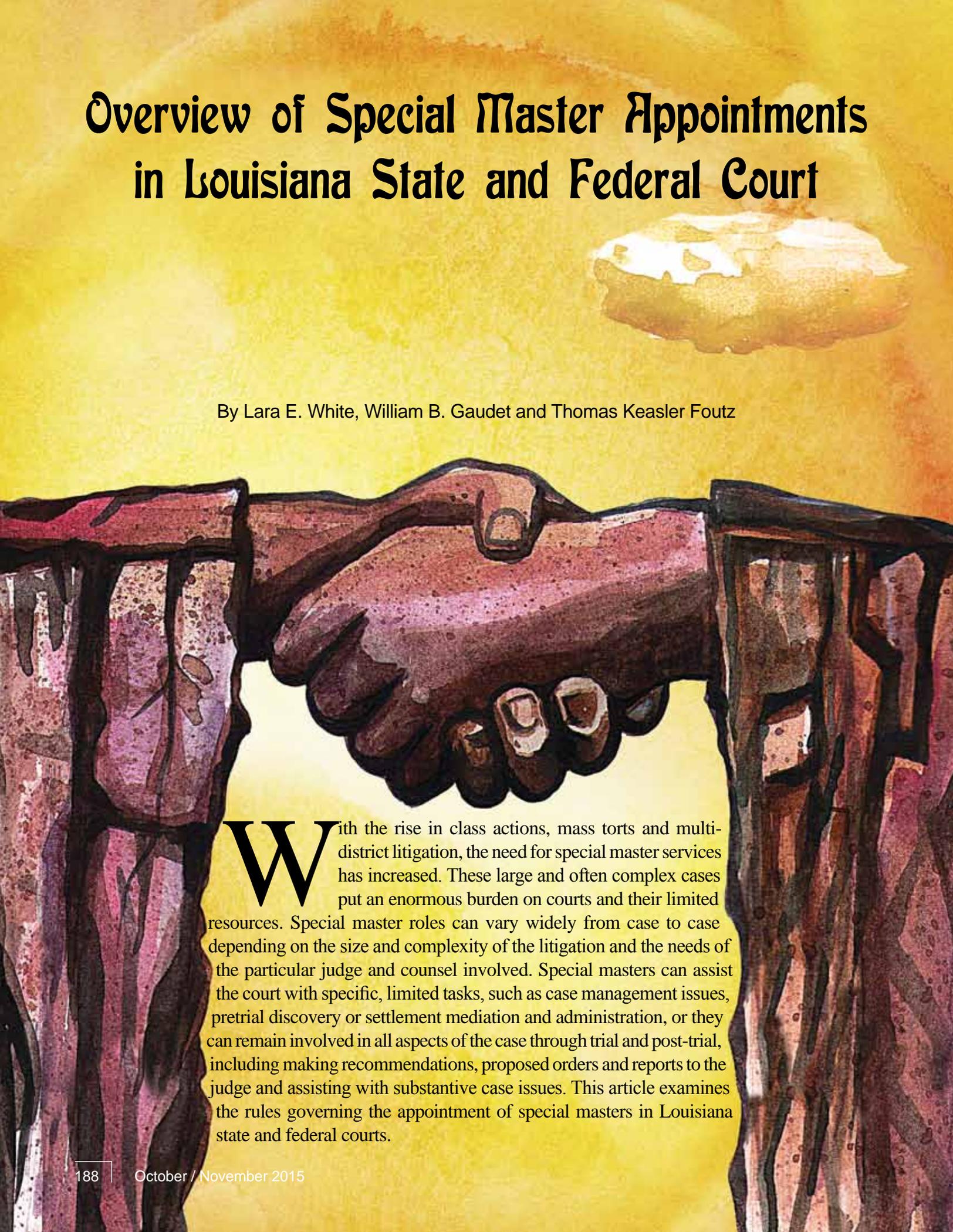


Overview of Special Master Appointments in Louisiana State and Federal Court

By Lara E. White, William B. Gaudet and Thomas Keasler Foutz



With the rise in class actions, mass torts and multi-district litigation, the need for special master services has increased. These large and often complex cases put an enormous burden on courts and their limited resources. Special master roles can vary widely from case to case depending on the size and complexity of the litigation and the needs of the particular judge and counsel involved. Special masters can assist the court with specific, limited tasks, such as case management issues, pretrial discovery or settlement mediation and administration, or they can remain involved in all aspects of the case through trial and post-trial, including making recommendations, proposed orders and reports to the judge and assisting with substantive case issues. This article examines the rules governing the appointment of special masters in Louisiana state and federal courts.

Federal Court

Appointment

The rule governing the use of special masters in federal court is Federal Rule of Civil Procedure 53. A federal court may appoint a special master in limited circumstances, as district judges must retain the primary responsibility for the cases in their courts.¹ Rule 53(a)(1) provides the three standards for special master appointments: (1) by consent of the parties; (2) for trial duties; and (3) for pretrial or post-trial duties.²

Although a special master may be appointed by consent of the parties, mere consent does not obligate the court to actually make the appointment, as the court has the ultimate discretion on this issue.³ A court also has ultimate authority to appoint a special master for trial, pretrial or post-trial duties, even without the consent of the parties, if the court meets the conditions provided in Rule 53(a)(1)(B) and (C). It should be noted, however, that a court may not appoint a special master for trial duties without the consent of all parties when the case will be tried to a jury.⁴

Trial master appointments are limited.⁵ Examples of trial master duties include presiding over an evidentiary hearing, a preliminary injunction hearing, or determining complex damages issues.⁶

Pretrial and post-trial masters are used by district courts when help is needed to manage unusually large or complex cases, and when the judge and magistrate are unavailable to timely or effectively handle certain matters. The intent is for these appointments to be made only when there is a clear need for such assistance.⁷ Examples of pretrial master duties include handling e-discovery matters, reviewing extensive documents for privilege, overseeing investigations, settlement conferences and administrative oversight.⁸ Post-trial master duties may involve enforcing a complex decree.⁹

A special master is subject to the same conflicts of interest and disqualification standards as that of a district judge under 28 U.S.C. § 455.¹⁰ However, the parties, with court approval, may still consent to a special master appointment after disclosure of the grounds for disqualification under Rule 53(a)(2).¹¹ Because a special master is not a public judicial officer, a court may find it appropriate to permit the parties to

consent to a special master appointment when circumstances would otherwise require judges to disqualify themselves.¹²

Order of Appointment

Once the court decides that a special master will be appointed, the court must give notice to the parties of who is proposed for this appointment and the terms of the appointment, and also give the parties an opportunity to be heard on these issues and to nominate other candidates for appointment.¹³ After a special master has been selected, the scope and limits of the master's duties and authority must be detailed in a written order. The more detailed the order, the better, so as to not have any misunderstanding or confusion. The order should include information on: (1) the specific duties of the master and any limits on authority; (2) guidelines for *ex parte* communications with the court and the parties;¹⁴ (3) any materials that need to be preserved and filed to record the activities of the special master; (4) the procedures and deadlines for reviewing any orders, findings or recommendations of the master; and (5) the plans and procedures for compensating the master under Rule 53(g).¹⁵ The parties must be given an opportunity to be heard on the terms of the appointment order.¹⁶ The final order of appointment may be amended later as long as there is notice to the parties and an opportunity for hearing.¹⁷

Authority, Orders and Reports

Once appointed, a special master has broad authority to meet his/her assigned duties as provided in the appointing order.¹⁸ Any order issued by a special master must be filed with the court and entered on the docket and must be served on all parties.¹⁹ The special master must prepare and file reports to the court as the court requires in the appointing order, and must file and serve the report on the parties unless otherwise directed by the court order.²⁰

Prior to acting on a special master's order, report or recommendation, the court must first provide the parties with notice and hearing.²¹ In response, a party may file an objection, or motion to adopt or modify, within the time frame set by the rules or the court.²² Any objections to findings of fact or conclusions of law made or recommended by the special master are reviewed by the

court *de novo*.²³ However, a master's ruling on a procedural matter may only be set aside for an abuse of discretion unless otherwise indicated in the appointing order.²⁴ The court is the ultimate authority over the master's order, report or recommendation, and "may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions."²⁵

Compensation

The court will determine the special master's compensation as provided in the appointing order or subsequent amendments.²⁶ The court also will determine how the master's fees will be allocated between the parties or taken from a fund or the subject matter of the litigation within the custody of the court.²⁷ When considering the allocation of fees, the court may consider the amount in controversy, the means of the parties, and whether any particular party is more responsible for the appointment of the master in the case.²⁸ After a decision on the merits, the court may decide to amend an interim allocation.²⁹

Louisiana State Court

Appointment

Louisiana's special master statute is relatively recent, as compared with the federal rule. La. R.S. 13:4165, governing the appointment of special masters, was enacted by the Louisiana Legislature in 1997. This original statute was less than clear as to what the specific role of the special master would be in a particular matter appointment. This led to concerns and objections when the role of the special master was expanded during the course of the matter without complete notice to the parties. Another concern regarding the application of this original statute was the appointment of special masters without full consent of all the parties.

Because of concerns expressed by both the plaintiff and defense bar and other interested parties, Louisiana's statute was amended and enacted by the Louisiana Legislature and became effective on Aug. 1, 2014.³⁰ The specific consent requirement of the Louisiana statute differs from the federal rule. As noted above, a federal judge has authority to appoint a special master even

without the consent of the parties. However, the Louisiana statute by its general terms, while requiring consent of the parties, does not require the court to provide the parties an opportunity for a hearing on the appointment or the right to nominate other candidates for appointment.

When compared with the federal rule, the Louisiana statute does not provide specific guidelines for the formal disclosures by the special master or the details that should be included in the order of appointment—*e.g.*, guidelines for *ex parte* communications, preservation and recordation of special master activities, and disclosure requirements. The Louisiana statute requires reports from the special master to be served on the parties and a right to objections in a contradictory hearing regarding that report before the court adopts, modifies or rejects the report of the special master.

There is minimal Louisiana case law discussing the special master issues but, given the increase in the use of special masters in Louisiana, more decisions are likely to be forthcoming. Until more guidance is provided by the Louisiana courts, the parties should consider the more specific guidance provided by the federal rules and federal courts.

Authority, Orders and Reports

Like the federal rule, the Louisiana statute provides broad authority to the special master and leaves much discretion with the district courts regarding the limits of authority, the issues that can be addressed, and the reports to be provided by the special master. The federal rule and authorities

interpreting that rule are more specific as to the power of a special master to conduct evidentiary hearings, imposing certain sanctions, and providing parties with notice of hearings before the special master. But given the broad authority provided to state courts, those issues should be addressed in a more detailed order of appointment and the federal form should be used as a template. It is important for the state court judge, in coordination with the special master, to spend the time to anticipate all issues that may arise during the course of the litigation, set forth the details of the special master's authority and anticipated scope of tasks, and provide as much detail as reasonable in order to avoid future objections by the parties.³¹

Compensation

Like the federal rule, state courts determine the special master's compensation; unlike the federal rule, the Louisiana statute provides that this compensation is to be taxed as costs of court. Because the estimate of the amount of compensation of the special master is to be provided before appointment, it is important for the special master to notify the parties well in advance of seeking an order for compensation if there are valid reasons to increase that original estimate. Once again, however, there is little guidance for the state courts regarding the factors to be applied in approving the special master's compensation. There are ample filings and orders in the federal court system that can be adopted. Because the compensation of a special master will be scrutinized not only by the judge but also by the parties paying the special master,

the backup documentation and details of the time and tasks being charged require even higher scrutiny by the special master.

FOOTNOTES

1. The Advisory Committee Note to the 2003 Amendments to Rule 53.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Fed. R. Civ. P. 53(a)(2).

11. *Id.*

12. The Advisory Committee Note to the 2003 Amendments to Rule 53.

13. *Id.*

14. Although not dictated by the rule, normally, *ex parte* communications between a special master and the court and parties are discouraged. There may, however, be circumstances when it would be beneficial, and even necessary, for such communications to take place. Ultimately, these are matters of discretion for the court, but it is important that the parameters for such communications be laid out in the order of appointment. *See*, the Advisory Committee Note to the 2003 Amendments to Rule 53.

15. Fed. R. Civ. P. 53(b)(2).

16. The Advisory Committee Note to the 2003 Amendments to Rule 53.

17. Fed. R. Civ. P. 53(b)(4).

18. The Advisory Committee Note to the 2003 Amendments to Rule 53.

19. Fed. R. Civ. P. 53(d).

20. Fed. R. Civ. P. 53(e).

21. Fed. R. Civ. P. 53(f)(1).

22. Fed. R. Civ. P. 53(f)(2).

23. Fed. R. Civ. P. 53(f)(3)&(4).

24. Fed. R. Civ. P. 53(f)(5).

25. Fed. R. Civ. P. 53(g)(1).

26. Fed. R. Civ. P. 53(g)(1).

27. Fed. R. Civ. P. 53(g)(2).

28. Fed. R. Civ. P. 53(g)(3).

29. *Id.*

30. The special master statute in its present form is designed to ameliorate the concerns noted above and require the court to specify the "anticipated specification of the powers to the special master" and more clearly require the consent of the parties contingent upon: (1) an estimate of the amount of the compensation of the special master; (2) the identity of the special master; and (3) the court's anticipated specifications of the powers of the special master.

31. An example of the role and authority of a special master can be found in *Pollard v. Alpha Technical*, 31 So.3d 576 (La. App. 4 Cir. 2010). There, the special master's authority included holding an evidentiary hearing on class certification and issuing recommendations to the court. The district court affirmed the special master's recommendations denying class certification and the court of appeal affirmed.



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