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*** CURRENT THROUGH CHANGES RECEIVED MAY, 2005 ***

FEDERAL RULES OF CIVIL PROCEDURE
VI. TRIALS

USCS Fed Rules Civ Proc R 53 (2005)

Review Court Orders which may amend this Rule.

Review expert commentary from The National Institute for Trial Advocacy

Rule 53. Masters

(a) Appointment.
(1) Unless a statute provides otherwise, a court may appoint a master only to:
(A) perform duties consented to by the parties;
(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
(i) some exceptional condition, or
(ii) the need to perform an accounting or resolve a difficult computation of damages; or
(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.
(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.
(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master.
(1) *Notice.* The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.
(2) *Contents.* The order appointing a master must direct the master to proceed with all reasonable diligence and must state:
(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
(B) the circumstances—if any—in which the master may communicate ex parte with the court or a party;
(C) the nature of the materials to be preserved and filed as the record of the master's activities;
(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).
(3) *Entry of Order.* The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.
(4) *Amendment.* The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all

proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.
(1) *Action.* In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.
(2) *Time To Object or Move.* A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.
(3) *Fact Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:
(A) the master's findings will be reviewed for clear error, or
(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.
(4) *Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.
(5) *Procedural Matters.* Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation.
(1) *Fixing Compensation.* The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.
(2) *Payment.* The compensation fixed under Rule 53(h)(1) must be paid either:
(A) by a party or parties; or
(B) from a fund or subject matter of the action within the court's control.
(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.

(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

HISTORY:
(Amended July 1, 1966; Aug. 1, 1983; Aug. 1, 1987.)
(As amended Dec. 1, 1991; Dec. 1, 1993; Dec. 1, 2003.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:
Notes of Advisory Committee on Rules. Note to Subdivision (a). This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).
Note to Subdivision (b). This is substantially the first sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See Ex parte Peterson, 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Note to Subdivision (c). This is former Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Note to Subdivision (d). (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

Note to Subdivision (e). This contains the substance of former Equity Rules 61 (Master's Report—Documents Identified but not Set Forth), 61 1/2 (Master's Report—Presumption as to Correctness—Review), and 66 (Return of Master's Report—Exceptions—Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See Camden v Stuart, 144 US 104, 12 S Ct 585, 36 L Ed 363 (1892); Ex parte Peterson, 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Notes of Advisory Committee on 1966 amendments. These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

Notes of Advisory Committee on 1983 amendments. Subdivision (a). The creation of full–time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with 28 U.S.C. § 636(b)(2), authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., Gautreaux v. Chicago Housing Authority, 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied sub nom., Chicago Housing Authority v. Austin, 511 F.2d 82 (7th Cir. 1975); Avco Corp. v. American Tel. & Tel. Co., 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

Subdivision (b). The provisions of 28 U.S.C. § 636(b)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when private masters who are not magistrates are appointed with the consent of the parties. See Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

Subdivision (c). The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

Subdivision (f). The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under 28 U.S.C. § 636(b)(1)(A) and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1991 amendment. The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

Notes of Advisory Committee on 1993 amendments. This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Notes of Advisory Committee on 2003 amendments. Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post–trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, Special Masters' Incidence and Activity (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

Subdivision (a)(1)

District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or posttrial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 [1 L. Ed. 2d 290] (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post–trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post–trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an

evidentiary hearing.

Pretrial and Post–Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post–trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or posttrial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e–5(f)(5).

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial–master provisions of subdivision (a)(1)(B).

Post–Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post–trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481–482 [92 L. Ed. 2d 344, 391–392] (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court–appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2), and (3)

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances — and with the judge's own determination that there is no troubling conflict

of interests or disquieting appearance of impropriety — consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney–master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non–appearance condition on the lawyer master, and perhaps on the master's firm as well.

Subdivision (b)

The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off–the–record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence–based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, and recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize

the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Subdivision (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

Subdivision (d)

The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e)

Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f)

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access — a report on continuing or failed settlement efforts is the most likely example. A post–trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

Subdivision (g)

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. 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.

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of — a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10–day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or – with respect to a master appointed on the parties' consent or appointed to address pretrial or post–trial matters — that the findings will be final. Clear–error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear–error review; or to withdraw its consent to a stipulation for clear–error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear–error review, it may or reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

Subdivision (h)

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.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

Subdivision (i)

Rule 53(i) carries forward unchanged former Rule 53(f).

NOTES:

Related Statutes & Rules:

Fees of United States magistrates for attending to any reference, 28 USCS § 633.

Clerks of courts being ineligible to appointment as masters, 28 USCS § 957.

Appointment of master by single judge in three–judge court, 28 USCS § 2284.

Pretrial determination as to preliminary reference, USCS Rules of Civil Procedure, Rule 16.

Adoption of master's findings by court, USCS Rules of Civil Procedure, Rule 52(a).

Judgment not being required to recite report, USCS Rules of Civil Procedure, Rule 54(a).

Reference to masters to determine amount of damages in default judgments, USCS Rules of Civil Procedure, Rule 55(b)(2).

Research Guide:

Federal Procedure:

1 Moore's Federal Practice (Matthew Bender 3d ed.), Scope and Purpose of Rules § 1.20.

1 Moore's Federal Practice (Matthew Bender 3d ed.), Time § 6.04.

3 Moore's Federal Practice (Matthew Bender 3d ed.), Pretrial Conferences; Scheduling; Management § 16.04.

8 Moore's Federal Practice (Matthew Bender 3d ed.), Jury Trial of Right §§ 38.12, 38.42.
9 Moore's Federal Practice (Matthew Bender 3d ed.), Subpoena § 45.03.
9 Moore's Federal Practice (Matthew Bender 3d ed.), Findings by Court; Judgment on Partial Findings §§ 52.13, 52.31.
9 Moore's Federal Practice (Matthew Bender 3d ed.), Masters §§ 53.02–53.05, 53.10–53.13, 53.16, 53.17, 53.32, 53.40, 53.60, 53.90, 53.92.
10 Moore's Federal Practice (Matthew Bender 3d ed.), Judgments; Costs § 54.102.
13 Moore's Federal Practice (Matthew Bender 3d ed.), Receivers Appointed by Federal Courts § 66.03.
13 Moore's Federal Practice (Matthew Bender 3d ed.), Condemnation of Property §§ 71A.04, 71A.12.
14 Moore's Federal Practice (Matthew Bender 3d ed.), Magistrate Judges; Pretrial Orders § 72.02.
15 Moore's Federal Practice (Matthew Bender 3d ed.), The Structure of the Federal Judicial System § 100.45.
22 Moore's Federal Practice (Matthew Bender 3d ed.), Original Jurisdiction of Supreme Court § 402.05.
23 Moore's Federal Practice (Matthew Bender 3d ed.), Procedure in an Original Action § 517.04.
28 Moore's Federal Practice (Matthew Bender 3d ed.), Petty Offenses and Other Misdemeanors § 658.01.
3 Federal Rules of Evidence Manual (Matthew Bender) § 706.02.
5 Fed Proc L Ed, Bankruptcy §§ 9:16, 162.
5B Fed Proc L Ed, Bankruptcy § 9:1840.
5B Fed Proc L Ed, Bonds, Civil Fines, and Forfeitures §§ 10:94, 261.
6 Fed Proc L Ed, Civil Rights §§ 11:172, 225, 987.
6A Fed Proc L Ed, Class Actions § 12:328.
7 Fed Proc L Ed, Condemnation of Property §§ 14:69, 77, 283.
8 Fed Proc L Ed, Courts and Judicial System §§ 20:14, 182.
10 Fed Proc L Ed, Derivative Actions by Shareholders § 25:7.
10 Fed Proc L Ed, Discovery and Depositions §§ 26:12, 140, 177.
10A Fed Proc L Ed, Elections and Elective Franchise § 28:78.
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21A Fed Proc L Ed, Judgments and Orders § 51:126.
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28 Fed Proc L Ed, Pretrial Procedure §§ 64:57, 58.
28 Fed Proc L Ed, Process § 65:293.
29 Fed Proc L Ed, References, Referees, and Masters §§ 68:1–98.
32 Fed Proc L Ed, Trademarks § 74:494.
33A Fed Proc L Ed, Trial § 77:333.
33A Fed Proc L Ed, Witnesses § 80:265.

Am Jur:
1 Am Jur 2d, Accounts and Accounting § 57.
2 Am Jur 2d, Admiralty § 212.
9 Am Jur 2d, Bankruptcy §§ 23, 188.
9E Am Jur 2d, Bankruptcy § 3520.
19 Am Jur 2d, Corporations § 2139.
20 Am Jur 2d, Costs § 62.
27 Am Jur 2d, Eminent Domain §§ 564, 570, 573.
27A Am Jur 2d, Equity §§ 226 – 229, 231, 232.
32 Am Jur 2d, Federal Courts § 178.
45C Am Jur 2d, Job Discrimination §§ 2368, 2636.
54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 614.
60 Am Jur 2d, Patents § 930.
66 Am Jur 2d, References §§ 4, 8, 13, 19, 27, 31, 36, 37, 39 – 41, 43 – 45, 51, 53, 57 – 59.

Am Jur Trials:
21 Am Jur Trials, Preparation and Trial of Federal Class Actions, p. 625.

56 Am Jur Trials, A Guide to the Federal Rules of Civil Procedure, p. 293.

Am Jur Proof of Facts:
13 Am Jur Proof of Facts 2d, Client's Ratification of Stipulation Made By Counsel, p. 505.

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9 Bender's Federal Practice Forms, Federal Rules of Civil Procedure, Forms 53:1 et seq.
11 Bender's Federal Practice Forms, Federal Rules of Civil Procedure, Form 71A:85.
13 Bender's Federal Practice Forms, Admiralty, Form Adm:6.
18 Bender's Federal Practice Forms, Federal Rules of Appellate Procedure, Forms AR21:3, AR21:21.
5A Fed Procedural Forms L Ed, Condemnation of Property (2000) § 13:133.
6A Fed Procedural Forms L Ed, Contempt (2003) § 16:44.
14 Fed Procedural Forms L Ed, References, Referees, and Masters (2004) §§ 57:14–25, 27, 28, 34, 35, 41–49, 54, 55.
9A Am Jur Pl & Pr Forms (2005), Eminent Domain, § 155.
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Validity and effect of local District Court rules providing for use of alternative dispute resolution procedures as pretrial settlement mechanisms. 86 ALR Fed 211.
Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference. 71 ALR4th 889.
Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor. 70 ALR3d 1079.
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Interpretive Notes and Decisions:

I. IN GENERAL 1. Generally

A master is appointed only to help the court in a case where the help is needed; his appointment and activities are only for the purpose of assisting the court to get at the facts and arrive at a correct decision in a complicated piece of litigation pending before the court. Webster Eisenlohr, Inc. v Kalodner (1944, CA3 Pa) 145 F2d 316, cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404.

Service as master may involve all incidents of nonjury trial, including reception of documentary evidence and taking of testimony where credibility based on demeanor of witnesses may be important; master may also rule on admissibility of evidence and make findings of facts and conclusions of law. Yascavage v Weinberger (1974, MD Pa) 379 F Supp 1297.

Fed. R. Civ. P. 53 grants special masters same autonomy and discretionary authority they enjoyed in equity. Cobell v Norton (2004, DC Dist Col) 310 F Supp 2d 102.

2. Applicability

Rule 53 applies to proceedings in the court of appeals to enforce order of National Labor Relations Board. Polish Nat. Alliance v NLRB (1946, CA7) 159 F2d 38, 19 BNA LRRM 2055, 11 CCH LC P 63420.

Although Rule 53 governs proceedings before masters, it should also apply to proceedings before the court preliminary to reference to a master in order to eliminate legal questions and limit the issues before the master. Activated Sludge, Inc. v Sanitary District of Chicago (1942, ND Ill) 56 USPQ 260.

3. Constitutionality

Reference to Special Master does not violate Article III where, inter alia, authority of Special Master has been

explicitly defined and limited, District Court has power to terminate his authority, parties have opportunity to object, respond, or comment on any recommendation filed by Master, District Court is required to review all recommendations filed by Master and to adopt, modify, or reject any recommendation, and Master's recommended conclusions of law are subject to rigorous standard of review, as are his conclusions of mixed fact and law. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

4. Relation to other rules

In absence of clear intent to have Rule 53 control, court must presume that party's intent is to follow practice set forth in local rules; however, where local rule is silent, court must find Rule 53 valuable source of instruction. Oliver v Allison (1980, DC Dist Col) 488 F Supp 885, 23 BNA FEP Cas 417.

Scope of reference pursuant to FRCP 53 may include report and recommendation on motion for summary judgment. Union Carbide Corp. v Montell N.V. (1998, SD NY) 179 FRD 425.

5. Appointment

Two defendants waived their right to object to appointment of special master by not objecting until after special master's second report was filed; it is well–settled that objection to appointment and use of special master may be waived if not made in timely fashion and party may not wait to see whether it likes master's findings before challenging use of master. Regents of the Univ. of N.M. v Knight (2003, CA FC) 321 F3d 1111, 66 USPQ2d 1001, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 8846 and reh den, reh, en banc, den (2003, CA FC) 2003 US App LEXIS 8847 and reh den (2003, CA FC) 2003 US App LEXIS 8870 and reh den (2003, CA FC) 2003 US App LEXIS 8871.

The power of the trial court to appoint a special master is inherent, Rule 53 merely serving to outline the procedure to be followed when the power is exercised. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

Under Rule 53, courts have inherent authority to appoint master who is nonjudicial officer to aid in carrying out their judicial functions. Powell v Ward (1980, SD NY) 487 F Supp 917, mod on other grounds (CA2 NY) 643 F2d 924, cert den 454 US 832, 70 L Ed 2d 111, 102 S Ct 131.

6. Death

Where evidence was controverted and master died before making findings and report, it was duty of District Court to direct trial de novo before another master or before itself in order to afford parties "hearing" within recognized legal meaning of that word. Smith v Dental Products Co. (1948, CA7 Ill) 168 F2d 516, 78 USPQ 117.

When master whose order of reference calls for findings of fact and conclusions of law dies or is disqualified before rendering factual findings, new trial must be granted if case involves disputed questions of fact dependent upon credibility determinations. Henry A. Knott Co., Div. of Knott Industries, Inc. v Chesapeake & Potomac Tel. Co. (1985, CA4 W Va) 772 F2d 78, 3 FR Serv 3d 945.

Upon death of master, District Court may properly order successor master to file report based upon existing record, and report is properly given same effect as report of master before whom proceedings took place, since report of master is advisory only and is without effect until confirmed by court, and it is consequently unnecessary to have master who makes findings hear testimony and take evidence. D. M. W. Contracting Co. v Stolz (1946) 81 App DC 334, 158 F2d 405, cert den 330 US 839, 91 L Ed 1286, 67 S Ct 980 and (disagreed with Henry A. Knott Co., Div. of Knott Industries, Inc. v Chesapeake & Potomac Tel. Co. (CA4 W Va) 772 F2d 78, 3 FR Serv 3d 945).

II. References

A. In General 7. Generally

The use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the courts. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

References in law cases are to be used very sparingly, in view of the possible hardships they may create. Graffis v Woodward (1938, CA7 Ill) 96 F2d 329, cert den 305 US 631, 83 L Ed 404, 59 S Ct 95.

The evils of delay and added expense are both inherent in references. Re Irving–Austin Bldg. Corp. (1938, CA7 Ill)

100 F2d 574.

Reference may not be obtained by a party as a matter of right. Helfer v Corona Products, Inc. (1942, CA8 Ark) 127 F2d 612; Ira S. Bushey & Sons, Inc. v W. E. Hedger Transp. Corp. (1948, CA2 NY) 167 F2d 9, cert den 335 US 816, 93 L Ed 371, 69 S Ct 36.

An especially important ground for strictly limiting the use of references lies in the fact that litigants normally prefer, and are entitled to, the decision of the judge or the court before whom the suit is brought, and greater confidence in the outcome of the contest and more respect for the judgment of the court may normally be expected when the trial is by the judge. Adventures in Good Eating, Inc. v Best Places to Eat, Inc. (1942, CA7 Ill) 131 F2d 809, 56 USPQ 242; United States v Kirkpatrick (1951, CA3) 186 F2d 393.

The delay and postponement of judicial consideration which is involved in a reference is another of the reasons why references should be the exception and not the rule. Helene Curtis Industries, Inc. v Sales Affiliates, Inc. (1952, CA2 NY) 199 F2d 732, 95 USPQ 172.

District Court has the right in an intricate subject of suit to engage an advisor to attend the trial and assist the court in its comprehension of the case, but when there is a merger of master and advisor the result may have a hybrid status. Bullard Co. v General Electric Co. (1965, CA4 Va) 348 F2d 985, 146 USPQ 141, 9 FR Serv 2d 53d.13, Case 1.

Every reference to a master, no matter what the litigation incident involved may be, and regardless of what may be the form or scope of the task sought to be referred, is within the application of the rule. Arthur Murray, Inc. v Oliver (1966, CA8 Mo) 364 F2d 28, 1966 CCH Trade Cases P 71846, 10 FR Serv 2d 1270, 1 ALR Fed 909, on remand (WD Mo) 262 F Supp 565, 1967 CCH Trade Cases P 72050, vacated on other grounds (CA8 Mo) 406 F2d 1138, 1969 CCH Trade Cases P 72700, on remand (WD Mo) 301 F Supp 621, 1969 CCH Trade Cases P 72946.

Special master appointed by court in bankruptcy proceedings to conduct hearing and receive bids for sale of bankrupt's property is an officer of the court. American Secur. & Trust Co. v Fletcher (1974, CA4 Va) 490 F2d 481, cert den 419 US 900, 42 L Ed 2d 146, 95 S Ct 184.

8. Court's discretion

Reference to an auditor in action on veteran's insurance policy was within discretion of trial court. Coyner v United States (1939, CA7 Ill) 103 F2d 629.

Whether in a given case a reference should be ordered is a matter primarily within the discretion of the district judge. Re Hotel Governor Clinton, Inc. (1939, CA2 NY) 107 F2d 398; Miller v Weiant (1942, DC Ohio) 42 F Supp 760; Buckley v Altheimer (1945, CA7 Ill) 152 F2d 502; Phelan v Middle States Oil Corp. (1946, CA2 NY) 156 F2d 697; Fraver v Studebaker Corp. (1950, DC Pa) 11 FRD 94, 87 USPQ 398; Troyak v Enos (1953, CA7 Ind) 204 F2d 536; Modern Art Printing Co. v Skeels (1954, DC NJ) 123 F Supp 426, 102 USPQ 286, revd on other grounds (CA3 NJ) 223 F2d 719, 106 USPQ 8.

The existence of exceptional circumstances warranting reference [absent parties' consent] is a matter for the trial court to determine in the exercise of a sound discretion. Bair v Bank of America Nat. Trust & Sav. Assn. (1940, CA9 Mont) 112 F2d 247, cert den 311 US 684, 85 L Ed 441, 61 S Ct 61; Howes Leather Co. v La Buy (1955, CA7) 226 F2d 703, affd 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

The reference power accorded the Federal District Courts by Rule 53(b) is a discretionary power which the courts may exercise sua sponte. Re Joslyn's Estate (1948, CA7 Ill) 171 F2d 159.

A trial court's determination of the propriety of exercise of its reference power in a particular case is subject to judicial review. United States v Theimer (1952, CA10 Okla) 199 F2d 501.

While reference should be the exception and not the rule in judicial administration, the court may, in its discretion, make appointment of a master to assist in any of the incidents of a proceeding before it, whether civil or criminal, so long as there is no infringement upon the right of trial by jury or any prejudice to other substantive right. Schwimmer v United States (1956, CA8 Mo) 232 F2d 855, 56–2 USTC P 9711, 50 AFTR 644, cert den 352 US 833, 1 L Ed 2d 52, 77 S Ct 48.

Even if the order of reference was improvidently or improperly granted, that alone would not entitle the plaintiff to a reversal or affect the review of the case by the Court of Appeals. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

Mere error in the application of the standard set forth in Rule 53(b) with respect to reference to a master would not justify the intervention of mandamus. Re Watkins (1959, CA5 Miss) 271 F2d 771, 2 FR Serv 2d 773, 76 ALR2d 1113.

The appointment of a master is a matter of discretion. American Cyanamid Corp. v Ellis–Foster Co. (1962, CA3 NJ) 298 F2d 244, 132 USPQ 302.

Since the trial court possesses the power to enter an order of reference, inquiry of Court of Appeals centers solely upon question whether trial court had abused its discretion in ordering reference. Macri v United States (1965, CA9 Alaska) 353 F2d 804, 9 FR Serv 2d 53b.121, Case 2.

A trial judge must exercise discretion in the determination of an exceptional circumstance warranting appointment of a master [absent parties' consent], and such discretion is reviewable by the Court of Appeals. Wilver v Fisher (1967, CA10 Okla) 387 F2d 66, 11 FR Serv 2d 1183.

Rule 53(b) does not mandate that no reference may be made whatsoever, a degree of discretion being exercisable under it, and whether there was proper exercise in any case is dependent not only on facts but also on change of circumstances that has been wrought by passage of Federal Magistrates Act of 1968, 28 USCS §§ 631–639. Civil Aeronautics Bd. v Carefree Travel, Inc. (1975, CA2 NY) 513 F2d 375, 19 FR Serv 2d 1529.

Whatever broad powers may be available to United States Magistrates under Federal Magistrates Act, 28 USCS §§ 631 et seq., reference of case to magistrate designated as "special master" must be in compliance with Rule 53. Piper v Hauck (1976, CA5 Tex) 532 F2d 1016, 22 FR Serv 2d 154.

Special master had right to appeal district court's orders disqualifying special master for serious misconduct during post–judgment proceedings and ordering disgorgement of compensation already paid where special master was bound to district court's order setting compensation, but appellate court lacked jurisdiction to consider appeal because district court's orders were not final judgments nor did they fit within narrow collateral order exception. Cordoza v Pac. States Steel Corp. (2003, CA9 Cal) 320 F3d 989, 2003 CDOS 1473.

Appellate court denied special master writ of mandamus under 28 USCS § 455(b)(1) where district court's evaluation of special master's conduct and subsequent disqualification was part and parcel of judge's supervisory role over special master under Fed. R. Civ. P. 53. Cordoza v Pac. States Steel Corp. (2003, CA9 Cal) 320 F3d 989, 2003 CDOS 1473.

9. Propriety, generally

A Federal District Court's power with respect to references is abused where the reference amounts to little less than an abdication of the judicial function, depriving the parties of a trial before the court on the basic issues involved in the litigation. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

References to masters should seldom be made and if at all, only when unusual circumstances exist. Re Irving–Austin Bldg. Corp. (1938, CA7 Ill) 100 F2d 574.

It is far better practice, except where stress of work or other good cause is shown, for the court to try cases where the determination of the issues is dependent upon the credibility of witnesses. Coyner v United States (1939, CA7 Ill) 103 F2d 629.

The words "exception" and "exceptional" as used in Rule 53(b) are not elastic terms with the trial court as the sole judge of their elasticity. Adventures in Good Eating, Inc. v Best Places to Eat, Inc. (1942, CA7 Ill) 131 F2d 809, 56 USPQ 242.

A master is appointed only to help the court in a case where the help is needed. Webster Eisenlohr, Inc. v Kalodner (1944, CA3 Pa) 145 F2d 316, cert den 325 US 867, L Ed 1986, 65 S Ct 1404.

While a court of equity may refer issues or the entire suit to a special master, it is far better practice for the court to hear and determine the fact issues decisive of the right to a money decree before ordering a reference. Buckley v Altheimer (1945, CA7 Ill) 152 F2d 502.

References are "frowned upon," and doubts as to the propriety of a reference will ordinarily be resolved against the reference. Ira S. Bushey & Sons v W. E. Hedger Transp. Corp. (1948, CA2 NY) 167 F2d 9, cert den 335 US 816, 93 L Ed 371, 69 S Ct 36.

Before a reference can be made under Rule 53(b), exceptional and extraordinary circumstances must be present, or it must appear that the facts make it expedient or necessary in the interest of justice that a reference be made. United States v Theimer (1952, CA10 Okla) 199 F2d 501.

Reference should be the exception and not the rule in judicial administration. Schwimmer v United States (1956, CA8 Mo) 232 F2d 855, 56-2 USTC P 9711, 50 AFTR 644, cert den 352 US 833, 1 L Ed 2d 52, 77 S Ct 48; Bartlett-Collins Co. v Surinam Navigation Co. (1967, CA10 Okla) 381 F2d 546, 10 FR Serv 2d 1277; Bradshaw v Thompson (1972, CA6 Tenn) 454 F2d 75, 15 FR Serv 2d 1438, 10 UCCRS 641, cert den 409 US 878, 34 L Ed 2d 131, 93 S Ct 130.

Where the nature of the case is such that the constant supervision of the taking of depositions is desirable, an exceptional condition exists which justifies the appointment of a master under Rule 53(b). First Iowa Hydro Electric Cooperative v Iowa—Illinois Gas & Electric Co. (1957, CA8 Iowa) 245 F2d 613, cert den 355 US 871, 2 L Ed 2d 76, 78 S Ct 122, reh den 355 US 921, 2 L Ed 2d 281, 78 S Ct 339; MacAlister v Guterma (1958, CA2 NY) 263 F2d 65, 1 FR Serv 2d 681.

References to masters, although provided for by federal rules, should be very sparingly used by district judges. New York, S. & W. R. Co. v Follmer (1958, CA3 Pa) 254 F2d 510.

The Court of Appeals disapproves of unnecessary references. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

Delay on part of defendants, the variety, number and complicated nature of the problems, the issues involved and the best interests of justice do not amount to an exceptional circumstance warranting the appointment of a master. Wilver v Fisher (1967, CA10 Okla) 387 F2d 66, 11 FR Serv 2d 1183.

Since service as special master is one of duties specifically authorized for United States magistrates under 28 USCS § 636(b)(1), it is necessary to consider both Rule 53 and Federal Magistrates Act of 1968, 28 USCS § 631 et seq., and their history, to determine whether reference in particular case is proper. Civil Aeronautics Bd. v Carefree Travel, Inc. (1975, CA2 NY) 513 F2d 375, 19 FR Serv 2d 1529.

While Rule 53(b) provides that reference to master shall be exception and not rule, this limitation does not emanate from constitutional construction but is intended to protect litigants, and cornerstone of rule being avoidance of delay, cost, and factfinder other than judge, parties for whose benefit restrictions are imposed may waive their objections to reference. Cruz v Hauck (1975, CA5 Tex) 515 F2d 322, 20 FR Serv 2d 912, cert den 424 US 917, 47 L Ed 2d 322, 96 S Ct 1118 and later app (CA5 Tex) 627 F2d 710, 30 FR Serv 2d 494.

Referring fundamental issues of liability to master for adjudication, over objection, is impermissible. Stauble v Warrob, Inc. (1992, CA1 Mass) 977 F2d 690, 24 FR Serv 3d 28.

The use of masters should be discountenanced except in cases of emergency and when the request comes from litigants. Joyce, Inc. v Fern Shoe Co. (1940, DC Cal) 32 F Supp 401, 45 USPQ 243, remanded on other grounds (CA9 Cal) 116 F2d 498, 47 USPQ 532.

Before a reference will be made there must be some evidence to show the necessity for it. Pollack v Carlye Dress Corp. (1948, DC Mo) 76 F Supp 755.

A showing of exceptional circumstances is required before a special master may be appointed. Fisher v Harris, Upham & Co. (1973, DC NY) 61 FRD 447, dismd without op (CA2 NY) 516 F2d 896.

Just as characteristics of one class of federal cases will almost always make reference to master unsuitable, characteristics of another class may make it "exceptional" within meaning of Rule 53 and therefore almost always appropriate for reference. Mullinax v Willett Lincoln—Mercury, Inc. (1974, ND Ga) 381 F Supp 422, 19 FR Serv 2d 183.

Reference of cases to master does not have to be on case-by-case basis, and reference of entire "class" of cases as a class is not inherently impermissible; neither Rule 53 nor cases spell out any such distinction. Mullinax v Willett Lincoln—Mercury, Inc. (1974, ND Ga) 381 F Supp 422, 19 FR Serv 2d 183.

Number of parties involved and nature and volume of evidence to be presented are relevant to determination of whether exceptional circumstances exist within meaning of Rule 53. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

10.—Accounting problems

Even in suits for accounting, no reference will be made until there has been sufficient evidence showing the necessity for an accounting. Buckley v Altheimer (1945, CA7 Ill) 152 F2d 502.

Reference to master is within discretion of District Court, and such discretion is particularly broad where difficult accounting problems are involved. Southern Agency Co. v La Salle Casualty Co. (1968, CA8 Mo) 393 F2d 907, 12 FR Serv 2d 1102.

Mere fact that accounting may be necessary is not enough to justify a reference; it must appear that the matter is complex and would take an undue amount of the court's time. Hanover Ins. Co. v Emmaus Municipal Authority (1965, ED Pa) 38 FRD 470. 9 FR Serv 2d 15a.21, Case 4, 9 FR Serv 2d 53b.121, Case 3.

Action for accounting by mobile home sales partnership against mobile home retail sales corporation was within court's equity jurisdiction and relationship of parties and complication of issues made case properly referable to a master. Dunkin v Froehde Mobile Homes, Inc. (1966, DC SC) 260 F Supp 226.

District Court has broad discretion to appoint master where accounting problems are involved. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

11.—Complex litigation

Presence of complex issues does not constitute exceptional conditions under Rule 53(b) warranting appointment of a master, but, rather, makes the case specially suited for trial by an experienced judge. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553; Bartlett–Collins Co. v Surinam Navigation Co. (1967, CA10 Okla) 381 F2d 546, 10 FR Serv 2d 1277; Bradshaw v Thompson (1972, CA6 Tenn) 454 F2d 75, 15 FR Serv 2d 1438, 10 UCCRS 641, cert den 409 US 878, 34 L Ed 2d 131, 93 S Ct 130; Brosious v Pepsi–Cola Co. (1943, DC Pa) 3 FRD 335.

Appointment of masters under Rule 53(b) to assist juries in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone should seldom be made, and if at all only when unusual circumstances exist. Dairy Queen, Inc. v Wood (1962) 369 US 469, 8 L Ed 2d 44, 82 S Ct 894, 133 USPQ 294, 5 FR Serv 2d 632.

Use of reference is not limited to cases involving an accounting and complicated items of arithmetical computation; whenever the trial judge finds that issues are very complex, or evidence, documentary or otherwise, very voluminous, he may, in his discretion, order a hearing by an auditor for the purpose of simplifying the issues of fact for presentation to the jury. Graffis v Woodward (1938, CA7 Ill) 96 F2d 329, cert den 305 US 631, 83 L Ed 404, 59 S Ct 95.

Whether a reference to a master should be directed is largely within the discretion of the court and is proper only when the issues are complicated. Barnard–Curtiss Co. v Maehl (1941, CA9 Mont) 117 F2d 7.

In class action concerning constitutional rights of mentally retarded patients in public psychiatric hospitals, appointment of special master was not abuse of discretion, since class was large and each class member required individualized consideration. Thomas S. v Flaherty (1990, CA4 NC) 902 F2d 250, 16 FR Serv 3d 851.

In jury case where legal issues as to defendant's liability had been determined in rulings on motions and in which facts were complicated and involved many separate transactions over a considerable period, reference to master was proper in order to insure that issues would not be lost to jury by maze of documents and in order that the case might be justly, speedily, and inexpensively disposed of. United States v Wilson (1957, DC Tex) 21 FRD 173.

Whenever the court is of the opinion that extremely large numbers of intervenors exist, and most will have new questions of law or fact, this is a special condition warranting the appointment of a special master under Rule 53. Foster v Detroit (1966, ED Mich) 254 F Supp 655, 10 FR Serv 2d 610, affd (CA6 Mich) 405 F2d 138, 12 FR Serv 2d 372, motion den (CA6 Mich) 423 F2d 660.

Multiplication of simple issue does not create complex one to justify reference to master. Veizaga v National Bd. for Respiratory Therapy (1979, ND Ill) 27 FR Serv 2d 426.

12.—Congested calendar

Facts that court calendar was congested and that there was no other judge available to try the case within a reasonable time did not warrant reference of case to master for trial. McCullough v Cosgrave (1940) 309 US 634, 84 L Ed 992, 60 S

Ct 703, 45 USPQ 1.

A congested trial calendar is not, in itself, such an exceptional circumstance as to warrant the District Court in referring litigation for trial before a master. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

Federal District Court is not empowered to make a general compulsory reference of all the issues in a group of admiralty cases merely to relieve a congested docket and not because the cases themselves present exceptional circumstances which make reference of them necessary for the purpose of justice. United States v Kirkpatrick (1951, CA3 Pa) 186 F2d 393.

Congestion of court calendar caused by sudden death of judge, who was trying patent infringement case and was at time of his death carrying one–third of case load, constituted exceptional condition under Rule 53(b), warranting reference to master. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

Crowded court calendar is not valid reason for reference to master in case involving Social Security disability benefits, since applicant is entitled to judicial review. Ingram v Richardson (1972, CA6 Ky) 471 F2d 1268, 17 FR Serv 2d 177.

Increasing docket and shortage of "judge–power" do not constitute exceptional conditions warranting reference to special master. McCormick v Western Ky. Navigation, Inc. (1993, CA6 Ky) 993 F2d 568, 26 FR Serv 3d 27.

The court may not refer a nonjury case to a master on the ground that the issues are complex and the court calendar is congested; neither may a case be referred as a matter of account merely because an accounting may be necessary if defendants are found liable. United States v Wilson (1957, DC Tex) 21 FRD 173.

Joint appointment of master and referee to handle settlement of several hundred asbestos injury cases pending in federal and state courts would be ordered to clear court dockets to make room for increases in drug cases. Re Joint Eastern & Southern Dist. Asbestos Litigation (1990, ED NY) 129 FRD 434.

13.—Discovery supervision

Order of reference appointing master to supervise the answers to interrogatories was unjustified as bordering on an abdication of judicial function. Wilver v Fisher (1967, CA10 Okla) 387 F2d 66, 11 FR Serv 2d 1183.

A special master to whom an action was referred for the taking of evidence was directed to consider objections to interrogatories which have been filed and to make a special report as to what information sought by interrogatories has already been presented in evidence, what interrogatories need not be answered for lack of relevancy, and to submit recommendations concerning the objections to the remaining interrogatories. Waldo Theatre Corp. v Dondis (1941, DC Me) 1 FRD 591.

Where certain of defendants objected to plaintiff's interrogatories on the ground that the obtaining of the answers thereto would impose a tremendous burden and expense upon defendants, it would be appropriate to appoint a master to ascertain the extent of the burden and expense to be placed upon defendants, since the court lacked the time and facilities to do so. Tivoli Realty, Inc. v Paramount Pictures, Inc. (1950, DC Del) 10 FRD 201.

Conduct of the parties prior to appointment of special master demonstrating that they were unable to proceed with discovery without impartial supervision constituted exceptional circumstances warranting appointment of special master. Fisher v Harris, Upham & Co. (1973, DC NY) 61 FRD 447, dismd without op (CA2 NY) 516 F2d 896.

Defendant's egregiously sanctionable conduct during course of discovery presented clear case of exceptional circumstances contemplated by Rule 53 as justifying appointment of special master to supervise discovery, where defendant's discovery abuses included destruction of documents, incorrect or false responses to discovery requests, and failure to divulge information and produce documents. National Asso. of Radiation Survivors v Turnage (1987, ND Cal) 115 FRD 543.

Appointment of special master to oversee discovery was warranted under Fed. R. Civ. P. 53(a) and that special master should be neutral technology or computer expert because there was approximately 996 network backup tapes, containing, among other things, electronic mail, plus estimated 300 gigabytes of other electronic data to be reviewed. Medtronic Sofamor Danek, Inc. v Michelson (2003, WD Tenn) 56 FR Serv 3d 1159.

Special master, appointed by court under Fed. R. Civ. P. 53, in case to reform defendant Secretary of Department of Interior's accounting of Indian trust funds, had authority to determine when deposition should be terminated under Fed. R. Civ. P. 30(d)(4) and to file recommendation that court issue order to show cause requiring defense counsel to explain why counsel's conduct should not be referred to Disciplinary Panel for review and appropriate action under D.C. Rules of Prof'l Conduct R. 8.4(d), or why counsel's conduct did not warrant sanctions under Fed. R. Civ. P. 30(d)(3), 37(a)(4)(A). Cobell v Norton (2003, DC Dist Col) 213 FRD 48.

14.—Lengthy trial

The great length of time which the trial of a particular case will require is not such an exceptional circumstance as to warrant a Federal District Court in referring the case for trial before a master. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

Although reference to master is to be made only upon showing of some exceptional condition, where hearing could take several weeks and direct observation of the place in dispute appears necessary, reference to master seems particularly appropriate. EEOC v International Union of Operating Engineers (1975, ND Cal) 416 F Supp 728, 20 BNA FEP Cas 1031.

15.—Distant witnesses

The necessity of examining numerous persons in various places constitutes an exceptional condition authorizing a reference under Rule 53(b). Bair v Bank of America Nat. Trust & Sav. Assn. (1940, CA9 Mont) 112 F2d 247, cert den 311 US 684, 85 L Ed 441, 61 S Ct 61; Troyak v Enos (1953, CA7 Ind) 204 F2d 536.

Where, after a return showing a judgment in plaintiff's favor unsatisfied, plaintiff applied for an order requiring defendant to appear and answer concerning his property, action of trial court, in response to such application, in appointing a referee to conduct supplemental proceedings, was not an abuse of discretion, since reference was proper where numerous persons were to be examined at various places in proceedings supplementary to execution. Bair v Bank of America Nat. Trust & Sav. Assn. (1940, CA9 Mont) 112 F2d 247, cert den 311 US 684, 85 L Ed 441, 61 S Ct 61.

Where issues of fact were closely drawn, it was desirable that the finder of facts see and hear the witnesses in person rather than by transcribed deposition, and that since the witnesses were available in Indianapolis, Cleveland, and Florida, and the case was broad and complex, containing 300 exhibits and requiring the taking of 6 days of parol evidence, exceptional conditions under Rule 53(b) existed which fully warranted the trial court's referring the issues to a master. Troyak v Enos (1953, CA7 Ind) 204 F2d 536.

Where trial judge was not available on date set for trial, there was no error in affording parties opportunity of opting between reference to master or trial by deposition; reference to master was proper not only because case involved accounting and difficult computation of damages, but also because of exceptional condition that one witness had arrived from Australia, one was en route, and third was departing for United States. Sims Consol., Ltd. v Irrigation & Power Equipment, Inc. (1975, CA10 Colo) 518 F2d 413, 20 FR Serv 2d 709, cert den 423 US 913, 46 L Ed 2d 141, 96 S Ct 218.

16.—Judge's death

Death of the judge in charge, who was the only one thoroughly familiar with the prosecution of the litigation, does not warrant a reference, which is contrary to the admonition of Rule 53(b). Newman & Bisco v Realty Associates Secur. Corp. (1949, CA2 NY) 173 F2d 609; United States v O'Connor (1961, CA2 NY) 291 F2d 520, 61–2 USTC P 9495, 4 FR Serv 2d 849, 7 AFTR 2d 1541, 100 ALR2d 858.

Congestion of court calender caused by sudden death of judge, who was trying patent infringement case and was at time of his demise carrying one–third of case load, constituted an exceptional condition under Rule 53(b), warranting reference to master. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

Death of a judge who was trying a case involving an attempt to enforce tax liens while an action by the taxpayers for a redetermination of deficiencies and penalties was still pending in the Tax Court did not constitute an exceptional condition which would warrant a reference to a special master, but rather made the case a clear–cut one for the Tax Court, especially since the special knowledge of the judge who had presided at earlier proceedings was forever lost by his death. United States v O'Connor (1961, CA2 NY) 291 F2d 520, 61–2 USTC P 9495, 4 FR Serv 2d 849, 7 AFTR 2d 1541, 100 ALR2d 858.

17.—Miscellaneous

The increase in costs to the parties which is a consequence of a reference is a factor which militates against the propriety of the reference. Adventures in Good Eating, Inc. v Best Places to Eat, Inc. (1942, CA7 Ill) 131 F2d 809, 56 USPQ 242; United States v Kirkpatrick (1951, CA3) 186 F2d 393 (recognizing rule); Helene Curtis Industries, Inc. v Sales Affiliates, Inc. (1952, CA2 NY) 199 F2d 732, 95 USPQ 172; Pollack v Carlye Dress Corp. (1948, DC Mo) 76 F Supp 755; Fraver v Studebaker Corp. (1950, DC Pa) 11 FRD 94, 87 USPQ 398.

District court abused its discretion in referring motions for summary judgment related to liability and remedy issues under Clean Water Act to special master; fact that case had been pending for two years, that filings were voluminous and contained highly technical documents, and that issues concerned compliance with state and federal regulations were not so exceptional as to require reference of dispositive motions. Sierra Club v Browner (2001, CA5 La) 257 F3d 444.

District court did not abuse its discretion when it appointed special masters pursuant to Fed. R. Civ. P. 53 because case involved myriad of issues with each being briefed in exhaustive detail by parties. Hatteberg v Red Adair Co. (2003, CA5 Tex) 79 Fed Appx 709, 32 EBC 1755.

18. Agreement or consent of parties

Where both parties consented to court's order of reference to master and agreed that master's findings were not to be final, plaintiff could not, on appeal from judgment against him, object to order of reference. Charles A. Wright, Inc. v F. D. Rich Co. (1966, CA1 Mass) 354 F2d 710, 9 FR Serv 2d 51.32, Case 1, cert den 384 US 960, 16 L Ed 2d 673, 86 S Ct 1586, reh den 385 US 890, 17 L Ed 2d 122, 87 S Ct 14.

The fact that the parties have agreed to a reference is a factor to be considered in determining the propriety of the reference. Hart v Williams (1952) 91 App DC 340, 202 F2d 190; Allen Bradley Co. v International Brotherhood of Electrical Workers (1943, DC NY) 51 F Supp 36, 12 BNA LRRM 871, revd on other grounds (CA2 NY) 145 F2d 215, 15 BNA LRRM 586, 8 CCH LC P 62366, revd 325 US 797, 89 L Ed 1939, 65 S Ct 1533, 16 BNA LRRM 798, 9 CCH LC P 51213, reh den 326 US 803, 90 L Ed 489, 66 S Ct 11; Cademartori v Marine Midland Trust Co. (1955, DC NY) 18 FRD 277.

Reference under FRCP 53 may be made without consent of parties. Union Carbide Corp. v Montell N.V. (1998, SD NY) 179 FRD 425.

19. Order of reference

In proceedings in aid of execution in accordance with state practice providing for reference to a master, the time and place for the appearance of the debtor need not be specified in the order of reference but may properly be left to be fixed by the referee. Bair v Bank of America Nat. Trust & Sav. Assn. (1940, CA9 Mont) 112 F2d 247, cert den 311 US 684, 85 L Ed 441, 61 S Ct 61.

Reference to a master of proceedings in aid of execution in accordance with the appropriate state practice is governed by these rules and may be made wihout notice to the judgment debtor. Bair v Bank of America Nat. Trust & Sav. Assn. (1940, CA9 Mont) 112 F2d 247, cert den 311 US 684, 85 L Ed 441, 61 S Ct 61.

Though Rule 53 does not, in so many words, place any limitation on the scope of a master's commission, an order of reference cannot be more extensive than the allegations and proofs of the parties. Webster Eisenlohr, Inc. v Kalodner (1944, CA3 Pa) 145 F2d 316, cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404.

District Court's order of reference to master in which it precluded appeal to District Court and authorized appeal directly to Circuit Court is improper since Circuit Court is without jurisdiction to hear appeals directly from decision of United States Magistrate; furthermore where master made findings of fact and law, final order is deficient where it fails to indicate that court considered issues of law as well as those of fact. Duryea v Third Northwestern Nat. Bank (1979, CA8 Minn) 602 F2d 809, later app (CA8 Minn) 606 F2d 823.

Water Master, as special master appointed to reclassify farmland, was not required to follow Federal Rules of Evidence or Civil Procedure when conducting reclassification proceedings; although Fed. R. Civ. P. 53(c) authorized Water Master to conduct evidentiary hearings, rule upon admissibility of evidence, and to examine witnesses under oath, reference orders did not mandate that he do so. United States v Clifford Matley Family Trust (2004, CA9 Nev) 354 F3d 1154, 57 FR Serv 3d 1252.

Blanket reference of civil matter to magistrate, under pressure of docket crowded with criminal drug prosecutions, was beyond District Court's authority to order and judge would be ordered to revise order of reference to reserve for himself core function of making dispositive rulings, including findings of fact and conclusions of law on issues of liability. Re Bituminous Coal Opewrators' Assn. (1991, App DC) 949 F2d 1165, petition gr Re Bituminous Coal Operators' Assn. (1991, App DC) 1991 US App LEXIS 28963.

Reference was ordered directing master to examine exhibits in the light of the pleadings and depositions, and to consider the materiality of certain exhibits to the issues, and to report to the court which, if any, of papers and documents included in such exhibits were material to the issues, and which not material. Stentor Electric Mfg. Co. v Klaxon Co. (1939, DC Del) 28 F Supp 665, 42 USPQ 352.

Order of reference was entered to determine question whether plaintiff's complaint should be dismissed for failure to produce certain papers. Societe Internationale Pour Participations, etc. v McGrath (1951, DC Dist Col) 11 FRD 294.

Stipulation proposing order for reference which would have had the effect of committing court in advance to decision of master would be denied where there was no showing of justification for such extraordinary delegation. Cademartori v Marine Midland Trust Co. (1955, DC NY) 18 FRD 277.

Order implementing interpretation of treaties between tribes and state is amended as to procedure for selecting special masters to resolve disputes, where parties call for unbiased and qualified panel, because court will insert itself more explicitly into selection process, in light of language of FRCP 53. United States v Washington (1995, WD Wash) 909 F Supp 787.

Judicial branch has uniformly acknowledged authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel, and that special master, in context of institutional reform, may engage in ex parte communications. Cobell v Norton (2004, DC Dist Col) 310 F Supp 2d 102.

20. Objections to reference

Impropriety of an order of reference cannot be urged for the first time on appeal. Coyner v United States (1939, CA7 Ill) 103 F2d 629.

Whether the combination of circumstances prompting the appointment of a special master constituted exceptional conditions is a procedural matter, and unless the trial judge abused his discretion as a matter of law, personal objection to the appointment should have been made in order to preserve a right of review. McGraw-Edison Co. v Central Transformer Corp. (1962, CA8 Ark) 308 F2d 70, 135 USPQ 53, 6 FR Serv 2d 959.

Where both parties consented to the court's order of reference to master and agreed that master's findings were not to be final, plaintiff could not object to order of reference because master's report, which was submitted to jury, contained certain conclusions of law. Charles A. Wright, Inc. v F. D. Rich Co. (1966, CA1 Mass) 354 F2d 710, 9 FR Serv 2d 51.32, Case 1, cert den 384 US 960, 16 L Ed 2d 673, 86 S Ct 1586, reh den 385 US 890, 17 L Ed 2d 122, 87 S Ct 14.

Although upon remand of case it was likely that report of special master would be read to jury, unless excluded on some proper ground under Rule 53(e)(3), court would not hear objections of party to reference since it had not indicated objection to reference to special master until case was on appeal. Diamond Door Co. v Lane—Stanton Lumber Co. (1974, CA9 Cal) 505 F2d 1199, 19 FR Serv 2d 586.

Party who desires to contest propriety of reference should move trial court for revocation of reference; objection to reference at hearing before special master, without objection to court, is not adequate to preserve issue for appeal. Hayes v Foodmaker, Inc. (1981, CA5 Tex) 634 F2d 802, 35 BNA FEP Cas 334, 25 CCH EPD P 31522, 30 FR Serv 2d 1359.

Defendant's objections to an order of reference were without merit and properly overruled where it appeared that the reference was made pursuant to the agreement of all counsel and that defendant's objections to the reference were not made until after the auditor had found the issues in favor of plaintiffs. Hart v Williams (1952) 91 App DC 340, 202 F2d 190.

Even if motions to revoke reference to Special Master are considered timely for technical purposes, they must be denied due to reliance that Master, District Court, and parties have placed on longstanding grant of authority to Master to hear specified issues. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

21.—Bias of master

Masters and experts are not held to strict standards of impartiality that are applied to judges because masters and experts are subject to control of court which must hire individuals with expertise in particular subject matters. Morgan v Kerrigan (1976, CA1 Mass) 530 F2d 401, cert den 426 US 935, 49 L Ed 2d 386, 96 S Ct 2648, 96 S Ct 2649, 24 BNA FEP Cas 1515, 12 CCH EPD P 10977, reh den 429 US 873, 50 L Ed 2d 156, 97 S Ct 193 and reh den 429 US 1125, 51 L Ed 2d 577, 97 S Ct 1166.

Defendant school board's objections to appointment of certain person as master, and research work of another as expert consultant, on grounds of bias are meritless where it was shown only that these persons had been, or were, members of NAACP which, though not party to suit, had financially supported plaintiffs' action, and had permitted its general counsel to serve as one of plaintiffs' counsel because these persons' memberships hardly provide reasonable basis for bias in plaintiffs' favor with respect to breadth of desegregation remedy. Morgan v Kerrigan (1976, CA1 Mass) 530 F2d 401, cert den 426 US 935, 49 L Ed 2d 386, 96 S Ct 2648, 96 S Ct 2649, 24 BNA FEP Cas 1515, 12 CCH EPD P 10977, reh den 429 US 873, 50 L Ed 2d 156, 97 S Ct 193 and reh den 429 US 1125, 51 L Ed 2d 577, 97 S Ct 1166.

In action under Indian Trust Management Reform Act, 25 USCS § 4001 et seq., district court abused its discretion in supplementing court–appointed monitor's role by appointing him as special master/monitor pursuant to Fed. R. Civ. P. 53; district court appointed monitor to judicial role in case in which he had significant prior knowledge obtained in his role as court monitor, on basis of which he had formed and expressed opinions of continuing relevance to litigation; monitor was, therefore, disqualified under 28 USCS § 455(b)(3) from assuming judicial role in case. Cobell v Norton (2003, App DC) 334 F3d 1128.

Mere fact that chairman of commission, in condemnation proceedings, had previously employed a witness who might appear before him was not a sufficient ground of disqualification. United States v 3065.94 Acres of Land (1960, SD Cal) 187 F Supp 728, 4 FR Serv 2d 1048, revd on other grounds (CA9 Cal) 308 F2d 453, 6 FR Serv 2d 1202.

Although examiner had played non–adversarial support role with private corporation in previous action against defendant in case at bar, court is convinced of his suitability to serve as examiner; however, plaintiff's motion to substitute examiner for another person will be granted since examiner had been appointed to avoid delay in plaintiff's requests for legitimate information and retention of examiner would have increased delay since defendant had filed petition for extraordinary writs and appeal and its proceedings were still pending before the court of appeals. United States v International Business Machines Corp. (1977, SD NY) 76 FRD 636.

Special Master is not disqualified from continued participation in litigation notwithstanding party's contention that he has acquired extensive nonrecord information through his active participation in settlement discussions; standards to be applied in evaluating Master's conduct should be similar to those used to examine judicial conduct, where Special Master has served approximately same function that judge would fulfill in attempting to resolve litigation. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

Department of Interior's motion to disqualify special master was denied because (1) no fully informed objective observer could reasonably have imputed bias or prejudice to special master for his conduct during investigation, (2) master could not be recused pursuant to 28 USCS § 455(a), (b)(1) because his knowledge of disputed evidentiary facts was not gained extrajudicially, (3) Interior's delay in seeking master's disqualification constituted waiver, and (4) Interior failed to meet its burden of proving "bias in fact" pursuant to § 455(b)(1). Cobell v Norton (2004, DC Dist Col) 310 F Supp 2d 102.

22.—Waiver

Where defendant in accounting proceeding voiced no opposition to the appointment of a master for the purpose of making an accounting, defendant cannot for the first time on appeal object to plaintiffs' right to an accounting. Mauro v Rodriguez (1943, CA1 Puerto Rico) 135 F2d 555.

Action of court in setting aside order of reference conditioned upon plaintiff's posting of security for cost of reference upon plaintiff's announcement of his inability to furnish security would not be reviewed on appeal where plaintiff did not raise the point in appellate court although he objected at the time. De Stubner v United Carbon Co. (1947, CA4 W Va) 163 F2d 735, 75 USPQ 48, cert den 334 US 829, 92 L Ed 1757, 68 S Ct 1328, 78 USPQ 380.

In civil rights action by prison inmates seeking greater access to legal materials, where plaintiffs never objected at any time to magistrate conducting evidentiary hearing, plaintiffs waived their right to object. Cruz v Hauck (1975, CA5 Tex) 515 F2d 322, 20 FR Serv 2d 912, cert den 424 US 917, 47 L Ed 2d 322, 96 S Ct 1118.

Parties who wait until appeal to raise argument that claims cannot be referred to special master waive right to object; parties should object to reference to magistrate or special master at time reference is made or within reasonable time thereafter. Spaulding v University of Washington (1984, CA9 Wash) 740 F2d 686, 35 BNA FEP Cas 217, 26 BNA WH Cas 1335, 34 CCH EPD P 34496, cert den 469 US 1036, 83 L Ed 2d 401, 105 S Ct 511, 36 BNA FEP Cas 464, 26 BNA WH Cas 1622, 35 CCH EPD P 34793.

Movant did not waive its objections to appointment of special masters to decide contempt motion by failing to file formal objection after appointment, since it made appropriate objection to appointment in letter to court challenging court's expressed desire to refer motion to panel and urging resolution of contempt motion by court. Apex Fountain Sales, Inc. v Kleinfeld (1987, CA3 Pa) 818 F2d 1089, 3 USPQ2d 1430.

If party agrees to appointment of master and then objects after master has issued recommendations, party has waived right to object; party cannot wait to see whether he likes master's findings before challenging use of master. Constant v Advanced Micro–Devices, Inc. (1988, CA FC) 848 F2d 1560, 7 USPQ2d 1057, cert den (US) 102 L Ed 2d 218, 109 S Ct 228.

Failure to make timely objection to appointment of Master either at time of order of reference or promptly thereafter constitutes waiver of error. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

23. Vacation of reference

The All Writs Act (28 USCS § 1651(a)) confers upon a Federal Court of Appeals the discretionary power to issue a writ of mandamus to compel a district judge to vacate his orders, entered under Rule 53(b), referring anti–trust cases for trial before a master, where it appears, that by virtue of the district judge's knowledge of the cases at the time of reference, together with his long experience in the anti–trust field, he could dispose of the litigation with greater dispatch and less effort than anyone else, and the only exceptional circumstances alleged by the district judge to warrant reference were that the cases were very complicated and complex, that they would take considerable time to try, and that the District Court's calendar was congested. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

Where, in mandamus proceeding to vacate an order of reference, the respondent offered to amend his order by striking out the reference to the special master, the question could be treated as if moot. William Goldman Theatres, Inc. v Kirkpatrick (1946, CA3 Pa) 154 F2d 66.

Where issues raised by action against cotton ginner on promissory notes, in which defendant counterclaimed for amount unconnected with any of plaintiff's claims, were of a kind traditionally for judge or jury as fact finder and were not complicated within the meaning of the rule, a reference of such issues would be vacated. Re Watkins (1959, CA5 Miss) 271 F2d 771, 2 FR Serv 2d 733, 76 ALR2d 1113.

Court of Appeals had jurisdiction to issue writ of mandamus directing vacation of order of reference by District Court judge in bankruptcy proceeding, notwithstanding that district judge making order had died subsequent to filing of writ. Burgess v Williams (1962, CA4 SC) 302 F2d 91, 5 FR Serv 2d 819.

Appellant has properly preserved his objection to reference of his case to magistrate, thus permitting Court of Appeals to vacate erroneous order, where appellant not only filed timely objections to reference, but also submitted lengthly and detailed memorandum setting forth reasons for his objections. Piper v Hauck (1976, CA5 Tex) 532 F2d 1016, 22 FR Serv 2d 154.

Writ of mandamus will issue to district court where district court's abuse of discretion through reference of dispositive motions to special master would deprive parties of right to have basic issues heard by district court judge. Re United States (1987, CA6 Ohio) 816 F2d 1083, 7 FR Serv 3d 659, 17 ELR 20663.

Where government moved to vacate court's reference of motions for summary judgment to United States magistrate, mistaken premise was that magistrate appointed under 28 USCS § 636(b) would be acting as traditional "special master" whose employment would be unquestionably appropriate only in exceptional circumstances under Rule 53(b) [absent parties' consent], but Federal Magistrates Act has created new judicial officer of potentially far greater utility than former master intermittently drawn from bar for special service in extraordinary case, and motion to vacate reference was denied. Kliban v United States (1974, DC Conn) 65 FRD 6.

B. Particular Proceedings or Issues 24. Admiralty

After entry of consent decree under Ship Mortgage Act of 1920 [46 USCS §§ 922, 951] foreclosing preferred mortgages on barges and vessels, owner of the vessels was not entitled to have the consent decree set aside on the ground that it was forced hastily into what should have been a long trial before a special master and that libellant refused to accept either security, stipulation for value, or a tender and deliver proper satisfaction of the mortgage, since there was nothing improper in libellant pressing for immediate trial and respondent actually never made tender of bond, payment, or other security until the ultimate tender of payment and its acceptance. Ira S. Bushey & Sons, Inc. v W. E. Hedger Transp. Corp. (1948, CA2 NY) 167 F2d 9, cert den 335 US 816, 93 L Ed 371, 69 S Ct 36.

In admiralty, presence of complex issues of fact makes case eminently suited for trial by experienced judge, and does not warrant reference under "exceptional conditions" provision of Rule 53(b). Bartlett–Collins Co. v Surinam Navigation Co. (1967, CA10 Okla) 381 F2d 546, 10 FR Serv 2d 1277.

Where exhibits were put in evidence by stipulation showing sale price of cargo of freight for transportation from Baton Rouge to Genoa and the insurance paid by shipper, trial court's order appointing commissioner in admiralty suit to ascertain damages was error since there were no exceptional conditions warranting such reference. Federazione Italiana Dei Corsorzi Agrari v Mandask Compania De Vapores, S. A. (1968, CA2 NY) 388 F2d 434, cert den 393 US 828, 21 L Ed 2d 99, 89 S Ct 92.

Reference to magistrate would not be ordered, over objection of Department of Justice Attorney, in action by United States against carrier for alleged cargo damage where claimed amount was $10,000 and there was claim over for almost $8,000. United States v Eastmount Shipping Corp. (1974, DC NY) 62 FRD 437.

Court refused to recuse the special master based upon alleged ex parte communications with employees of the Interior and Treasury Departments because defendants contemplated that such communications would take place Cobell v Norton (2003, DC Dist Col) 237 F Supp 2d 71, motion gr, sanctions allowed, motion to strike gr (2003, DC Dist Col) 213 FRD 16.

25. Antitrust

A Federal District Court's power, under Rule 53(b), to refer cases for trial before a master, is abused when a District Court refers anti–trust suits for trial before a master on the general issue (which includes determination of the existence of an alleged illegal conspiracy and the question of liability vel non, as well as questions as to damages and the issuance of an injunction), notwithstanding that, by virtue of the district judge's intimate knowledge of the cases at the time of the reference, and his long experience in the anti–trust field, he could dispose of the litigation with greater dispatch and less effort than anyone else; under these circumstances, the reference amounts to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

In anti–trust suits involving numerous parties, the detailed accounting required in order to determine the damages suffered by each of the plaintiffs might properly be referred to a master after the court had determined the over–all liability of the defendants, provided the circumstances at that time indicated that the use of the court's time was not warranted in receiving the proof and making the tabulation. La Buy v Howes Leather Co. (1957) 352 US 249, 1 L Ed 2d 290, 77 S Ct 309, reh den 352 US 1019, 1 L Ed 2d 560, 77 S Ct 553.

In action by a hydroelectric co–operative for treble damages and injunctive relief under the Sherman and Clayton Acts against 10 utility corporations and an unincorporated association on the ground that defendants acted to prevent the issuance of a license for the project to plaintiffs and the financing and construction of the project, the appointments of masters to take discovery depositions were warranted by exceptional conditions within the meaning of Rule 53(b) where there was an obvious possibility of oppression and hardship unless the discovery proceedings were continuously supervised and kept in order by a master. First Iowa Hydro Electric Cooperative v Iowa–Illinois Gas & Electric Co. (1957, CA8 Iowa) 245 F2d 613, cert den 355 US 871, 2 L Ed 2d 76, 78 S Ct 122, reh den 355 US 921, 2 L Ed 2d 281, 78 S Ct 339.

Where record, in suit for treble damages under anti–trust statutes, contained evidence on which a substantial award of damages could be made, evidence of defendants' profits would only serve as an element of aid or fortification to the court in the assessment of damages, and did not constitute an "exceptional condition" under Rule 53(b) warranting appointment of special master. Arthur Murray, Inc. v Oliver (1966, CA8 Mo) 364 F2d 28, 1966 CCH Trade Cases P 71846, 10 FR

Serv 2d 1270, 1 ALR Fed 909.

Underlying purpose of Rule 54(b), to prevent prejudice to parties and unnecessary costs to public by piecemeal appellate consideration of issues so intimately intertwined as to constitute but one claim, was served by consolidation for hearing in Court of Appeals of separate appeals on two issues raised by claim in antitrust action, and court would not consider whether its authorization of entry of partial final judgment on one of the issues, although there was only one claim for relief, met strict technical requirements of Rule 54(b). Woods Exploration & Producing Co. v Aluminum Co. of America (1975, CA5 Tex) 509 F2d 784, 1975–1 CCH Trade Cases P 60208, 50 OGR 378, reh den (CA5 Tex) 512 F2d 1407 and cert den 423 US 833, 46 L Ed 2d 52, 96 S Ct 59 and (ovrld on other grounds by Affiliated Capital Corp. v Houston (CA5 Tex) 793 F2d 706, 1986–1 CCH Trade Cases P 67184, 5 FR Serv 3d 369).

It would be contrary to Rule 53(b) to refer summary judgment motions routinely to masters in antitrust cases, notwithstanding that several thousand pages of materials may have been submitted; however, reference to master is not reversible error, where delegation of judicial power to master does not exceed bounds of Article III of Constitution, and where appellant does not object to reference on appeal. Jack Walters & Sons Corp. v Morton Bldg., Inc. (1984, CA7 Wis) 737 F2d 698, 1984–2 CCH Trade Cases P 66080, 39 FR Serv 2d 504, cert den 469 US 1018, 83 L Ed 2d 359, 105 S Ct 432.

In antitrust suit, facts that computation of profits alleged by plaintiffs to have been lost would involve a complicated task of taking proofs, and that such task would be one of peculiar difficulty for a jury, made case one appropriate for reference to a master, since by use of such procedure it would be possible to get before the jury considered findings having the halmark of impartiality, untainted with passion or prejudice, and it might shorten the trial by making it possible for one party, and possibly all, to forego the time–consuming luxury and uncerainty of other evidence on the subject matter of the master's report. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

Allegation, in action to recover damages for alleged violations of the antitrust laws, that the issues were unusually complicated and would require the taking of much evidence and examination of many documents, showed no exceptional conditions which would warrant liability under Rule 53. Brosious v Pepsi–Cola Co. (1943, DC Pa) 3 FRD 335.

Where, in an action for treble damages under the Clayton Anti–Trust Act, it appeared that certain documents, papers, and records which defendants were entitled to examine were located at a place some 115 miles distant from where the judge of the court would be hearing contested matters over a period of several months, a master would be appointed to supervise the examination of the records and to rule on disputes as to the materiality and relevancy of particular documents and records, such rulings being reviewable by the court. Olson Transp. Co. v Socony–Vacuum Oil Co. (1944, DC Wis) 7 FRD 134.

Although plaintiff was entitled to any and all materials which would be useful in enabling it to obtain evidence of defendant's market share, court denied motion (1) to appoint auditor pursuant to FRCivP 53 to determine which of approximately 1334 computer tapes that defendant asserted contained its leasing and purchasing files were required to create statistics sought by government and (2) to obtain from defendant copies of each computer tape necessary to provide such statistics, but court ordered defendant to make available for inspection and copying items set forth in plaintiff's memorandum in support of its motion. United States v International Business Machines Corp. (1976, SD NY) 72 FRD 638.

Where software company was found liable for illegal monopoly maintenance in non–settling States' suit, court rejected proposal to appoint special master to, inter alia, monitor software company's compliance with remedial decree, because empowering special master to engage in determination of rights and obligations contravened parameters of appropriate use of special master. New York v Microsoft Corp. (2002, DC Dist Col) 224 F Supp 2d 76, judgment entered (2002, DC Dist Col) 2002 US Dist LEXIS 22862, judgment entered (2002, DC Dist Col) 2002 US Dist LEXIS 22858.

26. Bankruptcy

The ordinary reference of a case to a referee in bankruptcy makes him a court officer for that purpose, unlike a master, who functions in an advisory capacity only. Re Mifflin Chemical Corp. (1941, CA3 Pa) 123 F2d 311, 41–2 USTC P 9713, 28 AFTR 306, cert den 315 US 815, 86 L Ed 1213, 62 S Ct 804.

Where it was alleged, in bankruptcy proceeding, that certain persons had secretly taken oil from a lease then in the custody of the bankruptcy court, the trial court could properly appoint a master to determine the amount of oil, if any, run from the lease operated by the trustee to the persons accused of taking the oil, and the value thereof, it appearing likely

that the matter referred would involve "difficult and perhaps complicated inquiry." Burnham v Todd (1943, CA5 Tex) 139 F2d 338.

Orders of District Court directing special master to proceed and report in reorganization proceedings was within discretion of District Court. Re Pittsburgh R. Co. (1947, CA3 Pa) 164 F2d 488.

Where a creditor of one who had been adjudged a voluntary bankrupt filed an application to reopen the bankruptcy proceeding, alleging that the bankrupt had fraudulently concealed assets, the bankruptcy court could of its own volition refer the matter to a special master for the purpose of conducting an investigation and making a report. Re Joslyn's Estate (1948, CA7 Ill) 171 F2d 159; Re Thomas (1953, CA7 Ill) 204 F2d 788, 41 ALR2d 971.

Even though original judge had died, it was improper to refer petitions for allowances in bankruptcy proceeding to special master. Newman & Bisco v Realty Associates Secur. Corp. (1949, CA2 NY) 173 F2d 609.

District Court did not abuse its discretion in referring to master, for preliminary findings of fact, suit brought by trustee in bankruptcy to set aside alleged preferences to certain persons where issues were complicated in that, in determining whether bankrupt was insolvent when payments were made to such persons, it was necessary to decide as to each of 1500 contributors to investment company whether he was a creditor of the bankrupt, as trustee contended, or a joint adventurer with him. Burgess v Williams (1962, CA4 SC) 302 F2d 91, 5 FR Serv 2d 819.

Even if reference to referee in bankruptcy as a special master had been improvident, appellant was not entitled to a reversal in the absence of a showing of prejudice. Kent v Walter E. Heller & Co. (1965, CA5 Ga) 349 F2d 480.

In trustee's suit against former directors of bankrupt corporation, trial court does not err in denying defendants' motion for appointment of master to make account for set off of their personal expenditures in acquiring bank stocks because defendants had withheld evidence of their personal expenditures and had not moved for master's appointment until after all evidence had been adduced at trial. Borden v Sinskey (1976, CA3 NJ) 530 F2d 478.

While not every creditor's petition for involuntary bankruptcy requires use of master, this is matter for district judge's determination in light of his perception of whether jury would find issues complicated; thus, considering debtor's tangled financial affairs, there is no abuse of discretion in reference to special master and debtor was not entitled to examine special master for his opinion on complexity of case and whether reference was warranted. Crateo, Inc. v Intermark, Inc. (1976, CA9 Cal) 536 F2d 862, 21 FR Serv 2d 1411, cert den 429 US 896, 50 L Ed 2d 180, 97 S Ct 259.

Interim rule permitting district courts to refer bankruptcy matters to bankruptcy judges is not inconsistent with Rule 53(b) of Federal Rules of Civil Procedure. Re Stewart (1984, CA7 Wis) 741 F2d 127, 12 BCD 308, CCH Bankr L Rptr P 69970.

Motions, in proceedings growing out of bankruptcy, to turn over to debtor certain sums, which were in the hands of executors as a result of a settlement between debtor and testator's decedent, were submitted to reference. Application of Holbrook (1942, DC NY) 42 F Supp 814.

Motion by creditor of bankrupt for an order requiring trustees to turn over to creditor a specified sum as a trust fund was submitted to reference in proceedings growing out of bankruptcy. Re Capital Foundry Corp. (1946, DC NY) 64 F Supp 561.

In railroad reorganization proceedings, a special master was appointed to take evidence and submit a plan of reorganization. Guaranty Trust Co. v Seaboard A. L. R. Co. (1946, DC Fla) 68 F Supp 639.

Matters stated in petition for withdrawal of unclaimed dividends which had arisen from estate of bankrupt were submitted to reference. Re Van Schaick (1946, DC NY) 69 F Supp 764.

In proceedings under the bankruptcy statutes, the court has unquestioned power to refer a claim for damages allegedly suffered by the claimant as a result of a breach of contract by the debtor to a special master for the purpose of taking testimony with respect to the validity of the claim and reporting to the court his findings of fact and conclusions of law with respect thereto. Re California Eastern Airways, Inc. (1951, DC Del) 95 F Supp 348.

In reorganization proceedings, reference was ordered as to all matters arising in connection with day–to–day management of properties of debtor. Re Portland Electric Power Co. (1951, DC Or) 97 F Supp 857.

Initial across–the–board referral of all bankruptcy cases and proceedings made by local rule is invalid; such wholesale

referral cannot be sustained as refernce pursuant to provisions of Rule 53 of Federal Rules of Civil Procedure; amount of judicial power delegated to non–Article III bankruptcy judges exceeds maximum allowable under provisions of Rule 53; provisions of local rule amount to little less than unconstitutional abdication of judicial function depriving parties of determination by District Court on basic issues involved in litigation; any referral of bankruptcy cases and proceedings must comport with basic statutory and constitutional requirements. Re Matlock Trailer Corp. (1983, MD Tenn) 27 BR 318, 10 BCD 372, 8 CBC2d 742.

Emergency Rule, whereby all bankruptcy proceedings, related and others, are routinely and ex parte referred to bankruptcy court by District Court, is unconstitutional abdication of judicial function; Emergency Rule also fails to comply with requirements of Rule 53 of the Federal Rules of Civil Procedure which prescribes requirements for referral by District Courts to special masters. Re Hidalgo Industries, Inc. (1983, BC DC Puerto Rico) 35 BR 804, 11 BCD 279, CCH Bankr L Rptr P 69592.

27.—Fees and costs

The reference to a special master to determine the amount of fees in reorganization proceedings, while perhaps within the possible permissive scope of a reference, is to be discouraged. Re Irving–Austin Bldg. Corp. (1938, CA7 Ill) 100 F2d 574.

With respect to reference, in bankruptcy proceeding, of issues of fact and law raised by petition by one to whom debtor's property was transferred in reorganization proceedings for commmissions paid to the oeprator of the debtor's property during the pendency of the proceedings, as well as the issues raised by the defendant's answer in which he denied the jurisdiction of the bankruptcy court until final disposition of the litigation, whether testimony should be taken by a master or by the judge himself lies wholly within the discretion of the trial court. Re Hotel Governor Clinton, Inc. (1939, CA2 NY) 107 F2d 398.

Although order of District Court with respect to costs, which was based on findings of master's report in reorganization proceeding under Bankruptcy Act, was affirmed, reference of apportionment of costs to special master was disapproved. Prudence–Bonds Corp. v Prudence Realization Corp. (1949, CA2 NY) 174 F2d 288.

28. Civil rights

Local Rule directing assignment of actions under Civil Rights Act of 1964 to magistrates was repugnant to letter and spirit of that Act, and judgment approving magistrate's report was vacated. Flowers v Crouch–Walker Corp. (1974, CA7 Ill) 507 F2d 1378, 9 BNA FEP Cas 158, 8 CCH EPD P 9846, later app (CA7 Ill) 552 F2d 1277, 14 BNA FEP Cas 1265, 14 CCH EPD P 7510.

In civil rights action in which plaintiff charges that she was deprived of her rights to due process, inter alia, when city housing authority terminated her employment as its executive director following hearing before housing authority itself, and in which District Court has granted plaintiff's motion for partial summary judgment on due process claim, matter is properly referred to U.S. Magistrate to act as Special Master for purpose of determining whether plaintiff is entitled to recover damages, where neither party has demanded jury, and where court has full transcript and video tape of lengthy hearing before housing authority, at which plaintiff admits she was permitted to present all or nearly all of evidence she desired to present; Magistrate is properly directed to review transcript and video tape and to take additional evidence in his discretion. Salisbury v Housing Authority of Newport (1985, ED Ky) 615 F Supp 1433.

Parents' action to recover attorney's fees and costs incurred in their efforts to secure free appropriate public education for their handicapped son pursuant to Individuals with Disabilities Education Act (20 USCS §§ 1400 et seq.) is not referred to master pursuant to FRCP 53(b), because requisite exceptional circumstances for reference of matter to master are not present. Chagnon v Town of Shrewsbury (1995, DC Mass) 901 F Supp 32, 13 ADD 318.

29.—Housing

Mandamus would not issue to vacate trial court's order of reference to master to study and review segregation in Chicago public housing, since order, in terms, did not require master to make findings of fact and conclusions of law as contemplated in Rule 53(e)(1), order referred to master's draft report to be discussed with parties, and order stated that master's final report would be submitted to court for review and possible use. Chicago Housing Authority v Austin (1975, CA7 Ill) 511 F2d 82.

Appointment of special master is necessary and proper in case brought under Fair Housing Act (42 USCS § 3613)

where there is broad scope of legal violations of Act and resolution of litigation will involve development of comprehensive plan for development of low or moderate income residential housing over period of several years. United States v Parma (1980, ND Ohio) 504 F Supp 913, affd in part and revd in part on other grounds (CA6 Ohio) 661 F2d 562, reh den (CA6) 669 F2d 1100, cert den 456 US 926, 72 L Ed 2d 441, 102 S Ct 1972, reh den 456 US 1012, 73 L Ed 2d 1309, 102 S Ct 2308 and app dismd without op (CA6 Ohio) 774 F2d 1164.

New interim injunction must be entered ordering Department of Housing and Urban Development (HUD) affirmatively to use its power, authority and discretion in supervision and operation of all federal housing programs to remedy past, current and future segregation in traditional low-rent public housing in East Texas, and since intricate and complex order entails continuing consideration of economic, demographic and logistical factors, Rule 53 special master's role of investigating HUD's activities, monitoring HUD's compliance, and advising HUD's implementation of affirmative action plan becomes even more essential, because HUD's voluntary compliance over last 2 years with desegregation order has been unsatisfactory. Young v Pierce (1988, ED Tex) 685 F Supp 975.

30.—Job discrimination

Court may properly order hearings before magistrate as special master to determine monetary damages in "pattern or practice" suit filed under Civil Rights Act for depriving blacks of employment opportunities in masonry construction industry. United States v Masonry Contractors Asso. (1974, CA6 Tenn) 497 F2d 871, 8 BNA FEP Cas 159, 8 CCH EPD P 9445, 18 FR Serv 2d 1115.

Special master appointed to resolve any disputes arising under Title VII consent judgment is "special master" within Rule 53 and not, in essence, arbitrator whose decisions are final and binding. Turner v Orr (1984, CA11 Fla) 722 F2d 661, 33 BNA FEP Cas 1105, 33 CCH EPD P 34049, 38 FR Serv 2d 548, later app (CA11 Fla) 759 F2d 817, 37 BNA FEP Cas 1186, 36 CCH EPD P 35220, later proceeding (CA11 Fla) 785 F2d 1498, 40 BNA FEP Cas 833, 40 CCH EPD P 36147 and cert den 478 US 1020, 92 L Ed 2d 738, 106 S Ct 3332, 41 BNA FEP Cas 272, 40 CCH EPD P 36207, later proceeding (CA11 Fla) 804 F2d 1223, 42 BNA FEP Cas 581, 41 CCH EPD P 36680.

Where Title VII action has been referred to magistrate acting as master, on ground that case has not been set for trial within 120 days after issue has been joined, even though no exceptional condition exists and parties have not consented, reference is made under Rule 53, and magistrate's findings are subject to review under "clearly erroneous" standard by District Court. Brown v Wesley's Quaker Maid, Inc. (1985, CA6 Mich) 771 F2d 952, 38 BNA FEP Cas 1763, 38 CCH EPD P 35529, 3 FR Serv 3d 498, reh den, en banc (CA6) 39 BNA FEP Cas 488 and cert den 479 US 830, 93 L Ed 2d 63, 107 S Ct 116, 43 BNA FEP Cas 1896, 43 CCH EPD P 37222.

Issue as to plaintiffs' claim for incidental damages was submitted to reference in action in which Negro railway employees claimed to have been discriminated against by railway and union. Mitchell v Gulf, M. & O. R. Co. (1950, DC Ala) 91 F Supp 175, 26 BNA LRRM 2151, 18 CCH LC P 65771, mod on other grounds (CA5 Ala) 190 F2d 308, 9 BNA FEP Cas 409, 28 BNA LRRM 2295, 1 CCH EPD P 9623, 20 CCH LC P 66441.

Computation of back pay in class actions for discrimination in employment presents exceptional circumstances which warrant appointment of special master. Ellison v Rock Hill Printing & Finishing Co. (1974, DC SC) 64 FRD 415, 10 BNA FEP Cas 48, 8 CCH EPD P 9627, 19 FR Serv 2d 287.

Rule 53(b) permits reference to special master of cases where computation of damages is difficult and question of how much back pay class members are entitled to as result of civil rights action against employer is appropriate for such reference. Wattleton v Ladish Co. (1981, ED Wis) 520 F Supp 1329, 29 BNA FEP Cas 1307, 29 CCH EPD P 32727, affd (CA7 Wis) 686 F2d 586, 29 BNA FEP Cas 1389, 29 CCH EPD P 32996, cert den 459 US 1208, 75 L Ed 2d 442, 103 S Ct 1199, 30 BNA FEP Cas 1856, 31 CCH EPD P 33362.

Following liability phase of action for sex discrimination in employment, reference to special master is appropriate where it is evident that identification of members of prevailing subclasses, determination of defendants' liability for individual claims from within membership of subclasses, correction of misrankings and of salary levels, and computation of damage award for each successful claimant will in aggregate require extraordinary expenditure of time, effort, and detail work. Chang v University of Rhode Island (1985, DC RI) 606 F Supp 1161, 40 BNA FEP Cas 3, 39 CCH EPD P 35891, later proceeding (DC RI) 107 FRD 343.

Referral of Title VII case, 42 USCS §§ 2000e et seq., to magistrate to act as master which could not be scheduled for trial within 120 days did not require consent of parties, where (1) 28 USCS § 636(b)(2) provides that magistrate may

serve as special master under Rule 53, and (2) 42 USCS § 2000e–5(f)(5) permits judge to appoint master pursuant to Rule 53 under certain circumstances. Morse v Marsh (1987, ND Ill) 656 F Supp 939, 43 BNA FEP Cas 1806, later proceeding (ND Ill) 1987 US Dist LEXIS 12086.

Where the parties conducted extensive discovery previously in settlement negotiations prior to an employment discrimination suit and defendants made a substantial amount of documentation available to the plaintiff and made valid and eminently reasonable objections to several of plaintiff's requests, no special master was appointed. Goins v Hitchcock I.S.D. (2002, SD Tex) 191 F Supp 2d 860, 88 BNA FEP Cas 975.

31.—Mentally retarded persons

District court did not abuse its discretion in ordering appointment of special master pursuant to Rule 53 to implement court order protecting rights of mentally retarded and emotionally disturbed children placed in institutions in foreign state where appellants had failed to substantially comply with original injunction for period of 2 years and where authority given special master comported with Rule 53 since special master's functions as factfinder, monitor, and hearing officer were clearly spelled out in referral. W. v Louisiana (1979, CA5 La) 601 F2d 240, 28 FR Serv 2d 187, later proceeding (CA5 La) 861 F2d 1366, 27 Fed Rules Evid Serv 441, later proceeding (ED La) 1990 US Dist LEXIS 1746.

Appointment of master under Rule 53(b) to implement relief for class of persons confined at school and hospital for mentally retarded is appropriate since it is abundantly clear that providing 1200 hospital residents with right to habilitation in least restrictive environment will be complex and lengthy process, probably involving monitoring, dispute resolution, and development of detailed enforcement mechanisms which court is particularly unsuited to provide. Halderman v Pennhurst State School & Hospital (1979, CA3 Pa) 612 F2d 84, 28 FR Serv 2d 759.

Eleventh Amendment does not bar appointment of special master to monitor compliance with consent decree involving state officials even though decree imposes financial burden and will have fiscal consequences to state treasury as necessary result of compliance since judgment was consented to and effect of appointment will be prospective. New York State Asso. for Retarded Children, Inc. v Carey (1982, ED NY) 551 F Supp 1165, affd in part and revd in part on other grounds (CA2 NY) 706 F2d 956, 36 FR Serv 2d 233, cert den 464 US 915, 78 L Ed 2d 257, 104 S Ct 277, later proceeding (CA2 NY) 727 F2d 240.

Special master would be appointed to assist in implementation and enforcement of settlement in case involving rights of mentally retarded persons, since exceptional conditions existed in litigation, including, inter alia, long pendency of suit, delay of defendants in implementing settlement, and subject matter and complexity of case and consequent need for technical expertise in devising implementation plan. Lelsz v Kavanagh (1986, ND Tex) 112 FRD 367, later proceeding (CA5 Tex) 807 F2d 1243, reh den, en banc (CA5 Tex) 815 F2d 1034, later proceeding (ND Tex) 673 F Supp 828, later proceeding (CA5 Tex) 824 F2d 372 and cert dismd 483 US 1057, 97 L Ed 2d 821, 108 S Ct 44 and (disagreed with by Kozlowski v Coughlin (CA2 NY) 871 F2d 241).

Court would appoint special master to assist it in determining whether to certify class of children who need special education and their parents to challenge state's administration of agency that handles complaints about special education programs and whether to approve consent decree which parties had indicated was likely forthcoming. Beth V. v Carroll (1994, ED Pa) 155 FRD 529.

32.—Prisoners

It is improper for district court to refer prisoner's suit seeking injunction and damages for prison discipline to magistrate designated as "special master" on sole ground that same prisoner had initiated sixteen lawsuits over three–year period because, even considering district court's crowded docket, such situation is not "exceptional condition" which would justify reference in nonjury action. Piper v Hauck (1976, CA5 Tex) 532 P2d 1016, 22 FR Serv 2d 154.

District court's order of reference, empowering master to monitor compliance with court's orders regarding prison conditions and to approve plans ordered submitted by court, is not an abuse of discretion. Hoptowit v Ray (1982, CA9 Wash) 682 F2d 1237, 9 Fed Rules Evid Serv 1511, later app (CA9 Wash) 753 F2d 779, 40 FR Serv 2d 1450 (disagreed with by Duckworth v Franzen (CA7 Ill) 780 F2d 645, cert den 479 US 816, 93 L Ed 2d 28, 107 S Ct 71 and (disagreed with by Jones v Chicago (CA7 Ill) 856 F2d 985)).

Although judge's authority to make referral under Rule 53, if not consented to by parties, is limited, appointment of special master to monitor compliance with final injunctive order in prisoner civil rights case was particularly desirable

where noncompliance with previous District Court order was emphasized and record was replete with instances of administrative recalcitrance; appointing master directed to supervise and coordinate actions of prison officials to effectuate full compliance is especially appropriate for cases challenging conditions of prison confinement since judges cannot be expected to neglect busy dockets to insure that recalcitrant defendants no longer violate basic rights of such persons. Williams v Lane (1988, CA7 Ill) 851 F2d 867, 11 FR Serv 3d 753, cert den (US) 102 L Ed 2d 1001, 109 S Ct 879, later proceeding (ND Ill) 1989 US Dist LEXIS 11157, later proceeding (ND Ill) 1990 US Dist LEXIS 725.

Pursuant to 18 USCS § 3626(g)(8), term "special master" is defined by Prison Litigation Reform Act of 1995 (PLRA) as any person appointed by federal court pursuant to Fed. R. Civ. P. 53 or pursuant to any inherent power of court to exercise powers of master, regardless of title or description given by court; therefore, in action by pretrial detainees challenging prison conditions, Office of Compliance Consultants (OCC) was not special master under PLRA. Benjamin v Fraser (2003, CA2 NY) 343 F3d 35.

In class action challenging adequacy of medical services available to prison inmates, court would appoint special master pursuant to Rule 53 because this area of study was highly technical and involved medical knowledge beyond expertise of court. Costello v Wainwright (1973, MD Fla) 387 F Supp 324.

Defendant's record of noncompliance with preliminary injunction and other court orders concerning prison conditions constitutes exceptional condition requiring appointment of special master to monitor compliance with permanent injunction. Toussaint v McCarthy (1984, ND Cal) 597 F Supp 1388, later proceeding (ND Cal) 597 F Supp 1427 and affd in part and revd in part on other grounds, vacated, in part on other grounds (CA9 Cal) 801 F2d 1080, cert den 481 US 1069, 95 L Ed 2d 871, 107 S Ct 2462.

Fact–Finding Special Master and Monitor–Assessors, appointed to enhance compliance with consent judgment, where conditions of detention center were found to have violated Eighth Amendment, are authorized to have access to facilities at all times and access to files relating to constitutional issues of confinement, may conduct unimpeded confidential interviews with any county employee or inmate, may conduct procedurally fair hearings, issue subpoenas, and take testimony under oath, but have no authority to intervene in daily jail operations; any report or findings from hearings shall be presumed correct and shall not be set aside unless clearly erroneous. Alberti v Klevenhagen (1987, SD Tex) 660 F Supp 605, later proceeding (SD Tex) 688 F Supp 1176, later op (SD Tex) 1987 US Dist LEXIS 12674, later proceeding (SD Tex) 1987 US Dist LEXIS 12677 and mod on other grounds (SD Tex) 688 F Supp 1210 and affd in part and revd in part on other grounds (CA5 Tex) 896 F2d 927.

33.—School desegregation

Defendant school board's objections to appointment of certain person as master, and research work of another as expert consultant, on grounds of bias are meritless where it was shown only that these persons had been, or were, members of NAACP which, though not party to suit, had financially supported plaintiffs' action, and had permitted its general counsel to serve as one of plaintiffs' counsel because these persons' memberships hardly provide reasonable basis for bias in plaintiffs' favor with respect to breadth of desegregation remedy. Morgan v Kerrigan (1976, CA1 Mass) 530 F2d 401, cert den 426 US 935, 49 L Ed 2d 386, 96 S Ct 2648, 96 S Ct 2649, 24 BNA FEP 1515, 12 CCH EPD P 10977, reh den 429 US 873, 50 L Ed 2d 156, 97 S Ct 193 and reh den 429 US 1125, 51 L Ed 2d 577, 97 S Ct 1166.

District Court did not err in requiring special master to continue with assigned task of formulating system–wide desegregation plan following remand of case on appeal since risk of some wasted effort and needless expense is inherent in case of this kind and alternative of "stopping wheels" and incurring further delay and expense if District Court's findings should ultimately be affirmed is unacceptable. Reed v Cleveland Board of Education (1979, CA6 Ohio) 607 F2d 737.

Complexity of formulating school desegregation remedy warrants sua sponte appointment, prior to submission of plans and proposals from parties, of special master to conduct hearings and other proceedings in order to recommend to court appropriate remedial decree. Amos v Board of School Directors (1976, ED Wis) 408 F Supp 765, motion den (ED Wis) 408 F Supp 825, 23 FR Serv 2d 1588, affd (CA7 Wis) 539 F2d 625, vacated on other grounds 433 US 672, 53 L Ed 2d 1044, 97 S Ct 2907, on remand (CA7 Wis) 566 F2d 1175, on remand (ED Wis) 451 F Supp 817 and on remand (ED Wis) 471 F Supp 800, affd (CA7 Wis) 616 F2d 305, 29 FR Serv 2d 618 and motion den (ED Wis) 416 F Supp 1325.

Appointment of special master was necessary in action by board of education against insurer for breach of contract pay board expenses incurred in defending desegregation action, because complex issues of reasonable value of substantial attorney services and defense costs incurred, and their necessity, together with volume of evidence to be presented in case

were matters too intricate for otherwise unaided jury. Board of Education v CNA Ins. Co. (1987, SD NY) 113 FRD 654.

34.—Voting rights

Where no plan was before court which could be approved in county reapportionment case, court could appoint special master under Rule 53 to formulate redistricting plan which satisfied constitutional requirements. Moore v Leflore County Board of Election Comrs. (1972, ND Miss) 361 F Supp 603.

Upon issuing preliminary injunction against defendants to prevent further violations of Voting Rights Act of 1965, as amended, 42 USCS § 1973 et seq., court appointed special master to work with parties in preparing for primary election on May 20, 2003, and to ensure that defendants complied with court's order; appointment of special master was necessary because government requested sweeping relief and court did not have sufficient facts on record to ascertain whether all of items of relief requested were necessary, or even achievable in time remaining until primary election; also, court found that there had not been sufficient attention paid to logistics and location of various polling precincts or to cost–benefit analysis. United States v Berks County (2003, ED Pa) 250 F Supp 2d 525.

Where principal issue before court was whether plan met requirements of Voting Rights Act, in particular 42 USCS § 1973, and United States Constitution, these were issues for court to decide, not special master. Montano v Suffolk County Legislature (2003, ED NY) 263 F Supp 2d 644, injunction den, motion den (2003, ED NY) 2003 US Dist LEXIS 10407.

35. Condemnation

Commissioners appointed in condemnation actions brought under the Tennessee Valley Authority Act [16 USCS § 831] and proceedings following the awards of such commissioners are governed by § 831x of USCS Title 16, and not by this rule or Rule 71A of the Federal Rules of Civil Procedure [USCS Court Rules, Part 1]. United States ex rel. Tennessee Valley Authority v Easement & Right of Way (1959, MD Tenn) 214 F Supp 29, 7 FR Serv 2d 1194.

Where potential intervenors in condemnation proceedings were legion, but no questions of law or fact would be present as to most of them, exceptional conditions existed which warranted the appointment of a master with respect to the question of the amount of damages only. Foster v Detroit (1966, ED Mich) 254 F Supp 655, 10 FR Serv 2d 610, affd (CA6 Mich) 405 F2d 138, 12 FR Serv 2d 372, motion den (CA6 Mich) 423 F2d 660.

In condemnation action to acquire title to easements and interests in land for use in conjunction with construction, operation and maintenance of the Allegheny River Reservoir Project, court properly referred issue of just compensation to commission. United States v Certain Parcels of Land (1970, WD NY) 327 F Supp 181, affd (CA2 NY) 443 F2d 375.

Case involving compensation for property condemned for United States would not be resubmitted for more specific findings to commissioners appointed to decide issue of proper compensation for property, even though their report left much to be desired, where issue decided in report was not complicated and it had been almost 6 years since start of case. United States v 3.0 Acres of Land (1974, WD Va) 378 F Supp 30.

While findings and report of land commission shall be accepted by district court unless found to be clearly erroneous, conclusional findings are not acceptable under clearly erroneous standard because they provide no way of knowing what path commissioners took through maze of conflicting evidence; thus, it is required of commissioners that they state not only end result of their inquiry, but process by which they reached it. United States v 90.39 Acres of Land (1976, SD Iowa) 413 F Supp 91.

36. Contracts

The trial court did not err in failing to refer causes of action to recover on contracts, express and implied, by which plaintiff agreed to do certain work preparatory to the construction of a dam and reservoir by the defendant, where the pleadings did not disclose issues so complicated that it was an abuse of discretion to fail to make a reference. Barnard–Curtiss Co. v Maehl (1941, CA9 Mont) 117 F2d 7.

In a suit in equity against a corporation for an accounting and recovery of commissions, and to recover expenses and damages for which plaintiff claimed the corporation was obligated by reason of its alleged breaches of a contract for the employment of plaintiff, the trial court erred in referring the whole case to a master to take the testimony and report his findings of fact and conclusions of law, since there was nothing involved in the suit referred other than to ascertain and adjudicate how much, if anything, the defendant corporation owed plaintiff in respect to the contract it had with him, and it appeared that all the testimony was taken in less than 4 days of hearings. Helfer v Corona Products, Inc. (1942, CA8

Ark) 127 F2d 612.

Where action for accounting involved hundreds of distinct shipments of countless commodities to and from numerous points under a contract carrier's lease operating contract, it was proper to refer to a master. Bynum v Baggett Transp. Co. (1956, CA5 Ala) 228 F2d 566.

Buyer in contract dispute did not waive its right to jury trial on issues of liability and damages where it refused to participate in proceeding conducted by independent accountant acting under supervision of magistrate judge and it was not clear from final pretrial conference that defendant waived its right to jury trial; district court never responded to defendant's objections but instead entered judgment against it, which was erroneous since there must be clear and explicit waiver of jury trial. Middle Tenn. News Co. v Charnel of Cincinnati, Inc. (2001, CA7 Ind) 250 F3d 1077.

A reference of litigation involving disputed questions of amounts due by reason of work done by plaintiffs for the defendant in repairing and renovating an old dwelling for use as offices, and also for painting and redecorating defendant's home, was proper, since the result of the reference, reflected in the record of 11 hearings over a considerable period of time, supported the exercise of the court's discretion sufficiently to bar the appellate court from disturbing the reference. Tendler v Jaffe (1952) 92 App DC 2, 203 F2d 14, cert den 346 US 817, 98 L Ed 344, 74 S Ct 29.

The issue as to measure of damages in event of judgment in plaintiff's favor in action to recover damages arising out of alleged breach of contract, was submitted to reference; and master was authorized by order of reference to examine and require production of any and all books of any party and to issue subpoenas to secure attendance of witnesses. Pathe Laboratories, Inc. v Du Pont Film Mfg. Corp. (1943, DC NY) 3 FRD 11.

Where suit was brought for breach of contract for collaboration in production of picture and a division of receipts was requested, the fact that the trying of issue of receipts would be very difficult would not take such cause from jury, since such issue could be referred to master. Bercovici v Chaplin (1944, DC NY) 3 FRD 409, 60 USPQ 409, mod (DC NY) 7 FRD 61, 72 USPQ 340. terms of the escrow agreement by tearing off the signatures, on the ground that a decision of the United States Supreme Court had rendered the agreements invalid, indicated that the proofs might well become protracted. Krinsley v United Artists Corp. (1950, DC Ill) 94 F Supp 478.

Reference was granted of action seeking declaration that plaintiff had not entered into any contract with defendants for sale of soybean oil and had not contracted to settle any controversies with defendants by arbitration, and for temporary and permanent injunction restraining defendants from proceeding further under a demand for arbitration made upon plaintiff. Soya Processing Co. v Sirota (1952, DC NY) 104 F Supp 428, 49 Ohio Ops 40, 64 Ohio L Abs 107.

Where numerous corporations and individuals, all connected with property located in France brought action charging that American manufacturer supplied them with defective roofing materials, court appointed special master under FRCivP 53 to supervise all discovery matters, since resolution of problems in case might well require examination of hundreds of thousands of documents by person having both technical and legal background, and counsel had previously been unable to agree on any discovery matter. Omnium Lyonnais D'Etancheite et Revetement Asphalte v Dow Chemical Co. (1977, CD Cal) 73 FRD 114.

Although issues in action brought by government contractor against subcontractor are complex, and documentary and other evidence at trial will be massive, reference to master would not materially aid disposition of case where court has already gained familiarity with dispute from having ruled on various pretrial motions. Litton Systems, Inc. v Frigitemp Corp. (1985, SD Miss) 613 F Supp 1386.

37.—Employment

Where nothing more was involved in the suit than to determine how much a small company owed its sales agent, and it took less than 4 days to take testimony, no exceptional conditions existed within the intendment of Rule 43 to warrant the trial court's referring the case to a master, and it was the court's duty to try and to decide the case without a reference. Helfer v Corona Products, Inc. (1942, CA8 Ark) 127 F2d 612.

In a jury action to recover compensation which plaintiff alleged was due him for services rendered as defendant's district sales manager, appointment of a master to examine the defendant's books and records and report computations of bonus payments which would be due plaintiff in accordance with the theories of each party, was appropriate, since such efficient procedure unquestionably shortened and simplified the trial, which otherwise might well have got bogged down in a welter of figures. Wilson v Homestead Valve Mfg. Co. (1954, CA3 Pa) 217 F2d 792, cert den 349 US 916, 99 L Ed

1250, 75 S Ct 606.

District court had jurisdiction to review magistrate's pretrial order granting discharged employee's motion to compel identity of confidential informant whose information led Postal Service to discharge plaintiff for making fraudulent injury claim, despite not having reserved that right pursuant to Rule 53 by specifically limiting master's powers, since magistrate judge's initial ruling was made under referral authority of § 636 and, by establishing standard of review for district court to apply, statute can only be construed to give district court authority to review such rulings. Castillo v Frank (1995, CA5 Tex) 70 F3d 382, 69 BNA FEP Cas 513, 67 CCH EPD P 43794.

Where it appeared in action in federal court in New York against corporation for salesmen's commissions that corporation's offices, factory and books and records, as well as its officers, were located in Missouri and it merely maintained salesroom and selling office in New York, an auditor would be appointed in Missouri, since to bring all the officers and books and records to New York would involve a great deal of expense and would seriously interfere with the corporation's business. Newcomb v Universal Match Corp. (1938, DC NY) 25 F Supp 169.

In a class action against a railroad by trainmen claiming compensation for coupling air hose, in which there had been no request for a jury trial in the complaint, the matter was appropriate for reference to a master for the purpose of hearing testimony as to the amount of each plaintiff's claim and detailed facts which gave rise to each claim. Shipley v Pittsburgh & L. E. R. Co. (1947, DC Pa) 70 F Supp 870.

In action for an accounting based on a written employment contract by which defendant promised to pay plaintiff a salary plus a percentage of profits, plaintiff's request for appointment of a referee to audit defendant's records was denied where plaintiff offered nothing to show that a referee would or could discover facts in plaintiff's favor which had not already been discovered from plaintiff's examination of defendant's books, and it appeared that cost of a reference would be substantial. Pollack v Carlye Dress Corp. (1948, DC Mo) 76 F Supp 755.

38.—Noncompetition

In action for breach of covenant not to engage in restaurant business, reference was allowed for determination of damages, if any, which plaintiffs had suffered by reason of breach. Goodacre v Panagopoulos (1940) 72 App DC 25, 110 F2d 716.

39.—Quasi-contracts

In proceeding involving an application by the equity receiver of defendant corporation for an order requiring the repayment to plaintiff of a sum representing erroneous payments made by plaintiff, in which defendant alleged that not all of the sum claimed represented money recoverable by plaintiff, the issue raised by defendant's allegation could not be resolved on papers alone and must therefore be made the subject of a hearing before a special master. Prudential Ins. Co. v Land Estates, Inc. (1941, DC NY) 39 F Supp 608.

40. Copyrights

Exceptional circumstances within the meaning of Rule 53(b) are not present in a copyright infringement action requiring only a few hours' oral testimony. Adventures in Good Eating, Inc. v Best Places to Eat, Inc. (1942, CA7 Ill) 131 F2d 809, 56 USPQ 242.

Reference of a cause which involved questions of liability of defendants for infringement of plaintiff's copyrighted book and damages were improper, where the question of damages required almost no evidence and did not involve an accounting, and a trial of 6 or 8 hours would have finished the taking of testimony with respect to question of defendants' liability. Adventures in Good Eating, Inc. v Best Places to Eat, Inc. (1942, CA7 Ill) 131 F2d 809, 56 USPQ 242.

In action to restrain infringement of copyright, a master was appointed and directed to take evidence and pass on issue as to damages to plaintiff and to require accounting of, and pass on, profits of defendants to which plaintiff might be entitled. Houghton Mifflin Co. v Stackpole Sons, Inc. (1940, DC NY) 31 F Supp 517, 44 USPQ 6685 mod on other grounds (CA2 NY) 113 F2d 627, 46 USPQ 296.

Where issue of damages resulting from copyright infringement was reserved for future determination and it appeared that the defendants' books and records were unavailable upon the trial, the issue and computation of damages would be referred to a special master. Chappell & Co. v Frankel (1968, SD NY) 285 F Supp 798, 157 USPQ 693.

41. Damages, generally

Local rule which provides that diversity case involving only monetary damages may be referred to mediation before trial is not inconsistent with Rules 53 or 72–75. Rhea v Massey–Ferguson, Inc. (1985, CA6 Mich) 767 F2d 266, 86 ALR Fed 203.

Issue relative to the amount of the damages suffered by the plaintiff may be submitted to a master if it is found that there is necessity for such reference. Brosious v Pepsi–Cola Co. (1943, DC Pa) 3 FRD 335.

Upon final adjudication on merits in favor of person who has been restrained by injunction, it is usual practice of court to refer matter of assessment of damages on injunction bond to the auditor of the court or to a special master. Alabama Mills v Mitchell (1958, DC Dist Col) 159 F Supp 637, 34 CCH LC P 71387.

42. Environmental cases

Appointment of special master is not warranted in action challenging construction of interstate highway and urban renewal project bordering river because there are no "extremely compelling circumstances" in that court can review only whether proper procedures were followed and whether reasoned record for decision was created. Sierra Club v United States Army Corps of Engineers (1983, CA2) 701 F2d 1011, 13 ELR 20326.

In environmental litigation initiated under Comprehensive Environmental Response, Compensation and Liability Act, District Court erred in granting master authority to preside at trial on merits of case, but District Court acted properly in granting master broad authority to supervise and conduct pretrial matters, including discovery, production and arrangement of exhibits, and stipulations of fact, and power to hear motions for summary judgment or dismissal and to make recommendations with respect thereto; if District Court determines that liability rests with some or all of parties, it may request master to conduct evidentiary hearings with respect to damages and alternative relief and make recommendations with respect to these matters, and it may also direct magistrate to monitor and supervise any injunctive relief granted and to make reports to it with respect to compliance with any decrees entered. Re Armco, Inc. (1985, CA8) 770 F2d 103, 3 FR Serv 3d 229, 15 ELR 20774, on remand (WD Mo) 628 F Supp 391, 17 ELR 20158.

District court abused discretion in finding that hazardous–waste litigation under Comprehensive Environmental Response Compensation and Liability Act (42 USCS §§ 9601 et seq.) manifested exceptional conditions justifying reference of dispositive motions to special master, where district court articulated following reasons for reference: (1) calendar congestion, (2) complexity of issues, (3) possibility of lengthy trial, (4) extraordinary pretrial management required in case with more than 250 parties, and (5) public interest in quickest feasible resolution of Superfund cases. Re United States (1987, CA6 Ohio) 816 F2d 1083, 7 FR Serv 3d 659, 17 ELR 20663.

District court abused its discretion in referring motions for summary judgment related to liability and remedy issues under Clean Water Act to special master; fact that case had been pending for two years, that filings were voluminous and contained highly technical documents, and that issues concerned compliance with state and federal regulations were not so exceptional as to require reference of dispositive motions. Sierra Club v Browner (2001, CA5 La) 257 F3d 444.

In multi–party hazardous waste cleanup suit defendant's motion to permit direct submission of "routine" discovery and case management matters to master without need for application to court on case–by–case basis as currently provided would not be approved since reference to magistrate is exception not rule, pretrial matters are not necessarily routine, and rather than saving time and expense direct reference to masters is likely to increase both where party questions appropriateness of reference or objects to master's report. United States v Hooker Chemicals & Plastics Corp. (1981, WD NY) 90 FRD 421, 31 FR Serv 2d 1598, 11 ELR 20883.

Exceptional circumstances warrant appointment of Special Master to hear issues relative to government's suit seeking cleanup of chemical waste disposal site, inter alia, in litigation pursuant to Comprehensive Environmental Response, Compensation and Liability Act and Resource Conservation and Recovery Act, where (1) there is serious and immediate threat to public health, (2) time required for hearing requires that issues relative to injunction be resolved with high level of continuity which court cannot provide, (3) complexity of issues and volume of evidence contributes to need for complete and uninterrupted hearing, (4) Special Master has acquired irreplaceable expertise in case by virtue of his extensive involvement, and (5) authority of Special Master has been adequately limited so that basis of judicial power remains in District Court. United States v Conservation Chemical Co. (1985, WD Mo) 106 FRD 210, 2 FR Serv 3d 1039.

Due to extremely large number of parties involved in case filed under CERCLA—23 named plaintiffs on behalf of themselves and 66 other parties and 1181 corporate and individual defendants—court would appoint panel of settlement masters, to be coordinated by chair, and would encourage, whenever possible, combination of claims to be submitted to

certain masters to add to effectiveness and efficiency of settlement master process. Active Prods. Corp. v A.H. Choitz & Co. (1995, ND Ind) 163 FRD 274.

In action in which not for profit corporation and concerned citizens filed suit against corporate successor to owner and operator of chromate production facility and numerous property owners, seeking declaratory and injunctive relief mandating cleanup of environmental contamination at Study Area No. 7 (the site), located in Jersey City, New Jersey, court ordered appointment of special master to oversee all aspects of remediation and to ensure timely compliance with remediation schedule. Interfaith Cmty. Org. v Honeywell Int'l, Inc. (2003, DC NJ) 2003 US Dist LEXIS 8898, amd (2003, DC NJ) 263 F Supp 2d 796.

Exceptional conditions existed and therefore court ordered appointment of Special Master to oversee all aspects of excavation, removal, and treatment of approximately one million tons of chromium contaminated processing residue that covered 34 acres approximately 15 to 20 feet deep. Interfaith Cmty. Org. v Honeywell Int'l, Inc. (2003, DC NJ) 263 F Supp 2d 796.

43. Fair Labor Standards Act

Where major issues on existence of coverage under Fair Labor Standards Act and as to substantial work not compensated for would have to be determined by the court, the case was the kind in which the judge, in his discretion, could refer accounting phase of case and related matters to a master. Mitchell v Mitchell Truck Line, Inc. (1961, CA5 Tex) 286 F2d 721, 41 CCH LC P 31064.

Reference to master who is both lawyer and accountant for settlement of Fair Labor Standards Act case after court found employer in violation was appropriate, where there were approximately 52 employees due backpay and/or overtime, employers' business records were incomplete, and there was considerable "piecing together" to be made by one knowledgeable in accounting matters and familiar with business records. Brock v Ing (1987, CA10 Okla) 827 F2d 1426, 28 BNA WH Cas 566, 107 CCH LC P 34951.

In action under Fair Labor Standards Act for unpaid wages and unpaid overtime compensation, the court ordered reference by which master was directed to supervise and conduct plaintiff's inspection and copying of payroll records, time slips, and other records, showing persons worked and number of hours worked each day, and the weekly wage paid to each of the plaintiffs during the period in question. Saxton v W. S. Askew Co. (1941, DC Ga) 38 F Supp 323, 4 CCH LC P 60535.

In action under Fair Labor Standards Act to recover pay, overtime pay, and liquidated damages, the court ordered reference by which master was directed to take evidence and have audit made of records, timeclock cards, daily assembly or activity reports canceled paychecks and all other documents introduced in evidence in the case and to make findings and conclusions therefrom for his report and audit. Ballard v Consolidated Steel Corp. (1945, DC Cal) 61 F Supp 996, 10 CCH LC P 62738.

44. Freedom of Information Act

In Freedom of Information Act case in which newspaper sought production of documents relating to attempts to rescue U. S. hostages in Iran in 1980, documents comprising approximately 14,000 pages, District Court did not abuse its discretion in appointing special master to representatively sample documents in question and summarize to the court each party's arguments with respect to exemptions claimed by defendant, given exceptional circumstances of case and fact that judge appointed as master attorney who was previously counsel for intelligence policy in Department of Justice and in that capacity held top–secret security clearance. Re United States Dept. of Defense (1988) 270 App DC 175, 848 F2d 232.

45. Fraud

Issues in fraud hearings are not proper subject for reference to special master save in extraordinary or exceptional cases. Re Irving–Austin Bldg. Corp. (1938, CA7 Ill) 100 F2d 574.

The practice of submitting to a special master the determination of the amount of compensation which numerous counsel should receive for investigating and trying the fraud issue in debtor reorganization proceedings, "does not commend itself," since a fraud issue ordinarily is not a proper one for reference to a special master. Re Irving–Austin Bldg. Corp. (1938, CA7 Ill) 100 F2d 574.

Reference was granted of cause in which fraudulent appropriation of certain properties and of mortgage bearer notes

was charged, and in which prayer for relief included request for accounting. Mauro v Rodriguez (1943, CA1 Puerto Rico) 135 F2d 555.

Actions for fraud are particularly inappropriate for reference to a master, save in extraordinary or exceptional cases. Bradshaw v Thompson (1972, CA6 Tenn) 454 F2d 75, 15 FR Serv 2d 1438, 10 UCCRS 641, cert den 409 US 878, 34 L Ed 2d 131, 93 S Ct 130.

46. Habeas corpus

Reference to a master under Rule 53 is inapplicable in habeas corpus cases in view of the provision of Rule 81(a)(2) that the rules are not applicable in habeas corpus cases except to the extent that the practice in such cases is not set forth in the statutes. Holiday v Johnston (1941) 313 US 342, 85 L Ed 1392, 61 S Ct 1015.

Restriction of Rule 53(b) that reference to master shall be exception and not rule is made applicable under Federal Magistrates Act to evidentiary hearings in federal habeas corpus proceedings since Act authorizes magistrates to serve as special masters but makes that service subject to Federal Rules of Civil Procedure. Wingo v Wedding (1974) 418 US 461, 41 L Ed 2d 879, 94 S Ct 2842.

Habeas corpus proceedings are not subject to reference to a master under this rule. United States ex rel. Corsetti v Commanding Officer of Camp Upton (1944, DC NY) 3 FRD 360.

47. Insurance

In a jury action by an insurer to collect a balance of premiums due on a canceled policy of liability insurance, the appointment of an auditor to report what was due under plaintiff's and defendant's methods of computation, respectively, was proper, where it was apparent that plaintiff needed an auditor to ascertain and prove what was due, and that the court itself needed one "to check and state the records of the insured from which alone the facts could be obtained." Bowen Motor Coaches, Inc. v New York Casualty Co. (1943, CA5 Tex) 139 F2d 332.

48. Patents

Reference of all issues in an action in which the basic question related to the validity and meaning of a patent was proper, where the circumstances surrounding the litigation suggested a good probability that the reference would expedite settlement of the difficult and troublesome issues involved in the case. Helene Curtis Industries, Inc. v Sales Affilates, Inc. (1952, CA2 NY) 199 F2d 732, 95 USPQ 172.

Where it appeared in declaratory judgment action involving validity and meaning of patent for cold–permanent–waving solutions that controversy surrounding the patent had kept the particular industry in turmoil for several years, with litigations in various parts of the county, reference of all the issues to a former district judge of considerable experience would expedite the settlement of the difficult and troublesome issues involved, and was warranted under Rule 53(b). Helene Curtis Industries, Inc. v Sales Affiliates, Inc. (1952, CA2 NY) 199 F2d 732, 95 USPQ 172.

The court in patent infringement suit did not abuse its discretion in appointing a special master to take an accounting of the full extent of breach of licensing agreements and to recommend whether acts of defendant were such as to warrant exemplary damages. American Cyanamid Co. v Ellis–Foster Co. (1962, CA3 NJ) 298 F2d 244, 132 USPQ 302.

Masters can properly aid court in evaluating issues of patent validity and infringement in context of motions for summary judgment and such use of special master does not deprive party of right to jury trial. Constant v Advanced Micro–Devices, Inc. (1988, CA FC) 848 F2d 1560, 7 USPQ2d 1057, cert den (US) 102 L Ed 2d 218, 109 S Ct 228.

In a patent infringement suit relating to intake manifolds for internal combustion engines, plaintiff's motion for reference to special master to determine damages and profits with respect to an infringement, as to which there was no contest, and for a determination by the master of the question of an alleged independent infringement, was denied on ground that the reference would do more than amount to a duplication of labor and delay the court in reaching a final conclusion on merits, unless the master were an expert in this particular phase of mechanical engineering. Swan Carburetor Co. v Nash Motors Co. (1938, DC Md) 25 F Supp 21, affd (CA4) 98 F2d 115.

In a patent infringement suit involving a jury, motion for appointment of a master was denied on ground that the method of operation of the devices with which the litigation was concerned was not so complicated that the average layman could not understand it with the assistance of counsel. Gasifier Mfg. Co. v Ford Motor Co. (1939, DC Mo) 1 FRD 10, 43 USPQ 377, app dismd (CA8 Mo) 116 F2d 498, 47 USPQ 532.

On motion of plaintiff in a patent suit to require the defendant to permit him to inspect and copy certain exhibits produced during the taking of depositions which had been placed in the custody of the clerk of the court, a special master was appointed to determine whether such exhibits were produced under Rule 34 or as in response to a subpena duces tecum under Rule 45, and to report to the court which parts of such exhibits are material to the issues. Stentor Electric Mfg. Co. v Klaxon Co. (1939, DC Del) 28 F Supp 665, 42 USPQ 352.

Questions whether defendants, in patent infringement suit, had regular place of business within jurisdiction of court and whether person served was defendants' manager or general agent were the subject of reference. Schlessinger v Ingber (1939, DC NY) 29 F Supp 581, 42 USPQ 624.

Issue whether defendant had been guilty of contempt of decree by which plaintiff's patent had been held valid and infringement thereof by defendant had been enjoined was subject of reference. Catalin Corp. v Slosse (1939, DC NY) 30 F Supp 169, 43 USPQ 349.

An interlocutory judgment in a patent infringement suit may properly include a reference to a master for an accounting of profits and damages, notwithstanding that there is, at the time of entry of the judgment, no final determination as a matter of law that the plaintiffs are entitled to such accounting. Kilgore Mfg. Co. v Triumph Explosives (1941, DC Md) 37 F Supp 766, 48 USPQ 510, 49 USPQ 51, mod on other grounds (CA4) 128 F2d 444, 52 USPQ 199, cert den 317 US 660, 87 L Ed 530, 63 S Ct 59, 55 USPQ 493.

In action for accounting and compensation for use of a patented device, matters involved in interlocutory judgment that defendant account for the value of the use of the invention in question were submitted to reference. Dysart v Remington Rand, Inc. (1941, DC Conn) 40 F Supp 596, 50 USPQ 342.

In patent infringement suit in which plaintiff's patent was ruled invalid, reference was granted for purpose of assessing defendant's damages and costs. Gold Seal Importers, Inc. v Morris White Fashions, Inc. (1945, DC NY) 4 FRD 386, 65 USPQ 277, affd (CA2 NY) 152 F2d 660, 68 USPQ 1.

Defendant's counterclaim, not for mere accounting but for damages, in patent infringement suit, did not warrant granting of his motion for an order referring the question of damages to a master, since facts that court's trial list was heavy and that the hearing in the case would undoubtedly be burdensome did not present an exceptional condition such as is contemplated by Rule 53(b). Hartford–Empire Co. v Shawkee Mfg. Co. (1946, DC Pa) 5 FRD 46, 68 USPQ 77, motion den (WD Pa) 68 USPQ 150.

In a patent infringement case, a master may be appointed to hear and determine the amount of damages the owner of the patent is entitled to recover because of the infringement, and the change in the language of the patent statute did not affect the court's power in this respect. Zenith Radio Corp. v Dictograph Products Co. (1947, DC Del) 6 FRD 597, 72 USPQ 403.

Plaintiff's claim that appointment of a master in patent infringement suit would cause financial hardship to him was sufficient ground for refusing the appointment on defendant's motion. Fraver v Studebaker Corp. (1950, DC Pa) 11 FRD 94, 87 USPQ 398.

Plaintiffs' motion, in patent infringement action, to set aside that portion of an order of the trial court appointing a special master to hear and report to the court on defendants' claims of laches and estoppel was denied, on ground that the issue of laches and estoppel was of a sufficiently complex and lengthy character as to warrant the reference, and that the circumstances of the case were such as to bring the case within the "exception" referred to in Rule 53(b). Skinner v Aluminum Co. of America (1951, DC Pa) 95 F Supp 183, 88 USPQ 212.

Reference was ordered, in patent infringement suit, for purposes of ascertainment and reporting of amount of general damages accrued to plaintiff by reason of infringement. Aetna Ball & Roller Bearing Co. v Standard Unit Parts Corp. (1952, DC Ill) 103 F Supp 26, 93 USPQ 246, mod on other grounds (CA7) 198 F2d 222, 94 USPQ 129.

In an action in which infringement of a patent is established, the trial court has discretionary power to refer the damage question to a special master. Modern Art Printing Co. v Skeels (1954, DC NJ) 123 F Supp 426, 102 USPQ 286, revd on other grounds (CA3 NJ) 223 F2d 719, 106 USPQ 8.

Where evidence supported plaintiff's claim that defendant had infringed plaintiff's trademark, and plaintiff was entitled not only to an injunction restraining defendants from continuing the infringement, but also to an accounting for all profits accrued to defendants from the infringement and to such damages as plaintiff might be able to establish as resulting

therefrom, such accounting of profits and determination of damages were appropriate matters for reference to a master under Rule 53(b). Matarazzo v Isabella (1956, DC RI) 138 F Supp 86, 109 USPQ 145.

The necessity of an accounting in a patent infringement suit warranted appointment of a master to ascertain the extent of the infringement of the patent in suit by each of the defendants and to determine the damages authorized by statute. Marvel Specialty Co. v Bell Hosiery Mills, Inc. (1964, WD NC) 235 F Supp 218, 143 USPQ 283.

Work product and attorney client privileges exist in the field of patent law and must be respected by the court in regulating discovery; in view of the volume of the documents requested, the court will not hold an in camera inspection but if party aggrieved by its refusal to order the production of documents will pay the expenses the court will appoint a "special master" to make the examination in camera and report to the court. Collins & Aikman Corp. v J. P. Stevens & Co. (1971, DC SC) 51 FRD 219, 169 USPQ 296.

49. Pension and retirement benefits

District Court's failure to appoint master to determine extent of former employee's interest in pension plan was not erroneous where issue was not so complex that it could not be determined by an accounting. Yeseta v Baima (1988, CA9 Cal) 837 F2d 380, 9 EBC 1377, 10 FR Serv 3d 365.

50. Personal injury

In negligence jury action growing out of an injury sustained by plaintiff when, while employed by defendant, she was injured when traveling in defendant's automobile in France, questions presented as to the law of France at the time of the accident, so far as the rights and remedies of plaintiff against defendant were involved, were complicated within the meaning of Rule 53(b) and were therefore to be referred to a special master to take testimony and report his findings to the court. Heiberg v Hasler (1941, DC NY) 1 FRD 735.

In class action where court had previously certified class of plaintiffs in personal injury asbestos cases filed in district, special master would be appointed to assist class action jury in its factual determination of whether or not significant disparity exists between claims of class representatives and other members of class. Jenkins v Raymark Industries, Inc. (1985, ED Tex) 109 FRD 269, affd (CA5 Tex) 782 F2d 468, 3 FR Serv 3d 1137, reh den, en banc (CA5 Tex) 785 F2d 1034, later proceeding (CA5 Tex) 831 F2d 550.

Joint appointment of special master by both New York state and federal courts in DES products liability litigation would be made to facilitate settlement since only issues of relative market share and details of individual claims required resolution, attorneys representing parties had requisite skill and experience to negotiate fair settlement without further trials, and individual trials of hundreds of pending DES cases would require more than 50 judge–years and thousands of jurors. Re New York County DES Litigation (1992, ED NY) 142 FRD 58, later proceeding (ED NY) 789 F Supp 548, later proceeding (ED NY) 789 F Supp 552.

51. Property damage

Question of damages in action for negligence resulting in fire damage to tugboat was submitted to reference. Southport Transit Co. v Avondale Marine Ways, Inc. (1956, CA5 La) 234 F2d 947.

Product liability action seeking recovery of costs of testing, air–monitoring, removing and encapsulating asbestos–containing products allegedly installed by defendants in numerous properties of plaintiff involved neither volume of work nor complexity sufficient to meet exceptional conditions standard for appointment of special master. Prudential Ins. Co. v United States Gypsum Co. (1993, CA3 NJ) 991 F2d 1080, 25 FR Serv 3d 16.

52. Real property

Where, in an action for an accounting and to recover certain timber lands, 14 days were devoted to trial of the case by the court, it was not an abuse of discretion to fail to make a reference at plaintiff's suggestion on the eleventh day of the trial. Buckley v Altheimer (1945, CA7 Ill) 152 F2d 502.

District Court, in boundary dispute, could advisably and permissibly select as a master a surveyor to execute the court's definition of the boundary line; and, as such expert, he was subject to questioning by either party. United States v Cline (1968, CA4 NC) 388 F2d 294.

Reference to master of action seeking to void real property conveyances is improper and when hearing before master

was devoted almost exclusively to issues of credibility and accounting, which may have justified use of master, was not accomplished, appellate court, in exercise of its supervisory powers over district court of Virgin Islands, would remand case for trial before district court even though plaintiff did not on appeal advance as ground for reversal reference to master. Bennerson v Joseph (1978, CA3 VI) 583 F2d 633, 25 FR Serv 2d 1328, later app (CA3 VI) 842 F2d 710, cert den (US) 102 L Ed 2d 94, 109 S Ct 121.

Where defendant in civil action to set aside a conveyance of real estate filed a cross complaint for services rendered and for sums expended upon the property, the trial court's action, after making findings of fact and conclusions of law, in referring the matter to the auditor of the court for a report stating the account between the parties, was proper, and defendant's contention that the reference was not within the trial court's authority was rejected. Gilmore v Hinman (1951) 89 App DC 165, 191 F2d 652.

Court grants former business associate's application for appointment of members of arbitration panel to be special masters under Rule 53 to implement rulings and orders mandated by arbitration award in view of long history of disharmony between parties and obdurate conduct by other associate, because court is deeply concerned that speedy, effective and inexpensive resolution of issues, lofty purpose of arbitration process, has been shamefully thwarted for years in this case of disputing land developers. Dighello v Busconi (1987, DC Conn) 673 F Supp 85, affd without op (CA2 Conn) 849 F2d 1467.

53. Securities

In action against corporation by its preferred shareholders, in which plaintiffs sought declaration that they possessed the exclusive voting power in the company, and prayed that a receiver pendente lite be appointed and that general relief be granted, it was beyond the power of the trial court to refer to a master the investigation of the conduct and financial condition of the corporation, and the circumstances relating to an offer made by the corporation, after the commencement of the litigation, for the purchase of the preferred stock, where the litigation itself did not involve these matters. Webster Eisenlohr, Inc. v Kalodner (1944, CA3 Pa) 145 F2d 316, cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404.

District court should not have appointed special agent to investigate possibility that securities law violators had committed additional violations of securities laws that SEC had not pleaded or proven, since appointment was not for purpose of assisting in adjudication of case before court; claims brought by SEC in case had been adjudicated and appropriate amount of disgorgement determined, and appointment of investigator to unearth claims not previously pursued is not ancillary to completed adjudication. SEC v First Jersey Secs. (1996, CA2 NY) 101 F3d 1450, CCH Fed Secur L Rep P 99367.

Reference to a master of a secondary action by a shareholder, which involved the accounting of assets of several hundred thousand dollars, the use of expert accountants, and voluminous testimony of a technical nature, would be referred to a master in the exercise of the court's discretion. Miller v Weiant (1942, DC Ohio) 42 F Supp 760.

Where the matter of accounting would be somewhat involved in a stockholder's derivative action in which plaintiff sought an injunction and an accounting for profits based on alleged acts of fraud by the defendant corporations, an appropriate order of reference to a master could be made under Rule 53(b) after all testimony on liability had been presented. Hirshhorn v Mine Safety Appliances Co. (1948, DC Pa) 8 FRD 11, 76 USPQ 526.

In stockholder's derivative suit, reference was ordered to determine question of residence of one defendant, where such defendant's residence was important on issue of venue. Citrin v Greater New York Industries, Inc. (1948, DC NY) 79 F Supp 692.

Reference was granted of issues raised by pleadings in action in which Securities and Exchange Commission sought removal of trustee of railway. Re Pittsburgh R. Co. (1948, DC Pa) 80 F Supp 14.

In action under Securities and Exchange Act for recovery of corporate insiders' "short-swing" profits, the court ordered reference by which master was directed to hear testimony as to amount of defendants' profits and determine amount due corporation. Blau v Hodgkinson (1951, DC NY) 100 F Supp 361.

Numerous complex privilege issues in securities litigation warranted appointment of special master. Re Sunrise Secur. Litigation (1989, ED Pa) 124 FRD 99, later proceeding (ED Pa) 1989 US Dist LEXIS 4397, later proceeding (ED Pa) 1989 US Dist LEXIS 6288, amd on other grounds, reconsideration den, in part (ED Pa) 1989 US Dist LEXIS 13880 and clarified, reconsideration den (ED Pa) 109 BR 658.

54. Service of process

Motion to quash service of process on the ground that defendant corporation was not doing business within the state and that summons was not served on a proper representative of the defendant, raising complicated issues of fact, may be referred to a special master. Lazar v Cecelia Co. (1939, DC NY) 1 FRD 66; Sorrens v Click, Inc (1940, DC NY) 1 FRD 333.

Reference would be ordered to determine question whether person served was defendant's managing or general agent or any other agent authorized by appointment or by law to receive service of process. Steinberg v Landair Associated Corp. (1950, DC NY) 10 FRD 447.

55. Social Security

In cases involving Social Security disability benefits, crowded court calendar is not valid reason for reference to master, applicant being entitled to review by court. Ingram v Richardson (1972, CA6 Ky) 471 F2d 1268, 17 FR Serv 2d 177.

Order of District Court providing for reference to United States magistrate of all actions to review administrative determinations on entitlement to benefits under Social Security Act, was not, as applied, repugnant to Rule 53(b) as "blanket reference" to special masters. Weber v Secretary of Health, Education & Welfare (1974, CA9 Cal) 503 F2d 1049, affd 423 US 261, 46 L Ed 2d 483, 96 S Ct 549, 21 FR Serv 2d 459.

With regard to motions to dismiss and motions for summary judgment in Social Security cases, only Article 3 judge can engage in ultimate adjudicating responsibilities. Yascavage v Weinberger (1974, MD Pa) 379 F Supp 1297.

56. Taxes

In grand jury investigation of tax evasion and official corruption in connection therewith, in which the files of an attorney were subpoenaed as a means for obtaining information regarding the tax affairs of his clients, the appointment of a master to examine the files, and to turn over to the grand jury everything which he found to be connected with the affairs of the clients whose tax status was at issue except when he concluded that particular documents indicated the existence of a personal attorney–client relationship between the attorney and persons other than those involved in the tax evasion, was proper, so long as the master was required to disclose to the attorney the identity of papers which the master found to be unprivileged and so long as the attorney was permitted to have a ruling from which he contended represented confidential and separate attorney–client relationships. Schwimmer v United States (1956, CA8 Mo) 232 F2d 855, 56–2 USTC P 9711, 50 AFTR 644, cert den 352 US 833, 1 L Ed 2d 52, 77 S Ct 48.

Reference of case to master for analysis of plaintiffs' application for preliminary injunction constituted abuse of discretion as matter of law, in view of absence of exceptional conditions, in plaintiffs' action for wrongful levy under 26 USCS § 7426, and for order enjoining government from selling their home in order to collect delinquent taxes. Liptak v United States (1984, CA8 Minn) 748 F2d 1254. 84–2 USTC P 9958, 55 AFTR 2d 85–316.

Reference of entire case in which railroad challenged state's ad valorum personal property taxes as discriminatory was erroneous since state's desire for prompt resolution so that it could make fiscal plans did not constitute exceptional conditions and judge's request and judicial efficiency were likewise insufficient reasons. Burlington N. R. Co. v Department of Revenue (1991, CA9 Wash) 934 F2d 1064.

In action for refund of estate taxes where government moved to vacate court's reference of motions for summary judgment to United States magistrate argument's mistaken premise was that magistrate appointed under 28 USCS § 636(b) would be acting as traditional "special master" whose employment would be unquestionably appropriate only in exceptional circumstances, under Rule 53(b), but Federal Magistrates Act has created new judicial officer of potentially far greater utility than former master intermittently drawn from bar for special service in extraordinary case, and motion to vacate reference was denied. Kliban v United States (1974, DC Conn) 65 FRD 6.

57. Trademarks

In trademark infringement suit, reference was had to determine questions whether defendant was doing business in state in which it was served, and whether person served was defendant's "managing agent". Bomze v Nardis Sportswear, Inc. (1948, CA2 NY) 165 F2d 33, 76 USPQ 150.

Fountain manufacturer's contempt motion raising single question whether alleged trademark infringer's exhibition

of fountains was in compliance with consent decree and court order was improperly referred to special masters, since motion presented relatively simple questions of fact and law involving construction of decree and order—whether alleged infringer could exhibit fountain without prior approval so long as it made design changes recommended by panel and, if it could, whether alleged infringer had complied with design recommendations. Apex Fountain Sales, Inc. v Kleinfeld (1987, CA3 Pa) 818 F2d 1089, 3 USPQ2d 1430.

Defendant's claim, in trademark infringement suit, that it was Illinois corporation not subject to service of process in New York and not properly served in such suit was subject of reference. Lazar v Cecelia Co. (1939, DC NY) 30 F Supp 769, 43 USPQ 496.

In accounting for profits derived from the sale of goods in trademark infringement case, appointment of master was denied because master would be involved in an inextricable tangle from which it would be impossible to emerge with a substantial recovery based upon a rational rule of damages. Baker v Master Printers Union (1940, DC NJ) 34 F Supp 808, 47 USPQ 69.

In action for damages and injunctive relief on account of alleged trademark infringement by an Illinois defendant who claimed that no proper service had been made on it, and that it was a foreign corporation not doing business within the jurisdiction of the court and not subject to process there, plaintiff's request for reference to a master was denied on ground that on the showing made it would only unfairly harass the Illinois defendant. Jones v Davega Stores Corp. (1950, DC NY) 10 FRD 434, affd (CA2 NY) 186 F2d 707, cert den 342 US 817, 96 L Ed 618, 72 S Ct 31.

58. Trusts and estates

Reference of the entire litigation, consisting of an action against a trustee for an accounting of his trust administration, for certain property, and for relief from trustee's alleged breach of fiduciary obligations was justified not only on the ground that the suit involved an accounting but also in view of exceptional circumstances that many of witnesses were available only at far distant points, that the case was broad and complex involving some 300 exhibits, and that the judge was retired and was sitting by assignment only until his successor should be appointed. Troyak v Enos (1953, CA7 Ind) 204 F2d 536.

Where an issue arose as to the date of resignation of a trustee, on an action involving an allegedly unauthorized payment of a portion of the principal of a trust, and the issue was important because the date of resignation was determinative of the trustee's status as an indispensable party, and the court's diversity jurisdiction would be affected by his presence or absence as a party, the matter might be referred to a special master, at the preference of the parties, for a forthwith determination of the issue. Bentinck v Guaranty Trust Co. (1952, DC NY) 109 F Supp 827.

59. Truth in Lending Act

Suit brought under Truth In Lending Act was appropriately referred to bankruptcy judge as special master, where number of truth in lending cases filed with court was staggering, and could not have been handled by judges as ordinary litigation. Mullinax v Willett Lincoln—Mercury, Inc. (1974, ND Ga) 381 F Supp 422, 19 FR Serv 2d 183.

60. Veterans' benefits

Appellate court affirmed reference to an auditor in an action on a veteran's insurance policy holding that the ruling was within the discretion of the trial court but observed that "it is far better practice, except where stress of work or other good cause is shown, for the court to try cases where the determination of the issues is dependent upon the credibility of the witnesses." Coyner v United States (1939, CA7 Ill) 103 F2d 629.

Reference under local rule of court of plaintiff's action for declaratory judgment as to his right to veteran's preference eligibility in his civilian employment in the Civil Aeronautics Administration was proper as against contention that local rule permitting such reference was repugnant to Rule 53(b). Blackmon v Lee (1952, DC Dist Col) 12 FRD 411.

61. Wrongful death

In action in New York federal court to recover for death of plaintiff's decedent on one of defendant's trains in Nevada, reference was ordered to determine questions as to the domicil and residence of the decedent, domicil and residence of decedent's son at the time when the cause of action arose, and extent of the activities carried on by the defendant within the state of New York. Stone v Southern Pac. Co. (1940, DC NY) 32 F Supp 819.

Court had authority in asbestos death actions to appoint U.S. Magistrate or another person to serve as special master

to decide motions for autopsies. Re Certain Asbestos Cases (1986, ND Tex) 113 FRD 612, 6 FR Serv 2d 1302.

62. Miscellaneous

Reference to magistrate was exception making it proper within Rule 53(b), in action by Civil Aeronautics Board seeking injunctive relief against defendants selling airplane passage on charter flights in violation of CAB regulations, where trial judge did not delegate judicial decision–making function as to entire case but only power to make initial findings, and made further findings on his own and reached result contrary to that recommended by magistrate. Civil Aeronautics Bd. v Carefree Travel, Inc. (1975, CA2 NY) 513 F2d 375, 19 FR Serv 2d 1529.

Prospect of noncompliance with preliminary injunction limiting federal and state entities' participation in marijuana eradication program was exceptional condition justifying reference to master to monitor compliance, court's delegating power to master to act as investigator as well as hearing officer was appropriate in context of monitoring compliance with court order, and master's duties did not impermissibly infringe on function of executive since master had not been given power to control entities' efforts, only to observe them. National Organization for Reform of Marijuana Laws v Mullen (1987, CA9 Cal) 828 F2d 536, 9 FR Serv 3d 51.

In case involving Indian fishing rights under treaty there were exceptional conditions justifying appointment of special master where, since 1974, there had been numerous supplemental proceedings with voluminous filings and in proceedings below, instant case was one of 14 sub–proceedings and over 11,000 papers had been filed with District Court. United States v Suquamish Indian Tribe (1990, CA9 Wash) 901 F2d 772.

Where hundreds of plaintiff's stockholders had intervened and many variously contested proceedings had resulted in hearings before each of the several district judges in suit by Swiss holding company under Trading With the Enemy Act against the Attorney General, as successor to alien property custodian, appointment of special master by Chief Judge on his own motion because of the exceptional circumstances involved in the case would be affirmed. Rogers v Societe Internationale Pour Participants Industrielles et Commerciales, S. A. (1960) 107 App DC 388, 278 F2d 268, 3 FR Serv 2d 831, cert den 364 US 895, 5 L Ed 2d 189, 81 S Ct 223.

Where, with respect to question whether defendant foreign corporation was doing business in state in action removed to federal court, there were essential contradictions which could not be satisfactorily determined on basis of affidavits, matter would be submitted to a special master to hear and determine. Pioneer Utilities Corp. v Scott–Newcomb (1939, DC NY) 26 F Supp 616.

Lawsuit by United States against carrier for approximately $10,000 would not be referred to magistrate, where reference was opposed by Department of Justice, in accordance with recently promulgated regulation directing department attorneys to oppose references whenever they would be in contravention of Constitution or Rule 53(b). United States v Eastmount Shipping Corp. (1974, DC NY) 62 FRD 437.

With respect to plaintiff judgment creditor's proposal that District Court designate federal magistrate to serve as federal parallel to state commissioner in chancery in proceedings in aid of execution, resort to Rule 53 is unnecessary, since discovery procedure requested pursuant to state law is in nature of deposition, Federal Magistrate Act explicitly gives federal magistrate power to take deposition, and local rules for practice before magistrates provide that magistrate conduct examination of judgment debtors in accordance with Rule 69. Chicago Pneumatic Tool Co. v Stonestreet (1985, SD W Va) 107 FRD 674.

Scope of reference pursuant to FRCP 53 may include report and recommendation on motion for summary judgment. Union Carbide Corp. v Montell N.V. (1998, SD NY) 179 FRD 425.

Since special master is vested with full and complete powers under FRCP 53(c) and (d), special master's decision is functional equivalent of magistrate judge's adjudication of nondispositive motion; thus, decision of special master in discovery dispute is entitled to great deference. Katz v AT&T Corp. (2000, ED Pa) 191 FRD 433.

In action in which Individual Indian Money (IIM) beneficiaries filed suit against Secretary of Interior and other federal officials, alleging that mismanagement of trust constituted breach of fiduciary duty to beneficiaries, court found that appointment of monitor to report on Department of Interior's compliance with court's structural injunction would be appropriate because (1) Department had demonstrated its intransigence towards previous orders in present case requiring changes in its practices and conditions; (2) Department had both repeatedly failed to acknowledge even completely evident violations of its fiduciary duties to IIM beneficiaries and failed to conform its actual practices to its written policies

and procedures; and (3) in order for beneficiaries to be able to determine whether Department was interpreting injunction in such manner, it would be necessary to provide means for generation of regular reports of injunction's implementation by detached, neutral observer. Cobell v Norton (2003, DC Dist Col) 283 F Supp 2d 66.

III. PROCEEDINGS BEFORE MASTER 63. Generally

The Federal Rules of Civil Procedure contemplate a separate and distinct proceeding before the master; if it is a genuine reference, they should be strictly followed. Bullard Co. v General Electric Co. (1965, CA4 VA) 348 F2d 985, 146 USPQ 141, 9 FR Serv 2d 53d.13, Case 1.

Court–appointed administrator in long–standing race discrimination case against union lacked authority to enjoin parties since magistrates are not permitted to hear motions for injunctive relief without parties' consent and administrator, who was court–appointed special master, cannot have more authority than that Congress has granted magistrates. EEOC v Local 638 (1996, CA2 NY) 81 F3d 1162.

By treating magistrate judge qua special master's report as referral for report and recommendation under 28 USCS § 636(b)(1), Fed. R. Civ. P. 72, and U.S. Dist. Ct., D. D.C., Civ. R. 72.3(b), trial court erred as matter of law; under Fed. R. Civ. P. 53, it was trial court's duty to review special master's legal conclusions de novo. Wallace v Skadden, Arps, Slate, Meagher & Flom, LLP (2004, App DC) 362 F3d 810, 58 FR Serv 3d 260, costs/fees proceeding, request den (2004, App DC) 2004 US App LEXIS 9322.

64. Meeting of parties or attorneys

There was no prejudice as result of master's failure to hold meeting of the parties, since such meeting is not required if the order of reference otherwise provides. Sauget v Johnston (1963, CA9 Guam) 315 F2d 816, 7 FR Serv 2d 986.

Failure of Master to hold evidentiary hearing in case in which Master is reviewing documents claimed to be privileged does not violate USCS FRCP, Rule 53(d)(1) in view of fact that Master proceeded with all due diligence to complete his report and defendant was not prejudiced since it had opportunity to present evidence at hearing before Master after court remanded reports to Master for reconsideration. Re Ampicillin Antitrust Litigation (1978, DC Dist Col) 81 FRD 377, 202 USPQ 134, 1978–1 CCH Trade Cases P 62043, 25 FR Serv 2d 1248.

65. Diligence requirement

While under Rule 53(d) either party may apply to the court for an order requiring special master to speed the proceedings and make his report, the failure of the defendant so to do does not relieve plaintiff. Trico Products Corp. v E. A. Laboratories, Inc. (1944, DC NY) 54 F Supp 782, 60 USPQ 486.

66. Evidence

The denial by the master and confirmation thereof by the district court of a motion to take additional proof in a patent action, made after the testimony was closed and the master had submitted a draft of his report to counsel, on the grounds that the proving of the alleged facts would not alter his conclusions, that the motion was not seasonably made, that defendant did not claim surprise at the hearing, that there was no claim that the evidence was newly discovered, that no excuse was offered for not producing the evidence at the hearing, and that no motion was made at the hearing for a continuance in order to produce it, would be sustained by the appellate court. B. F. Sturtevant Co. v Massachusetts Hair & Felt Co. (1941, CA1 Mass) 122 F2d 900, 51 USPQ 198, reh den (CA1 Mass) 124 F2d 95, 51 USPQ 420 and cert den 315 US 823, 86 L Ed 1219, 62 S Ct 917, 52 USPQ 644.

Testimony taken before a master appointed in a jury action under Rule 53(e) should not be included in record on appeal. Phillips Petroleum Co. v Williams (1947, CA5 Tex) 159 F2d 1011.

Where no objection was made to appointment of successor master to determine controversy on basis of existing record, consisting of evidence taken before prior master who had become incapacitated, appellate court would not entertain belated charge that District Court erred in not requiring complete or partial rehearing of evidence before successor master. W. R. B. Corp. v Geer (1963, CA5 Tex) 313 F2d 750, 6 FR Serv 2d 962.

Although any competent evidence at variance with the master's conclusions and any resulting conflict may be submitted to the jury, any offer to show the content of the evidentiary record before the master should be excluded, and the court might properly instruct the jury that since every party had as much opportunity to present evidence to the master as to the jury it must be presumed that all pertinent evidence within the scope of the report had been made available and

received judicial consideration by master and by the court in accepting his report. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

In absence of any direction to contrary and of any special circumstances, all questions relating to relevancy and materiality of documentary evidence should be left to special master. Pathe Laboratories, Inc. v Du Pont Film Mfg. Corp. (1943, DC NY) 3 FRD 11.

A master's direction for production of records by party should not be disturbed unless his findings that such records were material, relevant and necessary were clearly erroneous. Pathe Laboratories, Inc. v Du Pont Film Mfg. Corp. (1943, DC NY) 3 FRD 11.

When difficult questions of law arise upon a reference, the decision upon which may admit or exclude a large amount of evidence, the party aggrieved by the master's rulings may apply to the court for instructions to the master upon the subject, but such applications are granted only in extraordinary cases. Cold Metal Process Co. v United Engineering & Foundry Co. (1950, DC Pa) 92 F Supp 969; Pathe Laboratories, Inc. v Du Pont Film Mfg. Corp. (1943, DC NY) 3 FRD 11.

Master could rule on admissibility of evidence, or, in the alternative, note objections and leave it to court upon review to pass on such objections. United States v Southerly Portion of Bodie Island (1956, DC NC) 19 FRD 313, vacated on other grounds (CA4 NC) 246 F2d 330.

On plaintiff's motion to confirm report of special master under FRCivP 53(e)(2), defendants were not allowed to introduce evidence of cost or deduction in computing their profits from sale of products which infringed plaintiff's trademark, under FRCivP 53(d)(2), where defendants never provided all information sought, what they did produce was after significant delay and without adequate excuse, material sought was neither voluminous nor difficult to produce, and defendants' delaying tactics hindered orderly and expeditious resolution of matter. Chesa International, Ltd. v Fashion Associates, Inc. (1977, SD NY) 425 F Supp 234, 193 USPQ 506, 22 FR Serv 2d 1191, affd without op (CA2 NY) 573 F2d 1288.

IV. MASTER'S REPORT

A. In General 67. Generally

Master's report was admissible since his findings upon the issues submitted were admissible as evidence of the matters found and could be read to the jury. Charles A. Wright, Inc. v F. D. Rich Co. (1966, CA1 Mass) 354 F2d 710, 9 FR Serv 2d 51.32, Case 1, cert den 384 US 960, 16 L Ed 2d 673, 86 S Ct 1586, reh den 385 US 890, 17 L Ed 2d 122, 87 S Ct 14.

The practice in District Court is for auditor to make his report and recommendations in writing to court pursuant to to court's order of reference, and to send a copy thereof to all interested parties. Re Kosmadakes (1971) 144 App DC 124, 444 F2d 999, 15 FR Serv 2d 91.

While the writing of an opinion to indicate the grounds of the court's decision is favored, it is not obligatory, even in patent suits, if there is a detailed and reasoned master's report. Joyce, Inc. v Fern Shoe Co. (1940, DC Cal) 32 F Supp 401, 45 USPQ 243, remanded on other grounds (CA9 Cal) 116 F2d 498, 47 USPQ 532.

Magistrate refused to consider appeal from report of special master noting that function of special master and role of magistrate judge was to large extent parallel as to pre–trial matters under Fed. R. Civ. P. 53(a)(1)(C) and 28 USCS § 636(b)(1)(A), and that it would be both anomalous and inefficient for magistrate judge to consider appeal from order of special master, just as it would be for magistrate judge to review determination of another magistrate judge. Convolve, Inc. v Compaq Computer Corp. (2004, SD NY) 223 FRD 162.

68. Form and content

A master's report which does not define the issues presented by the pleadings and evidence, does not contain findings of fact and conclusions of law but consists of general narrative expressions of opinion, conclusion, and a recommendation for dismissal, does not conform to the rules. Helfer v Corona Products, Inc. (1942, CA8 Ark) 127 F2d 612.

Where report of special master showed exactly what he found to be the facts relative to the issues in suit and plaintiff in its objections to the report recognized that report contained master's findings, District Court's approval of the report was not erroneous because report did not contain separate findings of fact. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

A master's report should only cover those matters stated in the order of reference. Sauget v Johnston (1963, CA9 Guam) 315 F2d 816, 7 FR Serv 2d 986.

In view of rule provision that the master shall not be directed to report the evidence in jury actions, any offer to show content of evidentiary record which was before the master would be excluded and court may properly instruct jury that since every party had as much opportunity to present evidence to master as to jury under procedure prescribed by Rule 53(d), it must be presumed that all pertinent evidence within scope of master's report had been made available to master and had received judicial consideration by master in formulating his report and by court in accepting report. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

It is not essential that the master's report separately state and number his findings and conclusions. Helene Curtis Industries, Inc. v Sales Affiliates, Inc. (1954, DC NY) 121 F Supp 490, affd (CA2 NY) 233 F2d 148, 109 USPQ 159, cert den 352 US 879, 1 L Ed 2d 80, 77 S Ct 101, 111 USPQ 467, reh den 352 US 945, 1 L Ed 2d 240, 77 S Ct 260.

Magistrate judge exceeded his authority in employee's sexual discrimination and sexual harassment action, where magistrate entered order denying employer's motion to dismiss for lack of subject–matter jurisdiction, because magistrate should have prepared special master's report including proposed findings of fact and conclusions of law, but since magistrate's order contained findings of fact and conclusions of law, court could treat order as special master's report and would review magistrate's findings under clearly erroneous standard. Richardson v Bedford Place Hous. (1994, ND Ga) 855 F Supp 366, 65 BNA FEP Cas 182.

69. Necessity of transcript

Where neither party to action for accounting procured a transcript of the testimony before the master from the reporter prior to the filing of master's report, the court did not abuse its discretion in declining plaintiffs' motion to compel filing of transcript until security for reporter's charges was posted. Bynum v Baggett Transp. Co. (1956, CA5 Ala) 228 F2d 566.

Where neither party ordered transcript of reference proceedings and there was no objection to master's failure to have shorthand notes taken of proceedings, master's report could not be objected to on grounds that transcript of proceedings was not filed. Re A. Maggioli Co. (1943, DC Mass) 3 FRD 83.

Rule 53(e)(1) does not require, absolutely, that transcript of proceedings be made; such requirement may be dispensed with at discretion of court; thus, where master is called upon to render accounting and all records he reviews are supplied by defendants or introduced and authenticated at trial and where defendants fail to object to absence of court stenographer, transcript may be denied. Levin v Garfinkle (1982, ED Pa) 540 F Supp 1228.

70. Weight

Order of reference in an action to be tried by a jury is not unconstitutional as unduly interfering with the jury's determination of issues of fact, since the report of the master will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein, being treated as prima facie evidence thereof, leaving parties free to call, examine, and cross–examine witnesses as if report had not been made. Coyner v United States (1939, CA7 Ill) 103 F2d 629.

Report of master serves advisory and evidentiary capacity and, under Rule 53, does not preclude use of jury. Franquez v United States (1979, CA9 Guam) 604 F2d 1239, 28 FR Serv 2d 1003.

It is not necessary for trial court to scrutinize for possible error in master's report in civil rights case where violations on part of defendant are probable and not determined solely on basis of statistics and inferences flowing from them. United States v Lee Way Motor Freight, Inc. (1979, CA10 Okla) 625 F2d 918, 20 BNA FEP Cas 1345, 21 CCH EPD P 30286, on remand (WD Okla) 25 BNA FEP Cas 142.

The rule as to the weight to be given to the report of a special master was not changed by the new rules. Re Pullmatch, Inc. (1939, DC Ohio) 27 F Supp 884.

Court permitted the master's report to be read to the jury accompanied by an instruction that it be treated by the jury as an item of evidence entitled to such weight as its best judgment may accord to it. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

Scope of review of master's report by District Court in jury actions should be narrower than in nonjury actions. Eastern Fireproofing Co. v United States Gypsum Co. (1970, DC Mass) 50 FRD 140, 1970 CCH Trade Cases P 73342,

14 FR Serv 2d 534.

In jury case, report of master is merely prima facie evidence which parties may attack at trial with any competent evidence and which jury is free to disregard. Eastern Fireproofing Co. v United States Gypsum Co. (1970, DC Mass) 50 FRD 140, 1970 CCH Trade Cases P 73342, 14 FR Serv 2d 534.

A master's findings of law carry no weight with the court. Clark v Atlanta Newspapers, Inc. (1973, ND Ga) 366 F Supp 886, 73 CCH LC P 33039.

In evaluating weight to accord Masters' report, which has not yet been approved by District Court which commissioned Masters, District Court presiding over pretrial proceedings in multidistrict litigation properly considers nature and circumstances surrounding preparation of report, evidence relied upon by Masters in reaching their conclusions, and logical strength of their reasoning; use of contents of Masters' report in this fashion—as evidence, not as facts not subject to reasonable dispute—is proper. Re A.H. Robins Co. (1985, DC Kan) 107 FRD 2, 18 Fed Rules Evid Serv 849, 3 FR Serv 3d 298.

71. Objections to report

The findings of fact by a master cannot be reviewed upon appeal where there are no exceptions to his report and no objections to the court's approval of the master's findings. Socony—Vacuum Oil Co. v Oil City Refiners (1943, CA6 Ohio) 136 F2d 470, 26 Ohio Ops 560, 58 USPQ 632, cert den 320 US 798, 799, 88 L Ed 482, 64 S Ct 368, 59 USPQ 495 and cert den 320 US 798, 88 L Ed 482, 64 S Ct 369, 59 USPQ 496.

In the trial of an action submitted to an auditor after a jury verdict was set aside, appellant was not prejudiced by court's refusal to allow withdrawal of exceptions to the auditor's report since the presence or absence of exceptions is immaterial in that such findings are not conclusive unless stipulated. Shima v Brown (1943) 77 App DC 115, 133 F2d 48, cert den 318 US 787, 87 L Ed 1154, 63 S Ct 982.

While the court is to accept the master's findings of fact unless clearly erroneous, it is necessary for the judge to review the transcript of the proceedings to determine if error has been made, and when objection is taken to the report, he is bound to review the transcript of the proceedings, evidence, and exhibits to determine for himself whether the master's report should be accepted, rejected wholly or partly, modified, recommitted with instructions, or whether he should receive further evidence. D. M. W. Contracting Co. v Stolz (1946) 81 App DC 334, 158 F2d 405, cert den 330 US 839, 91 L Ed 1286, 67 S Ct 980. and (disagreed with by Henry A. Knott Co., Div. of Knott Industries, Inc. v Chesapeake & Potomac Tel. Co. (CA4 W Va) 772 F2d 78, 3 FR Serv 3d 945).

Party cannot rely on exceptions to master's report that challenge finding but do not provide arguments or direct court to record evidence that might establish commission of reversible error by master; Court of Appeals cannot be expected to undertake complete review of voluminous record evidence and then proceed, in effect, to act, at least in first instance, as that party's advocate to determine whether unadorned exception has any merit. Oil, Chemical & Atomic Workers International Union v NLRB (1976) 178 App DC 278, 547 F2d 575, 92 BNA LRRM 3059, 94 BNA LRRM 3074, 78 CCH LC P 11455, cert den 431 US 966, 53 L Ed 2d 1062, 97 S Ct 2923, 95 BNA LRRM 2642, 81 CCH LC P 13256, later proceeding 242 NLRB 744, 101 BNA LRRM 1209, 1979–80 CCH NLRB P 15887, enforcement gr (CA10) 683 F2d 1296, 111 BNA LRRM 2191, 94 CCH LC P 13688.

A motion to strike out a report of a special master should be considered as "written objections" to the report. Re Blakesley (1939, DC Mo) 27 F Supp 980.

In jury actions the master's report is evidence, and objections thereto may be made at the trial. Daley v Evans Case Co. (1940, DC Mass) 1 FRD 270, 45 USPQ 686.

Written objections to a master's report may not be filed and the practice thereon may not be adopted in cases tried by jury. Daley v Evans Case Co. (1940, DC Mass) 1 FRD 270, 45 USPQ 686.

Master's interim report prior to taking testimony is report within provisions of Rule 53(e) to which exceptions may be filed and rueled on by district court. Coca–Cola Co. v Dixi–Cola Laboratories, Inc. (1943, DC Md) 59 USPQ 47.

Where local court rule requires memoranda of law to be filed in support of all motions, failure to file brief or other document in response to properly supported motion stating objections to report of special master indicates that such motion is unopposed. Houston v Atlanta Federal Sav. & Loan Asso. (1976, ND Ga) 414 F Supp 851.

It is improper to incorporate by reference briefs filed before special master as part of objections presented to trial court because if parties rely generally upon all briefs and documents previously filed in action in supporting or objecting to special master's report, that report will effectively be lowered to level of mere amicus brief. Houston v Atlanta Federal Sav. & Loan Asso. (1976, ND Ga) 414 F Supp 851.

Objections to special master's report and recommendation were too general to be valid, since objections were equivocal and ambiguous and were merely referral to memoranda previously filed by objecting party. United States v Washington (1986, WD Wash) 626 F Supp 1405.

72.—Timeliness

Objections to a master's report in a jury case may be heard before trial. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

Court required that any objections to the report of the special master be filed in writing within twenty days after the filing of his report. Connecticut Importing Co. v Frankfort Distilleries, Inc. (1940, DC Conn) 42 F Supp 225.

Court refused to grant additional allowances to persons who failed to file exceptions to report of special master within period of time specified by Rule 53. Re Portland Electric Power Co. (1948, DC Or) 97 F Supp 918.

FRCivP 6(e) gives parties three additional days in which to make objection under FRCivP 53(e)(2), since FRCivP 53(e)(2) gives parties right to do some act or take some proceedings within prescribed period after service of notice upon them, and Clerk is required by FRCivP 53(e)(1) to mail all parties notice of filing. United States ex rel. Tennessee Valley Authority v 72.0 Acres of Land (1976, ED Tenn) 425 F Supp 929.

73.—Hearing on objections

Objections to referee–special master's report were entitled to hearing before the District Court before the court acted on such report, notwithstanding that arguments raised in opposition to the report had been fully aired before the referee–special master and were reflected in party's written objections filed with District Court. Re Wonderbowl, Inc. (1970, CA9 Cal) 424 F2d 178, later app (CA9 Cal) 460 F2d 1220.

District Court erred in adopting special master's report and recommendations without holding hearing in employment discrimination case; hearing is mandated when party objects to report and fact that party's objections are comprehensively briefed does not excuse departure from language of rule. Kieffer v Sears, Roebuck & Co. (1989, CA6 Ohio) 873 F2d 954, 49 BNA FEP Cas 1137, 50 CCH EPD P 39997.

When neither party objects to conclusions of law of special–master monitor, court may adopt those conclusions without holding hearing. Cobell v Norton (2003, DC Dist Col) 257 F Supp 2d 203, motion to strike den (2003, App DC) 2003 US App LEXIS 7684.

On petition by federal government, seeking to enforce IRS summonses served on accounting firm and requesting information relating to firm's promotion of and participation in alleged tax shelter transactions, firm's claims of privilege under 26 USCS § 7525 were unsupportable for all of requested documents, except for certain alleged opinion letters, where special master accurately found that firm was misrepresenting its unprivileged tax shelter marketing activities as privileged communications and where firm's privilege log was inaccurate, incomplete, and even misleading regarding those documents. United States v KPMG LLP (2004, DC Dist Col) 316 F Supp 2d 30, 2004–1 USTC P 50281, 93 AFTR 2d 2106.

74. Rejection in whole or part

Trial judge's determination in accounting proceeding of value of accounts receivable differing from findings of special master must be accepted by appellate court where no exceptions were taken to judge's findings of fact. Mauro v Rodriguez (1943, CA1 Puerto Rico) 135 F2d 555.

In an action tried without a jury in which there is a detailed and reasoned report of the master, the court need not indicate its grounds for adhering to that part of the report which is adopted but should indicate its views fully as to the portions rejected. Joyce, Inc. v Fern Shoe Co. (1940, DC Cal) 32 F Supp 401, 45 USPQ 243, remanded on other grounds (CA9 Cal) 116 F2d 498, 47 USPQ 532.

The court is more reluctant to overturn the master's findings where such findings are based upon conflicting testimony

of witnesses who have been seen and heard by the master than where the findings are simply logical inferences drawn by the master from documentary evidence, depositions, or undisputed facts. McGraw Edison Co. v Central Transformer Corp. (1961, DC Ark) 196 F Supp 664, 130 USPQ 189, affd (CA8 Ark) 308 F2d 70, 135 USPQ 53, 6 FR Serv 2d 959.

75. Modification

While rule of civil procedure provides that exceptions to master's report must be filed within 10 days after party has been served with report, the court, if it be deemed necessary and of vital importance in the interest of substantial justice, can modify master's report in any particular without any exceptions having been filed thereto. Re Portland Electric Power Co. (1948, DC Or) 97 F Supp 918.

The District Court has power to modify master's report upon motion for action upon report and failure of party to timely serve objections does not limit such power. Mitchell v All-States Business Products Corp. (1965, ED NY) 250 F Supp 403, 9 FR Serv 2d 53e.32, Case 1, 52 CCH LC P 31729.

76. Recommitment

Although District Court's resubmission of case to master by use of specific interrogatories was an unusual method for passing on exceptions to master's report, it had distinct advantage of informing District Court, and thereafter the appellate court, of precisely what the master found, together with precise legal holdings on such facts. Fulton Nat. Bank v Tate (1966, CA5 Ga) 363 F2d 562.

Defendants were not entitled to recommitment of case to master to make additional findings of fact where request of defendants for such additional findings consisted almost entirely of demand for specific evidence which master considered when making each finding of fact. Loew's, Inc. v Lieberman (1948, DC Mass) 78 F Supp 201, 77 USPQ 456.

B. Findings 77. Generally

Appellate court will not question the presumption of correctness that is attributed to an auditor's report which has been approved by the trial court, where the record on appeal does not disclose the testimony of the witnesses who testified at the auditor's hearing. Coyner v United States (1939, CA7 Ill) 103 F2d 629.

Where master's report disclosed that he made exhaustive findings of fact and the district court adopted the findings, it cannot be said that the district court made no findings of fact. Connolly v Gishwiller (1947, CA7 Ill) 162 F2d 428, cert den 332 US 825, 92 L Ed 400, 68 S Ct 166.

Master's findings are entitled to special weight because he has seen and heard the witnesses but they are not given the effect of a verdict by a jury. United States v Twin City Power Co. (1957, CA4 SC) 248 F2d 108, cert den 356 US 918, 2 L Ed 2d 714, 78 S Ct 702.

Where master's report in nonjury trial shows that he has performed his duties conscientiously, made a clear discussion of the facts, and has applied the proper rules of law, the court must accept the master's findings. Rundell v Box (1948, DC Colo) 89 F Supp 166.

In determining the sufficiency of the evidence to support the findings of a master's report and the jury determination of the same facts, the court will apply the substantial evidence test. Eastern Fireproofing Co. v United States Gypsum Co. (1970, DC Mass) 50 FRD 140, 1970 CCH Trade Cases P 73342, 14 FR Serv 2d 534.

Special master's findings of fact carry presumption of correctness, but his conclusions of law carry no weight with reviewing court. Monmouth County Correctional Institution Inmates v Lanzaro (1984, DC NJ) 595 F Supp 1417.

If District Court accepts master's report generally, it may nonetheless modify and supplement his findings, but court's added findings must be based on evidence contained in record. Dooley v Quick (1984, DC RI) 598 F Supp 607, affd without op (CA1 RI) 787 F2d 579.

78. Stipulations

In a jury action, a master's findings are mere evidence unless the parties stipulate that they shall be final; absence of exceptions to a master's report does not amount to a stipulation that the findings shall be final. Shima v Brown (1943) 77 App DC 115, 133 F2d 48, cert den 318 US 787, 87 L Ed 1154, 63 S Ct 982.

Stipulation proposed in order for reference which would have had the effect of committing the court in advance to the

decision of the master would be disapproved. Cademartori v Marine Midland Trust Co. (1955, DC NY) 18 FRD 277.

79. Reading findings to jury

Where it was clear from report of master, appointed in action on government contractor's bond, that issues were not too complicated for jury to decide, it was error to admit master's findings as evidence of matters found and in permitting them to be read to jury. Boyd Callan, Inc. v United States (1964, CA5 Tex) 328 F2d 505.

Master's findings upon the issues submitted were admissible as evidence of the matters found and might be read to the jury. Charles A. Wright, Inc. v F. D. Rich Co. (1966, CA1 Mass) 354 F2d 710, 9 FR Serv 2d 51.32, Case 1, cert den 384 US 960, 16 L Ed 2d 673, 86 S Ct 1586, reh den 385 US 890, 17 L Ed 2d 122, 87 S CT 14.

Rule 53(e)(3) does not require that special master personally read his findings to jury and, therefore, special master did not have to be made available for cross-examination on procedures he used to reach findings which were presented to jury. Crateo, Inc. v Intermark, Inc. (1976, CA9 Cal) 536 F2d 862, 21 FR Serv 2d 1411, cert den 429 US 896, 50 L Ed 2d 180, 97 S Ct 259.

80. Objections

Objections to magistrate's findings of fact and conclusions of law filed within time authorized by Rule 53 but refused as too long in violation of local rules would be deemed timely filed since local rule would otherwise be given impermissibly jurisdictional character. Smith v Frank (1991, CA9 Cal) 923 F2d 139, 91 CDOS 322, 91 Daily Journal DAR 384, 54 BNA FEP Cas 1321, 55 CCH EPD P 40492, 18 FR Serv 3d 527.

In absence of objections to findings of fact of special master, the District Court will accept the master's findings of fact and adopt each and every one of them verbatim. Associated Stores, Inc. v Industrial Loan & Invest. Co. (1962, ED NC) 202 F Supp 251, affd (CA4 NC) 326 F2d 756, cert den 379 US 830, 13 L Ed 2d 39, 85 S Ct 60.

While the rule provides that any party may serve written objections, it is not necessary to make objections to the master's findings as permitted therein. Mitchell v All-States Business Products Corp. (1965, ED NY) 250 F Supp 403, 9 FR Serv 2d 53e.32, Case 1, 52 CCH LC P 31729.

In objection to special master's report made pursuant to Fed. R. Civ. P. 53, assertion of food company and chemical company that response to interrogatory would be unduly burdensome, was rejected since it appeared that defendants had already undertaken necessary research. In re Vitamins Antitrust Litig. (2002, DC Dist Col) 217 FRD 229.

Assertion of food company and chemical company in their Fed. R. Civ. P. 53 objections to special master's report that requiring them both to provide Fed. R. Civ. P. 30(b)(6) witnesses for depositions would be duplicative since at all relevant times, food company was wholly-owned subsidiary of chemical company was rejected; although plaintiffs were correct that two companies were separate entities, plaintiffs alleged that each entity individually participated in conspiracy. In re Vitamins Antitrust Litig. (2002, DC Dist Col) 217 FRD 229.

Assertion of food company and chemical company in their Fed. R. Civ. P. 53 objection to special master's report that requiring chemical company to provide additional Fed. R. Civ. P. 30(b)(6) witness at all, at late stage in litigation, served no useful purpose, because it had already produced documents relating to alleged conspiracies known or reasonably known to it, was rejected by court based on "substitution theory of discovery"—that chemical company could respond as it saw fit rather than as requested by plaintiffs. In re Vitamins Antitrust Litig. (2002, DC Dist Col) 217 FRD 229.

Apparent assertion of food company and chemical company in their Fed. R. Civ. P. 53 objection to special master's report that since other foreign defendants had not been required to produce educated Fed. R. Civ. P. 30(b)(6) witnesses, they should not be required to do so was rejected based on "substitution theory of discovery"—that companies could respond as they saw fit rather than as requested by plaintiffs. In re Vitamins Antitrust Litig. (2002, DC Dist Col) 217 FRD 229.

81.—Burden of proof

Party excepting to master's findings carries burden of proving them to be clearly erroneous. Oil, Chemical & Atomic Workers International Union v NLRB (1976) 178 App DC 278, 547 F2d 575, 92 BNA LRRM 3059, 94 BNA LRRM 3074, 78 CCH LC P 11455, cert den 431 US 966, 53 L Ed 2d 1062, 97 S Ct 2923, 95 BNA LRRM 2642, 81 CCH LC P 13256, later proceeding 242 NLRB 744, 101 BNA LRRM 1209, 1979-80 CCH NLRB P 15887, enforcement gr (CA10) 683 F2d 1296, 111 BNA LRRM 2191, 94 CCH LC P 13688.

The burden is upon him who attacks a finding of the master to show that it is clearly erroneous. Esdale v Edwards (1961, DC NC) 28 FRD 390.

The burden of showing that the master's findings are erroneous is especially strong where the question is one of credibility and is lighter as to logical inferences drawn from undisputed facts or documents. Esdale v Edwards (1961, DC NC) 28 FRD 390.

Burden is on party who objects to findings of fact by special master to show that it is clearly erroneous. Badger By—Products Co. v Employers Mut. Casualty Co. (1974, ED Wis) 64 FRD 4, 19 FR Serv 2d 187, affd without op (CA7 Wis) 519 F2d 1406.

Findings of Special Master carry presumption of correctness and burden is on objector to overcome that presumption, however, such presumption does not apply to conclusions of law. Union County Jail Inmates v Scanlon (1982, DC NJ) 537 F Supp 993, revd on other grounds (CA3 NJ) 713 F2d 984, reh den (CA3) 718 F2d 1247, cert den 465 US 1102, 80 L Ed 2d 130, 104 S Ct 1600.

82. Review

Findings of auditor, concurred in by both auditor and trial judge, will not ordinarily be disturbed by appellate court, unless there is clear mistake or unless findings are unsupported by the evidence. Coyner v United States (1939, CA7 Ill) 103 F2d 629.

Where District Court, on exceptions to master's report, sustained it in full, and it appeared that testimony heard by master had never been transcribed and included as part of the record, reviewing court must abide by master's fact findings since there was no way to test them under the scrutiny of "clearly erroneous"; the inquiry on review would be to determine whether, as held by District Court, the master's conclusions found adequate support and reason on the face of his report. Bynum v Baggett Transp. Co. (1956, CA5 Ala) 228 F2d 566.

Where master has been appointed under Rule 53(e), his findings should not be disturbed merely because trial court is of different opinion or dissatisfied with master's findings. Leader Clothing Co. v Fidelity & Casualty Co. (1956, CA10 Kan) 237 F2d 7.

Findings of master are entitled to great weight and should not be disregarded unless cleary wrong. Baker v Simmons Co. (1963, CA1 Mass) 325 F2d 580, 140 USPQ 45, 8 FR Serv 2d 53c.21, Case 1.

The findings of a master are entitled to great weight and should not be disregarded unless clearly wrong. United States v S. Volpe & Co. (1966, CA1 Mass) 359 F2d 132.

Failure by plaintiff to object to findings of magistrate does not bar him from raising independent obligation of court to determine that master's findings are not clearly erroneous. Livas v Teledyne Movible Offshore, Inc. (1979, CA5 La) 607 F2d 118, 21 BNA FEP Cas 505, 21 CCH EPD P 30486, 28 FR Serv 2d 590.

Court of appeal's review of magistrate's findings of fact is not affected by party's waiver of review by federal district court. Iten Leasing Co. v Burroughs Corp. (1982, CA8 Minn) 684 F2d 573, 34 UCCRS 535.

District court's adoption of special master's report did not have to be overturned for its failure to have held hearing before adopting it, since at no time did parties suggest to district court that oral argument was either desired or required. Golden Door Jewelry Creations v Lloyds Underwriters Non–Marine Ass'n (1993, CA11 Fla) 8 F3d 760, 7 FLW Fed C 1053.

Where finding of auditor was accepted by trial court as not being erroneous, it will not be disturbed by the court of appeals when there is ample evidence to support the finding and the absence of any evidence indicating anything to the contrary. D. M. W. Contracting Co. v Stolz (1946) 81 App DC 334, 158 F2d 405, cert den 330 US 839, 91 L Ed 1286, 67 S Ct 980.

While findings of master arrive before court with strong presumption of validity, parties are entitled to genuine review to determine whether findings are clearly erroneous. Spencer v Newton (1978, DC Mass) 79 FRD 367.

While District Court is not bound by findings of master, those findings are entitled to special weight and deference. Dooley v Quick (1984, DC RI) 598 F Supp 607, affd without op (CA1 RI) 787 F2d 579.

It is especially important for district court to conduct de novo review in addressing special master's recommendations

resolving dispositive motions, such as motion for summary judgment. Travelers Ins. Co. v Broadway W. St. Assocs. (1995, SD NY) 164 FRD 154.

83.—Clearly erroneous rule

The district court may not reject the master's findings unless they are clearly erroneous. Arrow Distilleries, Inc. v Arrow Distilleries, Inc. (1941, CA7 Ill) 117 F2d 636, 48 USPQ 499, cert den 314 US 633, 86 L Ed 508, 62 S Ct 67, 51 USPQ 545; Libbey—Owens—Ford Glass Co. v Celanese Corp. of America (1943, CA6 Ohio) 135 F2d 138, 57 USPQ 258, cert den 320 US 744, 88 L Ed 442, 64 S Ct 46, 59 USPQ 495; Michelsen v Penney (1943, CA2 NY) 135 F2d 409; Michael Del Balso, Inc. v Carozza (1943) 78 App DC 56, 136 F2d 280; Socony—Vacuum Oil Co. v Oil City Refiners (1943, CA6 Ohio) 136 F2d 470, 26 Ohio ops 560, 58 USPQ 632, cert den 320 US 798, 88 L Ed 482, 64 S Ct 368, 59 USPQ 495 and cert den 320 US 798, 88 L Ed 482, 64 S Ct 369, 59 USPQ 496; Slavin v Port Service Corp. (1943, CA3 Pa) 138 F2d 386; NLRB v Standard Trouser Co. (1947, CA4) 162 F2d 1012, 20 BNA LRRM 2430, 13 CCH LC P 63928; First Nat. Bank & Trust Co. v Skokie (1951, CA7 Ill) 190 F2d 791, cert den 342 US 909, 96 L Ed 680, 72 S Ct 303; Bynum v Baggett Transp. Co. (1956, CA5 Ala) 228 F2d 566; London v Troitino Bros., Inc. (1962, CA4 Va) 301 F2d 116, 5 FR Serv 2d 823; Re Vernon Hills, Inc. (1965, CA7 Ill) 348 F2d 4; Pathe Laboratories, Inc. v Du Pont Film Mfg. Corp. (1943, DC NY) 3 FRD 11; Mathey v United Shoe Machinery Corp. (1944, DC Mass) 54 F Supp 694, 61 USPQ 79; Lupton v Chase Nat. Bank (1950, DC Neb) 89 F Supp 393; Cold Metal Process Co. v United Engineering & Foundry Co. (1955, DC Pa) 132 F Supp 597, 105 USPQ 333, motion to dismiss app den (CA3 Pa) 221 F2d 115, affd 351 US 445, 100 L Ed 1311, 76 S Ct 904 and affd (CA3 Pa) 235 F2d 224, 110 USPQ 332; E. I. Du Pont De Nemours & Co. v Purofied Down Products Corp. (1959, DC NY) 176 F Supp 688; McGraw Edison Co. v Central Transformer Corp. (1961, ED Ark) 196 F Supp 664, 130 USPQ 189, affd (CA8 Ark) 308 F2d 70, 135 USPQ 53, 6 FR Serv 2d 959; Esdale v Edwards (1961, DC NC) 28 FRD 390; United States v 620.98 Acres of Land (1966, WD Ark) 255 F Supp 427; Eastern Fireproofing Co. v United States Gypsum Co. (1970, DC Mass) 50 FRD 140, 1970 CCH Trade Cases P 73342, 14 FR Serv 2d 534; Clark v Atlanta Newspapers, Inc. (1973, ND Ga) 366 F Supp 886, 73 CCH LC P 33039.

On appellate review, such findings of the master as are disclosed by his report to the extent that the court below has adopted them may not be set aside unless clearly erroneous. Helfer v Corona Products, Inc. (1942, CA8 Ark) 127 F2d 612; Dyker Bldg. Co. v United States (1950) 86 App DC 297, 182 F2d 85; London v Troitino Bros., Inc. (1962, CA4 Va) 301 F2d 116, 5 FR Serv 2d 823; United States v S. Volpe & Co. (1966, CA1 Mass) 359 F2d 132; Rohde v K. O. Steel Castings, Inc. (1981, CA5 Tex) 649 F2d 317, 26 BNA FEP Cas 308, 26 CCH EPD P 31927.

Master's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that mistake has been committed. Krinsley v United Artists Corp. (1956, CA7 Ill) 235 F2d 253.

Requirement of rule that court shall accept master's findings unless clearly erroneous is manifestly a guide to be followed in the exercise of discretion vested in district judge, not a limitation upon his power. United States v Twin City Power Co. (1957, CA4 SC) 248 F2d 108, cert den 356 US 918, 2 L Ed 2d 714, 78 S Ct 702.

The clearly erroneous concept requires findings to be set aside if the court is left with the impression that the result is not the truth and right of the case. W. R. B. Corp. v Geer (1963, CA5 Tex) 313 F2d 750, 6 FR Serv 2d 962.

In carrying out vital judicial duty to determine whether findings of master are clearly erroneous, the court is entitled to assistance of counsel in pinpointing both the specific issues under attack and the relevant portions of the record demonstrating the asserted presence or absence of evidence, but essential as is a court's dependence on counsel, it cannot escape the judicial travail incident to the objections by putting the burden on counsel alone. W. R. B. Corp. v Geer (1963, CA5 Tex) 313 F2d 750, 6 FR Serv 2d 962.

Trial judge's use of "substantial evidence" as basis for approving master's findings would not be assumed by appellate court to be the equivalent of "clearly erroneous". W. R. B. Corp. v Geer (1963, CA5 Tex) 313 F2d 750, 6 FR Serv 2d 962.

Under the "clearly erroneous" concept requiring a finding to be set aside when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, does not require the district judge in every case to read the transcript verbatim but only the evidence relevant to the particular finding under attack. United States v Certain Lands of Statesboro (1965, CA5 Ga) 341 F2d 742, 9 FR Serv 2d 71A–h.4, Case 1.

Master's findings may not be disturbed on appeal unless clearly erroneous, test being whether appeals court is left

with definite and firm conviction that mistake has been committed. Ray v Safeway Stores, Inc. (1980, CA10 Colo) 614 F2d 729, 22 BNA FEP Cas 49, 22 CCH EPD P 30626.

Appellate court reviews special master's findings, to extent they were adopted by district court, for clear error. Summers v Howard Univ. (2004, App DC) 374 F3d 1188, 9 BNA WH Cas 2d 1398.

Master's finding is clearly erroneous when, although there is evidence to support it, the court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Esdale v Edwards (1961, DC NC) 28 FRD 390.

The court must accept the master's award unless it is clearly erroneous in whole or in part because it is based upon substantial error in the proceedings, a misapplication of controlling law, unsupported by substantial evidence or contrary to the clear weight of all the evidence. Esdale v Edwards (1961, DC NC) 28 FRD 390.

Court refused to disqualify special master, who was not asked to decide whether finding of civil or criminal contempt should lie or directed to resolve any dispute central to merits of underlying litigation, because he was functionally distinguishable from a judge; court had expressly permitted special master to engage in ex parte communications in course of his assignments, and decided, in abundance of caution, that it would not apply clearly erroneous standard under Fed. R. Civ. P. 53 (e)(2) to any of special master's recommendations. Cobell v Norton (2003, DC Dist Col) 237 F Supp 2d 71, motion gr, sanctions allowed, motion to strike gr (2003, DC Dist Col) 213 FRD 16.

Jenkins standard that compels disqualification of judges as final adjudicators does not apply to special masters who are not undertaking judicial functions, i.e., rendering determinative findings entitled to a "clearly erroneous" level of deference. Cobell v Norton (2003, DC Dist Col) 237 F Supp 2d 71, motion gr, sanctions allowed, motion to strike gr (2003, DC Dist Col) 213 FRD 16.

After review of law governing attorney–client privilege, court adopted special master's report where most of information did not need to be redacted because it was intended to be disclosed to third parties; thus, special master's report was not clearly erroneous. Diversified Group, Inc. v Daugerdas (2003, SD NY) 304 F Supp 2d 507.

84.—Findings of fact

The parties are entitled to a real review to determine whether or not the factual findings of a master are clearly erroneous. Locklin v Day–Glo Color Corp. (1970, CA7 Ill) 429 F2d 873, 166 USPQ 164, 1970 CCH Trade Cases P 73241, cert den 400 US 1020, 27 L Ed 2d 632, 91 S Ct 582, 168 USPQ 385 and cert den 400 US 1020, 27 L Ed 2d 632, 91 S Ct 584, 168 USPQ 385.

Although master's findings of fact are binding on District Court unless clearly erroneous, that rule is not an invitation to abdicate the judicial function upon receiving a master's report. Locklin v Day–Glo Color Corp. (1970, CA7 Ill) 429 F2d 873, 166 USPQ 164, 1970 CCH Trade Cases P 73241, cert den 400 US 1020, 27 L Ed 2d 632, 91 S Ct 582, 168 USPQ 385 and cert den 400 US 1020, 27 L Ed 2d 632, 91 S Ct 584, 168 USPQ 385.

District Court properly applied "clearly erroneous" standard to magistrate's findings of fact, where case was not referred to magistrate pursuant to 28 USCS § 636, but rather magistrate was appointed as Master pursuant to Rule 53. Day v Wayne County Bd. of Auditors (1984, CA6 Mich) 749 F2d 1199, 36 BNA FEP Cas 743, 35 CCH EPD P 34816.

District court did not impermissibly disregard factual findings of special master in imposing liability for eleven false claims instead of 1,149; special master's report did not determine as matter of fact that 1,149 false claims had been made, only that that many may have been made if certain presumption were applied. United States v Krizek (1997, App DC) 111 F3d 934.

Factual finding by master is not clearly erroneous unless it stands from a mistaken view of the law, or unless, although it be supported by substantial evidence, the court is thoroughly convinced after a consideration of the evidence that a mistake has been made. McGraw Edision Co. v Central Transformer Corp. (1961, ED Ark) 196 F Supp 664, 130 USPQ 189, affd (CA8 Ark) 308 F2d 70, 135 USPQ 53, 6 FR Serv 2d 959; United States v 620.98 Acres of Land (1966, WD Ark) 255 F Supp 427.

While master's findings of fact in non–jury cases must, under Rule 53(e), be accepted unless clearly erroneous, great weight to which they are entitled is not invitation to abdicate judicial function upon receiving master's report, and finding must be set aside if judge is left with impression that result is not truth and right of case. General Plywood Corp. v Georgia—Pacific Corp. (1973, SD Ga) 362 F Supp 700, 180 USPQ 121, affd (CA5 Ga) 504 F2d 515, 184 USPQ 131.

Clearly erroneous standard to be applied with respect to master's findings of fact make master's findings binding on District Court as long as court conducts real review to determine whether or not factual findings are clearly erroneous. Badger By-Products Co. v Employers Mut. Casualty Co. (1974, ED Wis) 64 FRD 4, 19 FR Serv 2d 187, affd without op (CA7 Wis) 519 F2d 1406.

Finding of fact is clearly erroneous under FRCivP 53 if it is (1) based on substantial error in proceeding, (2) based on misapplication of controlling law (3) unsupported by substantial evidence or (4) contrary to clear weight of evidence; once threshold determination has been made that finding is clearly erroneous, court has authority to make its own findings and modify report accordingly. United States ex rel. Tennessee Valley Authority v 72.0 Acres of Land (1976, ED Tenn) 425 F Supp 929.

District court is generally required to accept special master's findings of fact unless clearly erroneous; however, where court orders special master to hear motions and merely render recommendations to it, special master's factual findings are entitled to somewhat lesser degree of deference. Travelers Ins. Co. v Broadway W. St. Assocs. (1995, SD NY) 164 FRD 154.

Where both parties objected to special masters' report, findings of fact were not reviewable because parties stipulated to finality of masters' findings of fact under Fed. R. Civ. P. 53(e)(2),(4); conclusions of law, however, were reviewed de novo. AgGrow Oils, L.L.C. v Nat'l Union Fire Ins. Co. (2003, DC ND) 276 F Supp 2d 999.

85. —-Factual conclusions or inferences

Rule 53 does not operate to relieve appellate court of burden of reviewing inferences or conclusions drawn by the master and the trial court. Socony—Vacuum Oil Co. v Oil City Refiners (1943, CA6 Ohio) 136 F2d 470, 26 Ohio Ops 560, 58 USPQ 632, cert den 320 US 798, 88 L Ed 482, 64 S Ct 368, 59 USPQ 495 and cert den 320 US 798, 88 L Ed 482, 64 S Ct 369, 59 USPQ 496.

Master's findings of fact which are in the nature of conclusions or inferences will not be given any great weight since the court is in as good a position to make or draw them as the master. Stubbs v Fulton Nat. Bank (1945, CA5 Ga) 146 F2d 558, cert den 325 US 864, 89 L Ed 1984, 65 S Ct 1202.

While master's findings are as conclusive upon District Court as District Court's findings are conclusive upon Court of Appeals, some review is always open, and it extends as much to untenable inferences from conceded evidence as to the credibility of testimony. Pallma v Fox (1950, CA2 NY) 182 F2d 895, 85 USPQ 474.

Where the evidence has not been reported, the reviewing court must accept the master's findings and conclusions unless inconsistent or plainly wrong in the light of his subsidiary findings. Legate v Maloney (1964, CA1 Mass) 334 F2d 704, cert den 379 US 973, 13 L Ed 2d 564, 85 S Ct 662 and cert den 379 US 973, 13 L Ed 2d 564, 85 S Ct 664 and petition to recall mandate den (CA1 Mass) 348 F2d 164, 9 FR Serv 2d 13b.1, Case 1.

In District of Columbia Circuit, clearly erroneous standard applies even to findings based on documentary evidence or inferences from undisputed facts. Oil, Chemical & Atomic Workers International Union v NLRB (1976) 178 App DC 278, 547 F2d 575, 92 BNA LRRM 3059, 94 BNA LRRM 3074, 78 CCH LC P 11455, cert den 431 US 966, 53 L Ed 2d 1062, 97 S Ct 2923, 95 BNA LRRM 2642, 81 CCH LC P 13256, later proceeding 242 NLRB 744, 101 BNA LRRM 1209, 1979-80 CCH NLRB P 15887, enforcement gr (CA10) 683 F2d 1296, 111 BNA LRRM 2191, 94 CCH LC P 13688.

The rule that in nonjury actions the court shall accept a master's findings of facts unless clearly erroneous does not apply to conclusions or deductions derived from established facts or to findings based wholly on inferences, the reasonableness of which may be determined as well by the court as by the master. Thruston v Nashville & American Trust Co. (1940, DC Tenn) 32 F Supp 929.

If there was evidence presented to master from which he might reasonably infer an amount of damage, then the jury will be permitted to hear his conclusions despite their uncertainty and despite the fact that the court might have preferred proof of a different nature or drawn different inferences from the evidence. Eastern Fireproofing Co. v United States Gypsum Co. (1970, DC Mass) 50 FRD 140, 1970 CCH Trade Cases P 73342, 14 FR Serv 2d 534.

When findings are based on documentary evidence, stipulated facts, or other nondemeanor testimony, secondary inferences and conclusions of master from these sources are not entitled to controlling weight and are subject to greater scrutiny because court is equally capable of making such deductions. Spencer v Newton (1978, DC Mass) 79 FRD 367.

86. —-Conclusions of law

It is not good practice for master to state conclusions of law when his report is not to be considered final and is to be read to the jury. Charles A. Wright, Inc. v F. D. Rich Co. (1966, CA1 Mass) 354 F2d 710, 9 FR Serv 2d 51.32, Case 1, cert den 384 US 960, 16 L Ed 2d 673, 86 S Ct 1586, reh den 385 US 890, 17 L Ed 2d 122, 87 S Ct 14.

Where both parties consented to court's order of reference to a master and agreed that the master's findings were not to be final, plaintiff could not object to such order of reference because the master's report, which was submitted to the jury, contained certain conclusions of law. Charles A. Wright, Inc. v F. D. Rich Co. (1966, CA1 Mass) 354 F2d 710, 9 FR Serv 2d 51.32, Case 1, cert den 384 US 960, 16 L Ed 2d 673, 86 S Ct 1586, reh den 385 US 890, 17 L Ed 2d 122, 87 S Ct 14.

Failure of District Court to review and consider questions of law arising upon special master's report violates Rule 53(e)(4) and where court entered judgment "in conformity with" special master's order apparently without reviewing it case must be remanded to District Court for review of special master's report. Polin v Dun & Bradstreet, Inc. (1980, CA10 Okla) 634 F2d 1319, 30 FR Serv 2d 1046, later app (CA10 Okla) 768 F2d 1204.

Where magistrate applies wrong legal standard his findings are not protected by "unless clearly erroneous" provision of Rule 53(e)(2). Fogel v Chestnutt (1981, CA2 NY) 668 F2d 100, CCH Fed Secur L Rep P 98388, cert den 459 US 828, 74 L Ed 2d 66, 103 S Ct 65, reh den 459 US 1059, 74 L Ed 2d 625, 103 S Ct 478.

Rule 53(e) makes it clear that the court can refer both issues of law and issues of fact to the master, but this does not mean that the master is clothed with the authority by such a reference, to make a final determination of all the issues, and while Rule 53(e) provides that in a nonjury action the master's findings of fact shall be accepted by the courts unless they are clearly erroneous, there is no provision that the court must accept the conclusions of law. D. M. W. Contracting Co. v Stolz (1946) 81 App DC 334, 158 F2d 405, cert den 330 US 839, 91 L Ed 1286, 67 S Ct 980.

Master's conclusions of law are entitled to no special deference from reviewing court, and will be overturned wherever they are believed to be erroneous. Oil, Chemical & Atomic Workers International Union v NLRB (1976) 178 App DC 278, 547 F2d 575, 92 BNA LRRM 3059, 94 BNA LRRM 3074, 78 CCH LC P 11455, cert den 431 US 966, 53 L Ed 2d 1062, 97 S Ct 2923, 95 BNA LRRM 2642, 81 CCH LC P 13256, later proceeding 242 NLRB 744, 101 BNA LRRM 1209, 1979–80 CCH NLRB P 15887, enforcement gr (CA10) 683 F2d 1296, 111 BNA LRRM 2191, 94 CCH LC P 13688.

The District Court is not bound by the master's conclusions of law. McGraw Edison Co. v Central Transformer Corp. (1961, ED Ark) 196 F Supp 664, 130 USPQ 189, affd (CA8 Ark) 308 F2d 70, 135 USPQ 53, 6 FR Serv 2d 959.

While referee's factual determinations are binding upon court unless clearly erroneous, his conclusions of law have no such controlling effect. Re Delta Food Processing Corp. (1973, ND Miss) 363 F Supp 382, 13 UCCRS 563.

Special master's conclusions of law have no affect except to extent they constitute correct legal rules. Badger By–Products Co. v Employers Mut. Casualty Co. (1974, ED Wis) 64 FRD 4, 19 FR Serv 2d 187, affd without op (CA7 Wis) 519 F2d 1406.

Although reports of special master generally are entitled to great deference and may constitute persuasive authority on particular legal point, unapproved, or even summarily approved recommendations do not establish controlling law; if parties seek to rely on reasoning in particular recommendation, applicable portions of that recommendation should be made part of record for trial court. Houston v Atlanta Federal Sav. & Loan Asso. (1976, ND Ga) 414 F Supp 851.

Under Rule 53(e)(2), clearly erroneous rule is to be applied to all findings of fact of master, but not to master's conclusions of law. Paper Converting Machine Co. v FMC Corp. (1977, ED Wis) 432 F Supp 907, 195 USPQ 123, affd without op (CA7 Wis) 588 F2d 832.

More rigorous standard of review applies to conclusions of law or conclusions of mixed fact and law captioned as pure findings of fact. Spencer v Newton (1978, DC Mass) 79 FRD 367.

With respect to conclusions of law, special master's recommendations are subject to de novo review. Travelers Ins. Co. v Broadway W. St. Assocs. (1995, SD NY) 164 FRD 154.

When court reviews conclusions of law made by special–master monitor, it uses de novo standard. Cobell v Norton (2003, DC Dist Col) 257 F Supp 2d 203, motion to strike den (2003, App DC) 2003 US App LEXIS 7684.

C. Reports and Findings in Particular Proceedings 87. Antitrust

Report of special master appointed in private antitrust suit to determine damages would be vacated in its entirety where it was impossible to separate what findings were infected by errors as to quantum or burden of proof. Haverhill Gazette Co. v Union Leader Corp. (1964, CA1 Mass) 333 F2d 798, 8 FR Serv 2d 546.1, Case 1, petition to recall mandate den (CA1 Mass) 333 F2d 808 and cert den 379 US 931, 13 L Ed 2d 343, 85 S Ct 329, reh den 379 US 984, 13 L Ed 2d 578, 85 S Ct 645.

Although District Court's reference order stated only that Master was to make "recommendations," Master's factual recommendation constitutes findings of fact and will be accepted unless clearly erroneous as required under USCS FRCP, Rule 53(e) where Master included statement of reasons on which he based his recommendations sufficient for court and parties to understand basis of it. Re Ampicillin Antitrust Litigation (1978, DC Dist Col) 81 FRD 377, 202 USPQ 134, 1978–1 CCH Trade Cases P 62043, 25 FR Serv 2d 1248.

In determining whether license fee recommended by magistrate sitting as special master pursuant to consent decree in antitrust case is reasonable and whether licensor has borne its burden of proving reasonableness, legal principles controlling those factual determinations must be accorded plenary review. United States v American Soc'y of Composers (In re Capital Cities) (1994, SD NY) 157 FRD 173, 1994–2 CCH Trade Cases P 70733.

88. Bankruptcy

When a finding by a referee in bankruptcy is based wholly upon an inference, drawn from uncontradicted facts, and the reasonableness of the inference may be as fairly determined by the court as by the referee, no presumption exists in favor of the finding which binds the independent judgment of the court. Stewart v Ganey (1940, CA5 Ala) 116 F2d 1010.

In an action in which the district court has reversed the order of the referee on appeal the appellate court has as wide a latitude in reviewing referee's findings as did the district court; if it appears on appeal that district court should have accepted referee's finding in a bankruptcy case, the order overruling referee's finding of facts should be reversed. Morris Plan Industrial Bank v Henderson (1942, CA2 NY) 131 F2d 975.

Subdivision (e)(2) of this rule is especially imperative in a suit for modification of an equity railroad plan of reorganization where the master has lived with the case for four years, has patiently studied the complex questions involved, and has listened with painstaking care in extended hearings to the arguments and proposals of all the parties who desired to be heard. Badenhausen v Guaranty Trust Co. (1944, CA4 Va) 145 F2d 40, cert den 323 US 797, 89 L Ed 636, 65 S Ct 440.

Findings of referee in bankruptcy confirmed and adopted by the district court cannot be set aside unless clearly erroneous. Re United Toledo Co. (1945, CA6 Ohio) 152 F2d 210.

Where referee found that amounts set forth in claims for contributions under state unemployment insurance act were based upon wages which had been paid by the debtor to its employees and such findings were approved by bankruptcy court, they could not be set aside as clearly erroneous. Diamond Laundry Corp. v California Employment Stabilization Com. (1947, CA9 Cal) 162 F2d 398.

The presumptive validity accorded a master's findings of fact under Rule 53(e)(2) is not accorded the findings of a special master in a corporate reorganization proceeding. Eddy v Prudence Bonds Corp. (1947, CA2 NY) 165 F2d 157, cert den 333 US 845, 92 L Ed 1128, 68 S Ct 664.

The District Court and the Court of Appeals are required to accept the findings of the referee in bankruptcy, unless such findings are clearly erroneous. Hoppe v Rittenhouse (1960, CA9 Cal) 279 F2d 3.

Reference to master for preliminary findings of fact involving alleged preferences in bankruptcy proceeding did not impinge upon party's right to jury trial where such right was specifically preserved in the order of reference and where, following submission of the master's report, which would be given prima facie effect, each petitioner would be afforded the opportunity to present evidence and make arguments to the jury, and the burden would rest upon the trustee to prove to the jury matters properly withheld from the master's consideration. Burgess v Williams (1962, CA4 SC) 302 F2d 91, 5 FR Serv 2d 819.

Debtor's statutory right to jury trial under Bankruptcy Act gives no greater rights than those available in civil proceedings governed by Seventh Amendment; thus, reading to jury findings of special master who was not available for cross–examination does not impermissibly interfere with right to trial by jury because debtor's primary guarantee that proper legal standards and proceedures were used by master in making his findings is expert qualifications of special

master to which debtor did not object, and debtor was given full opportunity to introduce evidence at trial to contradict findings of master. Crateo, Inc. v Intermark, Inc. (1976, CA9 Cal) 536 F2d 862, 21 FR Serv 2d 1411, cert den 429 US 896, 50 L Ed 2d 180, 97 S Ct 259.

Party objecting to report of special master in bankruptcy regarding abandonment of branch railroad line owned by railroad seeking reorganization has right under Rule 53 to hearing on objections, even if objections have been presented to and considered by special master, and filed with court, and brief colloquy between counsel and judge is not such hearing. Re Chicago, M., S. P. & P. R. Co. (1984, CA7 Ill) 739 F2d 1169.

In connection with attorney's claim for additional compensation for services rendered in railroad reorganization proceeding, special master's findings that attorney did not deliberately intend to deceive trustee was not clearly erroneous where special master reviewed documents, including those allegedly concealed, and presided over hearing in which representative of attorney testified as to issue. Re Chicago, M., S. P. & P. R. Co. (1988, CA7 Ill) 841 F2d 789.

A master's findings of fact in bankruptcy proceedings should be accepted by the court unless clearly erroneous. Re Pullmatch Ins. (1939, DC Ohio) 27 F Supp 884; Re Philpott (1940, DC W Va) 37 F Supp 43.

In corporate reorganization proceedings under the Bankruptcy Act [11 USCS §§ 1 et seq.], a master's factual findings of the fair value of debtor's property will be accepted by the court if not clearly erroneous. Re Warren Bros. Co. (1941, DC Mass) 39 F Supp 381.

Local bankruptcy rule giving judge power in contested adjudications to refer to referee in bankruptcy, as special master to ascertain and report the facts, all issues raised by the pleadings not to be tried by jury, cannot relieve special master in bankruptcy of his duty to file along with his report a transcript of the proceedings and of the evidence and the original exhibits. Re A. Maggioli Co. (1943, DC Mass) 3 FRD 83.

Findings by a referee in bankruptcy on questions of fact should not be disturbed unless clearly and manifestly erroneous. Re Tumen (1944, DC NJ) 58 F Supp 210, affd (CA3 NJ) 146 F2d 268.

In a reorganization proceeding, the court rejected the special master's conclusion of law that doubt existed as to whether debtor's option to convert debentures into stock was a valid provision, which conclusion was based upon unchallenged findings of fact relating principally to written documents and accepted as binding the opinion of the court of appeals that the debtor's option to convert the debentures into stock was a valid and enforceable provision of the certificate. Re Associated Gas & Electric Co. (1944, DC NY) 61 F Supp 11, affd (CA2 NY) 149 F2d 996, cert den 326 US 736, 90 L Ed 439, 66 S Ct 45.

Where special master in equity reorganization of railroad made an allowance to depositary of bonds for clerical services which was not clearly erroneous it would not be disturbed. Guaranty Trust Co. v Seaboard A. L. R. Co. (1946, DC Fla) 68 F Supp 639.

Findings of fact by referee in bankruptcy that construction of houses by bankrupt was a joint venture between mortgage company and bankrupt and that liens of mortgage company should be subordinated to liens of materialmen was based on substantial evidence and were not clearly erroneous. Re Simpson (1963, MD NC) 222 F Supp 904.

89. Civil rights

Argument of defendants in school desegregation case that Rule 53(e)(2) required court to accept findings of fact made by four masters it had appointed unless clearly erroneous was without support since that section has reference to actions tried without a jury, and in this case trial on merits had already been completed and reference was made under Rule 53(c) limiting powers of masters to hold evidentiary hearings and make recommendations on desegregation plan, district judge being required to evaluate for himself what actions had to be undertaken in order to remedy noncompliance with Constitution. Morgan v Kerrigan (1976, CA1 Mass) 530 F2d 401, cert den 426 US 935, 49 L Ed 2d 386, 96 S Ct 2648, 96 S Ct 2649, 24 BNA FEP Cas 1515, 12 CCH EPD P 10977, reh den 429 US 873, 50 L Ed 2d 156, 97 S Ct 193 and reh den 429 US 1125, 51 L Ed 2d 577, 97 S Ct 1166.

In school desegregation case where special master has been appointed to report to trial court with respect to question of remedy, rather than make findings of fact, master's recommendation would be entitled to only such weight as its merit commands and sound discretion of judge warrants so that master's appointment in case does not constitute impermissible delegation of judicial function. Armstrong v O'Connell (1976, ED Wis) 416 F Supp 1325.

90.—Job discrimination

It is necessary to retry employment discrimination action brought by black employee who claims he was placed on selective surveillance, harassed, and unlawfully discharged solely because of his race since loss of trial transcript makes impossible, necessary, obligatory review of magistrate's finding for clear error. Cockrham v South Cent. Bell Tel. Co. (1983, CA5 La) 695 F2d 143, 30 BNA FEP Cas 1788, 30 CCH EPD P 33276, 35 FR Serv 2d 1115.

Finding of discrimination is reviewable only for clear error, thus, District Court's review of magistrate's express finding of age discrimination under standard providing that discrimination is issue of ultimate fact to which clearly erroneous standard of appellate review does not apply is incorrect and case will be remanded for consideration under clearly erroneous standard. Archambault v United Computing Systems, Inc. (1983, CA11 Fla) 695 F2d 551, 30 BNA FEP Cas 1714, 30 CCH EPD P 33307, 35 FR Serv 2d 1261, later app (CA11 Fla) 786 F2d 1507, 40 BNA FEP Cas 1050, 40 CCH EPD P 36305.

Provision of 42 USCS § 2000e–5(f)(5) for reference to master pursuant to Rule 53 incorporates provision of Rule 53 requiring district court to accept master's findings unless clearly erroneous, hence, nursing faculty of university whose claims under Equal Pay Act [29 USCS §§ 203, 206] and Title 7 of Civil Rights Act of 1964 [42 USCS §§ 2000e et seq.] are referred to special master pursuant to 42 USCS § 2000e–5(f)(5), Rule 53 and Rule 21 [now Rule 5] of Western District of Washington Magistrates' Rules is not entitled to de novo review of master's findings in district court; nor will court of appeals undertake its own de novo review of master's findings as approved by district court. Spaulding v University of Washington (1984, CA9 Wash) 740 F2d 686, 35 BNA FEP Cas 217, 34 CCH EPD P 34496, cert den 469 US 1036, 83 L Ed 2d 401, 105 S Ct 511, 36 BNA FEP Cas 464, 26 BNA WH Cas 1622, 35 CCH EPD P 34793 and (ovrld on other grounds by Atonio v Wards Cove Packing Co. (CA9 Wash) 810 F2d 1477, 43 BNA FEP Cas 130, 42 CCH EPD P 36809).

District Court erred in adopting special master's report and recommendations without holding hearing in employment discrimination case; hearing is mandated when party objects to report and fact that party's objections are comprehensively briefed does not excuse departure from language of rule. Kieffer v Sears, Roebuck & Co. (1989, CA6 Ohio) 873 F2d 954, 49 BNA FEP Cas 1137, 50 CCH EPD P 39997, 13 FR Serv 3d 1366.

District court's adoption of special master's recommendations in Title VII job discrimination action prior to receiving either transcript of hearing or exhibits was erroneous since, given complicated factual nature of employee's claims, district court could not have properly fulfilled its obligation under Rule 53 without reviewing hearing transcripts. Shafer v Army & Air Force Exch. Serv. (2002, CA5 Tex) 277 F3d 788, 87 BNA FEP Cas 1345.

Special master clearly erred in class action involving racial discrimination by iron workers' unions against African–American construction workers in awarding back pay to class member from date predating applicable liability period, since his attempt to join union at time predating liability period could not serve as basis of award despite district court's apparent acceptance of class's theory that union had knowledge that he wanted to join union, since it authorized pay only for claimants who attempted to join union or were discouraged from doing so within relevant period. Berger v Iron Workers Reinforced Rodmen, Local 201 (1999, App DC) 170 F3d 1111, 79 BNA FEP Cas 1018.

Order of Special Master appointed to implement relief ordered and to insure defendant union's compliance with consent judgment and court's order granting EEOC's motion to enforce subpoenas for unions' financial records did not involve report by special master to court so that Rule 53 did not apply. EEOC v Local 580, International Assn. of Bridge, etc. (1990, SD NY) 133 FRD 445, 55 CCH EPD P 40553.

Residual settlement funds in employment discrimination case are to be distributed to tax–exempt foundation created by employer to establish scholarships for educational opportunities for African–Americans to allow them to obtain necessary educational backgrounds to fill supervisory, managerial, and technical positions in employer's work force, where no provision was made for disposition to remaining funds to either class members of employer, because distribution to foundation would be most equitable distribution. Powell v Georgia–Pacific Corp. (1994, WD Ark) 843 F Supp 491, 64 BNA FEP Cas 96.

91. Condemnation

Rule 81(a)(7) which made these rules apply to appeals in condemnation proceedings did not apply to the review of a master or referee by the district court in a condemnation proceeding hence, in view of § 258 of USCS Title 40, requiring the court to follow state procedure the court of appeals would follow the practice of the state courts in deciding whether the judge was right in affirming the awards of commissioners. United States v Highland Falls (1946, CA2 NY) 154 F2d

224, cert den 329 US 720, 91 L Ed 624, 67 S Ct 54.

Trial court is entitled to modify award by commission in eminent domain proceeding or reject in toto if convinced that determination is erroneous. United States v Waymire (1953, CA10 Wyo) 202 F2d 550.

When district judge has set aside findings of commissioners in condemnation proceedings, the Court of Appeals must give consideration to fact that the commissioners saw and heard the witnesses and that District Court did not, but, unless Court of Appeals could then say that district judge's findings were clearly erroneous when viewed in this light, the Court of Appeals must accept them. United States v Twin City Power Co. (1957, CA4 SC) 248 F2d 108, cert den 356 US 918, 2 L Ed 2d 714, 78 S Ct 702.

In reviewing findings of condemnation commissioners, district judge could weigh the previous experience of witnesses, the thoroughness of inspection and study of the properties and the reasons supporting the valuations, and rely on his own opinion derived from his personal prior knowledge and experience; appellate court reviews the district judge not the commissioners. United States v Twin City Power Co. (1958, CA5 Ga) 253 F2d 197.

A District Court can properly accept and approve the findings of the commission in condemnation proceedings and may modify and supplement them by making further findings from the evidence. United States v Tampa Bay Garden Apartments, Inc. (1961, CA5 Fla) 294 F2d 598, 4 FR Serv 2d 1055.

If the district court judge correctly finds that the determinations of the commission in condemnation proceedings are clearly erroneous, the judge may then adopt one of two alternatives, remand to the commissioners with proper instructions or, if there is evidence in the record before him from which a correct ultimate decision can be made and which does not involve a determination upon conflicting testimony of questions of fact, make the necessary determinations himself and enter final judgment rather than remand the case for further proceedings before the commission. United States v Carroll (1962, CA4 Va) 304 F2d 300, 6 FR Serv 2d 1194.

The "clearly erroneous" standard is applicable in reviewing findings of court–appointed commission in condemnation proceedings, and where there was ample support in the record for material findings of commission, errors asserted in this regard were without merit. Mills v United States (1966, CA5 Tex) 357 F2d 659.

District court has power to modify or reject an order by the master or commission in an eminent domain suit if the finding is clearly erroneous and the court reviewing the evidence has a firm conviction a mistake has been made. United States v Hilliard (1969, CA8 Ark) 412 F2d 174.

The test of whether the trial court has committed reversible error in adopting the award of a commission in condemnation proceedings is whether the award is clearly erroneous, based upon misapplication of law, unsupported by the evidence or contrary to the clear weight of the evidence. United States v 79.95 Acres of Land (1972, CA10 Okla) 459 F2d 185; 42 OGR 639.

Findings and awards of commission in condemnation proceedings must be accepted by court unless they are clearly erroneous. United States v 3065.94 Acres of Land (1960, SD Cal) 187 F Supp 728, 4 FR Serv 2d 1048, revd on other grounds (CA9 Cal) 308 F2d 453, 6 FR Serv 2d 1202.

The District Court does not have the right to reconsider, weigh and evaluate evidence of value of property in condemnation proceedings to arrive at its own independent conclusions, but must accept the determination of the commission unless clearly erroneous. United States v 992.61 Acres of Land (1962, WD Ark) 201 F Supp 578.

Where findings of fact as to value of property by commission in condemnation proceedings are supported by substantial testimony and do not arise from mistaken view of the law, it is the duty of the court to approve report of commission and to overrule objections and exceptions made by defendant to such report. United States v 992.61 Acres of Land (1962, WD Ark) 201 F Supp 578.

On objections to report of commission in condemnation proceedings, the findings of fact of commission must be accepted by the court unless clearly erroneous. Virgin Islands Housing Authority v 15.5521 U. S. Acres of Land (1964, DC VI) 230 F Supp 845.

If report of commission in condemnation proceedings is supported by substantial evidence, the court does not have the right to set aside the findings of fact; the court cannot reconsider, weigh and evaluate the evidence to arrive at its own independent conclusions, but must accept those of the commission unless clearly erroneous. United States v 620,98

Acres of Land (1966, WD Ark) 255 F Supp 427.

92.—Particular cases

Where reports of commissions in condemnation proceedings were insufficient as being conclusory in failing to indicate the reasoning used in assessing damages and should not have been adopted by the District Courts, District Courts, on remand, could themselves resolve the disputes on the existing records, or on those records as supplemented by further evidence, or could resubmit the matter, in whole or in part, to the commissioners. United States v Merz (1964) 376 US 192, 11 L Ed 2d 629, 84 S Ct 639, 8 FR Serv 2d 71A–h.3, Case 1, reh den 376 US 973, 12 L Ed 2d 87, 84 S Ct 1131.

Failure of commissioners appointed in condemnation proceedings to find value for each of subtracts of certain tract of land was not objectionable where there was no request for commissioners to find such values, and action of reviewing judge in rejecting commissioners' report and substituting its own findings was error. Cunningham v United States (1959, CA4 NC) 270 F2d 545, cert den 362 US 989, 4 L Ed 2d 1022, 80 S Ct 1078.

District Court's confirmation and approval of commissioner's award in condemnation proceeding was not based on proper review of their action where District Court's action was based upon counsels' versions of evidence adduced before commission in arriving at his decision rather than transcript of the evidence. United States v Certain Lands of Statesboro (1965, CA5 Ga) 341 F2d 742, 9 FR Serv 2d 71A–h.4, Case 1.

While Commission's findings in eminent domain proceeding are to be accepted by District Court unless clearly erroneous, conclusory findings alone are not sufficient, particularly where Commissioners failed to show their pathway through maze of conflicting evidence and failed to demonstrate reasoning they used in deciding on award. United States v 20.53 Acres of Land (1973, CA10 Kan) 478 F2d 484, later app (CA10 Kan) 527 F2d 1000.

In a condemnation action to acquire title to easements and interests in land for use in conjunction with the construction, operation and maintenance of the Allegheny River Reservoir Project, the court properly referred the issue of just compensation to a commission and is bound to accept the findings of that commission unless clearly erroneous. United States v Certain Parcels of Land (1970, WD NY) 327 F supp 181, affd (CA2 NY) 443 F2d 375.

Land commission's findings are clearly erroneous where commission stated that it would rely upon capitalization of income to assess value of land, but then, rather than sort through conflicting evidence and set forth their rationale, commissioners summarily accepted land owners' estimate of before–taking valuation even though such was not computed by income method. United States v 298.31 Acres of Land (1976, SD Iowa) 413 F Supp 571.

Substantial evidence supported commissioner's finding in condemnation case that land involved was not suitable for immediate subdivision and recreational use but that portions of land had highest and best use as rural or agricultural areas where rulings of commissioner did not appear to prejudice either party and to be well within the exercise of his discretion and evidence introduced over objection of either party did not result in injury to anyone. United States v 223.50 Acres of Land (1979, ND Miss) 473 F Supp 875, motion den (ND Miss) 480 F Supp 394.

93. Contracts

Finding that operation of compressor was a technical violation of sales contract, but that there was no adequate proof of any damage resulting from the operation of the compressor would be upheld. Red Jacket Oil & Gas Co. v United Fuel Gas Co. (1944, CA4 W Va) 146 F2d 645.

Check clearance condition was not meant to have the effect of causing additional charges to debtor, and whether contracts were ambiguous is a question of law and does not come under the "clearly erroneous" rule. East Coast Electronics, Inc. v Walter E. Heller & Co. (1966, CA5 Fla) 355 F2d 923.

To what extent hours claimed or actually expended on legal services were reasonably necessary and therefore compensable under security agreement between creditor and debtor is mixed question of fact and law, as to which special master's conclusions are reviewable under FRCivP 53(e)(2). Re Continental Vending Machine Corp. (1976, CA2 NY) 543 F2d 986.

Special master's finding that attorneys' fees awarded related to defense of action which insured failed to defend was not clearly erroneous; in fact, special master's 73–page report was thorough, well–reasoned and fully supported. Charter Oak Fire Ins. Co. v Hedeen & Cos. (2002, CA7 Wis) 280 F3d 730, 61 USPQ2d 1557, reh, en banc, den (2002, CA7 Wis) 2002 US App LEXIS 3348.

94. Fair Labor Standards Act suits

In action for overtime compensation under the Fair Labor Standards Act [29 USCS §§ 201 et seq.], findings of master that, although the employees punched time clock earlier than the scheduled hours of work, they did not begin work before the scheduled hours were supported by substantial evidence and were not clearly erroneous; hence, the district court was in error in failing to accept such findings and in creating a formula of compensation based upon a contrary view. Anderson v Mt. Clemens Pottery Co. (1946) 328 US 680, 90 L Ed 1515, 66 S Ct 1187, 11 CCH LC P 51233, reh den 329 US 822, 91 L Ed 699, 67 S Ct 25.

Where agreement settling pay dispute between employer and several employees entitled employer to setoff for certain premium pay that was paid to employees for hours they worked in excess of eight in any given day, decision by special master to determine materiality of setoff by extrapolating from sample of pay data was not clearly erroneous. Summers v Howard Univ. (2004, App DC) 374 F3d 1188, 9 BNA WH Cas 2d 1398.

In employee's action under Fair Labor Standards Act, master was not required to set up the evidence or the probative, evidentiary or subordinate facts in support of his ultimate finding that certain number of claimed hours were proven to be overtime work and others were not; as long as evidence in record of proceedings was readily available for the court to determine whether or not master's findings were clearly erroneous, plaintiff suffered no reversible prejudice by master's summary listing of ultimate facts found. Clark v Atlanta Newspapers, Inc. (1973, ND Ga) 366 F Supp 886, 73 CCH LC P 33039.

95. National Labor Relations Act proceedings

Although the rule that a master's finding of fact will not be set aside unless clearly erroneous applies solely to district courts, it should be applied by analogy to the appellate court on appeal. In contempt proceedings for failure to comply with an order of national labor relations board, the findings of the master based on the unimpeached testimony of defendant's witness as against statistical evidence submitted by the board regarding the speed at which discharged employees were rehired, is not so clearly erroneous as to warrant setting it aside. NLRB v Remington Rand, Inc. (1942, CA2) 130 F2d 919, 11 BNA LRRM 575, 6 CCH LC P 61250.

Findings of national labor relations board as to back pay and reinstatement are not reviewable under subdiv. (e)(2) of this rule. NLRB v New York Merchandise Co. (1943, CA2) 134 F2d 949, 12 BNA LRRM 578, 6 CCH LC P 61500 (disapproved on other grounds by NLRB v Deena Artware, Inc., 361 US 398, 4 L Ed 2d 400, 80 S Ct 441, 45 BNA LRRM 2697, 39 CCH LC P 66238).

In contempt proceeding brought by NLRB against employer for its failure to obey prior court orders to bargain in good faith with union, court may adopt special master's findings of fact unless they are clearly erroneous. NLRB v J. P. Stevens & Co. Gulistan Div. (1976, CA5) 538 F2d 1152, 93 BNA LRRM 2265, 79 CCH LC P 11622, 1 Fed Rules Evid Serv 337.

Appellate court will set aside findings of Master under Rule 53 since it was improper for Master, in civil contempt proceeding against employer for alleged refusal to bargain, to base his determination of bad faith on whether position of company was inherently unreasonable, unfair, impracticable or unsound since company's position was obviously negotiating tactic in light of high union wage proposal. NLRB v Crockett–Bradley, Inc. (1979, CA5) 598 F2d 971, 101 BNA LRRM 3040, 86 CCH LC P 11417.

Court of Appeals is not bound by "clearly erroneous" standard in reviewing Special Master's conclusion of law that National Labor Relations Board did not meet its burden of proof in establishing contemptuous conduct. NLRB v Trailways, Inc. (1984, CA5) 729 F2d 1013, 116 BNA LRRM 2054, 100 CCH LC P 10978.

96. Patents

Findings of fact of special master in patent infringement suits must be accepted by both the District Court and the appellate court unless clearly erroneous. Republic Steel Corp. v Farval Corp. (1949, CA6 Ohio) 179 F2d 719, 84 USPQ 434, cert den 339 US 938, 94 L Ed 1355, 70 S Ct 673, 85 USPQ 527.

Master's failure to require statement taking into account plaintiff's omitted costs was not erroneous because Rule 53(d)(3) is discretionary, not mandatory, and it was not abuse of master's discretion to refuse requested statement. Panduit Corp. v Stahlin Bros. Fibre Works, Inc. (1978, CA6 Mich) 575 F2d 1152, 197 USPQ 726.

Jury trial was not flawed by allowing jury to have copy of master's report since technology, fine points of patent

validity and infringement, and accounting evidence were all complex, all were explained in master's report, reference was made to report during both parties' arguments, witnesses testified on points that had been discussed by special master, and it was significant that jury verdict did not track master's conclusions. Festo Corp. v Shoketsu Kinzoku Kogyo Kabushiki Co. (1995, CA FC) 72 F3d 857, 37 USPQ2d 1161, reh, en banc, den (1996, CA FC) 1996 US App LEXIS 4885.

Recommitment to the master, previously appointed in a patent infringement action, to permit him to consider a point which defendant had not raised before the court, would be refused, where the point at issue was one which would ultimately have to be decided by the court, and recommitment would merely delay disposition of the case. Grayson Heat Control Ltd. v Los Angeles Gas Appliance Co. (1941, DC Cal) 40 F Supp 928, 51 USPQ 11, affd (CA9 Cal) 134 F2d 478, 57 USPQ 93.

In a patent suit, a conclusion by the master that an infringement was unintentional is a finding of fact and should appear to be clearly erroneous before rejection by the court. Borg-Warner Corp. v Accurate Parts Mfg. Co. (1941, DC Ohio) 42 F Supp 1018, 51 USPQ 223.

Objection to master's findings in patent infringement suit that they were not supported by preponderance of evidence was not within the scope of District Court's review of the master's report, since the court is compelled to accept express findings of fact unless they are clearly erroneous. Mathey v United Shoe Machinery Corp. (1944, DC Mass) 54 F Supp 694, 61 USPQ 79.

In action to restrain alleged infringement of a design patent the complaint was dismissed and the dismissal was affirmed by the court of appeals, whereupon a special master proceeded with hearings for assessment of damages and costs; finding that the only damage proved to have been sustained by defendant was the sum of $115.50, its actual loss of sales of the patented article in question, on hand at the date of the injunction and sold after the vacating thereof, was sustained. Gold Seal Importers, Inc. v Morris White Fashions, Inc. (1945, DC NY) 4 FRD 386, 65 USPQ 277, affd (CA2 NY) 152 F2d 660, 68 USPQ 1.

97. Trusts and estates

Findings against complaining devisees, in suit against testamentary trustees to review partition required by will, which were not clearly erroneous and sustained by the evidence could not be disturbed. Atwood v Kleberg (1947, CA5 Tex) 163 F2d 108, cert den 332 US 843, 92 L Ed 414, 68 S Ct 267.

Action of District Court, without receiving further evidence, in approving auditor's report and adopting auditor's findings of fact that decedent's stepson was accountable to the estate was neither error nor abuse of discretion. Hepner v Chozick (1961) 111 App DC 338, 296 F2d 595, 5 FR Serv 2d 822.

Where auditor recommended entry of money judgment against former conservator of incompetent's estate in favor of successor conservator, such former conservator was entitled to be heard on her objection to auditor's report, and where she was not afforded the requisite opportunity to be heard on her objection, District Court should have granted her motion to vacate money judgment in favor of successor conservator and rescheduled the hearing on her objection. Re Kosmadakes (1971) 144 App DC 124, 444 F2d 999, 15 FR Serv 2d 91.

In action by beneficiaries against federal government concerning administration of certain trust, beneficiaries' motion for order pursuant to Fed. R. Civ. P. 53(a)(2) adopting special master's opinion was granted in part where there was no reason to disturb special master's conclusion that documents prepared for use in instant action or other pending litigation and which contained legal theories and opinions of counsel as to specific matters arising in instant action were protected from disclosure by work-product doctrine, but denied in part where court's deliberative process privilege conclusions superceded special master's findings on issue. Cobell v Norton (2003, DC Dist Col) 213 FRD 1.

98. Miscellaneous

Where master's function pursuant to order of reference was not to act as independent auditor but to make accounting on basis of records provided him by the parties, fact that master's accounting procedure did not conform to generally accepted accounting principles because the records given to him were not complete did not make his findings clearly erroneous. Sauget v Johnston (1963, CA9 Guam) 315 F2d 816, 7 FR Serv 2d 986.

Where, under state law, releases lacked legal consideration to support discharge of particular items allowed by master, master's findings were properly set aside by district judge since master's findings relating to releases were clearly erroneous if findings of fact and were clearly wrong if conclusions of law. W. R. B. Corp. v Geer (1964, CA5 Tex) 332

F2d 180, cert den 379 US 841, 13 L Ed 2d 47, 85 S Ct 78.

Surveyor, appointed as special master by District Court in boundary dispute to determine the boundary line and report his findings, was subject to questioning by either party. United States v Cline (1968, CA4 NC) 388 F2d 294.

To what extent hours claimed or actually expended on legal services were reasonably necessary and therefore compensable under security agreement between creditor and debtor is mixed question of fact and law, as to which special master's conclusions are reviewable under FRCivP 53(e)(2). Re Continental Vending Machine Corp. (1976, CA2 NY) 543 F2d 986.

City waived objections to District Court's factual findings supporting its order holding city in contempt for failing to comply with consent degree concerning jail population levels since city failed to contest findings when they were submitted by special master as part of his progress reports. Stone v San Francisco (1992, CA9 Cal) 968 F2d 850, 92 CDOS 5528, 92 Daily Journal DAR 8803, amd, reh, en banc, den (CA9 Cal) 1992 US App LEXIS 19513 and amd (CA9 Cal) 968 F2d 850, 92 CDOS 6062, 92 Daily Journal DAR 9544 and amd, reh den, stay den (CA9) 92 CDOS 7261, 92 Daily Journal DAR 11819.

Special master's finding that government attorney's were not reckless in failing to disclose exculpatory information to alleged Nazi war criminal during proceedings culminating in extradition proceedings which led to petitioner's forced departure from U.S. and trial on capital charges in Israel was erroneous; attorneys acted with reckless disregard for their duty to court and their discovery obligations in failing to disclose at least three sets of documents in their possession before proceedings against petitioner ever reached trial; there was no excuse for casual treatment of information that could cast doubt on validity of important testimony. Demjanjuk v Petrovsky (1993, CA6 Ohio) 10 F3d 338, 27 FR Serv 3d 437, reh, en banc, den (CA6) 1994 US App LEXIS 3678.

Finding that plaintiff was only temporarily unable to perform duties as mail handler, master exceeded bounds of lawful authority by substituting his judgment for that of postal service and Federal Employees Appeals Authority; wrong standard of review was applied and master's decision is clearly erroneous within meaning of Rule 53(e)(2). Poole v United States Postal Service (1982, SD Ohio) 540 F Supp 105.

V. COSTS AND FEES 99. Generally

The taxing of special master's fee and expenses as costs is within discretion of trial court. Southern Agency Co. v La Salle Casualty Co. (1968, CA8 Mo) 393 F2d 907, 12 FR Serv 2d 1102.

District court has broad discretion in fixing amount of masters' compensation and in determining which parties to assess; there is no basis for concluding that district court abused its discretion where court reasonably reached conclusion that masters' work was necessary and useful. Morgan v Kerrigan (1976, CA1 Mass) 530 F2d 401, cert den 426 US 935, 49 L Ed 2d 386, 96 S Ct 2648, 96 S Ct 2649, 24 BNA FEP Cas 1515, 12 CCH EPD P 10977, reh den 429 US 873, 50 L Ed 2d 156, 97 S Ct 193 and reh den 429 US 1125, 51 L Ed 2d 577, 97 S Ct 1166.

District Court did not err in ordering state defendants to compensate special master appointed pursuant to Rule 53 with departmental funds since Rule 53 provides that compensation shall be paid to master "as court may direct" and such direction is not limited to proposition that master's task must be completed before compensation may be exacted. W. v Louisiana (1979, CA5 La) 601 F2d 240, 28 FR Serv 2d 187, later proceeding (CA5 La) 861 F2d 1366, 27 Fed Rules Evid Serv 441, later proceeding (ED La) 1990 US Dist LEXIS 1746.

Provision in Rule 53 that requires magistrate to file transcript of proceedings before him with District Court clerk of court does not imply that magistrate must pay cost of doing so and District Court is granted authority to tax as costs reporter fees for all or any part of stenographers transcript necessarily obtained for use in case. Danner v United States Civil Service Com. (1981, CA5) 635 F2d 427, 25 BNA FEP Cas 1634, 25 CCH EPD P 31550, 30 FR Serv 2d 1621.

The fees and costs of a special master, appointed to supervise discovery proceedings in an action by the federal home loan bank and its stockholders for restoration of the bank to the status it had prior to an order dissolving the bank and transferring its assets, do not appear to be included in those which might be settled by the clerk under his statutory power to fix costs, and such fees and costs must be assessed by the court. Mallonee v Fahey (1953, DC Cal) 117 F Supp 259.

An accountant appointed by the court to examine defendant's books is not a "master" within the terms of this rule and court has no authority to fix fees or impose a lien for them. Vanacore v Castiglia (1958, SD NY) 161 F Supp 293, 1 FR Serv 2d 752.

In federal court, masters' fees are determinable by the court and taxed by the clerk as costs. Norris v Green (1965, DC Ala) 317 F Supp 100.

Fund resulting from contempt fine which court imposed after defendants failed to comply with order that they provide certain living arrangements for retarded residents of state facilities may properly be used to pay costs of special master appointed to oversee defendants' planning and providing for those arrangements. Halderman v Pennhurst State School & Hospital (1981, ED Pa) 526 F Supp 423, 32 FR Serv 2d 1625.

100. Liability

In a case referred to a master on plaintiff's request over defendant's objections the cost of the reference should be paid by plaintiff if a short trial would have sufficed. Adventures in Good Eating, Inc. v Best Places to Eat, Inc. (1942, CA7 Ill) 131 F2d 809, 56 USPQ 242.

The successful party may be charged with the whole, or part, of the costs of an unnecessary reference which proved futile and was factiously prolonged. Gold Seal Importers, Inc. v Morris White Fashions, Inc. (1945, CA2 NY) 152 F2d 660, 68 USPQ 1.

Provision in order of reference providing that the expenses of hearing, if defendant was unsuccessful, might be borne by the party who eventually failed in the action was proper. Bomze v Nardis Sportswear, Inc. (1948, CA2 NY) 165 F2d 33, 76 USPQ 150.

Amount of master's compensation taxable by the court under Rule 53(a) is a taxable cost against the unsuccessful party. Chemical Bank & Trust Co. v Prudence–Bonds Corp. (1953, CA2 NY) 207 F2d 67, cert den 347 US 907, 98 L Ed 1063, 74 S Ct 429.

If order of reference was erroneously granted, cost of reference should be borne by party which induced court to make the order. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

Taxing of the cost of special master against agent against whom judgment was awarded was proper exercise of trial court's discretion. Southern Agency Co. v La Salle Casualty Co. (1968, CA8 Mo) 393 F2d 907, 12 FR Serv 2d 1102.

Order appointing special master and providing that prevailing party could tax entire expense as costs was proper, compensation of master being paid as court may direct, under Rule 53(a), and costs being allowed as of course to prevailing party unless court otherwise directs, under Rule 54(d). K–2 Ski Co. v Head Ski Co. (1974, CA9 Wash) 506 F2d 471, 183 USPQ 724, 19 FR Serv 2d 1418.

Master's fees, costs, and expenses are "costs," and 28 USCS § 2412 does not preclude Federal Government paying them. National Organization for Reform of Marijuana Laws v Mullen (1987, CA9 Cal) 828 F2d 536, 9 FR Serv 3d 51.

Cost of reference properly may be considered as costs within the meaning of Rule 54(d) and may be divided equally between the parties if the court so directs. Dyker Bldg. Co. v United States (1950) 86 App DC 297, 182 F2d 85.

Where a master's report is confirmed by the court and awards nominal damages, the costs of the reference, including the master's fees, should be taxed against the party who obtained the appointment of the master. Gold Seal Importers, Inc. v Morris White Fashions, Inc. (1945, DC NY) 4 FRD 386, 65 USPQ 277, affd (CA2 NY) 152 F2d 660, 68 USPQ 1.

In the exercise of its discretion, District Court may apportion cost of proceedings before special master equally between petitioner and respondent. E. I. Du Pont De Nemours & Co. v Purofied Down Products Corp. (1959, DC NY) 176 F Supp 688.

Allowance of master's fees may be imposed as charge upon both parties, although ultimate liability is that of defendants, and where payment is made by plaintiffs, they have right to be reimbursed therefor by defendants. Norris v Green (1965, DC Ala) 317 F Supp 100.

Master's fees are regarded as costs and ultimate liability is therefore determined under Rule 54(d). United States v Yonkers Bd. of Education (1985, SD NY) 108 FRD 199.

101.—Particular cases

In action by an insurer against a motor carrier for balance of premium due on cancelled liability policy, wherein an

auditor was appointed to audit insured's records from which alone the facts could be obtained, the expense of the audit was divided between the parties. Bowen Motor Coaches, Inc. v New York Casualty Co. (1943, CA5 Tex) 139 F2d 332.

Where appellant incorporated in the records the voluminous proceedings before the master in a jury action and caused such record to be printed, appellant would be required to pay two–thirds of the entire cost of the appeal. Phillips Petroleum Co. v Williams (1947, CA5 Tex) 159 F2d 1011.

Where evidence in suit to recover royalties under patent licensing agreement showed that advances made to plaintiff by defendant largely exceeded profits on sales, court was well within its discretion in requiring that the plaintiff put up security for costs as condition precedent to reference for accounting requested by plaintiff. De Stubner v United Carbon Co. (1947, CA4 W Va) 163 F2d 735, 75 USPQ 48, cert den 334 US 829, 92 L Ed 1757, 68 S Ct 1328, 78 USPQ 380.

In action by plaintiff to recover sales commissions, fee of master appointed to report upon defendant's sales was properly taxable against the latter. Wilson v Homestead Valve Mfg. Co. (1954, CA3 Pa) 217 F2d 792, cert den 349 US 916, 99 L Ed 1250, 75 S Ct 606.

Where District Court did not abuse its discretion in granting reference in patent infringement case but it would be unfair to order plaintiff who opposed the reference to pay the entire costs occasioned by it because defendant did not make a convincing showing that any serious prejudice would result to it if the motion was denied and the case tried by the court in the regular course, defendant would be required to pay at least one–half the cost attributable to the reference whatever the final outcome of the case might be. Johnson Fare Box Co. v National Rejectors, Inc. (1959, CA8 Mo) 269 F2d 348, 122 USPQ 550, 2 FR Serv 2d 777.

Fee of master, who was surveyor appointed by court in boundary dispute to determine correct boundary line, was assessed one–half against landowners and one–half against government where, although case initially was in the nature of ejectment action by government against landowners, it became in reality a boundary adjustment of equal importance to both parties. United States v Cline (1968, CA4 NC) 388 F2d 294.

In libel action by shippers against carrier for cargo loss, District Court did not abuse its discretion in assessing cost of master's fee against shippers, where shippers had refused to consider anything other than the invoice value as the basis of recovery and by so doing had forced the submission of the case to the master for the determination of the market value. Holden v S.S. Kendall Fish (1968, CA5 La) 395 F2d 910.

District Court did not abuse its discretion in action by former employees to recover retirement benefits pursuant to collective–bargain pension plan by splitting fees of special master between employer and former employees rather than taxing fees to employer, since contrary to former employees' argument record did not contain any indication that employer had acted fraudulently, and assessment of portion of special master's fees against prevailing party does not constitute per se abuse of discretion. Apponi v Sunshine Biscuits, Inc. (1987, CA6 Ohio) 809 F2d 1210, 8 EBC 1397, 124 BNA LRRM 2494, 106 CCH LC P 12361, 22 Fed Rules Evid Serv 561, 7 FR Serv 3d 565, reh den (CA6) 8 EBC 1567 and cert den 484 US 820, 98 L Ed 2d 40, 108 S Ct 77, 8 EBC 2456, 126 BNA LRRM 2495, 107 CCH LC P 10125.

District Court abused its discretion in ordering Secretary of Labor to pay half of master's expenses in Fair Labor Standards Act suit against employer, since Secretary was in no sense wrongdoer and court had held that employer violated minimum wage and overtime provisions of Act and had failed to keep and maintain business records as required by Act, the latter contributing to District Court's decision to refer case to master. Brock v Ing (1987, CA10 Okla) 827 F2d 1426, 28 BNA WH Cas 566, 107 CCH LC P 34951.

District court did not improperly tax state for 90 percent of costs of monitors appointed in connection with its remedial plan for overcrowded county jails, since it determined that state's actions were primary cause of overcrowding and overcrowding in large part necessitated monitors' presence. Alberti v Klevenhagen (1995, CA5 Tex) 46 F3d 1347.

Trial court did not abuse its discretion in taxing master's fees against plaintiffs' counsel after plaintiff lost class action brought under Magnuson–Moss Warranty Act, notwithstanding order of reference which specified that master's fees would be split by plaintiff and defendant and did not specifically provide that prevailing party could subsequently recover its share as costs, since order of reference did not purport to allocate responsibility for special master's fees for all time; and, although it might be better for district court to advise parties in advance that it plans to tax master's fees as costs, there was no abuse of discretion in failing to do so given apparently widespread practice of treating such fees as taxable costs. Aird v Ford Motor Co. (1996, App DC) 86 F3d 216, 1996–1 CCH Trade Cases P 71441, 34 FR Serv 3d 1230.

Where allegation in derivative stockholders' suit was sufficient to justify inquiry into mismanagement of corporation, special master's fee would be taxed one–half against plaintiff and one–half against corporation, notwithstanding special master's report found that there had been no diversion or misuse of funds or general mismanagement of corporation by its officers and directors and recommended dismissal of complaint. Strong v Broward County Kennel Club, Inc. (1948, DC Fla) 77 F Supp 262, app dismd (CA5 Fla) 170 F2d 72.

In patent suit to determine amount due from defendant to plaintiffs, it was equitable to apportion between plaintiffs and defendant the compensation of special master and costs of printing his report. Cold Metal Process Co. v United Engineering & Foundry Co. (1955, DC Pa) 132 F Supp 597, 105 USPQ 333, motion to dismiss app den (CA3 Pa) 221 F2d 115, affd 351 US 445, 100 L Ed 1311, 76 S Ct 904 and affd (CA3 Pa) 235 F2d 224, 110 USPQ 332.

Prevailing plaintiff in suit on insurance policy would be awarded costs of reference, where insurance company did not suggest any sufficient reason for court to exercise its discretion to direct otherwise. Badger By—Products Co. v Employers Mut. Casualty Co. (1974, ED Wis) 64 FRD 4, 19 FR Serv 2d 187, affd without op (CA7 Wis) 519 F2d 1406.

Defendants in school desegregation suit must bear special master's cost on hourly compensation basis and necessary expenses he may incur in course of his duties which shall be reimbursed on monthly basis by submitting voucher for court's review which will be forwarded to defendants for payment; in addition, defendants shall provide special master with office space and stenographic services in offices of school superintendent. Amos v Board of School Directors (1976, ED Wis) 408 F Supp 765, motion den (ED Wis) 408 F Supp 825, 23 FR Serv 2d 1588, affd (CA7 Wis) 539 F2d 625, vacated on other grounds 433 US 672, 53 L ED 2d 1044, 97 S Ct 2907, on remand (CA7 Wis) 566 F2d 1175, on remand (ED Wis) 451 F Supp 817 and on remand (ED Wis) 471 F Supp 800, affd (CA7 Wis) 616 F2d 305, 29 FR Serv 2d 618 and motion den (ED Wis) 416 F Supp 1325.

Assuming, arguendo, that judge ordered counsel to represent class of sellers in interpleader action for determination of rights of bondholders to certain interest payments, class representatives are not entitled to attorneys' fees from interpleader plaintiffs where class representatives were chosen pursuant to Rules 22 and 23 and were on notice of risk that their costs would not be reimbursed, notwithstanding contention that counsel performed services analogous to master, appointed pursuant to Rule 53(a), and should be compensated accordingly. United States Trust Co. v Executive Life Ins. Co. (1985, SD NY) 602 F Supp 942, later proceeding (SD NY) 607 F Supp 504 and remanded (CA2 NY) 791 F2d 10, later app (CA2 NY) 835 F2d 1007, 10 FR Serv 3d 221.

In accordance with Rule 53, compensation to be allowed to Hiring Hall Monitor shall be fixed by court and shall be paid by union, where union was given 5 years in which to prove to court that it could operate hiring hall in non–discriminatory, fair and equitable manner, and where court, upon finding that union had failed in this regard and had continued to use hiring hall as tool of discrimination, has appointed Hiring Hall Monitor, directly responsible to court, with full authority to operate and oversee all features of hiring hall. Pennsylvania v Local 542, International Union of Operating Engineers (1985, ED Pa) 619 F Supp 1273, 42 BNA FEP Cas 831, affd (CA3 Pa) 807 F2d 330, 42 BNA FEP Cas 836, 41 CCH EPD P 36701, later proceeding (ED Pa) 1989 US Dist LEXIS 4731, affd without op (CA3 Pa) 891 F2d 280.

Sovereign immunity of United States and its various agencies did not shield Veterans Administration from payment of fees and expenses of special master appointed to supervise discovery because of Veterans Administration's discovery abuses which included destruction of documents, incorrect or false responses to discovery requests, and failure to divulge information and produce documents, since special master was appointed specifically as sanction against Veterans Administration and sovereign immunity does not shield government from payment of fees and expenses of special master when it fails to prevail. National Asso. of Radiation Survivors v Turnage (1987, ND Cal) 115 FRD 543.

Under Indian Trust Fund Management Reform Act, Pub. L. No. 103–412, 108 Stat. 4239, structural injunction was issued establishing deadlines for defendant Department of Interior (DOI) to establish procedures to bring about compliance as to accounting for Native American trust accounts, and judicial monitor was appointed to report on DOI's compliance with provisions of order pursuant to Fed. R. Civ. P. 53, and DOI would bear costs of monitor, because DOI's unlawful actions necessitated appointment. Cobell v Norton (2003, DC Dist Col) 283 F Supp 2d 66.

102. Amount

The District Court's judgment as to amount the court should allow a master is one which will not be disturbed unless a clear abuse of discretion is shown. Stonesifer v Swanson (1945, CA7 Ill) 146 F2d 671, cert den 325 US 880, 89 L Ed

1996, 65 S Ct 1573, reh den 326 US 805, 90 L Ed 490, 66 S Ct 14.

103.—Particular cases

Where commissioner in admiralty case made numerous errors in determination of damages so that allowance of fees to commissioner greatly exceeded value of services rendered, court would itself take note of that fact and reduce allowance notwithstanding there was no exception by party. Glidden Co. v Hellenic Lines, Ltd. (1963, CA2 NY) 315 F2d 162.

Award of $10,000 to commission as his fee for services in admiralty case was grossly excessive and would be reduced to $3500 where commission's sole responsibility was fixing of damages as to which commissioner and his associates devoted 161 hours, including 6 days of hearings in which testimony and exhibits were submitted by plaintiffs to establish their damages. Petition of New York, etc. (1964, CA2 NY) 332 F2d 1006, cert den 379 US 922, 13 L Ed 2d 335, 85 S Ct 277.

Where hearings before master in accounting proceeding covered substantial part of 13 days and involved 1800 pages of testimony and over 100 exhibits and required lengthy report by master, allowance to master of $25,000, while liberal in amount even approaching the point of being excessive would be allowed to stand in the absence of countervailing evidence. Reid v Silver (1965, CA7 Ill) 354 F2d 600.

Since commissioner in admiralty is a specially appointed officer of the court, the court will not order party to pay commissioner compensation which does not appear to be reasonable. Levatino Co. v American President Lines, Ltd. (1966, CA2 NY) 359 F2d 406.

Highest range of fees in private litigation is not proper basis for compensation of masters and therefore, master in school desegregation case will be compensated at two–third highest rate and his associates at approximately one–half that rate especially in light of fact that, while task of formulating school desegregation plan required highest degree of skill and experience, hours special master spent gathering information did not require such high degree of expertise and judgment and furthermore, in dealing with most difficult problems, special master had benefit of thorough audit by public accounting firm and advice by constitutional law professor. Reed v Cleveland Board of Education (1979, CA6 Ohio) 607 F2d 737.

In absence of objections by party, special master's request for allowance of $2000 as compensation for total of 84 hours of work of reference in patent infringement case was granted. Clair v Kastar, Inc. (1946, DC NY) 70 F Supp 484, 73 USPQ 347.

For performance of duties with respect to remedial phase of desegregation suit, special master's fee is not limited to half that obtainable by private attorneys in commercial matters. United States v Yonkers Bd. of Education (1985, SD NY) 108 FRD 199.