

# DISCOVERY masters

When They  
Help—  
and When  
They Don't

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BY RON KILGARD

The use of discovery masters in civil cases is a practice, like mediation, that has grown gradually, not because of any top-down directive from the judiciary or the legislature, but because of the necessities of actual cases. Like mediation 10 years ago, discovery masters are largely unregulated by rule or statute: The current rule on masters, Rule 53, has nothing to say about discovery masters. And discovery masters are the subject of few cases. This article takes a look at these neglected creatures.

## The Law on Discovery Masters

### Old Rule 53

Court-appointed masters have long been the subject of Federal Rule of Civil Procedure 53 and its Arizona counterpart. Until it was recently amended, the heart of the federal rule, subsection (b), was an admonition against using masters in the first place: "Reference to a master shall be the exception and not the rule."<sup>1</sup> The balance of the rule deals in some detail with the compensation and powers of the master, the nature of the proceedings in front of the master (witnesses, subpoenas, etc.), and the contents, filing and format of the master's "report."

The Arizona rule, which has not yet been amended, differs only in details from the old federal rule. In fact, the







## Discovery Masters

Arizona rule is even more restrictive of the master's powers than the federal rule was, for it prohibits reference in any cases to be tried to a jury.

There is one glaring omission. There is nothing in the old federal rule, and there is nothing in the current Arizona rule, about discovery or pretrial procedures generally. This is not surprising given the fact that the rule was originally adopted as Equity Rule 59 in 1912.

Lots of things have changed since President Woodrow Wilson's first term, among them the techniques of modern civil litigation. There really wasn't discovery when the rule was adopted, at least not in the sense in which we understand it. The rule was designed for traditional mas-

ters—people who acted as decision makers of specifically identified substantive issues. Some authorities doubted that rule even applied to discovery masters.<sup>2</sup>

The federal cases on discovery masters are few—and there are no Arizona cases.<sup>3</sup> Generally, the courts have recognized that the appointment of discovery masters, though still the exception and not the rule, is quite different from appointment of the full-fledged special master contemplated by Rule 53. As one district court indicated, "Courts have distinguished between dispositive matters and discovery or other non-dispositive motions or issues, requiring a much greater showing to warrant referral of dispositive matters than for discovery matters."<sup>4</sup>

In appropriate cases, the courts recognize that discovery masters are not only permissible, but invaluable.<sup>5</sup> In many cases, especially those decided before magistrates were widely used, it is hard to see what the court could have done except appoint a master. On the other hand, courts do not hesitate to reverse an appointment when

the parties oppose the master and there is no apparent need for him or her.<sup>6</sup> But on the nuts and bolts of the practice, the cases are essentially silent.

### New Rule 53

The obvious disconnect between the rule and the practice led the Judicial Conference to propose a completely new rule, which became effective Dec. 1, 2003.

The new rule deals with discovery masters and traditional adjudicatory masters. The new rule keeps traditional masters on a short leash<sup>7</sup> but recognizes the very different concerns bearing on discovery masters. Appointment

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of discovery masters is available, even over the parties' objection, whenever there are "matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge."<sup>8</sup> The new rule addresses several issues concerning discovery masters that were addressed neither in the old rule nor the case law:

- **Consultation With the Judge.** Should the discovery master confer privately with the judge to maximize the efficiency of the engagement, or should he decide things entirely on his own to provide a clear record of authority and review? The rule makers recognized that different cases will require different relationships with the trial judge. The new rule requires only that the appointment order spell out clearly "the circumstances—if any—in which the master may communicate ex parte with the court."<sup>9</sup>
- **Appearing Before the Judge.** May the special master appear before the judge as a lawyer during the course of his

engagement? An early draft of the rule simply forbade the practice. As finally adopted the rule is silent on the matter, with the Notes suggesting that the judge address the issue at the time of appointment.<sup>10</sup>

- **Impartiality.** The impartiality requirements applicable to federal judges apply awkwardly to lawyers, who, after all, have ongoing practices. The new rule provides that the master must be qualified under the relevant federal statute (28 U.S.C. § 455), but, recognizing that this may prove difficult, the parties may consent to the appointment.<sup>11</sup> The central point is that all potential conflicts be disclosed and agreed to.<sup>12</sup>
- **Orders.** The new rule recognizes that discovery masters typically do not issue lengthy “reports,” the mainstay of the old rule, but make decisions on specific discovery issues. The new rule provides that these decisions are to be filed, that the court will review them on a timetable set by the court, and so on.<sup>13</sup>
- **Standard of Review.** The rule also addresses the vexing topic of the standard of review. The law on this subject is scarce, so it is helpful to have it spelled out in the rule. Procedural matters are reviewed only for an abuse of discretion.<sup>14</sup> Legal matters are, of course, reviewed *de novo*.<sup>15</sup> Factual findings are also reviewed *de novo*, unless the parties consent in the appointment order to a different standard.<sup>16</sup>
- **Other Matters.** The new rule addresses in detail a host of other matters, but it is noteworthy how the rule is almost entirely a codification of existing practice, at least the better practice, and not a template for a new practice. The new rule, if adopted in Arizona, will streamline the use of discovery masters in superior court and make us all more comfortable with what we’re doing, but it will not significantly alter the current practice.





## Discovery Masters in Practice

The issues addressed and the concerns raised by the cases, and the new rule, confirm my own experience as a discovery master, which has been entirely in state court. It strikes me that there are certain factors that tend to indicate that appointment of a discovery master is a good idea, and a couple of others that indicate the opposite. Let's start with some of the circumstances in which appointment of a discovery master is useful, both to the court and to the parties.

### Cases Suitable for Discovery Masters

#### 1. The Parties Want One

When the parties consent to a discovery master, they are pretty much stuck with him.<sup>17</sup> They are also far more likely to be content with him. If the parties consent, it usually means that they are concerned that the institutional limitations of superior court, the caseload, the pre-emptive demands of the criminal trial calendar, and the lack of legal support staff for judges will have an adverse effect on their client. It may seem odd that both parties could conclude this, but they often do. Even adversaries sometimes have common ground.

#### 2. The Contentious Case

Highly contentious lawsuits are hard for the superior court to manage.<sup>18</sup> The weary judge, forced to decide disputes based on incomplete information at unpleasant hearings, will be tempted to split the difference. Matters will get worse as each side nurses real and imagined grievances.

A discovery master can be a useful tool in these cases. The lawyers will not stop hating each other because of the discovery master, but they will gradually stop telling the same story over and over again. Reviewing the deposition schedule month after month, or in some cases, week after week, gives the discovery master a familiarity with the witnesses, the practices on fees and travel, what documents have been produced, and so on, that gradually do narrow

the areas of dispute. Item by item, disputes are cleared away. And the mere fact of having to discuss these issues in person with the master present, and not in angry faxes and e-mails written late at night, has a taming effect on the lawyers.

#### 3. Privilege Disputes

Genuine privilege disputes over large numbers of documents throw a wrench into the litigation system. The document-by-document review necessary to resolve them is all but impossible for a superior court judge, given the obligations of her docket. Cases like these are naturals for discovery masters. As one court found, "A special master is best situated to conduct the detailed, close analysis necessary to ferret out which documents are privileged."<sup>19</sup>

#### 4. The Big Case

Size alone does not necessarily mean a case is suitable for a discovery master, but numerous lawyers and witnesses bring their own problems. Especially if the parties are trying to squeeze into a court-ordered schedule, simply scheduling depositions becomes almost impossible. A discovery master who meets with the lawyers on a fixed schedule reviewing all of the depositions, hearing all the excuses why a witness couldn't make it last month, becoming familiar with the lawyers' various schedules and airport preferences, and so on, can keep the case on track.

### Cases Unsuitable for Discovery Masters

I have found two circumstances in which appointment of a discovery master is counterproductive.

#### 1. The Contentious Cases Revisited

Let's return to the contentious case. Although, as I have said, a master can do a world of good in such cases, one must be wary that the discovery master doesn't simply become a forum for more disputes.

In a typical lawsuit in superior court, the system can only handle so many discovery disputes. Lawyers who insist on calling the court in the middle of depositions will gradually find their resolve worn

down. Motions on minor issues that will not be heard in court for two months, by which time they may be moot, eventually will not be filed.

However, when a discovery master is readily available and can be reached essentially any time day or night (the parties are paying for him, after all), one can end up with a case in which every deposition leads to protracted phone calls with the discovery master, every minor document dispute results in a motion and every routine squabble about an expert's fee gives birth to a hearing.

In such cases, the master must develop procedures to prevent discovery from swamping the case. But in many such cases, the master should not have been appointed in the first place.

#### 2. The Routine Case

A second case in which the master can do more harm than good is the case that just doesn't need one. Seeing the parties infrequently, the master will have little more familiarity with the case than the trial judge, and often even less, because he will not have handled the motions on the merits. The decisions on the few matters that come before him will often be appealed to the trial judge, adding nothing to the process but delay and expense. Like every other tool of litigation, from fountain pens to handheld computers, masters work best if they are used, and they should only be used if they are needed.

## Selecting the Master

Because the pool of masters is simply lawyers and former judges, the lawyers seldom have any trouble in finding someone willing to serve. More difficult is finding someone who is right for the case. In this respect, selecting a master is no different from selecting an arbitrator or a mediator.

Obviously, if the parties can agree on someone, the master is far more likely to be effective. And, of course, whoever is selected should have common sense and a good knowledge of the law on discovery, privilege, and so forth. It won't do much

good to have a master if the judge finds it necessary to reverse every third decision, or if the parties come to lack confidence in his abilities. But in an appropriate case, a competent discovery master can benefit the parties and court enormously. ▲

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## endnotes

1. "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional circumstance requires it." FED. R. CIV. P. 53(b) (before Dec. 1, 2003).
2. See *Simpson v. Canales*, 806 S.W.2d 802, 807 (Tex. 1991) (good discussion of the historical background). And even if the rule doesn't apply, courts have the inherent power to appoint masters.
3. On the other hand, pursuant to statute, discovery masters are widely used in California state courts, and there is a substantial case law on them. *E.g.*, *Lu v. Superior Court*, 55 Cal. App. 4th (Ct. App. 1997); *San Diego Unified Port Auth. v. Barnhart*, 116 Cal. Rptr. 2d 65 (App. 2002); *Collins v. Kanoff*, 2003 WL 145631 (App. 2003).
4. *In re Sunrise Securities Litigation*, 124 F.R.D. 99 (E.D. Pa. 1989).
5. *Id.* (discovery master appropriate because of extensive disputes on privileged documents); *Mercer v. Gerry Baby Prods. Co.*, 160 F.R.D. 576, 577 (S.D. Iowa 1995) (discovery master appropriate because "the lawyers are out of control").
6. See *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991).
7. See *Chartone Inc. v. Bernini*, 418 Ariz. Adv. Rep. 60, 66 n.3 (Ct. App. 2004) (discussing new federal rule).
8. FED. R. CIV. P. 53(a).
9. FED. R. CIV. P. 53(b)(2)(B).
10. Committee Note, Subdivisions (a)(2) and (3), FED. R. CIV. P.
11. FED. R. CIV. P. 53(b)(3).
12. Committee Note, Subdivisions (a)(2) and (3), FED. R. CIV. P.
13. FED. R. CIV. P. 53(e) & (g).
14. FED. R. CIV. P. 53(g)(5).
15. FED. R. CIV. P. 53(g)(4).
16. FED. R. CIV. P. 53(g)(3).
17. *Simpson*, 806 S.W.2d at 811.
18. *Mercer*, 160 F.R.D. at 576.
19. *Sunrise Securities Litigation*, 124 F.R.D. at 100.