

# Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation

BY SHIRA A. SCHEINDLIN AND JONATHAN M. REDGRAVE

The modern practice and use of special masters in federal courts gradually evolved from a strict and limited role for trial assistance prescribed by Federal Rule of Civil Procedure 53 to a more expanded view, with duties and responsibilities of masters extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice.

The result is a new rule, effective as of December 1, 2003, that differs markedly from its predecessor and sets forth precise guidelines for the appointment of special masters in the modern context. In general, the changes provide more flexibility in the use of special masters, permitting them to be used on an as-needed basis with the parties' consent or by court order when exceptional conditions apply.

This article reviews the history of Rule 53, the evolution of the use of special masters in practice, and the significant new provisions of Rule 53.

## Historical Rule and Purpose

The practice of appointing or referring matters to a special master predates the adoption of Rule 53. Before it was enacted, federal courts relied on precedent and their inherent authority to appoint and define the duties and responsibilities of masters in law and equity cases.<sup>1</sup> This authority and practice were formally recognized and codified in the Federal Equity Rules of 1912. The revisions to federal equity procedure memorialized in the Equity Rules severely curtailed the use of masters, mandating that a reference to a master, save in matters of account, was to be the "exception, not the rule" and was permitted only upon a showing that some "exceptional condition" required it.<sup>2</sup>

The restrictive provisions of the Equity Rules were incorporated into the earliest Federal Rules of Civil Procedure in 1938 in the form of Rule 53.<sup>3</sup> Yet while the substantive provisions of Rule 53 were similar to the equity procedures, Rule 53 eliminated, as did the Federal Rules of Civil Procedure in general, the distinction between law and equity that previously existed. Accordingly,

under Rule 53's unified procedure, different standards governed the use of masters in jury and non-jury proceedings. In both types of cases, Rule 53 continued to provide that appointment of a special master "shall be the exception and not the rule."<sup>4</sup>



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Rule 53 envisioned a rather limited role and purpose for masters. Located in the trial section of the Federal Rules, Rule 53 focused primarily on a master's use as a trial master, *i.e.*, hearing trial testimony and reporting recommended findings of fact. In the context of jury cases, "a reference shall be made only when the issues are complicated."<sup>5</sup> In analyzing whether a reference to a master was appropriate, courts considered whether the master would assist the jury in reaching a resolution, in many ways like a fact expert for the jury.<sup>6</sup> The master had the authority to conduct hearings, require the production of evidence, rule upon the admissibility of evidence, examine witnesses,<sup>7</sup> and was required to submit a report setting forth findings of fact.<sup>8</sup> The master's report was then presented to the jury as admissible evidence that the jury could consider.<sup>9</sup>

In non-jury matters, Rule 53 provided that "save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."<sup>10</sup>

The limitations of the original Rule 53 and the use of masters in general were clarified by the Supreme Court in *La Buy v. Howes Leather Co.*<sup>11</sup> In *La Buy*, the Court reviewed a decision by the Court of Appeals granting a writ of mandamus ordering the District Court to vacate an order referring two large and complex antitrust cases to a trial master. In affirming the decision of the appellate court, the Supreme Court identified what considerations were insufficient to establish an exceptional condition, but it failed to define what considerations constituted an exceptional condition.

The District Court in *La Buy* based its order of reference on the congestion of its docket, the complicated and complex nature of antitrust litigation, and the duration of the trial. The Court declared that "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception."<sup>12</sup> The Court similarly rejected the District Court's reference based on the complexity of the issues. "[M]ost litigation in the antitrust field is complex. It does not follow[, however,] that antitrust litigants are not entitled to a trial before a court."<sup>13</sup> In fact, the Court believed the opposite to be true. The complexity of the field of law, the Court reasoned, was "an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial

work."<sup>14</sup> Finally, the Court declared that the duration of a trial did not "offer exceptional grounds."<sup>15</sup>

The structure of Rule 53 and the Supreme Court's decision in *La Buy* significantly limited the use of special masters. The "exceptional condition" requirement was hard to meet,<sup>16</sup> especially in cases where one party did not agree that a special master was advisable, and thus reported use of Rule 53 was limited. Even so, changes in the volume and complexity of civil litigation gradually brought about an increased use of masters at every stage of litigation.

### Modern Use and Practice

By the end of the 20th century, the use and practice of appointing special masters had grown beyond the language and design of Federal Rule of Civil Procedure 53. Unlike the original conception of the rule as a specialized device to assist the jury in fact analysis, a master's

role in complex litigation grew to include overseeing complex and voluminous discovery issues, as well as implementation and enforcement of post-judgment orders and decrees. Courts that used special masters in these non-traditional roles either assumed that such appointments were sanctioned

by Rule 53 or relied on the court's inherent authority to appoint non-judicial individuals to assist the court when needed.<sup>17</sup>

With respect to "discovery" masters, district courts increasingly viewed resort to a Rule 53 master as necessary in light of increasing docket pressures and limited judicial resources.<sup>18</sup> Masters have been appointed to oversee the discovery process, which can entail resolving disputes, establishing procedures and schedules, monitoring document production, and attending depositions and conferences.<sup>19</sup> References of discovery and discovery disputes have been seen as particularly useful because of their time-consuming nature or need for immediate resolution.<sup>20</sup> Factors considered in these appointments included the volume of material to be produced and exchanged,<sup>21</sup> the scientific and technical nature of the information subject to discovery,<sup>22</sup> and the complexity of the underlying dispute.<sup>23</sup> Another important role that masters have filled is resolving claims of privilege that accompany document productions.<sup>24</sup>

The increased use of special masters under the existing framework of Rule 53 created a tension with the need to ensure that the role of masters remained limited. For ex-

***References of discovery and discovery disputes have been seen as particularly useful because of their time-consuming nature or need for immediate resolution.***

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## **Federal Rule of Civil Procedure 53 – Masters (Effective December 1, 2003)**

### **(a) Appointment.**

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

### **(b) Order Appointing Master.**

(1) Notice. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances – if any – in which the master may communicate *ex parte* with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(4) Amendment. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

### **(c) Master's Authority.**

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

### **(d) Evidentiary Hearings.**

Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

### **(e) Master's Orders.**

A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

**(f) Master's Reports.**

A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

**(g) Action on Master's Order, Report, or Recommendations.**

(1) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) Time To Object or Move. A party may file objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) Fact Findings. The court must decide *de novo* all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions. The court must decide *de novo* all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

**(h) Compensation.**

(1) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(2) Payment. The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

**(i) Appointment of Magistrate Judge.**

A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

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ample, in *United States v. Hooker Chemicals & Plastics Corp.*,<sup>25</sup> a case involving injuries allegedly stemming from the improper disposal of hazardous material, the court disapproved of a plan to refer all "routine" discovery and case management matters to a special master. The court stated that such a plan presented "an unacceptable risk of having significant, potentially dispositive issues taken away from the court."<sup>26</sup> Thus, courts that considered granting broad powers to a special master were cautioned to ensure that reference orders specifically delineated the matters referred and the powers a master could exercise.<sup>27</sup>

In addition to assisting in the management and resolution of discovery matters, special masters have been appointed to oversee issues arising after trial.<sup>28</sup> In these situations, the issues referred to masters primarily in-

involved crafting and overseeing the remedial stage of litigation.<sup>29</sup> For example, an area specifically identified by the Federal Judicial Center as warranting the involvement of a special master under the prior version of Rule 53 was the administration of class settlements.<sup>30</sup> Remedial special masters also aided in monitoring compliance with post-judgment decrees.<sup>31</sup> Another post-trial function that special masters fulfilled was analyzing the continued validity of consent decrees.<sup>32</sup>

**The New Rule 53**

The objectives of the new rule are to harmonize best practices with rule-based principles in an effort to assure the effective use of special masters.

To conform Rule 53 to the contemporary practice of using masters during pre-trial, trial and post-trial stages, the Advisory Committee on Civil Rules recommended extensive revisions to the rule.<sup>33</sup> These changes,

which took effect December 1, 2003, and the amendments bring Rule 53 into harmony with current practice.

The amended Rule 53 has five significant aspects that affect civil practice: (1) the significantly limited use of special masters in most trials, but particularly jury trials; (2) the authorization for broad use of special masters when the parties consent; (3) the explicit authorization of masters to assist with pre-trial and post-trial matters; (4) the establishment of specific procedures and standards for the appointment of special masters; and (5) a definitive explication of the standards of review governing the actions of the master.

**Trial masters** The amended Rule 53 retains provisions relating to the appointment of trial masters with significant modification. Importantly, the rule eliminates the direct power of a court to appoint a trial master as to issues to be decided by a jury.<sup>34</sup> The use of a trial master in jury cases is nevertheless permitted, provided the parties consent.<sup>35</sup> This exception itself is limited, however, because the Advisory Committee cautions that a trial master "should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence."<sup>36</sup> In no case, however, may a trial master be appointed to preside at a jury trial.

The amended rule continues to permit the use of trial masters in non-jury cases.<sup>37</sup> The standard for appointment of non-jury trial masters is carried forward in the amended rule, *i.e.*, an appointment is warranted only by "some exceptional condition."<sup>38</sup> According to the Advisory Committee Notes, this phrase is intended to retain the meaning afforded it under *La Buy* and its progeny.<sup>39</sup> Issues such as docket congestion, duration of trial, and complexity of issues do not constitute exceptional conditions.<sup>40</sup> The exceptions to this "exceptional condition" requirement are also retained. In matters of accounting or difficult computation of damages, use of a master is appropriate regardless of whether exceptional conditions are present.<sup>41</sup>

**Consent masters** The appointment of "consent masters" to fulfill any role is expressly approved with the consent of the parties.<sup>42</sup> The change imposes no restrictive standard on a master's appointment.<sup>43</sup> The only limitation, which appears in the Advisory Committee's Notes, indicates that party consent "does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment."<sup>44</sup> Provid-

ing the district court with the ability to refuse a consensual appointment allows the court to retain its authority over managing its docket.

**Pre-trial and post-trial masters** To conform Rule 53 with the modern practice of referring pre-trial and post-trial matters to masters, Rule 53 explicitly provides that "pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge" may be referred to a special master.<sup>45</sup> No exceptional condition finding is required as had previously been true, although the Advisory Committee Notes reflect a continued concern that masters remain the exception and not the rule.<sup>46</sup> Overall, given the increasing volume of complex litigation, it is likely that there will be increased use of special masters for pre-trial and post-trial matters under the reformulated rule.

Duties specifically contemplated by the Advisory Committee include reviewing discovery documents for privilege, settlement negotiations, and administration of an organization. Reference to a special master to oversee complex decrees is also ap-

propriate, particularly when a party has proved to be resistant or intransigent. As noted by the Advisory Committee, this practice has been sanctioned by the Supreme Court.<sup>47</sup>

**Procedures for appointments** The new Rule 53 sets out what are essentially "best practices" standards that have evolved over the past two decades in cases that have adapted the prior version of Rule 53 to fit specific circumstances. A number of these provisions are noteworthy.

Rule 53(a)(2) makes clear that the Code of Judicial Conduct is applicable to masters and that the standard of disqualification under 28 U.S.C. § 455 applies to masters absent consent of the parties.

Rule 53(b)(1) requires that the parties be given notice and an opportunity to be heard before a master is appointed, and that the parties can suggest candidates.

Rule 53(b)(3) specifically requires the proposed master to file an affidavit addressing the potential grounds, if any, for disqualification before the court can issue an order of appointment.

The Advisory Committee Notes to Rule 52(a)(2) and (3) further encourage the courts and parties to examine the considerations that may be involved in a consent appointment and to consider other limitations attendant to the appointment, such as a prohibition on the master (or the master's firm) from appearing before the court in any matter during the pendency of the appointment.<sup>48</sup>

**Collectively, these changes have brought Rule 53 into the 21st century. It remains to be seen whether they will result in the increased use of masters.**

In essence, these procedures are akin to other “sunshine” rules and are intended to bring a more formal and regulated practice to the appointment of masters to avoid real or apparent conflicts of interest.

The new rule also specifies the contents of an order appointing a master.<sup>49</sup> These include the specification of duties, the circumstances (if any) in which the master may have *ex parte* contact with the court or a party; the nature of materials to be preserved and filed as the record of the master’s activities; the time limits and procedural aspects of filing the record and reviewing the master’s orders, findings and recommendations; and the procedures for setting the master’s compensation.<sup>50</sup>

The authority of a master (unless otherwise directed in the appointing order) is now set forth in Rule 53(c) and includes the ability to impose non-contempt sanctions upon a party under Rule 37 or 45 and to recommend contempt sanctions against a party and sanctions against a non-party.<sup>51</sup>

#### **Review of orders, reports or recommendations**

Rule 53(e) and (f) dictate that the master’s orders and reports must be filed and served. Rule 53(g) prescribes the procedures following the filing of the order, report or recommendation.

In particular, the court must afford the parties an opportunity to be heard and may receive evidence.<sup>52</sup> A party may file objections to (or a motion to adopt or modify) an order, report or recommendation no later than 20 days from service, unless the court sets a different time.<sup>53</sup> A court can affirm, modify, wholly or partially reject or reverse or resubmit to the master with instructions.<sup>54</sup>

Regarding the standard of review, the new Rule 53 contains the following provisions:

#### *Findings of Fact:*

The court must decide *de novo* all objections to findings of fact unless the parties stipulate with the court’s consent that (a) the master’s findings will be reviewed for clear error<sup>55</sup> or (b) the findings of a master under Rule 53(a)(1)(A) or (C) will be final.<sup>56</sup>

#### *Legal Conclusions:*

All objections to conclusions of law made or recommended are reviewed *de novo* by the district court.<sup>57</sup>

#### *Procedural Matters:*

Unless a different standard of review is established in the appointing order, procedural rulings of a master are set aside only for an abuse of discretion.<sup>58</sup>

By spelling out the criteria for the standards of review, the new Rule 53 eliminates confusion that could arise from existing case law while providing mechanisms that allow for different standards of review where the parties stipulate and the court consents.<sup>59</sup>

## **Conclusion**

The newly amended Rule 53 is vastly more flexible than its predecessor. It permits the use of special masters on an as-needed basis, with the parties’ consent, or, when exceptional conditions require, by court order. In addition, the rule exposes the process to public scrutiny and encourages, if not requires, a new level of participation by the litigants. Finally, the rule requires that an order of appointment explicitly address the duties of the master, the cost of this service to the parties, communications between the court and the master, and between the parties and the master, and the standard of review for a master’s decisions.

Collectively, these changes have brought Rule 53 into the 21st century. It remains to be seen whether they will result in the increased use of masters. Certainly it will result in increased citation to Rule 53, which now expressly permits the many uses that courts made of special masters in the past, albeit with or without citation to the former rule that did not accommodate those various uses.

1. See *Ex Parte Peterson*, 253 U.S. 300, 312–13 (1920) (holding that a federal court has inherent authority to appoint a master whether sitting in equity or law); *Kimberly v. Arms*, 129 U.S. 512, 524–25 (1889) (stating that the reference of a case to a master has always been within the power of a court of chancery).
2. Rules of Practice in Equity 59, 226 U.S. 666 (1912).
3. Rule 53 is derived from the Equity Rules 49 and 51 (Evidence Taken Before Examiners, Etc.); 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner); 59 (Reference to Masters – Exceptional, Not Usual); 60 (Proceedings Before Master); 61 (Master’s Report – Documents Identified but not Set Forth); 61 1/2 (Master’s Report – Presumption as to Correctness – Review); 62 (Powers of Master); 63 (Form of Accounts Before Master); 65 (Claimants Before Master Examinable by Him); 66 (Return of Master’s Report – Exceptions – Hearing); and 68 (Appointment and Compensation of Masters). See 12A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure App. C* (2003) (Advisory Committee Notes to Rule 53 as originally promulgated).
4. Fed. R. Civ. P. 53(b) (effective until Dec. 1, 2003); see, e.g., *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985) (“The courts have tended to read [Rule 53] somewhat narrowly, closely circumscribing the range of circumstances in which reference to a master is appropriate.”).
5. Fed. R. Civ. P. 53(b) (effective until Dec. 1, 2003).
6. See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) (stating that appointment of a master to assist the jury was appropriate “where the legal issues are too complicated for the jury adequately to handle alone”); *United States v. Horton*, 622 F.2d 144, 148 (5th Cir. 1980) (holding that reference to a master of a Medicare provider reimbursement case was appropriate when the “legal issues . . . were too complex for the jury of laymen to resolve without assistance”); *Burgess v. Williams*, 302 F.2d 91, 94 (4th Cir. 1962) (holding that use of master to aid jury in

- bankruptcy case was proper since the issues were complicated and 1,500 separate transactions had to be examined); *Bd. of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 655 (S.D.N.Y. 1987) (finding that a master was necessary to determine complicated issues involving reasonable value of substantial legal services and defense costs that, with volume of evidence, were too complicated for jury).
7. Fed. R. Civ. P. 53(c) (effective until Dec. 1, 2003).
  8. Fed. R. Civ. P. 53(e)(3) (effective until Dec. 1, 2003).
  9. See *Jackson v. Local Union 542, Int'l Union of Operating Eng'rs*, 155 F. Supp. 2d 332, 337 (E.D. Pa. 2001) ("Master's findings are simply admissible evidence to be considered by the jury, with the jury remaining the ultimate arbiter of fact.").
  10. Fed. R. Civ. P. 53(b) (effective until, Dec. 1, 2003).
  11. 352 U.S. 249 (1957).
  12. *Id.* at 259.
  13. *Id.*
  14. *Id.*
  15. *Id.*
  16. "Exceptional conditions," however, were not required for the appointment of masters in all proceedings. Rule 53 specifically provided that in cases of accounting and difficult computation of damages, reference to a special master is warranted. See, e.g., *Roy v. County of Lexington*, 141 F.3d 533, 549 (4th Cir. 1998) (affirming appointment of master to determine damages in Fair Labor Standards Act case); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 694 (1st Cir. 1992) (stating that "masters are most helpful where complex quantitative issues bearing on damages must be resolved"); *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 32-33 (8th Cir. 1966) (holding there was no abuse of discretion regarding appointment of special master to make an accounting analysis and compilation in suit for treble damages under antitrust statutes). A district court's discretion was also considerably greater in referring matters of computation. See, e.g., *Southern Agency Co. v. LaSalle Cas. Co.*, 393 F.2d 907, 914 (8th Cir. 1968); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 218 (W.D. Mo. 1985). In this regard, it has been suggested that reference of computation matters are particularly suited for the expertise of special masters because accounting and computation of damages requires "[n]o peculiar judicial talent or insight . . . and errors in accounting lend themselves to detection and correction on review." Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 457 (1958). Despite the value of masters in accounting matters, a court's discretion was not unlimited and reference was restricted to complicated matters. See *Bowen Motor Coaches, Inc. v. N.Y. Cas. Co.*, 139 F.2d 332, 334 (5th Cir. 1943) (stating that in matters of account, matters must be complex and time-consuming).
  17. See, e.g., *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent . . . authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."). *Stauble*, 977 F.2d at 695 (stating, without discussion, that Rule 53 permits the appointment of special masters to oversee preparatory issues); *Active Prods. Corp. v. A.H. Choitz & Co.*, 163 F.R.D. 274, 282 (N.D. Ind. 1995) (citing inherent authority of court to appoint special masters); *United States v. Int'l Bus. Machs. Corp.*, 76 F.R.D. 97, 98 (S.D.N.Y. 1977) (appointing pursuant to Rule 53 an examiner to report to court as to information defendant possessed and produced, to supervise discovery and to conduct appropriate hearing); *Omnium Lyonnais D'Etancheite et Revetement Asphaltic v. Dow Chem. Co.*, 73 F.R.D. 114, 118 (C.D. Cal. 1977) (relying on Rule 53 for authority to appoint master to supervise all discovery matters).
  18. The practice of employing masters to oversee discovery is not a uniquely modern practice. Judge Learned Hand, while a district judge, indicated in 1917 that this practice was permissible. *Pressed Steel Car Co. v. Union Pacific R.R. Co.*, 241 F. 964, 967 (D.N.Y. 1917) (stating that the most convenient way to conduct discovery would be for the parties to agree upon a master).
  19. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 967 (9th Cir. 1999) (permitting reference to special master of all pre-trial matters); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168-69 (D.C. Cir. 1991) (concluding that it is improper for district court to refer dispositive matters, but proper to refer pre-trial preparation matters); *In re United States Dep't of Defense*, 848 F.2d 232, 236-37 (D.C. Cir. 1988) (permitting reference of pre-trial matters); *In re Armco, Inc.*, 770 F.2d 103, 104-05 (8th Cir. 1985) (holding that litigation did not present exceptional condition to warrant reference to master of trial on merits but that master's broad authority to supervise and guide pre-trial matters was permissible); *Mercer v. Gerry Baby Prods. Co.*, 160 F.R.D. 576, 577-79 (S.D. Iowa 1995) (appointing master to supervise discovery because disagreement and accusations among lawyers created a chaotic atmosphere for discovery and misuse of discovery motions); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2605, at 664 (2d ed. 1994) (stating that the "use of a special master to supervise discovery still may be appropriate and useful in unusual cases"); *Manual for Complex Litigation (Third)* § 21.424, 21.43 (1995).
  20. *Manual for Complex Litigation (Third)* § 20.14 (1995).
  21. See, e.g., *Mobil Oil Corp. v. Altech Indus., Inc.*, 117 F.R.D. 650, 652 (C.D. Cal. 1987) (appointing master in order to supervise discovery due to conflicting factual evidence, high volume of documentary evidence, and anticipated addition of new parties by defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y. 1982) (appointing special master because discovery involved production of millions of documents). *But see Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1087 (3d Cir. 1993) (concluding that "[n]either the volume of work generated by a case nor the complexity of that work will suffice to meet the 'exceptional condition' standard promulgated by Rule 53").
  22. See, e.g., *Omnium Lyonnais*, 73 F.R.D. at 117 (appointing master with technical and legal background to oversee discovery requiring individual review of hundreds of thousands of documents containing technical information); *Costello v. Wainwright*, 387 F. Supp. 324, 325 (M.D. Fla. 1973) (appointing special master because of highly technical nature of case and need for specialized medical knowledge).
  23. See, e.g., *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 380 (D.D.C. 1978) (referring to special master responsibility for monitoring production of over 700 documents and ruling on complicated privilege claims); *Fisher v. Harris*,

- Upham & Co.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973) (appointing master to supervise discovery in complex securities action).
24. See, e.g., *Dep't of Defense*, 848 F.2d at 235–36 (upholding the district court's order and stating that due to the practical difficulties of reviewing documents, the case amounted to an exceptional condition warranting the appointment of a master); *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) (“[I]t is within the discretion of a trial court to designate a special master to examine documents. . . . This special master would not act as an advocate; he would, however, assist . . . by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.”); *United States v. AT&T*, 461 F. Supp. 1314, 1346–49 (D.D.C. 1978) (appointing master to make preliminary rulings on all claims of work product and other privilege asserted during discovery).
  25. 123 F.R.D. 62 (W.D.N.Y. 1988).
  26. *Id.* at 63.
  27. Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 216 (1995).
  28. The practice of using special masters after liability has been established stems from the use of masters in equity. See Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297, 1321–23 (1975).
  29. See generally *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481–82 (1986) (permitting appointment of master to ensure union's compliance with court's order to establish an affirmative action program); *Stauble*, 977 F.2d at 695 (recognizing use of master in connection with remedy-related issues).
  30. Manual for Complex Litigation (Third) § 30.47 (1995); see, e.g., *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1465 (D. Haw. 1995) (appointing special master to supervise taking depositions of 137 randomly selected class members to distribute award of compensatory damages to victims of human rights violations); *McLendon v. Continental Group, Inc.*, 749 F. Supp. 582, 612 (D.N.J. 1989) (appointing master in ERISA case to aid parties in post-liability settlement of damages for 5,000 claimants).
  31. See, e.g., *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988) (approving appointment of special master due to continued failure to comply with order); *Nat'l Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542–45 (9th Cir. 1987) (approving appointment of master to monitor compliance with injunction); *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 962–65 (2d Cir. 1983) (affirming reference to special master for monitoring defendant's compliance with consent decree entered in suit challenging conditions of institution for mentally retarded); *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 764–69 (E.D.N.Y. 1974) (appointing law professor specializing in urban renewal as special master in desegregation case), *aff'd*, 512 F.2d 37 (2d Cir. 1975).
  32. *In re Pearson*, 990 F.2d 653, 657–60 (1st Cir. 1993). *But see United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998) (holding non-consensual appointment of a special master to consider propriety of permanent injunction was not proper and amounted to a complete abdication of the district court's Article III responsibilities).
  33. The text of the amended Rule 53 (effective December 1, 2003) is set forth in the accompanying sidebar, see pages 20–21.
  34. See generally Fed. R. Civ. P. 53.
  35. Fed. R. Civ. P. 53(a)(1)(A).
  36. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
  37. Fed. R. Civ. P. 53(a)(1)(B).
  38. Fed. R. Civ. P. 53(a)(1)(B)(i).
  39. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
  40. *Id.*
  41. Fed. R. Civ. P. 53(a)(1)(B)(ii).
  42. Fed. R. Civ. P. 53(a)(1)(A).
  43. *Id.*
  44. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
  45. Fed. R. Civ. P. 53(a)(1)(C).
  46. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53. As to pre-trial functions, the Advisory Committee noted that cases involving important public issues or many parties may not be particularly appropriate for a master's involvement and recommended that in those situations, judicial functions should be controlled by the court.
  47. *Id.*
  48. *Id.*
  49. Fed. R. Civ. P. 53(b)(2).
  50. *Id.*
  51. Fed. R. Civ. P. 53(c).
  52. Fed. R. Civ. P. 53(g)(1).
  53. Fed. R. Civ. P. 53(g)(2).
  54. Fed. R. Civ. P. 53(g)(1).
  55. In this regard the Advisory Committee noted that “[c]lear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request.” Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
  56. Fed. R. Civ. P. 53(g)(3). The Advisory Committee's Note emphasizes that the court is free to decide the facts (as well as legal conclusions) *de novo* even absent an objection of the parties. Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.
  57. Fed. R. Civ. P. 53(g)(4).
  58. Fed. R. Civ. P. 53(g)(5).
  59. It should be noted that the court can, sua sponte, withdraw its consent to a stipulation for finality or clear-error review and may reopen the opportunity to object. Fed. R. Civ. P. 53(g)(2); Notes of Advisory Committee on 2003 Amendments, Fed. R. Civ. P. 53.