

What is a Special Master? The use of Special Masters in New York Courts

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In complex litigation, the use of Special Masters, or referees as they are sometimes called in New York state court, is pervasive and can be strategically utilized to the benefit of the parties and the court alike.

A “Special Master” or “master” is generally a private individual appointed by a court to carry out an express directive on its or the parties’ behalf in a pending action. New York courts commonly employ Special Masters to carry out a variety of express tasks in civil cases. In complex litigation, the use of Special Masters, or referees as they are sometimes called in New York state court, is pervasive and can be strategically utilized to the benefit of the parties and the court alike.

Authority for the use of Special Masters

In federal court, it has long been common practice for courts to appoint Special Masters to perform a variety of pre- and post-trial duties. Unlike magistrate judges, who are full-time, salaried officers of the court, Special Masters are usually private individuals appointed for a specific purpose in a specific case or set of related cases. Federal Rule of Civil Procedure 53(a)(1) authorizes the court to appoint a Special Master 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 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.
- (C) Address post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

In New York state court, Special Masters are interchangeably referred to as referees. Articles 31, 40, 42 and 43 of the New York Civil Practice Law & Rules (CPLR) authorize the appointment of referees for diverse reasons, including to “determine an issue, perform an act, or inquire and report.” CPLR §4001; see generally CPLR §§3104, 4001, 4201, 4301-4321.

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Qualification and disqualification

Retired judges, practicing attorneys, and law professors are the usual candidates for Special Masters. Beyond that, Special Masters and referees are typically appointed based on their qualifications to fulfill a particular function, including the expertise needed for a specific matter. New York statutory law also authorizes the use of a judicial hearing officer in New York state court to preside over particular proceedings (in part or in full) or act as a referee. Judicial hearing officers are individuals that have served for at least one year as a judge or justice of a court within the Unified Court System. N.Y. Comp. Codes R. & Regs. tit. 22, §122.1. For example, pursuant to CPLR §3104, either a judicial hearing officer or a referee may be appointed to “supervise all or part of any disclosure procedure.”

In both federal and state court, Special Masters are subject to statutory disqualification requirements applicable to judges, i.e., they are disqualified if their impartiality might be reasonably questioned. See Fed. R. Civ. P. 53(a)(2); 28 U.S.C. §455; Rules of the Chief Judge, 22 NYCRR 36.2. However, in federal court, parties, with the court’s approval, may consent to the appointment of an individual who would otherwise be disqualified. Fed. R. Civ. P. 53(a)(2).

Limitations on the authority of Special Masters

Special Masters and referees “have all the powers of a court in performing a like function.” E.g., CPLR §4301. Nevertheless, Article III judges have the authority to refuse to appoint a master or limit her duties. See 9 James WM. Moore et al., *Moore’s Federal Practice* §53.10. Similarly, in state court, the jurisdiction of a Special Master or referee is “limited to those matters which were part of the order of reference.” *Semigran Enterprises v. Noren*, 285 A.D.2d 409, 410 (1st Dep’t 2001). In addition, Special Masters cannot decide issues for the jury. Fed. R. Civ. P. 53(a)(1)(B); CPLR §4211.

A party may request the appointment of a Special Master without the consent of an adversary, although it will need to convince the court of the need for one. Recently, upon plaintiff’s unilateral motion, Southern District of Florida

Judge Aileen Cannon appointed a Special Master to review documents seized during the Aug. 8, 2022 search of Mar-a-Lago. *Trump v. United States*, No. 22-81294, Dkt. 29 (S.D. Fla. Aug 27, 2022). Eastern District of New York Judge Raymond Dearie was selected to serve as the Special Master. Subsequently, the Department of Justice sought, and was granted, a stay pending appeal from that portion of the court’s order pertaining to classified materials, which effectively eliminated review of those materials by the Special Master. *Trump v. United States*, No. 22-13005, 2022 WL 4366684 (11th Cir. Sept. 21, 2022). On Oct. 13, 2022, the U.S. Supreme Court declined to intervene in the matter.

When Special Masters can be useful in a Federal or State Court case

Privilege disputes. The resolution of privilege log disputes and challenges is a common role for Special Masters. See, e.g., *Certain Underwriters at Lloyd’s v. Nat’l R.R. Passenger*, No. 14-CV-4717, 2017 WL 1232526, at *2 (E.D.N.Y. Feb. 17, 2017) (assigning to Special Master task of reviewing defendant’s privilege log); Comm. Div. Rule 11-b, 22 NYCRR 202.70(g) (encouraging use of Special Masters). Special Masters are particularly useful when in camera review of potentially privileged documents is required, as parties can avoid exposing the judge to information that might be deemed privileged.

Discovery. Special Masters may also be appointed to oversee all (or most aspects of) fact discovery, particularly in complex cases involving electronically stored information (ESI) or sensitive business information. They can help parties negotiate document collection and review procedures and ESI protocols and make recommendations or preliminary rulings on discovery disputes. See, e.g., *Crocker C. v. Anne R.*, 49 Misc.3d 1202(A), 26 N.Y.S.3d 724, 2015 WL 5664299, at *24-28 (N.Y. Sup. Ct. 2015) (discussing the utility of appointing a referee with technical expertise to supervise discovery from a device containing spyware given the complex nature of the task and privilege issues associated with requested communications). Indeed, CPLR §3104 specifically contemplates the use of a referee or a judicial hearing officer to facilitate discovery.

Case management. Special Masters may also assist judges with their case management duties. In patent cases, Special Masters may be appointed to make recommendations to the court concerning claim construction. E.g., *Paone v. Microsoft*, 881 F. Supp. 2d 386, 392 (E.D.N.Y. 2012). In class actions, Special Masters may be appointed to make recommendations about class certification. E.g., *Hirt v. Equitable Ret. Plan for Emps., Managers & Agents*, No. 01 Civ. 7920 (AKH), Dkt. 15 (S.D.N.Y. Sept. 6, 2002). In other cases, the business of the parties themselves may be so technical that the court would benefit from a subject matter expert in the form of a Special Master. E.g., *HSBC Bank USA, Nat. Ass'n v. McKenna*, 37 Misc.3d 885, 893-94 (Sup. Ct. Kings Cnty. 2012) (complex foreclosure issues).

Settlement and ADR. Facilitating settlement is another function of Special Masters. See, e.g., *In re Tobacco Litig.*, 192 F.R.D. 90, 95 (E.D.N.Y. 2000) (appointing Special Master to oversee settlement discussions). The First and Second Departments of the Appellate Division of the New York State Supreme Court also use Special Masters to preside over mediation sessions prior to the perfection of an appeal. See 22 NYCRR §600.3; 22 NYCRR §670.3(d). The Special Masters used in these programs are typically retired judges or attorneys with relevant subject matter expertise.

Coordination of related proceedings. Special Masters may assist in the coordination of related proceedings pending in the same or different jurisdictions. See, e.g., *In re Zyprexa Prod. Liab. Litig.*, 238 F.R.D. 539, 541 (E.D.N.Y. 2006) (directing Special Masters to coordinate state and federal MDL proceedings to avoid duplicative discovery and to facilitate settlement efforts).

Post-trial issues. Special Masters may oversee post-trial issues, including distributing settlement proceeds or ensuring compliance with judgments. See, e.g., *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 149-150 (E.D.N.Y. 2000) (appointing master to oversee allocation and distribution of settlement proceeds).

There are a variety of specific and focused areas where Special Masters may be more effective or more efficient than a court. Even where a magistrate judge has been assigned to a case, a Special Master may add value by providing subject-matter expertise or by having the ability to be completely devoted to a singular task so as to complete that task on a faster timetable. Special Masters can add value at various stages of a case, from early in discovery through the administration of a final judgment. As a result, litigants should consider the strategic use of Special Masters and referees throughout the life cycle of a case, as well as appropriate limitations to place on their role. Special Masters are a powerful tool in litigants' toolboxes, as has been recently exemplified in the highly publicized appointment of Judge Dearie.



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