

Howard R. Marsee
Upchurch Watson White & Max
1060 Maitland Center Commons
Suite 440
Maitland, Florida 32751
407-661-1123

**UTILIZING “SPECIAL MASTERS” IN FLORIDA:
UNANSWERED QUESTIONS, PRACTICAL CONSIDERATIONS AND THE ORDER OF
APPOINTMENT**

Howard R. Marsee

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“Masters” are adjuncts of the court, exercising limited judicial authority and appointed by the court to perform specific tasks. “Special masters” typically are appointed by the presiding judge to serve in specific cases.¹ “General masters” serve more broadly and typically are appointed to serve over a variety or class of cases, often on a venue-wide basis.² The terms “special master” and “general master” are sometimes confused or used indiscriminately, even within the same case.³

The master’s authority derives from his or her appointment by the court. Historically, courts relied upon the common law and upon the court’s inherent authority to appoint masters and to define the master’s duties and responsibilities.⁴ The practice of utilizing masters to assist trial judges in the disposition of cases predates the American legal system and has its origin in common law English chancery courts during the reign of King Henry VIII.⁵ Congestion in the federal court system spawned the use of masters in the United States as early as the colonial period.⁶

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Over time, the use and appointment of masters came to be governed by state and federal rules of civil procedure. At the state court level in Florida, the appointment of special masters in civil cases is now governed by: Rule 1.490 of Florida Rules of Civil Procedure (hereinafter Rule 1.490); Rule 12.492 of the Florida Family Law Rules of Procedure (hereinafter Rule 12.492); and Rule 5.697 of the Florida Probate Rules (hereinafter Rule 5.697).⁷ At the federal level, appointment is governed by Rule 53 of the Federal Rules of Civil Procedure (hereinafter Rule 53). The role of masters has evolved, from a strict and limited role of trial assistance, to a more expanded view – with the duties and responsibilities of masters now extended to every phase of litigation.⁸ As court dockets have burgeoned, and as litigation has become increasingly complex, the utilization of masters has increased.

*Masters perform a wide variety of tasks. They serve various roles in pretrial discovery and proceedings, facilitate the mediated settlement of cases, make recommendations and submit reports to judges, assist with complex issues, chair advisory committees composed of lawyers of record, help administer class actions and settlements, propose orders jointly recommended by the parties, make decisions based on judicial reference or the parties' consent, and become engaged in post-trial proceeding.*⁹

The purpose of this article is to identify some of the yet unanswered questions surrounding the use of special masters in Florida, and to provide practical information for lawyers involved with the appointment of a “special magistrate” or “special master.” Because the special master’s authority and duties derive from the order appointing him or her, special consideration has been given to the form of that order.

A note on nomenclature is unavoidable. “Magistrates” have replaced “masters” in Florida state courts. Effective October 1, 2004, the Supreme Court of Florida amended Rule 1.490, Rule 12.492 and Rule 5.697 so that all references to “master” thereafter became “magistrate.”¹⁰ “Special

masters” became “special magistrates.” The change was essentially administrative and cosmetic.¹¹ Both “master” and “magistrate” denote court appointees with varying degrees of limited judicial authority. The subject of *general* magistrates, except incidentally, is outside the scope of this article. We are concerned here with masters serving specifically delineated tasks in specific cases – masters that have been historically designated as “special masters.”

Rule 53 continues to use the term “master” but has abandoned the term, “special master.” A careful reading of Rule 53, however, suggests that Rule 53 uses “master” synonymously with the historic term “special master.” “Master” within the context of Rule 53 is a court-appointed in specific cases before the district court. Rule 53 makes no distinction between “general masters” and “masters” because federal courts have institutionalized the role of magistrate judge.¹²

For purposes of simplicity and unless context clearly indicates the need for a distinction, this article will use the terms “master”, “special master” and “special magistrate” interchangeably.

Consent to Appointment: The issue of consent under Rule 1.490(c) and Rule 12.492(b) is straight forward. No reference may be made to a special magistrate without the consent of the parties.¹³ Several Florida appellate decisions have held lack of consent fatal to the appointment of a special master.¹⁴ Mandamus is appropriate to correct a trial court’s referral without consent.¹⁵ In *Prater v. Lehmebeck*, where a party filed a blanket objection to referral to a master, but nevertheless participated in the referred proceedings, the trial court assumed consent from the party’s participation and was reversed on appeal.¹⁶ To minimize issues regarding consent, the order appointing the special magistrate should recite that the referral is consensual.

An interesting consent issue is whether a party, having given consent *ab initio* to the appointment of a special magistrate, may later withdraw that consent. This may occur in matters involving continuous magistrate supervision, such as supervision of discovery matters, when one party decides that the magistrate’s rulings aren’t as favorable as desired. Rules 1.490, Rule 12.492

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and Rule 5.697 are silent on this question and there seems to be no Florida appellate law on point. Logic would seem to require, at a minimum, that the party withdrawing consent should move for a court order relieving the magistrate of his or her duties and responsibilities and – until that order is rendered -- that the party is bound by the order appointing the special magistrate.

Probate Rule 5.697 is a relatively new rule, having been adopted in 1992 and “patterned after” Rule 1.490.¹⁷ On its face, there is no requirement for consent by the parties to the appointment of a special magistrate, and as yet there are no appellate decisions addressing this point. The drafters of Rule 5.697 apparently chose not to adopt the consent language contained in subsection (c) of Rule 1.490. It would seem to follow that a consent requirement was not intended. One reason for this may lie in the relatively narrow scope of duties performed by the special magistrate in probate. Subsection (b) provides that special masters may be appointed “in connection with the *court’s review of guardianship accountings and plans.*” This delegation of duties is more restrictive than the delegation of duties contained in Rule 1.490.¹⁸

Under Federal Rule 53, consent is not in all instances necessary. Subsection (a)(1) provides that non-consensual referrals, in cases to be decided by the court without a jury, may be justified by: exceptional conditions; the need to perform an accounting or difficult damage computation; *or* the need to address pretrial or post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge¹⁹ Rule 53(a)(3) requires the court to “consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay”. Notwithstanding Article III of the U.S. Constitution, non-consensual referrals to special masters have been sustained against constitutional attack where the master’s duties were performed under the “total control and jurisdiction of the district court....”²⁰ The Supreme Court has recognized that in certain situations, the efficiency and expertise benefits of such referrals outweigh the

diminution of Article III values (neutral, independent adjudication) – creating a kind of balancing test.²¹

The master’s qualifications: Rule 1.490(b), Rule 12.492(a) and Rule 5.697(b) provide that the court may appoint “members of The Florida Bar as special magistrates.” The subsections go on, however, to provide that “upon showing that the appointment is advisable, a person other than a member of the Bar may be appointed.” Rule 5.697 requires “good cause shown” for the appointment of some person other than a member of The Florida Bar. Where the task to be performed requires certain types of expertise, (*e.g.*, accounting, corporate share valuation, patent issues, scientific questions), the need for a non-lawyer may be the *raison d’être* for appointment of the master.

Rule 53(a)(2) contains no bar membership requirement. It provides that, without the consent of the parties, “a master must not have a relationship to the parties that would require disqualification of a judge under 28 U.S.C. § 455. The court may enter an order of appointment only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. The Academy of Court-Appointed Masters, a national organization, offers the following suggested affidavit language.

*I have thoroughly familiarized myself with the issues in this case. As a result of my knowledge of the case, I can attest and affirm that I know of no grounds for disqualification under 28 U.S.C. § 455 that would prevent me from serving as the special master in the captioned matter.*²²

Rule 1.490, Rule 12.492, Rule 5.697 and Rule 5.697 require no affidavit regarding disqualification, but they do provide in subsection (d), subsection (c) and subsection (c), respectively, that all “grounds for disqualification of a judge shall apply to a magistrate.” Therefore, although not required, it may be good practice in Florida state court actions to have the master file a modified affidavit similar to that recommended by the Academy of Court-Appointed Masters.

In the order of referral to the master, the subject of the master's qualifications should be addressed. If the appointment is pursuant to Rule 1.490 or Rule 12.492, and the appointment is to a person other than a member of the Florida Bar, then the order should recite the reasons that referral to a non-Bar member is "advisable." If the referral is pursuant to Rule 5.697, then the basis for a finding of "good cause" ought to be recited. In all cases under Rule 53, and in state court cases where an affidavit regarding disqualification has been filed, the order of appointment probably should recite that the affidavit has been filed.

Oath and Bond requirements: Rule 1.490a) of the Florida Rules of Civil Procedure requires persons appointed as *general* magistrates to "take the oath required of officers by the constitution and the order shall be recorded before the magistrate discharges any duties of that office."²³ In the case of *special* magistrates, Rule 1.490(b), Rule 12.492(a) and Rule 5.697(b) specifically provide the administration of an oath is discretionary with the court. This distinction between general and special masters has its roots in chancery.²⁴ Rule 53 doesn't address the subject of an oath.

Subsections (b) and (e) of Rule 1.490, and subsections (a) and (d) of Rule 12.492 address the question of whether a bond may be required of the special magistrate. The gist of the subsections is that the requirement of a bond is discretionary with the court. However, Rule 1.490(e) and Rule 12.492(d) specifically provide that the court *may* require bond of magistrates who are appointed to dispose of real or personal property, and those subsections establish language that such bonds should contain. Rule 5.697 does not address the subject of a bond. Rule 53 also is silent on the subject of a bond. If a bond is going to be required in a case, whether state or federal, then any bond requirements should be included in the order of reference to the master. The order should also address all issues regarding funding of the bond.

The master's powers and duties: In broad terms, the master's authority is established by the terms contained in the order of reference. Therefore, it is extremely important to delineate in the

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court's order the task or tasks the master is to perform. The following is a representative sampling of tasks assigned to masters in state and/or federal cases: ruling upon and monitoring discovery matters; conducting in camera document inspections; coordinating discovery in multi-party or multi-district cases; supervising class action notices; monitoring settlement and judgment compliance; administering the distribution of settlement or judgment proceeds; making findings of fact and recommendations regarding real property disputes; disposing of real or personal property under jurisdiction of the court; overseeing the winding down of corporations and other business entities; calculating damages and/or attorney's fees; making insurance coverage determinations; serving as technology masters; and managing settlement efforts in complex cases.

Rule 1.490, Rule 12.492 and Rule 53 offer some specific guidelines regarding the exercise of the master's powers, duties and authority. For example, Rule 1.490(d) and Rule 12.492(c) provide that "the magistrate shall hold hearings in the county where the action is pending, but hearings may be held elsewhere by order of court to meet the convenience of the parties or witnesses." Interestingly, Rule 1.490(d) and Rule 5.697(c) provide that "process issued by a magistrate shall be directed as provided as provided by law." Rule 12.492 contains no such provision, and one is left to wonder whether the omission suggests that the special master under 12.492 may not issue process. If hearings are going to take place outside the county where the action is pending, then this should be included in the reference order. If any unusual problems with process are anticipated, then these too ought to be addressed in the order.

Rule 1.490(f), Rule 12.492(e) and Rule 5.697(d) deal with the subject of hearings before the magistrate. Generally, they place on the magistrate the duty to set and notice hearings, and provide the authority to proceed *ex parte* if any party fails to appear. The magistrate may examine parties and witnesses on oath and may require the production of books, papers, writings, vouchers, and other documents. Under Rule 1.490 and Rule 12.492, the special magistrate may admit evidence by

deposition or otherwise and “may take all actions concerning evidence that can be taken by the court and in the same manner.” The language of Rule 5.697 differs slightly. It makes no reference to deposition testimony, but says essentially that the special magistrate shall admit evidence that “would be admissible in court.” Under Rule 1.490(f) and Rule 5.697(d), evidence at hearings is to be taken “in writing” and shall “be filed with the magistrate’s report. Rule 12.490(e) differs slightly and provides that, “unless otherwise ordered by the court, all parties shall equally share the cost of a court reporter at a special magistrate’s proceeding.” Rule 12.492(e) also specifically provides that if *all* parties waive the presence of a court reporter at hearing, they should do so in writing. In almost every instance, therefore, it seems that a court reporter is advisable, and that the order of reference should provide who is to make arrangements for the reporter and how the costs are going to be allocated.

Rule 1.490(g) and Rule 12.492(f) deal with the content of the magistrate’s report:

In the reports made by the magistrate no part of any statement of facts, accounts, charge, deposition, examination, or answer shall be recited. The matters shall be identified to inform the court what items were used.

The precise language of Rule 5.697 differs, but the substance is the same. As will be discussed hereinafter, the creation of a record is one of the master’s most important duties. Failure to provide an adequate record can have serious consequences.

Omitted from Rule 1.490, Rule 5.697 and Rule 12.492 is whether the magistrate has the authority to impose sanctions on any party for non-compliance with any of the magistrate’s directives. Rule 53 explicitly addresses this question. Under Rule 53(c) the master has the authority to *impose* any *non-contempt* sanction provided by Rules 37 or 45,²⁵ but is limited to *recommending* contempt sanctions. Absent an explicit delegation of contempt authority either by statute or by Rule 1.490, Rule 12.492 or Rule 5.697, it is doubtful whether a special magistrate under these Rules may

do more than recommend a contempt sanction to the presiding judge.²⁶ It is also unclear whether a magistrate under Rule 1.490, Rule 5.697 or Rule 12.492 may impose non-contempt sanctions (*e.g.*, award attorney's fees or costs, strike pleadings or defenses, or order matters taken as admitted) or whether he or she is confined to recommending such sanctions to the presiding judge.

Rule 53, Rule 1.490, Rule 12.492 and Rule 5.697 have very similar provisions regarding the dispatch with the master is to proceed. Rule 1.490(f), Rule 12.492(e) and Rule 5.697(d) provide that the magistrate "shall proceed with reasonable diligence" in every reference and with "the least practicable delay." They go further to say that any party may apply to the court for an order to the magistrate to speed the proceedings. Rule 53(b)(2) *requires* that the order of reference "direct the master to proceed with all reasonable diligence."

Rule 53(d) makes specific reference to "Master's Orders." Indeed, Subsections (d) and (e) envision a court adjunct that both *reports* to the court and issues *orders* to the parties. At no place in Rule 1.490, Rule 12.492 or Rule 5.697 is there reference to the master issuing or filing *orders*. One can fairly ask whether a magistrate under the state rules has authority, whether explicit or implicit, to *issue* orders – as opposed to *recommending* orders to the appointing judge. At least one appellate decision has held that a special master's role is advisory only, and that any ultimate disposition and determination must be adjudicated by the court.²⁷

On their face Rule 1.490, Rule 12.492 and Rule 5.697 seem to envision a narrower grant of power to masters than those granted by Rule 53. One reason is historic. Rule 1.490, Rule 12.492 and Rule 5.697 are based mainly on the old Chancery Act, sections 54 through 65, which were taken in large part from the Federal Equity Rules.²⁸ The former practice in equity was to have testimony taken by a master or special examiner.²⁹ Masters in chancery were not adjuncts with adjudicative functions. In England, chancellors would primarily utilize masters as assistants to aid in the performance of ministerial functions such as: recording testimony, disposing of property in pursuance

of settling judgments, presiding over evidentiary hearings, tabulating damages, and auditing accounts.³⁰ In essence, masters in equity were information gatherers and advisers. Read in this historic context, it is easy to see why Rule 1.490, Rule 12.492 and Rule 5.697 make no reference to the issuance of *orders* by masters. It seems that Rule 53 has been “revised extensively to reflect changing practices in using special masters”³¹ -- whereas Rule 1.490, Rule 12.492 and Rule 5.697 are still tethered to earlier equity practice.

When appointing a special magistrate under Rule 1.490, Rule 12.492 or Rule 5.697 it seems advisable to specifically include in the order of reference: whether the special magistrate may issue orders; under what circumstances he or she may do so; and what types of orders are permissible. Rule 53 (b)(A) provides that the order appointing a master *must* state the master’s duties and any limits on his or her authority. Subsection (c) of Rule 53 (which enumerates fairly broad categories of power vested in a master) opens with the language “Unless the appointing order directs otherwise...” This underscores the relatively broad nature of authority granted the master under Rule 53. This means also, however, that care must be taken in drafting the order of reference. An order of reference that too narrowly delineates the grants of power could be construed as a *limitation* upon the broader authority granted by Rule 53. The order of reference needs to be clear whether the intention is to expand or curtail the authority granted by the language of the applicable rule.

The record, report and exceptions: Rule 1.490, Rule 12.492, Rule 5.697 and Rule 53 differ significantly on the subject of the master’s report to the court. Rule 1.490(h) requires the special magistrate to take evidence “in writing” and file that written *record* with the magistrate’s *report*. Rule 12.492 requires a court reporter at hearing *unless waived by all parties*. Rule 5.697(d) provides that “evidence shall be taken in writing or by electronic recording” and that the record “shall be filed with the magistrate’s report.” All three rules prohibit the recitation of evidentiary detail in the body of the report. Rule 53 does not specify how the record is to be created or what recitations may be

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contained in the magistrate's report, but it does provide in subsection (e) that the master must report "as required by the order of appointment." Under all three rules the *report* itself must be filed with the court.

After the magistrate's or master's report has been filed with the court, any party may file exceptions or objections to any or all of his or her findings and/or recommendations. Under Rule 1.490(h), Rule 12.492 and Rule 5.697(f), a party's exceptions must be *served* within 10 days of the master's *service* of copies of the report on the parties. Rule 12.492(g), unlike Rule 1.490(h), provides for the *filing* of cross-exceptions within 5 days of service of the opposing party's exceptions. Under Rule 53(f)(2) 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*." (Emphasis supplied). (Effective December 1, 2009, Rule 53 (f)(2) is amended and the 20 day time period becomes 21 days.) Cautious practitioners will note the distinction between "file" and "serve" in these rules.

If no exceptions or objections are filed, then the court, after expiration of the time for filing exceptions or objections, may act on the report. Rule 1.490(h), Rule 12.492(g) and Rule 5.697(f) each provide that the court "*shall* take appropriate action on the report." It has been held reversible error for the court to act on the magistrate's report before the expiration of the time for exceptions.³² Even in the absent of exceptions by a party, the "trial court -- prior to entry of a final judgment in accordance with the master's report" -- has a duty to examine and consider the evidence for itself and to determine whether under the law and facts the findings and recommendations of the magistrate are justified.³³ One Florida District Court of Appeal, addressing this issue under Rule 1.490, expresses this view that *review* of the magistrate's *record* is obligatory.³⁴ There seems to be no appellate decision addressing a potential problem created by Rule 12.492(e), which subsection

suggests that all parties may *waive the presence of a court reporter* at a magistrate's hearing.

Without a record to review, how is the court to rule on exceptions to the magistrate's report?

From the language of Rule 53(f)(1), a hearing is required but it lies within the discretion of the federal court whether to review the *record* or *evidence* underlying the master's report. Rule 53(f)(1) provides:

*(2) Opportunity for a Hearing: Action in General. In acting on a master's order, report, or recommendations, the court **must** give the parties notice and an opportunity to be **heard**; **may** receive evidence; and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master for instructions. (Emphasis supplied]*

Under Rule 1.490, Rule 12.492 or Rule 53, the court *must* provide an opportunity to be heard once exceptions or objections are filed. Rule 5.697(f) provides that all "timely exceptions *may* be heard by the court on reasonable notice by any party."

Subsections (f)(3), (4), and (5) of Rule 53 provide explicit standards for the court's review of the master's report. The court must decide *de novo* all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's approval, that the master's findings of fact will be reviewed for "clear error" or that findings of fact by a master appointed under Rule 53 (a)(1)(A) or (C) will be final. If such stipulations exist, the order of reference should acknowledge them and recite the court's consent. The court must decide *de novo* all conclusions of law made or recommended by the master. "*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*. It is interesting to note that the appointing judge, arguably, may establish his or her own standard of review for matters of procedure. If some standard other than abuse of discretion is to be utilized, this is a subject that ought to be addressed in the order of reference.

Rule 1.490, Rule 12.492 and Rule 5.697 provide no explicit standards for a judge reviewing the report and recommendations of a special magistrate. Instead, we need look to published appellate decisions in Florida. The early decisions, arising during a time when special masters served essentially as fact finders, couched the standard of review in jury-verdict terms. In essence, these decisions hold that because the special master had the opportunity to observe the witnesses and assess their veracity, the master's findings and conclusions were to be accorded the same weight as a jury verdict in a common law action.³⁵ In examining the various appellate decisions addressing the question of review standards, we see that over time two disparate sets of standards emerge. One line of cases has adopted a "competent substantial evidence" standard for findings of fact and a "clearly erroneous" standard for issues of law.³⁶ A second line of decisions applies a "clearly erroneous" standard for findings of fact and a "misconception of the law" standard for conclusions of law.³⁷ The two lines of cases are irreconcilable as to nomenclature, *i.e.*, with respect to what they *call* the standards of review. One Fifth District Court of Appeal decision interjects yet another variation on the theme. In *Anderson v. Anderson*, the Fifth District Court of Appeal speaks of "a 'clearly erroneous' standard for findings of fact and an 'abuse of discretion' standard for the application of law to the facts."³⁸

There appears to be no Florida appellate decision considering what the standard of review should be for *procedural* conclusions by the magistrate under Rule 1.490, Rule 12.492 or Rule 5.697. For example, if the magistrate concludes that a party's responses to requests for admission are insufficient and that the matter requested be deemed admitted, what standard should the presiding judge apply? Under the federal rule, the standard of review would be "abuse of discretion." One can only speculate whether a state appellate court would apply an "abuse of discretion" standard, a "clearly erroneous" standard, or a "misconception of the law" standard.

An equally thorny problem is that of the special master's record. As we have seen above, Rule 1,490 requires that evidence be taken in writing and *filed* with the magistrate's report. The court has a *sua sponte* duty to examine and consider the evidence and to determine whether under the law and facts the findings and recommendations of the magistrate are justified.³⁹ If the magistrate fails to make and file a written record, then the court is thwarted in this responsibility. Some earlier appellate decisions held that it was the responsibility of the party filing exceptions to insure that the record was made and filed, and failing to do so, that their exceptions should be overruled.⁴⁰ Later decisions have placed the onus of creating an accurate and complete written record on the master. In the *Boalt v Boalt* and *De Clements v De Clements* cases,⁴¹ trial courts denied exceptions to special master reports because the records of the masters' proceeding were defective or unavailable. The trial courts in each case placed the burden of providing the record, at the time of hearing on the exceptions, on the excepting party. In each case the appellate court reversed. These decisions notwithstanding, Rule 12.492(g) provides that the "party seeking to have exceptions heard shall be responsible for the preparation of the transcript of proceedings before the magistrate."

The requirement of Rule 1.490 to create and *file* a record *with the magistrate's report* creates some problems of expense and practicality. The parties may find it cost effective to have a court reporter recording hearings, but want to withhold the ordering of a transcript until the filing of exceptions. Further, some clerks of court may balk at voluminous filings of papers without an imminent hearing that necessitates the filing. A common sense solution would be to address this problem in the order of reference or by a stipulation of the parties. In any event, however, the special magistrate, the court and the parties would be wise to create a complete an accurate record for each proceeding presided over by the special magistrate – even if that record is subject to delayed transcription and filing.

Rule 53 contains no explicit provision requiring a written record or filing of such record with the master's report. However, subsection (b)(C) requires that the order of reference specify the nature of the materials to be preserved and filed as the record of the master's activities. Because a written record is essential if the court is to perform a de novo review, the need for a record is central in the procedural scheme of the Rule.

Form of the master's report: The format of the master's or magistrate's report may be as varied as the many tasks that can be assigned to him or her. However, due to the need for court review and rulings on exceptions, the report should clearly distinguish between findings of fact, rulings of a procedural nature, recommendations, and conclusions of law. This aids the parties and the presiding judge in assessing: whether the master is deciding a matter within the scope of his or her appointment; what records need to be reviewed for the purpose of ruling on exceptions, and what standard of review is applicable to a given decision or conclusion. The report should reflect clearly whether the master or magistrate is acting in an adjudicatory role (*e.g., ruling on procedural matters, matters of sanctions, etc*) or in a fact finding or advisory role.

Ex parte communications: Rule 53 (b)(B) requires that the order of reference specify the circumstances, if any, under which the master may communicate *ex parte* with the court or a party. Rule 1.490, Rule 12.492 and Rule 5.697 are silent on the subject of *ex parte* communications. In most instances, *ex parte* communications are probably not desirable or necessary. An exception may be in situations where the master is serving as a settlement master.⁴² Whether dealing with a federal or state appointment, the subject of *ex parte* communications ought to be addressed in the order of reference. To the extent that a special master is granted adjudicative (as opposed to advisory) powers, it probably would be wise to limit the conditions under which the master engages in *ex parte* communications with the parties.⁴³

Master’s compensation: Rule 53(b)(E) requires that the order of appointment specify the basis, terms, and procedure for fixing the master’s compensation under Rule 53(g). Under that subsection, compensation may be paid either by a party, parties or a fund or subject matter that is within the court’s control. It also permits the court to specify how the compensation is to be allocated among the parties. Rule 1.490 and Rule 5.697 make no reference to the magistrate’s compensation. Rule 12.492(h) provides that “the costs of a special magistrate may be assessed as any other suit money in family proceedings and all or part of it may be ordered prepaid by the order of the court.” The order of reference should provide in some detail how compensation is going to be addressed. One appellate decision outlines criteria the court should consider in adjudicating the compensation to be paid the magistrate where the amount of compensation is in controversy.⁴⁴

A final note: Today, electronic discovery looms large in litigation.⁴⁵ The U.S. Supreme Court on April 12, 2006, approved extensive electronic discovery amendments to several of the Federal Rules of Civil Procedure.⁴⁶ These took effect on December 1, 2006. The Florida Bar is exploring whether to propose modifications similar to the Federal amendments.⁴⁷ The labyrinthine, technical aspects of electronic discovery, and the increasing complexity of litigation generally, create fertile ground for the utilization of special masters. Additional expansion of the role of masters seems inevitable. Carefully drafted orders of reference, which anticipate issues and problems, can do much to make the utilization of special masters effective and cost-efficient.

¹ The provisions of Fed. R. Civ. P. 53, taken in their entirety, point to a case-specific designation of the person serving as “master.”

² See generally: *Bell v. Bell*, 307 So.2d 911, at note 3 (Fla. 3rd D.C.A. 1975); Fla. Fam. Law R. P. 12.490; Fla. R. Juv.P. 8.060; and Fla. R. Traf. Ct. 6.630.

³ Compare *Gray v. State of Florida*, 489 So.2d 86 (Fla. 5th D.C.A. 1986) (The appellate court’s language suggests confusion as to the status of the “master” involved in the case) with *Ciccarelli v Ciccarelli*, 352 So.2d 1204 (Fla. 4th D.C.A. 1977) (The appellate court uses both terms in one sentence to describe a master, who from the context of the case,

appears to be the same person.) and *Bell v Bell*, *supra* (Fla. 3rd D.C.A. 1975) (The trial court in its judgment uses the term “special master” to refer to a separate and distinct “general master” in the case.)

⁴ See *Ex Parte Peterson*, 253 U.S. 300, 312-13 (1920); *Kimberly v. Arms*, 129 U.S. 512, 524-525 (1889).

⁵ See Irving R. Kaufman, *Masters in the Federal Courts : Rule 53*, 58 Col. L. Rev. 452, 452 (1958).

⁶ See Bryant, *The Office of Masters in Chancery: Colonial Development*, 40 A.B.A. Journal, 595 (1954).

⁷ It should be noted that Rule 1.490 of the Florida Rules of Civil Procedure governs the appointment of *both* general and special magistrates in civil cases. However Florida Family Law Rules of Procedure 12.492 governs only the appointment of special magistrates. Rule 12.490 governs the appointment of general masters in family law cases. The appointment of general masters in family law, and the use of masters under the Florida Rules of Juvenile Procedure, are beyond the scope of this article.

⁸ For a detailed history of this evolution, see Mark A. Fellows and Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31:3 William Mitchell Law Review (2005); and Shira A. Scheindlin and Jonathan M. Redgrave, *Master Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters*, New York State Bar Journal (January 2004).

⁹ Mark A. Fellows and Roger S. Haydock, *supra* at 1270.

¹⁰ *Amendments to the Florida Rules of Appellate Procedure, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Florida Family Law Rules of Procedure, the Florida Rules of Juvenile Procedure, and the Florida Probate Rules*, 887 So.2d 1090 (Fla. 2004).

¹¹ The change in nomenclature was prompted by the need to reconcile the language of Rule 1.490 with 2004 legislative changes to various related statutes. See *id* at 1090.

¹² See Fed. R. Civ. P. 53(h). (dealing with the applicability of Rule 53 to magistrate judges.)

¹³ Consent is also required for referral to a general master under Fla. Fam. Law R. P. 12.490.

¹⁴ See *Rosenberg v. Morales*, 804 So.2d 622 (Fla. 3rd D.C.A. 2002); *Pesut v. Miller*, 773 So.2d 1185 (Fla. 2d D.C.A. 2000); and *Wilson v. McKay*, 568 So. 2d 102 (Fla. 3rd D.C.A. 1990).

¹⁵ *Novartis Phams. Corp v. Carnoto*, 798 So.2d 22 (Fla. 4th D.C.A. 2001). *Pesut v. Miller*, *supra*.

¹⁶ 615 So.2d 760 (Fla. 4th D.C.A. 1993).

¹⁷ Committee Note to Fla. Probate R. 5.697.

¹⁸ Compare subsections (b) and (c) of Rule 1.490 with subsections (b) and (c) of Rule 5.697.

¹⁹ Fed. R. Civ P. 53(a)(1).

²⁰ See e.g., *United States v. Raddatz*, 447 U.S. 687 (1980) (appointment upheld where magistrate judge had no independent authority to enforce orders, and dispositive decisions on the law and facts were reviewed de novo on the record).

²¹ See *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

²² The Academy of Court-Appointed Masters (ACAM) was created in 2004 at a conference sponsored by the National Arbitration Forum. ACAM has completed a handbook that contains sample appointment orders, as well as numerous useful references and appendices. The title is *Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges*. First published March 2004, the handbook may be downloaded from the ACAM website: www.courtappointedmasters.org. (last visited February 23, 2007).

²³ This is consistent with the requirements for general magistrates under Fla. Fam. Law R. P. 12.490 and Fla. Probate Rule 5.697(a).

²⁴ See generally *Quee v. Breed*, 165 So. 56 (Fla. 1936) and *Lyle, et al v. Hunter*, 136 So. 633 (Fla. 1931).

²⁵ Rule 37 relates to failures to make discovery and the consequences for such failures. Rule 45 deals with failures to comply with subpoenas.

²⁶ See *Gray v. State of Florida*, *supra*. (A “general or special master” appointed by Seminole County to hear a child support case found the father in contempt by virtue of arrearage and ordered him jailed. The father resisted and was ultimately convicted of battery and resisting arrest. The appellate court reversed the conviction, holding that the master was without authority to order the arrest.)

²⁷ *Tucker v. Diodato*, 321 So.2d 569 (Fla. 4th D.C.A. 1975) (a special master appointed for the purpose of presiding over an involuntary hospitalization under the Baker Act ordered the Petitioner hospitalized.).

²⁸ Authors Comment to Fla. R. Civ. P. 1.490.

²⁹ *Id.*

³⁰ *De Clements v. De Clements*, 662 So.2d 1276, 1279 (Fla. 3rd D.C.A. 1995); See James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. Rev. 800, 800-01 (1991).

³¹ *Administrative Office of the U.S. Courts, Amendments to the Federal Rules of Civil Procedure*, 215 F.R.D. 158, 328 (2003).

³² *Berkheimer v. Berkheimer*, 466 So.2d 1219 (Fla. 4th D.C.A. 1985).

³³ *De Clements v. De Clements*, *supra* at 1282; *Bell v. Bell*, *supra* at 914 (A fascinating aspect of this case is that the trial judge appointed a special master to rule on exceptions that a party had filed to a report of the general master. The appellate court found this to be an impermissible delegation of judicial power.)

³⁴ *Id.*

³⁵ See *Mahan v. Mahan*, 88 So.2d 545, 547 (Fla. 1956); *Lyon v. Lyon*, 54 So.2d 679, 680 (1951); *Harmon v. Harmon*, 40 So.2d 209 (1949); and *Kent v. Knowles*, 133 So. 315, 316 (Fla. 1931).

³⁶ See *Cerese v. Dewhurst*, 935 So.2d 575, 578 (Fla. 3rd D.C.A. 2006); *Robinson v. Robinson*, 928 So.2d 360 (Fla. 3rd D.C.A. 2006); *Carlson v. Carlson*, 696 So.2d 1332, 1333 (Fla. 4th D.C.A. 1997);

³⁷ See *In Re: The Guardianship of Anne Ruppert*, 787 So.2d 925, 926 (Fla. 2d D.C.A. 2001); *Ares v. Cypress Park Gardens Homes I Condominium Assn*; 696 So.2d 885, 887 (Fla. 2d D.C.A. 1997); and *De Clements v. De Clements*, *supra* at 1282.

³⁸ 736 So.2d 49, 50 (Fla. 5th D.C.A. 1999).

³⁹ *De Clements v. De Clements*, *supra* at 1282.

⁴⁰ See *Ben-Hain v. Tacher*, 418 So.2d 1107 (Fla. 3d D.C.A. 1982) *overruled by De Clements v. De Clements*, *supra* at 1284.

⁴¹ *Boalt v. Boalt*, 672 So.2d 109 (Fla. 4th D.C.A. 1996) and *De Clements v. De Clements*, *supra*.

⁴² See generally Mark A. Fellows and Roger S. Haydock, *supra* at 1280-1282.

⁴³ Mark A. Fellows and Roger S. Haydock, *supra* at 1283.

⁴⁴ See *Novartis Pharms. Corp. v. Carnoto*, 837 So.2d 1127, 1129 (Fla. 4th D.C.A. 2003).

⁴⁵ See generally Robert H. Thornburg, *Electronic Discovery in Florida*, *The Florida Bar Journal* (October 2006)

⁴⁶ *Amendments to the Federal Rules of Civil Procedure*, available at: www.uscourts.gov/rules/Ediscovery (last visited February 19, 2007).

⁴⁷ Robert H. Thornburg, *supra* 36.

Howard R. Marsee serves as a special master, mediator and arbitrator with the ADR group of Upchurch Watson White & Max, with offices at Maitland, Daytona Beach and Miami, Florida, as well as Birmingham, Alabama. He is a member of the national Academy of Court-Appointed Masters. He received his B.A. degree with honors from University of South Florida, and his J.D. degree with honors from the University of Florida. At the University of Florida he served on the Law Review and was a member of The Order of the Coif. He was formerly a board certified civil trial attorney with the law firm of Hannah, Marsee and Voght, P.A. in Orlando, Florida.

