

Using Special Masters in San Mateo



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Multiparty construction defect cases often require exceptional judicial management because they involve complex factual and legal issues and include large numbers of parties, attorneys, insurance companies and experts. Litigants frequently retain a referee or special master to work with the complex litigation judge by providing case management, addressing discovery disputes and/or facilitating settlements of these cases. This article is the second in a series that analyzes how different Bay Area courts utilize special masters in complex construction defect cases.

San Mateo County Superior Court currently has approximately 25 complex construction defect cases. More than 85 percent of these cases utilize the services of a special master under the supervision of Presiding Judge Beth Freeman.

When filing a multiparty construction defect case, plaintiff's counsel may request a complex case designation by filing a civil case cover sheet with the appropriate boxes checked and a certificate regarding complex case designation. If a

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case is not initially designated complex, any party may move for a complex designation. The complex case designation fee is an additional \$550 per party (capped at \$10,000 per side). Alternatively, the parties may submit a stipulation with a proposed complex designation order. Ex parte hearings concerning complex designation requests are discouraged. The clerk of the court will set a status conference before Freeman to address a complex designation request. The presiding judge may decide the matter with or without hearing.

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At the first case conference, Freeman will ask counsel if they agree to the appointment of a special master. Homeowner's counsel Kevin Frederick generally addresses this issue with lead defense counsel very early in the litigation — often before filing the complaint. "The very first conversation is who are we going to get to be our special master," he says. "The key is get the special master appointed before the subcontractors come in, because once three parties are in the case, the parties will have difficulty reaching an agreement. No subcontractor has ever objected to a previously agreed-upon special master in any of my cases."

Defense attorney Lisa Cappelluti of Lorber, Greenfield & Polito, adds that the parties generally stipulate to the lead parties' special master proposal. If one or two parties object, lead defense counsel works with the parties to negotiate a consensus. Counsel can be creative. Cappelluti has negotiated agreements whereby minor parties opted out of the special master process in exchange for informal document exchanges, a stay on formal discovery and one-on-one settlement discussions with lead defense counsel.

Once a consensus is reached, the parties submit to Freeman a completed stipulated order appointing a special master; the court generally designates the case to be complex and executes the proposed order. See Local Form CV-67, Local Rule 8. If a consensus is not reached, Freeman may designate a case complex and entertain a motion to appoint a special master "if the parties can work out a special master fee arrangement." Freeman views the amount of court time needed on special master cases as "very manageable" and therefore complex construction defect cases remain in the presiding judge's department for case management. The presiding judge refers complex construction defect cases without special masters to San Mateo's complex litigation department.

CASE MANAGEMENT

Form case management conference statements are not helpful in construction defect cases. Freeman explains that "the form itself is not designed to give the kind of information that is needed in complex construction defect cases." Freeman prefers that the special master confer with counsel and submit a single status report via facsimile, mail or hand delivery one week before a case management conference. Otherwise, "the submission of quarterly reports is a good rule of thumb."

In addition to court status reports, homeowner counsel Frederick believes that “the special master should focus on party communications. Something should be happening every 30 days” to keep the case moving toward resolution. Cappelluti suggests that the special master “create a vehicle to communicate with the parties and update the entire group regarding case progress at least every two months.” As a case approaches trial, the special master should increase communications with all counsel and the court.

Substantive status reports to the court include a summary of occurrences in the case and a schedule of upcoming events — including anticipated dispositive motions that the court will be asked to handle. When appropriate, the reports should include a recommended trial date. A special master status report may include a request for a trial date continuance if the request is unopposed and supported by good cause. The special master should circulate a status report to all counsel for review before forwarding it and any proposed order to the court. The report should confirm that all parties agree with, or explain any objections to, the proposed order. The court generally adopts the special master’s recommendations.

DISCOVERY DISPUTES

Freeman encourages special masters to “actively engage in resolving disputes between parties. It is far more useful to the case if the special master develops his/her role as a decision maker. Whether it be discovery disputes, expert issues, [or] inspection questions, the special master should not just try to find the middle ground where parties can compromise.”

SETTLEMENT

Most special master mandatory settlement conferences are conducted at

private offices. If it will assist the settlement process, the special master may submit a request to Judge Steven Dylina to conduct an MSC at the San Mateo courthouse. Dylina welcomes the collaboration of the special master in resolving disputes. He is a “strong believer in the special master process. San Mateo has 26 superior court judges and a huge number of criminal cases that take statutory priority over civil cases. It is critical that the court keep the special master system going.”

Prior to a courthouse MSC, Dylina welcomes a confidential settlement status report from the special master. He also encourages all counsel to hand-deliver or fax to his department settlement conference statements one week in advance of the conference. “I read everything,” he says.

Any requests for carrier representatives or principals to attend a courthouse MSC by phone should be submitted to the special master who in turn will address the issue with Dylina. The judge emphasizes that “participants need court permission to attend by phone.” While it is not his preference, Dylina has sanctioned parties for not attending MSCs in person without prior court approval.

Dylina strategizes with the special master to design an effective approach toward settlement discussions. He and the special master “divide and conquer to the extent that they can to assist all parties.” He acknowledges that the special master “knows the case far better than the judge does and can identify claims, defenses, insurance coverage issues, additional insured matters, scope-of-work issues, critical timing issues and other key settlement factors. That is something that the trial judge doesn’t really have a chance to do.” In some cases, Dylina actively participates in the negotiations; in others, he serves as a background player.

Cappelluti believes that “San Mateo judges have an interactive relationship with the special masters. They seem to coordinate with them on an active and ongoing basis. This is very useful. The parties get more accomplished when they are able to utilize the courthouse and the judges cooperate. There is a cohesion between the bench and the special master.”

If a case does not resolve at a settlement conference, Dylina’s clerk will call counsel before trial and ask if there is anything that the judge can do to facilitate settlement. If any settlement dynamic changes, the judge invites the parties back for more settlement negotiations.

On the first day of trial, counsel should be prepared to participate in a settlement conference with Dylina or another judge. The parties will receive their trial assignment after the conference.

In summary, Presiding Judge Freeman supervises the management of complex construction defect cases with special master appointments; the complex litigation department handles the remaining complex construction defect cases. Once appointed, the special master is charged with communicating with the court at least once a quarter to assist with efficient case management and resolution. The court favors special master status reports over the standard form CMC statements. Freeman generally will grant special master proposals if the special master has conferred with counsel and submitted a timely case management schedule. The judge also may grant special master trial continuance proposals that are unopposed and supported by good cause. A special master may conduct courthouse MSCs with Judge Dylina. In San Mateo, counsel should be ready to engage in meaningful settlement discussions on the first day of trial.