

**SPECIAL MASTERS IN STATE COURT COMPLEX
LITIGATION: AN AVAILABLE AND UNDERUSED CASE
MANAGEMENT TOOL**

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I. INTRODUCTION

Judicial masters have an honored place in the American judicial system.¹ Masters are regularly used in the highest court of the land, and provide a valuable service to the operation of the

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1. See *Ex parte* Peterson, 253 U.S. 300, 312 (1920) (providing in a decision written by Justice Brandeis that courts have inherent power to appoint special masters to aid judges in the performance of judicial duties).

Court.² Masters also have an important role—and a greater potential to contribute—in litigation in the trial courts. The breadth of roles served by special masters is reflected by the number of names used to describe their role; names include “auditors, assessors, appraisers, commissioners, examiners, monitors, referees, and trustees.”³ Under state law, receivers may also serve a special master-like role. This expansive definition is used by the Federal Judicial Center (FJC) in its study of special masters,⁴ and use of the term “special master” in this article includes those roles.

Generally, masters have been used more extensively in federal court litigation, although they are often put to use in the state courts as well. Particularly in state court litigation, however, there are both opportunities and needs for the litigation benefits masters can provide. Indeed, because state court judges may not have magistrate judges or other resources available, special masters may be very valuable to state court judges.

This article examines the role masters have played in litigation and explores the benefits that might be obtained from the greater use of masters in the future. The FJC survey of federal judges appointing special masters concluded that special masters were “extremely or very effective.”⁵ The FJC study is an empirical survey of the effectiveness of special masters, and it includes commentary from judges regarding their experience after appointing special masters.⁶ These benefits include better, faster, and fairer resolution of litigation in the cases in which masters are used, as well as an easing of the burdens these cases place on the judiciary. This article also analyzes the barriers to the use of masters and how they might be removed.

II. CURRENT USE OF JUDICIAL MASTERS IN STATE AND FEDERAL COURTS

Rule 53 of the Federal Rules of Civil Procedure (F.R.C.P. Rule

2. See generally ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 10.12 (8th ed. 2002).

3. Thomas E. Willging et al., *Special Masters' Incidence and Activity*, FED. JUD. CENTER 1 (2000) [hereinafter FJC Study], available at http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index.

4. *Id.*

5. *Id.* at 58.

6. *Id.*

53) allows courts to appoint a special master to perform or manage certain aspects of a case, if consented to by the parties.⁷ It is becoming almost commonplace in complex federal court cases for special masters to be appointed as mediators or facilitators of other alternative dispute resolution processes.⁸ In 2003, F.R.C.P. Rule 53 was amended to allow courts to appoint special masters to assist with pretrial and post-trial work.⁹ When courts appoint a special master to address pretrial or post-trial matters, it is usually because the court cannot efficiently address the matter.¹⁰ Use of special masters also arises when a matter requires protracted fact finding,¹¹ for example, the making of a difficult damages computation.¹²

State court rules governing procedural aspects of a case vary from state to state. Twenty-three states have a rule of civil procedure that nearly mirrors the pre-2003 amended F.R.C.P. Rule 53.¹³ Twenty-four states have a rule of civil procedure that differs from F.R.C.P. Rule 53, the current rule, and the pre-2003 amended version of the rule, primarily by not including the F.R.C.P. Rule 53 language stating that appointment of a special master should be the “exception and not the rule.”¹⁴ Some states allow for

7. FED. R. CIV. P. 53(a)(1)(A).

8. *See generally In re Kensington Int'l Ltd.*, 368 F.3d 289 (3d Cir. 2004); *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2d Cir. 1994).

9. FED. R. CIV. P. 53(a)(1)(C); *see also* Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. ST. B.J. 18, 21-22 (Jan. 2004), available at http://www1.jonesday.com/FILES/tbl_s31Publications/FileUpload137/1086/Revisions_in_Federal_Rule_53.pdf (discussing the 2003 changes to Federal Rule 53 and how the amendments conform the rule to actual practice).

10. FED. R. CIV. P. 53 advisory committee's note to 2003 amendments; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.52 (2004) [hereinafter MANUAL] (noting that courts will appoint special masters when the amount of discovery work will impose an undue burden on the judge).

11. FED. R. CIV. P. 53(a)(1)(B).

12. FED. R. CIV. P. 53(a)(1)(B)(ii).

13. *See infra* Special Master Authorities Appendix (comparing state court rules (by state) to the federal rule). Alabama, Arizona, Colorado, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming have all adopted a rule similar (some may contain minor modifications) to the pre-2003 amended version of the federal rule. *Id.*

14. *See id.* (comparing state court rules (by state) to the federal rule and noting additional requirements, such as written consent of the parties). Alaska, California, Delaware, Florida, Georgia, Kansas, Louisiana, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia,

appointment of a special master but limit the scope of when a special master can be appointed.¹⁵ At least one state authorizes the use of a special master under a state constitutional provision.¹⁶ Nevertheless, most states provide some procedure, whether by statute or as part of the state court rules of civil procedure, that allows courts to appoint special masters to handle certain aspects of litigation.¹⁷ In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters.¹⁸

A. *Benefits Provided by Special Masters*

State courts employ special masters to serve a variety of objectives. The objective of some state courts is to alleviate some of the caseload problems.¹⁹ The sheer magnitude of a complex case may overwhelm the time available to a judge who has other cases on the docket. Conducting in camera review of documents to review claims of privilege might take weeks or months of time, and many judges cannot fairly absent themselves from their other cases to devote this amount of time to a single case. Other courts appoint special masters to preside over discovery motions involving highly specialized issues.²⁰ A special master will assist the parties in

Washington, and West Virginia all have a rule that does not include the language providing the appointment of a special master should be the "exception and not the rule." *Id.*

15. *See id.* Arkansas, Maryland, and Michigan limit appointment to non-jury actions, while Connecticut currently allows appointment in family law matters as part of a civil matter pilot program scheduled to end in December 2004. *Id.* Kentucky limits appointment to matters involving judicial sales, and settlement and receivership, while Vermont limits appointment to actions requiring account/voucher investigation. *Id.*

16. MICH. CONST. art. VI, § 23.

17. *See infra* Special Master Authorities Appendix.

18. *Id.* Even in the absence of express rule authority, courts may have some inherent authority to appoint a special master. *See* *Mitan v. New World Television, Inc.*, No. 225530, 2002 WL 31928598, at *6 (Mich. Ct. App. Nov. 12, 2002), *rev'd*, 669 N.W.2d 813 (Mich. 2003) (reversing and remanding a decision by the Michigan Court of Appeals where the court of appeals concluded the district court erred in appointing a special master under the Michigan Constitution).

19. *In re* Pub. Law No. 305 & Pub. Law No. 309, 334 N.E.2d 659, 666 (Ind. 1975).

20. *See* MANUAL, *supra* note 10 (stating that special masters are increasingly appointed because they bring expertise in areas of "accounting, finance, science, and technology"); JUDICIAL COUNCIL OF CALIFORNIA, DESKBOOK ON THE MANAGEMENT OF COMPLEX CIVIL LITIGATION § 2.05 (Matthew Bender 2003) [hereinafter CALIFORNIA DESKBOOK] (stating that a master may bring technical expertise or first-hand litigation experience in similar matters to bear on such

developing a discovery plan that is both logical and cost effective.²¹

Construction defect suits present many difficult factual issues and create unique settlement problems.²² Initial case management is therefore important, and often courts will enlist the help of a special master.²³ A special master can help resolve problems regarding sequencing of different types of discovery, manage interim settlement negotiations between the many parties, and resolve discovery disputes.²⁴

Aside from pretrial work, some courts use special masters to assist with settlement negotiations.²⁵ In complex litigation matters, parties often select attorneys for their expertise at litigating.²⁶ Judges therefore suggest that special counsel or special masters preside over settlement discussions and in “post-settlement claims-resolution proceedings.”²⁷

B. Actual Use of Special Masters in State Courts

Many state courts have realized the benefits of appointing special masters to assist in case management. The following list provides a broad overview of state courts’ use of special masters over the past three years. Undoubtedly, state courts have used special masters in a much broader range of cases; however, the following list provides a representative sampling of state court cases documenting use of a special master.

- Presiding over attorney professional responsibility violation proceedings.²⁸
- Overseeing or monitoring discovery.²⁹

issues).

21. CALIFORNIA DESKBOOK, *supra* note 20.

22. *Id.* § 3.10.

23. *Id.* § 3.13.

24. *Id.*

25. *Id.* § 2.92.

26. *Id.*

27. *Id.*

28. *See* Ligon v. Dunklin, No. 04-661, 2004 WL 2036927, at *1 (Ark. Sept. 9, 2004) (appointing a special master to preside over disbarment proceedings); *In re* Rutherford, 569 S.E.2d 840 (Ga. 2002) (adopting the special master’s recommendation that the court accept attorney’s petition for voluntary surrender of his license to practice law); *In re* Meagher, 681 N.W.2d 145, 147 (Wis. 2004) (appointing a referee to preside over hearing regarding attorney’s petition for reinstatement of license to practice law).

29. *See* Leo’s Gulf Liquors v. Lakhani, 802 So. 2d 337, 338 (Fla. Dist. Ct. App.

- Conducting in camera document inspection.³⁰
- Supervising class notice process.³¹
- Overseeing employment promotion practices within a city fire department.³²
- Presiding over divorce proceedings.³³
 - Overseeing discovery.
 - Determining spousal income for purposes of spousal support.
 - Determining value of marital estate.
 - Preserving the marital estate.
 - Determining depletion amount of marital assets.
- Making child support determinations.³⁴
- Modifying a child support order.³⁵
- Making findings of fact and recommendations regarding property disputes.³⁶

2001) (appointing a special master to preside over discovery in a negligent misrepresentation claim for the sale of a business where discovery continued over a three-year period); *Lipco Elec. Corp. v. ASG Consulting Corp.*, No. 8775/01, slip op. 50967U, 2004 WL 1949062 (N.Y. Sup. Ct. Aug. 18, 2004) (appointing a referee to supervise, monitor, and schedule discovery including document protection orders, and any other discovery issue that might arise); see also Ron Kilgard, *Discovery Masters When They Help—and When They Don't*, 40 ARIZ. ATT'Y 30 (Apr. 2004) (discussing use of discovery masters); Janet Griffiths Peterson, *The Appointment of Special Masters in High Conflict Divorces*, 15 UTAH B.J. 16 (Aug./Sept. 2002) (discussing use of special masters in divorce cases).

30. *Gaton v. Health Coalition, Inc.*, 774 So. 2d 59, 60 (Fla. Dist. Ct. App. 2000).

31. *Edwards v. Long Beach Mortgage Co.*, No. CT 02-16446, 2004 WL 2137824, at *7 (Minn. Dist. Ct. July 22, 2004).

32. See *Broadnax v. City of New Haven*, 851 A.2d 1113, 1119 (Conn. 2004) (affirming the trial court's decision to appoint a special master to oversee the promotion practices of New Haven's fire department after repeated allegations of affirmative action violations among others).

33. See *Hough v. Hough*, 92 P.3d 695, 698 (Okla. 2004) (appointing a special master to assist with divorce proceeding because one party was continuously uncooperative); *In re Marriage of Petropoulos*, 110 Cal. Rptr. 2d 111, 115-16 (Cal. Ct. App. 2001) (appointing special master to determine debts and assets of the parties, income of the parties, and the parties' credibility).

34. See *Eberhardt v. Eberhardt*, 672 N.W.2d 659, 664 (N.D. 2003) (sending determination of party's request to increase child support to a judicial referee).

35. See *Lasker v. Johnson*, 123 S.W.3d 283, 286 (Mo. Ct. App. 2003) (appointing a special master after one party attempted to modify a child support order without circuit court approval).

36. See *Gilbert v. Nicholson*, 845 So. 2d 785, 787 (Ala. 2002) (appointing a special master to inspect and oversee roadway construction); *Watkins v. Hartwell R.R. Co.*, 597 S.E.2d 377, 378 (Ga. 2004) (appointing a special master to resolve a right-of-way dispute between a railroad and a property owner making

- Overseeing environmental restoration project.³⁷
- Overseeing the winding up of a general partnership.³⁸
- Making insurance coverage determinations.³⁹
- Presiding over evidentiary hearings.⁴⁰
- Presiding over a judicial misconduct action.⁴¹
- Determining facts in a mortgage foreclosure action.⁴²
- Conducting preferential lien hearings.⁴³
- Calculating attorney fees.⁴⁴

improvements to the disputed property); *Libby v. Vachon*, No. CV-02-651, 2004 WL 1433690, at *1 (Me. Super. Ct. Apr. 22, 2004) (appointing a referee to preside over a dispute where one party constructed a culvert diverting water to neighbor's property and neighbor subsequently blocked the culvert); *Young v. Hayward*, No. RE-01-35, 2003 WL 21957120, at *3 (Me. Super. Ct. July 31, 2003) (appointing a referee to decide a case involving contaminated well water where the parties could not agree on the cause or the settlement terms); *Fisher v. Cranberry Township Hearing Bd.*, 819 A.2d 181, 183 (Pa. Commw. Ct. 2003) (appointing a referee to conduct hearings, review evidence, and make findings of fact regarding property rezoning); *Houston v. Mounger*, No. E2002-00779-COA-R3-CV, 2003 WL 22415363, at *1 (Tenn. Ct. App. Oct. 23, 2003) (appointing a special master as a surveyor in a property boundary line dispute).

37. See *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 878 So. 2d 522, 530 (La. Ct. App. 2004) (appointing a special master to oversee a restoration project whose duties included obtaining necessary permits, and contracting with necessary parties, which included a dredging company).

38. See *Seminatore v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, Gen. P'ship*, 774 N.E.2d 1233, 1235 (Ohio Ct. App. 2002) (referring winding-up of a partnership to a special master). The FJC Study reports that a lawyer respondent to the study found that in South Carolina, use of a special master in a case accounting for partnership activity is almost "automatic." FJC Study, *supra* note 3, at 74.

39. See *Buller v. Minn. Lawyers Mut.*, 648 N.W.2d 704, 707 (Minn. Ct. App. 2002) (agreeing to refer determination whether insurance policy provided coverage to a consensual special magistrate (retired Minnesota Supreme Court justice)).

40. See *Brooks v. State*, 816 So. 2d 199 (Fla. Dist. Ct. App. 2002) (ordering appointment of a special master to make evidentiary findings regarding timely notice of appeal); *Williams v. State*, 816 So. 2d 718 (Fla. Dist. Ct. App. 2002) (requesting appointment of a special master to conduct a hearing regarding a party's right to raise a claim of ineffective assistance of counsel).

41. See *In re Anderson*, 82 P.3d 1134, 1141 (Utah 2004) (appointing a special master to gather additional evidence in a juvenile court judge misconduct proceeding).

42. See *United Cos. Lending Corp. v. Candela*, 740 N.Y.S.2d 543, 545 (N.Y. App. Div. 2002) (ordering appointment of a referee to determine outstanding mortgage balance in a foreclosure action).

43. See *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 41 P.3d 327, 329 (Nev. 2002) (affirming trial court decision to appoint a special master to preside over preferential lien hearings in which the special master did not have a conflict of interest).

Federal courts make extensive use of special masters. The following list highlights case situations where federal courts have put special masters to work.

- Complex litigation or mass tort cases.⁴⁵
- Calculating attorney fees.⁴⁶
- Finding investigative facts.⁴⁷
- Preparing redistricting plans for state house and senate.⁴⁸
- Acting as a trustee over a constructive trust.⁴⁹
- Determining net profits due.⁵⁰
- Reviewing documents for possible redaction of privileged documents in a summary judgment motion.⁵¹
- Managing discovery disputes.⁵²
- Conducting in camera document review.⁵³
- Conducting evidentiary hearings in a claim under the

44. See Jan Skutch, *Special Master Calls for Heads of Roberson, Woodall*, LOCAL NEWS NOW, SAVANNAH MORNING NEWS, Mar. 30, 2000, at <http://www.savannahnow.com/stories/033000/LOCshiggs.shtml> (discussing the special master's recommendation regarding disciplinary action against two attorneys involved in a medical malpractice case where they claimed over seventy percent of the cash portion of the patient's settlement). See generally MANUAL, *supra* note 10, § 21.727 (noting that courts have broad discretion to refer issues regarding a fee amount request to a special master).

45. See *In re Kensington Int'l Ltd.*, 353 F.3d 211, 215 (3d Cir. 2003) (appointing special masters to preside over bankruptcy proceedings in mass tort asbestos litigation); see also Bedouin L. Joseph, *The "Nuts & Bolts": The Louisiana Special Master Statute: A Valuable Tool or an Expensive and Unnecessary Diversion?*, 51 LA. B.J. 261, 262 (Dec. 2003/Jan. 2004) (noting mass tort and complex litigation cases "continue to inundate [Louisiana] courts").

46. *Am. Presents, Ltd. v. Hopkins*, 330 F. Supp. 2d 1217, 1234 (D. Colo. 2004).

47. See *Cobell v. Norton*, 310 F. Supp. 2d 102, 104 (D.D.C. 2004) (ordering a special master to investigate whether the Department of Interior concealed information).

48. *Larios v. Cox*, 306 F. Supp. 2d 1212, 1213 (N.D. Ga. 2004).

49. *Triple Five of Minn., Inc. v. Simon*, 280 F. Supp. 2d 895, 909 (D. Minn. 2003).

50. *Id.*

51. *Diversified Group, Inc. v. Daugerdas*, 304 F. Supp. 2d 507, 510 (S.D.N.Y. 2003).

52. *Good Stewardship Christian Ctr., Inc. v. Empire Bank*, 341 F.3d 794, 797 (8th Cir. 2003).

53. *In re Omeprazole Patent Litig.*, 2004 WL 842024, at *1 (S.D.N.Y. 2004).

National Childhood Vaccine Injury Act.⁵⁴

- Determining necessary relief in Voting Rights Act matter.⁵⁵
- Reviewing attorney fee applications in class action litigation.⁵⁶

In addition to reported decisions, an empirical study created by FJC studied federal courts' use of special masters.⁵⁷ The FJC Study also found non-attorney special masters' activities included testifying to a jury, establishing a claims process, recommending approval of or implementing a settlement, and drafting an enforcement decree.⁵⁸

Federal courts recognize the benefits that special masters offer, and the courts continue to appoint masters to manage difficult and complex issues.⁵⁹ Many resources used by federal courts are also used extensively within state courts.⁶⁰ Like federal courts, state courts should appoint special masters to manage difficult or complex issues. In many situations, state court and federal court litigation is indistinguishable and often involves the same issues and the same attorneys.⁶¹ Both federal and state court rules permit courts to appoint special masters.⁶² State courts should take greater advantage of the discretion allowed under the rules and appoint special masters to difficult matters.

State courts' use of special masters may be limited by various

54. *Dixon v. Sec'y. of Dep't of Health & Human Servs.*, 61 Fed. Cl. 1, 6 (2004).

55. *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 542 (E.D. Pa. 2003).

56. *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 184 (3d Cir. 2002).

57. FJC Study, *supra* note 3.

58. *Id.* at 41.

59. See MANUAL, *supra* note 10 (noting that the Federal Rules of Civil Procedure allow judges to appoint special masters when pretrial and post-trial matters cannot be efficiently and effectively addressed by a judge, particularly in cases requiring accounting, finance, science, and technology expertise); see also FJC Study, *supra* note 3, at 13 (showing that in 1506 cases out of 445,729 docket entries, the court made some entry to a special master).

60. See DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) 3 (West, 2004) (noting that the Manual for Complex Litigation is used extensively by state courts).

61. See, e.g., ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS § 1.1 (Thomson West, 3d ed. 2004).

62. See *supra* notes 13-14 and accompanying text.

hurdles or standards inherent in the authorities allowing state courts to appoint a special master.⁶³ Some of the conditions or limitations include:

- Requiring consent of the parties before appointing a special master.⁶⁴
- Requiring a finding of an extraordinary need.⁶⁵
- Limiting the scope of cases permitting appointment of a special master.⁶⁶
- Limiting appointment to non-jury actions.⁶⁷
- Requiring that an action to be tried to a jury involve “examination of complex or voluminous accounts.”⁶⁸

Nevertheless, state courts can put special masters to work, and such limitations should not stand in the way of utilizing special masters when allowed.

In state courts, a contentious divorce proceeding, such as one involving custody issues, is one situation where the court may appoint a special master to make decisions regarding “day-care, . . . diet, . . . discipline, health care, and daily routines.”⁶⁹ Any decisions the special master makes regarding “education, religious training, vacations and holidays, supervision of visitation, and participation in physical and psychological examinations” would require adoption by the court.⁷⁰ The court’s goal in appointing a special master to a divorce/custody proceeding is to protect the child from ongoing litigation and parental conflict.⁷¹

Courts can also appoint special masters to resolve complex calculations. Special masters hear evidence and make damages recommendations regarding the fair market value of property.⁷² In one case, the court noted that appointment of a special master might be useful in determining the value of improvements to a

63. See *infra* Special Master Authorities Appendix (listing the authorities by state and stating some of the authorities’ limitations).

64. FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005).

65. TEX. R. CIV. P. 171.

66. CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53.

67. MD. CIR. CT. R. CIV. P. 2-541.

68. KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002).

69. Griffiths Peterson, *supra* note 29, at 18.

70. *Id.*

71. *Id.*

72. McKemie v. City of Griffin, 537 S.E.2d 66, 67 (Ga. 2000).

water system.⁷³ In another case, the trial court appointed a special master to make an accounting of a company's books and bank accounts.⁷⁴ Special masters help determine amounts due under rental agreements.⁷⁵ When a case involves a dispute regarding attorneys' fees and the court appoints a special master, the special master can offer recommendations that might include disbarment.⁷⁶

Cases involving school funding are one area where several state courts have appointed special masters. In Arkansas, the school-funding program was declared unconstitutional.⁷⁷ Since the *DuPree* decision, several cases have again challenged revisions to the state's educational-funding program.⁷⁸ In 2002, the Arkansas Supreme Court once again declared the state-funding program unconstitutional.⁷⁹

After the state missed a January 2004 deadline where it was to complete a cost study and propose a funding program that is constitutional, the court appointed two special masters.⁸⁰ The special masters were to answer ten questions related to steps the state had taken to bring the educational system into compliance with the state's constitution.⁸¹ The Arkansas Supreme Court discussed the anticipated work of the special masters and noted that it would primarily involve document review.⁸² Nevertheless, the court mentioned that if the masters determined that they needed to take testimony, the masters had the authority to subpoena witnesses or other materials.⁸³ In April 2004, the masters released their report (128 pages) and noted their findings with respect to the state's action in bringing the educational system into

73. *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 928 P.2d 1047, 1052 n.5 (Utah Ct. App. 1996).

74. *See HRR Ark., Inc. v. River City Contractors, Inc.*, 87 S.W.3d 232, 235-36 (Ark. 2002) (noting that the trial court appointed a special master where the case involved a dispute about a sale of assets with provisions related to adjustments for revenue shortfalls, and the parties asserted counterclaims for unpaid commissions and unpaid rent).

75. *Fallahzadeh v. Ghorbanian*, 82 P.3d 684, 685 (Wash. Ct. App. 2004).

76. *Skutch*, *supra* note 44.

77. *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983).

78. *Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996); *Magnolia Sch. Dist. No. 14 v. Ark. State Bd. of Educ.*, 799 S.W.2d 791 (Ark. 1990).

79. *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002).

80. *Lake View Sch. Dist. No. 25 v. Huckabee*, 144 S.W.3d 741 (Ark. 2004).

81. *Id.* at 742.

82. *Id.* at 742-43.

83. *Id.*

compliance with the state constitution.⁸⁴ Courts in Idaho, Kentucky, New Jersey, New Mexico, New York, and West Virginia have also appointed special masters to cases involving school-funding programs.⁸⁵

Courts often appoint a special master to cases involving property disputes. In New Jersey, a court appointed a special master to recommend the number of housing units that a development lot could yield while complying with a zoning ordinance.⁸⁶ In another New Jersey case, the court appointed a special master to assist in revising a zoning ordinance at issue in a land use regulation case.⁸⁷ In Arizona, a court appointed a special master to a matter involving violations of a subdivision's covenants, conditions, and restrictions.⁸⁸ The special master heard testimony, conducted an on-site visit, and found that one of the parties did violate the subdivision's covenants, conditions, and restrictions.⁸⁹ The trial court adopted the special master's recommendations and findings, and the appellate court affirmed the decision.⁹⁰ State courts in California, Florida, Massachusetts, Michigan, Texas, and Washington have appointed special masters to assist in resolving property disputes ranging from zoning ordinance disputes to disputes concerning defective construction.⁹¹

84. *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2004 WL 1406270, at *1 (Ark. June 18, 2004); see also Molly A. Hunter, *Special Masters Report on Compliance in Arkansas, Offer Favorable Views on Early Childhood Education and Consolidation*, ACCESS (April 7, 2004), at <http://www.schoolfunding.info/states/ar/4-7-04mastersreport.php3> (discussing the special masters' findings regarding the Arkansas school-funding program).

85. Hunter, *supra* note 84; see *Idaho Sch. for Equal Educ. Opportunity v. State*, 97 P.3d 453, 456 (Idaho 2004) (noting the district court's appointment of a special master to assess dilapidated schools in the state); *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *State ex rel. Justice v. Bd. of Educ.*, 539 S.E.2d 777 (W. Va. 2000); *State Court Appoints Three Special Masters to Fix School Funding Formula*, NY1 NEWS (Aug. 4, 2004), at <http://www.allianceforqualityeducation.org/State%20court%20appoints%203%20masters.html>.

86. *Toll Bros. v. Township of W. Windsor*, 803 A.2d 53, 66 (N.J. 2002).

87. *S. Burlington County NAACP v. Mount Laurel Township*, 456 A.2d 390, 454-55 (N.J. 1983).

88. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 2 P.3d 1276, 1278 (Ariz. Ct. App. 2000).

89. *Id.*

90. *Id.*

91. *Regan Roofing Co. v. Superior Court*, 27 Cal. Rptr. 2d 62 (Cal. Ct. App. 1994); *Clay v. Monroe County*, 849 So. 2d 363 (Fla. Dist. Ct. App. 2003); *Yankee*

III. ASSESSMENT OF SPECIAL MASTERS' CONTRIBUTIONS

Cases where courts have appointed special masters have been met with success and complaints. Courts frequently adopt the special master's recommendations. Nevertheless, a losing party often appeals a court's decision where it adopts a recommendation by a special master.

A. Drawbacks

Expense is one area that some view as a drawback related to use of special masters.⁹² Whether expense is incurred by the parties or by the court, use of special masters may result in incurring additional expense.⁹³ Nevertheless, the reality is that efficiencies brought about by special masters ultimately save money for the parties and save public resources.⁹⁴

Cases where parties question the special masters' recommendations or findings often involve situations where a party asserts that the special master heard an argument raised for the first time on appeal.⁹⁵ More often than not, the appellate court affirms the trial court decision because transcripts of the hearing before the special master are not available.⁹⁶

Decisions where the appellate court vacates the findings of a special master have occurred when the trial court appointed a special master without the consent of the parties.⁹⁷ In Missouri, a trial court adopted an accountant's report as a report of a special master purportedly in accordance with Missouri Rule of Civil

Adver. Co. v. Outdoor Adver. Bd., 464 N.E.2d 410 (Mass. App. Ct. 1984); Northview Constr. Co. v. City of St. Clair Shores, 249 N.W.2d 290 (Mich. 1976); City of Garland v. Walnut Villa Apartments, L.L.C., No. 05-01-00234-CV, 2001 WL 789298, at *1 (Tex. App. July 12, 2001); Peterson v. Koester, 92 P.3d 780 (Wash. Ct. App. 2004).

92. FJC Study, *supra* note 3, at 59.

93. *Id.*

94. *Id.*

95. See Simmons v. Bearden, 596 S.E.2d 136, 137 (Ga. 2004) (arguing on appeal that the special master's determination was based on issues "neither considered nor ruled on below"); Gotel v. Thomas, 592 S.E.2d 78, 79-80 (Ga. 2004) (noting that the appellate court could not review the argument that the special master erred by considering an argument first raised on appeal because no transcript of the hearing before the special master was available).

96. See Simmons, 596 S.E.2d at 137; Gotel, 592 S.E.2d at 79-80.

97. Perez-Vasquez v. Smith-Rivera, No. 3D03-3256, 2003 WL 23006699, at *1 (Fla. Dist. Ct. App. 2003).

Procedure 68.01.⁹⁸ The appellant argued that the trial court erred in adopting the report, and the court of appeals agreed with the appellant.⁹⁹ The court of appeals noted that the trial court did not provide notice to the appellant that it was appointing the accountant as a special master, the accountant was not sworn in, and the appellant never had an opportunity to challenge the accountant's report.¹⁰⁰ Consequently, the Missouri Court of Appeals stated that the accountant's report could not be considered on remand.¹⁰¹

Parties have appealed appointment of a special master in jurisdictions that limit the appointment of a master to unusual or exceptional cases.¹⁰² If the trial court fails to make findings of the required condition precedent to use of a master, disqualification may be appropriate.¹⁰³ In most such situations, however, the reviewing court will readily determine that sufficient grounds existed for appointment of a master, even if they were not specifically found in the order of appointment.¹⁰⁴ In one Texas case, a party challenged the trial court's appointment of a special master for discovery on the grounds that the trial court did not have "good cause" to appoint the master.¹⁰⁵ In reviewing the matter, the Texas Court of Appeals noted that a trial court's decision to appoint a special master is within the court's discretion but should only occur when there is "good cause."¹⁰⁶ On review, the court of appeals noted that the case only involved two plaintiffs and one defendant.¹⁰⁷ Moreover, the court noted that neither party made a contention that the case was overly complicated.¹⁰⁸ The court concluded that the case was not exceptional and that the trial court did not show good cause when deciding to refer discovery matters to a master.¹⁰⁹

98. Shaner v. Sys. Integrators, Inc., 63 S.W.3d 674, 679 (Mo. Ct. App. 2001).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See, e.g.,* Wallin v. Drewery, 783 So. 2d 786 (Miss. Ct. App. 2001); Tollett v. Carmona, 915 S.W.2d 562 (Tex. App. 1995). *But see* Venetian Casino Resort, L.L.C. v. Eighth Judicial Dist. Court of Nev., 41 P.3d 327 (Nev. 2002).

103. *See, e.g.,* Tollett, 915 S.W. 2d at 563.

104. *Wallin*, 783 So. 2d at 790.

105. *Tollett*, 915 S.W.2d at 563.

106. *Id.* at 564.

107. *Id.*

108. *Id.*

109. *Id.*

Challenges to a court's appointment of a special master also occur when a party believes the special master has a conflict of interest. Often times, a party will need to show that the perceived conflict of interest is more than speculation.¹¹⁰ Nevertheless, if a legitimate conflict of interest exists, special masters should recuse themselves from a proceeding.¹¹¹ Parties should be aware that special masters are frequently attorneys and that accommodations should be made to limit the special master's role in the proceeding so as to avoid any possible conflict of interest.

B. Successes

Although the FJC Study is anecdotal in nature, it notes great satisfaction in the work special masters do and how federal judges view the special masters' work.¹¹² The work of special masters is very helpful; in fact, one judge in responding to the FJC Study "wished he had appointed a discovery master earlier."¹¹³ The FJC Study shows that generally, judges appointing special masters thought that the "benefits of appointments outweighed any drawbacks."¹¹⁴

In a case involving allegations of damages from lead-based paint, a special master was able to determine that the alleged damages occurred after the paint manufacturer stopped selling lead-based paint.¹¹⁵ The special master recommended dismissal of the case based on a variety of legal theories, and the trial court judge adopted the special master's recommendations.¹¹⁶

The work of special masters has also been successful when the work involves "side issues" or general research for the court. The Pennsylvania Supreme Court appointed a special master to gather data regarding death penalty cases in the state.¹¹⁷ The court was

110. *Wallin*, 783 So. 2d at 790.

111. *But see Venetian Casino Resort, L.L.C. v. Eighth Judicial Dist. Court of Nev.*, 41 P.3d 327 (Nev. 2002) (noting that despite the fact the plaintiff waived its right to object to the special master appointment, the concerns of the plaintiff were not so serious for the special master to recuse herself from the proceeding).

112. FJC Study, *supra* note 3, at 61.

113. *Id.* at 64.

114. *Id.* at 66.

115. *See Understanding Lead-Pigment Litigation*, at http://www.leadlawsuits.com/infobystate_MS.htm (last visited Jan. 6, 2005) (noting *Gaines v. Sherwin Williams*).

116. *Id.*

117. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53

studying concerns regarding race-based disparate treatment, and it needed to review evidence.¹¹⁸ The special master was able to gather the data, and a state commission called for a moratorium on executions.¹¹⁹

Special masters also provide valuable services to the court when a matter involves a highly technical dispute. For example, courts often appoint special masters to assist in resolving electronic discovery matters.¹²⁰ A special master who possesses the right qualifications is in a better position to resolve the dispute as compared to a judge with little or no technical expertise.¹²¹ Special masters can help answer questions such as what is the right amount of data to produce.¹²² Electronic discovery disputes often involve a question of which party should bear the cost of production, and a special master is in the best position to determine the answer.¹²³

Whether a court has appointed a special master to assist with pretrial or post-trial matters, the FJC Study shows that attorneys and judges alike thought that the special master helped manage the case more efficiently.¹²⁴ Even the attorneys involved in cases where special masters were appointed thought the special masters were “effective in meeting the goals of the appointment, [and] describ[ed] the appointments as a good idea.”¹²⁵

IV. NEED FOR SPECIAL MASTERS

A. *Financial and Workload Crises in the Courts*

Across the country, state budget crises are limiting individuals’

DEPAUL L. REV. 1411, 1441 (2004) (focusing in part “on the interaction between empirical evidence of racial discrimination in the administration of the death penalty”).

118. *Id.*

119. *Id.* at 1481.

120. Richard H. Agins, *An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery*, 23 PACE L. REV. 689, 694 (2003) (suggesting “that a properly qualified special master can provide substantial assistance to the court where electronic data discovery raises difficult questions related to the quantity or format of information, or to the maintenance of ongoing operations of the producing party while discovery is in progress”).

121. *Id.* at 718.

122. *Id.* at 719.

123. *Id.* at 723.

124. FJC Study, *supra* note 3, at 67.

125. *Id.*

access to the courts.¹²⁶ In response to budget cuts, states have temporarily suspended jury trials, closed courtrooms and courthouses, and reduced court hours.¹²⁷ Other states considered taking measures that would require employees to take unpaid days off, reduce judicial education, cut court staff, and curtail court interpretation services.¹²⁸

Comparing fiscal year 2002-03 to 2003-04, states experiencing some of the most significant budget cuts are reacting by cutting court support staff.¹²⁹ In Massachusetts, where the court's budget declined by 25%, courts reduced staffing by more than 1000 employees through layoffs and attrition.¹³⁰ The California judicial budget decreased by 25%, and its Chief Justice outlined a series of action steps for courts to consider in managing reduced budgets.¹³¹ The action steps required a "90-day vacancy period after an employee leaves a position, and a review to see if the position can be eliminated."¹³² In fact, 62% of the nation's state courts have delayed hiring or imposed hiring freezes during the recent slowed economic period.¹³³

126. See ABA State Court Funding Crisis, *ABA Commission on State Court Funding*, at http://www.abanet.org/jd/court/funding/funding_comm.html (last visited Jan. 6, 2005) (stating that the ABA launched the "ABA Commission on State Court Funding, . . . to examine problems arising from chronic underfunding of state judicial systems"); C.J. Ronald M. George, *State of the Judiciary* (Mar. 23, 2004), at <http://www.courtinfo.ca.gov/reference/soj0304.htm>.

127. ABA State Court Funding Crisis, *Summary of Issues and ABA Policies*, at <http://www.abanet.org/jd/court/funding/issues.html> (last visited Jan. 6, 2005) (noting Alabama temporarily suspended jury trials in 2002; Los Angeles County California closed courtrooms and courthouses; and Oregon closed courthouses on Fridays); see also Lisa Stansky, *The Big Squeeze: State Legal Systems are Feeling the Pain of Tight Budgets*, Special to the National Law Journal, at http://jud13.flcourts.org/aweb/news_1.htm (last visited Jan. 6, 2005) (detailing measures taken by state courts across the country in response to budget cuts).

128. Stansky, *supra* note 127.

129. See State Budget Appropriations to the Judicial Branch, at http://www.abanet.org/jd/court/funding/pdf/state_budget_tables.pdf (last visited Jan. 6, 2005) (showing double-digit budget decreases in Alabama, Arizona, California, Colorado, Massachusetts, and South Carolina); David L. Hudson, Jr., *Courts' Cash Crunch*, 2 No. 3 A.B.A.J. E-Report 1 (Jan. 24, 2003) (noting Colorado had a hiring freeze); ABA State Court Funding Crisis, *supra* note 127.

130. State Budget Appropriations to the Judicial Branch, *supra* note 129; ABA State Court Funding Crisis, *supra* note 127.

131. C.J. Ronald M. George, *Remarks on the Budget* (Dec. 13, 2002), at <http://www.courtinfo.ca.gov/reference/budget1202.htm>.

132. *Id.*

133. Kenneth G. Pankey, Jr., *Funding State Courts: Trends in 2002: Budget Woes and Resourceful Thinking*, available at <http://www.ncsconline.org/>

While budget cuts create financial management problems for the courts, the problems become more complicated as court caseloads continue to increase.¹³⁴ Since 1993, state court caseloads have increased at a steady pace.¹³⁵ Over the past ten years, state court civil case filings have increased 12%, criminal case filings 19%, domestic relations case filings 14%, and juvenile case filings 16%.¹³⁶ It is noteworthy that state court caseloads have increased at a rate two to three times higher than the growth in the number of state court judges, which has only averaged about one-half of 1% per year over the last ten years.¹³⁷ As courts react to continued financial constraints combined with increased caseloads, innovative solutions are needed to ensure that individuals have continued access to justice.¹³⁸

Some of the problems in the state court system are magnified when the problems are part of a large court system such as the California court system.¹³⁹ California's state budget problems have drawn national attention.¹⁴⁰ California courts have been forced to take drastic measures to help manage financial constraints and workload problems.¹⁴¹ In California, some of the effects from

WC/Publications/ KIS_FundCt_Trends02_Pub.pdf (last visited Feb. 11, 2005).

134. See Hudson, *supra* note 129 (noting that Oregon planned to close state courts on Fridays and lay off thirty-nine court employees with the result that courts will be unable to hear cases involving shoplifting, prostitution, criminal trespass, and vandalism); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, COURT STATISTICS PROJECT, 10 (2003), available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Overview.pdf (showing state court civil case filings increased 12% from 1993 – 2002, and that 96.2 million new cases were filed in state trial courts in 2002).

135. See NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, *supra* note 134, at 10 (stating combined civil, criminal, domestic relations, and juvenile case filings have increased fifteen percent since 1993).

136. *Id.*

137. *Id.* at 11.

138. See Frances Kahn Zemans, *Court Funding*, ABA Standing Committee on Judicial Independence 1, 11 (Aug. 2003), at <http://www.abanet.org/jd/courtfunding/pdf/courtfunding.pdf> (stating that courts' cost-cutting measures may "affect the quality of justice and its availability to the public").

139. JUDICIAL COUNCIL OF CAL. FACT SHEET 1 (Jan. 2003), at <http://www.courtinfo.ca.gov/reference/documents/cajudsys.pdf> (noting that California's court system is the largest in the nation).

140. See JUDICIAL COUNCIL OF CAL., 2004 ANNUAL REPORT, PRESERVING EQUAL ACCESS TO JUSTICE, PROGRESS AND CHALLENGES OF THE CALIFORNIA JUDICIAL BRANCH, 3 (2004), available at <http://www.courtinfo.ca.gov/reference/documents/ar2004.pdf> (last visited Jan. 3, 2005) (stating that California courts face "catastrophic budget reductions due to an ailing state economy").

141. See *id.* at 2 (stating that some judicial programs have been curtailed, and

reduced budgets and increased workloads have included increases in workers compensation claims by court employees, continued court closures, increased case backlogs and service delays, and elimination of services and programs.¹⁴²

In Minnesota, there is concern that funding levels have not increased proportionately to increases in caseloads.¹⁴³ Of particular concern is funding for the public defender system.¹⁴⁴ In 2004, the Minnesota public defender system faced potential layoffs of up to 40% of its staff.¹⁴⁵ Some predict Minnesota's judicial system could come to a halt.¹⁴⁶

According to the ABA study of judicial branch budgets, Minnesota's judicial budget actually increased from fiscal year 2002-03 to 2003-04.¹⁴⁷ Although the state judicial budget increased, it only increased at an annual rate of 0.07% while the state court caseload grew at an average annual rate of 1.7%.¹⁴⁸ Court workloads are leaving courts in search of creative solutions so that no one is denied justice.¹⁴⁹

Increasingly, courts are making use of court referees to perform duties that are traditionally performed by a judge.¹⁵⁰ One commentator suggests that this is the result of state legislatures

others are in danger of being eliminated); *see also* Blaine Corren, *Hearing Documents High, Costs of Budget Cuts*, CT. NEWS, May – June, 2004, at 1, *available at* <http://www.courtinfo.ca.gov/courtnews/mayjun04.pdf> (stating that some California courts are keeping vacant positions open for years and requiring mandatory furloughs, and others are cutting services).

142. Corren, *supra* note 141, at 1, 6.

143. James L. Baillie, *Our Public Defender System: A Funding Crisis*, 61 BENCH & BAR OF MINN. 5, 5 (2004).

144. *Id.*

145. *KARE 11 News: Crisis in the Courts?* (NBC affiliate television broadcast, July 18, 2004).

146. *See id.* (stating if layoffs become a reality, the state's court system could grind to a halt).

147. *See* State Budget Appropriations to the Judicial Branch, *supra* note 129.

148. *Id.*; *see also* MINN. JUDICIAL BRANCH, 2003 ANNUAL REPORT 5 (2003), *available at* http://www.courts.state.mn.us/documents/CIO/annualreports/2003/mjb_annual_report_2003.pdf (showing that over the past decade, Minnesota's case filings increased eighteen percent, which corresponds to an approximate 1.67% average annual increase).

149. *See* MINN. JUDICIAL BRANCH, *supra* note 148, at 3 (noting that due to continued caseload increases, and revenue decreases "[t]he judicial branch continues to search for alternative solutions to resolve disputes"); Corren, *supra* note 141, at 1 (stating that in California, due to budget cuts and reduced staffing levels, court employees need to become "generalists").

150. *See, e.g.*, Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-five Years of Radical Change*, 26 HAMLINE L. REV. 219, 233 (2003).

failing to fund additional judicial staffing needs.¹⁵¹ In Nebraska, courts utilize referees in child support cases to ensure cases meet case progression standards, and in Minnesota, courts in the second and fourth judicial districts use court referees for landlord/tenant disputes.¹⁵² It is noteworthy that in Minnesota, the fourth judicial district (where referees are utilized), has the highest caseload per judge of any court in the country.¹⁵³ So, as caseloads increase, courts continue to rely on judicial referees.¹⁵⁴

Statistics show that complex litigation matters,¹⁵⁵ and class action claim filings are on the rise.¹⁵⁶ Court dockets continue to increase.¹⁵⁷ One problem that state courts have is lack of legal support staff—federal court judges often employ one or more law clerks, whereas state court judges generally do not employ law

151. *Id.*

152. Nebraska Supreme Court Child Support Goals and Rules at 7.3-7.4, available at <http://court.nol.org/rules/CHSUPPREFS.07.PDF> (last visited Jan. 3, 2005); Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense Is Much More Than "Did You Pay The Rent?"*, 28 WM. MITCHELL L. REV. 65, 68 (2001).

153. Sheran & Amdahl, *supra* note 150, at 240.

154. See Probate Court Functions, at http://www.mahoningcountyprobate.org/a_about_the_probate_court.htm (last visited Jan. 3, 2005) (stating that in Ohio, due to heavy caseloads, probate courts are using referees to handle cases filed with the court).

155. The term "complex litigation" has been defined many ways. Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 71, 74 (1999). One source defines "complex litigation" as including "those cases in which the normal adversary process is impaired, and special rules, tailored to the specific litigation, must be devised if the cases are to be adjudicated and decided efficiently and fairly." Jack Friedenthal, *Tackling Complex Litigation*, 74 NOTRE DAME L. REV. 1301 (1999) (reviewing JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* (1998)).

156. See Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. ST. B.J. 18, 22 (Jan. 2004) (stating that the increased occurrence of complex litigation will likely lead to increased use of special masters); Bedouin L. Joseph, *The Louisiana Special Master Statute*, 51 LA. B.J. 261, 262 (Dec. 2003/Jan. 2004) (noting mass tort and complex litigation cases "continue to inundate [Louisiana] courts"); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (stating that state courts rarely encounter the problems of complex litigation because the cases are in federal court; however state courts do see nationwide class action suits, and such suits have reportedly increased) (citing Commentary, 18 Class Action Rep. 1, 1 (1995)).

157. See Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 570-71 n.23 (2004) (noting federal and state court dockets continue to grow, resulting in delays) (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (1991)).

clerks.¹⁵⁸ Court-appointed referees can help manage particular aspects of complex litigation matters, such as discovery disputes.¹⁵⁹ When complex litigation matters arise in state courts, the cases often need “managerial judging.”¹⁶⁰ In Connecticut, complex litigation matters involving real estate limited partnerships, environmental insurance litigation, and construction litigation have arisen in state courts and are examples of cases requiring managerial judging.¹⁶¹

B. State Courts’ Response—Common Cases

In response to concern about the pace of litigation, Connecticut established a pilot case management program.¹⁶² Connecticut’s pilot program established time standards for the disposition of civil cases.¹⁶³ The program provides “discovery judges” who are assigned to individual cases and then monitor case progress.¹⁶⁴ In addition, the program provides special masters who will primarily hear settlement conferences.¹⁶⁵ Connecticut’s pilot program was scheduled to end in December 2004.¹⁶⁶ Assuming the program succeeds, the judicial branch then wants to use it as a model for further deployment.¹⁶⁷

Concerns regarding timeliness of state court dispositions

158. Lloyd Milliken, Jr., *Fixing the Broken Class Action Lawsuit System*, 47 *RES GESTAE* 19, 21 (2003).

159. Vivien B. Williamson, *ADR: An Overview*, 600 *PRACTICING L. INST. LITIG.* 707, 712 (1999) (noting referees help resolve complicated financial or technical issues, and in California they resolve discovery disputes); Steiner, *supra* note 155, at 80 (noting that courts can appoint a discovery referee before a discovery dispute arises).

160. Barry Schaller, *Managerial Judging: A Principled Approach to Complex Cases in State Court*, 68 *CONN. B.J.* 77, 79 (1994).

161. *Id.* at 79-80.

162. STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2003), at <http://www.jud.state.ct.us/external/super/Standorders/RaiseBar-Feb.pdf>.

163. *Id.*

164. STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2003), at <http://www.jud.state.ct.us/external/super/Standorders/BPP-1P.htm>.

165. STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2003), at <http://www.jud.state.ct.us/external/super/Standorders/RaiseBar-Feb.pdf>.

166. *Id.*

167. *But see* STATE OF CONN. JUD. BRANCH, IN RE: BRIDGEPORT PILOT PROGRAM (BPP) (2005), at <http://www.jud.state.ct.us/external/super/Standorders/BPP.htm#Pilot> (stating that administrative appeals of fifteen and twenty-four month cases in the BPP have been suspended).

persist.¹⁶⁸ The presence of complex cases directly affects a court's average case resolution time.¹⁶⁹ One problem that state courts encounter more frequently than federal courts is the number of criminal cases.¹⁷⁰ When a criminal case involves a constitutional issue or a severe offense with a possible long-term incarceration, the efficiency of the court declines.¹⁷¹ It is noteworthy that the two states with the highest number of death penalty cases also take the most time to resolve their caseloads.¹⁷²

C. *Complex Cases*

Federal statutes help manage caseload problems by defining how courts can aggregate cases that contain a common question of fact. After consolidating the cases, a single judge hears the case.¹⁷³ Multidistrict litigation statute, 28 U.S.C. § 1407, requires that at least two cases be “pending in different districts” and “involv[e] one or more common questions of fact” before the cases may be aggregated or consolidated.¹⁷⁴ A multidistrict litigation (MDL) panel determines whether to allow the consolidation.¹⁷⁵ Mass tort claims are typical claims that are brought to a MDL panel for consolidation.¹⁷⁶ State courts as well as federal courts preside over

168. See Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 642 (2002) (noting that slow disposition of civil cases in state courts may be the result of the high number of criminal cases and criminal case priority, and lack of judges and court personnel); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 U. SEATTLE L. REV. 433, 453 (1996) (noting that state courts' time-to-disposition is usually greater than federal courts' time-to-disposition).

169. See Roger A. Hanson, Brian J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts*, CASELOAD HIGHLIGHTS (Nat'l Center for State Cts., Williamsburg, Va.), Mar. 2002, at 1, 2, available at http://www.ncsconline.org/D_Research/csp/Highlights/COLR_Vol8No1.pdf (noting that in Florida, case resolution times are comparatively longer due to the number of complex cases in the state court system).

170. *Id.*

171. *Id.*

172. *Id.*

173. DAVID F. HERR, MULTIDISTRICT LITIGATION: HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 2 (Little, Brown and Company 1986, Supp. 1996). For a thorough discussion of state-court counterparts to the federal statute, see MARK HERRMANN ET AL., STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS (Thomson West, 2d ed. 2004).

174. 28 U.S.C. § 1407(a) (2004).

175. *Id.*

176. HERRMANN, *supra* note 173, at 1.

mass tort proceedings.¹⁷⁷ In situations where within a single state many claims are pending within various state courts, a statewide process similar to the federal MDL process is needed.¹⁷⁸ Many lawyers are at least aware of the federal MDL process; however, fewer are familiar with similar state court processes.¹⁷⁹

Two examples of where state courts have implemented innovative programs to help manage state court caseloads and case disposition timeliness are programs in Pennsylvania and California. Pennsylvania Rule of Civil Procedure 213 defines the requirements for consolidation of claims in Pennsylvania state courts.¹⁸⁰ In Pennsylvania, claims that are frequently coordinated and consolidated include automobile accident cases (particularly when they involve an insurance coverage dispute) and mass tort cases involving “manufacture and use of bone screws and breast implants.”¹⁸¹

Management of other mass-tort claims often occurs in the Philadelphia Court of Common Pleas, where the “Complex Litigation Center” was established to specifically manage mass tort claims.¹⁸² The court was the first in the nation to establish an exclusive court to manage complex, mass tort claims.¹⁸³ The streamlined procedures of the Complex Litigation Center were designed to encourage communication among the parties and the court, and to eliminate redundant efforts.¹⁸⁴ The program created standardized procedures for managing claims involving asbestos, lead paint, carpal tunnel syndrome, Norplant, latex gloves, diet drugs, and Tylenol.¹⁸⁵

In its effort to streamline mass-tort case management proceedings, the Complex Litigation Center set up standardized pleadings for mass torts.¹⁸⁶ In addition, it centralized motion practice for mass torts.¹⁸⁷ Discovery proceedings are also

177. *Id.*

178. *Id.*

179. *Id.*

180. PA. R. CIV. P. 213.

181. HERMANN, *supra* note 173, at 420.

182. Mary McGovern, *Complex Litigation Center Programs*, Complex Litigation Center, *available at* <http://courts.phila.gov/pdf/civil2001/clc.pdf> (last visited Feb. 11, 2005).

183. *Id.*

184. HERRMANN, *supra* note 173, at 422.

185. *Id.* at 421.

186. *Id.* at 422.

187. *Id.* at 423.

standardized, and a discovery schedule is synchronized with its trial calendar.¹⁸⁸ The Pennsylvania Complex Litigation Center has been viewed as a success, as it “succeeded in dramatically reducing the asbestos docket and quickening the pace of other mass-tort proceedings.”¹⁸⁹

In California, the civil practice code outlines rules for aggregation of multi-county claims.¹⁹⁰ California’s program is one of the most organized programs in the country.¹⁹¹ After receiving a petition for case coordination or consolidation, a judicial council appoints a judge to determine whether to allow claim aggregation.¹⁹² California often permits case consolidation, and when approved for consolidation, the judicial council will then appoint a judge to hear the consolidated case.¹⁹³ California’s coordination program is essentially identical to the federal multidistrict litigation program except that California permits complex case coordination for both pretrial and trial purposes.¹⁹⁴ Other states, including Illinois, New York, and Texas, have also adopted programs that allow for case coordination or consolidation at the state court level.¹⁹⁵

When courts consolidate cases, the result may be a complex case with the possibility of overwhelming the judge and/or jury.¹⁹⁶ In 1997, California set up the Judicial Council on Litigation Task Force “to find ways [for state] trial courts [to] manage complex civil litigation more efficiently and effectively.”¹⁹⁷ The California Task Force noted that complex litigation involves claims requiring exceptional management so the courts are not excessively burdened.¹⁹⁸ The California Judicial Council approved Task Force recommendations, including “[d]istributing the *Deskbook on the*

188. *Id.* at 422-23.

189. *Id.* at 421.

190. CAL. CIV. PROC. CODE § 404 (West 1974); Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 911 (2001).

191. Rheingold, *supra* note 190.

192. *Id.*; HERRMANN, *supra* note 173, at 115.

193. Rheingold, *supra* note 190, at 911-12; HERRMANN, *supra* note 173, at 119.

194. HERRMANN, *supra* note 173, at 109.

195. *Id.* at 247, 379, 493.

196. Hugh H. Bownes, *Should Trial by Jury be Eliminated in Complex Cases?*, 1 RISK: ISSUES IN HEALTH & SAFETY 75, 79-80 (1990).

197. Complex Civil Litigation Task Force, Fact Sheet (Sept. 2004), *available at* <http://www.courtinfo.ca.gov/reference/documents/complit.pdf>.

198. *Id.*

Management of Complex Litigation to all judges.”¹⁹⁹ In addition, six trial courts participated in the “Complex Civil Litigation Pilot Program” with the goal being to give trial court judges tools to manage complex litigation cases more efficiently and effectively.²⁰⁰

The complex litigation programs in Pennsylvania and California are the exceptions rather than the rule. State courts continue to encounter challenges when faced with in-state complex litigation matters and/or class action lawsuits. Some practitioners are calling for a solution to manage class action lawsuits, urging for expansion of federal jurisdiction so that more class action claims can be heard in federal courts.²⁰¹ Another way state courts can manage judicial caseloads is through use of special masters.²⁰²

Special masters bring much-needed expertise and specialization to cases involving highly specialized issues. In addition, by allowing special masters to manage pretrial discovery matters, judges are able to focus on additional pending cases. In essence, by referring case management matters to special masters, in a complex litigation matter or mass-tort case, the judge and special master are able to work on parallel tracks and move a case along more quickly. The net result that courts realize when using special masters is two-fold: improved efficiency in resolving cases, and increased number of cases resolved.

D. State, Federal Coordination

Special masters have potential value in coordinating parallel state and federal proceedings.²⁰³ One instance where a special master was appointed to manage the state-federal coordination was in the silicone gel breast implant litigation.²⁰⁴ Either assigning a

199. *Id.*

200. *Id.*

201. Milliken, *supra* note 158, at 20-21.

202. Thomas Greene & Patricia A. Conners, *State Antitrust Enforcement*, 1427 PRACTICING L. INST. CORP. 809, 836 (May 2004). Under Rule 53 of the Federal Rules of Civil Procedure, a court may appoint a special master to perform duties consented to by the parties, make or recommend findings of fact, and address pretrial and post-trial matters that the judiciary cannot resolve efficiently. FED. R. CIV. P. 53.

203. See MANUAL, *supra* note 10, § 20.31 (noting that complex litigation often involves cases brought in both federal and state court). See generally William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992) (discussing approaches to complex case coordination among state and federal courts).

204. See MANUAL, *supra* note 10, § 20.311 (citing Francis E. McGovern,

special master in state court proceedings to coordinate with federal court proceedings, or cross-appointing a special master (appointing as a state court master the same individual assigned in federal court) may offer tremendous rewards in overall case management.

V. THE FUTURE

Special masters provide benefits to courts, whether federal or state, in terms of the specialized expertise they offer, and the ability to ease burdens on the judiciary from extensive discovery processes and case management tasks. State court rules permit the use of special masters. In turn, state courts should take advantage of the discretion inherent in the rules to appoint a special master to manage or oversee difficult and complex matters.

In appointing a special master, the state court, following the practice of federal courts, should provide a written order of reference. The written order of reference should detail the circumstances justifying the appointment of the special master.²⁰⁵ In addition, the reference to the special master should outline the procedures for the special master to follow, and identify reporting requirements for the special master, while also providing a provision regarding the special master's fees.²⁰⁶

State courts have an opportunity to streamline case management and resolve cases more quickly by utilizing special masters. In addition, in the interest of justice, special masters offer much-needed expertise in the areas of accounting, finance, science, and technology, which in certain cases, can help ensure a fair result. Increased use of special masters by state courts will benefit all involved with litigation—the parties, the attorneys, and the courts.

Rethinking Cooperation Among Judges in Mass Tort Litigation, 44 UCLA L. REV. 1851, 1870 (1997)).

205. See MANUAL, *supra* note 10, § 40.28 (providing a sample order for referral of privilege claims to a special master).

206. *Id.*

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SPECIAL MASTER AUTHORITIES APPENDIX

**State Court Authorities Governing Special Masters, Referees,
Commissioners, and Similar Judicial Adjuncts
And
Comparison State Rules to Federal Rule of Civil Procedure
Rule 53**

| State | Authorities and Comparison to FED. R. CIV. P. Rule 53 |
|--------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Alabama | ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53 Adopts pre-2003 amended version of the federal rule but state rule does not apply to state district courts. |
| Alaska | ALASKA R. CIV. P. 53 ALASKA CT. R., CHILD IN NEED OF AID 4 ALASKA CT. R., DELINQUENCY 4 |
| Arizona | 16 PART I, A.R.S. RULES OF CIV. PROC., RULE 53 ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party) Adopts pre-2003 amended version of the federal rule. |
| Arkansas | ARK. R. CIV. P. 53 Modeled after pre-2003 amended version of the federal rule but limited to non-jury actions. |
| California | CAL. CIV. PROC. CODE §§ 638 - 639 (West 2004) Requires agreement of the parties. |
| Colorado | COLO. CT. C.P.R. 53 Adopts pre-2003 amended version of federal rule. |
| Connecticut | CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53 Limited scope – only applies to family |

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| | law matters. Pilot program established for civil/family discovery masters and civil matter settlement conferences scheduled to end 12/31/2004. |
| Delaware | DEL. S. CT. R. 43(b)(v) DEL. CT. CH. R. 135 – 47 DEL. FAM. CT. C.P.R. 53 DEL. SUPER. CT. CRIM. R. 5 Limited to hearing issues of fact. |
| District of Columbia | D.C. SUPER. CT. R. CIV. P. 53 D.C. SUPER. CT. R. DOM. REL. 53 D.C. SUPER. CT. R. CRIM. P. 117 Adopts pre-2003 amended version of the federal rule. |
| Florida | FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005) Requires parties' consent. |
| Georgia | GA. CODE ANN. §§ 9-7-1 to -6 (1982 & Supp. 2004) |
| Hawaii | HAW. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |
| Idaho | IDAHO R. CIV. P. 53 IDAHO CRIM. R. 2.2 Adopts pre-2003 amended version of federal rule. |
| Illinois | Illinois does not use fee officials. ²⁰⁷ |
| Indiana | IND. R. TRIAL P. 53 Adopts pre-2003 amended version of federal rule. |
| Iowa | IOWA R. CIV. P. 1.935 Adopts pre-2003 amended version of federal rule. |
| Kansas | KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002) When parties consent, any issue can be referred to a special master. Contains language where without the parties |

207. Mullaney, Wells & Co. v. Savage, 282 N.E.2d 536, 538 (Ill. App. Ct. 1972).

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| | consent, the court can only refer a case to a master when justice will be measurably advanced, or to cases that will be tried to a jury when they involve examination of complex or voluminous accounts. |
| Kentucky | KY. R. CIV. P. 53.01 When appointed to matters other than judicial sales, settlement, receivership, and bills of discovery assets of judgment debtors, appointment requires that the matter involve complex calculations, multiplicity of claims, or other exceptional circumstances. |
| Louisiana | LA. REV. STAT. ANN. § 13:4165 (West Supp. 2004) Court can appoint in any civil action with parties consent if there is a complicated issue or when exceptional circumstances exist. |
| Maine | ME. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |
| Maryland | MD. CIR. CT. R. CIV. P. 2-541 Limited to non-jury matters. |
| Massachusetts | MASS. R. CIV. P. 53 MASS. R. CRIM. P. 47 Adopts pre-2003 amended version of federal rule but also requires assent of all parties prior to special master appointment. |
| Michigan | MICH. CT. RULES PRAC. R. 3.913 Applies to probate and juvenile court. Can conduct preliminary inquiries and can preside at hearings other than a jury trial or preliminary examination. |
| Minnesota | MINN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |
| Mississippi | MISS. R. CIV. P. 53 |

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| | Can refer any issue to a special master with the written consent of the parties, otherwise appointment requires an exceptional condition. |
| Missouri | MO. R. CIV. P. 68.01 Adopts pre-2003 amended version of federal rule. |
| Montana | MONT. CODE ANN. § 25-20-R. 53 (2003) Adopts pre-2003 amended version of federal rule. |
| Nebraska | NEB. REV. STAT. §§ 25-1129 to -1137 (2004) Appointment requires written consent of the parties. |
| Nevada | NEV. R. CIV. P. 53 NEV. 1ST JUD. DIST. CT. R. 5 Adopts pre-2003 amended version of federal rule. |
| New Hampshire | N.H. R. SUPER. CT. 85-A Appointment requires written consent of the parties. |
| New Jersey | N.J. CONST. art. 11, § 4, ¶ 7 N.J. R. CIV. PRAC. 4:41 Appointment requires parties' consent. |
| New Mexico | N.M. R. CIV. P. 1-053 Adopts pre-2003 amended version of federal rule. |
| New York | N.Y. UNIF. TRIAL CT. R. § 202.14 Chief Administrator of courts has power of appointment. |
| North Carolina | N.C. GEN. STAT. § 1A-1, R. 53 (2003) Modeled after pre-2003 amended version of federal rule. Certain actions require parties' consent prior to appointment. |
| North Dakota | N.D. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |
| Ohio | OHIO REV. CODE ANN. CIV. R. 53 OHIO REV. CODE ANN. CRIM. R. 19 |

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| | OHIO REV. CODE ANN. JUV. R. 40 Modeled after pre-2003 amended version of federal rule. Does include pre-trial and post-trial matters, or matters where the parties consent. |
| Oklahoma | OKLA. STAT. ANN. tit. 12, §§ 612-619 (West 2000) Can appoint to any civil action with the parties' written consent. |
| Oregon | OR. R. CIV. P. 65 Appointment requires written consent of the parties; without consent of the parties, appointment requires an exceptional condition. |
| Pennsylvania | 42 PA. CONS. STAT. ANN. §§ 1558, 1920.51 (West 2002) Court can appoint at any time after the preliminary conference and master can hear any issue or the entire matter. |
| Rhode Island | R.I. R. CIV. P. 53 R.I. R. PROC. DOM. REL. 53 Adopts pre-2003 amended version of federal rule but also provides greater latitude in appointing a special master; special master may be appointed to any issue where the parties agree. |
| South Carolina | S.C. R. CIV. P. 53 Allows appointment when the parties consent. |
| South Dakota | S.D. CODIFIED LAWS § 15-6-53 (West 2004) Adopts pre-2003 amended version of federal rule. |
| Tennessee | TENN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |
| Texas | TEX. R. CIV. P. 171 Adopts pre-2003 amended version of federal rule but requires parties' consent to appointment of a master. Other modifications include that the |

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| | case must be an “exceptional one” and there must be “good cause” for appointment of a master. |
| Utah | UTAH R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |
| Vermont | VT. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule with minor modifications. State rule is narrower because for actions to be tried by a jury, appointment is only made when the action requires investigation of accounts or examination of vouchers. |
| Virginia | VA. S. CT. R. 2:18, 3A:1 A court decree refers a matter to a “commissioner in chancery.” |
| Washington | WASH. SUPER. CT. CIV. R. 53.3 Adopts rule that is broader than the pre-2003 amended version of federal rule. State rule allows appointment for “good cause” and allows appointment of special master to discovery matters. |
| West Virginia | W. VA. R. CIV. P. 53 |
| Wisconsin | WIS. STAT. § 805.06 (1994) Adopts pre-2003 amended version of federal rule with minor modifications, i.e. “referee” used in place of “special master.” |
| Wyoming | WYO. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule. |