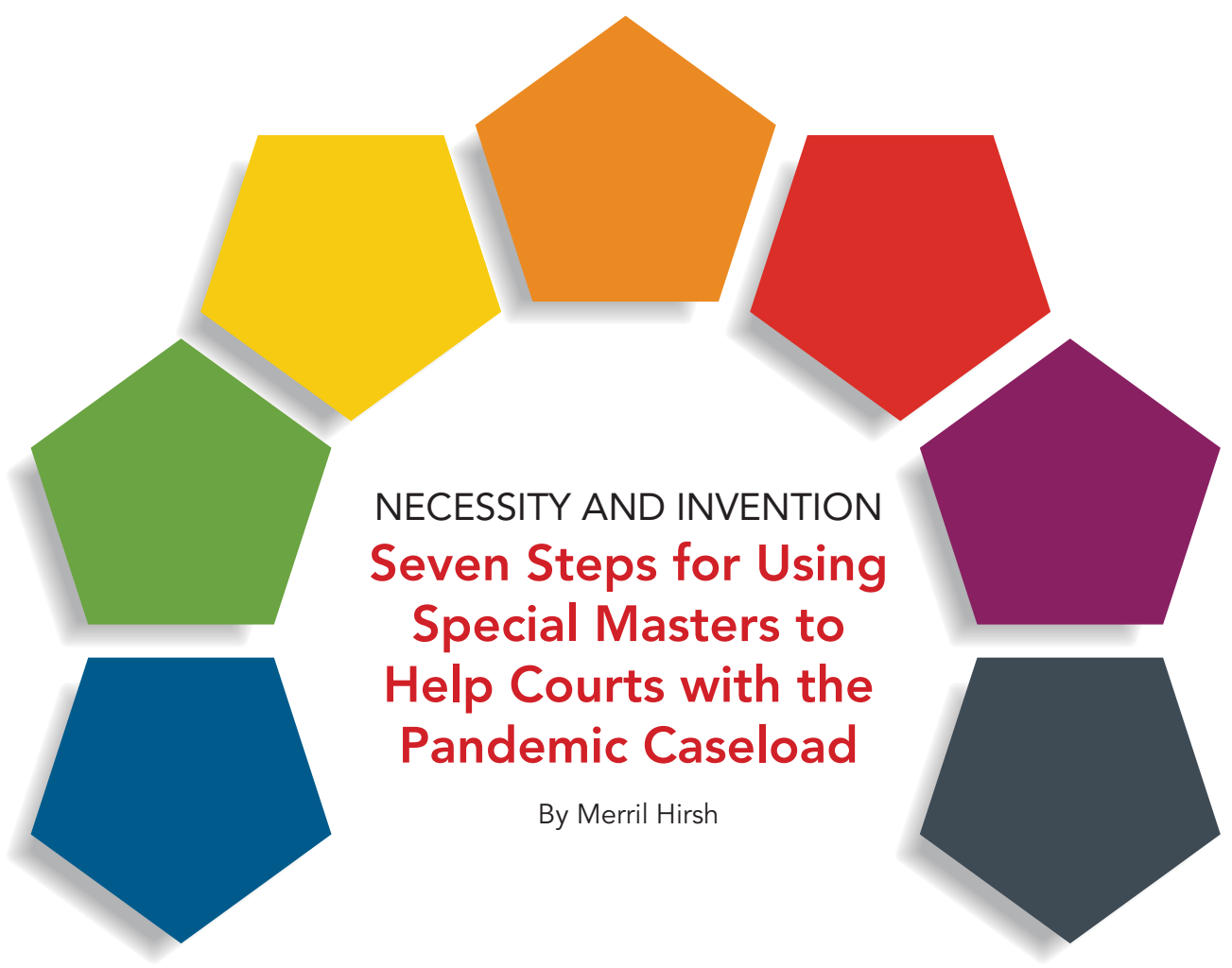




NECESSITY AND INVENTION **Seven Steps for Using Special Masters to Help Courts with the Pandemic Caseload**

By Merrill Hirsh

Some new ideas are born of necessity. But this time, necessity is shortcutting adolescence. In January 2019, when no one had a pandemic in mind, the American Bar Association's House of Delegates approved (over no apparent opposition) Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation.¹ The Working Group that drafted these guidelines (and co-sponsored the resolution approving them) included representatives from 10 ABA Sections, Divisions, and Forums who reached a consensus that there was a need to consider using special masters creatively as a regular part of judicial administration to help address the longstanding concern of expense and delays in civil litigation.

When the pandemic hit, the needs

became more immediate. Courts faced the new challenge of dispensing justice safely in a world of social distancing and remote communication. As we (hopefully) move to a post-pandemic America, courts face a whole new set of challenges. Moratoriums that have been preventing evictions will end. Bankruptcies, delayed by forbearance, borrowing, and hopes of solutions, now will be filed. Commercial disputes, slowed by the pandemic, will become even more active because of the delay. Schedules for long-delayed jury trials will project out for years, with criminal cases having priority. Courts, facing an enormous backlog, will be challenged more than ever to clear their dockets.

Worse still, many state courts will face these challenges with reduced budgets. The pandemic has cost states tax revenue while

increasing the demand for state services. Many states need to find money somewhere. Often "somewhere" means everywhere—with cuts facing the judiciary along with other branches.

The situation varies from jurisdiction to jurisdiction, as do the needs. The dockets differ. The finances differ. But it is safe to say that every court, federal or state, faces new and significant challenges.

Recognizing that the creative thinking that led to the adoption of the Special Masters Guidelines could be adapted to these new challenges, the Judicial Division leadership asked the Lawyers Conference Special Masters Committee to brainstorm about how we might use special masters to help courts deal with the demands left by the pandemic.

Out of the committee's work has come

a list of ideas that continues to grow. The Special Masters Committee has developed three pandemic-related documents. One is a checklist—identifying some ideas for courts and court staff in receiving assistance from special masters and resources for obtaining additional information.² The second compiles ideas on a specific problem—how can courts that are not able to schedule civil jury trials nonetheless keep civil cases moving.³ A third addresses ways of selecting special masters for a roster (perhaps initially for pro bono service).⁴

The Special Masters Committee is also working with courts on specific projects—including developing a roster of special masters for use by Indiana Commercial Courts in Marion (Indianapolis) and Allen (Fort Wayne) Counties, and developing a partnership with law schools, such as New York University Law School, to work with courts to determine needs and to develop special master programs. These are all in addition to the committee's ongoing projects to assist in implementing the guidelines by (1) creating the first-ever analysis of ethics rules as they apply to special masters; (2) designing a model rule for state courts in using special masters; (3) identifying criteria that can be used to select special masters to rosters; (4) drafting a survey instrument for evaluating special masters' work; (5) conducting outreach to courts, court staff, and practitioners to understand (and offer assistance in working to solve) the problems they are facing; and (6) working with other Sections, Divisions, and Forums of the ABA so that all the work of the committee is vetted and informed by the wisdom of others across the Association.

It should come as no surprise that special masters can help. A special master is a Swiss army knife—a multipurpose tool that can be adapted to meet needs. And the fact that a special master may not have been used for a particular purpose before is not an impediment. It is a test for our imagination.

So, how can courts use special masters to help address the current problems? Although certainly not every member of the Special Masters Committee would agree on the exact answer, here are seven steps that are informed by the committee's work.

STEP ONE

Start with the problem.

Special masters can provide adjunct services to free up time for judges and court administrators. What services? Almost anything. In civil litigation, special masters have been used (in among other ways) to oversee discovery (including specifically electronic discovery); handle pretrial motions, including motions for summary judgment and *Daubert* motions; facilitate settlements of either particular issues or the entire case; coordinate related proceedings; conduct hearings or trials; conduct investigations; advise the court or the parties as an expert; monitor compliance with court orders and other conduct (whether of the parties generally or the litigation specifically); analyze, facilitate, and deal with issues arising out of class actions; administer claims; conduct audits or provide accountings; serve as a receiver; act as an intermediary between the parties, or other alternative dispute resolution professionals, and the court; and resolve specialized disputes (for example, internecine disputes among plaintiffs or defendants or their counsel). In criminal proceedings, special masters have been used (again, among other ways) as a case master, a conference judge, a search warrant monitor, an investigator for the court, and a monitor of the adequacy of the government's *Brady* disclosures. And the demands of the pandemic open the possibility of using masters in ways no court has needed to in the past.

So, start with where the needs are. Is the problem the trials themselves? Absent help, parties in some jurisdictions cannot expect civil trials until 2022 at the earliest. Some parties may consent to have special masters try a case now rather than wait until the court is available. And in most jurisdictions, courts can appoint special masters, with or without consent of the parties, to serve an array of functions that incentivize parties to move cases even without the threat of immediate jury trials or facilitate the resolution of cases or significant issues within cases before the lawyers arrive on the courthouse steps.

Is the problem managing existing civil cases with undecided motions, or parties who are not moving cases at a time when the court is unable to schedule trials? Would it help to have the special master review the file, determine the issues that could most benefit from immediate resolution, and help the court prioritize them? A special master could also help to address these motions or work with the parties to determine what information is necessary to get motions teed up, or cases in a posture for settlement. Or a special master could mediate disputes or recommend another mediator who can assist the parties. Or a special master could do the heavy lifting for the court of reviewing the 5,000 pages of documents for privilege, categorize them, and issue a report and recommendation that the parties may or may not take up with the court. A special master could conduct weekly calls with the parties to go over every issue on the horizon and to see which can be resolved without motion. Indeed, a special master can review discovery when it is exchanged and schedule calls to discuss potential objections or inadequate responses before the discovery becomes the subject of nasty letters, nasty responses, nasty rejoinders, or expensive, long-delayed motions.

Is the problem figuring out what the priorities are? Why stop with reviewing the files in particular cases? What about having a special master do triage on case files to advise judges on how pending motions might be prioritized?



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Is the problem an onrush of cases? How about asking special masters to review court dockets or work with court staff to develop new case-handling methods or forms that could be used to determine how different cases might be addressed or grouped in efficient ways?



Tailor your search for special masters to the skills, diversity of background, and perspective you need.

Find special masters who have the talents, experience, personality, and methods that best track the tasks the court wishes to have performed and the role the special master will play. Just as there is no one role special masters perform, there is no one rule for determining what talents will make a person an appropriate master in a case. A candidate may have a talent or personality that a judge finds especially useful, even if the candidate has little experience as an adjunct or on the subject matter. Sometimes a wealth of experience generally as a master is more relevant than knowledge of the subject matter; sometimes the reverse is true and the need for subject matter expertise is predominant. This may be especially true in areas such as patent law, construction cases, pharmaceutical litigation, human services, government agency matters, or corporate restructuring. Sometimes the nature of legal issues to be addressed can affect the choice of a special master. For example, the questions raised on summary judgment, on privilege, civil rights, or foreign law, or that arise in the context of a summary judgment motion will often influence the qualities and skills that best service the court and the parties.

Although experience is obviously beneficial in some ways, relying too heavily on experience can also be a trap. Choosing only people who have already been special masters (or, for that matter, arbitrators or mediators) grandfathers those who were historically able to be special masters. This biases the choice to white men. It also

focuses the choice on those who have served traditional roles as special masters and not necessarily on those who are particularly adapted to new roles that special masters have not previously served.

The skills to look for in special masters should be adapted to the task they perform. Depending on the task, certified arbitrators, former judges, hearing officers, and lawyers with case management, settlement, or other relevant skills and experience are all potential special masters. In some cases, courts have appointed a team or committee of masters to perform one role or used an early-stage master for mediation and a remedial-stage master for monitoring or to provide a necessary mix of expertise and skills. Another approach can be to appoint a single special master with the expectation that the master will use a team (for example, to provide technical or computer expertise to the decision making). A candidate who has not previously been a special master may be a better match for a particular case.

If one size does not fit all, order different sizes. Courts can work with stakeholders to develop a pool of potential appointees with diverse backgrounds, skills, and perspectives.



Don't brainstorm alone.

Obtaining diverse perspectives not only benefits the fairness and quality of the process, but also helps to serve a critical goal of obtaining buy-in. As anyone who has seen a deed that still contains the word “enfeoff” can appreciate, lawyers tend to be cautious about change. The first reaction to “how about” is often “well, we’ve never done it that way before.” And it is understandable why the devil you know, even if you can appreciate its downsides, seems safer than the devil you don’t. Even suggesting change can easily sound like criticism. But “we’ve never done it that way before” is not a sound argument against progress or change.

A way around these natural tendencies is to make sure to have a wide group

participate in the change. You can place competing adages in competition—“two heads are better than one” fights with “too many cooks spoil the broth.” But here, the risk of delaying things is outweighed by the need to ensure that the ways special masters are used, the process for selecting them, and the actual selections are legitimate, accepted, and reflect the diversity of the community.

Diversity applies not only to obtaining a mix of available special masters that reflects underrepresented segments of our population, but also to creating a mix that reflects the differing perspectives that come from work in our profession. Plaintiffs’ lawyers, defense lawyers, and lawyers who represent both have different interests. Legal aid and family lawyers have different interests from commercial and business lawyers. Both the general and affinity bars have perspectives to add to this process. A fair process is transparent and inclusive.



Don't ignore concerns about compensation; allay them.

Having diverse and independent groups involved in the process is also an important way to help address another concern. It should come as no surprise that it is close to impossible to have a CLE concerning special masters without having someone ask how special masters are paid. Obtaining actual and perceived legitimacy requires that special master work be assigned based on the value the special master brings to solving real problems and not as some form of largesse provided at parties’ expense. And even one experience with a special master who has added cost without adding value makes it more difficult to convince stakeholders that greater use of special masters is going to provide more benefit than cost. Having diverse and independent groups involved in deciding what problems special masters should address and who should serve as special masters helps to ensure that special masters provide the value that justifies the expense.

Another way of helping to provide this assurance is to consider carefully how compensation should operate. In the long run, there are several reasons why a program for making effective use of special masters should not be purely pro bono. Although (as court-based mediation programs illustrate) a court pro bono program can be very effective in calling forth many lawyers willing to devote a limited number of hours each given year, this approach is less effective when what the court really needs is a smaller group of lawyers with particular skills each willing to devote a very large number of hours over many years. Most law firms have pro bono commitments on the order of 50 hours a year. A special master in a particularly active case could need to work 500 hours or more. And even someone who is willing and able to work that much on a pro bono basis in one year may not be able to do so every year. This means that a pro bono program will lead to high turnover, and, in turn, to constant demands for vetting, selection, training, and evaluation.

If you want professionals, they should be professional. Becoming a special master is a significant commitment not only for individuals but also their law firms (which may need to deal with conflicts with clients). It is difficult to get that type of commitment if people are expected to manage the commitment in their spare time. Nor is spare time evenly distributed. Requiring that work be pro bono biases the selection in favor of lawyers who have more resources.

Indeed, pro bono work is not actually free. If courts were to establish high-hour pro bono programs for special masters, those who participate will be using time they would otherwise be willing to spend on other worthwhile (or even critical) pro bono projects. Courts need to be careful about robbing Peter to pay Paul.

However, in the short term, it is reasonable to expect lawyers who are helping courts to deal with an emergency courts are facing to start out by offering some or all their time on a pro bono or low bono basis. We expect all lawyers to do pro bono work for the profession. And, indeed, the

willingness to demonstrate the value of work as a special master for some period on a pro bono basis is one way of ensuring that candidates are committed.

Another way of assuring stakeholders of value is to involve them not only at the formation of the project but also in its ongoing operation. As noted above, the Special Masters Committee developed a survey instrument to enable parties to laud what has worked for them and to criticize what has not so that individual special masters will improve their work and courts and researchers will have a base of information to improve the selection process going forward.

No one step is an answer to every concern. But taken together, these approaches provide significant assurance that the process will be fair and provide the parties and the court with a benefit that outweighs the cost.



Be open to creative solutions.

The National Center for State Courts has noted that Michigan Chief Justice Bridget Mary McCormack captured the sentiment felt by many in the state court community when she said, “the pandemic was not the disruption we wanted, but the disruption we needed.” As the ABA House of Delegates vote on the guidelines reflected and the Working Group that drafted the guidelines concluded, a lot of these ideas for making better use of special masters were already good ideas before the pandemic. But the pandemic gives them a particular urgency.

Historically, where special masters have been used in trial courts at all, it has usually been for large, high-exposure complex cases, mass torts, or class actions and in claims administration *after* prior actions, decisions, or settlements have established some need for individual adjudication or allocation. Courts have not generally used special masters *at the outset* to help address a high volume of smaller cases. But the skills that

have enabled special masters to administrate claims after adjudications and settlement can help address a high volume of small cases at the start. The real limitation is that it is more difficult to see how special masters could be paid when they are retained to help with whole dockets and not reimbursed by individual parties. That is another reason why having some work done pro bono may assist the process.

Creative tasks also suggest developing creative training. Special training for expanded use of special masters could take place in conjunction with existing Bar CLE programs or other judicial training programs or by having less experienced lawyers shadow more senior special masters. The ABA is also exploring the interest in and resources available for creating a training program and refining that work as evaluations provide more information on what is effective.



Recognize that using one type of solution should not prevent using others or combining approaches.

Hammers all risk falling victim to the misimpression that every problem is a nail. No one should suggest that special masters are the solution to every problem—or, more importantly, that they are supposed to be an *exclusive* solution to a problem as large as coping with the attempt to return to regular litigation after the pandemic. The multifaceted demands courts face often demand multifaceted solutions.

Take, for example, what is perhaps the 600-pound gorilla—how will jurisdictions deal with what could be tens of thousands of eviction cases filed when moratoriums end? The creative work that has been done in this field includes mandatory mediation of all or a part of the dispute; combinations of mediation with eviction diversion programs that work with agencies to maximize public aid funds or to incentivize landlords by helping them obtain benefits rather than pursue evictions; and other types of public/

private partnerships to design systems that allow for a fairer, faster resolution under very difficult circumstances. All of these have some precedent. For example, after the Great Fire hit London in 1666, the English Parliament established “Fire Courts” with extraordinary powers to work with landlords and tenants to resolve disputes.⁵ And the Railway Labor Act was a statute written by railroads and railway unions to establish a system that would allow for dispute resolution while reducing the chances of potentially disastrous railway strikes.⁶ What is new is dusting off the precedents and combining them for use in facing specific current problems.

People who suggest the possibility of bringing special masters into a mix must do so with humility, when others, much closer to the problem, have already expended such extraordinary efforts to address the situation. Might it help to establish several different ways cases can be handled—some using special masters either in an adjudicative or facilitative capacity and others not? Might it make sense to have special masters review dockets and recommend to courts how cases can be handled effectively, or how to prioritize pending motions so that the court’s decision-making is most effective in getting cases to resolution? Might it make sense to combine special masters with other ideas—for example, develop new docket forms that require information upon case filing that would assist in channeling cases for

resolution, or perhaps even use artificial intelligence to review existing dockets to help with that process?



There is help out there. Use it.

Answering the questions listed above requires working together to combine knowledge of the problems with ideas about solutions. No outside group, like our Special Masters Committee, can possibly know as much about a particular court’s needs as the court’s own judges and staff or the institutions like the Federal Judicial Center and the National Center for State Courts that work with those courts every day. We need to sit down together.

A good place to start is to review the Special Masters Committee page on the ABA Judicial Division’s website.⁷ If the ideas there, or in this article, seem promising, let’s start the conversation. The committee members are available to speak with any court to brainstorm or assist in implementing any ideas that would help them deal with their caseload. ■

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Endnotes

1. ABA Resolution 100 (Jan. 28, 2019),

<https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2019/100-midyear-2019.pdf>. For more background, see Merrill 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, https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/fall/a-revolution-doesnt-offend-anyone-aba-guidelines-the-appointment-and-use-special-masters-civil-litigation.

2. See ABA Judicial Div. Special Masters Comm., *Checklist for Making Use of Special Masters to Help Deal with the New Normal* (updated Oct. 2020), https://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2020-jd-lc-specialmasters-checklist.pdf.

3. See ABA Judicial Div. Law. Conf. Special Masters Comm., *Keeping Civil Cases Moving While Jury Trials Are Delayed* (July 2020), https://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2020jdlc-keepingcivilcasesmoving.pdf.

4. See ABA Judicial Div. Law. Conf. Special Masters Comm., *Appointing Qualified Screened Special Masters to Aid in the Pandemic* (2021), https://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2021-lc-special-masters-appointments.pdf.

5. See Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893 (2016).

6. 45 U.S.C. §§ 151–165.

7. SPECIAL MASTERS COMM., https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/special-masters.