# It Is Way Past Time to Allow Bankruptcy Judges to Use Court-Appointed "Masters"

By Merril Hirsh and Sylvia Mayer

**"Masters Not Authorized"**
"Rule 53 F.R.Civ.P. [which discusses the use of 'Masters'] does not apply in cases under the Code."
—Fed. R. Bankr. P. 9031 (adopted 1983)

"This rule precludes the appointment of masters in cases and proceedings under the Code."
—1983 Advisory Committee Notes (in toto)

Since 1983, these words have hamstrung bankruptcy judges from appointing a court-appointed neutral (what the current rules refer to as a "master"[1]) to increase judicial efficiency, reduce costs, or otherwise improve case administration. On January 28, 2019, the ABA House of Delegates spoke out against the limitation by adopting a resolution calling for Bankruptcy Rule 9031 to be amended or repealed to allow bankruptcy judges to use court-appointed neutrals in the same ways that other federal judges do.

Why repeal or amend Rule 9031? Because Bankruptcy Rule 9031 is a relic. It was not carefully drafted or cogently explained when it was adopted almost 40 years ago, and much has changed since its adoption.

Roughly 20 years after Bankruptcy Rule 9031 was adopted, the Advisory Committee rewrote the treatment of "Masters" in Rule 53 of the Federal Rules of Civil Procedure in a way that undermined any apparent logic for Bankruptcy Rule 9031. Fast-forward another 20 years and, today, Bankruptcy Rule 9031 is so far from modern views of case administration that it serves only as an artifact that deprives bankruptcy judges of a useful tool for no genuine reason.

## Not Very Much Was (or Can Be) Said for Bankruptcy Rule 9031

Even at the time it was drafted, Bankruptcy Rule 9031 appears to be based on a misunderstanding. While the title says that "Masters [Are] Not Authorized," what the text says is that *Federal Rule of Civil Procedure 53* does not apply. But Federal Rule 53 is *not* the source of authority for appointing special masters. Instead, that authority falls within the inherent power of the judiciary. Federal Rule 53 has described and *limited* the way in which that authority can be exercised.

The legal history recognizing courts' inherent authority to appoint neutrals is probably over a thousand years old. "The office of master in chancery, of French origin and imported [to England] with the Norman Conquest, is one of the oldest institutions in Anglo-American law."[2] And if it were not enough that the use of special masters in England might have predated the use of the English language, some historians trace the practice to "civilian judex of the Roman Republic and Early Empire—a private citizen appointed by the praetor or other magistrate to hear the evidence, decide the issues and report to the [appointing] court."[3] There are even references in canon law to having experts advise the adjudicating priesthood on, for example, annulments.

The U.S. Supreme Court appointed a committee of neutrals to assist in deciding the very first case filed on its docket.[4] Thus, as the Court noted over one hundred years ago, the inherent power of the judiciary "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the



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federal courts, when sitting in equity, by appointing either with or without the consent of the parties, special masters. . . ."[5]

The fact that courts have the inherent authority to appoint these neutrals is not just of historical interest. Courts continue to rely on this authority, for example, to appoint masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Federal Rule of Civil Procedure 53.[6] As a result, saying that Federal Rule of Civil Procedure 53 does not apply does not mean that "Masters [Are] Not Authorized."

In the context of the version of Federal Rule of Civil Procedure 53 that existed as of 1983, when Bankruptcy Rule 9031 was adopted, this inaccuracy might be understandable. As of 1983, Federal Rule of Civil Procedure 53 began with the statement "[t]he court in which any action is pending may appoint a special master therein."[7] So, the Advisory Committee might have construed Bankruptcy Rule 9031 to disclaim this authority for cases "under the Code," even though the source of the authority was not actually Rule 53.

## The Rationale for Adopting Rule 9031 Remains Unclear

Nothing though truly explains why Rule 9031 was adopted or how it was supposed to be applied. Reviewing the one-sentence statement in the Advisory Committee Note on the rule—"[t]his rule precludes the appointment of masters in cases and proceedings under the Code"—provides no insight. There is also an ambiguity between (a) the text of the rule and the Advisory Committee Note and (b) the preface to the proposed Rules of Bankruptcy Procedure from 1983.

In the preface, the Advisory Committee reviewed former Bankruptcy Rule 513. Rule 513 provided that "if a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply."[8] Under Rule 513, "judge" referred to a district court judge and not a bankruptcy court judge.[9] As a result, Rule 513 only applied in bankruptcy matters when a district judge retained or withdrew the reference to a bankruptcy case. If a district court judge presided, then special masters could be used, whereas if a bankruptcy court judge presided, then special masters could not be used.

In the preface to the new rules, the Advisory Committee indicated an intent to carry forward this distinction between district court and bankruptcy court judges: "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges*. The Advisory Committee, therefore, has decided that Former Rule 513 should not be continued in the rules and the Rule 53 F. R. Civ. P., not be made applicable." (Emphasis added.)[10]

However, the drafters of Rule 9031 did not incorporate this distinction. Instead, Rule 9031 provides broadly that Federal Rule of Civil Procedure 53 does not apply to bankruptcy cases. If Rule 9031 was solely to prevent appointments "by bankruptcy judges," then why do neither Rule 9031 nor the Advisory Committee Note include that limitation? And why would special masters be "unnecessary" only when appointed by bankruptcy judges but not if appointed by district court judges following the withdrawal of the reference?[11]

The short answer is that no one knows.

Some posit that, similar to the catalyst for adopting the U.S. trustee system in 48 states, it may have been out of concern for cronyism.[12] Alternatively, it may have been a concern over the increased costs of adding another professional.

Another explanation may be found in a feature of the 1983 version of Federal Rule of Civil Procedure 53. What the 1983 version called "master" is actually a very limited and specialized role that today is a tiny subset of what federal trial courts appoint these neutrals to do. The 1983 version of Rule 53 was located in the "trial" section of the Federal Rules. It did not discuss referring cases to a "master" to handle discovery or other pretrial disputes, assist settlement, or engage in post-trial or post-settlement work such as monitoring or claims administration. Instead, it discussed when a court might issue an "order of reference" to a *trial* master—an individual empowered "to receive and report evidence," conduct hearings, and file a report.[13]

The 1983 version of Rule 53 emphasized that it is rare that a judge would want to have a "master" conduct a trial. The rule declared that "a reference to a special master should be the exception and not the rule": "[i]n actions to be tried by a jury, a reference should be made only when the issues are complicated," and "in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."[14]

So, perhaps, in 1983, the rationale for Bankruptcy Rule 9031 was that referring trials to a "master" is a rare thing to start with, and if the judge has already referred the matter to a bankruptcy judge (who in some sense specializes in matters of account and difficult computation of damages), it is not going to be necessary to refer the trial further to a "master." That would give some meaning to the distinction discussed in the preface to the Advisory Committee Notes (even if not the rule itself) between Article I and Article III judges, and it is at least understandable.

But saying that the rule might have been understandable does not mean it was a good idea. The rule still assumes that drafters of a prospective rule can be sure that no

**Merril Hirsh** of HirshADR PLLC in Washington, D.C., is an ADR professional and also the executive director of the Academy of Court-Appointed Neutrals and the Chair of the ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee.

**Sylvia Mayer** of S. Mayer Law in Houston, Texas, is an arbitrator, mediator, and attorney and a member of the Academy of Court-Appointed Neutrals.



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circumstance could arise making it appropriate to appoint a master—that it is better to bar the appointment entirely rather than allow a bankruptcy judge to assess the situation when informed by actual circumstances. Whether intended or not, the rule communicates a significant (and distasteful) distrust of bankruptcy judges.

### In Any Event, Both the Wording and the Limited Rationale for Bankruptcy Rule 9031 Have Been Out of Date for Some 20 Years

Subsequent developments took the props out from under even this limited justification for Bankruptcy Rule 9031. In the 1990s, the Judicial Conference Advisory Committee on Civil Rules began to consider a proposal to amend Federal Rule Civil Procedure 53 to recognize "that in appropriate circumstances masters may properly be appointed to perform [pretrial and posttrial] functions and [regulate] such appointments."[15] In 1999, the Advisory Committee formed a Rule 53 Subcommittee chaired by then Southern District of New York Judge Shira A. Scheindlin that asked the Federal Judicial Center to report on how courts were actually using special masters.[16]

The Federal Judicial Center concluded that "[d]espite Rule 53's failure to address pretrial and posttrial functions," "judges appointed special masters to perform discovery management functions at the pretrial stage and decree monitoring or administration at the posttrial stage"; indeed, these appointments were about as common as those trial functions the rule actually contemplated, and "litigants rarely questioned special masters' authority to perform pretrial and posttrial functions."[17]

Recognizing that "[b]y the end of the 20th century, the use and practice of appointing special masters had grown beyond the language and design of" Rule 53,[18] the Rule 53 Subcommittee rewrote the rule into its current form effective December 2003.[19] Instead of saying, as the 1983 rule had, that the court "may appoint a special master" for a very limited trial purpose, the first line of the 2003 version of Rule 53 (which is the current version) presumed that courts had the authority to appoint special masters for an unspecified array of potential needs and described the *limits* on how that authority should be exercised.

Since 2003, Rule 53 has begun with the phrase "[u]nless a statute provides otherwise, a court may appoint a master *only to*" perform functions, which the rule then defines broadly.[20] The 2003 change contemplated not only appointing trial masters[21] but also appointing masters to "perform duties consented to by the parties"[22] and to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[23]

Moreover, while the new Rule 53 continued to limit the use of *trial* masters—in fact, trial masters were now limited to bench trials and to be used only when some "exceptional circumstances" or "the need to perform an accounting" warranted it[24]—those limitations did *not* apply to appointment by consent or for pretrial or post-trial matters. Since 2003, the rule has left it up to parties to decide whether to consent and, in the absence of consent, to jurists to decide when masters are needed to perform matters that the court cannot address effectively or in a timely manner.

While Federal Rule of Civil Procedure 53 was changed to reflect the use and practice existing by the end of the 20th century, Bankruptcy Rule 9031 unfortunately never has been amended. In an ironic twist, the 2003 change in Federal Rule 53 has meant that, for nearly 20 years, the words of Bankruptcy Rule 9031—if taken literally—would not achieve the rule's ostensible purpose. Rule 53 in its current form purports only to *limit* the use of what is actually inherent authority to appoint special masters. As a result, the effect of saying Federal Rule of Civil Procedure 53 "does not apply" to cases "under the [Bankruptcy] Code" would literally be to *free* appointments of special masters in bankruptcy cases from Rule 53's *limitations*.

But it is not just the language of Bankruptcy Rule 9031 that has been outdated for some 20 years. The sea change in the 2003 amendments to Rule 53 was the recognition that special masters could be (and were being) used for a vast array of functions that were not limited to referrals for trial and that judges could determine whether those functions are needed. Even if the framers of Bankruptcy Rule 9031 were correct that a bankruptcy court was so unlikely to need a *trial master* that bankruptcy judges should not be given the chance to assess it, it is mistaken to assume that *nothing* a special master could do could be of use to a bankruptcy court. The only effect of Bankruptcy Rule 9031 today is to prevent bankruptcy judges from appointing special masters when these appointments would be useful.

### Today, There Are Even More Reasons for Repealing or Amending Bankruptcy Rule 9031

The same January 2019 ABA Resolution that called for Bankruptcy Rule 9031 to be repealed or amended also approved Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation.[25] As explained elsewhere,[26] the central theme of the Guidelines is that courts could make more effective use of special masters if they considered using them as a regular part of judicial administration in complex or other litigation in which they might be useful.

In today's litigation, we have gained a greater appreciation of case management and are even more in need of it. Discovery is measured in terabytes instead of boxes; multidistrict litigation proceedings have come to dominate federal litigation; courts face backlogs from a pandemic; and judges face an array of new issues, including the prospect of cases arising from an online world that did not exist when they went to law school.

Today, there are numerous projects well underway to make court-appointed neutrals a more effective way of helping to deal with these issues. For example, the Judicial Division Lawyers Conference Court-Appointed Neutrals Committee is working to draft a new model rule to implement the Guidelines, to develop principles of ethics for these court-appointed neutrals, and to develop support documents to use in implementing rosters and evaluating work. The Academy of Court-Appointed Neutrals is working to broaden and diversify the profession; to develop new training and mentoring; and to partner with courts,



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court staff, and bar, affinity bar, judicial, alternative dispute resolution, and academic institutions to make more effective use of court-appointed neutrals.[27]

There is no reason to leave bankruptcy courts behind. On the contrary, bankruptcy courts are the quintessential federal courts of equity. If anything, they are the most obvious example of courts that can benefit from creative, fair, and flexible use of resources. Bankruptcy courts handle hundreds of thousands, and in some years even millions, of cases each year ranging from simple consumer Chapter 7 cases to detailed wage-earner Chapter 13 cases to complex multi-billion-dollar Chapter 11 cases, and everything in between.

Indeed, just as the 1983 version of Federal Rule 53 reached the point where the limited words of the rule did not reflect the practice, so too, bankruptcy practice no longer resembles Bankruptcy Rule 9031. Bankruptcy courts already appoint one or more neutrals in numerous circumstances. Bankruptcy judges do not call them "masters" (and are well-advised not to, given the existence of Bankruptcy Rule 9031), but these neutrals already perform important functions. Bankruptcy judges appoint neutrals to resolve claims in cases with a large volume of preference actions. These judges also appoint fee examiners to analyze fees in large Chapter 11 cases and other types of examiners to analyze specific issues in some cases.

Amending Rule 9031 would make it easier for these judges to use neutrals to manage their cases. For example, bankruptcy judges could appoint neutrals to serve as:

- **Discovery referees or facilitators** to manage myriad discovery issues in complex proceedings, including reviewing privilege logs, establishing electronically stored information (ESI) protocols, resolving discovery and ESI disputes, and creating and monitoring compliance with discovery plans.
- **Expert advisors** to offer a neutral perspective on technical or specialized issues (e.g., audits, patents, trade secrets, ESI, disposition of unique assets, equitable apportionment of marital assets, etc.).
- **Investigators** to explore the circumstances and produce a report and recommendation on issues such as valuation, asset disposition, claims estimation, or damages computation.
- **Fee adjudicators** to adjudicate fee disputes, which may entail making a report and recommendation to the court.

Indeed, bankruptcy courts often face the same type of case administration challenges that face the district courts. For example, in a mass tort-driven bankruptcy case, the bankruptcy judge has fewer options available to manage the case than a district judge would to manage the same mass tort litigation outside of bankruptcy. There is no reason why the happenstance of a defendant filing bankruptcy should prevent the responsible judge from appointing a neutral who would be appointed in other settlings.

Nor do court-appointed trustees and examiners substitute for court-appointed neutrals. Trustees and examiners have a duty *to the estate*, whereas court-appointed neutrals or masters are appointed *to aid the court*.

Forty years ago, the drafters of the rules hamstrung bankruptcy judges with an irrebuttable presumption that they knew better than the bankruptcy judges what resources those judges might need when faced with actual circumstances. Bankruptcy Rule 9031 should be amended to authorize bankruptcy judges to exercise their judgment and inherent authority so they can appoint neutrals as needed to efficiently manage their cases and proceedings. ■

*The views expressed in this article are the authors and not necessarily those of their associations or clients.*

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## Endnotes

1. In this article, we frequently use the term "master" because the Federal Rules of Civil Procedure do. Recently, both what had been the Academy of Court-Appointed Masters and the ABA Judicial Division Lawyers Conference Special Masters Committee changed their names to substitute the term "Court-Appointed Neutral" for "Masters." As the Academy explained, this change is designed to use a term that both better serves and better describes a profession that exists to serve courts and stakeholders. Acad. of Ct.-Appointed Neutrals, *Why We Became the Academy of Court-Appointed Neutrals* (June 2022), www.courtappointedneutrals.org/acam/assets/File/public/namechange/ON%20BECOMING%20THE%20ACADEMY%20OF%20COURT-APPOINTED%20NEUTRALS.pdf. Accordingly, where appropriate, we refer to the position as a court-appointed neutral.

2. Wayne D. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 8 Am. Bar Found. Rsch. J. 143 at n.31 and accompanying text (Winter 1983) (citing United States v. Manning, 215 F. Supp 272 (W.D. La. 1963)).

3. *Id.*

4. Vanstophorst v. Maryland, 2 U.S. 401 (1791).

5. *In re* Peterson, 253 U.S. 300, 312 (1920). *See also* Paulette J. Delk, *Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031*, 67 Mo. L. Rev. 29, 30–31, 54–57 & nn. 10–12, 131–43 (Winter 2002).

6. *See, e.g.*, United States v. Black, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (it "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation") (citing Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re* Peterson, 253 U.S. 300, 311 (1920)); Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the court's inherent power); Regents of the Univ. of Cal. v. Micro Therapeutics, Inc., No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect).

7. See Amendments to Fed. R. Civ. Proc. at 1105 (Apr. 28, 1983), https://tile.loc.gov/storage-services/service/ll/usrep/usrep461/usrep461amendments/usrep461amendments.pdf [hereinafter 1983 Amendments to Rule 53].

8. Fed. R. Bankr. P. 513 (repealed Aug. 1, 1983), *reprinted in* 12 James Wm. Moore & Lawrence P. King, eds., Collier on Bankruptcy, at 5-103 (14th ed. 1978). Although, as Collier points out, "[t]he word 'judge,'" in this context "meant the United States district judge, not the bankruptcy judge." *See* Delk, *supra* note 5, at n.64 (discussing the history).

9. *See* Delk, *supra* note 5, at n.64 and accompanying text.

10. *See id.* at n.65 and accompanying text.

11. *See id.* at 42.

12. *See id.* at n.66 and accompanying text, citing one commentator who suggested this theory.

13. *See* 1983 Amendments to Rule 53, *supra* note 7, at 1104 (Former Rule 53(c)). *See also*

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Brazil, *supra* note 2 (arguing that while the 1983 version of Federal Rule of Civil Procedure 53 did not authorize the use of special masters for pretrial discovery or post-trial proceedings, courts had inherent authority for this appointment); Thomas Willging et al., Special Masters' Incidence and Activity, at 1 (Fed. Jud. Ctr. 2000) [hereinafter 2000 FJC Report] (the 1983 version of Rule 53 "contains neither an explicit authorization for nor a prohibition of pretrial or posttrial activities of a special master"); Hon. Shira A. Scheindlin & Jonathan A. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. St. B. Ass'n J. 18, 19 (Jan. 2004) (describing the earlier rule).

14. 1983 Amendments to Rule 53, *supra* note 7, at 1104 (Former Rule 53(b)).

15. *See* 2000 FJC Report, *supra* note 13, at 1.

16. *Id.* at 1–2.

17. *Id.* at 4.

18. Scheindlin & Redgrave, *supra* note 13, at 19.

19. *See* Advisory Committee Notes to 2003 Amendment to Fed. R. Civ. P. 53 ("Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1983, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, Special Masters' Incidence and Activity (Federal Judicial Center 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes.").

20. Fed. R. Civ. P. 53(a)(1).

21. Fed. R. Civ. P. 53(a)(1)(B).

22. Fed. R. Civ. P. 53(a)(1)(A).

23. Fed. R. Civ. P. 53(a)(1)(C).

24. Fed. R. Civ. P. 53(a)(1)(B)(i), (ii).

25. *See supra* note 2.

26. *See* Merril Hirsh, *A Revolution That Doesn't Offend Anyone: The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation*, 58 Judges' J., no. 4, Fall 2019, at 30.

27. *See, e.g.*, Merril Hirsh, *Necessity and Invention: Seven Steps for Using Special Masters to Help Courts with the Pandemic Caseload*, 60 Judges' J., no. 3, Summer 2021, at 18; *ACAN News*, Acad. of Ct.-Appointed Neutrals, https://www.courtappointedmasters.org/about/acam-news.



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