Research on Fed. R. Civ. P. 53 from subcommittee member Greg Whitehair

June 24, 2016

The Subcommittee on Special Masters was asked to address why Fed. R. Civ. P. 53's standard for court review of a master's findings shifted in 2003 from "clearly erroneous" to "*de novo*." Greg Whitehair volunteered to research the issue and report back to the full Committee. The Committee is urged to reread as background Ms. Moore's fine summary of the 2003 Amendments to the Rule.

HISTORY OF THE RULE

The use of special masters originated in English chancery practice and continued via federal equity practice in the 1800s; it was extended to matters of law by the U.S. Supreme Court in 1920,[1] and was introduced into the "Trial" section of the federal rules in 1938.[2] From 1938 to 2003 at the federal level (and presently in Colorado), the Rule "focuse[d] on masters as trial participants,"[3] a use somewhat frowned upon after the U.S. Supreme Court decided *La Buy v. Howes Leather* in 1957.[4]

Despite that, the non-trial use of masters in the federal courts expanded substantially (and without regulation) in the 1970s and after. For example, settlement masters, discovery masters, privilege reviewers, foreign-law experts, patent claim constructionists, technology masters, class-action and claims administrators, and out-of-court decree monitors, to name a few.[5]

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[1] *Ex parte Peterson*, 253 U.S. 300, 364-65 (1920) ("[C]ourts have inherent power to provide themselves with instruments required for the performance of their duties. This power 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.").

[2] *See* D. Fergleger, *Special Masters Under Rule 53: The "Exceptional" Becomes "Commonplace,"* at 5 (2007), found at www.fergleger.com.

[3] Committee Notes on Rules – 2003 Amendment, Fed. R. Civ. P. 53, at ¶ 1 (hereinafter "2003 Committee Notes").

[4] *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (finding that two standard antitrust cases with anticipated lengthy trials did *not* meet the "exceptional conditions" trigger of Rule 53).

[5] D. Fergleger, *supra* note 2, at pp. 6-29.

As Ms. Moore's memo notes, a wholesale revision of Rule 53 was undertaken in 2003 to absorb these widely accepted expansions in pre-trial and post-trial matters. The federal Civil Rules Advisory Committee, relying upon extensive nationwide assessments by the Federal Judicial Center, came to a consensus that a milder hurdle should be placed in front of these non-trial appointments: "matters that cannot be effectively and timely addressed" by available jurists.[6]

The provision that a reference "shall be the exception and not the rule" was literally deleted from the body of the Rule.[7] The Advisory Committee saw as equivalent the "exceptional condition" language for trial masters; and, for all other uses, they felt it sufficiently restrictive to apply the limitation that the matter "cannot be effectively and timely addressed."[8]

THE ADVISORY COMMITTEE TAKES PUBLIC COMMENT

The Advisory Committee put two draft options out for public comment: one version called for *de novo* review of all fact-finding (unless the court dictated clear-error review in the appointment order, or the parties stipulated to no review); the other for *de novo* review on "substantive" fact issues and for clear error on "non-substantive" findings. According to the final Advisory Committee minutes of May 2002, "[b]oth versions reflected the growing concern expressed by several courts of appeal that Article III courts should not – and perhaps may not – surrender fact-finding responsibilities to non-Article III court adjuncts."[9] (Federal insiders will recognize a similar nervousness in allowing Magistrate Judges to tackle dispositive fact-finding).

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[6] *See* Fed. R. Civ. P. 53(a)(1)(C) (2003). The Advisory Committee was not proposing any further enlargement of the use of pre-and post-trial special masters; indeed, the Notes urge that "a pretrial master should be appointed only when the need is clear," and that special caution should apply to any reference involving "important public issues or many parties." 2003 Committee Notes, *Pretrial Masters* at ¶ 2. Post-trial matters were expected to involve mainly complex decrees with complex policing. *Id.*, *Post-Trial Masters* at ¶¶ 1-2.

[7] Notably, the Committee Note reads "[t]he core of the original Rule 53 remains, *including its prescription that appointment of a master must be the exception and not the rule*." *Id.* at ¶ 1 (emphasis added). However, this writer struggles to find any such "prescription" in the body of the new Rule, at least as it relates to non-trial masters.

[8] 2003 Committee Notes, *Pretrial and Post-Trial Masters* at ¶ 1.

[9] Civil Rules Advisory Committee Minutes of May 6-7, 2002, at 9 (found at www.UScourts.gov/files/15155/download).

All-party consent with court approval was thought to address the bulk of these constitutional issues (as it does now with Magistrate Judge consent jurisdiction), but was not thought to resolve the issue should one or both parties resist the reference. Especially given the skepticism expressed back in 1957 in the *La Buy* decision.[10]

Consequently, to avoid this issue altogether, the subcommittee proposed a new version, which was ultimately adopted: *de novo* review of all fact issues UNLESS the parties stipulate with court consent to clear-error review OR the parties waive review by deeming the master's findings final.[11]

CONCERNS WITH *DE NOVO* REVIEW

As Ms. Moore's memo notes, concern was expressed about the value of a non-deferential fact-finding if an objecting party could force a complete do-over. The Advisory Committee was satisfied (a) that many issues would fall by the way and (b) perhaps naïvely, that parties would think ahead and agree to stipulate to clear-error review for non-substantive findings.[12] In any event, the Notes make clear that an objections "hearing" could be held wholly on paper, thus avoiding evidentiary duplication unless desired by the court.[13]

For consistency, legal determinations were also to be reviewed *de novo,* if only to ensure that judges not be "boxed in" by consenting parties.[14] The more deferential "abuse of discretion" standard would apply to a master's procedural choices, though the "subordinate role" of the master might mean that the trial court's review would be "more searching than the review an appellate court makes of a trial court."[15]

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[10] *Id.*

[11] *Id.*

[12] *Id.* at 10.

[13] 2003 Committee Notes, *Subdivision (g)* ¶ 1 ("The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.").

[14] Committee Minutes, *supra* note 9, at 10.

[15] 2003 Committee Notes, *Subdivision (g)* ¶ 5.

CONCLUSION

It appears that the main engine driving *de novo* review in the federal version of Rule 53 was the fear of Article III overreach. Given the difference in Colorado state constitutional law and policy, this reasoning may not apply to our deliberations. However, in the event the Committee undertakes a 2016 revision of Rule 53, departing much from the federal rule may complicate our ability to rely on the federal Notes and case law developing around Rule 53.

ENDNOTE ON COST SHIFTING AND PROPORTIONALITY

The Subcommittee was also asked to spotlight the cost issue, particularly in light of access-to-justice concerns and the challenge of fronting fees for many parties, as well as proportionality concerns.

The present federal Rule provides as follows:

> F.R.C.P. 53(h) *Compensation. …*
>
> *(3) Allocation. The court must allocate payment of the master's compensation among the parties after considering*
>
> - *the nature and amount of the controversy*
> - *the means of the parties, and*
> - *the extent to which any party is more responsible than other parties for the reference to a master.*
>
> *An interim allocation may be amended to reflect a decision on the merits.*

The Notes for Subdivision (h) state:

> *The need to pay compensation is a substantial reason for care in appointing private persons as masters.*
>
> *Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important—parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major*

portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

Interestingly, the original 1994 discussion draft tendered by the Reporter, Prof. Ed Cooper, proposed to go much farther than the final Note that made it into print:

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

The risk of imposing unfair costs on a party is a particular concern in determining whether to appoint a pretrial master. Appointment of a trial master under Rule 53 will be an exceptional event, and a post-trial master is likely to be appointed only in large-scale litigation in which the costs can fairly be imposed on parties able to bear them or be paid from a common fund. Pretrial masters may seem desirable across a broader range of litigation, more often involving one or more parties who cannot readily bear the expense of a master. Parties are not required to defray the costs of providing public judicial officers, and should not lightly be charged with the costs of providing private judicial officers. Disparities in party resources are not automatically cured by disproportionate allocations of fee responsibilities – there is some risk that a master may appear beholden to a party who pays most or all of the fees. Even when all parties can well afford master fees, appointment is justified only if the expense is reasonable in relation to the character and needs of the litigation. The character and needs of litigation cannot be assessed in a vacuum. Appointment of a master may be justified when economically powerful adversaries conduct their litigation in a manner that threatens to consume an unfair share of the limited resources of public judicial officers. Consent of all parties may significantly reduce these concerns, although even then courts should strive to avoid situations in which consent is constrained by the unavailability of reasonable attention from a judge or magistrate judge.[16]

* * *

[16] E. Cooper, *Civil Rule 53: An Enabling Act Challenge*, 76 Tex. L. Rev. 1607, 1623 (1998).

An Act

ENROLLED HOUSE
BILL NO. 1920

By: Jordan of the House

and

Sykes of the Senate

An Act relating to discovery; amending 12 O.S. 2011, Section 3233, which relates to interrogatories; requiring restatement of interrogatory when answering; authorizing appointment of discovery master; requiring certain orders to contain specified findings; establishing procedures for certain disqualification; requiring certain notice; specifying contents of certain orders; authorizing amendment of certain orders; requiring certain oath; establishing authority of discovery master; providing for certain sanctions; requiring filing of certain report; establishing procedures for adoption or modification of certain report; requiring certain review; establishing guidelines for certain compensation; construing provision; providing certain immunity from civil liability; providing for codification; and providing an effective date.

SUBJECT: Civil procedure discovery

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 3225.1 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. Appointment.

1. Scope. Unless a statute provides otherwise, on motion by a party or on its own motion, upon hearing unless waived, a court may in its discretion appoint a discovery master to:

a. perform duties related to discovery, consented to by the parties, or

b. address pretrial and posttrial discovery matters to facilitate effective and timely resolution.

2. Required Findings. An order appointing a discovery master under subparagraph b of paragraph 1 of subsection A of this section shall contain the following findings by the court:

a. the appointment and referral are necessary in the administration of justice due to the nature, complexity or volume of the materials involved, or for other exceptional circumstances,

b. the likely benefit of the appointment of a discovery master outweighs its burden or expense, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, the importance of the referred issues in resolving the matter or proceeding in which the appointment is made, and

c. the appointment will not improperly burden the rights of the parties to access the courts.

3. Possible Expense or Delay. In appointing a discovery master, the court shall consider the fairness of imposing the likely expenses on the parties and shall protect against unreasonable expense or delay.

B. Disqualification.

1. In General. A discovery master shall not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge, unless the parties, with the court's approval, consent to the appointment after the discovery master discloses any potential grounds for disqualification.

2. Disclosure. The discovery master shall disclose any possible conflicts within fourteen (14) days of appointment.

3. Motions to Disqualify. A motion to disqualify a discovery master shall be made within fourteen (14) days of the discovery master's disclosure of the conflict. The discovery master shall rule originally on any motion to disqualify.

4. Review by Assigned Judge. Any interested party who deems himself or herself aggrieved by the refusal of a discovery master to grant a motion to disqualify may present his or her motion to the judge assigned to the case by filing in the case within five (5) days from the date of the refusal a written request for rehearing. A copy of the request shall be mailed or delivered to the judge assigned to the case, to the adverse party and to the discovery master.

5. Review by Presiding Judge. Any interested party who deems himself or herself aggrieved by the refusal of the judge assigned to the case to grant a motion to disqualify the discovery master may present his or her motion to the presiding judge of the county in which the case is pending. A copy of the request shall be mailed or delivered to the presiding judge, to the adverse party, to the judge assigned to the case, and to the discovery master.

6. Review by Supreme Court. If the hearing before the presiding judge results in an order adverse to the movant, the movant shall be granted not more than five (5) days to institute a proceeding in the Supreme Court for a writ of mandamus. The Supreme Court shall not entertain an original proceeding to disqualify a discovery master unless it is shown that the relief sought was previously denied by the discovery master, the judge assigned to the case, and the presiding judge, in accordance with this section. An order favorable to the moving party may not be reviewed by appeal or other method.

C. Order Appointing a Discovery Master.

1. Notice. Before appointing a discovery master, the court shall give the parties notice and an opportunity to be heard unless waived. Any party may suggest candidates for appointment.

2. Contents. The appointing order shall direct the discovery master to proceed with all reasonable diligence and shall state:

a. the discovery master's duties, including any investigation or enforcement duties, and any limits on

the discovery master's authority under subparagraph c of this paragraph,

b. the circumstances, if any, in which the discovery master may communicate ex parte with a party,

c. any limitations on the discovery master's communications with the court,

d. the nature of the materials to be preserved and filed as the record of the discovery master's activities,

e. the time limits, method of filing the record, other procedures, and standards for reviewing the discovery master's orders, findings, and recommendations, and

f. the basis, terms, and procedure for fixing the discovery master's compensation under subsection G of this section.

The court shall have the discretion to direct the discovery master to circulate a proposed appointing order to the parties and provide a time period for the parties to comment prior to the order's entry.

3. Amending. The order may be amended at any time after notice to the parties and an opportunity to be heard.

4. Oath. Before the appointing order shall take effect, the discovery master shall execute and file an oath that he or she will faithfully execute the duties imposed by the order of appointment and any amendments thereto.

D. Discovery Master's Authority.

1. In General. Unless the appointing order directs otherwise, a discovery master may:

a. regulate all proceedings and respond to all discovery motions of the parties within the scope of appointment, including resolving all discovery disputes between the parties,

b. call discovery conferences under Rule 5 of the Rules for District Courts, at the request of a party or on the discovery master's own motion,

c. set procedures for the timing and orderly presentation of discovery disputes for resolution,

d. take all appropriate measures to perform the assigned duties fairly and efficiently, and

e. if conducting an evidentiary hearing, exercise the appointing court's power to take and record evidence, including compelling appearance of witnesses or production of documents in connection with these duties.

2. Sanctions. The discovery master may recommend any sanction provided by Sections 2004.1, 3226.1 or 3237 of Title 12 of the Oklahoma Statutes.

E. Discovery Master's Orders, Reports, and Recommendations. A discovery master who issues an order, report or recommendation shall file it and promptly serve a copy on each party. The clerk shall enter the order, report or recommendation on the docket.

F. Action on the Discovery Master's Order, Report or Recommendations.

1. Time to Object or Move to Adopt or Modify. A party may file objections to or a motion to adopt or modify the discovery master's order, report or recommendations no later than fourteen (14) days after a copy is filed, unless this section or the court sets a different time. If no objection or motion to adopt or modify is filed, the district court may approve the discovery master's order, report or recommendations without further notice or hearing.

2. Action Generally. Upon the filing of objections to or a motion to adopt or modify the discovery master's order, report or recommendations within the time permitted, any party may respond within fifteen (15) days after the objections or motions are filed. If objections and motions are decided by the court without a hearing, the court shall notify the parties of its ruling by mail. In acting on a discovery master's order, report or recommendations, the court may receive evidence and may adopt or affirm, modify,

wholly or partly reject or reverse, or resubmit to the discovery master with instructions.

3. Reviewing Factual Findings. The court shall decide de novo all objections to findings of fact made or recommended by a discovery master, unless the parties, with the court's approval, stipulate that:

a. the findings will be reviewed for clear error, or

b. the findings of a discovery master appointed under paragraph 1 of subsection A of this section will be final.

4. Reviewing Legal Conclusions. The court shall decide de novo all objections to conclusions of law made or recommended by a discovery master.

5. Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a discovery master's ruling on a procedural matter only for an abuse of discretion.

G. Compensation.

1. Fixing Compensation. Before or after judgment, the court shall fix the discovery master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

2. Payment. The compensation shall be paid either:

a. by a party or parties, or

b. from a fund that is the subject of the specific action or proceeding, or other subject matter of the specific action or proceeding, to the extent such fund or subject matter is within the court's control and within the court's in rem jurisdiction. The compensation shall not be paid from the court fund.

3. Allocating Payment. The court shall allocate payment after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than

other parties for the reference to a discovery master. An interim allocation may be amended to reflect a decision on the merits.

H. Other Statutes. A referee or master appointed under the authority of another statute or provision is subject to this section only when the order referring a matter to the referee or master states that the reference is made under this section. Nothing in this section shall be construed to replace or supersede any other statute or provision authorizing the appointment of a referee or master.

I. A discovery master appointed pursuant to this section acting in such capacity shall be immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.

SECTION 2. AMENDATORY 12 O.S. 2011, Section 3233, is amended to read as follows:

Section 3233. A. AVAILABILITY; PROCEDURES FOR USE. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to that party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action or upon any other party with the summons and petition or after service of the summons and petition on that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. <u>When answering each interrogatory, the party shall restate the interrogatory, then provide the answer.</u> The number of interrogatories to a party shall not exceed thirty in number. Interrogatories inquiring as to the names and locations of witnesses, or the existence, location and custodian of documents or physical evidence shall be construed as one interrogatory. All other interrogatories, including subdivisions of one numbered interrogatory, shall be construed as separate interrogatories. No further interrogatories will be served unless authorized by the court. If counsel for a party believes that more than thirty interrogatories are necessary, he shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a

reasonable number of additional interrogatories. Counsel are expected to comply with this requirement in good faith. In the event a written stipulation cannot be agreed upon, the party seeking to submit such additional interrogatories shall file a motion with the court (1) showing that counsel have conferred in good faith but sincere attempts to resolve the issue have been unavailing, (2) showing reasons establishing good cause for their use, and (3) setting forth the proposed additional interrogatories. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days after the service of the interrogatories, except that a defendant may serve answers or objections to interrogatories within forty-five (45) days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Section 3229 of this title. All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. The party submitting the interrogatories may move for an order under subsection A of Section 3237 of this title with respect to any objection to or other failure to answer an interrogatory.

B. SCOPE; USE AT TRIAL. Interrogatories may relate to any matters which can be inquired into under subsection B of Section 3226 of this title, and the answers may be used to the extent permitted by the Oklahoma Evidence Code as set forth in Sections 2101 et seq. of this title.

An interrogatory otherwise proper is not necessarily objectionable because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. The court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

C. OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party

serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries thereof. A specification shall be in sufficient detail to permit the party submitting the interrogatory to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

SECTION 3. This act shall become effective November 1, 2015.

Passed the House of Representatives the 5th day of May, 2015.

Presiding Officer of the House
of Representatives

Passed the Senate the 22nd day of April, 2015.

Presiding Officer of the Senate

OFFICE OF THE GOVERNOR

Received by the Office of the Governor this 6th day of May, 2015, at 5:00 o'clock P M.

By: Audrey Rockwell

Approved by the Governor of the State of Oklahoma this 12th day of May, 2015, at 3:29 o'clock P M.

Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Office of the Secretary of State this 12th day of May, 2015, at 4:31 o'clock P. M.

By: Chris Benge