

# THE RECORDER

## IN PRACTICE

### Using special masters in Santa Clara

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



**Anne M. Lawlor Goyette**

#### Litigation

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

Santa Clara County Superior Court has approximately 180 cases pending in its complex litigation department. This total does not include multiple cases under single case numbers, such as Judicial Council-coordinated proceedings and consolidated cases. Approximately 18 percent are active complex construction defect cases. Almost all of the construction defect cases utilize the services of a special master under the supervision of the complex civil litigation Presiding Judge James Kleinberg.

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

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case cover sheet. If the case is not initially designated complex, a case management judge, a records supervisor or a party may recommend or request a complex litigation designation. Kleinberg will render a decision on the recommendation or request based on his review of the complaint; no supplemental papers are required. Cases are assigned to the complex department for all purposes, including trial; complex fees are due after case designation. Unless exempted by court order, all complex actions are subject to the Court's Electronic Filing and Service Standing Order. See [www.scefilng.org](http://www.scefilng.org).

Generally, if a construction defect case involves only two parties or a single home, the judge will leave the case with the assigned case manager, Judges Peter Kirwan, Patricia Lucas, Mark Pierce or Kevin McKenney; each of these judges manages approximately 1,400 cases. A party may file a formal motion if a complex designation application is denied.

Developer attorney David Stumbos explains that the lead parties generally select a special master before the first case management conference. "I literally start talking about the appointment during my first telephone call with plaintiff homeowners' attorney." Subcontractor attorney Cynthia Shambaugh notes that subcontractors usually go along with the lead parties' recommendation. However, subcontractors are "questioning whether there should be a process to re-examine the lead parties' candidate after the majority of subcontractors appear in the case." If one or two smaller parties object to a special master, Stumbos will try to work with them to reach a consensus or secure a settlement. Otherwise, Kleinberg may exercise his discretion and appoint the special master over objections, as "on balance, it is more efficient to do so."

#### CASE MANAGEMENT

Standard form case management conference statements are inappropriate for complex construction defect cases. Rather,

Kleinberg directs the parties to file a joint case management statement at least 15 calendar days before a CMC; this statement may be incorporated into a special master status report. The statement or report must be in pleading format and include a case summary, description of anticipated problems, proposed time line and any information needed to prepare an efficient case management schedule. A special master report may be mailed or emailed to Kleinberg's clerk, Rowena Walker. A statement or report in letter format will be disregarded. Special master email and phone updates are discouraged.

Kleinberg generally grants a special master CMC request. At any CMC, counsel should be prepared to give "an elevator speech" about his client's case.

On the one hand, Kleinberg sees that it is "great to have a special master who is familiar with a complex construction defect case with its multiple layers of parties, insurers and related legal and factual issues. These types of cases would bog down the calendar tremendously." However, Kleinberg emphasizes that he has a nondelegable duty to "keep cases current and move them along. I worry about cases that are around too long. Evidence gets stale. Witnesses pass on. Justice delayed is justice denied." The special master should report case progress to Kleinberg in a written status report every 60 days. He will generally grant timely special master proposals if the special master has conferred with counsel and submitted a case management schedule.

Shambaugh expects the special master to "keep the ball rolling, and the schedule moving." Stumbos sees the special master as a substitute for the court's active management of a case. They both note that bankruptcies, insurance coverage issues and missing or uncooperative parties can prolong the resolution of a case beyond the 18 to 24 month goal set by Santa Clara's complex department.

In moving a case forward, a special master should update all counsel. Sham-

baugh emphasizes: “Communications have to flow to all parties, not just the lead parties. Subcontractors and their adjusters want to be informed of reasons why dates come off and dates come on calendar.” Stumbos agrees. “There is no reason to not have open communications about the case schedule.” Both expect increased communications from the special master as a case nears trial.

### DISCOVERY DISPUTES

In cases riddled with big discovery disputes, Shambaugh suggests hiring a special master to handle the disputes and a mediator to facilitate settlement discussions. “This avoids a conflict situation where a special master rules against a party in a discovery dispute and then has to deal with baggage at mediation.” Stumbos believes, “there is no clear answer for every case. When a neutral is not involved in discovery issues, she has less understanding of the case. That impacts the efficiency of mediation. Moreover, if someone has a discovery dispute decided against him and then has an issue with the special master, how is that different from a single assignment?”

A special master generally stays discovery and instructs the parties to produce project documents, scope of work statements and insurance disclosures and initially authorizes limited depositions. Plaintiffs also prepare a statement of claims and damages, and the defense analyzes and responds to the statement.

Stumbos and Shambaugh are frustrated by vague statements that do not provide sufficient information to allow the attorneys to evaluate claims, make recommendations to carriers and obtain appropriate settlement authority. Shambaugh further criticizes developers who simply pass on plaintiff numbers and refuse to prepare early defense bids to assist settlement discussions. “This keeps the game wide open and forces subs to prepare their own defense bids” or base their evaluation on settlements in other similar cases. Stumbos explains that a developer’s counsel is playing three dimensional chess, protecting his client’s interests, defending against the overall homeowners’ suit and prosecuting individual claims against subcontractors.

Despite these issues, Stumbos believes that the special master’s stay on discovery is better than open discovery under the Code of Civil Procedure. “Parties complain that there is not enough information, but lets go back 30 years. There was no early disclosure. The parties conducted the full pallet of written and oral discovery to obtain information. Cases be-

came more numerous and expensive. Parties who were paying transactional costs looked for ways to manage expenses. The most cost-efficient solution was to stop discovery. Now the parties only get into full-blown discovery when they are looking down the double barrel shotgun of a trial date.”

Shambaugh believes that joint expert meetings provide an effective means of analyzing issues, determining areas of agreement and disagreement and highlighting issues deserving of further analysis. Stumbos adds, “Generally after a joint analysis, the delta between high and low is not that great.”

Kleinberg will review *de novo* any disputed special master discovery ruling. Prior to filing any motion, counsel must participate in an in person conference with the judge. Walker notes that since implementing the discovery conference requirement, the number of discovery hearings has significantly decreased.

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### SETTLEMENT

Most special master settlement conferences are conducted at private offices. The special master also may conduct a settlement conference at the complex court by submitting a scheduling request to Walker. Absent any objection to the trial judge’s participation, Kleinberg will work with the special master at the conference.

Kleinberg may waive the personal appearance of a principal or an insurance representative at a settlement conference upon a written showing of good cause made to and approved by the court in advance of the conference. A principal or carrier who has not been excused from attendance may be sanctioned for failure to attend.

Shambaugh prefers settlement conferences where all of the subcontractors arrive at the same time. “All subs in a room

ends the developer’s divide and conquer approach to settlement and allows the parties to compare their settlement demands.” Stumbos believes that a staggered agenda of starting times is more effective. “It is reasonable to set aside individual time with individual parties to talk about specifics. This is not effective in a group setting. There is some logic in having interfaced trades appear at same time of the day, so that the parties may talk separately and then together as a group.” Both counsel agree that parties should not leave a mandatory settlement conference before the parties have reached a resolution.

Kleinberg sees a “meaningful trial date as one of the best ways to get cases resolved. There is nothing like a trial date to focus the parties.” Accordingly, trial continuances are discouraged. However, if all parties agree, the special master may obtain available trial dates from Walker and thereafter submit a written request for a trial continuance to the pre-approved trial date. Any recommendation for a trial continuance must be supported by good cause. Jury selection begins on the first day of trial.

In summary, Judge Kleinberg supervises complex construction defect cases in Santa Clara County. The parties stipulate to the appointment of a special master in the majority of these cases very early in the litigation. A special master should report to the court every two months and work to keep the case current and moving forward. The court favors special master and joint status reports in pleading format and generally will grant special master proposals if the special master has conferred with counsel and submitted a timely case management schedule. Absent any objection to the trial court’s participation, Kleinberg will work with the special master in conducting a mandatory settlement conference in Santa Clara’s complex department. If the parties do not reach a settlement, counsel should be ready to select a jury on the first day of trial.

*In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at [vgashpar@alm.com](mailto:vgashpar@alm.com).*