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PERSPECTIVE

Special Masters: The court's (not so) secret weapon

By Anne M. Lawlor Goyette

For more than twenty years, responses to questions about my career often drew blank looks followed by: "What do you do exactly?" Donald Trump changed that. Now, most people seem to understand that a special master is an independent arbiter appointed by the court to support the management and resolution of complex civil cases.

A good way to understand the role of the special master is to look at the history.

More than a hundred years ago, the US Supreme Court acknowledged that judges have the "inherent power to provide themselves with appropriate instruments required for the performance of their duties." This includes the power to appoint a person outside of the court to assist judges with their workload. *Ex Parte Peterson* (1920) 253 U.S. 300, 312-313. Sixty years later, an amendment to the Federal Rules of Civil Procedure encouraged federal judges to take a more active role in pretrial management. *FRCP 16*. This change resulted in a notable increase in the use of special masters, particularly in large toxic tort litigation. Due to the complex issues and massive information they generated, these cases challenged the courts to create efficient case management processes. The use of special masters in these matters has become a common practice.

Similarly, California experienced a sharp population boom that

lead to a dramatic increase in construction defect litigation in the '80s and 90s. With heavy case-loads, the Superior Courts simply could not invest sufficient time to conduct settlement negotiations to resolve these multiparty cases. Modeling the federal approach, the courts employed their "inherent powers" and appointed special masters to assist in the efficient and expeditious management of

Over the past two and half years, Covid-19 significantly disrupted civil litigation. With civil trials suspended, the backlog of civil cases soared, causing delays and increasing costs. Many judges are spread thin and charged with managing voluminous dockets. They realistically cannot devote significant attention to manage complex multiparty cases. Difficult litigants who challenge rulings,

special master can promote meaningful negotiations, finalize settlements and allocate settlement funds. An attentive special master can address problems before they evolve into unnecessarily expensive and time-consuming disputes. The appointment of a special master allows parties to preserve their right to trial, while minimizing litigation risks and delays and maximizing settlement opportunities.

In the end, a special master brings value by easing the burden on litigants and the courts and reducing the backlog of civil cases.

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complex construction cases. Cal. C.C.P. §187; *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264. Special masters streamlined discovery and allowed for meaningful settlement discussions. The use of special masters shortened trial preparations at significant cost and time savings to the participants and reduced court backlog. Construction defect cases involving many parties or structures are now deemed to be provisionally complex in California, and parties frequently stipulate to the appointment of a special master or referee through judicial reference. CRC 3.400(c) (2); Cal. C.C.P. §§ 638, 639.

Now is the time for the expanded use of special masters.

reject informal resolution efforts, and refuse to engage in meaningful negotiations can further hamstring a judge's ability to address her case load.

Even before the pandemic, the ABA encouraged the accelerated use of special masters as an effective tool to "aid in the 'just, speedy and inexpensive' resolution of cases." *ABA Resolution 100*. A special master can streamline the production of necessary information, clarify issues, assist with complex technical matters, streamline case management schedules, craft and implement creative solutions unavailable through standard, formal litigation and monitor timely compliance with court orders. A

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