A Brainstorming Session: Using Special Masters To Help Courts Deal with the Challenges of the Pandemic

Non-CLE Webinar
Thursday, May 28, 2020
3:00-4:30pm Eastern

Program Materials

ABA Special Masters Resolution ................................................................. pg. 2
ABA Guidelines for the Appointment and use of Special Masters................ pg. 3
Checklist for Making Use of Special Masters to Help Deal with the New Normal pg. 25
A Revolution that Doesn't Offend Anyone .............................................. pg. 31
INSIGHT: Special Masters Can Help Tame Court Backlog After Covid-19 .... pg. 38
How Courts & Litigants Can Benefit From Special Masters ..................... pg. 42
Panelist Bios ......................................................................................... pg. 48
ADOPTED

AMERICAN BAR ASSOCIATION

JUDICIAL DIVISION
NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES
NATIONAL CONFERENCE OF STATE TRIAL JUDGES
STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM
BUSINESS LAW SECTION
SECTION OF LITIGATION
SECTION OF DISPUTE RESOLUTION
SECTION OF INTELLECTUAL PROPERTY LAW
TORT TRIAL AND INSURANCE PRACTICE SECTION
SECTION OF ANTITRUST LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019; and

4 FURTHER RESOLVED, That Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.
ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

Consistent with the Federal Rules of Civil Procedure or applicable state court rules:

1. It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

2. In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

3. In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants’ costs, against the anticipated cost of the special master’s services, in order to make the special master’s work efficient and cost effective.

4. Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:
   a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
   b. facilitating resolution of disputes between or among co-parties;
   c. pretrial case management;
   d. advice and assistance requiring technical expertise;
   e. conducting or reviewing auditing or accounting;
   f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
   g. conducting trials or mini-trials upon the consent of the parties;
   h. settlement administration;
   i. claims administration; and
   j. receivership and real property inspection.
   In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

5. Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

6. Courts should choose special masters with due regard for the court’s needs and the parties’ preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.
The referral order appointing the special master should describe the scope of
the engagement, including, but not limited to, the special master’s duties and
powers, the roles the special master may serve, the rates and manner in which
the special master will be compensated, power to conduct hearings or to
facilitate settlement, requirements for issuing decisions and reporting to the
court, and the extent of permissible ex parte contact with the court and the
parties. Any changes to the scope of the referral should be made by a
modification to the referral order.

Courts and the bar should develop educational programs to increase
awareness of the role of special masters and to promote the acquisition and
dissemination of information concerning the effectiveness of special masters.

Courts and, where applicable, legislatures should make whatever modifications
to laws, rules, or practices that are necessary to effectuate these ends.
REPORT

Introduction

The American Bar Association (“ABA”) has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution (“ADR”). Today, there is an underutilized dispute resolution tool that could aid in the “just, speedy and inexpensive” resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use.¹ This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.²

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA’s Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership

¹ Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. See Lynn Jokela and David F. Herr “Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool,” WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) “In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters.” Id. Courts have also recognized their inherent power to appoint special masters to assist judges in case management. See id. at 1302 n. 18. See also n.30, infra.

² Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – “special master” – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as “master,” “discovery master,” “settlement master,” “trial master,” “referee,” “monitor,” “technical advisor,” “auditor,” “administrator.” Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct’s officers. For example, a Rule 53 adjunct in Maine is a “referee.” See Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a “master” as “any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts,” suggesting more of a trial function than a pretrial role. See e.g., Mass. R. Civ. P. 53. See also 2006 Kan. Code § 60-253 (“[a]s used in this chapter the word ‘master’ includes a referee, an auditor, a commissioner and an examiner.” These titles may suggest a more limited function.
included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.3

The Working Group also obtained information from other interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center (“FJC”), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including the Academy of Court Appointed Masters (“ACAM”)), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group’s analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

Discussion and Rationale for the Guidelines

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver “a just, speedy, and inexpensive determination of every action and proceeding.” Since December 1, 2015, the Rules have declared that they are to be “employed by the court and the parties to secure” that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.4

3 The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merrill Hirsh (Convener); Cary Ichtler (Reporter); Christopher G. Browning; David Ferleger and Mark O’Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon J. Stephen Schuster; and Hon. Joseph R. Slichts III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. (“Pete”) Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

4 See, e.g., Fed. R. Civ. P. 26 Advisory Committee Note: “There has been widespread criticism of abuse of discovery”; 1983: the “first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information”; Rule 26(g) “provides a deterrent to both excessive discovery and evasion”; 1993: “A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner
All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.\(^5\) Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the parties on fairly resolving the issues in controversy.\(^6\)

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, special masters have time that courts do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them.\(^7\)

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases—particularly complex commercial cases or the practical ability to increase resources when to achieve those objectives\(^5\); 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources “that are accessible only by incurring substantial burdens or costs.” 2015: Amendments that, among other things, expressly limit discovery to be “proportional to the needs of the case”; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be “construed,” but also “administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

5 See Merrill Hirsh, James M. Rhodes and Karl Bayer, “Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).
7 Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider Brady obligations, see, e.g., United States v. McDonnell Douglas, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, see, e.g., United States v. Stewart, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at https://famguardian.org/Publications/USAtttyManual/title9/13mcrm.htm#9-13.420. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombuds to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using neutrals as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.
such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation (“MDL”), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases. Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bring to bear knowledge of many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Third, the judicial role limits the involvement judges can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires ex parte meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.

Federal Rule 16(c)(2)(H) and certain state rules provide that “[a]t any pretrial conference, the court may consider and take appropriate action on… referring matters to a magistrate judge or a master….” As previously noted, however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I). Few courts have a practice of regularly considering the appointment of a

10 See supra nn.5-6 and accompanying text.
11 Rule 16(c)(2)(I) provides as follow: “At any pretrial conference, the court may consider and take appropriate action on… settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule.”
special master when they are preparing a scheduling order.\(^{12}\)

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.\(^{13}\) This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to “rare occasions.”

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.\(^{14}\)

Moreover, as a matter of logic, a concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role. And, unless the parties agree otherwise, a special master’s “adjudication” is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Cost concerns actually animate these Guidelines. Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. Although no scientific study has empirically established that special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.\(^{15}\) Special masters can also inculcate a culture of compliance with procedural

\(^{12}\) There are exceptions. See infra n.25.

\(^{13}\) See, e.g., 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule “extensively to reflect changing practices in using masters” for a broader array of functions that “[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule”); Manual for Complex Litigation 4th, §10.14 at 14 (2004) (“Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving “some exceptional conditions” or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised)”).

\(^{14}\) See n.30 infra (discussing inherent authority of courts to appoint special masters to assist their judicial administration). See also Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) (“The entitlement to an Article III adjudicator is ‘a personal right’ and thus ordinarily ‘subject to waiver.’ … But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process”).

\(^{15}\) See Thomas D. Barton and James P. Groton, “The Votes Are In: Focus on Preventing and Limiting Conflicts, DISPUTE RESOLUTION, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,
rules by strictly monitoring the parties’ compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be “proportional to the needs of the case” and requiring objections to “state whether any responsive materials are being withheld on the basis of that objection.” Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by introducing an expanded universe of practitioners to work as neutrals.
- Helping courts to monitor implementation of orders and decrees.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. See also "http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf" at 42

• A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
• A concern among parties and their counsel of losing control of the litigation.
• A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court administration or as a practice of individual judges).
• Increased cost and delay.
• The introduction of another layer between the court and counsel.

Regardless of the reason, the failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,18 the ad hoc nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into ways to make the process more predictable and the work of special masters more effective.

**Highlights of Specific Recommendations**

1. It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

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practice are useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review, analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court-appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master’s rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

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In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants’ costs, against the anticipated cost of the special master’s services, and with the view of making the special master’s work efficient and cost effective.

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:

a. discovery oversight and management, coordination of cases in multiple jurisdictions;
b. facilitating resolution of disputes between or among co-parties;
c. pretrial case management;
d. advice and assistance requiring technical expertise;
e. conducting or reviewing auditing or accounting;
f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
g. conducting trials or mini-trials upon the consent of the parties;
h. settlement administration;
i. claims administration; and
j. receivership and real property inspection.

In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

Special masters can be used creatively and thoughtfully in a wide array of situations. It is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:
• Discovery oversight and management.
• Coordinating cases in multiple jurisdictions or between state and federal courts.
• Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
• Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
• Auditing/Accounting.
• Serving as a firewall that allows the benefit of neutral involvement while avoiding exchanges of information or ex parte contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
• Addressing class action administration and related issues.
• Real property inspections.
• Mediating or facilitating settlement.
• Trial administration.20
• Monitoring and claims administration.
• Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

• Adjudicative.
• Facilitative.
• Advisory.
• Informatory.
• Liaison.21

The role a special master performs in a case is subject to ethical and legal constraints, the court’s control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.22

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that

20 In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct “mini-trials” of specific, perhaps technical, issues. These proceeding differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.
21 “Liaison” refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.
22 See n.9 supra. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.
might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

(5) Courts should choose special masters with due regard for the court’s needs and the parties’ preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates. As discussed below, see Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties’ perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

(6) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master’s duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order “direct the master to proceed with all reasonable diligence” and 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

23 See Fed. R. Civ. P. 53(b)(1) (“Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment”).
(E) the basis, terms, and procedure for fixing the master’s compensation under Rule 53(g).

The Court should consider adapting these terms (or adding others) consistent with the special master’s role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards. 24

(7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters’ qualifications or how those qualifications should vary depending upon the role the special master is performing. 25

Depending on the appointing court’s circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline. 26

24 The website of the Academy of Court Appointed Masters includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special masters. See http://www.courtappointedmasters.org/resource-center/appointing-masters-handbook. See also Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

25 The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information. http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf See also https://www.discoverypilot.com/ (Seventh Circuit ediscovery pilot program incorporating neutral mediation).

26 For a discussion of how state and federal courts have enabled feedback, see Nancy A. Welsh, Magistrate...
While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.27

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

- Developing a diverse pool of persons who qualify for appointment.
- Ensuring the process is properly calibrated to the functions and roles special masters perform.
- Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
- Ensuring the process properly assesses candidates’ talents and experience.
- Determining whether subject matter expertise is necessary.
- Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.28 Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the use of special masters. Greater use of special masters will also assist the advancement of...
appropriate professional standards for the multiple roles they perform.

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.29

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special masters.

Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 “does not apply in cases under the [Bankruptcy] Code.” This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 “precludes the appointment of masters in cases and proceedings under the Code,” the rule purports to instead preclude

29 See supra n.26, supra for methods of feedback.
application of Federal Rule of Civil Procedure 53. Rule 53 is the sole or ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their inherent power to appoint special masters as a part of case management.\footnote{It “is well-settled that” federal “courts have inherent authority to appoint Special Masters to assist in managing litigation.” \textit{United States v. Black}, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (citing \textit{Schwimmer v. United States}, 232 F.2d 855, 865 (8th Cir. 1956) (quoting \textit{In re: Peterson}, 253 U.S. 300, 311 (1920)); see also, e.g., \textit{Reed v. Cleveland Bd. of Educ.}, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the Court’s inherent power); \textit{Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.}, No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, “Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,” 67 MO. L. REV. 29, 30-31 (Winter 2002).}

Moreover, if Rule 9031 actually precluded the use of special masters for cases “under the Code,” it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.\footnote{See Paulette J. Delk, supra. n.30, 67 Mo. L. REV. at 40-41 & nn.60-62.} However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules' preface to the then proposed Rules of Bankruptcy Procedure states that "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases by bankruptcy judges." (Emphasis added)\footnote{See Paulette J. Delk, supra. n.30, 67 Mo. L. REV. at 41-42 & nn.64-65.}

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a “just, speedy and inexpensive determination of every case and proceeding,” which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.\footnote{See Paulette J. Delk, supra. n.30, 67 Mo. L. REV. at 41-42 & nn.65-68.} Amending Rule 9031 to eliminate this confusing limitation serves this end.

\section*{Conclusion}

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

Respectfully submitted,

Hon. Toni E. Clarke (ret.)
Chair, Judicial Division
January 2019
General Information Form

1. Summary of Resolution.

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

2. Approval by Submitting Entity.

The Judicial Division (JD) Council voted to co-sponsor this Resolution by electronic vote on August 30, 2018. Pursuant to the JD Bylaws, a majority of the voting members of the JD Council participated, making this a binding action.

3. Has this or a similar Resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice in state and federal courts. This resolution would enhance the ABA’s current policy, summarized below:

Support in principle the proposed Dispute Resolution Act, which would provide federal funds to states to create or improve small claims courts and other means of dispute resolution such as mediation and arbitration. (enacted in 1980 but not funded) Also support the increased use of alternative means of dispute resolution by federal administrative agencies consistent with several specified principles. 88A103A

Support continued use of and experimentation with certain alternative dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system in the United States. All alternative dispute resolution techniques should assure that every disputant’s constitutional and other legal rights and remedies are protected. 89A114

Recommend that the Council of the Commission for Environmental Cooperation consider the Model Rules of Procedure for Dispute Resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption. 95M117C

Support legislation and programs that authorize any federal, state, territorial or tribal court, including Courts of Indian Offenses, in its discretion, to utilize systems of alternative
dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration. 97M112


Urges the Supreme Court of the United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for appointment of amicus curiae, special masters, and other counsel. 17M10A

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.


N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Judicial Division, through the Lawyers Conference Special Masters Committee and representatives of the Working Group that drafted the Guidelines will commence several projects to disseminate the guidelines and encourage state and local bars to promote the guidelines and encourage state and federal courts to implement them. Initiatives in discussion and planning area as follows:

(1) Conducting outreach through programs and publications to educate state and local bars, courts, staff and stakeholders in the guidelines and to work with courts around the country to adapt the guidelines to the needs of local courts;

(2) Working to develop model criteria that courts could use to select a diverse group of qualified candidates to rosters of special masters, and a survey instrument that courts could use on a consistent to evaluate the work of special masters, to improve their performance in future cases, and to create data that would be available to researchers to evaluate the effectiveness of special masters and the differing approaches and methods they employ;

(3) Encouraging the appropriate ABA Standing Committees, Commissions, Sections, Divisions and forums to develop a Code of Ethics for Special Masters;

(4) Working with interested parties to develop model rules, particularly for state courts, interested in making more effective and regular use of special masters; and

(5) Urging the amendment of Bankruptcy Rule 9031 to eliminate confusing impediments to using special masters in Bankruptcy proceedings.
8. Cost to the Association (both indirect and direct costs).

None.


None.

10. Referrals.

Business Law Section
Lawyers Conference
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Standing Committee on the American Judicial System
Section of Antitrust Law
Section of Dispute Resolution
Section of Intellectual Property Law
Section of Litigation
Solo, Small Firm and General Practice Division
Tort Trial and Insurance Practice Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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Executive Summary

1. Summary of Resolution.

This Resolution adopts the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and Recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

2. Summary of the issue which the Resolution addresses.

While the ABA has been a leading voice in favor of various forms of ADR, the appointment of special masters is an underutilized dispute resolution tool that could aid in the “just, speedy and inexpensive” resolution of cases. In 2016, the Lawyers Conference of the ABA Judicial Division (JD) formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning their use. This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.

To solve this problem, the Committee constituted a Working Group across ABA sections, divisions and forums to develop consensus guidelines for the use of special masters. The Working Group was formed in August 2017, included members of the Judicial Division (including the National Conference of FederalTrial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the Business Law Section, the Standing Committee on the American Judicial System, Section of Antitrust Law, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Section of Litigation and the Tort Trial and Insurance Practice Section, who collectively worked well over 1,000 hours to create these consensus guidelines.

3. An explanation of how the proposed policy position will address the issue.

The best practices described in this Resolution encourage courts to make greater and more systematic use of special masters to assist in civil litigation. These Guidelines provide recommendations concerning the use, selection, administration, and evaluation of special masters.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

There is no known opposition to this Resolution.
ABA-JUDICIAL DIVISION SPECIAL MASTERS COMMITTEE
CHECKLIST FOR MAKING USE OF SPECIAL
MASTERS TO HELP DEAL WITH THE NEW NORMAL

April 2020 (Draft)
How can use of Special Masters address case delay and increase court responsiveness?

Special Masters can provide adjunct judicial services to handle matters usually handled by judges or other full-time judicial officers. To maximize court responsiveness courts can consider:

What court services are currently suspended or substantially delayed? What backlogs or delays can be eased with the assistance of a Special Master.

Examples of the types of proceedings in which special masters may help are: facilitating cooperation between parties to minimize motion practice, modifications to visitation or temporary child custody, pre-trial preparation, discovery scheduling and dispute resolution, resolution of disputes concerning the use of experts or evidentiary issues, and providing expertise that can be used to clarify or simplify disputes, or providing mediation services to assist in resolving disputes. The current demands may give rise to other ways special masters can assist courts – such as assisting in reviewing case files to suggest efficient management.

Authority for the use of “special masters” and even what they are called varies among the jurisdictions. Federal district courts have been found the have inherent authority to appoint special masters, with Federal Rule Civil Procedure 53 addressing the terms of the appointment. The resource list below includes a reference to authority by state.

Special Master appointments will vary depending on local law, court needs and the Special Master’s role in the proceeding. Both the length of the appointment and the degree that parties are involved will differ as well. Special Masters can be appointed for entire cases or can be appointed for specific tasks. So too, Special Masters may be appointed for a specific length of time.

Laws and procedures in some jurisdictions may require that parties consent to the use of a Special Master. The scope of that consent will also differ. Even where party consent is not required, courts may wish to involve the parties in defining the scope of the appointment and choosing the Special Master. Parties can also be consulted about other alternative approaches to a speedy resolution.
• How do we find qualified Special Masters?

The skills to look for in Special Masters should be adapted to the task they perform. Depending on the task, certified arbitrators, former judges, hearing officers, lawyers with case management, settlement or other relevant skills and experience are all potential Special Masters.

Those jurisdictions with judicial selection bodies may want to use their selection criteria to assist in evaluating the qualifications of Special Masters. Jurisdictions with existing court-based ADR rosters may want to explore using individuals already qualified for those rosters. There are also individuals who have already served as special masters in local, regional and national capacities. Resources listed below may assist in identifying experienced Special Masters available to assist your court.

Special training for expanded use of Special Masters could take place in conjunction with existing Bar CLE programs or other judicial training programs. The ABA is also exploring the interest and resources available for creating a training program.

Courts also need either to establish a system, or to use some existing system, of vetting to ensure that the special masters chosen have the appropriate temperament and skills for the job and, as a group, bring to it the appropriate diversity of experience.
• Informed consent and public accountability when using Special Masters

Use of Special Masters should enhance and not lessen the quality of justice services. To that end, where use of Special Masters is by direct court appointment, the appointing authority has the obligation to ensure that the Special Master will comply with relevant Codes of Conduct, are appointed on the basis of qualifications and not favoritism, and with consideration of diversity.

Where parties will need to consent to use of a Special Master, ideally the parties will be given a list of qualified names to choose from. For parties of limited means, pro bono Special Masters or Special Masters paid through public funds may be needed.

A Special Master coordinator who is part of the court administration can oversee the appointment process and the compensation structure for the Special Master program.

Proceedings presided over by Special Masters must comply with court procedures, including accessibility to the public. Accessibility can be accomplished by use of technology. Where the court system does not have adequate technological resources, use of private Special Masters may have the benefit of having access to technology that the courts do not.

Those who serve as Special Masters must do conflict checks with their law practice and disclose any potential conflicts to the court and the parties consistent with the rules applicable to Special Masters.
Resource List

ABA Resolution 100 (adopting Guidelines for the Appointment and Use of Special Masters in Federal and State Court Civil Litigation), January 28, 2019, especially Guidelines 2, 3, 5
https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/100.pdf

Professor Nancy Welsh and Merril Hirsh, “A Tool To Help Courts: Special Masters, recorded presentation for the Ohio Supreme Court 2020 Dispute Resolution Conference, Columbus, Ohio (Mar. 10, 2020)
https://www.youtube.com/watch?v=kF9CJUvMgQo&list=PLLMMZAkTESmQrN3Qd9F5ZHL_5wi Ah55ml&index=3&t=0s

General Compendium of Information on Authority, Issues for Appointment, Use of Special Masters and Ethics

Academy of Court Appointed Masters, “Appointing Special Masters and Other Judicial Adjuncts,”

See also id. at 23-67 (compiling books and articles up to 2005 on the use of special masters).

See also id. at 69-83 (including sample orders for the appointment of special masters).

Authority for the use of special masters in various jurisdictions.


Federal Rule of Civil Procedure 53
On the uses of special masters and other adjuncts and the philosophy behind their use:


On Ethics for Special Masters

Academy of Court Appointed Masters Benchbook
A Revolution That Doesn’t Offend Anyone
THE ABA GUIDELINES FOR THE APPOINTMENT AND USE OF SPECIAL MASTERS IN CIVIL LITIGATION

By Merril Hirsh

Stories about special masters always seem to begin with “and then the judge threw up his [or her] hands and said, ‘I don’t have time for all this. Here’s what I’m going to do . . .’” At the American Bar Association’s (ABA’s) Midyear Meeting in January 2019, the House of Delegates did something to change that. The ABA approved Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. The guidelines are the product of a remarkable consensus to assist courts and stakeholders in judicial proceedings with the latest thinking on how special masters can be a more useful tool for their judicial administration.¹

It isn’t that special masters cannot help judges who are throwing up their hands in frustration. They can. But a working group of representatives across the ABA devoting well over 1,000 hours across a year considering the issue concluded that waiting to drive judges to the point of frustration is not the best and highest use either of judges or of special masters. And the Judicial Division Lawyers Conference Special Masters Committee is now working to help judges and courts adapt these new ideas to the needs of cases and dockets.

Unconventional Wisdom
So, what’s so different? The ABA’s working group did not invent special masters. It reinvented the conventional wisdom about them. The conventional wisdom has been
that special masters were . . . well . . . special. Even the name is a problem. As a former United States magistrate judge put it 35 years ago, “[t]he word ‘master’ is its own worst enemy. Embellishing it with the word ‘special’ only serves to aggrandize that which is already repugnant. Its pejorative connotations are practically infinite—slavemaster; headmaster; shipmaster; taskmaster.” Not only repugnant, but vague and often inapt. The words “special master” refer to a wide and varied array of potential functions—some of which involve facilitative functions in which the parties, and not the neutral, are supposed to be the “master.” (The more accurate technical term is “judicial adjunct.” At least it captures the idea that what binds these functions together is that they are performed at the behest and aegis of the court. But that one is pretty ugly too and in even less use than “special master.”)

Even getting past the name, the ABA needed to look at special masters in a new way to appreciate the benefits that could come from making considering the use of a special master a regular part of judicial administration. There is a natural concern that a special master would constitute either a challenge to or abandonment of judicial authority (enabling the parties to pay private adjudicators to do what judges really should be doing for free). There is also a perception that special masters have been appointed not because they truly save costs or improve the administration of justice but because they were friends of the judge, or, worse, that referees who used to handle bankruptcy cases before 1978 were actually referring cases to themselves as special masters in order to earn extra money.

It is difficult to sell people on an idea that has both marketing and a bad vibe. It is scarcely surprising that, historically, not only has appointing a special master been rare, but also the conventional wisdom has been that it should be.

The fact that wisdom is conventional, however, does not mean that it is wise, or current. Concerns about special masters largely date from a before-time, when courts generally viewed alternative dispute resolution as truly “alternative.” There was a time when, if what the parties really wanted was to settle their dispute, courts told them to do this on their own time. If the parties wanted assistance, they would hire a mediator. Behind this was a philosophy that what courts had to offer was not dispute resolution, but rather a particular type of dispute resolution—an umpire who would call the balls and strikes in disputes that the parties had largely fashioned themselves.

For many reasons, that time has long since passed. Courts and practitioners have come to think that, as a matter of course, courts will not merely call balls and strikes, but work to move the case to resolution and (as a means to that end) promote the use of alternatives that do not involve adjudication at all. These days, it is difficult to find a court that will not expect to refer a civil action for some type of attempt at resolution—most commonly one that does not involve ever reaching the final merits of the action.

In the guidelines, the ABA recommends that courts and practitioners get beyond the conventional wisdom to make much more effective use of a tool that, when properly used, supplements, not supplants, judicial authority. At the heart of the guidelines are two new messages: (1) think of special masters like a Swiss Army knife, a multipurpose tool that serves judicial needs and should be considered whenever it might help; (2) do it right—don’t appoint special masters merely ad hoc or post hoc at the point of frustration, but instead generally at the outset of litigation as part of a systematic plan to evaluate how special masters might help, to choose a special master well-geared for the task and make sure the special master does the job.

This article explains how the guidelines came to be, what they advise, and what work is being done to assist courts and stakeholders to take advantage of this new thinking.

How Did the Guidelines Come About?
In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning their use. This committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters. In an effort to see if it was possible to solve this problem, the committee contacted representatives from not only the ABA Judicial Division as a whole, and the Lawyers Conference, but also the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Standing Committee on the American Judicial System, the Business Law Section, the Section of Litigation, the Section of Dispute Resolution, the Section of Intellectual Property Law, the Tort Trial and Insurance Practice Section, and the Section of Antitrust Law. All of these Divisions, Sections, and Forums of the ABA agreed to send representatives to a working group that would discuss the possibility of reaching consensus on guidance that could be presented to the ABA’s House of Delegates for consideration. The working group began its efforts in fall 2017. Approximately a year later, after over 1,000 hours of work, the Judicial Division and each of the other Divisions, Sections, and Forums cosponsored a resolution to the ABA House of Delegates to approve the guidelines. At the January 2019 Midyear Meeting, the House of Delegates approved the resolution on a voice vote with no apparent opposition.

Merril Hirsh of HirshADR PLLC and the Law Office of Merril Hirsh PLLC in Washington, D.C., is the cochair of the ABA Judicial Division Lawyers Conference Committee on Special Masters and served as convener of the working group that developed the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. He can be reached at merrill@merrilhirsh.com.
No Apparent Opposition!? A Revolution That Does Not Offend Anyone?

The working group’s consensus on a new way of thinking about special masters stands on its head a line in the play and movie 1776. In 1776, John Adams watches as the Continental Congress picks apart a draft of the Declaration of Independence. Some members of the Congress are concerned that passages will offend the Parliament; others are concerned that it will offend the king. Finally, Adams yells in frustration (expletive deleted), “This is a revolution . . . ! We’re going to have to offend somebody!”7 The guidelines, however, are a revolution that is designed not to offend anyone. They change the thinking about using special masters, but do not require that anyone—judges, court staff, or participants in litigation—change practices. The guidelines are nine principles that urge that all participants in complex civil litigation consider using special masters in ways that revisit the conventional wisdom.

Guideline 1
The first guideline provides:

It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.

This guideline contains two concepts. First, it should be routine to consider using special masters in the type of cases where they might be useful. Second, courts and litigants should do this at the outset of the litigation, and not just when frustration has reached a boiling point.

In one sense, this is not revolutionary at all. Federal Rule 16(c)(2)(H) and its state counterparts already provide that “[a]t any pretrial conference, the court may consider and take appropriate action on . . . referring matters to a magistrate judge or a master.” This clause (H) appears immediately before Rule 16(c)(2)(I), which specifies that “[a]t any pretrial conference, the court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule.” And to look at them, you would think the two would apply similarly in practice.

But the practice under the two is very different. The part of clause (H) that discusses referral to a magistrate judge is not merely something most courts believe they “may consider” at a pretrial conference. In most federal districts, standing orders or trial judges automatically assign magistrate judges for some purpose (including, often, conducting the pretrial conference itself). And in clause (I), it is also routine for federal courts at least to consider some sort of alternative dispute resolution with a view toward resolution—again, some courts and individual judges have standing orders requiring it. But it is rare for courts even to consider the use of special masters.

The guidelines recommend that, in the types of cases most likely to benefit from the use of a special master, the court and the parties should take advantage of Rule 16(c)(2)(H) or similar state rules and consider whether a special master could assist.

This doesn’t sound like much of a revolution, but perhaps it can be a revelation. The idea is that special masters are not just a last alternative to be used when nothing else has helped to manage the case, but that special masters can head off problems long before they occur.

As Guideline 4 (discussed below) details, there are many types of situations in which a special master can be useful. For example, instead of (1) one party demanding every document that relates to every other document that, in turn, relates to something else; (2) the other complaining that this is overbroad and refusing to try to provide anything; and (3) the two fighting in meet and confer sessions, punctuated by emails, until one or both file motions that queue up on a docket before judges who have more important matters to resolve, have a special master look over the parties’ discovery in the first place. The immediate effect is that the parties have an incentive and not just an admonishment to be reasonable. No one wants to look unreasonable before a neutral. And if the parties are unreasonable, the special master can cut to the chase—schedule a telephone conference to discuss the production and work through what requests and responses are reasonable.

Do these types of disputes arise on an almost daily basis? Perhaps have a weekly call every Monday to go over and attempt to resolve as many issues as possible.

Does the case involve specialized expertise or turn on disputes about damages? Parties can litigate for years over other issues before getting to the one on which the case actually turns. Consider bringing in someone at the outset to work through these issues before the case bogs down a calendar with other issues.

Guideline 2
The second guideline recommends:

In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

Special masters are not to be used when nothing else has helped, but they can head off problems long before they occur.
Again, it does not seem like much of a revolution to say that people thinking about selecting a special master would think about what the special master might do. But, again, there is more to it. Because the use of special masters is so rare, very few people have thought about what it is special masters do, and even fewer about what role they might play. One of the very common and understandable reactions to the guidelines has been, ‘Okay, I understand that many state courts do not have magistrate judges, but in the federal system, doesn’t this just duplicate the magistrate judges? The answer is yes, no, and maybe so.

Yes. United States magistrate judges are often (but not always) given responsibility for managing complex civil cases. Indeed, Federal Rule of Civil Procedure 53(h) recognizes that federal district court judges can refer a matter to a magistrate judge to serve as a special master.

No. As Rule 53 implicitly recognizes, a magistrate judge and a special master are two different things. Some of the roles a special master performs are roles that we would not want to have a magistrate perform. For example, special masters have been used in multidistrict litigation to investigate and vet candidates for plaintiffs’ lead counsel and to resolve intermecine disputes among plaintiffs’ lawyers or defense lawyers. That is not a role any judge (whether district judge or magistrate judge) is in a position to play. Another special master may be involved because he or she has particularized expertise in the e-discovery or patent or forensic accounting or others issues involved. A magistrate judge may or may not have that particular expertise.

Maybe so. Even where the role is one a magistrate judge may be in a position to perform, there is still a question of making the best and highest use of the magistrate judge’s time. The real benefit a special master provides to case management is not resolving disputes that should be going to the court. It is avoiding disputes that should be resolved without the need for court intervention. The 2015 amendments to the Federal Rules of Civil Procedure reflect a philosophy that not just the court but also “the parties” should construe, administer, and employ the rules “to secure the just, speedy, and inexpensive determination of every action and proceeding.” But that admonition is not self-executing. And when counsel for whatever reason cannot agree on what is “reasonable,” those issues come back to the court in the form of expensive, time-consuming, and contentious motions. The fact that magistrate judges might be able to herd cats does not mean that they are best employed in doing so.

Guideline 3
The third guideline provides:

In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants’ costs, against the anticipated cost of the special master’s services, in order to make the special master’s work efficient and cost effective.

Considering a special master does not mean selecting one. The law does not prohibit courts from imposing litigation costs on the parties. Every time a court requires a brief, the court imposes a cost on the parties. But courts should not impose costs on the parties unless the benefit outweighs the cost. And in many cases, the choice on whether to use special masters permits a direct cost-benefit calculus: in general, a special master should earn his or her keep and then some.

In complex cases this is not very difficult to achieve. Save the parties one discovery motion and it could add up to $100,000. The special master’s bill for work avoiding that motion should not be anywhere close to that. And making special masters a more regular part of judicial administration, with a more clearly understood use and role, makes it easier to monitor and control their costs.

Guideline 4
Pursuant to the fourth guideline:

Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:

a. discovery oversight and management, and coordination of cases in multiple jurisdictions;
b. facilitating resolution of disputes between or among co-parties;
c. pretrial case management;
d. advice and assistance requiring technical expertise;
e. conducting or reviewing auditing or accounting;
f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;
g. conducting trials or mini-trials upon the consent of the parties;
h. settlement administration;
i. claims administration; and
j. receivership and real property inspection.

In these capacities, special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

If you are thinking of buying a Swiss Army knife, you need to know what it can do. Only with special masters, the potential roles are limited more by imagination and custom than they are by any set description. Although special masters usually do have adjudicative functions, they do not need to. A special master can be tasked with gathering information—for example, issuing a report on the type of information contained in 1,000 allegedly privileged documents without actually revealing their content. A special master can be the go-between who provides information while insulating a judge from direct contact that might create a problem for a later decision. A special master can be a facilitator to help codefendants agree on how to allocate expenses among them. A special master can administer a settlement or oversee compliance with a decree. A special master can be the neutral expert who conducts a Markman hearing in a patent case or reports to a court on the extent to which experts the parties have
Guideline 5
The fifth guideline advises:

Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

A huge advantage of rethinking how we use special masters is that we can rethink how they are chosen, trained, and evaluated. With special masters used rarely, very few courts have had occasion to develop a roster that reflects the diversity and talents of our community or a system of vetting, training, or evaluating special masters' work. The upshot has been that some special masters are wonderful, others not, feedback is haphazard, and evaluation is difficult. If courts consider the use of special masters regularly, they can also institute systems to consider and to ensure the quality of candidates.

Guideline 6
The sixth guideline recommends:

Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

Have a better system for selecting special masters, and you have a system better designed to establish legitimacy and install confidence. Members of the working group that created the guidelines disagreed over the extent, if any, to which courts should defer to party preferences on choosing a special master. Litigators, by and large, preferred deference. Judges were not so sure. But they all agreed that a process in which the selection is systematized provides much more comfort than one that simply relies on the judge's preference.

Guideline 7
Pursuant to the seventh guideline:

The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

This guideline largely tracks Federal Rule of Civil Procedure 53(b)(2), and it contains a checklist of things to consider in drafting an order. Just as the role of a special master can vary, so the appointing order needs to be clear to craft the special master's responsibilities and limitations. This too helps to instill confidence in the process and ensures checks on what the special master can do.

Guideline 8
The eighth guideline urges:

Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.

Buy-in requires knowledge. Courts and the bar will make better use of special masters if they understand better how they can be used.

Guideline 9
The ninth and final guideline proposes:

Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.

The guidelines are drafted to be consistent with rules. But just as rules govern practice, practice informs rules. And local practice means local rules.

So, What Have You Done for Us Lately?
The guidelines reflect a lot of thought and are important policy. But they will not implement themselves. The Judicial Division Lawyers Conference Special Masters Committee has formed four subcommittees to assist courts and practitioners with implementing these ideas.

The Outreach Subcommittee is focused on writing articles and developing programs designed to assist courts and practitioners in understanding the guidelines. The central focus behind the programs is not just to talk; primarily, it is to listen. Different courts have different needs. A state court judge with a docket of 1,000 cases is not in the same situation as a federal district court judge. A judge presiding over a multidistrict litigation proceeding or class action faces different challenges from one handling single claims. Different areas of the law, such as intellectual property or antitrust, benefit from different types of expertise. E-discovery can be a different issue if the problem is measured in terabytes rather than megabytes. If the guidelines are to be adopted and used, they must be adapted so that each court and even each judge can make them most effective.

The Support Subcommittee is drafting instruments that can be used by courts as part of this process. Among the current projects are drafting criteria and processes for selection of special masters to a roster and drafting a survey instrument that courts could use to obtain evaluations for special masters and researchers can use to compile studies of what techniques are effective.
The Ethics Subcommittee is working on examining what would be needed to articulate model ethics rules for special masters, and coordinating with other committees within the ABA responsible for establishing ethical standards.

The Rules Subcommittee is working on determining whether and to what extent it might be appropriate to reexamine existing rules to implement creative ideas for special masters.

A new project the Special Masters Committee is working on is partnering with law schools to have students assist courts in evaluating whether and how special masters might meet their local needs.

The program offers students access to the work of the Judicial Division and courts and court staff access to help so that courts can consider using special masters without unduly taxing judicial resources.

Conclusion
No one can promise that judges will stop pulling their hair out in frustration over complex civil litigation. But the ABA took a significant step toward helping in adopting the Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. We owe it to our judges and our litigators to make use of every tool that is available to bring cases to a just, speedy, and inexpensive conclusion.

The views expressed in this article are the author’s own and not necessarily those of his clients or the members of the working group. The guidelines described in this article are official policy of the American Bar Association, but comments in this article concerning them have not been approved by the ABA. The author wishes to thank Iowa District Court Senior Judge Annette J. Scieszinski and working group and Special Master Committee members William D. Johnston of Young Conaway Stargatt & Taylor, LLP and former Delaware Supreme Court Justice Henry

UNACCOMPANIED MINORS and the AMERICAN LEGAL SYSTEM

This video is an extremely valuable and timely resource for attorneys, state and federal courts, and child welfare organizations. It provides:

- Essential information for attorneys and child welfare organizations who represent unaccompanied minors in American courts
- Critical how-to guidance for state and federal courts that must make key findings regarding these minor children

This compelling video uses a basic, step-by-step approach that includes two brief mock hearings and an actual account of an unaccompanied minor who later became a legal resident of the United States. It also includes an all-judge expert panel discussion describing the process for obtaining the required predicate orders in state and local courts to support federal petitions for Special Immigrant Juvenile Status (SIJ petitions).

This video provides vital training that will help participants understand the critical decision-making tasks necessary to decide what is in the best interests of children. It also helps to dispel the “mystery” surrounding the work performed by immigration judges, including what state and local judges must do before the immigration court case can be decided.

Valuable resource materials are also included at the end of the video. Available for licensed viewing at inexpensive rates.
The judges’ journal • VOL. 58 NO. 4

Litigation (Fourth) §10.14, at 14 (2004) (“Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving ‘some exceptional conditions’ or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment” (footnote omitted).)

6. The resolution also urges that Bankruptcy Rule 9031 be amended to permit courts to use special masters in bankruptcy proceedings in the same way as they are used in other federal civil cases.


The pre-2003 version of the Federal Rules often refer to a “master” as “any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts,” suggesting more of a trial function than a pretrial role. See, e.g., Mass. R. Civ. P. 53; see also Kan. Stat. Ann. § 60-253 (“As used in this chapter, ‘master’ includes a referee, an auditor, a commissioner and an examiner.”). These titles may suggest a more limited function.


5. See, e.g., Fed. R. Civ. P. 53 advisory committee’s note to 2003 amendment (noting, even as it revised the rule “extensively to reflect changing practices in using masters” for a broader array of functions, that “[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule”); Manual for Complex Litigation (Fourth) §10.14, at 14 (2004) (“Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving ‘some exceptional conditions’ or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment” (footnote omitted).)

Endnotes


3. Statutes, rules, and practice have described these persons with numerous titles, such as “master,” “discovery master,” “settlement master,” “trial master,” “referee,” “monitor,” “technical advisor,” “auditor,” and “administrator.” Even states whose rules mirror the Federal Rules of Civil Procedure use different titles to describe the court adjunct’s officers. For example, a Rule 53 adjunct in Maine is a “referee.” See Me. R. Civ. P. 53. States using the national judicial outreach week

MARCH 1–10, 2020

Join the Judicial Division for this year’s National Judicial Outreach Week (#NJOW) on March 1–10, 2020. #NJOW encourages judges and lawyers to reach out to their communities to promote a fair and impartial judiciary and to confirm the public’s understanding and commitment to preserving the Rule of Law.

Presentation materials and resources are available at ambar.org/njow.
The United States Law Week

INSIGHT: Special Masters Can Help Tame Court Backlogs After Covid-19

By Hon. Nan R. Nolan (ret.), Jonathan M. Redgrave, and Christopher Q. King

April 29, 2020, 4:00 AM

The use of special masters is not reserved just for massive multi-district litigation or mass torts. Redgrave LLP attorneys explain how special masters can be used to help parties and courts in a wide variety of cases to address the litigation backlog that will arise due to the COVID-19 pandemic.

The Covid-19 pandemic has led to federal and state courts substantially limiting access to courts and necessarily delaying hearings and trials. When courts reopen, we can expect significant civil case backlogs to persist in many jurisdictions well into next year.

The reasons are many. Constitutional and statutory requirements cause courts to prioritize criminal matters. Judges, members of their staff, and court personnel or their families may be or have been ill. Magistrate judges, in particular, will be affected because many settlement conferences were deferred during the shelter in place period. Some courts have unfilled judicial vacancies.

Some social distancing measures may remain in effect, and it is not unreasonable to expect an increase in case filings raising novel Covid-19 related merits and discovery issues.
Without creative solutions, it will be difficult for many courts to address the backlog. Fortunately, state and federal courts have available to them a resource for cases, large and small: special masters. Many people think that the use of special masters is reserved for massive multi-district litigation or mass torts. Yet, the reality is that special masters can be used in many more situations, serving temporary or long-term assignments ranging from mediating or ruling upon a single discrete issue, to performing comprehensive case management from initial pleadings, through discovery and up to trial.

**Authority to Appoint a Special Master**

While Federal Rule of Civil Procedure 53 sets out a specific process for the appointment of special masters, some state courts have parallel rules and other courts have relied on inherent authority for the appointment of special masters.

Rule 53 specifically allows for appointment of a special master on consent of the parties with judicial approval. In addition, if a pretrial or post-trial matter cannot be effectively and timely addressed by the court, the court can appoint a special master without a special finding of exceptional circumstances as it once did and, while mutual consent of the parties is preferable, the court can make appointments over objection.

And even if the bar is set as high as requiring an “exceptional” circumstance for an appointment, the exigent circumstances of the Covid-19 pandemic and its resulting backlog in civil dockets fits the definition.

**How a Special Master Can Help and Best Practices**

There are three roles for special masters: facilitative, monitoring, and adjudicative. Each role involves different skills and levels of involvement.

Illustrative examples of the types of tasks special masters may undertake include: facilitating cooperation between parties to minimize motion practice, facilitating case management decisions and actions, assisting with discovery scheduling and monitoring case progress, adjudicating discovery disputes, especially on e-discovery issues and privilege issues, mediating disputes, and settlement administration.
Fortunately, there are significant resources available to parties and courts that may not be familiar with the use of special masters. The Academy of Court Appointed Masters (ACAM) has an up-to-date and very useful benchbook. And while some jurisdictions may have a list of known or available masters, such as the Western District of Pennsylvania’s program for eDiscovery Special Masters, ACAM is the one national resource that maintains a roster of previously appointed special masters. This list is accessible through its membership directory that allows the public to search by specialty or jurisdiction.

In addition, in early 2019, the American Bar Association adopted Resolution 100, which reflects the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. These guidelines and extensive commentary encourage courts to consider the appointment of special masters in appropriate cases and provide benchmarks for the process.

The guidelines note the following benefits to the appointment of special masters:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by introducing an expanded universe of practitioners to work as neutrals.
- Helping courts to monitor implementation of orders and decrees.

Special master fees can be split equally between parties or apportioned differently by agreement or order of the court. A special master may save the parties money because the master’s expertise brings efficiency to the case.

Parties should take stock of where matters stand now and how Covid-19 will impact the ability to move matters forward towards resolution. The adverse impact on civil discovery scheduling will vary by jurisdiction, depending upon criminal dockets, judicial vacancies, and overall case load. Consider how a special master could materially advance the case, and then proactively define the type of person and skills that would be necessary in the case.
Special masters need not be rarely seen or only appointed in a narrow range of cases. They can be useful in a wide variety of cases in the ordinary course and the challenges of emerging from Covid-19 disruptions presents an opportune time for courts and parties to consider anew how special masters can serve a valuable role in their cases.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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How Courts And Litigants Can Benefit From Special Masters

By Shira Scheindlin

We are about to celebrate the first anniversary of the American Bar Association’s adoption, in Resolution 100, of the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation, on Jan. 28, 2019. The purpose of these guidelines was to encourage courts to consider the appointment of special masters in appropriate cases.

Three years ago, I authored an article on the subject of special master appointments, relying on my experience in making such appointments during my 22-year tenure as a United States District Judge in the Southern District of New York.[1] In deciding to author a new article on the subject, I can now add my experience in having served as a special master in a number of cases since leaving the bench.

In both capacities — as an appointing judge and as a special master appointee — I unreservedly and enthusiastically conclude that in the appropriate case the appointment of a special master can be of great assistance to the court and to the parties.

I begin with the ABA guidelines. As a member of the ad hoc committee that drafted those guidelines, I can report that they had a dual purpose. The first was to encourage courts to make greater and more systematic use of special masters to assist in civil litigation. And the second was to address a lack of standardized procedures among courts for the appointment of special masters. Both goals were achieved with the adoption of the guidelines.

The guidelines begin with the recognition that special masters have been an underutilized tool in achieving the just, speedy and efficient resolution of complex civil disputes in both state and federal courts. There are many benefits to the appointment of special masters. These include:

- Faster resolution of cases;
- Facilitation of informal resolution of issues among multiple parties;
- A reduction in the cost of resolving issues before they evolve into full-blown disputes requiring judicial determination;
- Relieving courts of the burden of managing the pretrial process when there are insufficient personnel within the court to do so;
- Providing expertise in cases that involve specialized issues like accounting, science, finance and technology; and
- Ensuring a culture of procedural compliance by parties by strictly monitoring their adherence to the governing rules.
There are nine specific guidelines in the ABA resolution. Rather than quote them all, I provide my view (in my own words) of the highlights:

- All courts and parties should consider using a special master in appropriate cases at the outset of litigation;
- In considering such appointments, the courts and the parties should be aware of the wide variety of roles and functions such special masters can serve;
- In considering such appointments, the courts and the parties should weigh the benefits of the appointment against the costs;
- Educational programs should be developed by the courts and the bar to increase awareness of the variety of roles and functions such special masters can serve;
- Courts should consider local rules and/or practices for selecting, training and evaluating special masters; and
- Courts and legislatures should consider revisions to laws, rules or practices to facilitate such appointments.

Having briefly summarized the guidelines, I now turn to a quick summary of some of the appointments I made as a federal judge, and some of the appointments I have received as a court-appointed special master.

I appointed settlement special masters where I knew that the settlement negotiations would be protracted and difficult, requiring a time commitment that a judicial officer was not likely able to make. I also appointed discovery special masters in two distinct scenarios.

The first was where discovery issues would recur with troubling frequency, or required a particular expertise. In these instances, a special master was particularly useful in being available on short notice, familiar with the case from prior disputes, and generally able to rule quickly because he or she was not burdened with other courtroom commitments. One example of such expertise is the now-omnipresent field of e-discovery — which continues to develop at alarming rates with the advent of AI.

The second circumstance involves burdensome privilege reviews, which cannot reasonably be handled by a busy district judge or magistrate judge, and surely not by a judge sitting in the commercial divisions in state courts. A special master who is experienced in the law of attorney-client privilege and work product protection is ideally suited to quickly conduct a sampling-type review, make some preliminary rulings by category and move the parties toward resolving the remaining claims of privilege or protection.

I also appointed special masters in other circumstances — ones that do not occur as frequently as settlement or discovery, but where the appointment helped to move the litigation forward in a prompt and cost-effective manner.

I appointed a special master to distribute funds to claimants in a case that had a large settlement fund that needed to be fairly distributed to qualified applicants. I also appointed a special master to supervise a disputed union election, where each party had claimed irregularities when the first election was held and was subsequently voided.
On one occasion, I appointed a former magistrate judge to serve as a special master to supervise depositions on sensitive financial matters that were taken in various foreign jurisdictions. Finally, I appointed a special master to report and recommend on dispositive motions in one case that involved a very difficult and unfamiliar subject matter. The parties were satisfied that the special master was a true expert, and chose not to challenge his recommendations.

Other judges in the federal courts have also appointed special masters — generally for discovery or settlement — but also to distribute funds from a common fund or to resolve disputes over the allocation of attorneys’ fees.

Since leaving the bench, I have been appointed a special master on several occasions. I have supervised all discovery in a complex securities fraud case, have conducted several privilege reviews, have resolved disputes over the allocation of attorneys’ fees, have resolved disputes over the distribution of a common fund resulting from a settlement of a very complex class action, and have provided a report and recommendation on substantive motions. I believe that, in each instance, the parties benefited from the expertise and experience I brought to the table and the speed of the decisions I was able to render.

There are, of course, many other roles a special master might play that I have not yet handled. But I do not want to limit the variety of roles to those with which I have had experience. Over the years I have learned of special masters who acted as monitors with respect to corporate governance issues, who supervised prison reforms that had been ordered by the court, or who developed best practices for resolving disputes regarding educational institutions, transportation systems and disability rights, to name just a few.

Before concluding by raising some frequently asked questions — and perhaps providing some answers — about appointing special masters, it would be useful to briefly review the legal structure for appointing special masters in federal courts. Many states have also developed rules for such appointments, but it would be too cumbersome to summarize the differing rules of the states. The federal statute applies to all federal courts, and provides a framework for such appointments.

Rule 53 of the Federal Rules of Civil Procedure is the touchstone. A special master may be appointed on consent of the parties — although judge approval is still needed. The rule explicitly states that a special master may also be appointed when a pretrial or post-trial matter cannot be effectively and timely addressed by a judge of the court.

Before making an appointment, a court must give notice to the parties and an opportunity to be heard, and the parties may suggest candidates for an appointment. The court’s order of appointment must specify the special master’s duties, under what circumstances a party may communicate ex parte with a party or with the court, the materials the special master must preserve and file as part of the record, the standards for review of a special master’s orders or recommendations, and the procedures for the special master’s compensation.

The special master has the authority to conduct evidentiary hearings, compel attendance of witnesses, and take and record evidence. A special master may recommend a contempt sanction or impose any non-contempt sanction provided in Rule 37, or recommend a sanction against a nonparty.

After a special master issues an order or recommendation, the parties may appeal that order to the appointing court, which must give the parties an opportunity to be heard and possibly submit evidence. The court may affirm, adopt, modify or reverse the order or
recommendation, or order that the matter be resubmitted to the special master.

Objections to factual findings must be reviewed de novo, unless the parties stipulate that such findings will be reviewed for clear error, or agree that the special master’s fact findings will be final. Objections to conclusion of law must be reviewed de novo. Procedural matters are reviewed for abuse of discretion.

In addition to Rule 53, courts have used their inherent authority to appoint a special master. Federal Rule of Evidence 706 has also been the source of appointments. The court may appoint an expert witness sua sponte or at the request of a party. This has most frequently been done in patent cases.

Section 1104 of the Bankruptcy Code permits the appointment of a trustee or examiner — a species of special master. Rule 42 of the Federal Rules of Criminal Procedure authorizes the appointment of a special master to prosecute a charge of criminal contempt. Section 1345 of Title 18 of the United States Code authorizes the appointment of a temporary receiver when it appears that a fraud has been or is about to be committed or involving health care.

I conclude with my own list of FAQs.

**Q: Has my own experience as a special master affected my views on the benefits or burdens of their use?**

A: It has been an eye-opening experience to serve as a special master. My unique perspective is to compare the role of judge and special master. Many years ago I served as a United States Magistrate Judge in the Eastern District of New York, and more recently, of course, as a United States District Judge in the Southern District of New York. In both positions I had an extremely active docket.

I was unable to spend an entire day — much less several days in a row — on one case. Indeed, as a federal trial judge, I often presided over criminal cases and trials, which must be the highest priority. Another difference is that I always had the assistance of law clerks while on the bench.

The biggest difference for me is that, as a special master, I can devote as much time as needed to a single case — often over several days without interruption. That is a great benefit to the parties and to the case. Also, I am more personally involved in the process than I was as a judge.

Without a bevy of law clerks, I now review all of the submissions personally, as well as the cases and statutes cited by the parties, and am more engaged with the parties and the issues. In short, I firmly believe that the parties benefit from the undivided attention a special master can provide, compared to a busy and active trial judge.

**Q: Is there a difference between a settlement special master and a mediator?**

A: The roles are virtually identical, except that the most high-profile and complex cases benefit from the court’s imprimatur in appointing a special settlement master. The signal to the parties is that the judge believes that a negotiated resolution of this particular case would serve the parties and the public better than a litigated outcome — with all its uncertainties, costs and inevitable delays.

Special settlement masters are usually very experienced and highly regarded. Their
involvement in cases such as the Agent Orange litigation, the Dalkon Shield litigation, prison reform litigation in New York and California, the Deepwater Horizon disaster, the World Trade Center attacks and now the opioid cases has resulted in providing broad relief to large groups of litigants with fairness and finality.

**Q: When does it make sense to appoint a special master?**

A: When the court does not have the time or personnel to address the myriad disputes that often arise in large, complex litigations. The multidistrict litigation addressing the opioid cases is a good example. There, the federal court appointed several different special masters at the outset, to supervise discovery and to supervise settlement.[2]

As noted earlier, it also makes sense to appoint special masters when particular expertise is required. Finally, it makes sense to appoint special masters when the speed of resolution will be a service to disputes that affect many people, or in dire circumstances where speed may be the most important consideration.

**Q: What is the best way to select a special master?**

A: Consent of the parties is probably the best method of all, as all of the parties will be happy with the choice. The second-best method is selection by the judge, who has a sense of the qualities she is looking for when appointing a special master. Finally, some have suggested that courts should create lists of qualified special masters, and/or that special masters should receive a certification that qualifies them for appointment.

**Q: How can or should the relationship between the judge and the special master work?**

A: The answer depends on the type of assignment. Usually there is little or no contact between the court and the special master, but in some instances, there might be a reason to permit regular contact. Usually the contact, if any, will be done by written communication — i.e., reports that are filed.

Because the appointing judge may be asked to review orders of a special master, ex parte communications may be awkward. However, coordination is often essential, so that the division of labor between the court and the special master is clear.

**Q: How should the special master be compensated?**

A: This needs to be tailored to the particular appointment. The cost can be allocated to one party or both parties, or it can change as the matter progresses, depending on the circumstances.

Some courts have assigned all of the costs to the party whose behavior in some way caused the need for the appointment. Or compensation can be paid from a common fund. It is the general practice to set forth the terms of compensation in the order of appointment.

**Q: What concerns or pitfalls should lawyers be concerned about in the appointment of special masters?**

A: The most obvious answer is cost. Some lawyers have argued that this is just an extra step, or layer of quasi-judicial oversight, that merely increases the cost. But others say that if a court officer cannot handle the task assigned to a special master with speed and
efficiency, then it is well worth the cost to have speedy access to a decision-maker. After all, it is often said that what lawyers want most is a decision — any decision — rather than a delay that causes their case to languish in a judicial no man’s land.

Another concern is access to the court. Some lawyers have expressed concern that if a special master is appointed, they will lose access to the judicial officer who will ultimately preside over the final resolution of their case. While acknowledging the concern, I do not think it is a real problem. A party always has the right to challenge the ruling of a special master.

A final concern might be dissatisfaction with the special master. If all of the parties are unhappy, the judge can always end the appointment or substitute a new special master. If one side is unhappy, it may be because that side has been on the losing side of important rulings — but the same would be true if that party lost those rulings in court. In either case, the recourse is the same: Appeal!

Q: What are some best practices in the appointment of special masters?

A: Be sure that all potential conflicts are disclosed and considered at the outset of the appointment. Be sure that realistic expectations regarding the role of the special master are made clear to everyone at the outset of the appointment.

Keep the court informed of all rulings, and of any problems that might develop, so that the role can be contracted or expanded as needed. Be sure that the parties know they can have fast access to the special master whenever needed. Keep costs from spiraling out of control, given the issues at stake in a particular case.

I am certain more best practices could be added to this list. And over time, I and others will surely make those additions.

Conclusion

The judicious use of a special master can be a great benefit to the parties and the court in an appropriate case. I urge courts and litigants to take full advantage of this extrajudicial tool whenever either believes that the benefits that will accrue from the appointment of a special master warrant such an appointment.

Shira A. Scheindlin is of counsel at Stroock & Stroock & Lavan LLP, where she maintains a practice as an arbitrator, mediator and special master. Judge Scheindlin served as a federal judge of the U.S. District Court for the Southern District of New York for 22 years.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Some of the material in this article is also found in the author’s 2017 Law360 article, "The Use Of Special Masters In Complex Cases."

Merril Hirsh of HirshADR PLLC and the Law Office of Merril Hirsh PLLC in Washington, D.C. [www.merrilhirsh.com](http://www.merrilhirsh.com) is the co-chair of the American Bar Association Judicial Division Lawyers Conference Committee on Special Masters, and was the convenor of the ABA Working Group that drafted the Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation. Mr. Hirsh has litigated for over 36 years on behalf of both plaintiffs and defendants as well as the United States government in federal or state courts in over 40 states. He is an arbitrator on the AAA and FINRA panels, a hearing examiner for the Architect of the Capitol and the DC Board of Professional Responsibility, and a member of the mediation panel for the DC Court of Appeals and the International Task Force on Mixed-Mode Dispute Resolution. He is also a two-time recipient of the Academy of Court Appointed Masters Civil Justice Award and recently was named to the Academy.
Cary Ichter is widely recognized as one of the best and most active litigation lawyers in the State of Georgia. Mr. Ichter’s clients include national franchise companies, manufacturers, financial institutions, real estate developers, executive search firms, professional service firms, and high tech entities. Mr. Ichter also regularly works as a court-appointed Special Master in complex commercial matters and mass tort cases. Cary also wrote the Georgia Uniform Superior Court and State Court Rules governing the appointment and use of Special Masters. Cary was also the Reporter for the ABA Guidelines on the Appointment and Use of Special Masters. Cary is now working with the ABA Task Force on Legal Needs Arising Out of the 2020 Pandemic. He is a frequent speaker on the subject of special masters and has been published a number of times on the subject. He is on the Board and is a Past President of the Academy of Court Appointed Masters.

Mr. Ichter is a magna cum laude graduate of the University of Georgia School of Law (1984) where he the Executive Research Editor for the Georgia Law Review and a member of the Order of the Coif. He began his career with Powell, Goldstein, Frazer & Murphy (now known as Bryan Cave). Mr. Ichter is admitted to all state and federal courts in Georgia and has an AV Preeminent rating from Martindale Hubbell for the past 30 plus years.
Judge Shira A. Scheindlin (Retired)
U.S. District Court for the Southern District of New York
Fellow, College of Commercial Arbitrators

The Hon. Shira A. Scheindlin was appointed by President Bill Clinton as a federal judge of the U.S. District Court for the Southern District of New York and served for 22 years. Judge Scheindlin also served in the mid-'70s as Chief Administrative United States Attorney and Deputy Chief of the Economic Crimes Unit in the U.S. Attorney’s Office for the Eastern District of New York. She left to become the general counsel of the Department of Investigations of the City of New York. She then returned to the Eastern District as a Magistrate Judge for five years, followed by eight years in practice as a partner at two large New York City law firms, representing clients in both commercial litigation and products liability, in both state and federal court.

Her experience acquired over more than four decades in government service, private practice and on the bench makes her exceptionally well-qualified to assist parties and their counsel in resolving disputes through arbitration or mediation.

Experience and Qualifications

- Served for 22 years as a Federal District Judge — plus five as a Magistrate Judge — presiding over settlements, motions, discovery and trials, both civil and criminal.

- Sat by designation on the Second and Ninth Circuit Courts of Appeals.

- Deputy Chief of the Economic Crimes Unit of the U.S. Attorney’s Office for the Eastern District of New York.

- Arbitrated or mediated over 40 complex civil cases since leaving the bench in 2016.
Arbitrations and Mediations
Judge Scheindlin left the bench in May 2016. Since then she has arbitrated and mediated many cases, has heard mock arguments in several high-profile cases, has served as an expert witness and has been appointed as a Special Master by the federal court in Manhattan on two occasions.

Her significant arbitrations include, among others, the following:

- A large commercial/bankruptcy case in which a portion of a group of secured lenders, signatories to certain credit documents, sought millions of dollars, claiming that they were not allocated a fair share of the proceeds of the collateral that secured the loan following a sale of assets under section 363 of the Bankruptcy Code.
- A commercial transaction between two pharmaceutical companies with one claiming that a stream of payments (totaling millions of dollars) continued to be owed to the other based on an asset purchase agreement, despite the lack of success of the product.
- A catastrophic accident in which plaintiffs claimed they were injured as a result of a battery defect in a computer manufactured by a major computer manufacturer.
- Cybersecurity issues in the loss of funds by an investor in a cryptocurrency exchange.
- An attorneys' fees dispute among successful plaintiffs' counsel in a shareholder derivative action against a large pharmaceutical company.

Judge Scheindlin has also mediated a number of large cases including insurance coverage disputes, RMBS fraud litigation by investors against a major bank, intellectual property disputes and employment disputes. In addition, she has handled a number of general commercial disputes, real estate disputes and one construction dispute. Most reached a successful outcome.

As for mock arguments, Judge Scheindlin sat on an appellate argument regarding a dispute between various insureds and their insurers regarding scope of coverage and tiers of coverage, a trial court argument regarding a large antitrust case against a major computer component manufacturer, and a Libor-related matter against a major U.S. bank.

Judge Scheindlin is now a Special Master in a securities fraud case pending in the Southern District of New York and in another such case that has already settled but involves disputes regarding claim entitlement that remain to be resolved.

Finally, Judge Scheindlin has served as an expert witness on issues of U.S. law in two cases involving major U.S. technology companies.

Areas of Focus
- Securities.
- Antitrust.
- Environmental Law.
- Class Actions.
- Civil Rights.
- Employment Law.
- RICO.
- Products Liability.
Representative Matters:

Securities

- **Carpenters Pension Trust Fund of St. Louis v. Barclays PLC**: In a securities fraud class action, Judge Scheindlin issued two decisions granting the plaintiffs’ motion for class certification, holding that plaintiffs were entitled to rely on the fraud-on-the-market presumption that satisfies Rule 23’s predominance requirement. This ruling was affirmed by the Second Circuit in a landmark decision regarding the application of the well-known Cammer factors holding that an event study is not necessarily required in every case.

- **SEC v. Wyly (Wyly I-IV)**: In an SEC civil enforcement action, Judge Scheindlin held that the SEC could only seek civil penalties against the Wylys for alleged securities violations spanning 13 years for conduct occurring no more than five years before the Wylys signed a tolling agreement. After a six-week trial, the court ultimately found the Wylys liable for nine securities violations and ruled, in an issue of first impression, that the SEC could seek disgorgement in an amount equivalent to the taxes the defendants avoided paying.

- **Gamco Investors, Inc., v. Vivendi, S.A.; In re Vivendi Universal, S.A. Sec. Litig.**: In Vivendi, a securities fraud class action, Judge Scheindlin presided over a lengthy jury trial that resulted in a significant verdict for investors. In Gamco, Judge Scheindlin held that Vivendi successfully rebutted the investors’ presumption of reliance on misstatements by showing that the investors would have transacted in securities notwithstanding any inflation in the market price caused by fraud. Both cases were affirmed in the Second Circuit.

- **The Pension Comm. of the Univ. of Montreal Pension Plan v. Back of Am. Sec., LLC.**: In this case, investors sued fund administrators and officers, seeking to recover losses stemming from liquidation of two British Virgin Islands-based hedge funds in which they held shares. The case involved claims under the Securities Act and the Exchange Act, and various common law claims under New York law.

- **In re Initial Public Offering Sec. Litig.**: In the investors’ suits against underwriters of initial public offerings, Judge Scheindlin granted the plaintiffs’ motion for an order of final approval of the settlement, plan of allocation and class certification. She awarded plaintiffs’ counsel fees and reimbursement of expenses totaling over $46 million.

- **In re Optimal U.S. Litig.**: Judge Scheindlin dismissed securities fraud claims brought by a putative class of investors in Optimal, an investment fund that invested 100 percent of its assets with Bernie Madoff and his firm. Judge Scheindlin had issued an order to show cause why the plaintiffs’ securities law claims should not be dismissed in light of the Second Circuit’s decision in Absolute Activist Value Master Fund, Ltd. v. Ficeto, which clarified the scope of extraterritorial application of the Securities Exchange Act after the Supreme Court’s decision in Morrison v. National Australia Bank.

- **Monroe Cnty. Employees’ Retirement Sys. v. YPF Sociedad Anonima**: Judge Scheindlin dismissed a putative class action against an Argentine energy company, its underwriters and executives alleging violations of the Securities Act and Exchange Act. Judge Scheindlin held that the Securities Act claims were untimely, and the Exchange Act claims failed to adequately allege material misrepresentations or omissions, scienter, loss causation and reliance.
Intellectual Property

- **Verint Systems Inc. v. Red Box Recorders Ltd.**: Judge Scheindlin issued a complex *Markman* decision in a case where an analytics company brought action against a competitor. Issues at stake included infringement of patents and counterclaims of noninfringement and invalidity.

- **Katiroll Company v. Kati Junction Inc.**: This action involved trade dress infringement and unfair competition under the Lanham Act as well as state law claims for infringement, unfair competition, breach of loyalty, breach of contract and misappropriation of trade secrets. Judge Scheindlin denied the motion to dismiss, ruling that the plaintiff had successfully stated claims for trade dress infringement under the Lanham Act, trademark infringement, breach of duty of loyalty, breach of contract and misappropriation of trade secrets.

- **Eve of Milady v. Impression Bridal, Inc.**: In a copyright infringement action, Judge Scheindlin granted the plaintiff bridal dress manufacturer’s motion for preliminary injunction against a competitor. Judge Scheindlin held that the competitor’s revised lace patterns as used on bridal dresses were substantially similar to the plaintiff’s lace patterns as used on bridal dresses.

- **American Stock Exchange, LLC v. Mopex, Inc.**: In a patent infringement action, Judge Scheindlin held that a patent for a type of security called “exchange-traded funds” (ETFs) was invalid as anticipated by a prior publication. The case also involved a complex claim construction under *Markman*.

- **Luv N’ Care Ltd. v. Toys “R” Us, Inc.**: This complex case involved patent infringement, trade dress infringement and unfair competition under the Lanham Act as well as unfair competition and trade dress dilution under New York law. Judge Scheindlin dismissed the plaintiff’s claim for “contributory infringement” as vague and insufficient to state a claim under the *Iqbal* standard.

Environmental Law

- **In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Action**: This was a multidistrict litigation (MDL) where many states and municipalities sued virtually all of the major oil and gas companies. The overriding issue in these cases was the alleged contamination of groundwater based on contamination by MTBE, an additive in gasoline meant to reduce toxic emissions. Judge Scheindlin supervised this MDL for more than a decade, issuing dozens of groundbreaking opinions. After a jury trial where the City of New York was awarded a $105 million judgment against Exxon Mobil, Judge Scheindlin ruled that Exxon Mobil should not be liable for punitive damages because it had not recklessly disregarded the risks posed by MTBE. The Second Circuit affirmed.

- **BG Recovery Litigation I, LLC v. Barrick Gold Corp., et al.**: In this suit, shareholders opted out of a securities fraud class action and brought suit individually. Among the issues Judge Scheindlin decided were whether the company was making false statements regarding its compliance with Argentine and Chilean environmental laws. She specifically evaluated whether the defendants’ mining operations were impacting glaciers surrounding its operations, which would be a violation of environmental regulations. Judge Scheindlin held that the plaintiff adequately pleaded material misstatements regarding the
defendants’ compliance with Chilean environmental regulations.

Class Actions

- **Peoples v. Fischer; Peoples v. Annucci**: In 2016, Judge Scheindlin approved a historic class action settlement reducing the frequency, duration and severity of solitary confinement conditions across all New York state prisons.

- **Laumann v. NHL (Laumann I-V)**: Judge Scheindlin certified an injunctive class under Rule 23(b)(2), holding that class members suffered an antitrust injury with respect to broadcasts of team sports, including, but not limited to, professional hockey and baseball leagues and the regional sports networks that televised their games. After this ruling and others on many motions in limine, the case settled on the eve of trial.

- **Finch v. New York State Office of Children and Family Services**: Judge Scheindlin’s ruling that the plaintiffs, who were subjects of indicated reports of child abuse and maltreatment, possessed a protected liberty interest requiring prompt review of those allegations. The case eventually resolved in a landmark settlement that resulted in prompt administrative hearings.

- **In re Ski Train Fire in Kaprun, Austria on November 11, 2000**: Judge Scheindlin certified the first-ever “opt-in” plaintiff class outside of the Fair Labor Standards Act context. Judge Scheindlin ruled that certifying an opt-in class was within her discretion as a matter of equity. This ruling was reversed in the Court of Appeals, although it generated substantial interest in scholarly journals.

Civil Rights

- **Floyd v. City of New York; Ligon v. City of New York**: Judge Scheindlin granted the Ligon plaintiffs’ motion for a preliminary injunction in their complaint over Operation Clean Halls and ordered the NYPD to immediately cease its practice of conducting stops and frisks that were not based on reasonable suspicion of criminal conduct. After trial, the court found that the NYPD’s stop-and-frisk practices violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment, ordering comprehensive remedies for both cases.

- **Betances v. Fischer**: Judge Scheindlin denied the defendant’s motion to dismiss the plaintiffs’ claim that the State Department of Corrections imposed unconstitutional post-release supervision (PRS). The court held that the officials’ refusal to comply with the Court of Appeals decision holding administrative imposition of PRS violated prisoners’ due process rights was not objectively reasonable.

- **The New York Times Co. v. United States Dep’t of Labor**: The judge ruled that the newspaper, which was seeking to compel the Occupational Safety and Health Administration to disclose data regarding injury and illness rates for 13,000 worksites, had exhausted its administrative remedies following the Department of Labor’s initial denial and that since the information the newspaper sought was not confidential information within a FOIA exemption, the DOL had to disclose the requested information.

Labor and Employment

- **Tomka v. Seiler Corp.**: A female employee brought a suit against her former employer and three male co-employees asserting claims of sexual harassment and retaliation in violation of Title VII. Judge Scheindlin, sitting by designation on the Second Circuit, held that the hostile work environment, retaliatory
discharge and unequal pay claims should not have been dismissed on summary judgment by the district court. She also held that individuals were not subject to liability under Title VII.

- **Mullins v. City of New York:** Judge Scheindlin held that the plaintiffs, police sergeants, were exempt from the Fair Labor Standards Act and were therefore entitled to recover overtime compensation.

- **Rosenblum v. Thomson Reuters:** An employee brought action against Thomson Reuters claiming retaliation, harassment and termination as a result of whistleblowing, which is claimed as “protected activity” under the Dodd-Frank Act. In ruling on the defendant’s motion to dismiss, Judge Scheindlin held that it was appropriate for the court to apply *Chevron* deference to the SEC’s interpretation of the Dodd-Frank statute.

- **Gonder v. Dollar Tree Stores:** In a case involving racial discrimination and retaliation, the employer sought to dismiss and to compel arbitration. Judge Scheindlin held that there was sufficient consideration to support the arbitration agreement and the employer did not waive its right to arbitrate.

**Electronic Discovery**

- **Zubulake v. UBS Warburg:** Over the span of 15 months in 2003-04, Judge Scheindlin issued five critical rulings in the case *Zubulake v. UBS Warburg*. Four of the five rulings (*Zubulake I, III, IV and V*) defined requirements and/or established best practices for the e-discovery process. In *Zubulake V*, Judge Scheindlin imposed sanctions on the defendant as a result of the willful destruction of relevant information. Judge Scheindlin wrote that “counsel must take affirmative steps to monitor compliance” with regard to data preservation, essentially creating the mandate for proactive legal holds.

- **Pension Comm. of the Univ. of Montreal Pension Plan v. Back of Am. Sec., LLC:** In this case, the defendant moved for sanctions against plaintiffs, alleging that each plaintiff failed to preserve and produce documents, including ESI, and submitted false declarations about their document collection and preservation efforts. Judge Scheindlin held that the plaintiffs had a duty to preserve the documents upon the filing of the complaint. Grossly negligent plaintiffs were sanctioned with an adverse inference instruction, and both negligent and grossly negligent investors were subject to monetary sanctions.

- **National Day Laborer Org. Network v. Immigration and Customs Enforcement Agency:** This case involved the largest FOIA search in ICE’s history, where the vastness of the search made it unclear whether certain search terms would actually capture all responsive documents. Judge Scheindlin held that methods beyond keyword searches were required, including “computer-assisted” and “predictive”-coding approaches like “latent semantic indexing, statistical probability methods and machine learning tools to find responsive documents.”

- **SEC v. Collins & Aikman:** In this case, Judge Scheindlin held that the SEC was obliged to search its own electronic data to produce responsive documents, submit materials allegedly covered by the deliberative process privilege to the court for *in camera* review, and search its email and attachments after deciding on a search protocol with the defendants. Judge Scheindlin concluded that the SEC is subject to the “same discovery rules that govern private parties (albeit with the
benefit of additional privileges such as deliberative process and state secrets)."

- **Sekisui Am. Corp. v. Hart**: In this case, the plaintiff failed to put a litigation hold in place until 15 months after it sent notice of claim to the defendant and waited another six months to notify its technology vendor to preserve relevant documents. Relying on the Second Circuit’s decision in *Residential Funding*, Judge Scheindlin granted the defendant’s sanctions motion, holding that an adverse inference sanction may be appropriate in cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.

### Admitted to Practice
- New York
- United States Supreme Court.

### Education
- J.D., Cornell Law School cum laude (1975).
- A.B., University of Michigan cum laude (1967).

### Speeches & Events (2018-19)
- **Speaker**, “If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR.”
  - Deutsche Bank, September 12, 2018.
  - General Motors, June 13, 2018.
  - American Constitution Society, June 7-9, 2018.
  - Orlando Federal Bar Association, April 18, 2018.
- **Conflict Prevention & Resolution (CPR)**, March 7, 2018.


- **Speaker**, (Keynote), Keynote Address, ARIAS-US 2018 Fall Conference, November 8-9, 2018.


• **Speaker**, American Bar Association, Border Searches, August 11, 2018.


• **Panelist**，“People Behaving Badly: Disassembling the Culture of Sexual Harassment,” American Arbitration Association, New York City, May 23, 2018.

• **Speaker**, Electronic Discovery Sedona Conference, May 3-4, 2018.

• **Speaker**，“Rethinking Solitary Confinement: Where Do We Go From Here?” **Panelist**, John Jay College’s Center on Media, Crime and Justice, and the Langeloth Foundation, April 26-27, 2018.

• **Speaker**, ABA Litigation Conference, Mass Torts, April 23, 2018.

• **Panelist**, Mass Tort Made Perfect, April 12, Diversity – Implicit Bias Study/Juror Reactions to Attorney Gender

• **Moderator**, Symposium on Women Lawyers in the Courtroom, Chicago Bar Association, April 12, 2018.


• **Panelist**，“Recent Developments in Employment Law,” EEOC, South Asian Bar Association, March 15, 2018.

• **Scholar in Residence**, University of Cincinnati, February 25, 2018.

• **Speaker**, New York State Bar Association, Employment Law, January 27, 2018.


### Selected Publications


### Memberships

• Chair, Federal Courts Subcommittee of the Standing Committee on the American Judicial System, American Bar Association.

• Member, Advisory Council, Cornell Law School.

• Member, former Chair, Commercial and Federal Litigation Section, New York State Bar Association.
• Member, Council on Judicial Administration, Association of the Bar of the City of New York.

• Board of Directors, Justice Resource Center (formerly Mentor).

• President’s Council, Good Shepherd Services.

• Judicial Advisory Board, The Sedona Conference.

• Board of Directors (Executive Committee), Lawyers Committee for Civil Rights Under Law.

• Board of Directors, American Constitution Society.

• Board of Directors, Bronx Defenders.

**Selected Awards and Honors**

• Francis McGovern Writing Award, Academy of Court Appointed Masters (2019).

• The Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation, New York State Bar Association (2014).


• William Nelson Cromwell Award for unselfish service to the profession and the community, New York County Lawyers Association (2007).

• Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice,” New York County Lawyers (2005).

• William J. Brennan Award, Criminal Law Section, New York State Bar Association (2003).


• Special Achievement Award in Appreciation and Recognition of Sustained Superior Performance of Duty, U.S. Department of Justice (1980).
Heather A. Welch
Judge, Marion Superior Court, Civil One
200 East Washington Street, W407
Indianapolis, In 46204
317-327-4202

CIRRICULUM VITAE

Education:

Valparaiso University School of Law, J.D. 1994

DePaul University College of Law, Chicago, Illinois, Summer 1993
Summer course in Federal Income Tax

Indiana University School of Business, B.S. Business Analysis, 1989

Indiana Graduate Judges Program 2006-2007- two-week educational program presented by the Indiana Supreme Court

Professor John Krauss’s Public Policy Meditation Training 2010
National Judicial College Great Lakes Complex Commercial/Business Courts Seminar October of 2013, and additional specialized education from the American College of Business Court Judges

**Employment:**

Presiding Judge of the Marion Superior Court, January 2019- current.

Judge, Marion County Superior Court, Civil Division, Room One- 2015 to current; Civil Division, Room 12: 2009 to 2014, and Indiana Commercial Court Judge since June 2016

Judge Heather A. Welch is a Judge in the Marion Superior Court, Civil Division, Room 1. Judge Welch was elected in 2006 and began serving as a Judge in January 1, 2007. Judge Welch is one of the six judges serving the Indiana Commercial Court which is a pilot project established by the Indiana Supreme Court. She presides over civil matters and has been assigned to the Civil Division since January of 2009. She presides over complex civil litigation which includes business/commercial litigation, medical malpractice cases, insurance coverage cases, negligence cases, mortgage foreclosure, and commercial/ individual collection cases. In addition, since serving the Civil Division, attorneys have selected Judge Welch to serve at the Special Judge on over approximately 600 cases.

Adjunct Professor Robert H. McKinney School of Law, LCA I Fall 2018

Judge, Marion County Superior Court, Criminal Division, Room 9 2007-2008

Judge Welch presided over approximately 1800 D Felony cases. She was elected in November of 2006 and began her duties in Criminal 9 on January 1, 2007. Judge Welch remained Special Judge on several Dissolution cases.

Master Commissioner, Marion County Superior Courts 2001-2006

Master Commissioner Welch served in Criminal Court 1 and Civil Court 10. Presided over cases involving major felonies and murders, family law cases, and civil cases. Commissioner Welch presided over approximately 80 major felony jury trials, over 100 bench trials of all types, and over 350 felony sentencings.

Attorney, Kiefer & McGoff, Indianapolis 1999-2001

Practiced in areas of criminal law, family law, attorney disciplinary matters and administrative licensing in both state and federal courts.

Deputy Prosecutor, Marion County Prosecutor’s Office 1996- 1999

Major Felony trial attorney, Marion Superior Criminal Court 1. This caseload consisted of A-C Felonies and Murder cases. She conducted approximately 70 jury trials and 30 bench trials.

Deputy Attorney General, Indiana Attorney General’s Office 1995-96

Assigned to the Medical Licensing Division, drafted and filed complaints against physicians, nurses and other healthcare professionals on behalf of the State. She litigated the complaints before the appropriate administrative boards.
Certified Legal Intern, Marion County Prosecutor’s Office, Summer 1994
As a law student, Judge Welch tried approximately 5 major felony jury trials which included sitting second chair on a murder case which was a Life Without Parole charge and a reckless homicide case. She had the opportunity to try approximately 5 bench trials and handle many other motions.

Law Clerk and Certified Legal Intern, Lake County Prosecutor’s Office 1992-1994
Conducted legal research and prepared memoranda for Deputy Prosecutors. As a Certified Legal Intern, Judge Welch tried 5 major felony cases which included a reckless homicide case.

Externship with Magistrate Judge Andrew Rodovich during law school
Assisted Magistrate Judge Rodovich and his permanent clerks in drafting legal memoranda and proposed orders on criminal and civil cases.

Law Clerk, Indiana Civil Rights Commission, 1992
Completed legal research and prepared legal memoranda for the attorneys on various matters.

Boards, Commissions, and Other Membership:

Indianapolis Bar Association:

- Member of 2014 Legislative Committee
- Member of the IBA Professionalism Committee 2013 to 2015
- Member of the 2013 Legislative Committee
- Member of the 2013 Legislative Committee
- Member of the IBA Board of Managers: Vice President 2012
- Chair of the 2012 Legislative Committee
- Chair of the 2011 Legislative Committee
- Member of the IBA Board of Managers: Member at Large 2006-2008;
- Member of the IBA Board of Managers: Vice President 2011 and 2018
- Member of the Diversity Task Force
- Chair of the Pro Bono Standing Committee 2008
- Member of Pro Bono Standing Committee
- Member of the Executive Committee of the Women in the Law Division
- Member of the Bench Bar Conference Committee 2006
- Co-Chairperson of 2007 Bench Bar Conference
- Chairperson of the 2009 Bench Bar Conference
- Member of the Bench Bar Conference Committee 2010
- Indianapolis Bar Foundation Fellow

Indiana State Bar Association:
- Member of the Ethics Committee
Member of the Judicial Committee
Member of the Committee on Juvenile Justice Summit
Member Business Law Section

American Bar Association
National Conference of State Trial Judges: Executive Committee Member 2013 to current, Vice-Chair 2018-2019, Chair 2019-2020
Business Court Representative, Business Law Section 2018 to 2020
JD Record Editor for the National Conference of State Trial Judges 2013 to current
Member of the Commission of the American Jury Project 2013 to current
American Bar Foundation Fellow
Member of the Communications Committee 2013 to current, Chair of the Committee 2014-2015
Co-Chair of Judicial Clerkship Program 2014, 2016, 2017, 2018, and will serve as the Co-Chair again in 2019

National Association of Women Judges
Member of the Ethics Committee

American Judicature Society

American Inn of Court Saga more

Indiana Judges Association:
Member at Large for Marion County District 2009- current

Indiana Judicial Center:
Criminal Instructions Committee
Ethics & Professionalism Committee
Member 2008 to 2015, 2017 to current
Chair of the Committee 2011- 2015, 2017 to current

Marion County Bar Association
Indiana Commercial Court Working Group

**Marion Superior Court Committees:**

Member of Marion Superior Court Executive Committee January 2017 to current. I serve as the Executive Committee liaison to the Marion Superior Juvenile Court and oversee projects to improve the procedures, processes and services of this Court.

Civil Term Chairperson January 2009-2011:
The following were significant accomplishments as the Civil Term Chairperson:
1. Implemented an Electronic Filing System on Mortgage Foreclosure and Civil Collection Courts in the 13 Civil Courts in Marion County

2. Created a partnership between the Marion Superior Courts and the Indianapolis Marion County Public Library to assist self-represented litigants.

3. Successful in obtaining $130,000.00 from the Marion County Indianapolis City County Council for Child Advocates, Inc., who provides Guardian Ad Litem’s in family law cases.
Chair of the Marion Superior Court Ethics Committee 2010-2011
Chair of the Facilities Committee 2008
Supervising Judge of the Marion County Law Library 2007-2008
Legislative Committee Co-Chair 2010 Legislative Session
Member of Family Court Project Committee 2006-current
Member of Court Technology Committee
Member of Case Management Task
Chair of Budget Committee

**Recognitions:**

2011 ABOTA, American Board of Trial Advocates, Indiana Trial Judge of the Year
2012 Indiana Lawyer Leadership in Law: Distinguished Barrister

Over the last seventeen years, I have had the opportunity to preside over thousands of cases, which include serving as a special judge in over 600 cases. In 2012, the IBA Judicial Excellence Standing Committee conducted Judicial Surveys of the Marion Superior Court incumbent judges and other candidates which would be on the ballot in November of 2012. This evaluation was completed by attorneys who have appeared in front of me. Judge Welch was recommended by 95.6% of the four hundred plus attorneys who evaluated her performance as a judge. Many attorneys commented as follows:

“What I like about Judge Welch is her demeanor towards attorneys and pro se litigants alike. She is thoughtful in her consideration for the evidence presented.

“One of the best judges I have experience with in family law matters. Having practiced in 16 counties, that says a great deal about Judge Welch.”

“Excellent judge. Prepared, fair, neutral, moves cases along, and respects all counsel and parties appearing before her. Highly recommend.”

**Pro Bono and Community Service Work:**

Judge Welch has previously served on the Indianapolis Bar Association Pro Bono Standing Committee and was the Chair of the Committee in 2008.

In her community, Judge Welch has served in the following organizations:

1) Catholic Charities Spirit of Service Development Committee, Board Member 2012- 2014;
2) Dynamo FC Soccer League, non-profit travel soccer club, Board Member 2011- May 2016 and President of Board 2013 – 2015;
3) Big Brothers Big Sisters of Central Indiana, Board Member 2007-2010, Member of Quality Assurance Task Force 2013-Present;
4) St. Thomas Aquinas School Commission, Board Member 2008-2010;
5) Reach for Youth Volunteer for Teen Court;
6) Volunteer Boulevard Food Pantry;
7) Cathedral High School Men’s Soccer Upper Ninety Club, President 2017 to current. This is the parent volunteer organization which supports the Cathedral High School Men’s Soccer Team;

8) We the People Volunteer at Cathedral High School since 2014-Present;


**Teaching at Legal Seminars:**

During her career as Judge on the Marion Superior Court, Judge Welch has been a frequent speaker at seminars at the Marion County Bar Association, Indianapolis Bar Association, Indiana State Bar Association, American Bar Association, and Indiana Judicial Conferences. The details of Judge Welch’s teaching experience are listed on Exhibit A, which is attached.

**Judicial Opinions:**

During Judge Welch’s tenure on the Marion Superior Court as a Commissioner and Judge, she has issued approximately 500 substantive legal opinions on criminal, family and civil law matters. Many of the opinions have been reviewed by the Indiana Court of Appeals and the Indiana Supreme Court. Attached is one opinion on a case which is no longer pending as Judge Welch cannot provide writing samples on pending cases as it is prohibited by the Indiana Judicial Code of Conduct.

**Articles and Publications:**

Judge Welch has written or drafted the following articles for legal publications:

1) “Judicial Clerkships for Recently Admitted Attorneys.” Indiana Court Times Mar/Apr 2014;

2) “2014 Judicial Clerkship Program,” American Bar Association, JD Record Spring Issue 2014- (Co-authored with Judge Toni Clarke, Upper Marlboro, Maryland);

3) “Jurors Questions of Witnesses in Civil and Criminal Jury Trials: Do they improve the administration of justice?” American Bar Association, JD Record Winter Issue 2014. (Co-authored this article with retired Judge William J. Caprathe, Bay City, MI. In addition, Judge James Holderman, United States District Court Judge, Northern District of Illinois assisted by providing quotes to be added to this article.);

4) February 24, 2014: letter to Chief Justice Brent Dickson as the Chair of the Ethics and Professionalism Committee for the State of Indiana regarding a proposal to amend Rule 2.11 of the Code of Judicial Conduct for the Indiana Supreme Court’s Rule Committee’s review. (I along with members of the Indiana Ethics and Professionalism Committee drafted this proposed rule.);

5) May 2010: Amended Proposal for Implementation of HB1154 drafted by Judges Oakes, Carlisle, and Welch and submitted to Judges Moberly and Shaheed. HB1154 involves the conversion of commissioners to magistrates in Marion County;

6) Article Entitled “Award Given to Judge Herbert Dixon, Jr., at 2014 Annual Meeting, American Bar Association, JD Record, Fall Issue 2014;
7) “Judges Speak at TIPS Meeting in Philadelphia,” American Bar Association, JD Record, Summer Issue 2015;
8) “Why you should participate as a Judge? And how you can help?” 2016 Judicial Clerkship Program in San Diego, California, American Bar Association, JD Record Fall 2015;
9) “What do Members of the Judicial Division Value Most in their Membership? Chicago, IL, American Bar Association, JD Record Fall 2015 (Co-authored with Dr. Peter Koelling);
10) The 2016 Judicial Clerkship Program, American Bar Association, JD Record Spring Issue 2016;
11) “Kudos for a Project Well Done: Implicit Bias Training for Judges,” American Bar Association, JD Record Fall 2016;
12) “Another Successful Judicial Clerkship Program,” American Bar Association, JD Record Spring Issue 2017;
13) Judge Herbert Dixon Appointed to Chair ABA Standing Committee on the American Judicial System, American Bar Association, JD Record Fall 2017.

Encouraging Diversity in the Legal Profession:

Judge Welch has been committed to working toward a diverse judiciary since she joined the Marion Superior Court as a Master Commissioner in 2001. She has served as a member of the Indianapolis Bar Association Diversity Task Force and Committee on Juvenile Justice Summit through the Indiana State Bar Association. She has also served as Co-Chair of the American Bar Association Diversity Judicial Clerkship Program (“JCP”) in 2014, 2016, 2017, and 2018. All of these programs promote making the practice of law more diverse.

In particular, the JCP’s mission is to provide diverse law students education on the benefits of serving as a judicial law clerk in state and federal court. In addition, students who participate in this program are introduced to judges from federal and state benches in the United States who serve in trial and appellate courts. It is a three-day program where law students have the opportunity to explore a legal issue, conduct research using LexisNexis, prepare a legal memorandum for the judges, and orally explain the reason they suggested the judge rule a particular way. The purpose of the JCP is to encourage diverse law students to consider serving as law clerks after graduation from law school with the long-term goal being to increase the number of diverse judges in federal and state courts, and in administrative agencies. The JCP is a joint effort of the American Bar Association Judicial Division and the American Bar Association Council for Diversity in the Educational Pipeline.

Judge Welch has volunteered for the Indiana Conference for Legal Education Opportunity (ICLEO). This program assists minority, educationally disadvantaged college graduates, and low-income students pursue law degrees. During the summer of 2018, a law student from the Indiana University Robert H. McKinney School of Law will participate in a paid clerkship with Judge Welch.

Indiana Commercial Court Pilot Project:

In 2013, Judge Craig Bobay of the Allen Superior Court and Judge Welch assembled an informal committee of business attorneys to discuss the creation of Commercial/Business Courts in the State of Indiana. At this time, 23 states in the United States had Commercial/Business Courts. In June
of 2015, the Indiana Supreme Court created the Indiana Commercial Court Working Group, and Judge Welch was selected to be a member of this committee. This Committee prepared a proposal and submitted it to the Indiana Supreme Court. On June 1, 2016, the Indiana Supreme Court created the Indiana Commercial Court Pilot Project. Judge Welch was selected to serve as one of six judges in the State of Indiana. The purpose for the Commercial Court Pilot Project is: 1) to provide a court forum to allow business and commercial disputes to be resolved with expertise, technology, and efficiency; 2) to enhance the accuracy, consistency, and predictability of decisions in business and commercial cases; 3) to enhance economic development in Indiana by furthering the efficient, predictable resolution of business and commercial law disputes; and 4) to employ and encourage electronic information technologies, such as e-filing, e-discovery, and alternative dispute resolution. The pilot project is working well and I have handled over 165 commercial disputes.

**Mentoring Law Students:**

Since 2009, Judge Welch has mentored law students through her participation in the Robert H. McKinney School of Law externship program by hosting law students as externs during the school year and the summer. She has had the opportunity to mentor approximately 70 law students through externships and has provided the students opportunities to watch court proceedings, complete legal research and draft proposed court orders. During the externship, Judge Welch works with the law students to teach them effective legal writing from the viewpoint of a court and also strives to teach them good oral advocacy and what is effective legal writing from the many attorneys who practice in Marion Superior Court, Civil One.

**Professional Admissions:**

Indiana Supreme Court, October 31, 1994

United States District Court, Southern District of Indiana, October 31, 1994

United States Court of Appeals, Seventh Circuit, April 26, 1999
Biography Justice Thomson

Justice Thomson was sworn in on February 1, 2019 as a Justice on the New Mexico Supreme Court. Previously, Justice Thomson served as a State Trial Judge in the First Judicial District. His trial court docket exceeded 1000 assigned cases and was mostly comprised of civil cases including complex litigation and product liability cases. Justice Thomson has authored opinions on New Mexico’s Unfair Trade Practice Act and a number of criminal law subjects including double jeopardy.

Justice Thomson was born and raised in Santa Fe, New Mexico. He has an undergraduate degree in Economics and Government from Wesleyan University, Middletown Connecticut. Before law school he worked for U.S. Senator Jeff Bingaman. He graduated from the University of Denver College of Law in 1998. Justice Thomson was term law clerk for U.S. District Justice Bruce Black, District of New Mexico. After his clerkship he joined the New Mexico Attorney General’s Office as a litigation attorney eventually serving as a Deputy Attorney General. Prior to taking the bench in 2015 Justice Thomson was a sole practitioner.

The New Mexico Supreme Court has appointed Justice Thomson to Chair the Uniform Jury Instruction Committee, Committee on Performance Measures, and the Guardianship Reform Working Group. Justice Thomson graduated from the National Judicial College, and teaches legal education courses on a number of topics including trial practice, use of special masters, judicial ethics, evidence, and administrative appeals. Justice Thomson is on the Executive Committee of the American Bar Association Judicial Division Appellate Judges Conference and a former member of the National Conference of State Trial Justices.