

Broader Use of Special Masters: A Proposal

David B. Saxe and Danielle C. Lesser, *New York Law Journal* – August 4, 2017

Under Federal Rule of Civil Procedure 53, federal judges have the authority to appoint a special master, without the parties' consent, to be paid by the parties, to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." See FRCP Rule 53(a)(1)(C). The rule directs that the appointing court "consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Rule 53(a)(3).

We believe that such a rule ought to be adopted in our state civil practice, especially in matters involving complex commercial litigation. Commercial litigators have called for New York state courts handling commercial cases to be authorized to use special masters in the manner of the federal courts. In 2012, the Chief Judge's Task Force on Commercial Litigation in the 21st Century recommended that we "[c]reate a panel of 'Special Masters' drawn from our State's seasoned commercial litigators who are no longer in active practice and are available for appointment by the court—upon the consent, *and at the expense*, of the parties" (emphasis added). The following year, at a panel discussion held by the Commercial and Federal Litigation Section of the New York State Bar Association in January 2013, the focus was on how to implement the recommendations of the Task Force, and it was agreed that "the use of special masters, which are paid by the parties, to handle pretrial matters like discovery disputes is key to streamlining [commercial] litigation." Brendan Pierson, "Panel Suggest Ways to Execute Reforms to Commercial Division," N.Y.L.J., Jan. 24, 2013 at 1, col. 3.

CPLR 3104 authorizes judges to appoint referees or judicial hearing officers to supervise disclosure; it allows private attorneys to serve as referees to supervise disclosure only where the parties so stipulate. CPLR 3104(b); see *Ploski v. Riverwood Owners*, 255 A.D.2d 24 (2d Dept. 1999). In areas other than the supervision of disclosure, the appointment of private attorneys as special masters (without the parties' consent) is only permitted in special programs where the Chief Administrator has specifically approved of their use, and that regulatory authorization only provides for uncompensated service. See Uniform Rules of the Trial Court, 22 NYCRR §202.14.

Such a special master pilot program was created by the Chief Administrative Judge for the Commercial Division in August 2014, for a limited 18-month period. It authorized the referral of complex discovery issues to uncompensated special masters on the consent of the parties. See Lisa Gerson, "Summer of Rule Changes in the Commercial Division," N.Y.L.J., Aug. 21, 2014, at 4, col. 1. The Office of Court Administration was, however, slow to solicit pro bono special masters. See Amaris Elliott-Engel, "Court Administrators Seek Special Masters for Commercial Division," N.Y.L.J., Dec. 11, 2014 at 5, col. 1.

New York state courts need statutory or regulatory authorization comparable to that of FRCP Rule 53, allowing them to appoint special masters without the consent of the parties, to be compensated by the parties, in appropriate cases. Such special masters could serve various useful pretrial and post-trial functions to streamline the litigation process, functions that otherwise would fall within the orbit of the overloaded trial judge or court staff.

There are certainly various types of litigation in New York state courts where the assigned judges get bogged down for weeks, months, and even years by tasks that could be handled expeditiously through

such appointments. The functions served by special masters in federal court span an extraordinarily wide variety of situations, making such appointments essential to streamlining our over-burdened judicial system. See, e.g., *Moore v. Leflore County Bd. of Election Commrs.*, 361 F. Supp. 603 (N.D. Miss. 1972); *Costello v. Wainwright*, 387 F. Supp. 324 (M.D. Fla. 1973); *Bynum v. Baggett Transp. Co.*, 228 F.2d 566 (5th Cir. 1956). Lawyers representing parties in complex matters are well compensated for their work and ample funds are earmarked to pay for experts hired to put the best light on their client's position. The fees of a special master, a practitioner who has the confidence of the court, should be no less critical.

The enormous benefit of having a private attorney serve as special master is illustrated by the Napoli Bern dissolution action, where the feuding equity partners were persuaded by Justice Eileen Bransten of the New York County Commercial Division to engage an experienced attorney, Mark Zauderer, to resolve the issues of their highly contentious action. The parties agreed that, as referee pursuant to CPLR 4301 and 4317, "with all the powers of the court," he would handle all disputes. This form of reference serves to limit challenges to his decisions to appeals to the Appellate Division. See Ben Bedell, *"Napoli Bern Business Divorce Will Create Two Separate Firms,"* N.Y.L.J. Aug. 17, 2015 at 1, col. 3. In his first year, it was reported that Zauderer had "written close to 20 court decisions" (see Christine Simmons, *"New York Firm's Demise Means Many Tough Calls for Referee,"* N.Y.L.J. July 12, 2015 at 1, col. 3).

While this is clearly an extraordinary use of a private attorney at an expense far beyond what litigants would normally spend for a special master to resolve pretrial or posttrial issues, Zauderer's assignment highlights the benefits of the use of a private attorney in this manner. If every issue he addressed had been submitted to the court for determination, each issue would have required a formal motion, addressed through the normal, lengthy, decision process. The assigned tasks that were part of his mandate allowed him to address these issues efficiently.

Moreover, drawing from a diverse group of experienced practitioners will enhance the efficacy of a special master program and will encourage broad participation in these assignments. Recognition from the judiciary in this way will improve the visibility of talented and experienced practitioners and will highlight to firms, clients, and the bar that the judiciary supports diversity through these appointments. In our view, there is a paucity of women and minorities appointed to serve as adjuncts to the judiciary, necessitating programs like the 2015 series sponsored by the Second Circuit Judicial Conference and New York Federal and State Judicial Council entitled, "Securing Appointments As a Fiduciary, Monitor, Master or Other Judicial Adjuncts."

It is difficult to understand the downside of allowing for the appointment of special masters to move along complex litigation, particularly if safeguards like those in FRCP Rule 53 were included to protect against unreasonable expense. See Rule 53(a)(3). Not only does the appointing court have a continuing responsibility to protect against unreasonable expense and to ensure that the special master is properly performing the job, but the appellate court always has the authority to reverse an appointment if it is improper or is performed improperly.

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