SEARCHING FROM WITHIN

THE ROLE OF MAGISTRATE JUDGES IN FEDERAL MULTI-DISTRICT LITIGATION

by George C. Hanks, Jr.

WHILE FEDERAL MAGISTRATE JUDGES ARE WIDELY VIEWED AS A HIGHLY QUALIFIED, EXPERIENCED, AND FLEXIBLE corps of judicial officers who assist Article III district judges in docket management within the United States courts, some legal commentators have sounded the alarm that private special masters — who are compensated directly by parties — have largely usurped this function in complex federal litigation. Other commentators have urged more special master appointments, contending that district court dockets are becoming increasingly overwhelmed.

Although some contend special masters possess essential field-specific expertise, there is growing public concern that special master appointments have evolved into a lucrative "cottage industry" fueled by unnecessary delegation of judicial authority. At its harshest, there has been some concern raised that a kind of "cronyism" may be perceived by the public as a result of the frequency of special master appointments.

There is little comprehensive data on the frequency of special master appointments in multi-district cases, and the relative costs to the litigants is virtually nonexistent. This article seeks to address this question: Is there any factual basis for the concern that district courts may have effectively replaced magistrate judges with special masters in the management of multi-district litigation ("MDL")?

This article concludes that district courts are using magistrate judges, not special masters, as the primary resource for assistance in managing MDL. Core adjudicatory functions, such as fact-finding and the resolution of nondispositive motions, are largely being performed either by the district judge or magistrate judge. Further, broad delegations of judicial authority to special masters are rare. Arguments that a "longer-term up trend in MDL activity" should result in district courts increasing their use of special masters are belied by the steady decrease in the number of pending MDL cases since 2008. In the absence of evidence of systemic abuse, unreasonable expenses and delays, or similar due process burdens, the public should be reassured that district courts are properly weighing their use of magistrate judges versus special masters in managing multi-district cases.

INTRODUCTION: *The Evolution of Federal Magistrate Judges*

The authors of the Federal Rules of Civil Procedure and the Federal Magistrate Act of 1968 (the "Act") envisioned magistrate judges as the primary resource for district judges

to call upon for assistance in managing complex cases.[1] There are almost as many full-time magistrate judges as active district judges,[2] and the Act provides great flexibility as to how the magistrate judges may be used.[3]

Today's magistrate judge corps has evolved to be capable of performing virtually any task that a district judge may delegate. District judges may task magistrate judges as pretrial and discovery managers, early neutral evaluators, arbitrators, and mediators.[4] In these various capacities, magistrate judges may be asked to make recommendations on complex discovery issues and to formulate findings of fact and conclusions of law; facilitate settlement negotiations or joint stipulations; or enter remedial or injunctive orders and monitor compliance with those orders.[5] Further, magistrate judges may conduct a jury or bench trial and render final disposition of cases when the parties have consented.[6]

In addition to acting as adjudicators in civil and some criminal matters, magistrate judges have also become skilled in mediation and other forms of alternative dispute resolution — a role that some commentators thought magistrate judges were either too busy or could not be properly trained to manage.[7] "It is no exaggeration to say, as the Supreme Court recently did, that the role of the magistrate [judge] in today's federal judicial system is nothing less than indispensable."[8] As a result of the flexibility afforded by these magistrate judges, studies have concluded that federal courts are "better able" to handle complex cases than their state counterparts.[9]

Rule 53 Mandates for Special Master Appointments and the Presumption in Favor of Magistrate Judges

In addition to using magistrate judges, district courts have also traditionally called upon special masters to manage complex cases.[10] Federal Rule of Civil Procedure 53 is the primary mechanism for appointing special masters in federal cases. Rule 53 commits the weighing of the benefits and costs of special master appointments to the discretion of the district courts. However, Rule 53 specifically acknowledges that a district court's decision to use a privately retained special master may result in an additional financial burden and delay to the parties.[11] Further, before appointing a special master for any purpose, district courts are directed to pay "particular attention . . . to the prospect that a magistrate judge may be available for special assignments."[12] Accordingly, Rule 53 creates a presumption in favor of the assignment of magistrate judges. In other words, "appointment of a master must be the exception and not the rule."[13]

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Despite Rule 53's clear preference for magistrate judges, in recent years, some commentators perceive a dramatic increase in special master appointments in all types of federal cases.[14] While some contend special masters contribute valuable field-specific expertise, their increased use can also dramatically increase the financial burden upon the parties[15] and may decrease potential amounts available for awards or even hamper settlement.[16] Furthermore, special master appointments are perceived as a lucrative business opportunity for the bar, and this perhaps fosters a natural suspicion that judicial authority is being unnecessarily delegated.[17] The use of special masters also raises a number of concerns regarding the legitimacy of the process — concerns that can be largely avoided by the use of magistrate judges.[18]

Need for More Special Master Appointments

Some commentators have recently argued that the courts should increase their use of special masters to respond to a "longer-term up trend in [multi-district litigation ("MDL")] activity."[19] Others assume that the increased filings will simply overwhelm the court system, magistrate judges included, and outside help must therefore be sought.[20]

Notably lacking in these comments is a failure to fully consider the flexibility of the role of the federal magistrate judge, or to take the qualifications and abilities of the magistrate judge corps into account.[21] The arguments instead make little more than a passing reference to the availability of magistrate judges to assist in the management of these cases. Importantly, a central factual assumption of these comments — that there is a longer-term upward trend in MDL activity — is just factually wrong, for the total number of MDL cases has been steadily decreasing since 2008.[22]

Another argument made in support of increasing the number of special master appointments pertains to rapidly expanding criminal dockets. Magistrate judges are the only judicial corps that can assist the district courts in managing these dockets. Thus, it has been argued that assigning magistrate judges to time-consuming MDL cases would negatively impact time-

liness and due process in the criminal justice system. However, this argument also appears unwarranted. As seen in the cases surveyed, the MDL panel has not assigned MDL cases to the border districts — which have been facing drastically increasing criminal caseloads — or to districts that have a large number of judicial vacancies.

Comprehensive data on the number of special master appointments and their resulting costs and benefits to MDL cases is nonexistent.[23] Despite this, many commentators insist that such appointments are rapidly becoming "staples of complex litigation"[24] and that special masters are becoming a costly and "an almost Pavlovian response" by district judges facing complex cases.[25]

FINDINGS REGARDING MAGISTRATE JUDGE AND SPECIAL MASTER APPOINTMENT IN RECENT FEDERAL MDLS

The overall questions posed by this article relate to the frequency of magistrate judge and special master appointments and the effect of special master appointments on federal MDL cases. Addressing these two questions required a two-phase research design. Phase 1 consisted of an empirical analysis to examine magistrate judge and special master usage by district courts. Docket entries and orders from all federal MDL cases closed in 2011 and 2012 were analyzed, with particular attention paid to the frequency and function of magistrate judge and special masters.[26] Phase 2 consisted of judicial interviews to gain insight into the judicial decision-making process regarding special master appointments and magistrate judge use in MDL cases.

Incidence of Special Master and Magistrate Judge Use

The sample pool consists of all federal MDL cases closed in the calendar years of 2011 and 2012. Of these 112 total cases, intellectual property cases[27] and any cases whose docket entries were not available for download were excluded. The resulting pool consisted of 101 MDL cases. An analysis of these cases found that magistrate judges were involved in 54 of the 101 MDL cases in the pool. Likewise, a total of 20 MDLs in the pool were identified as having at least one special master appointed.[28] A cross-reference of these results identified nine MDL cases that utilized both magistrate judges and special masters. Of the 54 cases from the pool that were handled by magistrate judges, only one case showed a magistrate judge serving as a special master under Rule 53.

District judges do not appear to be systematically using special masters in place of magistrate judges for the management of MDL cases. To the contrary, magistrate judges were used to manage the sample MDL cases far more often than were special masters. Although special masters were used in 20 percent of the cases surveyed, magistrate judges were used in 54 percent of the cases surveyed. Likewise, magistrate judges were used alone over four times (45 percent of the cases) as often as outside special masters were used alone (11 percent of the cases).

Qualifications

The data from phase 1 showed that the magistrate judges and the special masters shared similar backgrounds. All of the magistrate judges were licensed attorneys and virtually all (99 percent) of the special masters were attorneys. Similarly, 71 percent of the special masters were former state or federal judges or former law clerks while 47 of the special masters were current or former law school professors.

Except for one special master who was licensed as a certified public accountant, none of the special masters had any advanced technical training or expertise in a scientific field. This was also true for the magistrate judges. Instead of technical training or scientific expertise, the special masters were "legal specialists" who either had previous experience handling particular types of cases or issues, such as pretrial matters, or had focused on that area in their legal studies. This stands in stark contrast to special masters in patent MDL cases, who tend to have specialized technical education or backgrounds.[29]

Reliability

The data from phase 1 did not establish that the work of one group was clearly any more reliable or likely to be affirmed than the work of the other. The docket sheets did not reflect any modifications or rejections to the recommendations of magistrate judges and special masters. Similarly, appeals arising from cases using either magistrate judges or special masters rarely resulted in reversal and remand.[30]

Subject Matter of the MDL

Clear patterns in the data emerged regarding the use of magistrate judges and special masters, depending upon the type of MDL.[31] Special master appointments were most common in products-liability MDL cases (32 percent) and were not used at all in commercial MDL cases involving securities and sales practices (0 percent).[32] In contrast, magistrate judges were assigned in 21 percent of products-liability MDL cases, 62 percent of antitrust MDL cases, and 48 percent of sales practice MDL cases. In a significant number of products-liability cases (26 percent), the district court appointed both a magistrate judge and a special master.

One obvious difference between products-liability and commercial cases is that products-liability cases involve scientific rather than commercial or business knowledge. However, the special masters appointed in products-liability cases were "legal specialists" rather than technical specialists, and they were largely involved with discovery management. Perhaps the products-liability MDL cases surveyed, which included toxic tort actions,

were more suited to special master appointments because these types of cases often involve complex legal issues such as damage claims and causation, plus large numbers of geographically diverse plaintiffs with greatly varying degrees of injury.[33]

That special masters were not used in any of the securities MDL cases seems to contradict the assumptions of one commentator, who argues that special masters are particularly suited to such work because magistrate judges are "generalist jurists" who "usually do not have the special legal … expertise often needed in toxic tort and other specialized [proceedings]."[34]

Functions Assigned

While some have criticized special masters as becoming "surrogate judges" and expanding beyond the scope historically contemplated for them,[35] the MDL cases analyzed did not reveal any unnecessarily broad delegations of judicial authority[36] to their appointed special masters. Instead, special masters were most often appointed to perform narrow specialized tasks such as managing complex discovery (in 50 percent of the cases using a special master alone) or conducting settlement proceedings and claims evaluation and administration. Most of the appointment orders tracked the requirements of Rule 53 and were very specific in setting out the scope and details of the special masters' duties. Special masters were not assigned fact-finding authority in any of the cases reviewed.[37]

Although 9 percent of the cases utilized both a special master and a magistrate judge, the district judges were mindful to make these assignments in a manner that did not lead to duplicated or wasted efforts. When special masters and magistrate judges were used together, they usually performed distinctly different roles in the litigation. Information gained in phase 2 judicial interviews was consistent with these observations.

Case Duration

The sample cases that used only a special master took longer to resolve than cases using only a magistrate judge. The average MDL case in the sample pool remained open for approximately 1,877 days. When both a magistrate judge and special master were used, the MDLs lasted an average of 2,918 days. Cases assigned to special masters consumed an average of 2,643 days; in contrast, MDL cases assigned to magistrate judges remained open for an average of 1,541 days. Although the largest MDLs tended to use magistrate judges and not special masters, the data reflects that the size of the MDL case does not appear to correlate to the duration of the litigation. On its face, this data suggests that magistrate judges resolve their assigned cases faster than special masters. [38]

Efficient Use of Resources

It is impossible to draw any empirical conclusions from the information derived from docket sheets and judicial interviews regarding a cost-benefit analysis of the overall cost savings from using special masters or magistrate judges. In large part, this is due to a dearth of information about the plaintiffs' attorney's fees, the special masters' fees, or the settlement amounts. As commentators have noted, even in instances where the actual amount of the special master's fee is large, the parties and courts somewhat paradoxically still see them as the most cost-effective and inexpensive means of achieving the particular goal of MDL litigation.[39] "Thus the cost of a special master may be more than offset by the efficiency and lower costs of the informal processes the master use[s]" to keep disputes outside of any formal court setting.[40]

BEHIND THE CURTAIN:

Other Factors Impacting District Judge's Decision to Appoint a Magistrate Judge or Special Master

In phase 2, the goal was to gain a general understanding of the motivations and considerations underlying a district judge's decision to appoint a magistrate judge or a special master.[41] The cases were selected to reflect geographic diversity — districts from the East Coast, West Coast, Midwest, and Gulf Coast were represented. In all, nine district judges and three magistrate judges were interviewed.

As contemplated by Rule 53, all of the district judges interviewed in Phase Two reported that their decision to use a magistrate judge or special master was a matter of judicial discretion, and that the parties had little input into this decision. Further, their overall decision-making process tracked the concerns set out in the Comments to Rule 53 — in making their decisions, the judges reported being conscious of the need to balance the competing interests of the parties: the cost-free oversight of a sitting federal magistrate judge against the perceived expertise and efficiency of an outside special master. These district judges were careful to adhere to the mandates of Rule 53 when appointing a special master, "consider[ing] the fairness of imposing the likely expenses [of imposing a special master] on the parties and [protecting] against unreasonable expense or delay." Further, the appointment orders surveyed in phase 1 demonstrated a high incidence of district judges carefully observing mandates of Rule 53 and citing the legal authority under which they were making their appointments.

But what other factors might be at play? The interviews in phase 2, coupled with the comments of those advocating for either the increased or decreased use of special masters, revealed a number of intangible considerations district judges evaluate when appointing a magistrate judge, special master, both or neither to assist with the management of complex litigation. Among these are the district judge's own estimate of the amount of time needed for particular tasks

and the district judge's willingness to assign particularly time-consuming tasks to a judicial colleague; the perceived degree of specialized training or experience needed to perform a particular task; whether the task was suitable for a judicial officer, including whether ex parte communications might be required or desirable; local customs and culture; and the availability of particular individuals to serve as special masters. Interestingly, even if the assertion of many commentators — that the number of MDL filings has increased in recent years — was correct, none of the judges interviewed reported that this alleged increase figured in their decisions to use a magistrate judge or special master.

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Perceived Expertise and Time Burden

Overall, judges reported that the most important factors when considering whether to appoint a special master were whether the contemplated tasks required particular expertise, and the amount of time the district judge estimated the tasks would consume. All of the judges interviewed reported that the magistrate judges in their districts were outstanding jurists and could, in theory, handle any duty assigned to them, given enough time and resources.

However, there appeared to be a direct correlation between the level of expertise required to accomplish a task and the time needed to complete it: tasks requiring higher expertise levels demanded proportionally greater amount of times for completion. Accordingly, more often than not, tasks that district judges believed were likely to consume the vast majority of a magistrate judge's time were instead assigned to a special master.

The consideration of these two factors often resulted in appointments of multiple special masters in a single case, as well as appointments using both special masters and magistrate judges in the same case. The judges who used both special master and magistrate judges stated that they structured the assignments so as to assign tasks that were more adjudicatory in nature, and required less time investment — such as evaluating expert qualifications and handling routine discovery disputes — to magistrate judges. On the other hand, tasks that the district judge estimated would require a hefty investment of time, such as investigating and resolving large-scale e-discovery disputes, were typically assigned to special masters.

Nature of Task as Appropriate for a Judicial Officer

Many special masters perform particularly specialized tasks not typically performed by judges. One such function is the process of administering settlement claims and monitoring potentially fraudulent claims. Oversight of billing records for common-benefit work by plaintiffs' counsel is another such function. A fraudulent claims investigation and prosecution special master appointment was also reported. While magistrate judges could, in theory, perform these tasks, these are investigatory, quasi-prosecutorial tasks in which judges do not usually participate. Further, the district judges interviewed noted that a number of available special masters had already developed the necessary procedures and recruited the specific staff necessary, and these masters had previously successfully completed these tasks in earlier cases. Accordingly, the judges stated that they appointed special masters because they wanted to avoid "reinvent[ing] the wheel" for such difficult tasks.

The judges also differed in their views about the importance of ex parte communications and informal procedures of special masters in making the decision. One judge stated that a key reason special masters worked so well was because they could engage in informal ex parte communications with the parties to freely discuss and work out problems well before rising to the level of requiring judicial attention. Ex parte communications are traditionally eschewed by judges, including magistrate judges. However, another judge stated that possible ex parte communications did not pose a problem because the district's magistrate judges were highly trained and skilled in mediation and ADR techniques and they routinely engaged in such communications as part of those mediations. The judge further noted that the matter could also be addressed by an agreement between the parties regarding the magistrate judge's ex parte communications.

Finally, the judges offered interesting insight into how attorney personalities could play a role in their decision whether to appoint a special master or a magistrate judge. The judges agreed that there was generally a high caliber of attorneys in the MDL bar. However, some judges noted regional and case-specific differences in attorney litigation tactics and the bar's perception of the role of magistrate judges. Further, where there are likely to be numerous appeals of magistrate judge decisions, some district judges believed it was more efficient to have the district judge make adjudica-

tory decisions and to appoint special masters to ease administrative burdens in everyday management decisions. Other judges thought that issues of attorney contentiousness and frequent appeals were largely in the hands of the district judge and should not preclude use of a magistrate judge. These judges expressed the belief that such issues could be resolved if the district judge retained a firm control over the attorneys and required attorneys to demonstrate professionalism and respect towards the magistrate judge as a judicial officer.

The judges differed in their views on the need for special masters to address large-scale discovery issues. As noted above, some appointed special masters to avoid placing an undue time burden on magistrate judges and reserving magistrate judge assistance for unforeseen future cases. Others felt large-scale e-discovery required the use of special masters with specialized expertise and training in the field, mainly for the purposes of evaluating innovative processes such as predictive coding to review documents and manage the discovery. There was also a belief in some cases that evolving appellate standards might require the use of special masters in e-discovery. Other judges, however, opined that the specter of complex e-discovery should not necessarily lead to a special master appointment. These judges cited previous experience reflecting the reality that most complex e-discovery disputes were resolved by mutual agreement among the parties pursuant to Federal Rule 26 and the doctrine of mutually assured destruction. In some districts, magistrate judges were trained as both discovery specialists (because of the volume of discovery issues handled) and as neutral adjudicators, and district judges felt the benefits of this combined experience outweighed the benefits of special master involvement in e-discovery.

The latter observations, in light of the data regarding special master qualifications, are important in analyzing the future roles of magistrate judges if regular case dockets continue to increase. While large-scale e-discovery might have increased the courts' need for technical or scientific assistance, such discovery does not mandate the increased use of the nontechnical management assistance of paid special masters. As noted by some districts, magistrate judges, possessing similar legal backgrounds to special masters, are more than capable of developing the expertise in specialized legal areas such as e-discovery.

> "Finally, special master appointments have become a lucrative "cottage industry" for the bar and, in the interests of equity for all involved parties, courts should carefully consider whether there is a bona fide need to appoint a special master before electing to do so.

District Culture

The interviews revealed another important factor affecting the decision: the specific culture of a given district court regarding magistrate judges. Districts with standing orders referring all pretrial matters to magistrate judges had a larger propensity to use such judges in MDL cases than districts lacking such orders. Districts using a team approach to case management — where magistrate judges typically worked closely with district judges throughout multiple stages of a case — also had a stronger likelihood of using magistrate judges rather than a special master. Districts that used magistrate judges as specialists for certain aspects of pretrial case management (such as discovery disputes in complex cases or settlement conferences) also used magistrate judges more than special masters to assist in the management of MDL cases.

Based on these types of cultural differences, some unusually innovative approaches were reported. One judge, for instance, described using a three-tiered special master approach, combining the efforts of the judge overseeing the case: a special master responsible for ongoing settlement discussions; a special master with previous law clerk experience to deal with ex parte communications between the parties to resolve issues before they reached a point of critical mass; and, finally, a tertiary special master to deal with attorney class-benefit issues. The magistrate judge was assigned the essential function of preparing the infrastructure for the case through rulings on administrative motions, such as pro hac vice motions, and acting as a liaison with clerk's office to set up the files and systems needed to administer the cases — duties that the magistrate judge had considerable experience performing in other cases. In another case the court appointed an "on-call" special master who was available as needed should the parties wish to informally address settlement issues without court involvement.

Another aspect of the culture within a particular district was the level of communication and collegiality between magistrate judges and district judges. Magistrate judges interviewed in phase 2 reported that, although the cases they were assigned did consume a large amount of time, their dockets did not become unmanageable. In fact, despite the increased demands on their dockets and staff, the magistrate judges reported they enjoyed the challenges of the cases, and appreciated their role as part of the district court team. All

of the magistrate judges interviewed reported that, prior to their assignment to the litigation, the assigning district judge consulted them about the workload and time commitments each case would require. The magistrate judges also reported that their fellow magistrate judges often stepped in to assist with their regular docket or that their workloads were managed through an internal reassignment of cases. Two of the judges reported that the district judges expressly gave them the option of discontinuing their work on the MDL if the matter became too burdensome. Neither of the judges surveyed stated that this had ever happened.

Judicial Perceptions of MDL Cases

The interviews conducted with district judges revealed three observations in particular to MDL cases that they considered important in the decision to use magistrate judges and special masters in MDL cases. First, nearly every MDL case is unique, and some are unique to the point of lacking any preexisting analogue in American case law. Each case has different litigants, different counsel, and differing dynamics between the two, plus, they involve claims from all parts of the country — and, in some cases, outside of it. Each case also involves different, and sometimes largely novel, legal issues, including ones in states outside of a magistrate judge's usual jurisdiction. A lack of innovation regarding magistrate judge versus special master utilization can result in the deprivation of the litigants' due-process rights through unmitigated case stagnation.[42] As a result, decisions regarding magistrate judge and special master appointments that work perfectly well in one MDL case may prove to be entirely inappropriate under the circumstances of a different case.

Second, MDL cases cannot be treated simply as larger versions of the types of complex litigation most judges are already accustomed to handling. Doing so creates the very real risk that a case will become a judicial "black hole," lasting for many years and depriving its litigants of their substantive due process rights to be heard in a timely fashion.[43] One judge noted that because of this issue, the court in the district specifically sought to appoint special masters with no previous MDL-case experience, ones without any preconceptions as to how the case should be managed.

Finally, special master appointments have become a lucrative "cottage industry" for the bar and, in the interests of equity for all involved parties, courts should carefully consider whether there is a bona fide need to appoint a special master before electing to do so. One judge interviewed was particularly surprised by the several phone calls received from special masters "offering their services" once an MDL case had been announced. On whole, judges are keenly aware of the problems inherent with special master appointments, and they suggest that courts remain vigilant in overseeing special master activities. Whenever the court appoints an unelected individual — one whose final adjudications may end up beyond the purview of traditional judicial review — to serve as a buffer between the court and litigating parties, there is the ever-present risk that this individual will simply assume the mantle of federal judicial authority with respect to the parties.

As a whole, the judges were pleased with the decisions that they made, and while some in hindsight would fine-tune various aspects of the appointments or assignments, most indicated that they would make the same decisions again.

CONCLUSION: END OF THE STORY?

As envisioned by the Act and the Rules, district courts have continued to use magistrate judges as their primary resource for managing challenging MDL dockets. Magistrate judges have evolved as a flexible corps of judicial officers capable of performing almost any function needed in the management of MDL litigation. As a result, district courts, applying the mandates of Rule 53, use magistrate judges alone more than four times as often as they use special masters alone in MDL litigation. Thus, the goal of the magistrate judge system — to provide a fair, inexpensive system of justice to the public — continues to be fulfilled.

Arguments for increased special master appointments and the expansion of the judicial authority delegated to them as result of a perceived "judicial crisis" are unwarranted. District courts have applied Rule 53 to achieve an efficient balance between competing interests of the parties in MDL cases: the cost-free oversight of a sitting magistrate judge against the expertise and perceived efficiency brought to an action by an outside special master. The statistical evidence reveals that the number of pending MDL cases has not been increasing at a rate that would require increased special master appointments.

Likewise, while large-scale discovery may have increased the courts' need for technical or scientific assistance, these issues do not necessarily mandate the increased use of the nontechnical management assistance provided by paid special masters. In many cases, there is nothing truly "special" about special masters. Instead, magistrate judges, as a judicial officer corps possessing similar legal backgrounds to special masters, are more than capable of developing the necessary expertise. As seen in nontraditional judicial functions such as ADR, the more training they receive and the longer they perform the function, the more efficient magistrate judges will likely become at performing the tasks. Thus, the tasks will take less time to complete and allow magistrate judges to take on other duties in the management of the court's regular dockets.

In recent years, the functions of

special masters may have expanded beyond the scope historically contemplated, but there does not appear to have been an unnecessary delegation of judicial authority in MDL cases. District courts seem quite aware of the potential for abuse in special master appointments. As a result, district judges typically grant narrow specific delegations of authority for the performance of the special master's duties rather than broad authority to act as "surrogate judges" in the case. In the absence of evidence of systemic excessive master appointments and few formal objections by the parties to payment of the special master fees, there should be little public concern regarding district court decisions to appoint special masters.

But this is not the end of the story. Each MDL case is unique and decisions regarding the use of magistrate judges and the appointment of special masters that work well in one case may not work well in future cases. To meet future challenges will require the district judges to continue to be innovative in their approach to the use of magistrate judges. This will not only require greater cross-pollination of case management strategies between district courts, but may also require district courts to reassess their district culture regarding the use of magistrate judges. Only then will district courts be able to confidently face the challenges of future MDL cases.

GEORGE C. HANKS has been a United States Magistrate Judge for the Southern District of Texas since 2010. He previously served as a Texas state judge on the 157th District Court and on the First Court of Appeals. This article was prepared in partial fulfillment of Duke Law School's Judicial Studies LL.M. program. An appendix containing statistical data, charts, and tables gathered for this article is posted at law.duke.edu/judicialstudies/research.

[1] *See* PHILIP M. PRO & THOMAS C. HNATOWSKI, *Measured Progress: The Evolution and Administration of the Federal Magistrate System*, 44 AM. U. L. REV. 1503, 1526 (2003) (magistrate judges are a corps of judicial officers created by Congress "to provide the federal district courts with supportive and flexible supplemental judicial resources . . . [to promote] prompt and efficient case resolution, and preserv[e] scarce Article III resources" (internal citations omitted)).

[2] ADMIN. OFFICE OF U.S. COURTS, JUDICIAL FACTS AND FIGURES 2012 TABLE 1.1: TOTAL JUDICIAL OFFICERS—COURTS OF APPEALS, DISTRICT COURTS, AND BANKRUPTCY COURTS, *available at* www.uscourts.gov.

[3] *See generally* PRO & HNATOWSKI, *supra* note 1, at 1520–22.

[4] DAVID A. BELL, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433, 434 (1997) (noting that a magistrate judge can be designated "to hear and determine any pretrial matter except for eight enumerated exceptions" (internal citations omitted)); *see also* R. LAWRENCE DESSEM, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799, 836 (1993) (setting out numerous functions and tasks that can be performed by magistrate judges under the Act).

[5] DESSEM, *supra* note 4, at 804–05.

[6] 28 U.S.C. § 636(b)(2).

[7] *See* PRO & HNATOWSKI, *supra* note 1, at 1526–28; *see also id*. at 1522 (noting "the emerging role of magistrate judges, many of whom conduct settlement conferences and preside over summary jury trials and other forms of [alternative dispute resolution]"); PETER LANTKA, *The Use of Alternative Dispute Resolution in the Federal Magistrate Judge's Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 UWLA L. REV. 71, 78 (2005).

[8] BELL, *supra* note 4, at 433 (internal citation omitted).

[9] *See, e.g.*, STATE OF NEW JERSEY REPORT OF THE SUPREME COURT COMMITTEE ON ENVIRONMENTAL LITIGATION 21 (1990) ("Members of the Committee have found that federal courts are better able to manage these complex environmental cases than our state courts, primarily because of the effectiveness of United States magistrates.").

[10] Special masters are private individuals appointed by a district court to assist in handling a case. These individuals are typically lawyers, retired judges, or legal academics. IRVING R. KAUFMAN, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 454–55 (1958). For a history of the creation and use of special masters in federal courts *see* LINDA SILBERMAN, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1390 (1975).

[11] FED R. CIV. P. 53, advisory committee's note to 2003 amendments ("The need to pay compensation is a substantial reason for care in appointing private persons as masters."); FED R. CIV. P. 53(a)(3) (courts must consider the fairness of imposing likely expenses on litigants and protect against unreasonable expense and delay when appointing a master).

[12] *See generally* FED R. CIV. P. 53, advisory committee's note to 2003 amendments.

[13] *Id.* The Comments to Rule 53 accordingly reflect the Advisory Committee's belief that, except in cases requiring the technical expertise of special master or when a magistrate judge is unavailable, "the existence of magistrates may indeed make the appointment of outside masters unnecessary in many instances." *Id.*

[14] *See* LINDA J. SILBERMAN, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2141–42 (1989) ("It is ironic that special master role, particularly in the pre-trial phase of litigation, appears to have been expanded rather than reduced by the appearance of federal magistrates."); *see also* CORREY E. STEPHENSON, *Use of Special Masters in E-Discovery Disputes on the Rise*, NEW ENG. IN-HOUSE, Mar. 31, 2008 ("The increased use of electronic discovery has resulted in a new cottage industry of sorts—e-discovery special masters."); DIONNE SEARCEY, *Judges Outsource Workloads as Cases Get More Complex*, WALL ST. J., Sept. 29, 2013.

[15] *See* Searcey, *supra* note 14 (special master rates "range roughly from $300 to $1,000 an hour, negotiated by the parties and the court").

[16] *See generally* Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 Widener L. Symp. J. 235, 273–87 (1997).

[17] One commentator has expressed this suspicion more harshly: To the extent that cases are shaped, ad hoc procedures embraced, settlements influenced and even coerced, and law articulated, special masters may represent an even greater threat to the integrity of the process because they are private individuals who are not institutionally entrusted with judicial powers. The danger of a new cottage industry, enhanced by large fees for special masters and endangered by potential cronyism and conflicts of interest, cannot be ignored when assessing the system of special masters presently in vogue. Silberman, *supra* note 14, at 2137.

[18] *See* Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, ALI-ABA Course of Study, Civ. Prac. and Litig. Techniques in Fed. and St. Cts., 1015 (Feb. 7–9, 2002) ("Because magistrates are full time [and] government paid . . . they do not present the same issues that are presented by the appointment of part time, party paid, expert masters appointed under Rule 53.").

[19] Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev. 1269, 1294 (2005).

[20] *Id.* at 1296–97 ("Despite magistrate contributions to the civil case workload, the court crisis continues."); *see also* Margaret G. Farrell, *Special Masters In The Federal Courts Under Revised Rule 53*, ALI-ABA Course of Study, Art and Science of Serving as a Special Master in Fed. and St. Cts., 13 n.43 (Nov. 2–3, 2006) (arguing that special masters are needed because "federal magistrate judges . . . have heavy caseloads, are generalists and are not skilled in mediation, have little experience in the use of informal procedures and lack substantive expertise").

[21] *See* Fellows & Haydock, *supra* note 19, at 1296–97.

[22] Between 2008 and 2014 the total number of pending MDL cases has decreased from 309 to 264.

[23] The United States District Courts and the Administrative Office of the United States Courts do not maintain statistics regarding the appointments of special masters.

[24] Searcey, *supra* note 14.

[25] Silberman, *supra* note 14, at 2158.

[26] Data was obtained from the Judicial Panel on Multidistrict Litigation (the "MDL Panel"), the Statistical Analyst at the MDL Panel, and from docket reports for each MDL case. The MDL Panel provides data from 1995 to the present day on its website. *See* Judicial Panel on Multidistrict Litigation, Statistical Information, http://www.jpml.uscourts.gov/statistics-info. Docket reports were accessed via the Case Management/Electronic Case Files ("CM-EFC") system.

[27] The rationale for excluding intellectual property cases was two-fold. First, because of their very nature, intellectual property disputes are the most likely cases to need the input from technically skilled third parties. When this characteristic combines with the complexities of multi-district litigation, the likelihood of a special master appointment increases even further. Accordingly, these cases were considered less helpful for an inquiry into special master appointments in the majority of MDL cases. Second, the Federal Judicial Center has already analyzed the frequency and role of special masters in patent cases generally. *See, e.g.*, Jay P. Kesan & Gwendolyn G. Ball, *A Study of the Role and Impact of Special Masters in Patent Cases*, Fed. Jud. Ctr. (2009), http://www.fjc.gov/library/fjc_catalog.nsf (search for authors).

[28] Interestingly, the data reflects that use of a magistrate judge or a special master did not correlate to the number of magistrate judges in the district or the overall workload of the district.

[29] Kesan & Ball, *supra* note 27, at 4–5.

[30] For MDL cases using magistrate judges, 18 of 54 dispositions were appealed, and 3 of those 18 were remanded. For MDL cases using special masters, 6 of 20 dispositions were appealed, and 2 of those 6 were remanded.

[31] MDL cases were categorized as either: Air Disaster, Antitrust, Common Disaster, Contract, Employment Practices, Miscellaneous, Products Liability, Sales Practices, or Securities.

[32] The use of a special master alone was primarily in products liability cases (6 of 11 or 54.5 percent), followed by miscellaneous cases (4 of 11 or 36.3 percent) and a single antitrust case (1 of 11 or 9.1 percent).

[33] *See* Farrell, *supra* note 16, at 239–45 (noting that the unique characteristics of toxic tort litigation make these types of cases difficult for district courts to manage); s*ee also* Carey C. Jordan, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 Hou. L. Rev. 473, 474 n.9 (1996).

[34] *See* Farrell, *supra* note 16, at 255.

[35] *Id*. at 256; Silberman, *supra* note 14, at 2134.

[36] *See* Farrell, *supra* note 16, at 256–57. For examples of this type of broad authority, *see* Silberman, *supra* note 14, at 2145–50 (discussing the AT&T Anti-Trust Litigation, the Ohio Asbestos Litigation, and the Agent Orange Litigation).

[37] None of the cases reported "exceptional" conditions as a basis for the appointment of a special master. *See* Fed. R. Civ. P. 53 (a)(1)(B).

[38] However, other factors may be at play. The difference in case duration may result from special masters being assigned in more complex or complicated cases. Similarly, the difference might result from special masters being used in cases where the parties are more intransigent or uncooperative, or where the litigants are more numerous or geographically spread out.

[39] *See* Farrell, *supra* note 16, at 274–75.

[40] *Id*. at 275.

[41] The cases for the interviews were actively selected and included cases outside of the Phase One pool of MDLs closed in 2011–2012 and are distinct from the statistical research sample. Accordingly, the interview results should not be taken as representative of the empirical research, but rather considered for their individualized insight into the decision-making process.

[42] *See, e.g.*, Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L. J. 97, 106–07 (2013).

[43] *See* Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 A.B.A. Litig. 26, 31 (2012) (so-called "black hole cases" comprise the single most prominent MDL-related complaint).