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Special Masters Can Help Overloaded Courts Amid COVID-19

CARLOS A. GONZÁLEZ

THE ONGOING COVID-19 pandemic has resulted in a veritable shutdown of the entire country. Federal and state courts are not exempt. In response, they have significantly curtailed their activities. Jury trials have been suspended, criminal proceedings delayed and rulings on discovery and pre-trial motions in many civil cases postponed. All of this adds up to court systems under great stress.

When the courts emerge from this current crisis, judicial resources will be at a premium. Having priority on the docket, criminal matters will take up much of a court's time, leaving civil cases to accumulate and causing delays to multiply. Courts and lawyers must adopt creative approaches to ensure civil dockets do not get neglected and parties secure timely access to justice. Therefore, it is especially worth noting that special masters are well situated to assist courts and litigants as they confront these challenges.

Special masters serve a variety of roles as judicial adjuncts, and they do so without burdening court resources. Appointed in routine and multiparty and multidistrict litigation alike, masters can assist with case management, handle pretrial issues and resolve problems before they become full-blown disputes. Judges regularly empower

special masters to issue reports and recommendations on pending motions, to prepare evidence for submission to the court and to facilitate settlements. Courts also appoint masters in criminal cases to consider *Brady* obligations and privilege issues that sometimes arise in the context of search warrants. Masters also are called upon to monitor the enforcement of court orders. Importantly, the appointment of a master can save parties substantial attorneys' fees by leading to quicker, and often informal, resolution of disputes as they arise.

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Cost concerns and the perception of an intermediary between the judge and the parties sometimes contribute to the unease litigants and lawyers may have about the appointment of a special master. Careful planning and clear objectives in selecting a master, as well as the experience of the special master him or herself, usually allays the early disquiet. Once all involved understand that the master's responsibility is to aid in case management in such a way as to save costs and increase the efficiency with which litigation disputes are identified and resolved, concerns about the appointment often ease.

In January 2019, the American Bar Association adopted "Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation." The guidelines promote the effective administration of justice by encouraging courts to use special masters in appropriate situations. Laid out in nine specific recommendations, the guidelines articulate the circumstances when courts should consider using masters, the factors that should go into selecting an appropriate judicial

adjunct and how states and courts can develop educational programs to increase the number and diversity of potential masters. Ultimately, under Rule 53 of the Federal Rules of Civil Procedure and most corresponding state rules, the decision to appoint a special master rests exclusively with the court, although parties are entitled to notice and an opportunity to be heard in most instances.

Court orders appointing a special master must include a clear statement of the master's responsibilities and duties; the circumstances, if any, in which the master may communicate *ex parte* with the court or parties; the materials to be maintained by the master; and the terms of the master's compensation. How these requirements are structured depends on the nature of the case in which the master is to be appointed. For example, in determining the master's compensation, the court can set an hourly rate, require that the master work for a flat fee or impose a hybrid of the two. The court is required under the Federal Rules of Civil Procedure to allocate the master's fee among the parties after consideration of the parties' means, the nature and amount of the controversy and the extent to which one party's conduct has led to the appointment of the master.

In conducting their duties, special masters in federal courts are held to the same code of conduct as judges. In fact, prior to any federal appointment, special masters are required to certify by affidavit that they are not aware of any grounds that would disqualify them under the same rules that apply to federal judicial officers generally. Courts are free to impose additional ethical requirements tailored to the needs of a specific case. It is worth noting that as part of its ongoing review of the role of special masters, the ABA is now studying whether it should promulgate dedicated rules of professional conduct for masters.

As judicial adjuncts acting at the direction of the court, special masters are well positioned to move quickly and help courts, lawyers and parties work through the coming wave of litigation. The breadth of duties that can be assigned to a special master are significant, and masters can lessen the burden on already overtaxed judges and court staffs. 

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