

## MEMORANDUM

03/23/04

TO: Judge McKeown

FROM: Benjamin Au

RE: Special Masters and ex parte communication

**Revised Rule 52(b)(2)(B), effective December 1, 2003, requires designation of the master's duties and authority at the time of the master's appointment, including "the circumstances—if any—in which the master may communicate ex parte with the court or a party." Fed. R. Civ. P. 52. According to one observer, ex parte communication between the master and the court occur frequently in practice, varying in degree from so-called "functional" ex parte communication involving substantive matters to administrative or casual ex parte interactions, such as discussion of scheduling or requests for information. Carrie Menkel-Medow, Ex Parte Talks With Neutrals: ADR Hazards, 12 Alternatives to High Cost Litig. 109, 117 (1994). These communications raise ethical concerns because such ex parte communication may undermine the appearance of objectivity and fairness. The revised Rule 53 attempts to mitigate these concerns by providing both the parties and the master with an early understanding of the master's obligations.**

**Ex parte communication with the court should ordinarily be prohibited in order to assure that the parties know "where authority is lodged at each step of the proceedings." Fed. R. Civ. P. 53 advisory committee's notes. However, there is often a practical necessity for masters and judges to have ex parte communication, such as logistical planning or sharing technical expertise. As a measure of when ex parte communication between the master and the court is appropriate, commentator Margaret Farrell proposes that we look to the functions and roles of the master:**

**It can be argued that masters can not carry out their duties effectively if they are completely prohibited from discussing scheduling, strategies and procedures with the judge outside of the presence of the parties. Yet, in light of ethical constraints judges may feel uncomfortable meeting with their masters without the parties present. The appropriateness of such communication can turn on the characterization of the master as a judicial agent or as an outside adjunct. If viewed an agent of the court, it is proper for the judge, as principal, to discuss with the agent the performance of his/her duties. If the master is viewed as an third party adjunct, it is improper for the judge as ultimate decision maker to receive undisclosed evidence and information from the master that could influence his or her decisions or which might reasonably be thought to do so. However, it may again be more useful to consider the functions and roles of the master. Thus, here the purpose of the appointment is to obtain the master's recommended findings of fact, ex parte communication would seem inappropriate to discuss the performance of the master's duties since the judge will review those findings and the record upon which they are based to determine whether they are clearly erroneous. Information outside the record could prejudice that review. Similarly where the master's role is that of mediator and facilitator, information going to the substance of proposed settlements and the facts of the case should not be communicated to the judge ex parte. But, a master appointed as an expert to advise the court might appropriately talk with the judge privately in order to provide the one-on-one education some judges want. Masters who bring their expertise in quantitative analysis to bear on the presentation of non-scientific and technical data would seem to serve a similar role, and private discussions with the master regarding his or her performance do not seem to prejudice the judge's independence or the parties ability to present their case.**

**Margaret G. Farrell, The Role of Special Masters in Federal Litigation, A.L.I. - A.B.A. Course of Study: Civil Practice and Litigation Techniques in the Federal Courts, 2002.**

**As a result of these practical considerations, Rule 53 does not bar ex parte communication outright, but rather leaves such communication within the discretion of the court. This nuance is arguably muted in the proposed draft of the Model Code of Judicial Conduct. Ambiguity in what is allowed might have significant practical results. For example, in Edgar v. K.L., 93 F.3d 256, (7th Cir. 1996), the Seventh Circuit granted a writ disqualifying a district court judge who meet ex parte with a panel of mental health experts appointed with the parties' consent to investigate public mental institutions. Although the judge did not appoint the experts under Rule 53, the experts served as expert investigators, a role commonly performed by special masters. To be clear, this result might not occur today, as the latest iteration of the Canon dealing with ex parte communication allows for more than its predecessor. Nevertheless, Edgar seems to be a reminder of the importance of considering aligning the Model Code with the rules of procedure. Importantly, state rules regarding special masters vary. Pairing ethical rules to match procedural rules might clarify ethical duties, to the extent the procedural rules describe the obligations of special masters and appointing courts. Compare Cal. Code Civ. P. § 639 (2004) (describing circumstances in which judges may appoint referees and referees' duties) with N.Y. C.L.S. Unif. Rules, Trial Cts. § 202.14 (2004) (granting authorization to appoint special masters without specifying duties or circumstances in which appointment is appropriate).**

**The Model Code should reflect Rule 53's balance between the general impropriety of ex parte communication and the context-specific situations that necessitate ex parte communication between judges and special masters. It may be worth exploring, for example, whether communication with special masters is adequately addressed by the provisions allowing a judge to "obtain**

**the advice of a disinterested expert on the law” or “consider any ex parte communications when expressly authorized by law to do so.” The aspiration should be for the Model Rules to indicate that although ex parte communication is the exception rather than the rule, there may be circumstances beyond incidental communications where ex parte communications are appropriate and do not raise the appearance of impropriety. Thus, language that imposes an outright ban on a judge’s ex parte communications would be too restrictive considering the intentional permissiveness of Rule 53.**