

Using Special Masters in San Francisco

Complex construction defect cases often require a neutral to work with parties during the pretrial phase



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Third article in a series that analyzes how different Bay Area courts utilize special masters in complex construction defect cases.

San Francisco Superior Court has approximately 300 to 400 cases pending in its two complex litigation departments; many of these line items are Judicial Council Coordinated Proceedings that involve multiple cases.

When filing a construction defect case, plaintiff may apply for a court order designating the case complex by checking the complex designation boxes on the civil case cover sheet and filing an application for approval of complex litigation designation. If a case is not initially designated complex, any party may move for a complex designation; counsel must deliver a copy of the application directly to department 304. Complex department Judges Richard Kramer and John Munter review the applications together, and if the criteria of CRC §3.400 are met,

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the judges assign a case to the complex litigation department without a hearing. The judges take a holistic approach and divide the cases between them based on the totality of circumstances, including their existing caseloads and subject matter experience.

Munter estimates construction defect cases make up approximately 15 percent of the complex department cases. Roughly 75 percent of these cases utilize the services of a special master.

The judges generally adopt the special master's recommendations. Judge John Munter views the 'special master as the choice of the litigants. If they uniformly accept a proposal, I will not get in the way of the process.'

California Civil Code §§895-945.5, 1375-1375.1 instruct parties to gather basic information, appoint a neutral and commence settlement discussions prior to filing many construction defect cases. Kramer believes these are "good laws that tee up complex construction defect cases early." If the parties have not retained a neutral under these rules, Kramer and Munter observe that lawyers who practice in the complex department are very knowledgeable and "able to recommend a qualified special master early in the case."

Plaintiff attorney Ann Rankin works with lead defense counsel to appoint a special master at the start of a complex

construction defect case. Defense counsel Sandy Kaplan of Gordon & Rees explains that it is important to obtain an appointment before the subcontractors appear: "Quite frankly, getting consensus from multiple parties with multiple agendas and multiple carriers makes coming to an agreement very difficult. Generally, all counsel agree to the lead counsel's selection." Where one party objects to an appointment, Rankin and Kaplan invite the party to address its concerns directly with the court. This situation is rare. Kramer has appointed a special master over a party's objection, but Munter does not recall this issue in any of his cases.

CASE MANAGEMENT

The judges agree that standard case management conference statements are inappropriate for complex construction defect cases. Both Kramer and Munter require a single, joint status report in pleading format from lead counsel. In addition, they welcome a special master's status report. At least three court days before a CMC, two hard copies of the status report should be hand-delivered directly to the complex department. Munter uses the report as the CMC agenda, and he encourages the special master to participate in the conference by phone.

A special master may submit additional written status reports after key events in the case.

Rankin supports frequent special master teleconferences with counsel. "If you don't keep bugging people they will not get work done — deadlines pass and the case stops moving forward. The conferences push counsel to complete tasks." Conferences also force the parties to communicate regularly with each other. Kaplan agrees: "As to case management, it is important for the special master to

stay periodically in touch with lead lawyers to address issues, remind parties of deadlines and move the case forward.”

Status reports should include a summary of significant occurrences, upcoming events, anticipated court activity and, according to Munter, the lawyers’ comments on “how to best move this case to some merciful conclusion. We want to be forward-looking — always looking at the next step. The goal is getting the case resolved — settled or whatever resolves the case.” The judges encourage the parties to identify issues for early resolution that will simplify the case. Munter explains that “with the agreement of the lawyers, there is a lot a complex department judge can do. There are many processes that the parties can devise to address key issues — for example, court trials, mini-trials and bifurcation of issues. Without an agreement, I am a law and motion judge. Counsel should take advantage of opportunities that are not always available outside of the complex department.”

Kaplan observes that San Francisco’s complex judges “work with attorneys as long as the attorneys are prepared and know what they are doing. It is refreshing to be able to pick up a phone and call a clerk in the complex department directly to request a CMC continuance. This is one of the intended benefits of having a case in the San Francisco complex litigation department.” Moreover, while a special master does not address substantive legal issues, the special master can assist the parties in working with the court to set briefing schedules and dates for good faith settlement hearings and other substantive matters.

The judges generally adopt the special master’s recommendations. Munter views the “special master as the choice of the litigants. If they uniformly accept a

proposal, I will not get in the way of the process.” Upon a showing of good cause, the judges typically grant unopposed trial continuances recommended by the special master; they take into consideration any objections to a recommendation.

Jury trials of construction defect cases are not common in San Francisco’s complex department. Kramer assists with the selection of a jury trial judge who will hear a case from Kramer’s department, but he does not conduct jury trials. Munter has not had a construction defect jury trial since he joined the department in 2007.

DISCOVERY DISPUTES

Rankin believes that “the special master can do a lot of things to prevent discovery abuse.” For example, the special master may set up streamlined procedures for producing email discovery, conducting inspections, organizing depositions and resolving discovery disputes. Rankin observes that “discovery abuse makes a case so expensive. San Francisco’s complex judges are hardworking and willing to assist the parties. However, especially in light of California’s budget woes, they simply do not have the time, budget or resources to deal with ongoing discovery abuses.”

The complex departments will review *de novo* any disputed special master discovery ruling. Before filing any discovery motion, however, the parties must meet with the court informally to attempt a resolution.

SETTLEMENT

The special master conducts most mandatory settlement conferences at private offices. Upon request, the San Francisco complex judges will allow the special master to conduct settlement conferences in their departments. Often, Kramer and Munter will do MSCs for each other, alone or in tandem with

the special master or settlement judge. But courthouse MSCs are rare in complex construction defect cases.

Kaplan believes MSCs at the courthouse are needed when there are parties “who have not properly evaluated the case or show up without authority and need the imposition of the court to take the case seriously. If everyone is smart and doing their job, the parties don’t need the courthouse.”

Kramer echoes Kaplan’s sentiment: “People we deal with in the complex litigation department do not need to be told when to settle their cases. As to construction disputes, people who can build have common sense. They will figure out how to settle these things. I don’t need to tell anybody about the invisible hand or the rational resolution to a business problem.”

Munter notices order to show cause hearings for any party who fails to appear with a carrier or decision maker with settlement authority at a court-ordered settlement conference. To date, he has issued no sanctions.

In summary, Judges Kramer and Munter supervise multiparty complex construction defect cases in San Francisco. Lead counsel frequently stipulate to the appointment of a special master very early in these cases; later-appearing parties seldom object to the stipulation. With the parties’ consent, complex judges work with the special master and counsel to streamline the resolution process and simplify the case. The court typically adopts special master recommendations, including unopposed trial continuance requests supported by good cause. Special masters may conduct settlement conferences at the courthouse, but courthouse settlement conferences are not common in complex construction defect cases. Jury trials of construction defect cases in San Francisco’s complex departments are rare.