

VERDICTS & SETTLEMENTS

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When does it make sense and how to get a special master?

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Over time, disputes have become increasingly more complex. COVID-19 has impacted access to the courts in California and around the nation, while civil caseloads continue to grow and the time to trial grows even longer. Even before the pandemic, the Federal Judicial Caseload Statistical report on the caseload of the federal courts for a 12-month period ending March 31, 2020, showed an increase in civil filings; increase in the percentage of “pending” cases; and a decrease in the percentage of “terminated” cases. As such, the bench and bar are increasingly looking to alternative processes, such as the appointment of special masters, to assist in keeping cases moving along.

Special masters are nominated by counsel or appointed through a court, arbitrator or other decision-making body with a mandate to carry out some action on its behalf. Typically, the special master makes factual determinations in complicated cases, resolves specific subject matter disputes, serves as a discovery referee, or serves as a forensic neutral. Special masters, also known as masters or referees, serve as “quasi-judges” who have specifically defined duties that relieve the court of some of its functions beyond its core responsibilities, often helping to narrow the range of issues for judicial focus. Examples of the diversity of assignments

for which a court may appoint a special master include everything from managing pre-trial discovery (perhaps the most common basis for appointment) to monitoring or implementing injunctions such as court orders or consent judgments to clean up the environment or reform public institutions. Special masters may be appointed to allocate attorney fees from a common benefit fund or to administer or allocate settlement funds in mass torts. Courts commonly use special masters for their expertise in accounting or to review potentially privileged materials, often “in camera.” The foregoing is just a sampling of the many areas in which special masters have assisted in achieving the just, speedy and efficient resolution of complex civil disputes.

While some litigants and counsel are reticent to seek a special master’s appointment because of a concern that it may lead to delays and additional expense, the opposite is often the result. Special masters are useful judicial adjuncts in reducing both the cost and the time required to get to trial. More importantly, a special master can provide the subject matter expertise necessary to keep a case moving forward, which is valuable in itself given the current state of the federal and state docket.

One of the most common complaints about the judicial system is the delay associated with moving cases forward. Lawyers and their clients need decisions, even adverse ones, to make strategic decisions. Flexibility is a significant ad-

vantage associated with appointing a special master. Special masters, unlike judges, are not judicial officers with a formal court docket. Most special masters control their own calendars and can more readily and easily carve out time for a conference call or quick hearing with counsel on a shortened notice. A special master can more easily attend an ad hoc meeting among lawyers, be more flexible with their schedules overall, and have one-party conversations with attorneys to help reach resolutions more efficiently. The limits on judicial resources have been highlighted with the ongoing COVID-19 pandemic so appointing a special master in such situations could be the

key to ensuring cases move along more effectively.

Also, counsel may experience a wide disparity in judges’ technical proficiency, which can cause significant delays and additional expense litigating cases involving electronically stored information and other forensic disputes. Some judges are more proficient with technology and can comprehend and address these types of disputes. State and federal judges contribute to a growing body of law, deciding and guiding a myriad of recurring issues. Notwithstanding the strides made in the growth of technological competence in both the bench and bar, litigants may be faced with a judge who readily acknowledges they lack the

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technical expertise or the ability to devote the requisite time to fully unpack and resolve complex electronically stored information or other data-driven issues. A lawyer with specialized knowledge or a forensic specialist with knowledge of the judicial system would be better equipped to quickly and cost-effectively identify and resolve forensic issues.

Despite these advantages, litigants and their counsel may still be concerned about the additional expense incurred by the appointment of a special master, especially in cases where the disputes are caused by recalcitrant parties and/ or their counsel, whom they believe may be operating in bad faith. However, the Federal Rules of Civil Procedure give judges broad discretion to address discovery abuses and apportion expenses to appoint a special master. FRCP Rule

53(a)(3) requires the court to consider the fairness of imposing costs on the parties and protect against unreasonable expenses or delay before appointing a special master. Rule 53(g)(2) specifies that compensation for the special master must be paid by the parties or “from a fund or subject matter of the action within the court’s control.” Significantly, Rule 53(g)(3) authorizes the court to allocate payment among the parties “considering the nature and amount of the controversy, the parties’ means, and the extent to which any party is more responsible than other parties for the reference to a master.” This fee-shifting provision is an important and powerful tool in the court’s arsenal to ensure equitable allocation of the additional expense.

Further, FRCP Rule 53 notes that the appointment of a master may be voluntary or invol-

untary. Specifically, Rule 53(a)(1) provides that the court is (A) allowed to appoint a master to “perform duties consented to by the parties”; (B) to “hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted; or (C) to address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” FRCP Rule 53 also outlines the conditions and requirements for using a special master and the scope of the special master’s authority and responsibilities. Per FRCP Rule 53(c)(1), a special master’s scope of authority is limited to what is defined in the rule unless the court’s appointing order specifies otherwise. FRCP Rules 53(f)(1) and (2) outline the parties’ rights to a hearing and their ability to ob-

ject or move to adopt or modify the special master’s order, report or recommendations.

Appointing a special master in the appropriate case can be the most cost and time-effective decision for everyone involved. Because the master’s order, report, or recommendations are not final, and parties have the option to object and/ or request modifications to them, there is no downside to appointing a special master in cases where they could be of assistance. Instead, their value can be quite substantial. Consequently, the demand for special masters will likely increase significantly over the next few years. ■

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