

## 2004 SPECIAL MASTERS CONFERENCE: TRANSCRIPT OF PROCEEDINGS

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### I. INTRODUCTION

A historic gathering of special masters occurred on October 15th and 16th, 2004 in Saint Paul, Minnesota. Federal and state court-appointed masters from around the country met for the first time to share their experiences as special masters and to form a national association of court appointed masters. This issue of the

*William Mitchell Law Review* contains articles presented at the conference and the transcript of faculty presentations. Throughout the transcript of faculty presentations, the word “speaker” denotes a conference attendee.

Roger Haydock, a Special Master and William Mitchell College of Law Professor, developed the ideas for a national conference and a permanent association. He attributes his work with the Honorable Michael Davis, a United States District Court Judge in Minnesota, as the inspiration for these ideas. Professor Haydock created a program covering special master topics and selected a faculty composed of the most preeminent court-appointed masters in America.

The National Arbitration Forum agreed to sponsor the conference with the assistance of the Federal Judicial Center. The Institute for Advanced Dispute Resolution at William Mitchell College of Law agreed to host the conference. David Herr, a Minneapolis lawyer with Maslon Edelman Borman & Brand, LLP agreed to draft legal documents creating a national association. And, the *William Mitchell Law Review* agreed to publish papers presented at the conference and some of the proceedings.

The attendees at the conference formed the Academy of Court Appointed Masters (ACAM). This national organization is open to any individual who has been appointed by a federal or state court judge and who has served as a master.<sup>1</sup>

## II. WELCOME<sup>2</sup>

Welcome to the first-ever national conference of special masters. We are most pleased with your being here, representing federal and state courts from all over the country. And we look forward to spending the next day-and-a-half together discussing topics of interest to us all, and to forming an ongoing, permanent organization of court-appointed masters, so we can learn more from each other at a national conference next year and in the

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1. More information about ACAM and a membership application can be found at: [www.courtappointedmasters.org](http://www.courtappointedmasters.org). Or you may contact Roger Haydock, its President, at [rhaydock@arb-forum.com](mailto:rhaydock@arb-forum.com) or at 888-WMCL-LAW.

2. Delivered by Roger S. Haydock, Director, Institute for Advanced Dispute Resolution; Professor of Law, William Mitchell College of Law; Director, National Arbitration Forum. Professor Haydock currently serves as a special master in the Baycol Products Litigation in United States District Court for the District of Minnesota.

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future.

Our American system of justice and our federal and state court dispute resolution systems need special masters to help parties, lawyers, judges, and the public achieve justice for all. There is much we can do as court-appointed masters to help educate the judiciary, the bar, and our communities about our work. And there is much we can learn from each other. This conference is a first step in achieving those goals.

This conference would have not been possible without the support and sponsorship of the National Arbitration Forum, a preeminent leader in providing dispute resolution throughout America and the world. And the Federal Judicial Center assisted in promoting the conference. We are here as honored guests of the William Mitchell College of Law and its Institute for Advanced Dispute Resolution. I want to publicly thank them all for making this possible.

I have always considered it a privilege and honor to be a special master, and standing here before you and realizing all the good you have done for our justice system makes me proud to be one as well. I would not be here but for the judge who first appointed me as a special master, Judge Michael Davis, whom you will shortly hear from. And you would not be here without your judge selecting you to be a very special master.

While this conference is for and about special masters, it seemed quite appropriate to begin the conference with a view from the bench, from those who appointed us. Our first three speakers are highly respected and very experienced jurists.

The Honorable Michael Davis is a United States District Court Judge for the District of Minnesota, and has served as one of our finest federal judges for ten years. Before that, he was an outstanding state court trial judge in Minnesota, and has viewpoints from both benches.

The Honorable Jonathan Lebedoff is Chief Magistrate Judge for the Federal District of Minnesota. He also has served as a state court trial judge on the same bench where Judge Davis served. He not only has over thirty-years service as a judge, but he is held in great esteem by both the bench and bar.

And, John Borg, a highly regarded former Minnesota state court judge and now an excellent special master in both federal and state courts, will talk about what it is like to be a judge appointing masters and to be a court-appointed master.

### III. VIEW FROM THE BENCH

#### A. *Summary of Presentation by the Honorable Michael J. Davis*

Judge Davis began by acknowledging the important service provided by special masters to judges and the judicial system. He said that he uses special masters for cases and in situations that significantly benefit the parties and their lawyers, and acknowledged that other federal judges may not use, or are disinclined to use, court-appointed masters.

The judge went on to explain how he has found special masters to serve important roles in getting complex, multi-party cases settled, in resolving discovery disputes, and in working with litigating lawyers to get them to agree to matters avoiding the need for judicial intervention.

Judge Davis recognized the need for the conference and believed that those attending will learn a lot about special master work. He acknowledged that federal and state court judges who do not use special masters may be educated about the great results that special masters can achieve in many cases.

#### B. *Summary of Presentation by the Honorable Jonathan Lebedoff*

Judge Lebedoff first acknowledged his thanks to special masters who have made his tasks as a magistrate judge more productive. He explained his duties as a magistrate judge and how special masters can assist judges on cases. He elaborated that much of his work as a judge involved the settlement of cases and that there are approaches that a judge can take in settlement discussions that special masters cannot, but that there are approaches special masters can employ that judges cannot. He concluded with the observation that special masters serve a vital and important role.

#### C. *Summary of Presentation by John Borg*

John Borg observed that it is hard to say something informative as the speaker following two very experienced judges. He focused on what helps make special masters most effective, including thorough preparation, the trust of the lawyers and parties, and hard work. He concluded by emphasizing specific areas of special master work and entertained the group with a top

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ten list for special masters.

#### IV. SPECIAL MASTER RULES

##### A. *Rule 53: Presentation by David Ferleger*<sup>3</sup>

MR. HAYDOCK: For our first presentation this morning, we picked the topic on developing the rules in federal and state court and picked the two Davids—David Ferleger and David Herr—who are going to chat with us about the process.

MR. FERLEGER: Good morning, I would like to talk a little bit about masters and their functions and Rule 53 and other issues under Rule 53. David Herr and I were just saying to one another that the rule fixes a lot of things, and makes a lot of things look skewed, and it may also have caused a lot of problems and confusion and will obviously be a basis for a lot more litigation.

Rule 53 is so vague and flexible that courts utilize it pretty much for whatever they want to. Masters have been around a long time. English chancery practice used masters. Federal rules have had masters since 1938 or so. Justice Brandeis in the 1920s observes that, since the founding of our government, masters have been used by the courts.

Masters were used very often just for clerical sorts of tasks later in the nineteenth century. Eventually, masters began taking evidence and making non-binding recommendations. Things have changed. For example, we have the old Rule 53's "exceptional circumstances" test for the use of masters and now we have elimination of that test in most situations in the new rule which went into effect at the end of 2003.

The Advisory Committee discussion of the new rule reflects today's reality that the courts have come to rely on masters to assist framing and enforcing complex decrees, as well as dealing with individual cases such as those where the master receives the referral, makes a report or perhaps has a hand in facilitating settlement of the case, or in administering damages or other relief. The new rule recognizes pretrial masters—some of us here know that role pretty well—and trial masters. Post trial masters can do all kinds of things from dealing with a long-run remedial plan-type

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3. Founder of Summit Solutions, Innovative Arbitration, Mediation & Alternative Dispute Resolution, Special Mastership & Court Monitoring, 10 Presidential Blvd., Bala Cynwyd, PA 19004, <http://www.summitsolutions.us>.

issues. In my case in Connecticut, *United States v. State of Connecticut*, I was appointed after the state was held in contempt of court, and my first job was to provide a remedial plan to help the state purge itself of contempt. We wrote a 300-page plan, and the court adopted it.

The rule doesn't discuss the category that the courts have created over the years which is the use of masters as technical advisors to the court. The technical advisor is a little bit expert, a little bit master. The courts find it appropriate when an independent technical advisor can assist the court in understanding the relevant technology or other technical information. The technical advisor will not contribute evidence or render conclusions of law. For example, in one case the court appointed an electrical engineer to educate the judge on programmable logic devices.

Courts have appointed people to be a neutral observer within the entity of the defendant's control, to analyze and continue efficacy of the decree, to report based not hearings, but rather on personal investigations of the facts. Masters may review fee applications, and administer settlement funds, restitution funds, or the like. Masters can also be involved in administration and organization, perhaps like the role of an interim CEO of a company.

Under the new rule, a master can do anything the parties can agree to, except preside over a jury trial. Without the parties' consent, the master can be appointed to make findings of fact on non-jury cases.

Something that I think the courts are going to have to struggle with is the masters' role outside the courtroom. The Advisory Committee notes that under the new rule the master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system. Now think about that. Unlike the traditional role of a judicial officer in an adversary system, here we have masters that under the rule can be appointed to things not like what judicial officers do.

The old rule as we know was silent on the contents of the Order of Reference. Ken Feinberg described Orders of Reference in settling cases essentially in one or two sentences. The new rule, however, prescribes the substance as a table of contents of what must be covered. The table of contents for the Order of Reference

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includes the masters' duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c). The second item covers the circumstances, if any, in which the master communicate ex parte with the court or a party. Third, the nature of the materials to be preserved and filed as the record of master's activities. Fourth, the time limits, method of filing the record, and standards for reviewing the orders of the master. Last, the basis, the terms and procedure for fixing the master's compensation.

The new rule provides twenty days to object to the report of the master. If there is an objection to the report, the rule says the court may receive evidence, act in other specified ways, or require the master to resubmit it. That kind of detail was not in the old rule.

SPEAKER: You have an Order of Reference under the old rule that sets up the ten-day response time for your report. Is it your belief that the new rule supersedes what is in the Order of Reference rather than under the old rule?

MR. FERLEGER: I would say no, but I would say the standard for judicial review would apply under the new rule, even to a pre-amendment Order of Reference since it is a substantive change to the law. For a Rule 53 master, to respond further to your question, I guess it depends if you refer in the Order to the rule, since the parties may have agreed or the court ordered ten days apart from the rule. But in my experience ten days is never enough anyway. The parties are going to come and ask me or the judge for more time.

SPEAKER: I have a question on the Findings and Conclusions. Are they reviewed by the judge de novo, or can he accept them without an independent review?

MR. FERLEGER: The new rule eliminates the clear and erroneous standard for Findings of Fact. I know of judges who were astounded to read this under the new rule. They would say "Why do I have a special master if I have to review it de novo?" The rule says the court must decide de novo all objections to Findings of Facts made by the master.

SPEAKER: By the way, I worked on those rules when they were written by a judge in the Southern District, Judge Sperling. The reason for that position is that you are a master and you're not a judge. And in the end, decisions ought to be made by the judge with recommendations. In fact, in my thirty or forty assignments, I

never decided anything. I always recommended it to the judge for his or her decision, and that's the reason masters do that type of thing.

SPEAKER: I just want to point out that the same level of review is applied by district courts and magistrate judges and even, for example, in summary judgment contexts, by the courts of appeals and the district courts. So really, in a sense, it's just so many words—that you have to make sure, when you're the reviewing court, you say "I'm reviewing this de novo" and look at what the special master did and that it's right.

SPEAKER: With de novo review, it would be on the record—you wouldn't have a right to introduce new witnesses or the same old witnesses in a de novo review. Am I correct?

MR. FERLEGER: In a section of the new rule on objections, it says the court may receive evidence and that implies that the court has the discretion to receive evidence or not.

SPEAKER: So it could be either kind of review?

MR. FERLEGER: Yes, either on the record or with new evidence. I doubt parties could go to a judge and say, "By the way, judge, we forgot, we got better evidence and failed to show it to the master but want to present it to the court now." Procedural decisions are held under the new rule absent an abuse of discretion standard.

SPEAKER: The new rule says the parties can stipulate that the master's fact-findings can be binding?

MR. FERLEGER: The parties can stipulate to anything. The parties can stipulate to a different standard of review. The Advisory Committee tells us that the rule doesn't address—it just refers to—the difficulties that arise when one person is appointed as both the expert witness and a special master. Some can be appointed under the Rule 706 expert witness and also as a court-appointed masters. And without really telling us what the consequences are of that lack of coverage, the Committee says the rule does not cover that situation.

I think about that issue in my work. Some of what I do is hold hearings. I also, in some situations, provide some expert advice about reviews and investigations. So far, we have not had a situation where I've been called as a witness, but I think if my factual conclusions are challenged, and I'm the one who did the investigation, I think the parties probably would have a right to call me as a witness as a fact-finder if there was no other source of the

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information. Generally, however, masters may not be called as witnesses.

Rule 53—under new Rule 53 makes it clear that the recusal requirement and other provisions of the Code of Conduct of Judges apply to masters.

The Advisory Committee says because a master is not a public judicial official, it's appropriate—may be appropriate—for the parties to consent to the appointment of a particular person and require the disqualification of the judge. And that would apply in situations where a judge might be biased, if the judge has some opinions on certain issues. The master will not be held to judicial standard for conflicts if the parties will accept the “opinionated” master.

The former rule didn't talk at all about *ex parte* communications. The new rule states only the things that the Order of Reference must say the circumstances, if any, in which *ex parte* communication is permitted. The Advisory Committee—and I think it is a mistake in my opinion—the Advisory Committee says *ex parte* communications between the master and the court present troubling questions, and ordinarily the order should prohibit such communications. In my experience, *ex parte* communication is often essential for effective relationships between the master and court, and the master and parties. It is usual for parties to stipulate, and for the court to order, that *ex parte* communication is allowed.

The Advisory Committee states that there may be circumstances that a master is assigned to help coordinate multiple proceedings, for example, and may benefit from off-the-record exchanges with the court about logistical matters. The rule not to directly regulate these matters and requires only that the court exercise its discretion and address the topic in the Order of Appointment.

A lot of what I've learned in doing work as a master for a while is that essentially it's very important to have some exchange of information between the master and the judge. The Advisory Committee seems to recommend against it, although there is discussion of it.

On *ex parte* communication with the parties, the Advisory Committee says the same kind of thing—that the communication may be essential in seeking to advance settlement or other settings such as with *in camera* review of issues. But in both settings, *ex*

parte communications of the parties should be discouraged or prohibited.

What I think we have here and other areas of this new rule is that the Advisory Committee and the new rule are advanced and very positive in defining the first time types of masters—post-trial, pretrial—and making clear that there is a new world out there for what masters do. But in the detail, the standards are not nuanced enough to distinguish among necessarily different ways of proceeding for the different types of masters. There's a variety of functions that we do, and these *ex parte* comments by the Committee, for example, really ignore the variety of function that masters have.

A trial master, of course, should not be communicating *ex parte* to the parties or the court about the details or substance of what the evidence may be (but may communicate about logistics or to urge settlement, for example), but the Remedial Order and enforcement masters might have to have substantive *ex parte* discussion to effectively fulfill their roles. The settlement master is obviously going to be talking *ex parte*, although the rule is not clear on that. A month ago, the District of Columbia Court of Appeals in *In Re Brooks* held that *ex parte* communication is essentially acceptable if the subject of the consultation is what the monitor is doing, not what he is finding.

Some questions to consider: Can we wear multiple hats in our roles? Can we serve as investigating master one moment and the next moment as a master who holds hearings and makes recommendations on the hearings? Can we have private communications with the court and then inform and tell parties which way the court is headed or headed on certain issues? Can we sit with the judge and talk to the judge about disputed facts, talk to the judge about our knowledge gained, not in a hearing, but in an investigation permitted under the Order of Reference? Thank you.

*B. State Rules: Presentation by David F. Herr*<sup>4</sup>

MR. HERR: Good morning. I really think everything we have heard about federal court masters applies in some way in state

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4. Partner of Maslon Edelman Borman & Brand, LLP; Elected Member of the American Law Institute; current President of the American Academy of Appellate Lawyers. David F. Herr has served as special master in state and federal court antitrust, consumer fraud, and tort cases.

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court. We've got this great model in rule administration and court administration of old Rule 53. Some states have added a specific requirement to these to allow masters only where there is a situation where there is consent of the parties. They're listed in footnote seven of the article in the back of the tab section three of your conference materials.

I think we all know that you don't have to be a very skilled judge to obtain the consent of the parties to the use of a special master. And I think the consent requirement is not an overly restrictive restriction. A lot of the rules go back to the old federal equity rules. Masters should be the exception and not the rule. Everyone who looks at it is going to say special masters should be the exception and not the rule. By definition, they are special. They're not standing masters. Special masters are performing something exceptional about the case.

And I don't think that's a bad requirement, again, or an undue restriction. I think for all of the situations where we would say courts ought to be using special masters, they would fall into the exception and not the rule. Class actions, protracted cases, you know, cases where there are going to be thousands of pages of documents. Those sorts of things are exceptional.

In the federal court, civil cases in the federal courts that have been brought to conclusion without a single deposition being taken, is approximately ninety-seven percent.

The cases we are talking about are by definition exceptional. The ones we're talking about are the plane crashes with multiple deaths and massive class actions involving multiple different defendants in the same industry, or millions of consumer transactions, or pervasive race or age discrimination. All of those types of cases, class action, complex cases are quite exceptional in their own right.

The same is true in state court. The cases where judges are tempted to put in state court special masters are exceptional.

I do think the 2003 amendments to the Federal Rules are very useful for us. The amendments came forward in a very unusual process, but the federal committee actually decided to do a little empirical research and have the Federal Judicial Center do the research. The Center actually surveyed and found out what use courts made of special masters. How are they using them; what are they doing; what are the ground rules they are using. And I'm sure they were alarmed to see that they were used in a whole host of

ways one won't guess as possible under the existing rule. So, they amended the rule. And I agree with the view that it may not be a perfect rule because it does ignore a couple of significant issues. But it does describe the actual practice and it provides at least one significantly greater level of detail. It's helpful to us as masters. It's helpful to trial courts. I think it's helpful to the appellate court in reviewing masters' decisions.

Recognizing that there are different types of masters is significant. I think the great divide is not between pretrial, trial, and post-trial, but between the *adjudicatory* roles and what I think of as *settlement* kinds of roles, facilitating roles and mediating—all of those roles designed to foster settlement. I think that that is really the division that is important in state or federal courts. That's where the expectations of the parties are significantly different.

I've been appointed in the case here where the judge said at the beginning of the case, if the parties agree or at least fail to object, which I think is the same as agree, Mr. Herr is going to be sort of my "super law clerk." He said that on the record.

Does anyone think that a judge ought to be prohibited from talking to his or her law clerk about a case? That doesn't seem very controversial. I think the problem is the judge talking to the law clerk and either one of them giving a bunch of factual information outside the record. That's the vice there. It's not the discussion with the law clerk. Neither one of them is doing things the lawyers didn't know about or couldn't know about. So, that's the problem.

I happen to be of the view that we'll be seeing greater use of the masters. I think that they are really coming into their own. Some of the materials are in the article, but the budget question is they have a significant impact on the state courts. I don't think Minnesota is alone in having significant budget pressure on state courts. And these huge cases can put huge burdens on the courts.

We've been involved in litigating the case where I'm sure we took the equivalent of a judge granting two years of his time for one case. And during that period, if there weren't a special master involved, the judge couldn't even get to our case with a special master, let alone the rest of his calendar. And, certainly, the court administrator was happy to see the parties incur the costs.

I think it's just a tremendous force. The lawyers in the case were starting to say that's good for the parties and good for other litigants. That issue gets debated sometimes, but I don't think very seriously, that they are somehow diverting . . . the parties that can

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afford it can get better justice from the special master situation than those who can't.

In some states, the rules certainly contemplate that the judge can appoint a special master and pay for it out of a court's budget. You don't have to have the parties pay for it. This doesn't happen very often, however. That's a significant deterrent to appointment if the judge is going to have to find some money out of the court budget. And in that context may have to find a special master that would have to do it at a prorated rate of a district court judge or a special referee.

There is a lingering attitude in court rules distinguishing between dispositive and non-dispositive matters—which clearly makes some sense. That regardless of what the intended role of the master is, it's possible that they shouldn't be involved in, and some states would say *cannot* be involved in, deciding dispositive things like summary judgment. That managing discovery is somehow different from managing summary judgment. I think that's a problem. The federal magistrate judges have a pretty long laundry list of what is dispositive and what isn't. Some judges are still confused on whether a motion in limine is dispositive or not. And I certainly know of situations where the non-dispositive motion in limine is quite dispositive and it's easy to be confused about it.

The ethics here, I just want to mention briefly. The rules in the state court don't seem to address ethics at all. The Federal Rules are at least an improvement, I think, for putting that on the radar screen. It is one of the big areas that I think we might, in forming a National Association of Masters, pay some attention and offer some model law suggestions.

No one pays much attention to the ethical issues when functioning as a master. Do you have to be a lawyer to be a special master? No. You do in some states. In some states, you can only be appointed if you're a lawyer. Who is regulating you when you're a special master? You have to follow the Rules of Professional Conduct or Rules of Professional Responsibility as a special master. Are there written rules to guide your activities? How about the Code of Judicial Conduct? Do you have to adhere to the Code of Judicial Conduct when you're a special master?

SPEAKER: You do now.

MR. HERR: You do now. In all states, it's certainly not clear, and certainly . . . . Can the judicial disciplinary board discipline a special master?

SPEAKER: [This fragment is unintelligible.] Calls you, and says, “What are you doing?” Remember that conversation we have.

MR. HERR: They may be able to do that. I doubt that they could do a lot of disciplining against lawyers that are not . . . who have a judicial position, and they certainly can’t remove an officer. I think that it’s a little bit of a murky area of what the standards are, as it is for law clerks. Law clerks have the ability to get their judges in trouble more easily than they can get in trouble themselves.

The same is true, I think, for masters, but obviously, they can get in trouble. I think the rules ought to be more clearly defined as a useful thing in the state court and in the federal court. It’s a problem in state and federal and what rules apply. I participated in the ALI’s project on the law—covering lawyers—and suggested that they really needed more attention to the disciplinary status and confidential status of lawyers serving as experts, which I had researched for a client and found murky as well. I think the same problem still remains for ADR, especially in the context of lawyers doing it, why lawyers can be disciplined, or how they can be disciplined, what the standards are for performing something that’s not fundamentally a lawyer’s job.

SPEAKER: I’m concerned about the pre-appointment disclosure process that special masters should, or must, go through. Some of you may have been following what happened out in California a couple of years ago with the new disclosure rules with both consumer and non-consumer arbitrations and mediations. It’s quite impressive. It’s quite a checklist, and anybody who is designated for appointment as an arbitrator—you have to go through hoops to facilitate the disclosure, making it more-and-more difficult for people in large firms to make that disclosure because you have to go through the whole firm. Basically, you have to canvass everybody in the office to see if they have any conflict.

The statute really doesn’t talk about special masters. And special masters fulfill mediation duties sometimes. Certainly, they’re handling interim discovery issues, and they’re handling, basically, arbitrations as well. We basically made the same disclosure to the special master appointment as we would for arbitration. But I don’t know how other people feel about what kinds of pre-appointment disclosures you would make.

MR. HERR: It’s a complicated question. I think the California requirements go beyond what is viewed as necessary elsewhere. So, one thing to do is not do it in California.

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SPEAKER: That's what some organizations had decided.

MR. HERR: I think it's an inherently inappropriate rule. One thing that's very clear, when I've been hired as special master, is that I'm hired and the firm isn't hired. I'm not assigning associates to cover this hearing because I have to go take a deposition or argue an appeal. It's a very personal appointment. And I don't think that conflicts, except there may be disclosures of what the firm has done as there would be with any other conflicts certainty at the beginning. You know, you disclose to the parties and might want to consider whether or not we have representations, which disqualify us from, let's say, representing either party. Beyond that, there is nothing I don't think that's unduly burdensome.

SPEAKER: In California the discovery is ongoing, so that when the case evolves and you start getting witnesses and experts, you have to continue that disclosure throughout.

SPEAKER: This is true throughout the country, at least to some degree.

MR. HERR: If you're an adjudicatory special master, those disclosures are appropriate. Whether they are ongoing as to every nuance, again, I think the right place to draw the line is personal. If I have never met someone who is going to be an expert in the case, the fact that some other lawyer in my firm has met that person . . . one thing I don't do is talk to the lawyers in my firm about special master work. I mean, it's confidential and always has been. The fact that I'm appearing is not, but it's not something that I'm talking about at the firm meetings or something like that.

It's just unworkable to have every development in the case be a potential conflict, particularly for removal. You can't be making those disclosures all the way through.

SPEAKER: Another issue that comes up is can you appear before the judge if you're appointed as special master in Case A and then you're handling Case B? Can you, or should you, appear before the judge who has appointed you? I understand that if I've been appointed by the judge, I will not appear before that judge in any other litigated case as a special master role.

MR. HERR: That's required of you personally, not the whole firm.

SPEAKER: That is the exception to the Judicial Code rule, you know, we follow the Judicial Code standards. But the general view might have been if you're a special master, that doesn't disqualify your firm from appearing before the judge.

The other issue that comes up is how do you handle potential conflicts? In my twenty-five years of experience in this area, what I've always done is I've told the parties cases my firm may have against (or for) them, and I've asked them if they have any problems with it. If they said yes, I tell the judge I can't be a master. If they said no, then I have gotten permission on the record that I can communicate with either side or with the judge without creating any problems. Once you get that on the record—and most lawyers would prefer it that way—there are a host of issues that come up, not only issues about timing and such. If they have faith in your credibility, they will go along with the stipulation that you can handle the matter without any issues coming up.

**SPEAKER:** The devil is in the detail. You say they don't hire your firm, they hire you. The money that's essentially paid, let's say it's \$300,000, is a substantial sum of money. Is it paid to you as an individual or do you have to put it in your firm account or is it paid to your law firm? I understand you said that you are being hired, where does the money go?

**MR. HERR:** It goes to my law firm. I do want that on the record. But it is true. Yes, my law firm's conference room is used and my law firm's secretary. There is an aspect of it at the firm. So, I don't think you are looking at the reality of it. Yes, our firm has open cases involving multiple litigants, it's not the same conflict of interest. It's not the conflict-of-interest of waiver analysis under the rules. It's a disclosure and waiver in an additional context.

We are not trained very well as lawyers on when a judge needs to disqualify himself or herself. And that's changing. I think we are doing this at a time where judicial disqualification is becoming more a significant issue and more aggressively pursued and more aggressively enforced by the appellate courts. But I think there may be situations now where a judge disclosing something, and the parties not objecting is usually pre-select and prevents a disqualification later.

I think there are situations right now where that might not be true anymore. I haven't studied the cases, but my perception is that—clearly I think—one of the side effects of the new regime, at least we brought it to the whole country through the Minnesota case—statements made by the judge who was in a campaign are going to be the source of disqualification claims that you haven't seen before.

I do think it's something that would be a useful area for the

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Academy of Court Appointed Masters to look at and study and make some recommendations on because the standards are not there. And once some of the providers and associations have done that, authorities for the mediation and arbitration context are quite helpful in defining what those responsibilities are.

Clearly, a special master is a different thing than a mediator or arbitrator or even a court-annexed neutral. We are clothed with some judicial authority, and no matter how we are defined, we are speaking like judges or expected to act like judges, and we ought to clarify what those expectations are of judicial officers.

SPEAKER: As I recall, kind of having done this twice—challenging a judge for recusal, which you do at your peril—my question is if the special master is working with a judge, and something is not on the record, something between the special master and judge becomes the grounds for recusal, who hears that, the judge?

MR. FERLEGER: I think that the judge who appointed the master would be the one who would be responsible for the recusal of the master.

SPEAKER: But the off-the-record fact has something to do with their communications, without the record, the judge—

MR. FERLEGER: In the *Stenbrooks* case, it was the judge who asked to recuse himself, and there was a request for depositions and discovery of the judge. And the judge decided, “I’m not recusing myself.” The district judge decided, “I’m not allowing discovery,” and there was a recusal, and a judge in Louisville and the court of appeals ruled without discussing that issue. But apparently, the judge ruling on whether he himself should have subrogated of him is—

MR. HERR: That is a fundamental difference between the master and the judge. Judges—federal and most state judges—once they are assigned to the case, will view themselves removable only for disqualifying circumstances as set forth in the rule. My view as a special master is that if a judge appointing me ever has second thoughts, I can be gone instantaneously. I can be off the case mid-sentence if he or she decided that they did not want me.

You really serve at their pleasure. So, I would think that the motion would invariably go to the judge. Maybe it would go to the special master first, depending on the nature of the assignment, but it would certainly go to the appointing judge before any other judge. I can’t imagine a federal judge or a state judge wanting to

hear it in the first instance, a question about a colleague appointing anybody.

SPEAKER: I was going to mention that there is a decision in the Third Circuit involving Judge Wolin, and that decision I would commend to everyone because the first thing it says is that Judge Wolin, who had appointed technical advisors and not special masters, the court of appeals thought that was a very significant distinction, and that that is the problem. But in the end that judge was removed because of his relationship with these technical advisors. And I believe in that case the parties had agreed to the use of technical advisors on the record, and it didn't matter.

So, I think the point you raised earlier where you could have a situation where the court said, fine, and then later have it turn out not to be fine that would be the basis for the removal of the judge, in fact, occurred in this case. But, again, one of the big distinctions is that he didn't use a Rule 53 master.

MR. HERR: What happens if the judge under the new federal rules and the parties agree and the judge agrees and, hence, a special master presides over the jury trial?

SPEAKER: I don't think you can do that. It was done once in California.

MR. HERR: It only goes to the court of appeals.

SPEAKER: Everybody knows you can't do it.

SPEAKER: Just a clarification on one of the issues raised earlier about someone who has been appointed in a federal proceeding as a special master and sometime later, six months later, as a separate unrelated piece of litigation, that that person served as a special master, he's serving as lawyer in the case. Is that or is that not a conflict?

SPEAKER: According to the comments to Rule 53, depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer-master and perhaps on the master's firm as well.

SPEAKER: So, that is left to the presiding judge?

SPEAKER: The prophylactic on this would be open, the parties didn't consent to the technical advisors, but generally if you get it out at the beginning you are in better shape.

MR. FERLEGER: Another thing that came up in D.C., in cases of which a master monitor, a person who is not a lawyer, who is hired by the defendants who is master-monitor-lawyer. The master-monitor person imposed in procedures and non-compliance use,

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and the defendant said, "If she is so good, let's hire her to help run our system." I guess hoping the judge would be impressed that they were now in greater compliance. I know the plaintiffs' lawyers were thinking about filing some kind of motion to keep her from taking a new job with the defendants.

SPEAKER: It was one of those tasks of the special master for the judge to make a ruling on the propriety of the former court monitor taking a job as a consultant to the defendant, and we were persuaded it wasn't in anyone's best interest to do that.

MR. HERR: I've got a couple of things that I want to make sure we get to. In following up on what Francis McGovern says, lots of the problems you see with the special masters under the state rules and federal rules, particularly under the state rules, is that they don't provide enough guidance if the Orders of Appointment are not specific enough. If you're appointed a master, if you're called and you immediately agree, the judge then may get an order out—that day.

SPEAKER: The *judge* asks you?

MR. HERR: Well, that's the good answer. I'm going to tell you how to deal with that one. Sometimes that's not the case. I think that the Order of Appointment, you can do so much to address these problems by an Order of Appointment just as you do—no one would agree to mediate a case with a one-sentence mediation agreement. The same thing with special masters. I think they ought to use Rule 53. I do in Minnesota.

We have the old version of the Rule 53 here. My Order of the Appointment will follow the amended version of federal Rule 53 and address the subject matters that rule addresses, the nature of the assignment. And I don't think it pays to have a more expansive assignment, as much as you would like having the appointed special master to deal with everything within the jurisdiction of the district court. I don't think you ought to do that.

If you're going to be the discovery master, it ought to specify what discovery issues may exist or may not. If it needs to be modified or amended later, that's great. I don't think it ought to cover everything. But, personally, I would suggest making it *very clear* whether it's an adjudicatory or settlement-facilitating kind of role.

I'm not sure most cases have a need for multiple special masters, but certainly having someone on the settlement front and someone to rule on objections, rule on documents, make privilege

determinations, rule on expert witness issues, whatever they are, makes sense. I think the rules ought to be clear as to what, on the question of communications, the judge ought to make it clear to the parties in a situation where they can object or not object—"I intended to talk to this special master as if he were my law clerk," or just to say, "You know, this is like any other settlement process, I'm not going to hear anything from the special master. I'm asking him not to talk to me about anything that goes on in these proceedings. Tell me anything, I'll report to the ethical authorities." That's, I think, helpful to the parties to hear from the judge what the ground rules are and then following them. If there is consent that is required, obviously, consent should be recited in the order.

I think the review mechanism is important. I happen to agree that a *de novo* review under the new rule, I think, will be the provision that gets adhered to much the way the other provisions in the old rule would adhere to. That's not a breach, or at least a rather expansive definition of the *de novo* rule.

It will be maybe be not fully deferential—the way clear-and-convincing was—but it will be somewhat deferential review that you get for that obvious reason. It's not something judges are going to want to re-visit everyday. They are certainly not going to go through the same process. It will have to be a Rule 60 sort of new evidence or new issue that we need to decide before our judge, I think, would exercise the right to take new evidence under review of a master's decision. And even that would likely be sent back to the master for processing that information to see if the new information changes the answer.

I think we ought to provide for a payment mechanism in the order. Obviously, it's helpful to have the judge point out that failure to make the payments required would be something that comes to the judge's attention and immediate remedy. I don't think there is very much that you want in an order that's inconsistent with the state rules that I've looked at. I think that you can make a special master assignment in those courts and the order can do just about anything.

Again, not if the state court says you can't do it unless you are a registered lawyer. I'll point out that the special master is a lawyer.

It only makes sense—Rule 53, by and large, makes sense, I think it might make sense to clarify at some point the summary judgment issues and to make sure the different roles . . . it

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addresses so much more of what's actually reported to the court. David is right. There will be cases within the next five years, there will be a fair number of cases out there on the meaning of the new Rule 53, the nature of the rules, and those cases will be much more meaningful if you're appointed, or getting appointed, in a process that mirrors in some way the Federal 53 process.

SPEAKER: For the audience as well as the speakers, a chicken-and-egg question: The judge calls you up and says he wants you to be special master, but what if the parties approach you? To what extent do the rules of engagement on ex parte communications and everything else structure the order that's going to set the parameters of the charter or authority? What do you do to help influence that if the parties were to present that to the court? How does it work in real time?

MR. HERR: I don't think it would get very far in the process with one side. I would tell them, "Yes, I'm interested," but I would set up a conference call. I don't think there is a problem "conspiring" behind the judge's back on appointment. I think it's necessary for both sides to talk to a potential special master, and the rules clearly contemplate that the judge ought to be getting input from the master and from the parties. It's great to do that. It's just like the ADR call. Say someone wants me to be a mediator—I listen to what's your role in the case, and who the parties are. It's a perfunctory conversation. It's certainly permissible.

MR. FERLEGER: I think it's important since it's the person who is going to be the master who knows a lot of the detail talked about. It's very possible to consent to ask him to write a draft of the order, if you would, to work on it with the parties. I would bring them . . . some parts we negotiated to put together something and met and that's what the judge . . . I don't think I would be comfortable to have the parties draft something and present it to me. Parties aren't going to think about all of these issues we talked about.

SPEAKER: David, I think you've got to be careful about this. Judges like to appoint special masters—or some do. Some of them have their own favorites. I wouldn't go too far with the parties. I would say to the parties, "Yes, I think I might like it. Would you approach the judge and ask him if he consents." I think some judges would be offended if you showed up . . . there is one thing talking about the possibility, there is another thing when you're

talking setting up an order and such. I wouldn't go that far with that.

The other question I had while I'm speaking, payment does not require both sides to pay each other fifty-fifty. In effect, I believe it's a taxable cost if there is a final decision and such—that is what you pay.

MR. HERR: The case law says it might be more than fifty-fifty.

SPEAKER: In the *Agent Orange* situation, the defendant said to the judge, "We've got horrible discovery problems. We've got to go back fifty years on chemical warfare." And the judge says, "Fine, I'll pick a master and you pay his expenses." The parties say, "Great." What people forget about masters is that they probably, in most cases, save hundreds-of-thousands-of-millions-of dollars in motion practice and discovery, and that is one of the key elements I believe of future masters as such.

The other thing—I have a difficulty, and I'm in the minority—the advisory notes in the federal court, (I served on Advisory Committee, was a liaison to the Advisory Committee)—I do not think you can elevate the advisory notes to the same degree as the rule itself.

MR. HERR: No one except the Advisory Committee would think otherwise, and that's always been true. I was a reporter for Minnesota, and I'm the only person in the state who thinks they are authoritative. [Laughter.] Every time the Supreme Court adopts rules, it specifically disclaims any authoritativeness for the comments.

SPEAKER: I think when the Supreme Court sends the federal rules to Congress, that they have no objection, and if they don't object they become effective. I don't believe they send the advisory notes. They just send the rules as such.

MR. HERR: They are authoritative, and they are useful for the background and for the reason for the rules. It's a form of legislative history that has some of the same problems and some of the same limited authoritative value that the legislative history does.

SPEAKER: Some of our procedures seem inconsistent with the new Rule 53. For example, the judge has ordered that the special master shall make discovery rulings; and that the parties may get de novo review within two days after the ruling, and after that it's too late. And I see in the commentary, and I don't see the text of the ruling here, now there is apparently twenty days. Would that apply to a discovery ruling? It says ordered as well as findings.

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MR. HERR: I was thinking about that question earlier. I can argue either side of that case.

MR. FERLEGER: There was a question that came up earlier of what happens if your Order of Reference is now inconsistent with the new rule. That question—I actually think the parties should have the benefit of the twenty days. I think the parties said two days is not long enough, look at the new rule. I think that you as masters would give them twenty days.

SPEAKER: The rule gives them the *right* to twenty days is what you're saying.

MR. FERLEGER: If the appointed officer—I think the court will give him that right.

SPEAKER: In my case I think that's unfortunate to say whether you have to have a deposition or not have that is delayed twenty days. The judge's view is to move this case forward.

SPEAKER: The rule takes care of you. It gives the court authority to set a different time. So, if your judge is a two-day judge, go for it.

MR. HERR: The judge is devoted to two days, the judge isn't going to hear one filed on the nineteenth day. Moreover, I can't imagine the appellate court reversing that application of the trial judge's discretion, especially if the parties agreed to the two days to begin with when at that time the rule says ten days. Their only argument is "I agreed to two, instead—I wouldn't have agreed to two instead of twenty."

SPEAKER: When I said, "Agreed," it's an MDL with 300 cases, and many of the cases, said the parties and counsel, came in long after the order. It was there at the beginning, but I think it would never get to appellate court by the time you get to appeal. You would have forgotten all about that. Also, am I right in reading the materials that the rule now provides for an abuse of discretion under the standards for discovery rule?

MR. HERR: That's right.

SPEAKER: And the Case Management Order in my case provides a *de novo*?

MR. FERLEGER: There are some judges who have rewritten Orders of Reference in light of the new rule, and some like mine who have decided not to rewrite them.

## V. SPECIAL MASTER EXPERIENCES

*A. Appointment Orders/Relationships with Judges: Presentation by Bradley Jesson*<sup>5</sup>

MR. JESSON: My name is Brad Jesson, and the reason I'm here is that it helps to know the appointing authority. In this case, my son-in-law is a professor at Mitchell, and through him, I've come to know some of the other people at Mitchell. It helps to know the appointing authority.

The Arkansas law on special masters is not nearly as well developed, or as modern, as the federal practice in Minnesota. Our version of Rule 53 is very limited. It says reference to the master shall be the exception and not the rule. Reference shall be made only in those cases where there is no right to a trial by jury or where such matters have been waived, except in matters of accounts and difficult computation of damages, the reference shall be made only upon the showing of some exceptional conditions which require. I was going to say it's been very limited.

A few years ago, the Arkansas Legislature in an effort to save money, not to pay exorbitant judges' salary, passed a law where judges appointed special masters in juvenile cases and in domestic relations cases. It would speed things up a lot, but some people were unhappy and the Arkansas Supreme Court said, "Hey, you can't do that. That's a job for the judges." So, the old standing master's rule that had been recognized for about twenty years went out of the window. Invariably, the standing masters were big buddies of the judges, some of them were lawyers, some of them were not, and there were always issues trying the case to one of the non-lawyers.

What I talk about today is my experience, which has been primarily as a special master in appellate court cases. I practiced law for a long time, and one day the Governor called me and said, "I want you to be the Chief Justice of the Arkansas Supreme Court." He said, "The Chief Justice has retired, and I need you to do it." I said I needed to think about it, and he said, "You can't take long. Your appointment will take effect next Tuesday" and that was Friday. So, on Friday, I was going along to do a deposition; on

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5. Of Counsel, Hardin, Jesson & Terry, PLC; Chief Justice, Arkansas Supreme Court 1995-96; Special Master, Arkansas Supreme Court 2004.

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Tuesday, I was the Chief Justice, and didn't have to go through a messy confirmation. I got to the court in time for a special master case, and the case was somewhat disputed in Arkansas. It was the Christmas tree light case.

There was a well-to-do man in Arkansas who had a beautiful home out in an exclusive area in town. He was taken by Christmas trees and Christmas tree lights much to the chagrin of his neighbors in this high-quality neighborhood that had very narrow streets and very few intersections. So, he put up Christmas displays that had 13-million lights on his home. It attracted not only everybody in the state, but from around the globe. If you lived in the neighborhood, you couldn't get out in the street and couldn't get downtown and even couldn't get to other residences from the neighborhood. So, the neighbors sued him, in essence asking that it be declared a nuisance.

The trial court did declare it a nuisance and the Arkansas Supreme Court upheld that and held it to be a nuisance. He then reduced the number of lights from 13-million down to 12-million. He changed the display slightly and worked in a large American flag. It still didn't pass muster with the court.

We have a seven-member court, and two of the members of the court lived in the neighborhood and they were disqualified and that brought two specials along. The other members of the court all agreed it was a nuisance. We appointed a special master who was a retired court of appeals judge. We upheld the special master's finding and decided it was a nuisance and to take it to court and told him to abate the nuisance.

My next involvement with the appellate type of special mastership is what I call the "Arkansas School Case." In 2002, the Arkansas Supreme Court declared the Arkansas Public School System unconstitutional, and the case had been pending some nine years. There were a number of these cases around the country—I remember thirty different states are at some point in the litigation.

The issue in these cases is whether the state public funding system for public education is constitutional under state law. The provision in our constitution is that the state shall provide a general satisfactory and efficient public education. The constitution makes it a state obligation. And in Arkansas, it had been treated as a local obligation and local taxes supported the public school system. That all changed in 2002.

So, back then the court held it unconstitutional. They gave

the General Assembly and the State Board of Education to January 1, 2004 to do something about it. The legislature appointed a joint committee who promptly went out and hired consultants to tell them what was wrong with that system. That study cost one-half of a million dollars. The legislature then chose to ignore it and didn't do anything.

The Governor then called a special session of the legislature in December of 2003, some thirty days before the deadline, and all hell broke loose. The Governor and the legislature got into a big fight primarily over school consolidation. The constitution required an efficient system and we had 357 school districts in Arkansas, and some districts had no more than 100 students. School districts in Arkansas, and each *district*—and this is not each school—each *district* had no more than 100 students. As you can see, that would make for an inefficient type of system. It's hard to offer algebra courses and trigonometry, much less chemistry and physics in a district that has only a hundred students. The legislature finally set the minimum size of a school district at 350 students.

So, anyway, nothing happened by the first of January. The plaintiffs asked the Arkansas Supreme Court to hold the Governor and the Speaker of the House and President of the Senate and the school board—and that's when the supreme court appointed me and another retired justice from the supreme court. We were appointed as co-special masters to evaluate all the things—whether they were done or not done—and report back to them, the court, within sixty days, which was a very short time.

We had to meet with the parties within five days. It was a very condensed schedule. The supreme court directed us to review the ten specific areas which included what had been done, including funding, salaries, accountability, facilities, testing, all of those things. After all of the months of disagreement, the legislators suddenly came into agreement and started passing all new laws. We ended up with requirements that all high schools in the state offer four years of mandatory science, four years of English, and four years of math, and all these good things that were long overdue. The Legislature passed these laws and provided an extra \$500 million to go solely to the schools. There were some exceptions. They also required that the schools for the first time have operating budgets and audits.

During the sixty-day period, we held four or five public

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hearings. It was a highly publicized undertaking. The plaintiffs' lawyers who were on this case for nine years had asked for attorney's fees of \$35 million. The trial court gave them \$10 million, and the Arkansas Supreme Court reduced it to \$3 million plus expenses. Plaintiffs' lawyers could not agree on how the fees should be divided and would not sit at the same table. The Governor had his own special lawyer and the Attorney General was there personally to represent the General Assembly. My co-special master and I decided early on that we would have little or no communication with the members of the supreme court. The only reports we gave from time to time were, "Yes, we're on schedule."

At the end of the day, we presented a 128-page report to the supreme court in which we detailed all the things the legislature had done, and they did a lot. During one of the hearings, we had an expert from the University of California–Berkeley who said that Arkansas had gone from the nineteenth century to the twenty-first century as far as public education is concerned. We skipped the twentieth century. The court accepted our findings but didn't like some of our recommendations, for instance, on pre-kindergarten education. We also recommended that high schools have a minimum of 300 students just in high school. A dispute then broke out as to whether two special masters should be kept on standby. And the court retained jurisdiction for a number of years. In a 4-3 decision, the court decided it was time for the special masters to go home. So, anyway, those are my experiences, and I thoroughly enjoyed them. Thank you.

*B. Communication with Parties and Lawyers/Ethical Obligations:  
Presentation by Martin Quinn<sup>6</sup>*

MR. QUINN: Good morning, we are going to have to come down from the lofty heights of commenting on the constitutionality of the school systems to the nuts and bolts. I'm Martin Quinn from San Francisco. One of the nice things about getting to talk late in the game is that someone has already covered your topics. I am going to get to my assigned topics, but before I do, I thought I would give you a warning about something that's going on in California because you know that both good and bad things that start in California often spread to the rest of the country.

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6. Harvard Law School, LL.B.; Martin Quinn has served as a special master in federal and state court cases.

Our legislature and our Judicial Council, which runs our courts, somehow got it in their heads a couple of years ago that special masters, which in California are called “referees,” were a bad thing in discovery disputes. They concluded for three reasons that the use of masters was getting out of hand in discovery disputes. First, they got the idea that judges were lazy and they’re shoveling all of their dirty work of managing discovery off to somebody else. Second, they were afraid that judges were picking their cronies as special masters. And third, they were concerned that parties who couldn’t afford it were being forced to pay, perhaps, five hundred bucks an hour to some lazy judge’s crony.

And so, they wrote new rules and restrictions on appointing a discovery special master or discovery referee in California state court. Before appointing a discovery master, the judge has to find that it is really necessary, and that the parties really can afford to pay for it. A second restriction, which is a bit odd, is that a master may not act as a mediator. This came out of an unusual case called *Foxgate Homeowners’ Association v. Bamalea California, Inc.*, in which a special master was supervising a complex construction case. When one party failed to participate in good faith in a settlement conference, the special master reported the counsel and the parties to the court, which sanctioned them. Ultimately, the supreme court reversed, holding that mediation confidentiality bars a master from reporting to the court any misconduct during a mediation. This decision persuaded the legislature to separate the role of master from that of mediator.

Let’s talk about communication between the master and the parties. The nature of a master’s role determines the kind of communications he or she has with the parties and counsel. If you’re doing adjudicative work, you obviously have no ex parte communications. That’s easy. It’s also straightforward that when you’re acting as a settlement master, you’re just like a mediator and you communicate freely ex parte with whomever you need to communicate with. The interesting stuff, as usual, is in the middle. As a master, I view my role as not to just decide disputes, but to roll up my sleeves and get in there and mix it up with the lawyers and help them manage the case efficiently and effectively.

So, a lot of days I’m not really adjudicating and I’m not really settling anything; I am managing the case. And I do this in a couple of ways. If it’s a big case, a class action, an MDL case, something like that—particularly if things are getting a little off

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track—I hold monthly status conferences. The lawyers come in or are called in on the phone and we have an agenda and we discuss disputes that are too minor to be the subject of a formal motion. For example, “When is this deposition going to be taken,” or “Do I have to produce these documents?” If the parties didn’t have a special master, they would have to go before a judge or magistrate. But since they have me, we can take them up at the status conferences. Somebody does an agenda so people don’t get sandbagged; we go down the agenda. I either decide it or I say, “Let’s set for a hearing.”

It’s a privilege matter and we need to be careful about this one. You don’t want to take it to the judge—let’s set it for a hearing. And then, at the end of that status conference, I send an e-mail to everybody summarizing what had happened at the status conference. I say, “These are not formal court orders or recommended orders by a referee or special master, but I expect everybody to obey them. And if you have a problem with that, let me know within five days.” So, in that kind of setting, I’m not really adjudicating—I’m kind of cajoling. During this process, I’m communicating with maybe some of the lawyers, but not others. Sometimes I have mini-status conferences with just lawyers who have a particular problem. Maybe everybody does this kind of thing. Any input?

SPEAKER: I hold meetings and also sometimes telephone conferences, and I, too, summarize the meetings. I rarely do it by e-mail. I made a rule in my cases that nothing formal gets decided or communicated solely by e-mail that has to be confirmed or we have a rule that we do send by e-mail but you have to acknowledge receipt so there is no controversy about that. I summarize results and, many times, important things get signed by consent with no need for an order.

MR. QUINN: Yes, and the supervising judge never hears about these minor management issues. If counsel wants something to be done in a formal way, all they have to do is ask for it and then they get it. The other technique I’ve used is what I call “guided meet-and-confers.” Among the really misused and wasteful procedures in litigation is the required meet-and-confer session before you bring a discovery motion. That sounds very good, but counsel typically write each other ten-page single-spaced letters, and I don’t think either one reads the other one’s letter. As far as I can tell, it’s a waste of time and money. So, I tell counsel, “I want you to talk

before you come to me, but don't write these silly letters. Pick up the phone, call me and come on in, and we'll deal with it." And what I mean by "deal with it" is if I sit in a room and I'm in a meet and confer, magic things happen. I don't have to say anything. Sometimes I make my own proposals. Agreements are reached and people are reasonable, and efficient things get done. And then I reduce those agreements to writing and another motion has been averted. I agree with what Sol said earlier, I don't think I've done my job unless I've saved the parties more money than they paid me. So, those are some of the ways I've used to communicate with parties in these cases.

I wanted to say a little bit about technology. I understand the problems with e-mail and the dangers of e-mail, but, frankly, the first thing I do when I get a case is to make up an e-mail list in Outlook and title it by the name of the case, and I just use that to communicate with people. In big cases, as you probably know, the lawyers often set up websites, and I can post my orders and communicate with the lawyers that way. Finally, the old-fashioned conference call is still a very useful means of communicating and managing large groups of counsel. So, that's all I have to say about communication. Any thoughts, questions?

SPEAKER: When you have the decision as to who to include or exclude—be that it's a conference call or e-mail—give us your thoughts about that.

MR. QUINN: I look at who needs to know. I've gotten burned a couple of times, you know, where I've said, "Okay, the two of you come on in next Tuesday, and we'll work this discovery issue out." All of a sudden, I've gotten angry calls from counsel all over the country who, for reasons unknown to me, wanted to participate in that hearing. So, now, I'm more careful about that. I'm now alerting everybody when I'm going to have a session like that.

SPEAKER: On the point of the meet and confer, in the case where Margaret and I are special masters, the judge has instructed the litigants that she doesn't want them filing any motions in the court without having first approached the special masters with whatever problems they have and try to resolve it informally. Do judges in other cases do that?

MR. QUINN: The Order of Reference typically says that all discovery matters, or all pretrial motions, go to the special master. So it's a given.

SPEAKER: Some judges who do the reference say, "If you have

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a dispute, bring it to me and then I'll decide if I will refer it to the special master." If you look at pretrial orders in different types of cases, you'll see lots of pretrial orders. It's generally because of the price of easy access to the decision maker. Whereas, if they have to go to the judge first, there's fewer pretrial issues because they'll want—Martin thinks it happening when you put them together, and I'm not sure exactly what it is, but it happens.

SPEAKER: What Roger says brings up a point in larger cases where you have liaison counsel appointed for various segments of the cases. Do you sometimes issue to the liaison counsel and let them distribute things?

MR. QUINN: Yes. The law firms acting on the steering committees can do the logistical work better than I can—yeah, true.

SPEAKER: I want to speak in favor of e-mail. I tell people that I'm a virtual special master and it's a way you can communicate is by e-mail in case management orders. I spoke a while ago. To request a ruling from the special master, I have to send an e-mail with copies to the interested parties. We have about 300 cases, plaintiffs, and liaison counsel. One member of the plaintiffs' coordinating committee is plaintiffs' liaison counsel. So, when I'm writing an e-mail, that, for example, I can always copy the two liaison counsels. And in the Case Management Order, there is notice on all the parties and 300 cases. I can also copy on the e-mails the parties in the individual case in addition to the liaison counsel when there is a discovery issue, "So and so didn't show up for the deposition." I work exclusively by e-mail. I think it's wonderful, and I found a lot of lawyers don't know how to use it, but they have to get on the program. It's terrific. It makes a complete record and—

MR. QUINN: That's good news, bad news—

SPEAKER: I don't do mediation. I move cases for management.

MR. QUINN: The only caution about e-mail—before I push the send button, I printout and read it. I don't use the forward button.

SPEAKER: I wonder if you can speak to how you deal with the nature of ex parte communication as your role might change during the course of case where you might be, for example, working only the discovery angle but then they want to settle, so from an adjudicatory to settlement. How do you deal with that?

MR. QUINN: Well, I agree with David Herr, who said . . . my own preference—if I’ve been a discovery person for a year and they suddenly want me to settle a case—is to try to get to one of my colleagues to do it. Sometimes they say, “No, no, no, we really want you to do it since you know about the case.” But I try not to mix those roles because if it doesn’t settle, then I have to put my adjudicative hat back on. I find it a little uncomfortable. I think you just have to be really sensitive because even in the discovery context I might be essentially mediating a discovery dispute to try to resolve it. “Okay, if I can get you these documents, and you don’t get these, can you live with that?”

SPEAKER: Martin, do you ever use the courtroom itself? I have found that in major cases, even though they can come to my office, it’s much more sensible to have it in a courtroom if there is one available. It adds a different dimension to the procedure.

MR. QUINN: I haven’t had to do that partly because my cases probably are not at that level. I probably have thirty people in a room. I haven’t had to, but certainly, that would be a good thing.

SPEAKER: I’ve used both my judges’ conference rooms with the parties. It does help to show where I am in terms of the relationship with the judge.

SPEAKER: One of the big challenges remaining in case management is coordination of state and federal litigation. If you have ever been appointed as a special master in both state and federal case at the same time or related case—Judge Davis did some really innovative things in getting state and federal judges and lawyers, more particularly, together in the *Baycol* case—but I don’t know if any of you are co-appointed—

SPEAKER: I’ve been appointed in both by multiple state judges and multiple federal judges. Mediating among judges is fascinating. Just one quick word on ethics because it’s been talked about. I’m sure you’ve all had this happen in a lengthy master assignment. A lawyer will come up to me in the hall and say, “Martin, seeing you just reminds me, I’ve got that two-week arbitration coming up. I just put your name in for it and I’m really hoping you can do it.” What do I say then? I say, “Well, I can’t consider it as long as I’m a special master.” Or do I walk back in the room and disclose it to everybody? How do you handle that as a practical matter, knowing you have to make a living? I think that you just go with what your stomach tells you. I think you say, “I would be happy to take on another significant assignment for your

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firm in this new arbitration, but I'm going to have to disclose it to everybody in the special master process and get their consent." That's the way I feel.

SPEAKER: In California, if you start out as an arbitrator, and don't disclose in your initial disclosure to the parties that you may consider receiving other assignments later on, you can't do it. You have to turn it down, and disclosure won't save you.

MR. QUINN: The arbitration disclosure forms in California do have that question. The computer at my firm automatically checks "yes" to that box to indicate that not only I, but other members of JAMS, will undoubtedly take new matters from the law firms involved in the master assignment. Any questions? Thank you very much.

SPEAKER: We have a few minutes before lunch. We could engage in a discussion either relating to those issues. David earlier raised some problems for us at the beginning of his presentation. We can address those, and David might want to remind us of a couple of those.

SPEAKER: Could somebody describe the process if you're managing discovery and it's not working out and there's a big problem, and you put your judging-type head on and make a ruling and then the parties go to the district judge, magistrate judge, how does that all work? In our area, they don't use special masters. I mean if I go back to South Louisiana, I'm going to create a market.

MR. QUINN: If you're in federal court, they can object within twenty days to the sitting judge. The state rules vary. In California, again, we can only make recommended rulings and those can be taken to the judge within a certain number of days.

SPEAKER: When you are in this role, do you try to avoid having to make a ruling? Like negotiating, "Let me get you these documents." This prevents you from making any kind of definitive ruling.

MR. QUINN: I do what's going to be the fastest and quickest. I take a quick shot at trying to resolve it. I don't take a lot of time worrying about it. If they can't resolve it quickly, I rule. Usually what lawyers want is a decision. It's not so much whether they win or lose.

SPEAKER: If you put that in an e-mail and they say, "We object," do you then put it in a formal ruling?

MR. QUINN: No. If it's a small thing—"Are we going to have this deposition in your office or her office; how are we going to

Bates stamp these documents”—that’s what goes in the e-mails. If it is a dispute about privilege, work product, relevance of documents, it probably will go in a formal order because they all have a right to take to the judge anything of significance.

SPEAKER: Have you ever had occasion where you differed with the judge as to what you should do? The reason I mentioned it is the late Charles Richie of the District Court in District of Columbia called me one day and said, “I have this great case for you. It’s an international antitrust. You’ll be spending months on it. You’ll be holding hearings until you will have to give up because it’s all work product and there are thousands of documents.” I said, “Great, Charles, I’ll take it.” And during the hearings, I had a court reporter, and we had thousands of pages of decisions on documents. And then the Judge said, “Schreiber, I want you to write a report on each one.” And I said, “Judge, are you crazy?” I knew him well, so I could say that. I said, “This will cost hundreds of thousands of dollars.” And he said, “What difference does it make? You’re going to get paid.” I said, “I just can’t do it.” And he backed off. I guess if you know the judge well—but can you raise issues like that and still hope to ever get an assignment?

MR. QUINN: I guess it depends who you are and who the judge is and how you do it. Obviously, we all do it with care and discretion.

SPEAKER: Sol, you raise one of the most difficult issues. You’re a special master, you’re mediating a case, and the judge says, “What’s going on?”

MR. QUINN: Is that difficult?

SPEAKER: Well, the line you draw is a very difficult line. I’m meeting with these folks on Thursday; I’m meeting with those folks on Friday, that’s easy enough. They’re close; they’re far away—probably okay, depending on what the judge is doing. But then you push it, and then the judge says, “Where are they? How far apart are they?” And the judge leans on you and leans on you and leans on you. And if you do it, you’re in deep trouble. And the judge leans and leans and leans. That’s the most difficult—personal interchange. I have to make a ruling and I need to know what’s going on. Very, very difficult, you cannot go over that edge, or you can end up being in—

SPEAKER: One more difficulty in that. When the judge says to you, “Gosh, I have so much trouble with that lawyer, are you having the same trouble?”

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SPEAKER: What do you do when you need a great big club to close the deal? I've had them close, and I just can't get them over the hump, but I know who can.

SPEAKER: Well, it depends. There are so many variables there. But what I'm going to talk about a little bit later is some of the defensive aspects of being a special master. You've got to remember that you are potentially subject to attacks of what you're doing. And I don't care what that judge says, and I don't care about getting that case resolved. I view myself about as good on the last ten percent as anybody. But at the same time, you've got to protect yourself, and you can't let the euphoria of the moment or the fact that the judge can do something to push you beyond the point of where if it's on the front page of the *New York Times*, you can't look through it. That's all, Sol, I'm dealing with. You're talking about the two biggest journals. Before I push the "do it" button, I say, "This is something that can stand being in the light of that."

SPEAKER: On the club in the question, it's useful sometimes to have the judge remind the parties in a conference call. My judge has had status conferences with the parties without me there. He's said, "Dave is my master and I trust him and I'm sure you all can work this out." That is done by telephone, also. That, I think, is one way to deal with this, the judge reminding the parties, especially in a long case, the master still has—

SPEAKER: I've told the judge that I think that I've got this problem, but I think a settlement conference call by Your Honor might be fruitful. And, of course, everybody is in there and the judge beats the hell out of them and tells them where they are.

SPEAKER: Or the judge can set deadlines and require the master by a certain date—

SPEAKER: Do you actually respond and run past the lawyer and say, "I'm going to ask the judge to jump in at this point. I'm not going to tell him what's going on, but I'm just going to tell him that I think his intervention will be helpful." Do you at least alert him to the fact that you're about to—

SPEAKER: Depends. Not always. I don't tell the judge. I just say, "We bumped into a wall." He may want to do a settlement conference.

SPEAKER: You have some questions, Martin. I try—what I do is to not have anything controversial occur without the judge having some forewarning of what's going to happen. So, if a

decision and order I know is going to be controversial, as I'm issuing it or finalizing it, I let the judge know I'm going to do something—whether it's the parties or some story in the newspaper about something—I let the judge know because I don't want my judge to be surprised of something that I knew was going to happen. And I think it's a whole topic—the next we'll talk about—which is the relationship between the master and the judge to cover both ethical issues and practical issues as well.

SPEAKER: I have the situation where the judge says, "Before you issue that, let me take a look at it. Let me see your decision before you issue it."

SPEAKER: My judge has it. I'm not even meeting with my judge. And she is always very careful not to tell me where to go or how to do what I do. And when I know something is in front of her, I'm not asking her "How are you going to rule on the objection to my order," because I feel it's not appropriate for her to do that. On the other hand, there are times when the judge lets me know, "I didn't believe a word that's been said." In this case, the logistics and some objections that were pending, the judge said about a witness who I heard at another hearing that I haven't issued an order. It's the same witness. In this case, I still have to do a report.

SPEAKER: I'm just going to say I view mine a little different. I never use the courtroom. I tell them any number of times that I'm not the Article III Judge. I don't make rulings; I just make determinations. The judge can follow them if he wants. I never invoke the judge. I say I make my decision, but I've never been reversed by the judge. And the practical effect of that relationship we have had over these years is that they generally understand that if I'm going to make a determination one way, chances are that's what's going to happen because I'm going to do a good job writing my report and recommendation, and I—probably in the course of the discussion—identify the vulnerabilities of one party's position over another, and then I just do a good job, I hope, in the report and recommendations.

What I've done in telephone conferences is made a preliminary determination. I usually do that and explain to them why. And I'll say, "Let me know if you're going to appeal me because I'm not going to bother writing a report and recommendation unless there is an appeal." Generally, they get back and discuss that they worked it out, and I never have to write a

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report and recommendation because I've given them the implicit level of the judge's approval of my report and recommendation following that I know what the judge's ruling is because I say, "I don't know if he's going to sustain me on this." Over the years, I haven't been reversed by the judge and we've had some pretty complicated issues.

So, the only reason I raise that is as we are talking about where we go as special masters, I know that the judges that I've dealt with are very jealous of their jurisdiction, and if this is going to stand in the area of the judges' use, we have to be very mindful of how jealous they are of their jurisdiction, and not say to do things that suggest to them that we are becoming "sort of" judges. We are simply serving the function that they have delegated to us as prescribed by Rule 53. We have to be very careful because there are a lot of judges that do feel that this is an inappropriate delegation of Article III authority. That's why we're having a hard time convincing of the difference. I can tell you that there is a way that in everything that you do to make sure that you defer to the jurisdiction of the Article III Judge and I think we will be able to expand our role.

SPEAKER: A revision of what Mr. Miller has just said is to consider writing a preliminary recommendation and circulating it and then getting back the response. Once in a while, even the special master goes off kilter, so to speak, and it's better to be told about it before you take your file. You better watch the judge and try to figure out how do get you out of that.

SPEAKER: I am not necessarily in disagreement. I think it depends on circumstances. I've been involved in a lot of cases involving thousands of people. For instance, in a class action methodology, you do the allocation and the due process says you have a right to object and you might have 3,000 objections. I have sent out to the judges I've dealt with, and they have been extremely cooperative, and it's only this requirement I'm talking about, and I have utilized with the court's permission and discussion, the courtroom in that setting. I'm going to tell you, it makes one helluva difference. In one morning they go through 150 to 200 people and in a process from the podium for the basis of the objection. We have a court reporter there. And my experience has been that we have literally—because of the process—very clear . . . we layout what authority and what appellant's rights are and recommendations. It has cleansed out literally eighty-five, ninety

percent of the things. And without that setting in that environment, I can tell you the result would not have been the same. I've done it the other way. Like in discovery and dealing with the lawyers, it doesn't do a thing to do it in a conference room or my office, but if the litigants are in that setting in the courtroom, it is extremely efficient.

SPEAKER: I have used the courtroom with special permission. I will tell you that our Chief Judge frowns on lawyers using courtrooms. That just came down from above. The one incidence where I was allowed to use the courtroom where the parties were taking a deposition in the courtroom and the judge is in the chambers. The reason was that I might make a preliminary ruling on a discovery issue, or a preliminary determination on a discovery issue. If they didn't like it, let's just go get the judge right now. And the judge would come in and hear the issue. Generally, that never happens, but this happened and the judge was a few paces away. It helped the process and the judge knew it helped the process, and he gave me permission and that lended me to the circumstances of using the courtroom for purposes of taking a deposition in the courtroom.

*C. The Roles of Special Masters in Institutional Reform Litigation:  
Presentation by Margaret Farrell*<sup>7</sup>

MR. HAYDOCK: The first topic after lunch will be the role of special masters in institutional reform litigation presented by Margaret Farrell and Clarence Sundram, co-special masters in a more-than-twenty year-old class action lawsuit in the District of Columbia.

MS. FARRELL: I would like to spend my time talking to you about my experience as a remedial master in institutional reform litigation. I will first give you some background information about the case, then the roles I perform under the terms of my Order of Reference, the effect of the amended Rule 53, and finally, my views on the utility of using special masters in cases like this.

My view of institutional reform litigation starts with my own experience when I was a legal services lawyer in the 1970s. At that time, poverty lawyers were bringing class action lawsuits on behalf

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7. Yale Law School, University of Chicago Law School, J.D.; Cornell University, B.A.; Special Master, United States District Court for the District of Columbia.

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of poor people, prisoners, and people with mental retardation and mental health problems. These suits were not brought to get compensation for injuries resulting from the wrongs done them in the past, but to get prospective relief—correction of the conditions from which they had suffered.

As you know, common law courts traditionally provided judgments for money damages only, while courts of equity would grant prospective non-monetary relief in exceptional circumstances. Until the 1970s, injunctive relief was seldom granted in suits against governments. With the rise of social conscience and the war on poverty, public interest litigation was brought against state, local, and federal governments to affect changes in government policy and programs. Success on the merits in these suits left courts with the difficult task of fashioning prospective relief concerning the operation of government-run institutions, such as prisons, mental hospitals, and nursing homes. Not only did post-liability remedial decrees have to be developed—blue prints for reform—but also, courts usually retained jurisdiction to oversee the implementation of those reforms.

For example, in the case in which I am now involved, *Evans v. Williams*, the court found the plaintiff class—people who have mental retardation and developmental disabilities and who were confined to a large residential institution called Forest Haven—had a constitutional right to residential services, habilitation services, and medical care in settings least restrictive of their liberty. In a Consent Decree and Declaratory Judgment, the court held that the Defendant District of Columbia had deprived class members of their constitutional right to those things. The case is unusual in that respect. If the government must provide services as a constitutional matter, the legislature and executive cannot avoid that responsibility through legislation or executive regulation.

In my view, this kind of litigation puts a court in a position something like that of an administrative agency. The court is required to say in a judgment against the government: “Here is what you have to do and here is how you have to do it.” In these reform suits, courts assume the task of managing a government bureaucracy, but do not have traditional judicial tools for enforcing those judgments. Different courts have dealt with the challenge in different ways. Some courts have become mired in micro-management. Some have appointed court monitors to inform the court about the progress of implementation. Others have

appointed receivers to take over the government's responsibilities entirely and run the facility or department under court order—sometimes for years. And some courts have appointed special masters under Rule 53 to perform a number of different roles on their behalf—some of which are adjudicative as anticipated by the old Rule 53 and some of which are not.

In the *Evans* case, the appointment of a special master occurred after the case had been in litigation for more than fifteen years. The court had ordered the mental retardation facility closed and ordered that the people in that institution be placed in less restrictive settings. Pursuant to a Consent Decree, the District contracted exclusively with private providers, such as group homes, intermediate care facilities, and day treatment programs, to carry out its responsibilities rather than provide those services directly. The defendants' dependence on private contractors raised a number of administrative management issues—the process for letting contracts, the monitoring of private provider performance, enforcement of contractual obligations, etc.—related to the defendants' compliance with court orders.

By 1995, the biggest issue in the lawsuit had become the District Defendants' obligation to pay private providers—group homes and day programs—for their services to class members. At that time, the District of Columbia was in severe financial difficulty and was not paying its bills to many private concerns (for street repairs, garbage collection etc.), including MR providers, despite a court order that they be paid within thirty days of the submission of their invoices. When the District failed to do that, it was held in civil contempt and a special master was appointed to develop a plan of purgation and to determine if there were other areas in which the defendants were violating court orders. The master was to be paid from a fund in the office of the clerk of the court to which defendants were required to make periodic payments.

As the appointed special master, I had several roles to play. First, I was to propose a system for prompt payment of providers and a way to verify and enforce the obligation. Second, I was to gather information through evidentiary hearings or informal investigation in specified areas, such as whether class members were receiving adequate medical care. Third, I was to make findings of fact and recommendations regarding defendants' violation of decrees and I was to design a planning process for the parties to settle their grievances and propose an exit plan, i.e., a

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Consent Order for the termination of the suit. Thus, I was asked to play the roles of investigator, adjudicator, mediator, and fact finder.

I was given broad authority to carry out these roles. As I mentioned, my Order of Reference was made in 1995, before the recent amendments to Rule 53. Nevertheless, some of the questions that have come up around the amended rule also came up in connection with my order. As we have discussed, the amendments to Rule 53 completely redraft the old rule. Rather than pre-1938 equity practice, the new Rule 53 is based on the ways in which courts have subsequently used special masters—pretrial, trial, and post-trial. Instead of expanding or restricting that practice and the authority that may be given to masters, the rule requires courts to expressly address the authority and responsibility being given to a master in each case, including certain issues such as *ex parte* communications and conflicts of interest. The exception is the use of special masters to hear the merits of the case as trial masters, which is limited to cases in which the parties agree to the appointment of a master for that purpose.

One controversial issue that faced draftsmen of the revised Rule 53 was the extent to which masters may communicate *ex parte* with the parties and the court. My Order of Reference expressly permits me to do both, which I believe is permissible under the new rule as well. I am permitted to base my Findings of Fact and recommendations to the court on formal evidentiary hearings or in informal procedures, including *ex parte* information. The former are to be given clearly erroneous weight under the old Rule 53, but any other findings based on informal procedures are to be circulated to the parties before they are filed with the court. The parties may comment on them and appeal their objections to the court for its *de novo* determination—much like the procedures established by the new Rule 53.

Both my appointing judge and I anticipated the due process challenges that would arise if my findings based on informal proceedings were given clearly erroneous weight. To avoid those concerns, under my order, the *de novo* review to which the parties are entitled includes a *de novo* hearing on disputed facts and the submission of evidence, but only if such evidence could not have been produced to the master, rather than simply a *de novo* review of the record.

In addition, I was expressly given broad authority to act in my

investigative role. The order requires defendants to give me broad access to defendants' records and employees, and the records of private providers to which the District would have access.

Finally, my role as mediator was expressly acknowledged in the court's request that I submit a plan, jointly with the parties, for the correction of violations of court orders and the specification of actions that would bring the District into compliance so that the case could end. This court-ordered planning process took two years and was initially resisted by the defendants. However, after being fined for the late payment of providers (which was subsequently overturned) the planning process was energized by the District's agreement to devote the amount of fines at issue for the late payment of providers to the creation and endowment of an independent agency that would provide monitoring and lay and legal advocacy after the suit ended.

The mediated, settlement-like planning meetings required the District to be frank about the ways in which its custodial system for people with mental retardation was not working, so that the parties could devise better mechanisms. However, at about the same time, the *Washington Post* published a series of sensational articles about the abuse and neglect of mentally retarded people in the District's custody. The District, reasonably enough, was reluctant to expose its shortcomings publicly for fear of wrongful death and abuse litigation. I felt that what defendants said in our planning meetings and documentation submitted by the parties, including expert reports, should be confidential and I issued a Confidentiality Order to protect our negotiated settlement talks. Plaintiff interveners, the United States Department of Justice, opposed my order, so I withdrew it and the judge issued a Confidentiality Order to protect the court-ordered mediated planning process.

Another important aspect of my appointment was the authorization to hire experts to advise the planning process and to be paid by defendants. My order requires that I notify the parties of my intention to hire an expert, on what terms, and when. If no objection is made within ten days, I may proceed. In this way, the parties could sit down with advisors who were expert in habilitation services, training of direct care staff, health care needs, Medicaid reimbursement, etc., and make decisions about the exit plan on a more informed basis. Eventually, the District was able to hire short-term expertise through this mechanism rather than through the much more cumbersome request for bids and contract

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procurement procedures that would otherwise have applied. One of the most helpful experts we hired was Clarence Sundram who had run the New York State Commission on Quality Assurance and was familiar with both the therapeutic and administrative issues with which we were dealing.

The planning discussions between the parties eventually became quite collegial, though heated at times, and the parties finally agreed to a very comprehensive plan through which defendants' compliance with express standards could be measured. It is called "The 2001 Plan" or the "exit plan." The concept underlying the exit plan was to get the agreement of the parties to the basic goals of the suit and how they might be realistically obtained. Often the goals are stated in idealistic terms and 100% compliance required, which, of course, can never be attained. So, secondly, we sought to develop measurable standards for the attainment of acknowledged goals. Over time, defendants in institutional reform litigation become demoralized because they are almost never regarded by plaintiffs as having complied with remedial decrees. Worse, sometimes, current good practice moves plaintiffs to require higher standards. The goal posts keep moving.

Thus, thirdly (for consistency), we sought agreement of the parties on the extent to which defendants must comply with each standard, recognizing there must be high measurable compliance with certain standards, such as protection from abuse, and lower compliance with other standards, such as reporting and budget processes. The reward for defendants in substantially complying with a portion of the plan is termination of the court decree pursuant to which it was required. The 2001 Plan was adopted as part of a settlement agreement between the parties, enforceable as a matter of contract. It is not court ordered, though the court approved it.

During the implementation period, the underlying court decrees remain in effect, and thus, the plaintiffs are free to file contempt motions for violations of those decrees if they believe the situation requires it. In the absence of such litigation, the parties agreed to a timetable for the District to take specific actions; the completion of which would provide grounds for a motion by defendants to vacate the particular court decree to which the action was related. Clarence Sundram will discuss that process further.

Thus, the other aspect of my role as remedial master was to

oversee the implementation of the 2001 Plan—a role to which Clarence Sundram was better suited than I. Because of his experience inside state government in a position in which he was responsible for the quality of care and habilitation provided by the state to people with mental retardation, Clarence knew a great deal about how the defendants could execute various plan requirements. The court, therefore, appointed Mr. Sundram, who had been active in the case for several years as planning expert, to serve as co-Special Master. Clarence Sundram will describe our implementation efforts and procedures for terminating court decrees.

In summary, let me say I think that amended Rule 53 legitimates the ways in which special masters have been used to carryout the administrative tasks that courts are required to perform in order to provide meaningful remedies to people harmed by government as well as private action. The rule retains much of the flexibility that courts have used to design the authority and responsibility of masters to perform the particular roles required for execution of the court's judgments, but requires them to articulate those authorities and responsibilities expressly with the involvement of the parties. In this way, the rule now permits courts to continue devising appropriate ways of enforcing important prospective relief requiring systemic change.

*D. Exit Planning and Phased Conclusion in the Remedial Phase of Systems Reform Litigation: Presentation by Clarence Sundram*<sup>8</sup>

You have become the special master in the remedial phase of a lawsuit requiring structural reform of the complex governmental activity and are now responsible for supervising the implementation of a series of court orders requiring significant changes in the way in which governmental services are delivered. The services in question may involve the operation of state institutions like prisons, mental hospitals, or mental retardation facilities; they may involve services delivered by private organizations which are licensed, certified, supervised or funded by one or more government agencies; they may involve some aspect of a public service like housing or education.

While each of these areas present their own subject matter

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complexity, in the remedial phase of the litigation they present some common challenges to a special master. One of the most common is a long and unsuccessful history of implementation efforts to comply with the court orders, a history which has probably necessitated the appointment of the special master in the first place. I have been involved in a number of these cases over the years, including the *Wyatt* litigation in Alabama, originally commenced in 1970; the *Willowbrook* litigation in New York commenced in 1972; *Gary W.* in Louisiana in the 1980s; *Evans v. Williams* in Washington D.C., which has been going on since the mid-1970s; and, *CAB v. Nicholas* in Maine which is about the same age.

In examining a number of such cases, which have been open for a long time, it seems that they all run through a fairly typical lifecycle. I don't know if this is true of commercial litigation as well.

In part due to the structural problems and differing expectations, decrees usually go through several phases. A typical life cycle of a system reform case is as follows:

Stage I: Euphoria at having settled a difficult lawsuit. Everyone is delighted that they were able to find a legal solution to some thorny problems of running a mental health system or prison system or a school desegregation issue. There is a honeymoon period, which may last a year or two and a degree of goodwill between the parties as the work of implementation gets underway.

Stage II: The Morning After. Usually, between eighteen months and two years into the implementation process, the defendants realize that the job is much harder than anticipated; that the crisis which created an expectation of flexibility has given way to bureaucratic resistance to reforms agreed upon by attorneys or policy makers or political leaders.

In the *Willowbrook* Consent Decree, for example, there were a number of things the state agreed to do within nine months of a new governor taking office. In hindsight, it seems clear that the parties negotiating the Consent Decree did not fully appreciate the complexity or time involved in making fundamental changes in public policy. In reality, not much was actually accomplished in this short time. Usually in this stage, the defendants discover that reform needs the "buy in" of a host of people not covered by the court orders: legislature, independently elected officers like the attorney general, or the comptroller (who is involved in the timely

processing of state contracts), labor unions, local governments, private providers, state licensing boards etc.

Usually, in this period, the first signs emerge that the parties may view compliance issues very differently. For example, in a Consent Decree in a prison reform case, the state agreed to re-write all of their policies dealing with mental health services in their prisons. They thought that this was all they were required to do under the decree and seemed surprised to hear that the plaintiffs would assess compliance by seeing how the revised policies actually affected the identification and treatment of mental illness among the prison population, which was a far more demanding expectation.

Stage III: Resentment/Resignation/Resistance. This type of divergent expectations can lead to resentment of the decree and the relentless pressure to comply. Defendants discover that the plaintiffs don't have much sympathy or understanding about the struggles the defendants are going through to implement the agreement. The defendants may be feeling pressure from the legislature as well to account for all the additional money that has likely been pumped into their system of services.

Usually, about this time, many of the key actors on the defendant's side leave their jobs and new people come in who don't have the same degree of understanding of the issues or commitment to the goals of the judgment. They were not involved in the negotiations, and may not have the same personal relationships with the plaintiffs. They often wonder: "What were they thinking when they signed this agreement?"

Stage IV: More Litigation. Eventually, this resentment may ripen into opposition to the judgment and a resignation to new litigation. This may happen either because of a frontal challenge on the original judgment, a motion to modify it due to a claim of impossibility or changed circumstances, or a motion for a finding of contempt or enforcement of specific provisions. Less frequently, there is a Motion for a Determination of Substantial Compliance, which tests the differing expectations of parties. Often this ends up with a new Consent Decree or Settlement Agreement and the whole process and cycle starts again. In some cases like *Wyatt*, there have been four to five such cycles over the twenty-five to thirty years the cases have been in existence.

The complexity of these cases and the changing legal, political, and public policy environment in which implementation takes place

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makes them particularly tricky to manage. In the mental retardation cases, in particular, this has been a problem because the field has changed dramatically over the past thirty years. Cases that were brought to address problems of overcrowding, abuse, and neglect in institutions, which had initial remedies focused on better institutional conditions, better staffing, and more treatment, were still struggling to achieve these goals when professional opinion and public policy shifted to emphasize services in the community rather than continued investment in institutions. The changing directions and priorities make it especially difficult for defendants to sustain the type of effort that is usually required to achieve compliance with court orders that are directed at broad goals such as protection from harm or the provision of services that are least restrictive of liberty.

It is against this backdrop that I believe special masters can play a role as a mediator in bringing the parties to the lawsuit together to mutually specify their expectations of compliance, to develop measurable exit criteria and methods for evaluation, and to develop a clear path to compliance and to judicial disengagement from the governmental services system. In doing so, the defendants are given a roadmap and the markers to chart their progress, are given an incentive to create internal management and oversight processes to demonstrate this progress, and are rewarded with public recognition when they can demonstrate compliance with the exit criteria. One of the significant features of an exit plan is creating a process for assessing compliance with discrete obligations under the court orders, rather than making it an all or nothing proposition.

In *Freeman v. Pitts*, the United States Supreme Court held that federal court decrees can be terminated in stages. In dealing with a long-standing school desegregation case, it approved the partial dismissal of portions of the case in which the school district was in compliance, while retaining jurisdiction over non-compliant aspects of the court orders.

This reasoning has been adopted in prison litigation as well in *Grubbs v. Bradley*. In this case, a federal district court overseeing Tennessee's implementation of remedial orders, found substantial compliance with most of the court orders (relying heavily on the report of the special master) and terminated judicial supervision, except for one discrete area—implementation of an adequate quality assurance plan for health care.

The court wrote: "In ordering partial withdrawal, a court should consider whether there has been full compliance as to factors

withdrawn from supervision; whether retention of judicial control is necessary to achieve compliance as to other factors; and whether defendants have demonstrated a good faith commitment to fulfilling the decree.”

Due to time constraints, I’m going to skip over the process of mediating an exit plan with the active participation of the parties to the lawsuit and discuss the next phase in which the special master engages in fact-finding and adjudication of compliance.

Depending on how the exit plan is constructed, the next role of the special master may begin when the defendants believe they are in compliance with a distinct part of the case, or the plan. Or the special master may create a process for periodic assessment of progress in the case, as a way of keeping pressure on to achieve compliance with the court orders.

In either case, there is a need for an orderly process for assessing the status of compliance. While this can be done by a Motion for a Finding of Substantial Compliance and to vacate or dismiss the related orders of the court, this option is burdensome to the court, which may not want to be involved in piecemeal litigation. But, as noted earlier, such periodic assessments and judicial acknowledgment of progress are important for sustaining the momentum for compliance, and important to governors and legislatures that must support implementation efforts over a multi-year time span.

An alternative to motion practice is a system for certification of compliance by the named defendant in the case. The process essentially works as follows:

- 1) The special master works with the parties to develop a certification procedure.

- 2) The certification procedure incorporates a grouping of court orders into discrete subject matter areas, which are capable of being assessed independently of one another.

- 3) For each subject area, the certification addresses the specific outcomes that are required by the exit plan or the court orders.

- 4) While it is the obligation of the defendants, who have the burden of proof of compliance, to determine what evidence of compliance they will submit, the certification aids this process by identifying the types of evidence the parties mutually agree is the most relevant and persuasive.

- 5) For each outcome with which the defendants cannot certify

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compliance, the certification document must provide reasons why compliance has not been achieved and a specific plan to achieve compliance—identifying the steps, the resources required, the persons responsible for implementation, and the date by which compliance will be achieved.

6) The defendant's certification is accompanied by a summary of the evidence supporting each outcome.

7) The procedure requires service of the certification upon the plaintiffs, who have timely access to any evidence relied upon by the defendants in making the certification, and may seek, through the special master, access to any other evidence that is relevant to the certification.

8) Within sixty days of the filing of the certification, the plaintiffs must file with the special master a written statement containing any objection to the defendant's certification, stating with particularity the basis for the objection.

9) If there is no objection by the plaintiffs, the special master shall review the certification and summary report of the evidence and, within thirty days of the plaintiff's response, submit a report to the court with Findings of Fact and Conclusions of Law regarding the defendant's compliance with the relevant provisions of the court orders.

10) If the plaintiffs object to any portion of the defendant's certification, the special master, in consultation with the parties, shall issue a Scheduling Order to hear and resolve the objection. The procedure for resolution of the objection may include informal conferences with the parties, the submission of documentary evidence of briefs, or an evidentiary hearing on the record, as the special master deems appropriate.

11) Within thirty days of the final submission of evidence and arguments, the special master shall prepare a report to the court with Proposed Findings of Fact, and Conclusions of Law. If the special master concludes that there is not compliance with any provision of the court orders that is the subject of the certification, the special master may issue a recommendation addressed to each area of non-compliance and require the defendants to prepare and implement an action plan as described above.

12) The parties have the same rights of objection to the report and recommendation of the special master as provided for in Rule 53 or the order of reference.

The experience with this process has demonstrated that it a

useful way of moving the defendants towards compliance with court orders. The periodic external evaluation of their progress reinforces internal management and quality assurance processes to achieve and document compliance and as time goes on, builds confidence in the plaintiffs in the quality of the information that is produced.

While the process creates additional work for defendants and plaintiffs and the special master, it reduces the workload of the court and the flexibility and informality of the fact-finding process supervised by the special master helps move the case forward with minimal involvement of the court.

*E. The Business of Being the Special Master: Presentation by Gregory Miller<sup>9</sup>*

MR. MILLER: Let me begin by stating, Roger is not my friend. Does a friend invite you to speak and then wait until after you accept to inform you your speech is after lunch? Does a friend, after you arrive say, "Oh by the way, this is going to be transcribed?"

Let me begin by telling you that I never, ever forget what it's like to be on the opposite side of the table. I never, ever forget what it's like being the lawyer representing the company that's constantly complaining about the costs, or the lawyer representing the plaintiff who is saying, "Why is it taking so long to get this case resolved?"

With that in mind, let's talk about the title of my speech. It says, "The Business of Being the Special Master." When my partners saw that title, they were concerned. Why would you fly across the country to tell others how to make money being a special master? They, and I assume you, misunderstood the purpose of my discussion today.

Really, what I intend to tell you is the procedure I use on a large project like *FenPhen* and how to utilize standard business practices on this type of assignment.

Let's start with the basics: getting paid. In *FenPhen*, my fees are filed publicly and I certify personally to their accuracy. Every party in *FenPhen* has an opportunity to check my bills. I have a large staff and have procedures to check to make sure their work is done, their time records are accurate, and that the information that goes to the court is accurate. Why is this the one issue I worry about the

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most? Because I was a federal prosecutor and I understand how much trouble you can get in if you aren't careful in these aspects of your job.

Now, let's talk about FenPhen. Some of you may know about FenPhen, but for those of you who do not, I'll give you a little background.

FenPhen is actually two compounds: fenfluramine and phentermine. Fenfluramine was a product produced by American Home Products now known as Wyeth. If you took fenfluramine, you could get primary pulmonary hypertension, a very serious disorder, and if you get primary pulmonary hypertension, in most cases, you will die. It's that simple.

The other disorder fenfluramine may cause is heart valve damage. The amount of damage, if any, may vary based on how long you took fenfluramine or the condition you were in at the time you took it.

About six million people took FenPhen. Thousands of lawsuits were filed in state and federal courts all over the country. An MDL was created and the MDL case was assigned to Judge Bechtel of the Philadelphia United States District Court. He appointed a Plaintiffs' Management Committee and a Defense Liaison Committee. Discovery for all cases in the MDL was conducted by the Plaintiffs' Management Committee (PMC) and the Defense Liaison Committee under my auspices as the special discovery master. All permitted discovery was set forth in pretrial orders by the court, and no additional discovery could be conducted without my approval as the special discovery master.

We all know Rule 53 was amended. When I was appointed, interestingly enough, my original Order of Appointment complied with the new rule. The parties had an opportunity to object. The fees were set. The judge encouraged me to take a discount, which I did, and responsibilities were set forth in my order of appointment.

Under the court's pretrial orders, to avoid having corporate representatives deposed multiple times, a single deposition was authorized. It was videotaped and made available for use in all MDL cases. Under these pretrial orders, all documents the defendants produced were placed in a single depository and scanned. Every plaintiff had access to these scanned documents.

The only discovery remaining in individual cases involved the depositions of the plaintiff, his or her treating physicians, and this case, specific experts. Generic experts, on issues such as causation,

were deposited by the PMC or the Defendant's Liaison Committee.

One of my first assignments as special discovery master was to resolve a very thorny privilege issue. The PMC challenged the specificity of a defendant's privilege log. The log left something to be desired, so the judge referred this dispute to me. Thousands of documents were provided to me *ex parte* for review and I determined some were privileged and some weren't. The defendant appealed, but fortunately my determinations were upheld by the court. As a result of this process, the plaintiffs received a resolution of a difficult issue and obtained access to information they may have spent years fighting to obtain.

I was also asked to resolve a very interesting discovery dispute involving computerized evidence. A defendant had a practice where their computer system, including all of their e-mails and other files, were "backed up" weekly. There was some guy whose job was, at the end of every week, to take the tape used two weeks before and reuse it by taping over it. The apparent purpose of the practice was to provide temporary-disaster protection. That apparently was a lot of work for this guy and he started putting the old tapes in the box. Plaintiffs found out about this practice and requested all of these old tapes, which presumably contained e-mails and other information otherwise thought lost or deleted.

The plaintiffs were demanding access to millions of documents and e-mails, mostly irrelevant. But what about the rights of the defendant? To complicate the issue, the software system used by the defendant at the time this material was generated was no longer in use. So, it was going to cost millions of dollars to create a system that could access information, which might, in the end, be totally irrelevant.

So, we devised a system to share the cost and efficiently address the issue. This involved some sampling, which ultimately determined there weren't that many relevant documents, which were not otherwise produced. Through this process, we were able to avoid a long and costly project.

Eventually, Wyeth decided to enter into a class action settlement. Thus began my second life as a special master.

In my first life, I dealt with about 6,000 cases. But all things considered, life was pretty easy and we handled most of the issues raised promptly.

But then the settlement occurred. Wyeth created a trust fund containing in excess of \$3 billion to provide for medical

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monitoring and payment of personal-injury claims. The fund would be administered by a board of trustees who would develop an apparatus to process these benefits. Until the board could be established, they needed somebody to get things started. They turned to me and asked if I would be a co-interim claims administrator. In this capacity, I interviewed and hired a company to begin processing the claims. To give you some sense of the size of this project, we had tractor-trailer loads of mail daily from people submitting claims.

After I completed my assignment as the interim-claims administrator, the parties and the court decided that I should continue to be involved with trust activities as special master to the trust. Today, administering and supervising the trust is a major portion of my assignment.

After the trust was up and running, hundreds of thousands of claims started coming in. Tens of thousands of individuals participated in the screening program, which provided free echocardiograms nationwide. Thousands of people also opted out of the settlement and proceeded with their claims in state and federal courts. Wyeth removed many of the state court cases to federal court. This created phase two of *FenPhen*. Thousands of motions for remand were filed and ruled upon by the court. There are currently about 28,000 cases in the federal MDL.

Recently, the trust has been confronted with what appears to be substantial fraud. It is alleged that some individuals fraudulently procured echocardiograms. The trust advised the court of the problem and the court ordered that a hundred percent of the claims be subjected to a comprehensive audit. The trust had to hire over a hundred cardiologists to review all the claims. Unfortunately, this caused the process to get bogged down, and the parties were forced to negotiate an amendment to the class action settlement agreement. This amendment creates, in essence, another trust fund. A fairness hearing on this amendment is scheduled in January. So, currently, we are waiting to see how many claimants remain with the original trust and how many will decide to participate in the new fund.

Now, I'm going to share with you an overview of a day in my life as well as the circumstances in which I feel ex parte communication with the court is appropriate.

I have two partners and four associates who assist me on a part-time basis. I have several paralegals who work full time on *FenPhen*.

Every day I get stacks of mail and generally write several reports and recommendations for the court each day. Every week I have several conferences on discovery disputes, and I have a special discovery master conference every month.

Unlike others who have spoken, I play no role in the settlement of cases. Even when asked to play some role in settlement efforts, I will serve only in an administrative capacity. In Amendment Number Eight to the Settlement Agreement, the parties established a mediation program. So now, I am developing this program.

Even under this program, I do not plan to be a mediator. I am reluctant to play that role, given my other responsibilities. I can develop the program. I can help the court select the mediators. I can provide administrative support to the mediators, but I hesitate being involved in the actual mediation.

On the issue of *ex parte* communications with the court, I think it should be limited to administrative matters. I don't think it's appropriate to get into any detailed *ex parte* discussions on the merits of an issue that will eventually be decided by the court.

My discovery status conferences occur once a month and hundreds of lawyers participate by phone. Any lawyer who has a *FenPhen* case in federal court can participate in my calls. The lawyers receive an e-mail scheduling the status conference call and identifying discovery issues I intend to cover. Any proposed order or report and recommendation I intend to submit to the court is discussed during these conference calls. Even where my decision involves an individual case, I think sharing those decisions gives other counsel an indication of how I might decide similar issues in their cases.

SPEAKER: Greg, on conference calls, do you have an agenda in advance?

MR. MILLER: Yes. An agenda goes out with the e-mail. That e-mail also provides the dial-in information. I also have a court reporter who transcribes the entire conference which can be ordered by the lawyers.

We also discuss my special master memoranda, as well as the reports and recommendations I make to the court. All of this information is on our web page. Also, I will circulate draft orders that I'm going to submit to the court for comment and suggestions. If they have any problem, better to know it before it goes to the court—that this is their opportunity to raise any issues.

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An example of one of the procedures we use in *FenPhen* is our fact sheet compliance process. In *FenPhen*, there are none of the usual interrogatories that are exchanged in typical cases. Every plaintiff is required to complete what we call a fact sheet, which is actually a generic interrogatory applicable in all cases. The plaintiff fills out all the information and attaches court approved medical authorizations. You won't believe how hard it is to get some plaintiffs to complete these fact sheets. Since no discovery generally occurs prior to completion of these fact sheets, prompt completion is critical. So, we created a process where the defendants can provide me with a list of the non-complying plaintiffs. I get them in a conference room and find out why they have not turned in their fact sheet. If, at the end of this process, they don't get their fact sheet in within the prescribed time, I recommend that the case be dismissed. So, as you might imagine, we don't have a major fact sheet compliance problem in MDL 1203. Within my office, I have an associate who works closely with me on this issue. A few days before the conferences, my associate calls counsel and encourages them to prepare for these conferences. By spending hours and hours on conference calls with the parties, she helps me resolve these issues efficiently.

Product identification is another problem common to this kind of litigation. I have to tell a story before we talk about the product identification process in *FenPhen*. Early in my career, I went into private practice and was assigned to do asbestos defense work. I had just left the United States Attorney's Office, had no civil experience, and I had started with a firm heavily involved with asbestos defense. They said, "We know you don't have a lot of experience, but just cover this deposition. You don't have to do anything. You don't have to ask any questions. One of the lawyers will ask the product identification questions. That lawyer is going to ask the plaintiff, do you remember if it was a red, white, or blue bag? Do you remember if it was a gold or brown bag? Do you remember if it was a ten- pound bag? And he will cover all the products produced by all of the defendants during this deposition. You don't need to do anything." I thought, "I can handle this."

So, I went to the deposition and I listened, and listened, and listened, but the lawyer never mentioned my client's product. Now what do I do? How can I not ask any questions, right? Well, plaintiff's lawyer asked if anybody else had questions and I said, "Yeah, I have a question." He asked me who I represented and I

said my client's name and the plaintiff blurted out "That company's name was on every bag I touched." So, I go back to my office and they ask, "How did it go?" Well, I said, "I didn't ask any questions."

In *FenPhen*, product identification is a critical issue. There are a number of companies that manufacture phentermine, which is the "Phen" part of FenPhen. Obviously, not all of these defendants were responsible for providing the specific phentermine the plaintiff claims harmed him or her. Absent some process, all of these defendants ordinarily would be forced to participate in all of the discovery in all of these cases.

So, we developed a process that resulted in quick product identification. The defendants provided color-coded photographs of their pills. They were placed in binders and provided to the plaintiff's lawyers who were required to go through that color-coded list of products with their clients and provide a definitive product identification. Plaintiffs then were required to dismiss any defendant their client could not identify. If the plaintiff's counsel balked, I would ask them, "If your client doesn't know the product they ingested, how are you going to prove your case?" Through this process, we were able to eliminate thousands and thousands of cases.

Now, the importance of these procedures, and the reason I spent time describing them, and the purpose of my speech, is to show how to demonstrate to the plaintiffs and defendants, who are contributing towards your fee, and the court, that your actions saved thousands and possibly millions of dollars. The processes utilizing the special master enable the parties to efficiently dispose of thousands and thousands of cases.

Now, I'm going to describe the process we use to keep track of 28,000 cases. We assign what we call Discovery Initiation Dates, or DIDs, to each case. A new wave of *FenPhen* cases are now coming into the MDL. These cases sometimes contain five hundred or a thousand plaintiffs in a single case. In Mississippi, until recently, you could file a case with a thousand plaintiffs. In federal court, the rules generally prevent filing these kinds of complaints. So, the judge in our case required plaintiffs' counsel to unbundle these thousand plaintiffs' cases and refile a thousand individual cases. We had to create a process that dealt with this process and had to work with the clerk's office on how to track the cases because eventually the cases have to be rebundled and sent back through the MDL panel to the transferor court.

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Now, with 28,000 cases, how do you keep track of discovery? The Discovery Initiation Date (DID) is a date upon which your discovery obligations commence. Everyone currently has eleven months to complete their discovery from their DID date. Right now we are assigning DID dates to about two thousand cases a month. In each of these two thousand cases, we expect the parties will complete their depositions and other discovery within the eleven-month period. At the end of this period, there is a hearing process to confirm discovery is complete. I don't monitor, on an ongoing basis, whether the discovery is being completed in a timely fashion. Eleven months from the DID date there is a hearing before the judge. If you don't have your discovery done by that time, you can explain it to him. There is a process for applying for an extension. I handled what we call the "Good Cause Application Process" for requests for extensions of this eleven-month discovery period.

In the remaining time, I will cover, very quickly, my trust responsibilities. I have discussed the mediation function for which I am now responsible. There is our "Show Cause Process." Under the settlement agreement, any claimant denied payment by the trust is entitled to present their arguments before the court at a "Show Cause Hearing." Under that process, I prepare the "Show Cause Hearing Record" for the court.

My responsibilities also include reviewing information submitted to the court by the trust on administrative matters. There is also an arbitration process for disputes between the trust and claimants. I am chair of the arbitration panel. There is a PPH process for individuals who claim they suffer from PPH, a condition not covered by the settlement agreement. Anyone who can prove they have this more serious condition is free to sue in court. Because of the importance of this issue, I have created a process to determine which plaintiffs actually have PPH. I review their medical records and ultimately recommend to the court whether I believe they ought to be allowed to pursue their alleged PPH claim.

The final aspect of my assignment involves attorney's fees. In the MDL, there is an assessment—for any case that settles in the MDL—of six percent in federal cases and four percent in state cases. This is payment for the work product created by the PMC in the MDL. I am the escrow agent for this account. The funds are used to reimburse the PMC for all its costs and ultimately fees if the court chooses to award them.

A number of you have contacted me in the past and I want to offer to each of you today that if you have any questions about what I've discussed, feel free to call me. I will gladly send you my reports and recommendations and any other materials describing the procedures I use. Thank you very much.

MR. HAYDOCK: Any questions?

SPEAKER: I've got a question for Margaret. Margaret, in your submissions you discussed the appellate court rulings on the special master's authority in the *Cobel* case, and then you also talked about the broad ex parte authority that you have. Since you are also in the District of Columbia, did the Justice Department [inaudible]?

MS. FARRELL: They are [inaudible].

SPEAKER: Did they, at any point, ever object to the extent of your authority—your ex parte authority?

MS. FARRELL: They have not. That wasn't done.

SPEAKER: Greg, first, thank you for that amazing tour through your case—the administrative structure you have. The panel of arbitrators, do they arbitrate individual cases or do they arbitrate issues that come up?

MR. MILLER: I'm sorry; I didn't get a chance to get into detail. Under the terms of the settlement, based on the level of heart injury, and other factors, you get placed into a grid that determines your payment. So, how much a claimant receives is based on that grid. The trust makes the determination where a claimant falls on that grid. If the claimant is unhappy with the trust's determination, they have a right to arbitration. I was asked to recommend the appointment of a panel of arbitrators.

Since there are occasional Settlement Agreement interpretation issues, I also serve as chair. In that capacity, I interpret contract terms, but it is the team of arbitrators who either agree or disagree with the trust's determination.

SPEAKER: How does that fit in with the remand process?

MR. MILLER: The remand process only affects certain cases. These are cases that opt out of the settlement and were removed from the state court, and transferred to the federal court for trial. So, as you can see, in some instances, I'm dealing with cases that are not in settlement, and in other instances, I'm dealing with cases that are part of the settlement.

SPEAKER: Greg, how do you respond to the criticism some folks make about courts being in the business of trying to save money? One thing you learn in law school, and one of the reasons

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we have tort law, is to force people to be more careful. In the case of *FenPhen*, where drug companies are involved, why should you be in the business of making it easier for companies involved in these most terrible cases to save money on the cost of litigation?

MR. MILLER: Well, there are two things. One, saving money isn't my primary goal. My primary goal is to try to get cases moving so everyone has their day in court. The bigger the case, the more difficult it is for anyone to get their day in court. But, cost efficiency is an important issue to discuss as special master. There is a very cost effective alternative to us: the United States Magistrate. I've heard the parties say, "Why don't we give this issue to the magistrate?" I think it's important to convince the parties that you are both effective and cost effective to avoid them electing the alternative: a magistrate. So, I never forget that I have to be efficient. I have to be prompt and I have to be fair because they have alternatives.

What I think the parties believed in *FenPhen* is that given the volume of work required, it would be difficult for a magistrate to give this matter the attention that I'm able to give them. In the appropriate case, the parties should avoid the cost of a special master and using a magistrate.

SPEAKER: In the Prison Litigation Reform Act, Congress explicitly did say to use the special master in those cases and said the federal courts in those types of cases should rely on magistrate judges and went further and said that the federal court appointed a special master and special master fees are limited to what magistrates get paid. So, an interesting class of cases gets favored by Congress.

SPEAKER: What favored case?

SPEAKER: Prison Litigation Reform Act.

SPEAKER: Greg, I had a couple of questions. One is that you mentioned special master memoranda that you created is on the website. I wonder if that's your own created website or ECF system of the court?

MR. MILLER: It's our own *FenPhen* website. I don't have the web address, but it's a *FenPhen* special website and not the district court's website. And, all of the main orders are there: my special master memoranda, my reports and recommendations are on there.

SPEAKER: Did the parties create that?

MR. MILLER: The judge created it and we administer it.

SPEAKER: I also wondered about the extent to which it sounds like as you are going through this process. Things come up and, you know, some of the squares on this flow chart weren't there until things happened which caused them to have to be there. I'm wondering to what extent the administrative process that you followed has led to changes in the settlement itself, and also the extent to which you actually helped arrange some of those amendments? I mean, we got to do something, so how about this?

MR. MILLER: The parties have tinkered with the settlement. I have not been involved in any discussion with the parties about what they might do in terms of modifying the settlement, but there have been occasions where the parties have agreed to let the special master decide. As I said, I think the reason I get invited to serve in these roles is not because they all like me. I think they believe I am equally unfair to all.

## VI. THE FUTURE OF JUDICIAL MASTERS

### A. *Presentation by Francis McGovern*<sup>10</sup>

MR. MCGOVERN: Well, we were very pleased to have the substantive parts of the conference with suggestions and opinions for the future. What I would like to do before I leave is to take four or five areas that I've seen some evolution over the last twenty-five years and suggest to you sort of where we've been, and where we might be going. And the first one is on ethics. I've got a little blurb, little article, that I wrote, actually for the American Inns of Court, in your materials, probably about Tab 7—Tab 6, and it's entitled "Judicial Ethics Meet Political Reality." And in it I suggest there has been, in my mind, sort of a major sea change in some of the ethical aspects of being the special master that makes it particularly sensitive at this point. And when we get called by a judge to be a special master, we tend to get sort of excited and it's an interesting case, the sense of euphoria that you all were talking about at the beginning of the litigation.

Let me caution you a little bit about the sort of interesting aspects of being a special master. You need to be particularly careful. A colleague called me up because I had done this a fair

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amount and asked me what he should do. I said, "Larry, stand sideways. Don't do anything. They're going to be after you, I guarantee you. That's what is going to happen." Of course, he ended up not staying in the case. I take my hat off to Greg—staying in the same litigation over a long period of time. I would argue the smartest thing you ever did was stay away from the core issues of the substance because being in a case over a long period of time, there is no way you can keep up making decisions that will hurt somebody. They know, in any court—federal district court judges, state judges—when you've got this long string of cases or cases that last over a long period of time, when you make some decisions toward the beginning, and the lawyers know what the impact will be on the tail of the cases, and they know they are going to lose by virtue of what you did at the beginning, then they are going to try to get rid of it. And that's where you have to really, really watch out.

A second thing is getting lawyers to bond with each other and do a deal. What we are seeing with the globalization and nationalization in mass torts, we are seeing the same faces over and over and over again, and I'm talking about federal cases. Ed Blizzard. I've had Ed in three or four cases. You see the same players over and over and over again. With the nationalization, you're seeing sort of a homogenous kind of culture. So, when you are used to one legal culture, but other folks are accustomed to another, it can create some real dysfunction.

I was doing some silicone gel cases. One judge would have a cocktail party. And all the lawyers would come to the cocktail party. We sort of mingled around and resolved all of the issues. Everybody loved it and got away with it and everything worked just fine.

The other federal district judge—and we had some of these cases in other districts, and I was appointed to mediate between these two judges. This was a judge who wouldn't even talk to the parties unless it was in the courtroom. Completely different styles of being a federal district judge. And you, as a special master, when you are put down in a setting have to be aware of the fact that the lawyers may not necessarily have the style that you have. And, so, you've got to be particularly conscious of the accepted norms of proceeding in one way as opposed to another.

A third—and I spent more time on this—is something that's real troubling to me. I teach kids to be persuasive when I teach in

law school, using deductive logic, inductive, dialectic reasoning by analogy, getting the facts straight, using experts—classic persuasion tools that we learn to love as lawyers. What I see happening now is a migration of techniques of persuasion more commonly found in the political arena coming into the court. Let me give you an example.

I was watching *Boston Legal*. I don't know if you've ever seen *Boston Legal*. In class I always like to try to relate to my students. When I related to *Leave It To Beaver*, the kids don't, so I had watch *Sex and the City* and *Friends*. I watched *Boston Legal*, and this is a perfect example, it was the best example I could imagine of how we are seeing different kinds of techniques being used by lawyers to persuade people.

The first one had to do with a little Orphan Annie, African-American, didn't get the job, mom brings suit. As the lawsuit progresses, it's clear the judge is going to rule against the kid after listening to the kid sing. So, the lawyer goes to Shatner and says, "I'm going to lose this case." He says, "You got to pull a rabbit out of the hat. Boy, you got to pull a rabbit out of the hat." So what does he do? He goes back the next day and then in walks Reverend Sharpton, who says, "In America, in America, little Orphan Annie doesn't have to be White." And he goes on and on like this, and, of course, they settle the case, and she gets a backup role, and performs in the matinee on Saturday.

Husband, wife. Wife puts husband through school. Very successful; two kids, divorced. They're living in Massachusetts. Wife always wanted to be a doctor and goes to medical school and wants to do her residency in New York. Clear as crystal that the judge in the case is not going to let these two kids be removed from Massachusetts. The lawyer knows he's going to lose in representing the wife, goes to Shatner, and Shatner says you got to pull a rabbit out of a hat, so he hires a hooker. Okay. Get the pictures of the former husband, I don't remember the details. If I remember the details, I'll share them. And goes into a board meeting where he says, "Listen, I won't make this public, if you don't let those two kids go to New York." What does that say? What does that say? That it's okay for lawyers—in fact, it's good for lawyers—to use techniques of persuasion that are very, very different from the techniques that we are accustomed? And we're seeing some of the public interest firms. They really don't care necessarily if they win a particular issue if it gets the publicity for the issue.

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The best that I know at using these techniques is Elliot Spitzer. What he has done with the publicity. . . . Spitzer used the media and used the press and took a different kind of approach. I would argue to you that, given increased politicalization of the techniques, that as a special master you need to be politically aware. You need to be aware of the publicity. You need to be aware of the potential for the media. And you can preempt most of these kinds of problems if you really think about your point of order and disclose—as I mentioned earlier—disclose everything you possibly can. You want to get out front with that because it is becoming accepted practice that I've never seen before in the practice of law. It's becoming accepted if you don't like the decisions someone is making, you go after them ad nauseam and try to get rid of them. You are going to see more and more of that as time goes on.

So, one of the trends that I see that I might share with you is be a little bit more defensive about what you're doing. Think about what bad things might happen and be prepared in advance and that would be okay. But you need take that into account because it can hit you with quite a surprise.

Secondary: sources of appointment. When I started out, it was *judges* who found you. We are now seeing much more in terms of attorney-initiated appointments. And that to me is a rather radical shift. Attorneys are no dummies. When they see that it's inevitable that you're going to have some special masters. What you will see is attorneys saying, "I'm not going to leave it to the judge." That's the reason we don't see too many 706-experts is because lawyers don't want to lose control over the cases.

So, now, in terms of if you're looking where these appointments are coming from, in the institutional cases back in the 1970s and the 1980s, you had sort of democratic appointees as judges who would reach out and bring people in. We just don't see as much of that anymore. What you see is a need for special masters as recognized by the courts. What you see is your continued appointment is a good indication that the parties need that kind of assistance and generally are willing to pay for it. But it's a different source than we had at the beginning of the process.

The role of the special master. You all had talked about fact-finding, expert advice, pretrial discovery, pretrial management, mediation, media. I'm going to shy away from that. I know we talked a little bit about that. Sometimes you have to [inaudible] because they are real, real dicey.

Remedial—we've talked about those. Let me mention two others. One Kenny talked about yesterday. He and I were at a conference at Harvard on how you might compensate new Israeli separatists and [inaudible] to move them out and what kind of system you might be able to put together. I think the use of the special master distributing funds is a growth industry. I think you are going to see more and more of that for a whole host of reasons.

The other one is the coordination among judges. Fascinating, absolutely fascinating. As I sort of alluded to earlier, I got really interested in the fact that state courts really were where the action was, they just weren't talking to each other. And, so, I got the Conference of Chief Judges to create something called Mass Tort Litigation Committee, and I asked the judges to come and talk about their shared experiences.

Clearly, whether—from an ethical perspective—if we had any problems with judges sharing ideas like that, it worked out really well. I got to know them, and Judge Pointer appointed me to coordinate between the MDL judge and the state judges in the silicon breast implants, and now I'm doing it for Judge Rothstein in the PPA cases.

After I got appointed by Bankruptcy, Judge Hood appointed me to work with all the judges to see if we could get sort of a common kind of approach—bankruptcy judge, federal district judge in Birmingham, and several state judges. Great, great opportunity for folks like us. Terrific. Judges need help in the communications process, and it works extremely well. Have to do it very, very gingerly. But it really has to do with the coordination involved, not necessarily *what* a judge would decide, but maybe the *when* a judge might decide it, so that you have a little bit more efficient process.

No question but the tension—yesterday I was in New York speaking on class action mass torts, Louisiana Bar Association—no question but some plaintiffs' lawyers like to use state court as mechanism for blocking some of the MDL efforts in federal court. In *FenPhen*, you could arguably say that's a large part of the battle that's going on there. That tension between the courts, tremendous growth area, I think, for the role of a special master. And, then, lots of other roles.

You were talking about how your job. There have been lots of permutations. So, I would say aside from the standard areas, the claim-resolution facilities, the coordination, and the other things

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that you do when you do a good job of what you've been doing. Expanding it is a big growth area right now.

Compensation. Folks haven't talked too much about that. Hourly rate looks like it's pretty much the way most people are going. I've done it both ways, by the hour, by the day, by the month. The amount of money that one is making as a mediator outside of being a special master is significantly greater than what one would make as a mediator being a special master. That's why you see some of these people are no longer being a special master. That's playing into the attorney controlling and the privacy as well. I would say it's the greatest competition is really the mediator is doing exactly the same thing you're doing.

Outside of the court-appointed area, it's purely product and because it's much more lucrative for the individuals who are being paid. One of the banes of my existence even at an hourly rate when I'm working my fingers to the bone, is I'm going to make an hourly rate multiple what the federal district judge makes. There's no way around it. I mean that's just the way it is. Even if you shave your rate, you're still going to have that kind of tension. It's always a problem for you and if somebody gets mad, it's going to be on the fees. Some would say, whatever the lawyers are getting, I'll get paid the same rates.

SPEAKER: That is a wonderful way.

MR. MCGOVERN: For some, it's a nice rule of thumb. I would think one of the areas you will see more competition would be from the ADR folks that don't want to be appointed special masters and instead do the mediation. In the mediation area, you've got to be aware of the fact that there is a substantial chance that somebody is going to come at you, and there is a substantial chance, not a hundred percent, but a chance your judge is going to say, "Yes, go ahead." So, you have to be aware of that particular risk. I don't use notes for that reason when I'm doing mediation. When I'm doing something like institutional kinds of cases, I might treat it somewhat different. I would tell you that now more so than in the past when you had to be more careful about keeping those documents.

I said a brief run through. I don't mean to be non-rosy about it, but it seems to me some of these cautions—that having been there and done that—some of these cautions are well worth taking into account because I'm so glad to see this group, to see what Roger has put together. It's been awful lonely for a real long time

out there. We didn't know exactly what we were supposed to be doing and what the rules are. I would recommend highly that this group think about putting together some standards to protect yourselves because it is an institution well worth saving. Thank you.

*B. Presentation by Sol Schreiber*<sup>11</sup>

MR. SCHREIBER: For those of you who read my biographical sketch will see the fact that I am the founder and Co-Chair of the Ovarian Cancer Research Fund. The reason I mention that is because of all the public service I have done, including in my [inaudible] that has been my greatest work coup. And the reason that came about is my wife of thirty years, who had ovarian cancer for five years, and then she died in 1994, and three months later, I founded the Ovarian Cancer Research Fund, and in the last ten years, we've raised \$20 million and supported forty-five researchers.

I think there is a rosy picture for special masters. I have attended two recent meetings, one at the Federal Trade Commission on the consumer class actions and all they talked about is, "Let's bring in and use special masters." I was at the American University meeting where they also talked about the need to use special masters.

Magistrates do the work of special masters, but their budgets are being cut and there aren't going to be as many magistrates as the judges had hoped for. They are also doing more criminal work as well as trying civil work so they are not going to have time to handle these complex cases. Plus the fact globalization is coming so fast that everyday you hear about suits in China and other places. Judges cannot go to Europe or Asia. The reason for that is some judge in North Carolina many years ago had a patent case and went off to Paris for six to eight weeks. Soon after, the Chief Justice said no federal judges can go to foreign jurisdictions. That means when there is a problem and the judge needs someone, he will send a special master, and I think that's an area that's going to increase tremendously.

I left the bench in 1978 because a judge told me I had the wrong "Rabbi." A "Rabbi" in New York politics is someone who helps you get judicial appointments. So, I went to the Federation of Jewish Philanthropies to run their insurance and their legal

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11. Of Counsel, Milberg, Weiss, Bershad & Schulman LLP; United States Magistrate Judge, Southern District of New York (1971-1978).

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programs. I was surrounded by Rabbis, but it didn't do me any good. It was the best thing that happened, so I've stayed in practice and I've continued to do special masters' work. I'd like to discuss for you some of my most interesting special master assignments.

One day in 1980, I got a call from a judge who said "Sol, you had this huge case, employment case involving 8,500 college teachers versus the Board of Education. The attorneys would like to come to you and try to settle the case." And I said, "Well, I'll do it for nothing," but the judge said it should be paid. I said to the judge, "Do me a favor Judge, consider me for the task of handling the payment plan if we settle the case." He said, "Who else am I going to consider?" We settled the case. And I might mention that even at a reduced rate, because of the litigation process it took fourteen years. In fact, one woman I knew met me one day and she was wearing a fur coat, and I said, "That's a beautiful coat." And she opened it up and inside was the name of the case. I said, "That's not your name." She replied, "You got me \$3,000 and I went out and got a fur coat."

A second case worth mentioning is *Agent Orange*. The judge came to me and said they are having disputes. "You will," he said, "have to resolve the discovery disputes." One issue concerned chemical warfare from the First World War right up to the Second World War. So, I said, "I'll do it for nothing." He said, "The defendants will pay for it, and they will pay your billing rates. Don't give me your reduced rate, your billing rate." So, we had *Agent Orange* for about three years until Judge Weinstein took over the case. He said, "Sol, I don't need you. I'm going to settle this case." I said, "Fine."

But during this case, it was a wonderful experience. Can you imagine taking depositions of Secretary McNamara and all the people in Reagan Administration, including Secretary Kissinger? His lawyer came up to me prior to the deposition and said "He doesn't have much time" and these nine lawyers are ready to take depositions. I said, "Don't tell the lawyers. If you tell the lawyers, you will be coming back." In any case, the deposition started and Mr. Kissinger said, "No, I don't remember, I don't remember, I don't remember." It was all over in fifty minutes. After, I said to the lawyers for Mr. Kissinger, I said, "John, he really handled himself so well." The lawyer said he has taken so many depositions that he knows if he says "I don't remember" or "I don't know" his deposition will go really fast.

And then I got assigned to the *Lockerbie* explosion case. I had 128 cases to settle and I settled 127. The one I didn't settle went to trial. The verdict was so high, it came back to me, and we settled it for \$14 million. But, the story I want to tell you about *Lockerbie* is how you grow up in life and you use what you learn. I grew up in a very poor neighborhood in Brooklyn, just before the Second World War. We were the only Jewish family in an Italian neighborhood. It was a little Jewish grocery store and everyone predicted that it would close in six months. And my father and mother, who worked seven days a week for twenty-five years in this store, sent one son through college and the other one through college and law school. I worked there every day and had wonderful experiences. I would sell cream cheese to Mrs. Vitals and I'd say "Fifteen cents," and she would say, "It is too expensive." She would offer twelve cents, and I would say, "Let's settle at thirteen cents."

The families of the *Lockerbie* action, they would come in and they would bring all their books and pictures, and when it came time to talk money, I'd tell them about my cream cheese story. And they would all listen and we would settle the case. In the last case of the 127 cases, I said, "Mrs. Jones, let me tell you the cream cheese story," and the fellow from the insurance company said, "Sol, I don't want to hear it again, no more cream cheese, give her what she wants."

Another interesting case was the *Marcos* case, human rights litigation. That was the only case that at that time where a special master was also appointed as a court-appointed expert. The problem was there were 9,200 execution, personal injury, and disappearance cases. How are you going to try 9,200 cases?

The plaintiff brought in a statistician who said if you take 150 depositions, fifty from each category and you worked out the figures on those fifty cases, you would have a benchmark in order to handle the rest of the cases. So, the plaintiffs went over to the Philippines and took 150 depositions. Fortunately, I didn't have to go. For some reason, Ms. Marcos' attorneys chose not to appear. So, we had 150 depositions taken by the plaintiffs and sent them back to me. I reviewed 150 depositions, and I gave them a benchmark figure, depending on Philippine damages, international damages, and American damages. When we went to trial and the judge said, "You are going to be the expert on damages." I said, "Judge you can't do it. I'm a special master." He said, "Why can't you be the court-appointed expert?" I said, "I

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don't know, maybe I can." So, I testified. It was a three-day trial. And I came in with a figure of \$656 million. The jury went out and examined 150 cases in five days and came back with \$654 million. The case then went to the Ninth Circuit, two to one. It's the only reported case involving aggregated damages as such.

SPEAKER: You were close to right.

MR. SCHREIBER: But the interesting part of it is what happened. Why don't they go to the Supreme Court? Ms. Marcos has a dispute with her appellate attorney. And by the time she got around to writing a letter to Justice O'Connor saying, "I once met you at a dinner party, I have this case, can you help me?" Justice O'Connor sends it back to the Clerk of the Court who advised her that it was filed three days too late. End of the case. I got paid as a special master for the first three years and unpaid for the last seven years.

My last case for discussion: I got a call from a judge in the Eastern District of New York concerning a Haitian detention center for illegal immigrants. "The Justice Department," he said, "is willing to settle it on constitutional grounds that a master will be appointed to review the jail and to ensure they have their constitutional rights." I said "That's fine, Judge. Has anybody talked about compensation?" I didn't want to raise it. The Judge said, "Yes. The government would like to give you \$60 an hour." I said, "Judge, do me a favor. I'll do it pro bono and I won't accept any money at all." So, for three years I ran a detention institution. Weekly I visited the center, spoke to the Haitians, and checked the health conditions. The thing I didn't know and the judge didn't know was that AIDS came to the United States from Haiti. And God knows how many of those people may have had AIDS, and could you imagine what would have happened if that ever got into the newspaper? Fortunately, it never did.

Have any of you ever served as a commissioner? I got another call from a judge in the Eastern District of New York. Most of my assignments come from Eastern District or the Southern District of New York. The judge said, "We got a case from Israel where two Jewish people from New York have run off to Israel because they were being charged with murder in the United States." It involved tax records on fuel oil. And I said, "it sounds interesting to me, Judge." I said, "How about three weeks?" and he said, "How about tomorrow?" So, I show up in court and there are two Assistant U.S. Attorneys there, with two prosecuting attorneys and two defense

lawyers from Israel. They also speak English, as you would guess. When I said I call the first witness, it turned out to be the number-two person in the Gambino family because the Mafia was involved. I don't mind saying the Italian Gambino. Do you know that there is a Russian Mafia in the United States? There's also an Israeli Mafia. They're all over the place. I must tell the story.

The witness for the Gambino family testified how they worked out this deal. They opened up a gas station. They would run it for a couple of years and they wouldn't pay the taxes and close it down. And then they would open up another one, and the Italian Mafia got involved. And I couldn't resist. I said, "You're from the Italian Mafia. Why do you need the Russian Mafia? Why do you need the Israeli Mafia?" He said, "We brought the Russians in for their brawn and brought the Israelis in for brains."

During the proceedings, I made a ruling, and the defense lawyer said, "Judge, that may be a ruling in the United States, but it's not in Israel." He said, "Would you mind if we called the Israeli Supreme Court for a ruling?" And I said, "As long as you come back tomorrow." The next day they came back and the DA from Israel said, "Judge, they are right, the Israeli's Supreme Court concluded that you were wrong" and I reversed myself.

I have a few other cases but I will not bore you with them. I'm so happy for this invitation because I think I'm in my senior years, if I have three, five, or ten years, I would be very lucky. Many of you have many years, and many of you are extraordinarily talented in the areas that I haven't heard much about. I believe in this organization, and, hopefully, we can get people to talk about masters and judges and a newsletter, and a CLE program. I've already gotten the approval from ALI-ABA for a program. I guess I am the oldest living active person in CLE, forty-two years of doing programs. If you get to speak to judges, explain. Tell them what masters are doing. And, by the way, there is a wonderful English writer by the name of C.P. Snow. He wrote a series of books about—they were about Cambridge and the fighting between professors as such, and one of those is called *Masters*. And I think we should be called masters, not special masters. Thank you.

SPEAKER: I want to at least return to one issue on the magistrates about the confidentiality. I was just curious. Perhaps, if I don't take notes if I'm special master assigned to settle the case, am I obligated to take notes if I'm the special master having to make decisions? I was curious of other peoples' practices on that.

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SPEAKER: My reason: I don't have any reason to keep the information or keep the records and the potential risk if I keep the other information around. I don't know if others are as paranoid as I am in terms of doing that.

MR. MCGOVERN: If you're talking about the deposition of Henry Kissinger, that's the Sergeant Schultz defense.

MR. SCHREIBER: In *Agent Orange*, I was called to testify before the judge on attorneys' fees. The plaintiff wanted to show the judge the quality of his work. How many of you have ever been a witness under oath? It's absolutely amazing. The first thing that comes to your mind is that's not the right question. What you had should be asking me is something else.

SPEAKER: They don't like it when you tell them that.

MR. HAYDOCK: Other issues and questions we want to address now that we have a few minutes?

SPEAKER: Francis, you seem to suggest that to be defensive—one way to do that is to disclose as much as you can think of as soon as you can and to even disclose that by way of inclusion in the Order of Reference.

MR. MCGOVERN: Well, just to give you an example. I've been in the *Dalkon* case for six years, and the new rule was passed in the interim. So, I decided to go ahead and do the disclosure statement even though I don't have to, arguably. I submit in a letter to the judge with a résumé and the names of every case that I've been involved in and the names of the law firms that I've involved in and the other cases that are in this particular case. I have always—I don't [inaudible] and never have. I just felt that if it was something you are looking at me, you are looking at my office. I'm my secretary; I'm my receptionist. I'm all of that. So, it seems to me to be appropriate under my circumstances not who work with anybody, I don't have the normal conflicts problems that one would have if one is in a law firm or representing folks. But I do have the problem of the same law firm being in multiple cases. One time we talked about the instance where here are you in a case, and one of the lawyers being in another case. That's the bane of my existence. I try to disclose that and say up front I have been, I am, or I will be and try to frame it that way.

SPEAKER: Do you have an example of that that I could see?

MR. MC GOVERN: Sure.

SPEAKER: My question is: Do you think that part of the problem is categorizing what all of these different things called

master are, what the tasks are? Do you think that the job is so inherently amorphous and vary by case to case to case to case that it can't yield to sort of a general rule of ethical constraints on communications? I'm thinking particularly about the two different types of ex parte communications. Would it lend itself to a rule or would it yield to trying to be codified?

MR. MCGOVERN: On ex parte?

SPEAKER: Yeah.

MR. MCGOVERN: If you look at the appellate rules of mediation, that's where you can't talk to the court about the any substantive issues. Yeah, I think you can do that on ex parte if you can have ex parte. I think it would be a great idea because as I mentioned before, I have a big problem sometimes where, you know, very inquisitive judges want to know what's going on and they're pushing me and pushing me and pushing me, and you're trying to be nice to your judge, so, if there were a rule, it would be quite helpful to me. The more definition, I'm arguing on this recusal issue, that this appearance of impropriety—all you have to have is there is an appearance of impropriety. There needs to be some more bite to it. So, I would argue the same thing as far as ex parte, the more definition, the better. This is something I think this crew can work on quite, quite well and it would be really, really helpful.

SPEAKER: You have to paper train the judge early so he doesn't keep asking these questions.

MR. MCGOVERN: It's hard. Some judges, once they put on the black nightgown there is not a whole lot you can do. I'd say after seven years that's the line of demarcation. Before seven years, they are trainable.

MR. SCHREIBER: Their problem is they have this rule that every six months for cases over three years, they must report them to Washington.

MR. MCGOVERN: Going back to the previous question let me give the answer. He was a control freak, but he wanted to know what was going on all the time and he was asking about mediating some negotiation. And I said, "Judge, I'll handle the negotiation." He suggested he could do a lot better job than I could have. I'm sure he could have. That's the kind of issue that comes up. I'm sorry. I interrupted you.

SPEAKER: Going back to the previous question. I've heard the term "settlement special master" this weekend for the first time.

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Is that any different from a court-appointed mediator, and if so, it seems that doesn't have much in common with the other. And if we're called different, there are different ethical problems, too, with this sort of quasi-judicial function.

MR. MCGOVERN: If you're a mediator, you're a mediator. The question is, are you doing it under Rule 53 or not. Generally speaking, in federal court, at least it's been my experience it's been under Rule 53. In bankruptcy there is no Rule 53. So, oftentimes, and you are appointed as a mediator. The function is the same, but the hook in the appointment is how long, can be quite different.

SPEAKER: The difference is just the mechanism of the appointment.

MR. MCGOVERN: And the rules that go with that. Rule 53 has certain rules; 706 has certain rules. Local in California, there are certain rules. So, it does make a difference, but the function of what you're doing is the same as what is the legal framework under which you are working would be different.

SPEAKER: The only thing I would add to that is it could be very useful in the case if you're just actually being a mediator. If you're appointed by the judge as a master, you can make assurances that people appear and you can set deadlines, and you can move the case along; whereas, if you're a mediator, you just have to pay.

SPEAKER: Could you elaborate a little bit on the thought that things like ex parte communication could be addressed by some kind of organization of special masters? And that brought to my mind maybe ten years ago somebody put forth the idea that there should be a group of certified special masters, and they would file a list of certified special masters to the court, and they choose a master from that list. They didn't go in that direction. But what is your thought about trying to regularize things like ex parte communications, more particularly than they currently are in the rule?

MR. MCGOVERN: I'm a proponent of that because it gives protection to the special master and to the court. I think that most folks feel that special masters, at least, are appointed by federal judges and whisper in the judge's ear about everything that's going on. In fact, I would say that most lawyers, they just expect that's what's going to go on. Talking about twisting arms, you're talking about when do you bring the judge in? I think most people think

that's what goes on. To me, that's a problem, because to me, it doesn't go on that way because I've done it enough to have seen the downside of that. One of the first cases I had, the judge said, "I don't want to know anything about the merits of this because I got to decide." He trained me well. So, I think you can. It's a little bit of a slippery slope. What did you mean by substantive? We're going to meet on Thursdays, is that substantive? Probably not. We can go down the slippery slope, but I think you can give a little bit more definition.

On your second issue, I've never been a great proponent of pulling up the ladder. Max Weber wrote about from charisma to routine, that what you see is charismatic folks that start some kind of activity or institution, and then eventually become organized. You like to see that. But in terms of being certified and pulling up the ladder, that's a little bit more of a problem.

In terms of a list to me of potential folks, usually the reason you get appointed is because you knew the judge or you knew somebody that knew the judge or just happened to be in the right place at the right time. The work I've done is judges talk to judges, you know—who should I appoint? It's very, very informal under any scenario. It would be helpful, I think, to have something in the nature of folks who have served and what kinds of cases so the judge could go to something. We tried to do that with 706 experts. A couple of times we tried to make it easier for the judge to appoint 706 experts in toxicology or pathology or whatever it may be, but it never really had taken off that much.

If a group like this does it, it looks sort of self-serving. If, on the other hand, the Federal Judicial Center were to have a list of all of the people who have served as special masters and what the kinds of cases they were, that would be really quite helpful. So, of your questions, that to me is the one that I think has the more worth to it and has the greatest potential. There are some rules on ex parte, many state rules, and you can borrow from those in the federal. In California, California tends to be out front, and, particularly, on the arbitration side, there were all kind of problems. That gives you an idea of where you might look. But, again, we're doing what we should be doing. We don't want to be accused of being in contact. The reason we're there is because we are clean as a whistle. Go ahead and get out of there, we're clean as a whistle, and you have protected yourself as far as that's concerned.

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SPEAKER: You talked about being sort of a one-man show. Others have whole organizations, firms, there are outside organizations. I'd like to hear from everyone else as to how do they try to approach this in terms of developing infrastructures once you get an assignment? And how far do you go?

MR. MCGOVERN: There are a couple of models, just to give you my model. I don't like to have to take the next case. That's just my personal view. I got a day job. I got tenure. It's hard to get more secure than that. It doesn't pay very much, but it's pretty secure. So, I have the luxury of doing it on an ad hoc basis. So, what I'll do is present [inaudible]. I'll get academics. I'll bring in people, again, on an ad hoc basis. I hired an economist just for a particular case, an accountant. Every now and then, I've hired lawyers. So, I do the runoffs in state river cases. I worked for about five years for charity and that was quite rewarding from the psyche perspective.

The other model is the one that the industry actually started and then they merged with JAMS. But there what you have, to a certain extent, JAMS give some support, but not a huge amount of support as Martin indicated, but with disputes and resolutions, they have got people on staff who can provide that kind of expertise. It's not a pyramid, but not it's not too far from it.

The third model would be the law firm model where you've got some of the classic person at the top bringing in the business and some other people handling various aspects. When Kenny Feinberg was working on that case, then he could do that. It's really the law firm model more than anything else—what his shop has been. I'm sure other people have other models, but those are the three that I can think of.

SPEAKER: There is certainly a fourth model. That's the solo practitioner that a large number, I think . . . you don't have to hire staff. You may have to contract for some support services of some sort, but maybe the parties even hire those. You work on who they should pick in administering notice or administering claims. That would be the parties really doing that.

MR. MCGOVERN: One of the problems, and I know Martin likes to do e-mails, when you get something and you got to put it together, a lot of times I don't have the capability of doing that at all, so, I have to get the parties on a conference call. I like the model where you do it yourself, but if I'm working something, I just don't have the facility or the ability. I have to get into the one-man

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kind of thing or sort of like the guy in the subway with the harmonica and the drums.

MR. HAYDOCK: Well, we'll end the substantive part of the conference, and I would like to thank Sol and Francis.