one example.[11] The newly launched study of discovery[12]—a topic that has barely been off the Committee's agenda for the last thirty years—is another. Other recent examples include the proposals to amend Rule 47 to establish a right of party participation in voir dire examination of prospective jurors,[13] and to amend Rule 48 to restore the twelve-person jury.[14] Substantial controversy has even attended a still-pending proposal to clarify the procedure and standards for modifying or vacating discovery protective orders. It does not seem likely that Rule 53 will rouse similar passions, although the special master provisions of the Prison Litigation Reform Act of 1995[15] suggest that specific subject-matter areas may bring the topic into the political arena.[16]

The Rule 53 draft illustrates other aspects of the revision process that are not so much problems as continuing choices. Perhaps the first of these is the decision whether to seek assistance outside the Committee. For this draft, great help was provided by Judge Wayne Brazil, who was a member of the Advisory Committee when Rule 53 first appeared on the agenda. In addition, half a dozen law professors with identifiable interests in the topic were consulted. This sort of informal consultation is a useful way of identifying topics that should be considered, and it seems to have few risks if approached as a request for questions, not answers.

When the time comes to draft a concrete model for Committee consideration, the breadth of the model must be considered. This is the

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11. The depth of the Advisory Committee's consideration of Rule 23 is reflected in the four volumes of working papers published in 1997. *See* Administrative Office of the United States Courts, Rules Committee Support Office, Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 (May 1, 1997).

12. *See* Symposium, *Conference on Discovery Rules*, 39 B.C. L. REV. 517 (1998).

13. Judicial Conference of the United States, Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence by the Committee on Rules of Practice and Procedure 128-29 (Sept. 1995).

14. *Id.* at 134.

15. 18 U.S.C. § 3626 (1994).

16. *See id.* § 3626(f). Inferences as to the nature of legislative concerns may be drawn from various provisions of the Act. Paragraph (1) authorizes appointment of a special master "who shall be disinterested and objective and who will give due regard to the public safety." *Id.* § 3626(f)(1)(A). Appointment during "the remedial phase of the action" is authorized "only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment." *Id.* § 3626(f)(1)(B). Paragraph (2) provides that "the defendant institution" and "the plaintiff" are each to submit a list of "no more than 5 persons to serve as a special master"; each can remove up to 3 persons from the opposing party's list, and the court is to select the master from those remaining. *Id.* § 3626(f)(2)(A); *see id.* § 3626(f)(2)(B)-(C). Paragraph (3) provides a right of interlocutory appeal from the selection of the special master, "on the ground of partiality." *Id.* § 3626(f)(3). Paragraph (4) sets compensation at "an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel." *Id.* § 3626(f)(4). Under paragraph (5), the appointment is to be reviewed every six months, and it cannot extend "beyond the termination of relief." *Id.* § 3626(f)(5). Paragraph (6) prohibits the special master from making findings or communications ex parte. *See id.* § 3626(f)(6)(A)-(B).

HeinOnline -- 76 Tex. L. Rev. 1611 1997-1998

first comprehensive draft. It seems better that the first draft touch on as many real issues as have been identified. This approach not only keeps the issues in mind, but it also suggests what a solution might look like. This approach is exaggerated in the draft Note. Assertions are made about many things that have not been discussed by the Committee, and at times they are made without any real feeling whether the assertion is right. The purpose is to stimulate discussion, not to dispose of the issue. Yet there are risks even in this modest purpose. Discussion of important practical issues may be distracted by the fascination of esoteric issues that have little connection to workaday practice. There is a temptation to adopt elegant but abstract solutions that rest on theory, not evidence, and that may address nonexistent problems or provide wrong answers. Not every identifiable issue should be addressed; drawing the line of exclusion may itself be a challenge.

The draft Note illustrates another general issue. The purpose of the Note attached to the final rule, if one emerges, is uncertain. There is a constant temptation to elaborate and to justify the provisions of the rule. As with many drafting enterprises, the temptation extends to addressing issues not answered by the rule itself. And a note prepared in advance of public testimony and comment may become a vehicle for persuasion, explaining the proposed changes in terms designed to win support as well as to educate. The result may be a lengthy note. Length itself is a problem to many, who prefer succinct notes that can be consulted quickly by lawyers who need to make snap decisions. Lengthy notes also may take on the aura of "legislative history," a label that carries more suspicion than helpful promise to many contemporary ears. Yet a complex rule that addresses a wide variety of problems and adheres to the rule tradition of relying on district court discretion invites a lengthy note explanation. This draft Note is certainly long. It is a fair question whether that signifies a need to add still greater detail to the rule itself, or perhaps instead to cut back on the ambitious sweep of the rule.

Of course all of these questions are less important than the basic question whether the particular rule should be revised at all. Even if the present Rule 53 does not reflect or speak to increasingly diverse uses of masters as judicial adjuncts, there may be little need to act quickly. There are few visible signs of distress. If satisfactory practices are evolving in the vicinity of Rule 53, even if not under its aegis, it may be better to allow continuing evolution that will provide a stronger foundation for a future rule that catches up to reality. The common-law process, supported as much by unarticulated notions of inherent power as by Rule 53, may generate better wisdom than a premature attempt to regularize practices by formal rule.

Even if revision should be undertaken, the scope of the project must be determined. This draft may fail to address important issues, may deal

HeinOnline -- 76 Tex. L. Rev. 1612 1997-1998

with trivial matters, and may give wrong answers. Some of the issues that raised particular doubts during the drafting and informal consultation processes were identified for the Committee by underlining and redlining. These markers might properly be extended to the entire draft, including many of the provisions taken directly from the present rule. Rather than attempt to guide discussion, however, it better suits my purposes to frame a more demanding challenge: Examine the draft. Reflect carefully on it. Consider the questionable provisions, and dream up the significant omissions. Then, armed with a catalogue of errors, think again about the worth of the enterprise. Is there reason to address Rule 53, and to address it now, or should the project remain suspended into the indefinite future?

HeinOnline -- 76 Tex. L. Rev. 1613 1997-1998

APPENDIX: RULE 53. MASTERS: REPORTER'S DRAFT, SEPT. 25, 1994

(a) Appointing.
  (1) A court may appoint a master only:
    (A) if the parties consent, or
    (B) if the master's duties cannot be adequately performed by an available district judge or magistrate judge [of the district], and—if the master is to exercise the powers described in subdivision (b)(8) or (9)—(i) in an action to be tried by a jury, if the issues are extraordinarily complicated and consideration of the master's report is likely to substantially assist the jury, or (ii) in an action to be tried to the court, if some exceptional condition requires reference to a master.
  (2) The master must not have a relationship to the parties, counsel, action, or court that creates an actual or apparent conflict of interest unless the parties consent to appointment of a particular person. A master cannot, during the period of the appointment, appear as an attorney before the judge who made the appointment.
  (3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties.

(b) Master's duties. The court may appoint a master to:
  (1) mediate or otherwise facilitate settlement;
  (2) formulate a [disclosure or] discovery plan; supervise [disclosure or] discovery; make [disclosure or] discovery orders under Rules 26 through 31, 32(d)(4), 33 through 36, and 45; make recommendations [to the court] for orders under Rules 26 through 36 and 45; make orders under Rule 37(a) or (g); or make recommendations [to the court] for orders under Rule 37;
  (3) conduct conferences and make orders or recommendations for orders under Rule 16;
  (4) hear and determine any other pretrial motion, except a motion:
    (A) for injunctive relief,
    (B) to dismiss for failure to state a claim,
    (C) for judgment on the pleadings,
    (D) to strike any claim or defense,
    (E) for involuntary dismissal, transfer, or remand,
    (F) for summary judgment,
    (G) to certify, dismiss, or approve settlement of a class action, or
    (H) to establish for trial under Evidence Rule 104 the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence;

HeinOnline -- 76 Tex. L. Rev. 1614 1997-1998

(5) conduct hearings and make proposed findings and recommendations for disposition of a motion described in paragraph 4;
(6) manage other pretrial proceedings;
(7) assist in coordinating separate proceedings pending before the court or in other courts, state or federal;
(8) assist the court in discharging its trial duties in a nonjury case;
(9) preside over an evidentiary hearing and:
  (A) report the evidence to the court in a nonjury action;
  (B) recommend findings of fact and conclusions of law; or
  (C) make findings of fact or conclusions of law in a nonjury action, subject to review as provided in subdivision (i);
(10) conduct ministerial matters of account;
(11) assist in framing an injunction when the parties have not been able to provide sufficient assistance;
(12) assist in supervising enforcement of a complex decree;
(13) assist in administering an award to multiple claimants;
(14) conduct independent investigations to assist in framing an injunctive order or in enforcing a decree; or
(15) perform other duties agreed to by the parties.

(c) Order Appointing Master.
(1) Hearing. The court must give the parties notice and an opportunity for hearing before appointing a master. A party [Parties] may suggest candidates for appointment.
(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state as clearly [precisely] as possible:
  (A) the master's name[, business address, and numbers for telephone and other electronic communications];
  (B) the master's duties under subdivision (b);
  (C) any limits on the master's authority under subdivisions (e) and (f);
  (D) the dates by which the master must first meet with the parties, make interim and final reports to the court, and complete the assigned duties;
  (E) the circumstances[, if any,] in which the master may communicate ex parte with the court or a party;
  (F) the time limits, procedures, and standards for reviewing the master's orders and recommendations;
  [(G) any bond required of a master who is not a United States magistrate judge;] and
  (H) the basis, terms, and procedure for fixing the master's compensation under subdivision (j).

HeinOnline -- 76 Tex. L. Rev. 1615 1997-1998

(3) Amendment. The order appointing a master may be amended at any time [after notice to the parties].

(d) Master's Powers. Unless expressly limited by the appointing order, a master may regulate all proceedings and take all measures necessary or proper to perform efficiently the duties assigned under subdivision (b).

(e) Master's Authority. Unless limited by the appointing order, a master has authority to:

(1) set and give notice of reasonable dates and times for meetings of the parties, hearings, and other proceedings;

(2) proceed in the absence of any party who fails to appear after receiving actual notice under paragraph (1), or—in the master's discretion—adjourn the proceedings;

(3) hold hearings under subdivision (f); and

(4) do all things necessary or proper for fair and efficient performance of the master's duties.

(f) Hearings. When a master is authorized to conduct hearings:

(1) the parties or the master may compel witnesses to provide evidence by subpoena under Rule 45, and the master may compel a party to provide evidence without resort to Rule 45;

(2) the master may put the witnesses on oath;

(3) the parties and the master may examine the witnesses;

(4) the master may rule on the admissibility of evidence;

(5) the master must make a record of excluded evidence as provided in the Federal Rules of Evidence for a court sitting without a jury if requested by a party or directed by the court;

(6) the master may impose the noncontempt consequences, penalties, and remedies provided in Rules 37 and 45 on a party who fails to appear, testify, or produce evidence; and

(7) the master may recommend to the court sanctions against a nonparty witness, or contempt sanctions against a party, who fails to appear, testify, or produce evidence.

(g) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(h) Master's Reports. A master must report to the court as required by the order of appointment~~, and may report on any other matter~~. Before filing a report, the master may submit a draft to counsel for all parties and receive their suggestions. The master must:

(1) file the report;

(2) promptly serve a copy of the filed report on each party; and

(3) file with the report any relevant exhibits and a transcript of any relevant proceedings and evidence.

HeinOnline -- 76 Tex. L. Rev. 1616 1997-1998

(i) Action on Master's Order, Report, or Recommendations.

(1) Time and Hearing. A motion to review a master's order, or objections to—or a motion to adopt—a master's report or recommendations, must be filed within 10 days from the time the order or the report is served unless the court sets a different time. The court must afford opportunity for a hearing, and may receive evidence.

(2) Action. In acting on a master's order, report, or recommendations, the court may:

(A) adopt or affirm it;

(B) modify it;

(C) wholly or partly reject or reverse it; or

(D) resubmit it to the master with instructions.

(3) Fact Findings. The court in a nonjury case may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous, unless:

(A) the order of appointment provides a more demanding standard of review, or

(B) the parties stipulate that the master's findings will be final.

(4) Jury Issue Findings. A trial master's findings on issues to be tried to a jury are admissible as evidence and may be read to the jury unless the court excludes them in its discretion or for legal error.

(5) Legal Questions. The court must ~~independently~~ decide de novo questions of law raised by a master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final.

[(6) Discretion. *Alternative 1.* The court may establish standards for reviewing other acts or recommendations of a master ~~at the time of review or~~ by order under (c)(2)(F).]

[(6) Discretion. *Alternative 2.* The court may set aside a master's ruling on a matter of procedural discretion only for an abuse of discretion.]

(j) Compensation.

(1) Fixing Compensation. The court must fix the master's compensation <u>before or after judgment on the basis and terms stated in the order of appointment unless a new basis and terms are set after notice and opportunity for hearing</u>.

(2) Payment. The compensation fixed under subdivision (1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

HeinOnline -- 76 Tex. L. Rev. 1617 1997-1998

(3) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(k) Application to Magistrate Judge. A court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under subdivision (j).

HeinOnline -- 76 Tex. L. Rev. 1618 1997-1998

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, and clarifies the provisions that govern the appointment and function of masters for all purposes. The core of the original Rule 53 remains. Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The new provisions reflect the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. The advantages of experience may be more than offset, nonetheless, by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master or trial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

Subdivision (a). District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only if the parties consent or the master's duties cannot adequately be performed by an available district judge or magistrate judge of the local district. The search for a judge need not be pursued by seeking an assignment from outside the district.

United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1).

HeinOnline -- 76 Tex. L. Rev. 1619 1997-1998

Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need to impose on the parties the burden of paying master fees to a magistrate judge. A magistrate judge, moreover, is less likely to be involved in matters that raise conflict-of-interest questions.

Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of paragraph (1)(B) that restrict appointments to exercise the trial functions described in subdivision (b)(8) and (9). The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

The use of masters in jury-tried cases is retained as well, but the practice is narrowed even further than former requirements that the issues be complicated and that reference be the exception. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials to reach even the first verdict. The actual usefulness of the master's findings as evidence also is open to doubt. It would be folly to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury. It might be better simply to abandon the use of masters in jury trials. Rather than take this final step, however, room is left for an exceptional circumstance that requires appointment of a master. Courts should be very reluctant to conclude that any circumstance is so special as to require the appointment.

The statute specifically authorizes appointment of a magistrate judge as special master. § 636(b)(2). In special circumstances, it may be appropriate to appoint a magistrate judge as a master when needed to perform

HeinOnline -- 76 Tex. L. Rev. 1620 1997-1998

functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be ~~readily~~ undercut by resort to Rule 53. Subdivision (k) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of another person as pretrial master. Appointment of a master is readily justified if the parties consent. Even then, however, a court is free to refuse appointment, exercising directly its own responsibilities. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by appointment of an expert who is not a lawyer. In large-scale cases, it may be appropriate to appoint a team of masters who possess both legal and other skills.

(This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. A master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination can be dangerous and can cause justifiable resentment. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions.) Masters are subject to the Code of Conduct for United States Judges, with

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exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. A lawyer, for example, may be involved with other litigation before the appointing judge or in the same court, directly or through a firm. The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. It does not prohibit other members of the same firm from appearing before the appointing judge, but special reasons should be found before appointing a master whose firm is likely to appear before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A lawyer or nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Apart from conflicts of interest, there is ground for concern that appointments frequently are made in reliance on past experience and personal acquaintance with the master. The appointing judge's knowledge of the master's abilities can provide important assurances not only that the master can discharge the duties of master but also that the judge and master can work well together. It also is important, however, to ensure that the best possible person is found and that opportunities for this public service are equally open to all. Suggestions by the parties deserve careful consideration, particularly those made jointly by all parties. Other efforts as well may prove fruitful, including such devices as consulting professional organizations if the master may be a nonlawyer.

The benefits of appointing a master must be weighed against the cost to the parties. The fairness of imposing master fees is affected by many factors, including the stakes in the litigation, the means of the parties, the conduct of any party that contributes to the need for a master, and the ability to apportion responsibility for the fees between the parties.

Subdivision (b). The duties that may be assigned to a master are loosely grouped as pretrial duties in paragraphs (1) through (7), trial duties in paragraphs (8) and (9), post-trial duties in paragraphs (10) through (14), and other duties agreed to by the parties in paragraph (15). These groupings should not divert attention from the need to consider the justifications for assigning each particular duty to a master, and the need for care in assigning multiple duties to the same master.

Pretrial masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well

HeinOnline -- 76 Tex. L. Rev. 1622 1997-1998

regulated by present Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53 is amended to confirm the authority to appoint—and to regulate the use of—pretrial masters.

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

The risk of imposing unfair costs on a party is a particular concern in determining whether to appoint a pretrial master. Appointment of a trial master under Rule 53 will be an exceptional event, and a post-trial master is likely to be appointed only in large-scale litigation in which the costs can fairly be imposed on parties able to bear them or be paid from a common fund. Pretrial masters may seem desirable across a broader range of litigation, more often involving one or more parties who cannot readily bear the expense of a master. Parties are not required to defray the costs of providing public judicial officers, and should not lightly be charged with the costs of providing private judicial officers. Disparities in party resources are not automatically cured by disproportionate allocations of fee responsibilities—there is some risk that a master may appear beholden to a party who pays most or all of the fees. Even when all parties can well afford master fees, appointment is justified only if the expense is reasonable in relation to the character and needs of the litigation. The character and needs of the litigation need not be assessed in a vacuum. Appointment of a master may be justified when economically powerful adversaries conduct their litigation in a manner that threatens to consume an unfair share of the limited resources of public judicial officers. Consent of all parties may significantly reduce these concerns, although even then courts should strive to avoid situations in which consent is constrained by the unavailability of reasonable attention from a judge or magistrate judge.

Pretrial masters have been used for a variety of purposes. The list of powers and duties in paragraphs (1) through (7) is intended to illustrate the range of appropriate assignments. The only explicit limitation is set out in paragraph (4), but courts must be careful in assigning pretrial tasks, just as care must be taken in assigning trial tasks. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272

HeinOnline -- 76 Tex. L. Rev. 1623 1997-1998

U.S. 701 (1926). Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, broad and unreviewed delegations of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C. Cir. 1991); *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991). Judicial time is not unlimited, however, and at some point fair allocation among the competing demands of the caseload may require that particularly time-consuming chores be delegated to a master. In addition, some special cases may call for special knowledge that few judges have and that is better supplied by a master.

Although many different functions may properly be performed by a pretrial master in an appropriate case, care should be taken in combining different functions. It is particularly important to remember that a master may be better able to facilitate settlement if this function is kept separate from other possible functions, if need be by appointment of separate masters.

Paragraph (1) confirms the frequent practice of relying on masters to mediate or otherwise facilitate settlement. A master may have several advantages in promoting settlement. The parties may share with a master information they would not reveal to a judge who might try the case or hear an important motion. The master may be able to offer assessments of the case and suggestions for settlement that would not be appropriate from a trial judge. The parties may have special respect for advice from a master with experience in a particular field, whether as litigator or otherwise. In multiparty cases, a master may be able to develop models of injury and damages that facilitate settlement of large numbers of claims. The advantages, however, do not all weigh in favor of a master. A master may lack the extensive experience and aura of office that can lend special weight to a judge's efforts to promote settlement. A master whose sole function is to promote settlement, moreover, may attach exaggerated importance to the value of settling.

Paragraph (2) {refers explicitly to discovery, but includes disclosure as well} [covers discovery and disclosure duties]. Supervision of discovery has been one of the tasks most frequently assigned to masters. The need for a master may be acute in overworked courts presented with claims that privilege, work-product, or protective order shield thousands of documents against discovery. A master also may be able to help the parties plan realistic discovery programs in ways that parallel help in settlement negotiations, to reduce the tensions of contentious discovery maneuvers, or

HeinOnline -- 76 Tex. L. Rev. 1624 1997-1998

to resolve disputes or even preside at depositions when reason fails. The limits of the adversary process must, however, be observed. It would be improper, for example, to appoint a master with "the power to restate the questions and to recommend the answers," see *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967). Often the court will retain power to make orders, directing the master only to make recommendations. Often, however, the court will prefer to delegate initial power to make discovery and disclosure orders, retaining review power. The rule permits the court to delegate power to make many types of orders, but allows only recommendations as to categories of discovery orders that are closely tied to a party's ability to litigate its positions on the merits or the conduct of trial. ~~The master also may be given power to recommend more severe sanctions.~~

Paragraph (3) permits a master to conduct Rule 16 pretrial conferences and make or recommend pretrial orders. Final pretrial conferences directly focused on shaping the trial, however, ordinarily should be conducted by the trial judge. A pretrial master's special experience and knowledge of the case can be tapped by having the master participate in the conference. The master likewise should be limited to making recommendations, rather than orders, as to particularly important aspects of pretrial management.

Paragraph (4) permits assignment of authority to hear and determine pretrial motions, with stated exceptions. The listed exceptions are frequently encountered matters of great importance. It is not possible to capture in a general list all matters that may be equally important in a particular case. Trial judges must be careful to retain responsibility for the initial as well as final decision of all matters central to a case. Hearings conducted by a master are governed by ordinary court practices of notice, record, and public access.

Paragraph (5) complements paragraph (4) by permitting reference to a master for hearings and recommendations for disposition of any motion described in paragraph (4), including those listed in paragraphs (A) through (H). Even though the court retains responsibility for independent determination of matters of law, and can retain responsibility for independent determination of matters of fact in the order referring the proceedings to the master, references should be limited to cases presenting special needs. Courts have frequently noted the undesirability of referring dispositive motions to masters. See *Prudential Ins. Co. v. U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir. 1993); *In re U.S.*, 816 F.2d 1083 (6th Cir. 1987); *In re Armco*, 770 F.2d 103 (8th Cir. 1985); *Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 711-713 (7th Cir. 1984). An assignment to recommend disposition of a motion for a temporary restraining order or preliminary injunction, for example, should be made only if severe constraints make it impossible for a judicial officer to provide an opportunity for effective relief.

HeinOnline -- 76 Tex. L. Rev. 1625 1997-1998

Paragraph (6) is a general authorization to assign authority to manage pretrial proceedings. This provision reflects the difficulty of foreseeing the innovative procedures that may evolve under the spur of litigation that is complex in subject matter, number of parties, or number of related actions. It also can encompass a variety of alternative dispute resolution devices. A master might, for example, preside at a summary jury trial. Matters that bear directly on the conduct of trial, however, are seldom apt to be suitable for delegation to a pretrial master. See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2147 n.88 (1989).

Paragraph (7) reflects an emerging practice of relying on masters to help coordinate separate proceedings that involve the same subject matter. One form of coordination is to appoint the same person as master in several actions. Other, often informal, forms of coordination may be possible as well. As experience develops with this practice, it may be possible to achieve many of the benefits of consolidation without the complications that might arise from attempts to consolidate actions pending in different court systems.

Trial masters. The policies that have severely restricted—indeed nearly eliminated—appointment of masters to discharge trial functions are described with subdivision (a)(1)(B).

The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master appointed under subdivisions (b)(8) or (9). The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials, and has prohibited a master's report of the evidence in a jury trial. These features are retained. There may be cases in which a mere report of the evidence is useful to the trial judge, although responsibility for credibility determinations must prove difficult. A report of the evidence in a jury trial, on the other hand, would compound unbearably the burdens of the master system. Trial before the master would be followed by simultaneous jury review of the first trial and a second trial.

Recommended findings may prove useful in nonjury trials as a focus for deliberation, leaving the judge free to decide without any required deference to the master. If a master is ever to be used in a jury-tried case, recommended findings represent the outer limit of proper authority.

HeinOnline -- 76 Tex. L. Rev. 1626 1997-1998

If a master is to hold an evidentiary hearing in a nonjury case, the most common and sensible practice is to delegate the task of decision as well as hearing, retaining the power of review. Under subdivision (i), fact findings are reviewed only for clear error unless a different standard is specified by the court.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial adjuncts to perform a variety of tasks that mingle the duties of court-appointed expert witnesses with more active functions, or that involve giving advice to the court. Perhaps the clearest combination of functions may arise when a court-appointed expert witness is given power to gather information on which to base expert testimony. Courts should observe great caution in making such appointments until there is a sufficient body of experience to provide substantial guidance. The order of appointment should be framed with particular care to define the powers and authority of a master appointed to relatively unfamiliar trial tasks.

Post-trial masters. Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Current Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is better to appoint two or even more persons. The sheer volume of work also may conduce to appointing more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role—one common label is "monitor."

Absent party consent, a post-trial master should be appointed only if no district judge or magistrate judge is available to perform the master's duties in adequate fashion. As with other masters, strong reasons must be found before the parties are forced to pay for the services of private judicial adjuncts. Masters—except those with prior public judicial service—ordinarily have little experience with the judicial role. Adding another layer to the judicial process can easily add to delay as well as cost. Yet masters may make important contributions. Overburdened courts simply may not have enough time to tend to all current business. A particularly complex case could absorb far too much of a judge's time, defeating

HeinOnline -- 76 Tex. L. Rev. 1627 1997-1998

the opportunity of litigants in many more ordinary cases to receive prompt official attention. A master may not only free up judge time but also give more time to the complex case than a judge could. The master also may bring to bear specialized training and experience that cannot be matched by any available judge. If all parties consent to appointment of a master, on the other hand, the court may freely grant the request if it wishes. Consent greatly reduces concern for possible burdens of cost, delay, and denial of direct judicial attention. Of course party consent does not require appointment of a master. The court may prefer to supervise post-trial matters directly, particularly in cases that affect broad public interests that may not be adequately represented by the parties.

Paragraph (10) establishes authority to appoint a master to conduct ministerial matters of account on terms somewhat different from the provision in former Rule 53(b). It is not required that the reference be "the exception and not the rule." This change reflects the restriction of the appointment to ministerial matters that do not call for judicial resolution. More complicated matters, whether referred to as accounting or damages, should be treated under the trial master provisions of paragraphs (8) or (9) if the case involves the ordinary trial function of resolving fact disputes. Administration of an award to multiple claimants is covered by paragraph (13).

Paragraph (11) reflects the increasingly frequent practice of using masters to help frame injunctions. Several factors may combine in different proportions to support this practice. Ordinarily the subject is quite complicated. Often the parties remain at loggerheads even after disposition of the basic issues of liability, advancing widely different remedy proposals that offer little help in framing a fair and workable decree. The parties, moreover, may not adequately represent public interests—even when one or more parties are public officials or agencies. Frequently expert knowledge is important. If a court-appointed expert has testified at trial, it may be appropriate to appoint that expert as post-trial master. A party's expert, however, should not be appointed.

Paragraph (12) authorizes appointment of a master to supervise enforcement of complex decrees in circumstances that require substantial investments of time or expert knowledge. Masters also may be important when the parties have proved unable to provide sufficient guidance on implementing a workable decree, and may be particularly important when independent inquiry is needed to supplement adversary presentation. As with framing the decree, a master also may be important because the parties do not fully represent and protect larger public interests.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional circumstance" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and

HeinOnline -- 76 Tex. L. Rev. 1628 1997-1998

enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late twentieth century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. Apart from requiring that a decree be "complex," the rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as contempt of a simple decree, see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir. 1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir. 1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir. 1979).

Paragraph (13) covers administration of an award to multiple claimants, another task that may call for appointment of a master or even creation of a small administrative organization. Class action awards may require creation of procedures and facilities for identifying claimants entitled to participate in the award, determining the shares of different claimants, maintaining the financial and ethical integrity of a common fund, and other purposes. In truly mammoth cases, these arrangements may take on the character of claims processing facilities.

Paragraph (14) contemplates powers of investigation quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic explanation of the need for—and limits on—sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

Party consent can be helpful in defining the duties of a post-trial master. Party consent, however, no more controls definition of the master's duties than it controls the decision whether to appoint a master.

HeinOnline -- 76 Tex. L. Rev. 1629 1997-1998

Other duties. Paragraph (15) emphasizes the importance of party consent. Just as parties may consent to arbitration, so consent has an important bearing on the means of processing disputes under judicial auspices. Party consent reduces concerns about expense and limiting access to public judges. Courts cannot, however, be asked to abandon all responsibility for proceedings conducted under their authority or judgments entered on their rolls. There are many illustrations of settings in which courts need not—and at times should not—accede to party consent. Consent of representative parties should be reviewed carefully in class actions. Arrangements that significantly alter the nature of adversary litigation also should be undertaken carefully; the use of masters to organize investigations by the parties, or to become active investigators, must be approached with caution. Usually it is better that the assigned judge directly resolve requests for interim relief, such as temporary restraining orders or preliminary injunctions.

Subdivision (c). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and powers. Care must be taken to make the order as clear [precise] as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment.

Long experience has demonstrated the danger that appointment of a master may lengthen, not reduce, the time required to reach judgment. From the beginning, Rule 53 has included a variety of terms designed to encourage prompt execution of the master's duties. These provisions are summarized in the phrase in paragraph (2), carried over from the original rule, requiring that a master proceed with all reasonable diligence. Additional assurances are provided by the requirement that deadlines be set. A party may make a motion to the master or to the court to compel expeditious action.

The simple requirement that the master be named does not address the means of selecting the master. Often it will be useful to engage the parties in the process, inviting nominations and review of potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement. However much the parties are involved, courts should guard against repetitive selection of a single small group of familiar candidates.

Precise designation of the master's duties and powers is essential. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule for performing the

HeinOnline -- 76 Tex. L. Rev. 1630 1997-1998

assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between master and court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that would not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

There should be few occasions for requiring that a master be bonded. If special circumstances suggest a risk that inadequate performance may cause significant harm, however, a court may wish to ensure a source of damage payments. Although a court rule cannot address the question of official immunity, it is proper to provide for a bond that—in the manner of an injunction bond furnished under Rule 65(c)—provides a source of compensation without regard to the possibility of individual liability.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guides to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. If compensation is to be fixed by an hourly rate, it may help not only to set the rate but also to set an expected time budget. When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for regular reports on cumulative expenses. The court has power under subdivision (j) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful

HeinOnline -- 76 Tex. L. Rev. 1631-1997-1998

assignments may emerge as the pretrial process unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (d). Subdivision (c) requires that the subdivision (b) duties of the master must be specified in the appointing order. Subdivision (e) describes the general scope of a master's authority. This subdivision recognizes that it is not possible to capture in a detailed rule all powers that may be necessary or appropriate for a master, and confirms the existence of powers that otherwise would have to be inferred.

Subdivision (e). The general authority of a master described in subdivision (e) is taken from past practice.

Subdivision (f). The provisions for hearings are taken from present Rule 53. Stylistic changes have been made. The present rule's detailed description of the power to compel production of documents is included in the Rule 45 power to compel production of documents or tangible things, or inspection of premises. This power to compel production of evidence may be exercised in advance of a hearing in order to make the hearing as fair and efficient as possible. It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

Subdivision (g). A master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (h). The report is the master's primary means of communication with the court. The nature of the report determines the need to file relevant exhibits, transcripts, and evidence. A report at the conclusion of unsuccessful settlement efforts, for example, often will stand alone. A report recommending action on a motion for summary judgment, on the other hand, should be supported by all of the summary judgment materials. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report against public access—a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Sealing is much less likely to be appropriate with respect to a trial master's report. ~~Recognition of the possibility of reporting on matters not specifically delegated to the master does not imply a broad license to exceed the bounds of the court's assignment. Diligent discharge of assigned duties, however, may inform~~

HeinOnline -- 76 Tex. L. Rev. 1632 1997-1998

~~the master of important matters that should be brought to the court's attention. A formal report, available to the parties, may be the best means of highlighting these matters.~~

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether—or how—such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's report.

Subdivision (i). The time limits for seeking review of a master's order, or objecting to—or seeking adoption of—a report, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review.

The clear error test provides the presumptive standard of review for findings of fact. ~~The clear-error phrase is used in place of the clearly erroneous standard of Rule 52 to suggest the subtle distinctions that may justify somewhat more searching review of a master.~~ The "clearly erroneous" phrase is as malleable in this context as it is in Rule 52, and account may be taken of the fact that the relationship between a court and master is not the same as the relationship between an appellate court and a trial court. A court may provide a more demanding standard of review in the order of appointment. The order should be amended to provide more searching review only for compelling reasons. Special characteristics of the case that suggest more searching review ordinarily should be apparent at the time of appointment, and action at that time avoids any concern that the standard may have been changed because of dissatisfaction with the master's result. In addition, the parties may rely on the standard of review in proceedings before the master. A court may not provide for less searching review without the consent of the parties; clear error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may stipulate that the master's findings will be final.

The use of masters in jury cases is discouraged by subdivision (b)(2)(B). A master's findings cannot be binding on the jury, and may confuse the jury as to any finding contested by a party. The court must exclude any finding that is affected by legal error, and may in its discretion exclude any finding. If a finding on an issue is admitted in evidence and no other evidence is admitted on that issue, judgment should be entered as a matter of law as to that issue. If other evidence is admitted, the finding is to be treated as any other evidence on the same issue, and does not affect the burden of persuasion.

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Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. The subordinate role of the master may at times warrant treating as questions of law matters that would be treated as questions of fact on reviewing a trial court.

Apart from factual and legal questions, masters often may make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The subordinate and ad hoc character of the master often will justify more searching review or de novo determination by a judge. It is important, however, to establish the master's strong working authority. Appointment of a master would be counterproductive or worse if the court routinely duplicates the master's efforts, encouraging frequent review requests by parties who are dissatisfied or who simply hope to increase delay and expense. If an "abuse of discretion" standard is used, the master's discretion is less broad than the discretion of a judge as to comparable matters. The rule does not catalogue these matters or attempt to suggest more specific standards of review. The court may, for the guidance of the parties and master, establish standards for specific topics in the order appointing the master. ~~Ordinarily, however, the standard of review will be determined during the review process.~~ The standard of review set in the appointing order may not foresee all questions, however, or may appear inappropriate when review is actually undertaken. The court has power under subdivision (c)(3) to amend the standard initially set.

Subdivision (j). The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979). Even if that suggestion is followed, a discounted public-service rate can impose substantial burdens. Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important—parties pursuing matters of public interest, for example, may deserve special protection. A party

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whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case. The factors that informed the initial allocation remain important, however. It may be unfair to impose these payments on a relatively poor party, and a victory on the merits is little reason to relieve an obstreperous party from the expenses of a master appointed to control that party's behavior. There is no presumption that a master's fees should be paid by the least successful party.

The basis and terms for fixing compensation should be stated in the order of appointment under subdivision (c)(2)(I). The court retains power to alter the initial basis and terms, after notice and opportunity for hearing, but should protect the parties against unfair surprise.

Subdivision (k). This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize the need to confuse the roles of magistrate judge and master only when justified by exceptional circumstances. See the Note to Subdivision (a).

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