

# MEMORANDUM

TO: The Honorable Loretta A. Preska  
FROM: Zachary W. Antilety  
CC: Joshua R. Rosenthal  
DATE: February 5, 2014  
RE: Special Masters and Other Judicial Adjuncts

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Under Federal Rule of Civil Procedure 53 (“Rule 53”), a court can appoint a master to “perform certain duties consented to by the parties...[and]...hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury,” if appointment is warranted. Masters and other judicial adjuncts lessen the burdens on judges and judicial staff created by heavy caseloads and diminishing budgets by performing a variety of functions. They are used most commonly in multi-district litigation cases, class actions, and other complex or multi-party litigations. The Academy of Court-Appointed Masters (ACAM), an independent organization of experienced masters and judicial adjuncts, has compiled a list with descriptions of the most common roles judicial adjuncts serve, which are as follows:

## 1. Settlement Master

- a. Settlement masters are used to reach settlements in many types of litigations. These neutral third-parties are granted quasi-judicial authority to act as a buffer between the court and the parties. They are especially useful in class actions and complex litigations involving numerous parties, or when disputes have matured and individual settlements become repetitive and time-consuming. *See, e.g., In re AH Robins Co.*, 88 B.R. 742 (E.D. Va. 1988) (special master specializing in mass torts appointed to assist in estimating the extent of A.H. Robins’s liability for damages caused by defective Dalkon Shield intrauterine device); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 752-53 (E.D.N.Y. 1984) (special master appointed to assist parties in settling a class action brought by Vietnam War veterans and members of their families against seven chemical companies for injuries alleged to have been caused by the veterans’ exposure to Agent Orange and other phenoxy herbicides during Vietnam War).

## 2. Discovery Master

- a. Discovery masters are used regularly to manage discovery plans, issue orders resolving discovery disputes, make recommendations to the judge, and monitor ongoing discovery. The need for speedy and frequent adjudication of privilege claims is a common basis for this type of appointment. Discovery masters

sometimes attend depositions that are potentially contentious. Because their authority is limited to discovery, discovery masters are considered less judicial and more managerial in nature. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (discovery master appointed to supervise discovery in light of “the magnitude of the case, the complexity of the anticipated discovery problems, and the sheer volume of documents to be reviewed, many of which are subject to claims of privilege.”); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 448 (S.D.N.Y. 1973) (master appointed to supervise discovery in complex securities action because parties were unable to “conduct discovery proceedings by themselves...without constant disagreement, interruption, delay and consequent court intervention”).

- b. Discovery masters are used often in cases involving discovery of electronically stored information (“ESI”). ESI issues include determinations as to what information is readily accessible or recoverable, what is an appropriate file format for production, and whether metadata must be disclosed. Discovery masters in these cases generally have experience with both discovery procedures and computer software. *See, e.g., In re World Trade Center Disaster Site Litig.*, No. 21 MC 100, 2008 WL 793578, at \*1 (S.D.N.Y. Mar. 24, 2008) (special masters appointed to assist in creating a database for managing the claims and discovery materials of approximately 10,000 plaintiffs suffering over 300 different diseases as a result of their participation in the World Trade Center site cleanup; on recommendation by the special masters, the court appointed a litigation technical support firm as technical advisor to build the database); *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, No. 00 Civ. 1898 (S.D.N.Y. June 18, 2004) (discovery master appointed to supervise entire discovery process and, upon referral by the court, to resolve all disputes that may arise, including “electronic discovery disputes, questions of privilege, work product, relevancy, scope, and burden.”).

### 3. Coordinating Master

- a. Coordinating masters coordinate activities among litigants. For example, coordinating masters meet and confer with lawyers to develop proposed orders to submit to the judge; chair liaison committees of lawyers; help administer claims in class action settlements; and coordinate events in cases that are filed in both state and federal courts to provide uniform and efficient procedures.

### 4. Trial Hearing Master

- a. Under Rule 53, parties may also agree to have special masters hold trial proceedings and make or recommend findings of fact subject to review by the court. Fed R. Civ. P. 53(a)(1)(B). Trial masters are sometimes used to compile and interpret technical or complex evidence or voluminous data. In patent suits,

for example, an experienced patent attorney may be asked to conduct a *Markman* hearing and prepare findings and recommendations.

#### 5. Expert Advisor

- a. Expert advisors serve as judicial tutors, providing guidance on specialized subjects. For instance, the need for expert advisors arises in the context of patent and trade secret cases because they provide technical expertise and discretion. Trial courts sometimes conduct trials with support from an advisor. *See, e.g., Rodriguez v. Pataki*, No. 02 Civ. 0618, 2002 U.S. Dist. LEXIS 11782 (S.D.N.Y. May 13, 2002) (special master, former United States District Judge Frederick B. Lacey, appointed to prepare a proposed congressional redistricting plan for New York State; Lacey was tasked with the state legislature's duties because court anticipated that the legislature would fail to complete the redistricting by the start of the candidate petitioning period; Lacey had previously been appointed special master for New York in 1992 to perform the same duty); *Hart v. Community Sch. Bd.*, 383 F. Supp. 699, 764-69 (E.D.N.Y. 1974) (court appointed law professor specializing in urban renewal as special master to formulate a desegregation plan for a Brooklyn junior high school); *Costello v. Wainwright*, 387 F. Supp. 324, 325 (M.D. Fla. 1973) (special master appointed to provide specialized medical knowledge about prison overpopulation).

#### 6. Monitor

- a. Monitors are appointed after a case is resolved to ensure that the court's order or settlement agreement is implemented properly and complied with going forward. In civil cases, monitors generally ensure compliance with structural injunctions. For example, they oversee employment or other organizational change, or orders requiring reform in government agencies. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986) (affirming district court's sanctioning of union for failing to comply with monitor tasked with overseeing union's compliance with court order to improve the racial diversity of its membership); *United States v. Apple, Inc.*, 12 Civ. 2826 (S.D.N.Y. Aug. 27, 2013) (monitor appointed for two years to oversee Apple's compliance with antitrust laws after the company found liable for conspiring to raise e-book pricing; monitor is Michael R. Bromwich, a litigation partner at Goodwin Proctor, who employed <sup>Pataki</sup> via his consulting venture); *SEC v. WorldCom, Inc.*, No. 02 Civ. 4963 (S.D.N.Y. 2002) (court appointed a corporate monitor for WorldCom to prevent the destruction of evidence and to prevent the payment of excessive executive compensation; corporate monitor later given oversight and approval authority over payments made to WorldCom's lenders, advisors, and attorneys). Critics argue court-appointed monitors are unnecessary financial and structural burdens on the institutions they monitor, and that monitorships merely provide financial windfalls for attorneys with close judicial contacts. Monitors are not

appointed under any procedural rule; rather, their appointments are agreed on as part of the negotiated settlement between the parties.

7. Claims Administrator

- a. Claims administrators are used to administer the settlement of class action claims or to pay out money damages to a class of recipients after trial. Claims administrators can help select, work with, and monitor the claims administration organization that administers and manages the details of the settlement. *See, e.g., United States v. Pokerstars*, 11 Civ. 2564 (S.D.N.Y. Mar. 14, 2012) (Garden City Group, Inc., a settlement and bankruptcy administration company, was selected to serve as Claims Administrator in overseeing the process of compensating eligible victims of fraud committed by Full Tilt Poker); *In re Bernard L. Madoff*, Adv. Pro. No. 08-01789 (S.D.N.Y. Feb. 13, 2013) (claims administrator appointed to administer the process of compensating the victims of the Madoff fraud from a pool of forfeitures).

8. Auditor/Accountant

- a. Auditors/accountants may be appointed to provide an accounting of complex financial information. For example, they may be asked to provide advice regarding a plaintiff's claims of damage or a defendant's ability to pay.

9. Receiver

- a. Receivers hold and preserve property until a dispute is resolved. A receiver typically acts as a representative and fiduciary for the court and all interested parties, including creditors of the receivership, the owner of the property, and all others claiming an interest in the property. Receivers can be given extensive responsibilities, including running parts of governments and businesses. In the bankruptcy context, parties may consider the appointment of a receiver prior to filing as receivers provide great flexibility in comparison to the procedures established under bankruptcy law. One advantage receivers have over bankruptcy trustees is that receivers may only be given control over a limited set of defined assets, as opposed to the trustee's control over the entire estate. Further, a petitioning plaintiff in a receivership proceeding may propose their own choice for receiver (rather than deferring judgment to a board of bankruptcy trustees), and the petitioning plaintiff may also draft the appointment order to provide the receiver with defined powers and discretion. *See, e.g., SEC v. Nicholson*, No. 09 CV 1748 (S.D.N.Y. Mar. 3, 2009) (in case alleging fraud by an investment management firm, receiver, Lee S. Richards, III, attorney specializing in white collar criminal defense, securities enforcement defense, and commercial litigation, given broad powers to determine the nature, location, and value of property interests of defendants, and then to manage the properties pending further court orders).

## 10. Criminal Case Master

- a. Criminal case masters may be asked to assist the prosecution and defense in negotiating plea bargains while preserving and protecting the interest of the public and the constitutional rights of the defendant. They may also help in administering or monitoring non-jail sentencing terms and conditions. They may accompany officers conducting searches for documents in the possession of certain professionals, such as attorneys or clergy. Criminal case masters review sensitive documents and secure them until a court determines if the items are privileged.

## 11. Ethics Master

- a. Ethics masters review evidence in connection with ethics complaints against attorneys. They make recommendations to ethics boards regarding disciplinary action against the subject attorney. Ethics masters sometimes supplement the work done by an ethics board.

A court can appoint a mediator as a form of alternative dispute resolution (“ADR”) under Local Civil Rule 83.9. A mediator is a neutral third-party who has been trained to facilitate confidential settlement discussions. The mediator meets with the parties and counsel sometimes collectively and sometimes individually. In January 2011, the Southern District of New York began automatically referring all employment discrimination cases, excluding cases arising under the Fair Labor Standards Act, for mediation under the court’s ADR program. The presiding magistrate does, however, have the authority to exempt a case from automatic referral. Mediators assist the parties to negotiate settlements by defining issues, evaluating the strengths and weaknesses of each party’s positions, and identifying agreements and disagreements.

A court may also appoint conservators or guardians where appropriate. Conservators or guardians are typically appointed to manage the financial affairs and/or daily life of another due to the lack of physical or mental health, including old age. Conservators are usually distinguished from guardians by only handling the financial affairs of the conservatee. The concept of conservatorship has also been used in reference to the management of Freddie Mac and Fannie Mae by the Federal Housing Finance Agency, rather than outright nationalization. Conservatorship could potentially be applicable to private corporations as well. A conservatorship is considered a less extreme alternative to a receivership because conservatorships are designed to end as soon as someone is capable to take over from the conservator.

Pursuant to Federal Rule of Criminal Procedure 42(a)(2), in certain circumstances a court can appoint a special prosecutor to investigate and prosecute certain criminal contempt proceedings. The rule also allows a court to appoint an attorney outside of the government if the interest of justice requires it or if the government declines an appointment request. *See, e.g.,* Order Appointing Special Prosecutor, *United States v. Stevens*, No. 08-231 (D.D.C. Apr. 7, 2009) (court appointed Henry F. Schuelke III, a Washington litigator specializing in internal

investigations and white collar criminal defense, to investigate six Justice Department lawyers involved in the 2008 prosecution of Senator Ted Stevens; lawyer defendants were accused of withholding information and materials from Stevens's defense team).

In a Chapter 11 bankruptcy case where a trustee has not been appointed, a court may appoint a bankruptcy examiner pursuant to 11 U.S.C. § 1104. The appointment must be made at the request of a party in interest or the United States trustee. Bankruptcy examiners are appointed when the debtor is alleged of fraud, dishonesty, incompetence, misconduct, or mismanagement. An examiner conducts an investigation of the debtor and presents his or her findings to the court. Bankruptcy judges and potential plaintiffs view examiners' reports as beneficial because the reports lessen the court's workload and provide a roadmap for later litigation. The scope of the examiner's duties and powers often varies and is defined by court order. *See, e.g., In re Dynegy Holdings, LLC*, No. 11-38111 (S.D.N.Y. Mar. 9, 2012) (examiner, a prominent bankruptcy attorney, tasked with completing an independent investigation of certain issues relating to the debtors' conduct in the months leading up to the bankruptcy filing, and to file a report of his findings within 60 days; examiner also asked to serve as a court-appointed mediator to attempt to forge Chapter 11 plan); *In re Residential Capital, LLC*, No. 12-12020 (S.D.N.Y. June 20, 2012) (examiner, former Bankruptcy Judge Arthur J. Gonzalez, tasked with performing an exceptionally broad investigation concerning the entire course of conduct and all material intercompany dealings involving the debtors and three financial institutions over a period of almost a decade); *In re Lehman Brothers Holdings Inc.*, No. 08-13555 (S.D.N.Y. Mar. 11, 2010) (examiner, a white collar and civil litigator, tasked with investigating the collapse of Lehman Brothers; questions included why debtors failed, whether colorable causes of action arose from debtors' failure, whether there were colorable claims for preferences or voidable transfers, and whether colorable claims arose out of the court-approved sale of a portion of debtors' property to Barclays PLC during the week following debtors' bankruptcy filing). Bankruptcy examiners are usually bankruptcy lawyers, however, such a background is not a requirement. Examiners sometimes specialize in complex civil and white collar criminal litigation. Examiners often investigate millions of documents dating back a number of years, making it necessary for examiners to have significant support staff. Examiners sometimes retain financial consulting firms to assist their investigations. Critics argue bankruptcy examiners add significant, unjustified costs to litigation, which are borne by the party seeking bankruptcy protection.

This memo summarizes my research and describes the types of special masters and judicial adjuncts that are typically appointed in United States District Court cases. If there is any more research you would like me to conduct, or if you would like me to follow up and provide any sources cited in this memo, please ask and I am happy to do so.