

# THE SPECIAL MASTER AS MEDIATOR

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## *Introduction*

Courts have increasingly begun to use special masters to aid in the implementation of complex institutional reform orders or consent decrees as well as to aid in the settlement process. The use of special masters in either circumstance raises significant questions. This paper discusses some of those questions and focuses on those issues peculiar to the special master as mediator.

## *Role*

### *The Special Master as Mediator*

Mediators do not decide. Rather, they engage in discussions with individual disputants outside of the hearing of the other, keeping confidential that information the parties do not want shared. At first blush, the process appears contrary to the rules and procedures by which courts operate.

The role of mediator is an easy one for the master to assume so long as the court and the parties understand that the master's role is to assist the parties in settlement without disclosing to the court the substance of negotiations. If the court accepts this role, then the master can be a true mediator—helping the parties to articulate their interests and to create settlement options. If the court requires a report at the conclusion of the mediation, the mediator may have to disclose confidential information. Such a problem will occur, however, only where the mediator is asked to disclose the substance of the failed settlement efforts.

The mediator has a more difficult role in post-liability matters. Here, the master invariably is required to prepare reports for the court. Because the master must be able to withstand challenges to the accuracy of the reports, the master cannot rely upon confidential information in their preparation. In a post-liability setting the master and the parties must be able to distinguish between the mediation activities engaged in by the master and those monitoring activities resulting in a report to the court.

### *The Master as Expert*

Should the special master be an expert in the subject matter of the dispute? The question is not easily answered. Proponents assert that an expert in a particular substantive area may be better able to mediate a particular dispute. Critics contend, however, that an expert mediator may dictate a solution. A non-expert mediator, it is felt, is likely to be more sensitive to the parties' lack of knowledge. At a minimum, it seems that the special master must be able to understand the subject matter at hand and be able to help all the parties understand the discussions taking place.

In addition to whatever other expertise the master possesses, the master must be a process expert to properly function as a mediator. If the master is not an expert, the court should allow the master to retain experts for assistance. For example, the master may hire a process expert.

### *Communications*

Masters are chosen by the court on the basis of several factors. Some masters are chosen because the judge has confidence in their ability. Others are selected because of their command of the subject matter, or because they appear to be uniquely qualified to employ a novel settlement technique. Regardless of the reason, the use of a pre-liability settlement master raises questions concerning with whom the master should communicate and the extent to which such communications are protected from disclosure.

#### *Communications with the Court*

In post-liability settings, mediating masters often communicate freely with the court concerning progress in the case. These discussions are used to review the mediator's periodic reports. Clearly, the court should take no action on these discussions.

In pre-liability settings, the master will inform the judge whether the mediation is progressing. The mediator cannot discuss the substance of the case, however, for if the mediation fails, the judge will have to ultimately resolve the dispute.

*Communications with the Parties*

If the parties in pre-liability mediation sense that the master will communicate with the court, they are likely to be less open in their discussions with the master and are less likely to settle.

A judge considering the appointment of a settlement master must decide at the outset whether that master will produce a report for the court containing factual findings and recommendations. Where a report is required, the master's communications with the parties are not protected by any privilege. The master must be careful about communications because his report is subject to scrutiny as are other experts' reports.

If, however, the judge decides that the master is to attempt to aid settlement without reporting more than "success" or "failure," then a different rationale applies. A settlement master who is not to find facts or to produce a report for the court may routinely communicate with the parties with the knowledge that the communications are largely protected from disclosure.

Most importantly, the court must decide *before* the master begins work what it expects from the process. If the master is to make recommendations to the court, due process mandates that the parties comment on the report and examine the findings. If, however, the court requires no formal report, then the master is not as constrained by due process requirements. Clearly, the court must make plain what it requires when it appoints the master.

The post-judgment, or implementation master, is faced with a different set of questions. Almost always, the master will be required to report routinely on the parties' compliance with the court's order. These reports must have a clear factual basis. The master, is forced to discuss the situation with the parties so as to dissuade them from taking action at inappropriate times or, encourage the parties to act when they appear to be relying solely on the master for monitoring compliance. Most of these discussions are informal. When the master is responsible for producing a report for the court, however, the master must be able to substantiate all findings, and to be able to sustain the report in the face of challenges from the parties.

*Communications with the Press*

Judges cannot ethically comment on pending cases. Special masters on the other hand, are often asked by the parties to act as a buffer between themselves and the press because the rules applying to judges in this regard do not apply to special masters.

Orders of Reference, the documents which formally appoint masters, generally are silent on the matter of contact with the press. The question of whom should speak to the press and under what circumstances, should be resolved by the parties and the master and not by the court. In those instances where the special master has issued a report, any press inquiries should be directed to the report which is a public document.

*Payment*

Differences also exist between pre- and post-liability masters in the payment of fees for their services. Courts generally compel payment of a master's fees once a finding of liability has been made. Although an extraordinary remedy, courts have occasionally taxed costs of masterships against the defendants as a cost of the litigation in those instances where payment has not been made. Such action is unassailable so long as the appointment of the master was justified by the circumstances of the case.

Judges have been more reluctant, on the other hand, to tax costs of settlement masters. In recent cases involving complex factual issues, the federal courts have increasingly relied on a variety of settlement mechanisms. Many of these mechanisms depend on the court's experts rather than on the masters, but the activities carried out by the experts are analogous to those of a mediating master.<sup>1</sup>

Since masters often have difficulty in receiving their compensation, the master should encourage the court to order a specific payment plan prior to engaging in any work. The identification of a specific payment mechanism can alleviate many of these problems.

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<sup>1</sup> See *In re Swine Flu Immunization Products Liability Litigation*, 495 F. Supp. 1185 (W.D. Okla. 1980).

### *Work-Product*

For a settlement master there may well be no work-product other than a settlement document. That document, by definition, is the parties' product, and will stand or fall under public scrutiny without any intervention by the master. If a pre-liability master has been appointed to aid settlement negotiations between the parties *and* is expected to prepare a report for the court regardless of the outcome of the negotiations, then the master must be aware that the report is likely to be challenged. A post-liability or implementation master routinely will prepare reports for the court. Those reports are public documents and often are subjects of press interest.

### *Orders of Reference*

The Order of Reference is the key to success in the mediation. Unfortunately, the master rarely reviews the Order before appointment. If the master is interviewed by the court or the parties before being appointed, the master should seek to review the proposed Order and suggest any changes at that time.