

THE USE OF SPECIAL MASTERS, COURT APPOINTED EXPERTS AND TECHNICAL ADVISORS IN FEDERAL COURT

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The use of special masters, court appointed experts, and technical advisors is not unique to any specialty area of litigation. In fact, this discussion has general application to all types of litigation and is intended to provide practical insights to the applicable provisions in the federal rules and case law. This article focuses on only the federal rules and related case law. It does not address the same issues in state court practice. The applicable rules and case law may be different in state court.

There are circumstances in litigation which cry out for the use of such “judicial” surrogates, such as multi-party litigation, complex technical subjects which may be beyond the common experience of the court and counsel, and the court’s desire to have neutral insight into issues which must be the subject of findings of fact and conclusions of law. Knowing the differences between such surrogates and how they may be used under the rules and case law will probably allow a practitioner to better protect client interests.

I. SPECIAL MASTERS

One perceived benefit of seeking or, agreeing to, the appointment of a special master is the belief that a special master can deal more quickly with the issues in question than they can be dealt with by the district court. Another perceived benefit lies in the belief that, where the issues in question are of a highly technical nature, a master may be chosen who has considerably more technical experience than the judge to whom the case was randomly assigned.

In combination, these perceived benefits are often quite appealing. However, the reality of finding an individual who is both well versed in conducting a legal proceeding and also competent in a highly technical field may be difficult. If someone fitting those qualifications can be found, they may not be able to dedicate the substantial time needed to deal quickly with a complex technical matter without commanding a substantial premium for their services, which will be borne by the parties. In addition, they may not have the experience or skill of a federal

judge to make decisions or do tasks of a judicial nature.

The use of special masters is controlled by Federal Rule of Civil Procedure 53 and the case law interpreting that rule. This section discusses certain features of the rule.

A. FRCP 53(a) – Appointment of a Special Master

(a) Appointment.

(1) Scope. *Unless a statute provides otherwise, a court may appoint a master only to:*

(A) *perform duties consented to by the parties;*

(B) *hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by*

(i) *some exceptional condition,*
or

(ii) *the need to perform an accounting or resolve a difficult computation of damages; or*

(C) *address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.*

(2) Disqualification. *A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under [28 U.S.C. § 455](#) unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.*

(3) Possible Expense or Delay. *In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.*

A special master may be appointed to “perform duties consented to by the parties.” Therefore, parties may object to a special master if such an appointment is not wanted, would cost too much, or is not deemed appropriate for the case.

A party wishing to object to the appointment of a special master must do so in a timely manner. If a party fails to timely object to the appointment of a special master it may be deemed to have consented to the appointment.¹

“A party who desires to contest the propriety of a reference to a master under Rule 53 should move the trial court for revocation of the reference. Inaction in this regard is tantamount to acquiescence and the reference cannot be challenged later on appeal.”²

Where the consent of the parties is obtained, the special master may readily be used for a wide range of functions, as set forth in more detail in subsection C.³ Without the parties’ consent, the special master may only be used for limited purposes or where some “exceptional condition” exists.⁴

B. FRCP 53(b) – Order Appointing Master

(b) Order Appointing Master.

(1) Notice. *The court must give the parties notice and an opportunity to be heard before appointing a master. A party 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:*

(A) *the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);*

(B) *the circumstances--if any--in which the master may communicate ex parte with the court or a party;*

(C) *the nature of the materials to be preserved and filed as the record of the master's activities;*

(D) *the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and*

(E) *the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).*

(3) Entry of Order. *The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under [28 U.S.C. § 455](#) and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.*

(4) Amendment. *The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.*

As the language of the above Rule suggests, the details of the order appointing a master are crucial. There should be a clear and complete description of the duties of the master, including any limitations on those duties.

The order appointing a special master may be as general as granting the special master “all the rights, powers, and duties as provided for a master under Rule 53 of the Federal Rules of Civil Procedure.”⁵ On the other hand, the order may be more specific.⁶

The order should also define the communication allowed between the master and/or the court and parties.⁷

¹ *Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 5-6 (1st Cir. 1999).

² *Id.* at 6.

³ *Mobil Oil Corp. v. Altech Industries, Inc.*, 117 F.R.D. 650 (C.D. Cal. 1987) (Jury trial could properly be presided over by a special master pursuant to stipulation of the parties.); *Iten Leasing Co. v. Burroughs Corp.*, 684 F.2d 573, 574 (8th Cir. 1982); *Duryea v. Third Northwestern National Bank*, 602 F.2d 809 (8th Cir. 1979) (Parties may, by agreement waive certain rights to appeal from a special master’s opinion.).

⁴ *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

⁵ *Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 5 (1st Cir. 1999).

⁶ See *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1518 -1519 (S.D. Fla. 1994) (The Court referred the matter to the Special Master to hold an evidentiary hearing specifically on whether pleadings should be stricken and/or other sanctions imposed on Lloyds).

⁷ *Satyam Computer Services, Ltd. v. Venture Global Engineering, LLC*, 2007 WL 1806198, 6 (E.D. Mich. 2007) (Finding that the

The order should also detail what materials will be preserved by the master and/or filed with the Court. After all, any recommendation and/or decision by the master is reviewable by the District Court.⁸

Assuming the parties have agreed to the appointment and the duties to be performed, the nature of those duties is described throughout Rule 53. However, there are occasions when a master may be used without agreement of the parties.

1. FRCP 53(a)(1)(b) – No Agreement of the Parties – Exceptional Conditions

When the parties do not agree, the question becomes are there “exceptional conditions” which warrant use of a special master?

Lead Case: In *La Buy v. Howes Leather Co.*, the Supreme Court made it clear that the “exceptional conditions” test is not easily met.⁹

The Supreme Court cautioned that a special master was not to displace the Trial Court and noted that complexity of issues of law and fact and congestion were not circumstances that warranted a reference to a special master. “On the contrary, we believe that this is a compelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work.”¹⁰

special master could communicate *ex parte* with the court regarding substantive issues only with the parties' consent, but allowing the special master to communicate *ex parte* with the court, without providing notice to the parties, regarding logistics, the nature of his activities and other appropriate procedural matters. Similarly, it ruled that the special master could communicate *ex parte* with any party or attorney regarding purely procedural issues such as logistics, as the special master deems appropriate but such *ex parte* communications should not address the merits of any substantive issue.)

⁸ See *Henry A. Knott Co., Div. of Knott Industries, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, 772 F.2d 78, 80 (4th Cir. 1985) (“The order of reference to a master may ... require the master to report upon particular issues.”).

⁹ *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

¹⁰ *Id.* at 259.

The Advisory Committee notes and case law supports a limited use of special masters without consent. “District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances.”¹¹

Case law supports limited use:

(a) Masters may “aid judges in the performance of specific duties, [but] they could not be permitted to displace the Court.”¹²

(b) Rule 53 allows for “the appointment of special masters to assist, not to replace, the adjudicator, whether judge or jury, constitutionally indicated for federal court litigation.”¹³

(c) Parties who object to the use of a special master may not be forced to have the fundamental issues of their disagreement, which would otherwise come within the jurisdiction of an Article III Court, decided by non-Article III surrogates.¹⁴

Exceptional conditions do not include congestion of a court’s docket, complexity of the issues, or an anticipated lengthy trial. In explaining that it is difficult to meet the “exceptional conditions” requirement, the Eighth Circuit stated, “[b]eyond matters of account, difficult computation of damages, and unusual discovery, it is difficult to conceive of a nonjury case that will meet [the] rigid standards of the *La Buy* decision....”¹⁵

In context of a CERCLA allocation case, a special master is not appropriate to conduct the allocation. “Accountings and other damages computations may be referred without the parties’

¹¹ Fed. R. Civ. P. 53 Advisory Committee’s notes (2003 Amendments Subdivision (a) (1)).

¹² *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 441 (3rd Cir. 2005).

¹³ *In re Bituminous Coal Operators’ Ass’n., Inc.*, 949 F.2d 1165, 1168 (D.C. Cir. 1991).

¹⁴ See *Stauble v. Warrob, Inc.*, 977 F.2d 690, 691 (1st Cir. 1992); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987).

¹⁵ *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985).

consent because they do not generally call for any peculiar judicial talent or insight. Equitable apportionment, on the other hand, is a quintessentially judicial endeavor.”¹⁶ The Third Circuit’s reasoning in *Beazer East* would be applicable in other cases which the Court is called upon to formulate an equitable remedy.

The Third Circuit Court of Appeals found determinations regarding the allocation of costs among liable parties involved “discretion, judgment, and legal reasoning that simply is not connoted by the phrase ‘difficult computation of damages.’”¹⁷

Examples of what has been found not to constitute “exceptional conditions” are demonstrated in a series of environmental cases:

(1) Action under CERCLA did not constitute exceptional conditions justifying reference of dispositive motions to special master.¹⁸

(a) The District Court listed 5 reasons for referral: (1) calendar congestion; (2) complexity of the issues; (3) possibility of a lengthy trial; (4) the extraordinary pretrial management required in a case with more than 250 parties; and, (5) the public interest in the quickest feasible resolution of Superfund cases.

(b) The Sixth Circuit rejected the reasoning of the District Court based on the Supreme Court’s reasoning in *La Buy* and noting that referral was likely to increase not decrease the time needed for resolution of the matter.

(2) In *Browner*, the district court referred motions for summary judgment and other liability and remedy issues under Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), to a special master.¹⁹

¹⁶ See *Beazer East, Inc.*, 412 F.3d at 441.

¹⁷ *Id.* at 441 (internal citations omitted).

¹⁸ *In re United States*, 816 F.2d 1083, 1088 (6th Cir. 1987).

¹⁹ *Sierra Club v. Browner*, 257 F.3d 444, 447 (5th Cir. 2001).

(a) The reasons given for the district court’s referral were that the filings were voluminous and contained highly technical documents and declarations, the issues concerned compliance with state and federal regulations, and that the Court’s congested docket and the inexperience with the subject matter of the action required referring the motions to a special master.

(b) The Fifth Circuit rejected these reasons and added that “the court’s unfamiliarity with the subject matter can hardly excuse the Court’s obligation to carry out its judicial function.”²⁰

(c) “The judge is obligated, whenever faced with unfamiliar factual or legal issues ... to educate himself in those fields with the aid of counsel, colleagues on the bench, law clerk, and published texts and decisions.”²¹

2. Approved Roles for Masters

Special masters have been accepted for certain functions in environmental cases.

(1) In *Interfaith Community Org.*, the special master was appointed to actually oversee the implementation of the remedy at the site.²²

(2) *Cronin* was a Clean Water Act action where the court noted that *if* a special master was appointed, it would be for enforcement of the consent decree already entered by the court.²³

²⁰ *Id.* at 445.

²¹ *Id.*, quoting *Madrigal v. Cello*, 779 F.2d 814, 818 n. (2d Cir. 1986).

²² *Interfaith Community Org. v. Honeywell International, Inc.*, 263 F. Supp. 2d 796, 834 (D.N.J. 2003)

²³ *Cronin v. Browner*, 90 F. Supp. 2d 364 (S.D.N.Y. 2000)

(3) In *Active Products Corporation*, the court appointed a group of special masters for settlement and fact-finding purposes early in the litigation.²⁴

- (a) The extraordinary size of the case, even by CERCLA standards, was cited as one reason.²⁵
- (b) The Court in the *Active Products* case discusses use of a master for a broad range of matters:

"In many circuits, reference to masters is becoming more frequent as courts are confronted with huge environmental law and mass tort litigation. For example, in *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985), a CERCLA case, the Eighth Circuit held that the district court acted properly in granting to a master broad authority to supervise and conduct pretrial matters, including discovery activities, the production and arrangement of exhibits and stipulations of fact, the power to hear motions for summary judgment or dismissal and to make recommendations with respect thereto. *Id.* at 105."²⁶

(4) In *In re Armco, Inc.*, the Eighth Circuit found that the district court erred in granting the master authority to preside at trial on the merits of this case, but upheld the district court's granting of broad authority to supervise and conduct pretrial matters, including discovery activity and the power to hear motions for summary judgment or dismissal and to make recommendations.²⁷

²⁴ *Active Products Corporation v. A.H. Choitz & Co.*, 163 F.R.D. 274 (N.D. Ind. 1995)

²⁵ *Id.* at 277. (case filed by twenty-three (23) named plaintiffs on behalf of themselves and some sixty-six (66) other parties who had assigned their rights to the named plaintiffs and which named as defendants 1,181 individual corporate entities).

²⁶ *Id.* at 283.

²⁷ *In re Armco, Inc.*, 770 F.2d 103, (8th Cir. 1985),

(a) The *Armco* decision in which the Eighth Circuit allowed the special master's relatively broad appointment, without a finding of extraordinary conditions has been questioned.

(b) In *Staubel v. Warrob*, the court notes that it was "baffled" by the *Armco* court's decision to authorize reference to dispositive matters to a special master.²⁸

(c) In *In re United States*, the court noted its inability to follow the *Armco* court's reasoning on the subject.²⁹

(d) Finally, the Third Circuit in *Beazer East v. Mead*, held that it did not "consider *Armco* to be persuasive authority."³⁰

(5) In *United States v. Hardage*, the district court allowed the master even broader powers than in *Armco*.³¹ The master was charged with reviewing dispositive pretrial motions, holding trial, and recommending findings of fact and conclusions of law on the proposed injunctive relief for the cleanup that was sought. In *Hardage*, the United States filed a petition for mandamus in the Tenth Circuit Court of Appeals, seeking a ruling that the court had abused its discretion and abdicated its judicial functions by appointing a special master to oversee these dispositive aspects of the case. The Tenth Circuit dismissed the petition without comment.³²

Furthermore, the master is not bound by rules of evidence unless the order appointing the master specifies as such.³³ This discretion includes determining the kind of evidence the parties must

²⁸ *Staubel v. Warrob, Inc.*, 977 F.2d 690, 696 (1st Cir. 1992).

²⁹ *In re United States*, 816 F.2d 1083, 1091 (6th Cir. 1987)

³⁰ *Beazer East v. Mead*, 412 F.3d at 443.

³¹ *United States v. Hardage*, 26 Env't Rep. Cas. (BNA) 1042, 1045-47 (W.D. Okla. 1987)

³² *In re United States*, 1987 HWLR 11,487 (10th Cir. Aug. 19, 1987); 163 F.R.D. at 283.

³³ *United States v. Visa USA, Inc.*, 2007 WL 1741185 (S.D. N.Y. 2007); *United States v. Clifford Monthly Family Trust*, 354 F.3d 1154, 1161 (9th Cir. 2004).

submit and the manner in which it must be submitted.³⁴

Although cases such as *Hardage* stretched the power of the special master beyond those generally recognized, the courts of appeal generally draw the line at allowing dispositive issues such as liability to be referred to a special master.³⁵ *In re United States*, the Sixth Circuit noted that the *Armco* decision was not persuasive and held that the master could not hear dispositive motions over the objection of one of the litigants.³⁶

In summary, where a party does not want a special master, a timely objection may require the court to focus on whether there are “exceptional conditions” which justify that appointment. If those “exceptional conditions” are not found, then a master may not be authorized. However, that will not prevent the court or parties from considering the other forms of “judicial” surrogates discussed in this article.

C. FRCP 53(c) – Master’s Authority

(c) Master's Authority.

(1) In General. Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

Unless the appointing order expressly directs otherwise, a master may conduct an evidentiary

³⁴ *U.S. v. Clifford Monthly Family Trust*, 354 F.3d at 1159.

³⁵ See *Stauble v. Warrob, Inc.*, 977 F.2d 690, 691 (1st Cir. 1992) (Court of Appeals held that the district court’s referral of liability issues to a special master was prohibited by Article III of the United States Constitution.); *U.S. v. Microsoft Corp.*, 147 F.3d 935, 954-56 (D.C. Cir. 1998) (Court of Appeals granted mandamus and overturned the district court’s referral of dispositive issues.)

³⁶ 816 F.2d at 1091.

hearing and may exercise the power of the appointing court to compel, take, and record evidence. The rule does not, however, require the master to hold evidentiary hearings or permit discovery, but gives the master discretion as to how to complete his duties.

(2) Sanctions. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.³⁷

D. FRCP 53(d) – Master’s Orders

(d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket. This subsection was added in the 2003 Amendments, but there is no case law dealing with this issue.

E. FRCP 53(e) – Master’s Reports

e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

It should be noted that current rule 53(e) no longer includes some of the previous requirements detailing which materials must be provided to support the master’s report.³⁸

F. FRCP 53(f) – Action on Master’s Order, Report, or Recommendations.³⁹

³⁷ See *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1518-1519 (S.D. Fla. 1994) (Court referred the matter to the special master, Henry Latimer, Esquire, to hold an evidentiary hearing on whether Lloyds’ pleadings should be stricken and/or other sanctions imposed); See also, *Satyam Computer Services, Ltd. v. Venture Global Engineering, LLC*, 2007 WL 1806198, 8 (E.D. Mich. 2007).

³⁸ *Cobell v. Norton*, 237 F. Supp. 71, 84 fn.14 (Dec. 2003) (Applying former Rule 53(e)(1), now Rule 53(e).)

³⁹ The Federal Rules of Civil Procedure were amended effective December 1, 2007. The applicable rule for objections is now

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

(1) Opportunity for a Hearing; Action in General. *In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.*

(2) Time to Object or Move to Adopt or Modify. *A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time.*

(3) Reviewing Factual Findings. *The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:*

(A) *the findings will be reviewed for clear error; or*

(B) *the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.*

(4) Reviewing Legal Conclusions. *The court must decide de novo all objections to conclusions of law made or recommended by a master.*

(5) Reviewing Procedural Matters. *Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.*

FRCP 53(f) sets the guidelines for actions by the court and the parties to the master's orders, findings or reports.

(1) **Timing** Parties have 20 days from date of service to file objections to or move to adopt or modify master's report or recommendation. [53(f)(2)].

(2) **Standard of Review**

Fed.R.Civ.P. 53(f) instead of Fed.R.Civ.P. 53(g). However, these changes to the Rule are mostly stylistic and do not affect the overall substance of the Rule. *In re Intel Corp. Microprocessor Antitrust Litigation*, 526 F. Supp. 2d 461, 462 (D.Del. 2007). The text of former Rule 53(d) is now contained in Rule 53(c)(1)(c). The text of former rules 53(g)-(i) are now 53 (f)-(h), respectively.

(a) **Findings of Fact** – Objections are reviewed *de novo* by district court unless stipulation by parties to have standard of review by clear error. Parties may also agree that special master's findings are final in some cases [53(f)(3)].⁴⁰ Prior to extensive changes to Rule 53 in 2003 the court was required to accept the master's findings of fact in non-jury matters unless they were clearly erroneous.⁴¹

(b) **Conclusions of Law** – Objections are reviewed *de novo* [53(f)(4)].⁴²

While the court's review of conclusions of law or findings of fact are to be conducted *de novo*, Rule 53 does not mandate that a *de novo* review be conducted in the exact same manner as the special master conducted the factual investigation.⁴³

(c) **Procedural Matters** – Objections reviewed for abuse of discretion unless appointment states differently. [53(f)(5)].⁴⁴

G. FRCP 53(g) – Compensation

(g) Compensation.

(1) Fixing Compensation. *Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.*

⁴⁰ *Sukumar v. Direct Focus, Inc.*, 2008 WL 1860677, 2 (S.D. Cal. 2008) (Rule 53 imposes on the District Court the obligation to decide *de novo* all objections to findings of fact made or recommended by a master.).

⁴¹ *See Label v. Norton*, 237 F. Supp. 2d 71, 84 fn. 14 (D.C.C. 2003); *Wooldridge v. Marlene Industries Corp.*, 875 F.2d 540, 544 (6th Cir. 1989) (applying prior rule 53(e)(2)).

⁴² *Evolution, Inc. v. Suntrust Bank*, 2004 WL 2278559, 4 (D. Kan. 2004); *Sukumar v. Direct Focus, Inc.*, 2008 WL 1860677, 2 (S.D. Cal. 2008).

⁴³ *Sukumar v. Direct Focus, Inc.*, 2008 WL 1860677, 2 (S.D. Cal. 2008).

⁴⁴ *Evolution, Inc. v. Suntrust Bank*, 2004 WL 2278559, 4 (D. Kan. 2004); *Sukumar v. Direct Focus, Inc.*, 2008 WL 1860677, 2 (S.D. Cal. 2008).

(2) Payment. *The compensation 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.

(3) Allocating Payment. *The court must allocate payment among the parties after 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. An interim allocation may be amended to reflect a decision on the merits.*

The court will set the compensation of the special master and allocate payment based upon several factors. The district court enjoys broad discretion to allocate the master's fees as it thinks best.⁴⁵

The amount in controversy and the means of the parties can be considered by the court in making the decision on allocation of fees.⁴⁶

If the unreasonable actions of one party are more responsible for the need for a master, that party may properly be charged all or a majority of the master's fees.⁴⁷

The decision on merits can be used to revise initial allocation of costs. "While in some cases the costs

⁴⁵ *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1220 (6th Cir. 1987), cert. denied, 484 U.S. 820, 108 S.Ct. 77, 98 L.Ed.2d 40 (1987); *Morgan v. Kerrigan*, 530 F.2d 401, 427 (1st Cir.), cert. denied, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976); see also *Dyker Bldg. Co.*, 182 F.2d at 89.

⁴⁶ See *Latin American Music Co. v. The Archdiocese Of San Juan Of The Roman Catholic & Apostolic Church*, 499 F.3d 32, 44 (1st Cir. 2007) (The Court notes that the consideration of disproportionate wealth is an appropriate factor for consideration in allocating compensation for the master, but the plaintiff failed to prove that there was a disparity in ability to pay the master.).

⁴⁷ *Sukumar v. Direct Focus, Inc.*, 2008 WL 1860677, 11 (S.D. Cal. 2008) (Court reallocated special master costs on final allocation after court found that plaintiff continued to unreasonably and unjustifiably obstruct the final resolution of the matter); *Satyam Computer Services, Ltd. v. Venture Global Engineering, LLC*, 2007 WL 1806198, p.4 (E.D. Mich. 2007)(The court required one party to pay the 75% of the cost of the special master because the court found it bore the bulk of the responsibility for the voluminous and lengthy process that has led to this reference, despite both parties having the means to pay.)

might best be divided among the parties, or charged at least to some extent against the party that created the need for reference to the master, the district court has the authority in appropriate cases to tax the master's fees as costs against the losing party."⁴⁸

H. FRCP 53(h) – Appointment of Magistrate

(h) Appointing a Magistrate Judge. *A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.*⁴⁹

I. FRCP 53 and the Right to Jury Trial Under Rule 39

The right of a party to trial by jury when timely requested under Rule 38 of the Federal Rules of Civil Procedure may also play a part in the assignment of a case to a special master. It has been found to be error to appoint a special master and adopt the recommendation and report of the master if a party has timely requested a jury trial.⁵⁰ In *Evans*, the Plaintiff made a timely demand for a jury trial on her Title VII employment discrimination case.

The district court appointed a special master pursuant to 42 U.S.C. § 2000e-5(f)(5) which states that, "[i]f such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure."⁵¹

⁴⁸ *Aird v. Ford Motor Co.*, 86 F.3d 216, 221, 318 U.S. App. D.C. 142, 147 (D.C. Cir. 1996).

⁴⁹ *Henry A. Knott Co., Div. of Knott Industries, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, 772 F.2d 78, 80 (4th Cir. 1985) (Because the order specifically provided that the reference to the magistrate was made under Rule 53, the magistrate is subject to the same Rule 53 requirements as any other special master.).

⁵⁰ *Evans v. Boyd Restaurant Group, LLC*, 240 Fed Appx 393 (11th Cir. 2007) (This case was not selected for publication in the Federal Reporter.)

⁵¹ 42 U.S.C.A. § 2000e-5

On appeal, the Eleventh Circuit held that while the district court can appoint a special master in Title VII cases, the reference to the special master is subject to the party's right for a jury trial.⁵²

The court of appeals went on to note that Plaintiff did not file a written consent to a bench trial, nor did the Plaintiff's participation in the special master proceeding imply consent.⁵³

However, in most cases, it has been found to be a waiver of the right to trial by jury where a party who makes a timely demand for a jury trial under Rule 38 and fails to object to an order for a bench trial, whether before the court, or before a magistrate.⁵⁴ Under the same logic, the failure to object to an appointment to a special master, where it is clear there is an intent to make findings of fact, will probably result in a waiver of the right to a jury trial.

J. Appellate Remedy for Order Concerning Appointment and/or Powers of a Special Master

Generally, the Court is given discretion in making the decision to refer a matter to a special master, and the ruling is reviewed based on an abuse of discretion standard⁵⁵. A party who objects to the appointment of a special master may not take an interlocutory appeal from orders concerning appointment and/or powers of a special master as a matter of right, but may ask the district court to

certify the matter for interlocutory appeal under 28 U.S.C. § 1292(b).⁵⁶

Although a request to certify the issue under 28 U.S.C. § 1292(b) is preferred, in some cases mandamus may be appropriate. *Id.* In *In re Bituminous Coal*, the DC Circuit Court of Appeals granted the petition for mandamus and found that mandamus was appropriate where the district court's order referred the trial of the case to a special master over objection because the order exceeded "the limits of the district court's reference authority limits implied by the character of federal courts functioning under Article III of the Constitution..."⁵⁷

II. COURT APPOINTED EXPERTS

A. Under what circumstances should the court appoint an expert?

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, noted that the district court should be mindful of its ability under Rule 706 to appoint experts of its own to assist with the evaluation of technical information.⁵⁸

Some case law supports the argument that appointment of experts by the court should be reserved for exceptional cases in which the ordinary adversary process does not suffice, such as complex mass tort problems.⁵⁹

Ultimately, the power to appoint an expert is within the discretion of the district court.⁶⁰

While it may be appropriate for the court to appoint an expert where the parties' experts have divergent views, it is generally not required for the

⁵² *Exans v. Boyd*, 240 Fed Appx. at 397.

⁵³ *Id.* at 398. The court noted in making this ruling that the special master instructed the parties prior to the proceeding that "a trial will result regardless" and "there's really not .. an ultimate resolution of the case."

⁵⁴ *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461 (6th Cir.1988), cert. denied, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989); *Lovelace v. Dall*, 820 F.2d 223,227 (7th Cir. 1987)(see also cases cited therein.); *Hayes, v. W.C. Caye & Co.*, 52 F.3d 928 (11th Cir. 1995).

⁵⁵ *Gary W. v. State of Louisiana*, 601 F.2d 240 (5th Cir. 1979).

⁵⁶ *BjIn re Bituminous Coal Operator's Ass'n., Inc.*, 949 F.2d 1165, 1168, fn.4 (D.C. Cir. 1991)

⁵⁷ *Id.*, 949 F.2d at 1168.

⁵⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593, 113 S.Ct. 2786 (1993).

⁵⁹ *In re Joint Eastern and Southern Districts Asbestos Litigation*, 830 F. Supp. 686 (E.D.N.Y. 1993).

⁶⁰ *Fugitt v. Jones*, 549 F.2d 1001 (5th Cir. 1977).

court to do so. Experts need not be appointed in cases where the parties' experts have divergent opinions.⁶¹

The circuit courts have, on occasion, made the suggestion to appoint a neutral expert.⁶²

B. Court Appointment of Experts is Controlled by Federal Rule of Evid. 706.

When dealing with difficult matters of a scientific or technical nature that are central to the outcome of a case, the appointment of an expert by the court may be a more attractive alternative than agreeing to submit the entire decision on the merits of the case to a special master. While a court appointed expert may have considerable sway with the judge, or jury, they are still subject to cross examination and challenge like any other expert.

Practical aspects to consider are whether the court appointed expert is more likely to strengthen or undermine the opinions of a party's hired experts. If, as counsel, you feel that your experts are more likely to make a favorable impression on the trier of fact than those of your opponent, your client may be better served opposing the appointment of an expert by the court.

While the federal district courts have long had the inherent power to appoint experts. The mechanics of the appointment and use of experts in the federal courts today is controlled by Federal Rule of Evidence 706. Rule 706 reads in relevant part:

“(a) Appointments: The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations.”⁶³

⁶¹ See *Oklahoma Natural Gas Co. v. Mahan & Rowsy, Inc.*, 786 F.2d 1004 (10th Cir. 1986), cert. denied; *Hiern v. Sarpy*, 161 F.R.D. 332 (E.D. La. 1995).

⁶² *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 1000 (5th Cir. 1976). (Because a court appointed witness would be unconcerned with either promoting or attacking a particular estimate of Eastern's damages, he could provide an objective insight into the \$24.5 million difference of opinion ... the mere presence of a neutral expert may have ... a “great tranquilizing effect” on the parties' retained experts.)

⁶³ FRE 706(a).

1. While the expert may be one agreed upon by the parties, the Court may appoint the expert of its own choosing.⁶⁴

2. If a party has the opportunity to help choose the expert, it should interview the expert on the approach the expert will follow. Avoid advocacy in the interview, however, since the court or opposing party will have an opportunity to depose the expert.

C. Court order should address many issues.

The Court informs the expert of his duties either in writing or at a conference where all parties may participate. In a case in which an expert is appointed, it is usually preferable to have the appointment made in the form of a written order.

(a) expert's responsibility;

It is essential to make the responsibilities of the Court Appointed Expert as clear as possible.

(b) communication with court and parties;

It is also important for the parties to agree, or have the court decide, how to get the expert information as agreed by the parties and establish a mechanism to communicate with the expert without it being *ex parte*. The problem of *ex parte* communications with the judge was highlighted in *Edgar v. K.L.*⁶⁵

(c) compensation;

The order should set out the compensation of the expert, any billing requirements as well as setting out how, and by whom the expert will be paid. Expert costs in a complex case can run in the hundreds of thousands of dollars which makes it even more important that the parties have some way to monitor the progress of the expert's work. As a practical matter, it will be difficult for either side to complain

⁶⁴ See e.g. *Good v. Austin*, 800 F. Supp. 557 (E.D. Mich. 1992).

⁶⁵ *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996) (Judge's actions in meeting *ex parte* with panel of court appointed experts was grounds for disqualification of judge.)

loudly about the expert's bills prior to the report and testimony being completed.

(d) report;

The order should provide information on the subject content and the timing of the expert's report.

(e) deposition testimony, trial attendance and trial testimony.

The order should set forth a time frame for the expert's deposition as well as what is expected regarding the experts' attendance at trial and trial testimony.

The court appointed expert, by definition, is supposed to be neutral. As such, the Court will probably treat the expert as less likely to be biased.⁶⁶

The jury may or may not be told that the expert was appointed by the court.⁶⁷

Rule 706(d) specifically states that the rule does not change the parties' ability to call their own experts. Where opposing experts are on polar ends of the case, it may give your expert added credibility if the methodology used and conclusions reached are aligned with the court appointed expert.

If the court appointed expert's conclusions are closer to the other side's position, your expert's evaluation may need to be re-assessed. In fact, a court appointed expert is sometimes used to attempt to bring other experts in line.

D. Compensation.

Costs for a court appointed expert in complex litigation may be significant. While the compensation must be reasonable, it will be whatever the court allows. Payment will be made by the method the court directs.

⁶⁶ See Ellen El. Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference, 77 Or. L. Rev. 59, 131, 132 (1998).

⁶⁷ FRE 706(c)

The court may require all costs be paid initially by one party, where ability to pay is an issue.⁶⁸ The court may split the costs by party or by side of the docket.

Costs for court appointed experts are included as court costs so they may be charged against the losing party just as other costs.⁶⁹

E. Reports and Examination

Rule 706 requires the expert to advise the parties of the witness' findings.

(1) Written report is not expressly required by the Rule, but is advisable and likely the preference in most cases.

(2) The parties have the right to depose the expert.⁷⁰

(3) The court, or any party, may call the expert to testify at trial.⁷¹

(4) Any party may cross-examine the expert. Calling the expert to testify does not make him your expert – you can still cross-examine him using leading questions as if he were the opponent's expert.⁷²

III. TECHNICAL ADVISORS

The role of the technical advisor is the least well defined by the rules and in some respects offers the most flexibility in use by the court to assist it in understanding the underlying technical issues that may be presented in a case. While the technical advisor does not present evidence or offer opinions on the ultimate findings in the case, the technical advisor is also not subject to the same scrutiny by the

⁶⁸ *U.S. Marshall Service v. Means*, 724 F.2d 642, on rehearing 741 F.2d 1053 (8th Cir. 1983).

⁶⁹ See 28 U.S.C. 1920(6).

⁷⁰ *LG Electronics, Inc. v. Q-Lity Computer, Inc.* 2007 WL 2904057 (N.D. Cal. 2007).

⁷¹ *Lopez v. United States*, 77 F.3d 477 (5th Cir. 1995) (case not selected for publication in Federal Reporter).

⁷² *Lopez v. United States*, 77 F.3d 477 (5th Cir. 1995) (case not selected for publication in Federal Reporter).

parties and therefore the parties may not even have knowledge of the advice given by the technical advisor.

It is always wise to ask the court to clearly define the role of the technical advisor and ask that the information provided be subject to the review of the parties.

A. District courts have the inherent right to appoint a technical advisor to assist.

(1) *Reilly v. United States*, 863 F.2d 149, 154-155 (1st Cir. 1988) (Trial court has inherent authority to appoint technical advisors to assist it in technically complex cases.).

(2) *Association of Mexican-American Educators v. California*, 231 F.3d 572, 590 (9th Cir. 2000) (“In those rare cases in which outside technical expertise would be helpful to a district court, the Court may appoint a technical advisor.”).

B. Differences Between Special Master, Court Appointed Expert and Technical Advisor

The role of a technical advisor is distinguishable from a special master under Fed. R. Civ. P. 53 or a court appointed expert under Fed. R. Evid. 706. A technical advisor’s role is purely advisory or tutorial.⁷³

A technical advisor cannot give advice to the court as to the ultimate resolution of a consequential fact, contribute evidence, determine legal issues, or undertake independent factual findings.⁷⁴

Unlike a court appointed expert, the parties do not have the right to cross examine a technical advisor, nor does the technical advisor have to produce a report to the parties.⁷⁵

⁷³ See 9 *James Wm. Moore, et al.*, Moore’s Federal Practice § 53.02[4] (3d ed. 2006) (In those limited cases in which a technical advisor is needed, a technical advisor’s role should be purely consultative, or tutorial, rather than judicial.)

⁷⁴ See *Conservations Law Found. v. Evans*, 203 F. Supp. 2d 27, 32 (D.D.C. 2002).

⁷⁵ *Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 591 (9th Cir. 2000).

Although a technical advisor’s role is not defined in the rules of civil procedure or the rules of evidence, procedural safeguards are appropriate.⁷⁶ *Tech Search, LLC v. Intel Corp.*, recognized some minimal guidelines for technical advisors. They were described as follows:

The district court must:

- (1) use fair and open procedures for appointing a neutral technical advisor;
- (2) define the technical advisor’s duties in writing;
- (3) guard against extra record information; and
- (4) make explicit the nature and content of technical advisor’s tutelage to the Court.⁷⁷

The Court went on to say:

“The fact that the use of a technical advisor is permissible under such guidelines does not mean that it is invariably desirable or that safeguards are not required. As a practical matter, there is a risk that some of the judicial decision-making function will be delegated to the technical advisor. District court judges need to be extremely sensitive to this risk and minimize the potential for its occurrence.”⁷⁸

In conclusion, there are circumstances in federal cases in which special masters, court appointed experts, or technical advisors may be appropriate. However, in order to know how to most effectively deal with those circumstances, one must be familiar with the rules and the case law to know how to protect the clients’ interests.

⁷⁶ *Tech Search, LLC v. Intel Corp.*, 286 F.3d 1360, (Fed. Cir. 2002), cert. denied, 537 U.S. 995 (2002)

⁷⁷ *Id.* at 1379.

⁷⁸ *Id.*