

Using Special Masters in Alameda



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

Alameda County Superior Court has approximately 280 cases pending in its two complex litigation departments. This total does not include multiple cases under single case numbers, such as judicial council coordinated proceedings (JCCP) and consolidated cases. Judge Steven Brick handles the even-numbered cases, and Judge Robert Freedman the odd-numbered ones. Due to potential conflicts, Freedman recuses himself

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from many construction defect cases. Brick, therefore, handles the lion's share of these files: He currently has about 20 active construction defect cases, while Freedman has approximately 10, excluding a substantial number of construction cases that are more in the nature of contract disputes than traditional construction defect claims. More than 80 percent of the complex construction defect cases in Alameda County Superior Court utilize the services of a special master.

The complex judges encourage the special master to work with the litigants to resolve discovery disputes informally, through case management efforts and informal discussions with counsel.

When filing a construction defect case, plaintiff's counsel may forward a case to a complex department simply by checking the complex designation boxes on the civil case cover sheet and paying an additional \$550 fee for complex designation. (Defendants pay an additional \$550 complex designation fee per party (\$10,000 cap).) If a case is not initially designated complex, any party may move for a complex designation; these motions are usually uncontested. If no party requests a complex designation, a construction defect case will be assigned to one of Alameda's 14 direct calendaring departments. Freedman or Brick may transfer the case to a complex department upon the request of a direct calendar judge if the criteria under CRC §3.400(b) are met.

Plaintiff and lead defense counsel generally select a special master and submit a stipulation and proposal to the court.

Homeowners' counsel Randolph Paul of Berding & Weil explains that it is simply more efficient to select a special master before all the parties are in the case. "If we wait until 30 cooks are in the kitchen, it's too hard to cook," Paul says. Any newly served party may object to the appointment order within 30 days of being served. If there is no objection, the party is bound by the order. Customarily, all parties agree to the appointment.

According to defense attorney William Staples of Archer Norris, if one or two parties object, lead defense counsel tries to work with the parties to negotiate consensus. If an agreement cannot be reached, the court instructs the consenting parties to file a motion to appoint the special master. For the most part, these motions are granted. According to Brick, "all parties [in a case] are either in the special master process or not. Otherwise, the purpose of the process is defeated."

CASE MANAGEMENT

The complex judges disfavor standard-form case management conference statements in construction defect cases. Brick prefers that the special master meet and confer with counsel for all parties and submit a status report 15 days before each complex CMC; one week thereafter, counsel may supplement the report. In contrast, Freedman welcomes a special master's update, but requires a joint narrative report ("not utilizing Judicial Counsel Form CM-110") from counsel for plaintiff and lead defense at least five court days prior to the CMC. Freedman wants "to ensure that both sides are talking to each other." In Alameda, counsel e-file status reports via EDelivery@alameda.courts.ca.gov.

Staples believes that periodic special master status reports move a case towards resolution. Similarly, Paul recommends conferences every month or so. "Status teleconferences keep the special master's finger on the pulse of the case

and determine where pressure points are before they become pressure points. They keep the case moving. The more the special master can take off the court's plate by dealing with things before they become issues, the better off everyone is."

Brick agrees. He encourages special master emails and phone calls. The judge reviews saved emails in preparation for CMCs. Moreover, he frequently emails the special master within hours of a formally noticed status teleconference to assess if there is any development that may impact case progress. "Communications are the whole key," according to Brick. "Because of email, its all very seamless."

Substantive status reports to the court include a summary of occurrences in the case, a 90-day schedule of upcoming events and, when appropriate, a recommended trial date. The special master should circulate the report and any proposed order to all counsel for review before faxing them to the court. Brick may request an email version of the proposed order. The status report should confirm that all counsel agree with, or explain any objections to, a proposed order. The court usually accepts the special master's recommendation.

DISCOVERY DISPUTES

The complex judges encourage the special master to work with the litigants to resolve discovery disputes informally, through case management efforts and informal discussions with counsel. In cases without a special master, Freedman offers "real time dispute resolution" during depositions whenever possible, and he expects special masters to

provide this type of service to parties in complex construction defect cases.

SETTLEMENT

Most special master mandatory settlement conferences are conducted at private offices. Staples notes that "if the special master is getting frustrated with parties not participating, he or she will conduct an MSC at court." Paul estimates that close to 50 percent of his cases end up with an MSC at the courthouse. "More and more, it seems as if we are getting closer and closer to trial before cases settle."

The complex judges in Alameda allow a special master to conduct MSCs at the courthouse. The judges remain available throughout the proceeding and offer their assistance if needed. They advise counsel to take the special master process seriously. If a principal or carrier representative with settlement authority is absent from any MSC, the judges may notice an order to show cause hearing where sanctions may be issued.

Alameda's complex judges rarely double-book their cases. Therefore, trial continuances complicate their schedules. With good cause shown, however, the court may grant an uncontested 30- to 40-day trial continuance request. Good cause may exist if the special master recommends a continuance to allow parties on the verge of settlement to complete their negotiations without incurring significant trial preparation costs. That said, the court most likely will deny any request that threatens a "domino effect" of delays on the court calendar.

Brick views a firm trial date as "the most effective means of resolving a case." Paul observes that Brick makes his position

very clear throughout the case.

"Brick in particular works closely with the parties and the special master to make sure discovery is completed prior to trial, so that he does not have to continue the trial to allow discovery and other activities to take place. When you get a trial date in his department, you'd better recognize that it's a real trial date. Counsel give opening statements on the first day of trial. All pretrial motions and jury selection are completed before that time. Brick is very careful to stick to his schedule."

There are no settlement conferences on the first day of trial.

In summary, Judges Brick and Freedman supervise complex construction defect litigation in Alameda County. In the majority of these cases, the parties stipulate to the use of a special master. Once appointed, the special master is charged with communicating regularly with the court and counsel and assisting with efficient case management and resolution. The court favors special master and joint status reports over the standard form CMC statements. The judges generally will grant special master proposals if the special master has conferred with counsel and submitted a timely case management schedule. A special master may conduct MSCs in the Alameda complex departments. For good cause shown, a trial continuance recommended by the special master will likely be granted, unless it will delay other trials on the court's calendar. In Alameda County's complex litigation departments, if the parties have not reached a settlement, counsel must be ready to deliver opening statements on the first day of trial.