

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

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April 29, 2020, 4:00 AM

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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.

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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.

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