

Academy of Court-Appointed Masters

Appointing Special Masters and Other Judicial Adjuncts *A Handbook for Judges and Lawyers* *January 2013*

Section 2. Appointment Orders

The appointment order is the fundamental document that establishes the judicial adjunct's powers, limits, and responsibilities. This order is often referred to as an "order of reference." Section 2 of this book provides a checklist of the items that should be included in an appointment order (specifying which items are mandatory under the federal rules) and explains each item in detail.

In all jurisdictions, a court has the authority to appoint a master if the parties consent. In some jurisdictions or in some cases, the court may only appoint a master to perform specific duties if all the parties consent. The issue of whether consent is necessary may depend upon the applicable law and what specific services the master will provide.

Federal Rule 53(a)(1)(a) empowers a judge to appoint a master to perform duties consented to by the parties. Rule 53(a)(1)(b) allows for an appointment of a master to conduct appropriate trial proceedings or to recommend findings of fact if an exceptional condition exists or there is a need to perform an accounting to resolve a difficult damage computation. And Rule 53(a)(1)(c) permits a master appointment to address pretrial and post trial matters in certain circumstances. Neither of the latter two subsections requires the consent of the parties, although a court may seek their agreement to an appointment.

In state court cases, the applicable law may or may not require consent, or an appellate decision may have decided whether consent is needed. A court usually has the power by applicable rule, statute, or judicial decision to appoint a special master. If a party does object, the duties of the master can be limited to those that are appropriate under the circumstances. If all parties object, the court may reconsider the appointment.

Federal Rule 53(b)(1) requires the judge to give notice to the parties and an opportunity to be heard about the appointment of a master. This subsection implies that the court may appoint a master even if the parties object as long as the appointment does not conflict with the provisions of Rule 53(a) explained above. Court decisions that review the propriety of appointments

approve appointments that serve the interests of the court and the parties, that do not deny a party rights, and that do not cost an unreasonable amount. In cases involving a government party, sovereign immunity may prevent a court from requiring the government to pay a master’s fee.

2.1 Items to Include in Appointment Orders

As a result of the substantial revisions that took effect in December 2003 and 2006, Rule 53 of the Federal Rules of Civil Procedure now prescribes a number of specific items an appointment order must include and suggests others that should be included. A copy of Rule 53 appears at Appendix 4, along with the relevant Advisory Committee Notes published with the Amendments. The Notes deserve attention because they elaborate on many of the issues addressed in the rule.

The following checklist summarizes the information that will be provided in this chapter. Some of the optional provisions appear in state court master appointment orders. An additional copy of this checklist can be found at Appendix 1.

Table 1. Checklist of Items to Include in Appointment Orders

<input checked="" type="checkbox"/>	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
<input type="checkbox"/>	1	Direct master to “proceed with all reasonable diligence”	Rule 53(b)(2)	Yes
<input type="checkbox"/>	2	Identify the master’s duties	Rule 53(b)(2)(A)	Yes
<input type="checkbox"/>	3	Identify when <i>ex parte</i> communication may occur	Rule 53(b)(2)(B)	Yes
<input type="checkbox"/>	4	Identify what records the master must maintain	Rule 53(b)(2)(C)	Yes
<input type="checkbox"/>	5	Describe how the master’s rulings will be received and reviewed	Rule 53(b)(2)(D)	Yes
<input type="checkbox"/>	6	Describe clearly how the master will be compensated	Rule 53(b)(2)(E)	Yes
<input type="checkbox"/>	7	Statement that appointment of a master is appropriate	Rule 53(a)(1)	No, but good practice
<input type="checkbox"/>	8	Identify source of authority for appointment (Rule 53, or other source)		No, but good practice

<input checked="" type="checkbox"/>	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
<input type="checkbox"/>	9	Modify master's authority to impose sanctions for failure to cooperate	See Rule 53(c)	No, but default standard set out in Rule 53(c) will apply unless modified.
<input type="checkbox"/>	10	List hearing procedures and location	Optional	Optional
<input type="checkbox"/>	11	Describe how documents submitted by parties/ lawyers may be provided to master	Optional	Optional
<input type="checkbox"/>	12	Describe scope of discretion and authority of master not previously covered in Step 2	Optional	Optional
<input type="checkbox"/>	13	Certification, Oath, or Bond may need to be included under state law	Optional	Optional
<input type="checkbox"/>	14	Include any stipulations agreed to by parties and approved by court relating to special master	Optional	May be included in separate Order
<input type="checkbox"/>	15	Include disclosure affidavit	Rule 53(b)(3)	No, but the rule requires that an affidavit be filed. It is good practice to either attach the affidavit to the appointment order or reference its filing in the appointment order.

The items in the checklist are explained below.

1. An appointment order must include the “magic words” directing the master to proceed with all reasonable diligence.

An appointment order must specifically “direct the master to proceed with all reasonable diligence.” Fed. R. Civ. P. 53(b)(2). Some states require the master to proceed with due diligence and with the least practicable delay.

2. An appointment order must identify the master’s duties.

Rule 53 provides that the order appointing a master must state “the master’s duties, including any investigation or enforcement duties, and any limits on the master’s authority under Rule 53(c).” Fed. R. Civ. P. 53(b)(2)(A). The rule adds that the court may

also appoint a master to “perform duties consented to by the parties.” Fed. R. Civ. P. 53(a)(1)(A).

An appointment order could simply contain a broad clause stating that the master may “perform any and all duties assigned to the master by the court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution.” But a more specific order would help ensure that the court, master, and parties have a common understanding of the master’s role. Where appropriate, the order language should also establish timetables and deadlines for performance of the master’s duties.

A master’s duties and responsibilities might include:

a. Case-management duties

- Assisting with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to case management orders.
- Establishing discovery and other schedules; reviewing and attempting to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records); and supervising discovery.
- Overseeing the management of docketing, including the identification and processing of matters requiring court rulings.
- Compiling data and assisting with the interpretation of scientific and technical evidence, or making findings and recommendations with regard to such evidence.
- Helping to coordinate federal, state, and international litigation.
- Chairing committees of lawyers regarding issues of common interest.
- Working with lawyers to draft and submit proposed orders to the judge.

b. Discovery-Related Responsibilities

- Coordinating disclosure and discovery schedules with the lawyers.
- Assisting with the formulation of a discovery plan to be submitted to the court.
- Establishing discovery schedules as needed and resolving time, method, and other conflicts.
- Assisting with issues raised by electronically stored information, native formats, and meta data.
- Monitoring depositions.

c. Settlement-related duties

- Serving as arbitrator, mediator, or neutral in the context of a settlement.

- Proposing structures and strategies for settlement negotiations on the merits and on any subsidiary issues, and evaluating parties' class and individual claims.
- Administering alternative dispute procedures such as summary jury trials, mini-trials, and settlement conferences.

d. Decision-making duties

- Assisting with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and making recommended findings of fact and conclusions of law.
- Interpreting any agreements reached by the parties.
- Issuing reports and recommendations.
- Holding trial proceedings and making or recommending findings of fact on issues to be decided by the court without a jury, if warranted by the conditions set out in Rule 53(a)(1)(B)&(C).
- Pursuing investigative or quasi-prosecutorial roles.
- Recommending that sanctions be imposed on a party or lawyer for wrongdoing.

e. Post-trial duties

- Proposing structures and strategies for attorneys fee issues and fee settlement negotiations, reviewing fee applications, and evaluating parties' individual claims for fees (*see also* Fed. R. Civ. P. 54(d)(2)(D)).
- Administering, allocating, and distributing funds and other relief.
- Adjudicating eligibility and entitlement to funds and other relief.
- Monitoring or enforcing compliance with structural injunctions.
- Directing, supervising, monitoring, and reporting on implementation and compliance with the court's orders, and making findings and recommendations on remedial action if required.

f. Duties that might arise in any role

- Assisting with responses to media and congressional inquiries.
- Making formal or informal recommendations and reports to the parties, and making recommendations and reports to the court, regarding any matter pertinent to the proceedings.
- Communicating with parties and attorneys as necessary in order to permit the full and efficient performance of the master's duties.

❑ **3. An appointment order must identify when *ex parte* communication may occur.**

Rule 53 directs the court to set forth “the circumstances—if any—in which the master may communicate *ex parte* with the court or a party.” Fed. R. Civ. P. 53(b)(2)(B). The propriety of a master’s *ex parte* communication with the court or a party depends on the duties the master is assigned and on the language in a court order governing *ex parte* communications. For example, if the master’s duties include settlement negotiations, *ex parte* communication with a party may be necessary and appropriate. *Ex parte* communication with the court may be necessary and appropriate if the master’s duties include assisting the court with legal analysis or providing the court with technical expertise. Where a master performs multiple roles, *ex parte* communication with the court might be appropriate concerning some topics but not others. The order might permit *ex parte* communication with the court about one type of matter but not another type of matter. Where a master plays a settlement role, the appointment order should spell out clearly the extent to which the master may report to the court on the progress of settlement discussions. The formula adopted should accommodate the court’s need to know the progress of the mediation, and the parties’ need to negotiate in confidence. One court adopted the following approach:

The Mediator shall periodically report to the Court the status of the Mediation process, but those reports should be limited to matters general to the Mediation and its progress and not to specifics or to the merits of the Mediation or to the respective parties’ positions or statements made during the course of the proceedings. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him by either of the parties or any matters which otherwise relate to the Mediation.

In re Propulsid Prods. Liab. Litig., MDL No. 1355, 2002 WL 32156066 (E.D. La. Aug. 28, 2002).

The court should modify any restrictions on *ex parte* communications as needed if the master’s duties change over time. *See, e.g., id.* (after the special master received additional mediation duties, the scope of his *ex parte* communications with the parties and the court changed).

Ex parte communication may be appropriate in the following circumstances:

a. With the court

- To assist the court with legal analysis of the parties’ submissions;
- To assist the court with procedural matters, such as apprising the court regarding logistics, the nature of the master’s activities, and management of the litigation; and

- to assist the court’s understanding of highly specialized matters.

b. With the parties

- To arrange scheduling matters;
- To ensure the efficient administration and management of the litigation;
- To make informal suggestions to the parties to facilitate compliance with orders of the court;
- To address discovery or other procedural issues;
- To resolve privilege or similar questions, and in connection with *in camera* inspections;
- To discuss the merits of a particular dispute, for the purpose of resolving that dispute, but only with the prior permission of the opposing counsel involved;
- To work with subcommittees consisting of a subset of the lawyers in a case;
- To obtain information from lawyers regarding scheduling and hearing agendas; and
- To discuss other matters with the permission of the lead lawyers.

□ 4. An appointment order must identify what records the master should maintain.

Rule 53 states that the court must define “the nature of the materials to be preserved and filed as the record of the master’s activities.” Fed. R. Civ. P. 53(b)(2)(C). The court may not want to obligate the master to maintain certain records and can specify in an appointment order that certain records need *not* be maintained. The court may amend the record requirements if the master’s role changes. *See, e.g., In re: Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the special master was charged with new duties of administering a settlement program). Rule 53 also specifies that the order must state the “method of filing the record.” Fed. R. Civ. P. 53(b)(2)(D).

The following are examples of records that a master might be ordered to maintain and file with the court, under seal or by regular filing:

- Normal billing records of time spent on the matter, with reasonably detailed descriptions of activities and matters worked on.
- Formal written reports or recommendations regarding any matter.
- Informal notes regarding any matter.
- Documents created by the master that are docketed in any court.
- Documents received by the master from counsel or parties.

- A complete record of the evidence considered by the master in making or recommending findings of fact.

The Advisory Committee Notes to the 2003 Amendments recommend that appointment orders “routinely” require masters to maintain a record of evidence considered unless there is no prospect that the master will make or recommend evidence-based findings of fact.

❑ 5. An appointment order must describe how the master’s rulings will be received and reviewed.

Rule 53 directs the court to state “the time limits, method of filing the record, other procedures, and standards for reviewing the master’s orders, findings, and recommendations.” Fed. R. Civ. P. 53(b)(2)(D). Rule 53 also provides for how and when parties may object to the master’s rulings, and prescribes the default standard of review. Fed. R. Civ. P. 53(f). Specifically, the order should include:

- The mechanism the master should use to file and serve any formal order, finding, report, or recommendation (*e.g.*, whether the master will receive assistance from the clerk of court).
- A reference to Rule 53(f)(2), explaining that a party may file an objection to a special master’s order, finding, report, or recommendation no later than 21 days after a copy is served. The order may set out a different time period.
- The consequences of failure to timely object to a master’s ruling (*e.g.*, permanent waiver of any objection to the master’s orders, findings, reports, or recommendations, such that they are deemed approved, accepted, and ordered by the court).
- The standard of review the court will employ if a party objects to a master’s finding or conclusion, as set out in Rule 53(f)(3, 4, 5). Note that the default standard under the rule is *de novo* for findings of fact and conclusions of law, and abuse of discretion for procedural matters. The parties may consent otherwise regarding the standard of review for findings of fact or procedural matters; however, the *de novo* standard of review for conclusions of law may not be changed by agreement of the parties.
- Whether and under what circumstances the parties consent to a different standard of review or waive the right to object to the master’s findings or conclusions.

❑ 6. An appointment order must clearly describe how the master will be compensated.

Rule 53 states that the court must set forth “the basis, terms, and procedure for fixing the master’s compensation.” Fed. R. Civ. P. 53(b)(2)(E). The Rule also raises related issues,

such as how payment obligations will be allocated between the parties. Fed. R. Civ. P. 53(g)(3).

In setting forth the basis, terms, and procedures for compensation, the order should address some or all of the following:

- Include an explicit statement that the court has “consider[ed] the fairness of imposing the likely expenses on the parties” and has taken steps to “protect against unreasonable expense or delay.” Fed. R. Civ. P. 53(a)(3).
- Identify the master’s hourly rate or an index that will be used to determine it (e.g., the Laffey Index, available at the Department of Justice web site, [http://www.usdoj.gov/usao/dc/Divisions/Civil Division/ Laffey Matrix 4.html](http://www.usdoj.gov/usao/dc/Divisions/Civil%20Division/Laffey%20Matrix%204.html)).
- Identify the sorts of expenses the master may and may not charge to the parties (e.g., overhead).
- Describe how the parties will allocate the cost of the master, and whether this allocation will change (e.g., whether a re-allocation will be made after a verdict or settlement is reached).
- Specify whether the master’s appointment is for a term certain (e.g., a given number of hours, or until a certain task is completed), and how and whether that term may be renewed.
- Address whether the master will receive a one-time or continuing retainer.
- Address when and to whom the master must submit an itemized statement of fees and expenses.
- Address whether the master should provide only summary fee statements to the parties and provide complete statements to the court under seal (because itemized statements might reveal confidential communications between the master and the court).
- Establish deadlines for the parties’ payment to the master of their share of any amounts owed.
- Establish the payment mechanism (e.g., whether payments are made directly to the master or deposited into the court registry for later disbursement).
- Address whether the master may hire, and obtain reimbursement or compensation for, support personnel (e.g., assistants, accountants, consultants, attorneys).

☐ 7. An appointment order should include a section establishing that appointment of a master is appropriate.

Rule 53 does not require that the appointment order state that appointment of a master is appropriate—but it is good practice to make that statement and specify why it is

appropriate. Rule 53 provides that masters are appropriate only in limited circumstances. 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
 - (1) Some exceptional condition, or
 - (2) The need to perform an accounting or resolve a difficult computation of damages; or
- c. Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a)(1).

In the context of pretrial conferences, Rule 16 further states that “the court may take appropriate action, with respect to . . . the advisability of referring matters to a magistrate judge or master” and with respect to “the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.” Fed. R. Civ. P. 16(c)(2)(H, L). Boiled down, if the court needs help because a case presents unusually difficult, complex, or labor-intensive issues, appointment of a master is appropriate. *See also* Fed. R. Civ. P. 54(d)(2)(D) (regarding the use of masters to determine attorneys’ fees).

In various appointment orders, Judges have used the language set out below to establish that appointment of a special master is appropriate in a specific case.

- The case requires complicated or detailed computations or accountings.
- The presence of multiple parties presents a difficult organizational challenge.
- The legal or factual issues will be especially sophisticated or protracted.
- There will be unusual discovery or evidentiary problems requiring continued oversight.
- The case will require a high degree of coordination with other lawsuits or other courts.
- Resolution of issues will require highly specialized or technical knowledge, or a detailed understanding of foreign law.
- To fully understand the dispute, the court will need the help of expert advisors or consultants.

- Timely or expedited decisions on masses of individual claims cannot be made without additional resources.
- The case will require lengthy oversight and administration of settlement funds.
- The case will require policing of complex injunctive relief.

❑ 8. An appointment order should identify the source of authority for the appointment.

Rule 53 does not require that the appointment order specify the source of authority for the appointment, but specifying the source of authority is good practice. Authority for the appointment could come from a variety of sources, including:

- Federal Rule of Civil Procedure 53 or an analogous state rule;
- The inherent authority of the court; or
- The parties' consent.

“Beyond the provisions of [Rule 53] for appointing and making references to Masters, a Federal District Court has `the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.’” *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re Peterson*, 253 U.S. 300, 312 (1920)); see *Ruiz v. Estelle*, 679 F.2d 1115, 116 n.240 (5th Cir. 1982) (same), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (noting that the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the court’s inherent power). The court’s inherent power to appoint a special master, however, is not without limits. See *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (stating that in the absence of consent by the parties, the inherent authority of the court does not extend to allow appointment of a special master to exercise “wide-ranging extrajudicial duties” such as “investigative, quasi-inquisitorial, quasi-prosecutorial role[s]”).

❑ 9. An appointment order should include a provision restating or modifying the master’s authority to impose sanctions for failure to cooperate.

While it goes without saying that a court expects the parties to cooperate with a master, a party or counsel may nevertheless engage in inappropriate behavior. Rule 53 addresses this possibility: if appropriate, a master may “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.” Fed. R. Civ. P. 53(c). It is good practice to state this authority explicitly in the appointment order. In addition, the order should provide that the master shall have the full cooperation of the parties and their counsel, and explain that full cooperation includes making available to the master any facilities, files, databases, or documents the master requires to fulfill his or her functions.

❑ **10. An appointment order may include information relating to hearings the master may conduct.**

There are a variety of hearings a master may preside over. Some will be informal, while others will resemble trial proceedings. It may be advisable to include in the order rules and procedures that govern these hearings, the location of a hearing if it is to occur in a place different than the court location, and other matters that relate to the processes.

❑ **11. An appointment order may specify how parties and lawyers may submit documents and information to a master.**

A master may obtain a copy of documents filed with the clerk or administrator of the court; or it may be more efficient for a master to receive submissions from the parties without those documents having to be formally filed. The nature and purpose of the materials may determine the method of submission. Masters can readily receive information and documents by email or other form of electronic messaging, and these methods can be listed in the order.

❑ **12. An appointment order may include provisions regarding the discretion and authority of a master.**

The scope of a master's discretion and authority may be included in the previous portion of the order detailing the duties of a master. Or it may be advisable or necessary to add additional and further descriptions regarding the general or specific responsibilities of the master. Some state court orders provide that: A Master shall have the discretion to determine the appropriate procedures for the completion of the master's duties and shall have the authority to take all appropriate measures to perform the assigned duties.

❑ **13. An appointment order may include references to a certification, oath or bond.**

State statutes or rules may require a master to provide a certification or oath which states, in summary, that the master is familiar with the applicable special master standards and with the grounds for conflicts of interest and disqualification, and that nothing known to the master disqualifies the master. Or a special master may need to procure a surety bond for the benefit of the parties, especially if the master is performing receivership or accounting duties.

❑ **14. An appointment order may include any stipulations regarding the master.**

The parties may have agreed to provisions and procedures regarding the role of the master which the court has approved. It may be wise to include these stipulations in the appointment order to avoid any later confusion caused by parties and lawyers entering the case after the appointment order takes effect. The order could also refer to the other orders or incorporate them by specific reference, if appropriate.

❑ 15. An appointment order should include or reference a disclosure affidavit.

Rule 53(b)(3) provides that the court may enter an appointment order “only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455.” *See also* Rule 53(a)(2) (discussing grounds for disqualification). It is good practice to attach the affidavit to the appointment order, or make reference in the appointment order to the affidavit’s separate filing. While the court and the master should review § 455 very carefully to ensure there are no grounds for disqualification, or that all such grounds have been disclosed to the parties, the key averment in the master’s affidavit could simply state:

I have thoroughly familiarized myself with the issues involved in this case. As a result of my knowledge of the case, I can attest and affirm that I know of no non-disclosed grounds for disqualification under 28 U.S.C. § 455 that would prevent me from serving as the special master in the captioned matter.

In addition to thinking carefully about the items to include in the appointment order, the judge and the adjunct should give advance consideration to ethical issues and practical concerns that may arise during the course of the appointment. Table 4 on page 28 provides a checklist of these issues and concerns.

© 2006-2013 by the Academy of Court-Appointed Masters.
ISBN 0-9786438-0-1

Permission to reprint is granted to all attorneys, judges, and court personnel for professional use
and to all accredited education institutions for education purposes.

All other persons and entities may reprint only with written permission.

Contact Roger.Haydock@WMitchell.edu