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### Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation

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1. Judge Hanks has been a United States district judge for the Southern District of Texas since 2015. He previously served as a United States magistrate judge for the Southern District of Texas, and has also served as a Texas state judge on the 157th District Court and on the First Court of Appeals.

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#### ABSTRACT

Federal magistrate judges are a highly-qualified, experienced and flexible corps of judicial officers who assist Article III district judges in efficient docket management within the United States Courts. But many legal commentators have sounded the alarm that private special masters—who are compensated directly by parties—have largely usurped this function in complex federal litigation. Other commentators have urged more special master appointments, contending that district court dockets are becoming increasingly overwhelmed.

Although some contend special masters possess essential field-specific

expertise, their substitution in place of magistrate judges can have negative consequences: dramatically increasing the financial cost of the litigation, decreasing potential amounts available for settlement and even perhaps prolonging the litigation. Accordingly, there is growing public concern that special master appointments have evolved into a lucrative “cottage industry” fueled by unnecessary delegation of judicial authority. At its harshest, there has been some concern raised that a kind of “cronyism” may be perceived by the public as result of the frequency of special master appointments.

Comprehensive data on the frequency of special master appointments in multi-district cases and the relative costs to the litigants is virtually nonexistent. This thesis addresses the following questions: have district courts effectively replaced magistrate judges with special masters in the management of multi-district litigation? If so, what are the consequences?

The thesis concludes that district courts are using magistrate judges, not special masters, as the primary resource for assistance in managing multi-district litigation. Although special masters were used in 20% of the cases surveyed, magistrate judges were used in 54% of the cases surveyed. Furthermore, magistrate judges were used alone four times (in 45% of the cases) as often as special masters were used alone (in 11% of the cases) in managing multi-district litigation. Core adjudicatory functions such as fact-finding and the resolution of non-dispositive motions were largely performed either by the district judge or magistrate judge. Further, broad delegations of judicial authority to special masters were rare. Arguments that a “longer term upward trend in MDL activity” should result in district courts increasing their use of special masters are unwarranted—the evidence suggests that district judges have made efficient decisions regarding magistrate judge assignments and it is not at all clear that multi-district litigation dockets are actually increasing at a rate that requires additional special master appointments.

Appointing special masters, rather than using magistrate judges, can result in significantly increased expenses borne by the parties. These cases, however, tend to be rare—typically involving highly unique, technical or scientific issues. In light of the rarity and complexity of these cases, the overall costs and benefits resulting from the use special masters cannot be easily quantified. Instead, as a general rule, the weighing of the benefits and costs of special master appointments is properly committed to the sound discretion of the district judges. In the absence of evidence of systemic abuse, unreasonable expenses and delays, or similar due process burdens, the public should be reassured that district courts are properly weighing their use of magistrate judges versus special masters in managing

multi-district cases.

## I. INTRODUCTION

The authors of the Federal Rules of Civil Procedure and the Federal Magistrate Act envisioned magistrate judges as the primary resource for district judges to call upon for assistance in managing complex cases.<sup>2</sup> As salaried federal judicial officers, magistrate judges provide a valuable resource that is virtually cost-free to the parties.<sup>3</sup> In fact, the Advisory Committee to Rule 53 stated its belief that, given the expanded role of magistrate judges in modern litigation, special master appointments would be “unnecessary” except in a very limited set of cases.<sup>4</sup> Nevertheless, in recent years, the legal community has seemingly perceived a dramatic increase in special master appointments in all types of federal cases.<sup>5</sup> While some contend special masters contribute valuable field-specific expertise, their increased use can also dramatically increase the financial burden upon

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2. See Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate System*, 44 AM. U. L. REV. 1503, 1526 (2003) (magistrate judges are a corps of judicial officers created by Congress “to provide the federal district courts with supportive and flexible supplemental judicial resources . . . [to promote] prompt and efficient case resolution, and preserv[e] scarce Article III resources”) (internal citations omitted); see also Thomas R. Garcia, Note, *Should Federal Magistrates Be Delegated the Authority to Approve Electronic Surveillance Applications?*, 18 W. NEW. ENG. L. REV. 271, 279 (1996) (“Congress intended the district courts to make extensive use of these new judicial officers.”).

3. See Margaret Farrell, *The Function and Legitimacy of Special Masters: Administrative Agency for the Courts*, 2 WIDENER L. SYMP. J. 235, 273 (judges are “compensated by our justice system as a public good that is necessary for the just resolution of disputes.”).

4. Special masters are private individuals appointed by a district court to assist in handling a case. These individuals are typically lawyers, retired judges, or legal academics. Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 454-55 (1958). See also Linda Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1309 (1975) (providing a history of the creation and use of special masters in federal courts). “Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances . . . 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.” FED. R. CIV. P. 53 advisory committee note (1983 Amendment) (discussing subdivision (a)).

5. See Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2141-42 (1989) (“It is ironic that the special master role, particularly in the pre-trial phase of litigation, appears to have been expanded rather than reduced by the appearance of federal magistrates.”); see also Correy E. Stephenson, *Use of Special Masters in E-Discovery Disputes on the Rise*, NEW ENG. IN-HOUSE, Mar. 31, 2008, <http://newenglandinhouse.com/2008/03/31/use-of-special-masters-in-ediscovery-disputes-on-the-rise/> (“The increased use of electronic discovery has resulted in a new cottage industry of sorts—e-discovery special masters.”); Dionne Searcey, *Judges Outsource Workload as Cases Get More Complex*, WALL ST. J., Sept. 29, 2013, <http://www.wsj.com/articles/SB1000142405270230398390457909559305850367>.

the parties<sup>6</sup> and may decrease potential amounts available for awards or even hamper settlement.<sup>7</sup> Comprehensive data on the number of special master appointments and their resulting costs and benefits to multi-district litigation<sup>8</sup> (“MDL”) cases is nonexistent.<sup>9</sup> However, many commentators insist that such appointments are rapidly becoming staples of complex litigation<sup>10</sup> and that special masters are becoming a costly and “an almost Pavlovian response” by district judges facing complex cases.<sup>11</sup>

Special master appointments are perceived as a lucrative business opportunity for the bar, and this perhaps fosters a natural suspicion that judicial authority is being unnecessarily delegated.<sup>12</sup> The use of special masters also raises a number of concerns regarding the legitimacy of the process—concerns that can be avoided by the use of magistrate judges.<sup>13</sup> This thesis examines whether district judges are using magistrate judges in the manner envisioned by the Rules to manage multi-district litigation caseloads.

The thesis addresses the following questions: have district courts effectively replaced magistrate judges with special masters in managing MDL cases? If so, then what have been the consequences? To answer

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6. Searcey, *supra* note 5 (special master rates “range roughly from \$300 to \$1,000 an hour, negotiated by the parties and the court”). These potential costs are particularly important to corporate litigants who often end up paying the special masters bills either directly or indirectly through settlement. Thus, special master utilization is an area of particular concern to this group of litigants. *See, e.g.* Panel, *The Use and Abuse of Referees and Special Masters in Discovery*, Ann. Meeting of Ass’n of Corp. Counsel, Oct. 23, 2011.

7. *See generally* Farrell, *supra* note 3, at 273-287.

8. Federal multi-district litigation was established in response to the increasing complexity of federal civil litigation and as an alternative to class actions. Its purpose was to coordinate and consolidate pretrial proceedings to facilitate efficient case management. *See generally* David A. Bell, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433, 437-40 (1997); *see also* Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION 26, 31 (2012).

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

10. Searcey, *supra* note 5, at 2.

11. Silberman, *supra* note 5, at 2158.

12. One commentator has expressed this suspicion more harshly:

To the extent that cases are shaped, ad hoc procedures embraced, settlements influenced and even coerced, and law articulated, special masters may represent an even greater threat to the integrity of the process because they are private individuals who are not institutionally entrusted with judicial powers. The danger of a new cottage industry, enhanced by large fees for special masters and endangered by potential cronyism and conflicts of interest, cannot be ignored when assessing the system of special masters presently in vogue.

*Id.* at 2137 (internal citations omitted).

13. *See* Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, SG046 ALI-ABA COURSE OF STUDY 1005, 1015 (2002) (“Because magistrates are full time [and] government paid . . . they do not present the same issues that are presented by the appointment of part time, party paid, expert masters appointed under Rule 53.”).

these questions, docket entries and orders from all federal MDL cases closed in 2011 and 2012 were analyzed, with particular attention paid to the frequency and function of magistrate judge and special masters. Interviews were also conducted with district judges who use magistrate judges, special masters, or both to manage MDL cases. Magistrate judges who have been assigned to MDL cases were also interviewed. Finally, data regarding docket loads in districts managing MDL cases were analyzed.

Section I addresses the evolution of the magistrate judges corps and its importance to the effective management of complex litigation in the federal courts. Section II examines the presumption created by the Rules that magistrate judges, not special masters, should be the primary resource for district courts to manage complex litigation. This Section also examines why the presumption exists and the benefits to the legal justice system envisioned by the Rules. Section III sets forth the research design constructed to answer the questions posed by the thesis. Sections IV and V present the data obtained from the research design and discuss the implications of these findings. Section VI presents a case example of the need for cross-pollination of MDL management strategies among district courts involving the use of magistrate judges. Section VII presents a summary of the major conclusions of the thesis, with recommendations for future decisions regarding the use of magistrate judge assignments in MDL cases.

## II. EVOLUTION OF FEDERAL MAGISTRATE JUDGES

The Federal Magistrates Act of 1968 (the “Act”), created a corps of “legal officers whose role is to promote judicial economy”<sup>14</sup>—making federal courts a more fair, inexpensive and expeditious forum for dispute resolution. Since the passage of the Act, magistrate judges have played an important role in the federal judiciary’s success in effectively managing complex litigation.<sup>15</sup> There are almost as many full-time magistrate judges as active district judges,<sup>16</sup> and the Act provides great flexibility as to how

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14. *Magistrate Law —Rule 11 Sanctions — Second Circuit Leaves Classification Of Magistrate Judges’ Rule 11 Sanctions Unresolved. — Kiobel v. Millison*, 592 F.3d 78 (2d Cir. 2010), 124 HARV. L. REV. 1327, 1327 (2011).

15. *See generally* Pro & Hnatowski, *supra* note 2, at 1526-1529; *see also* ARTHUR R. MILLER, AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 4 (1994) (“complex litigation” is typically defined as “multiparty, multiform” litigation).

16. ADMIN. OFFICE OF THE UNITED STATES COURTS, *Table 1.1: Total Judicial Officers—Courts of Appeals, District Courts, and Bankruptcy Courts*, JUDICIAL FACTS AND FIGURES (2012), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2012/Table101.pdf>.

the magistrate judges may be used.<sup>17</sup>

Today's magistrate judge corps has evolved to be capable of performing virtually any task that a district judge may delegate. Since the 1968 creation of the Act:

“[M]agistrate judges have assumed many of the duties and responsibilities of district judges. Magistrate judges are often called upon, for example, to rule on discovery and suppression of evidence motions, issue reports and recommendations on dispositive motions, adjudicate petty offenses and misdemeanor cases, and even, with the consent of the parties, preside over the trial of civil actions.”<sup>18</sup> In addition to acting as adjudicators in civil and some criminal matters, magistrate judges have also become skilled in mediation and other forms of alternative dispute resolution.<sup>19</sup> “It is no exaggeration to say, as the Supreme Court recently did, that the role of the magistrate in today's federal judicial system is nothing less than indispensable.”<sup>20</sup> As a result of the flexibility afforded by these magistrate judges, studies have concluded that federal courts are “better able” to handle complex cases than their state counterparts.<sup>21</sup>

Although magistrate judges serve eight-year terms, as opposed to the life appointment of district judges, they share many other characteristics with Article III district judges. Like district judges, magistrate judges are highly qualified career judicial officers. Magistrate judge appointments result from a rigorous and bipartisan merit-based selection process.<sup>22</sup> As a result, magistrate judge qualifications often mirror those of district judges.<sup>23</sup> Many magistrate judges come from the nation's top law firms and law schools, and many have extensive experience in high-profile, high-value cases.<sup>24</sup> Many are former law clerks to federal district and appellate judges.

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17. Pro & Hnatowski, *supra* note 2, at 1520-22.

18. Bell, *supra* note 8, at 433 (internal citations omitted).

19. See Pro & Hnatowski, *supra* note 2, at 1526-28; see also *id.* at 1522 (noting “The emerging role of magistrate judges, many of whom conduct settlement conferences and preside over summary jury trials and other forms of [alternative dispute resolution]”).

20. Bell, *supra* note 8, at 433 (internal citation omitted).

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

22. Bell, *supra* note 8, at 439 (“Magistrate judges are judicial officers appointed by the judges of the district in which they sit, with the assistance of a citizen merit selection panel.”); see also 28 U.S.C. §631(a), (b)(5) (appointment and tenure of magistrate judges).

23. See, e.g., Pro & Hnatowski, *supra* note 2, at 1526 (noting that magistrate judge appointments have “attracted lawyers and state judges of the highest caliber to the position”).

24. See generally UNITED STATES COURTS, <http://www.uscourts.gov>. Biographical information on all magistrate judges is contained on the United States Courts' internal electronic directory and is not available to the public. This information is collected and maintained by the

Others have distinguished themselves as past Assistant United States Attorneys.<sup>25</sup> Additionally, an increasing number of magistrate judges are appointed after serving as state trial and appellate jurists.<sup>26</sup> At the same time, there has been a steady increase in the number of federal magistrate judges elevated to serve as Article III district judges. In the past 10 years, 57 magistrate judges have been elevated to the position of district judges.<sup>27</sup>

Further, magistrate judges receive substantial preparation for their unique role. At the beginning of their tenure, and periodically during their term, magistrate judges are trained in judicial theory and practice. Much of this training is especially devoted to courtroom and case management, as well as issues such as due process, neutrality, and the ethical considerations presented by MDLs and other complex federal litigation.<sup>28</sup>

As noted above, the Act envisions a flexible role for magistrate judges dictated by the needs of the district court. District judges may task magistrate judges as pre-trial and discovery managers, early neutral evaluators, arbitrators, and mediators.<sup>29</sup> In these various capacities, magistrate judges may be asked to make recommendations on complex discovery issues and to formulate findings of fact and conclusions of law; facilitate settlement negotiations or joint stipulations; or enter remedial or injunctive orders and monitor compliance with those orders.<sup>30</sup> Further, magistrate judges commonly sit as the ultimate trier of fact.<sup>31</sup> Under the Act, a magistrate judge may conduct a jury or bench trial and render final disposition of cases when the parties have consented.<sup>32</sup>

The adaptability of the magistrate judge corps and the speed at which

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Administrative Office of the United States Courts, [www.uscourts.gov](http://www.uscourts.gov). Individual magistrate judges may post their biographical information on their district court websites or the information may be obtained from the state bars of which the judges are members.

25. *Id.*

26. *Id.*

27. *Id.*

28. Information about the various judicial educational programs offered every year is maintained on the internal website of the Federal Center for the Judiciary, available at [www.fjc.gov](http://www.fjc.gov).

29. See Bell, *supra* note 8, at 434 (noting that a magistrate can be designated “to hear and determine any pretrial matter except for eight enumerated exceptions”) (internal citations omitted); see also R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN’S L. REV. 799, 836 (1993) (setting out numerous functions and tasks that can be performed by magistrate judges under the Act).

30. Dessem, *supra* note 29, at 804-05.

31. For information regarding the number and types of trials conducted by magistrate judges nationwide for fiscal year 2013, see JUDICIAL BUSINESS OF THE U.S. COURTS: ANNUAL REPORT OF THE DIRECTOR (2013), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx>.

32. See 28 U.S.C. § 636(b)(2).

it responds to new challenges within the federal judiciary has been remarkable. A good example of this is the evolution of the role of magistrate judges in alternative dispute resolution (“ADR”). Some commentators initially believed that magistrate judges could not be effective in this role because they lacked the training and skill of full-time ADR practitioners.<sup>33</sup> Others were concerned that, in light of their other duties, magistrate judges would not have adequate time to devote to ADR.<sup>34</sup> In 1990, Congress passed the Civil Justice Reform Act, which required district courts to devise plans for the reduction of administrative costs.<sup>35</sup> By 1991, 34 districts had devised such plans.<sup>36</sup> Twelve of the plans included some form of alternative dispute resolution using magistrate judges.<sup>37</sup>

Today, magistrate judges have become an indispensable part of ADR case management in many federal district courts.<sup>38</sup> As commentators note, magistrate judges are the “most effective alternative dispute resolution tool in the federal judiciary.”<sup>39</sup> Further, “[w]hile many [alternative dispute resolution] procedures exist, none combine the stature of an independent judiciary with the amorphous, human qualities of traditional alternative dispute resolution like magistrate-assisted settlement. Slightly separated from the Article III judiciary, United States Magistrates are able to facilitate effective settlement conferences by remaining neutral, non-coercive, and authoritative.”<sup>40</sup> As the ADR evolution demonstrates, concerns about increases in magistrate judge workloads “are not insurmountable” and these concerns should not be a bar to the innovative use of magistrate judges in managing complex litigation.<sup>41</sup>

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33. See Peter Lantka, *The Use of Alternative Dispute Resolution in the Federal Magistrate Judge's Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 UWLA L. REV. 71, 78 (2005).

34. See generally *id.* at 90-91.

35. Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 716-717 (1994).

36. *Id.* at 717.

37. *Id.*

38. See, *Lantka*, *supra* note 33, at 88 n.115 (“Magistrates’ role in settlement conferences has been seen as the most drastic effect the office has had on the federal judiciary. Cases are often twice as likely to settle when a magistrate is involved in the settlement process in addition to the trial judge.”) (internal citations omitted).

39. *Id.* at 93.

40. *Id.*

41. *Id.* at 91-93.

## III. RULE 53 MANDATES FOR SPECIAL MASTER APPOINTMENTS

*Presumption In Favor of Magistrate Judges*

In addition to using magistrate judges, district courts have also traditionally called upon special masters to manage complex cases.<sup>42</sup> Federal Rule of Civil Procedure 53 is the primary mechanism for appointing special masters in federal cases.<sup>43</sup> Rule 53 commits the weighing of the benefits and costs of special master appointments to the discretion of the district courts. However, Rule 53 specifically acknowledges that a district court's decision to use a private retained special master may impose additional financial burdens upon the parties.<sup>44</sup> Accordingly, Rule 53 creates a presumption in favor of the assignment of magistrate judges. When assistance is needed, a district court should first consider using its magistrate judges before appointing a special master. In other words, "appointment of a master must be the exception and not the rule."<sup>45</sup>

The Rule reflects its presumption in favor of magistrate judges by limiting the circumstances under which a district judge may appoint a special master. First, Rule 53 states that the district judge may appoint a special master to address pretrial and post-trial matters "only . . . [if the matters] cannot be effectively and timely addressed" by an "available district judge or magistrate judge in that district."<sup>46</sup>

Second, Rule 53 precludes special masters from performing the core judicial functions of conducting trials and making findings of facts in non-jury cases except in two very narrow circumstances: (i) where some

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42. The benefits that paid private special masters and magistrate judges who have been designated as special masters can bring to litigation have been the subject of considerable scholarship. See Thomas E. Willging et al., FED. JUDICIAL CTR., SPECIAL MASTERS' INCIDENCE AND ACTIVITY (2000) [hereinafter "FJC Study"]. Section 636(b)(2) of the Act provides for the appointment of magistrate judges as special masters when one is needed to perform duties outside of those expressly delegated to magistrate judges. See also FED R. CIV. P. 53 advisory committee's note (2003).

43. Special masters can also be appointed pursuant to the district courts' long established inherent powers "to provide themselves with appropriate instruments for their duties," including the authority to appoint special masters with or without the consent of the parties to "simplify and clarify issues and to make tentative findings." Farrell, *supra* note, at 1011 (citations omitted); see also *Ex parte Peterson*, 253 U.S. 300, 314 (1920).

44. FED R. CIV. P. 53 (2003 amendments to subdivision (h)). ("The need to pay compensation is a substantial reason for care in appointing private persons as masters."); FED R. CIV. P. 53(a)(3) (courts must consider the fairness of imposing likely expenses on litigants when appointing a master).

45. FED R. CIV. P. 53 advisory committee's note (2003).

46. FED R. CIV. P. 53(a)(c).

“exceptional condition” warrants it; or (ii) where “essentially ministerial determinations” such as an accounting or a resolution of a “difficult computation of damages” are needed.<sup>47</sup> Courts have strictly construed the “exceptional condition” language as mandating that district judges maximize the use of their district’s resources—including magistrate judges—before appointing a special master.<sup>48</sup> If challenged, a district court that appoints a special master for such tasks without making a finding of an “exceptional” condition and articulating the basis for choosing not to assign the task to a magistrate judge may have committed reversible error.<sup>49</sup> The Third Circuit made such a finding in *Prudential Insurance Company of America v. United States Gypsum Co.*, noting, “[i]ndeed, the district court has neither given us specific reasons for appointing a special master nor has it called our attention to any particular, unique, special or exceptional circumstances with which a magistrate judge could not deal effectively or which would require that a magistrate judge be replaced by special master.”<sup>50</sup>

Third, Rule 53 permits appointment of a special master to “perform duties consented to by the parties.”<sup>51</sup> But this provision is not as broad as it seems— “[p]arty consent does not require that the court make the appointment; the court retains unfettered discretion to refuse the appointment.”<sup>52</sup> The Comments to Rule 53 accordingly reflect the

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47. FED. R. CIV. P. 53(a)(1). Special masters were originally created to perform accounting and damages calculations in early English courts. *See generally* Silberman, *supra* note 4.

48. FED. R. CIV. P. 53(a)(1)(B)(i). *See, e.g., La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249 (1957) (finding that general complexity of litigation, projected length of trial, and congestion of court’s calendar did not constitute “exceptional circumstances” justifying appointment of a trial-level special master). However, assuming every other Rule 53 requirement has been satisfied, this would not preclude a more limited scope of appointment of a special master, *i.e.*, to narrow the issues by resolution of specific pre-trial or non-dispositive matters, settlement negotiations, or post-trial implementation of a decree. *See* MANUAL FOR COMPLEX LITIGATION (4th ed.) Sec. 11.52; *See also In re United States*, 816 F.2d 1083, 1085 (6th Cir. 1987) (reversing a district court’s appointment of special master, notwithstanding the district court’s articulation of calendar congestion, complexity of issues, lengthy trial, extraordinary pre-trial management in a case with more than 250 parties, and public interest in speedy disposition of the matter as exceptional conditions warranting the reference.).

49. *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d. 1080, 1085 (3rd Cir. 1993) (finding that the appointment of a special master violated Rule 53 mandates).

50. *Id.*; *see also* Richard A. Posner, *Coping With the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2217 n.7 (1989) (“implying that a judge who ‘referred summary judgment proceedings [in a complex antitrust case] to a special master . . . that the judge then adopted without independent analysis’ displayed a lack of ‘sensitivity to the problems of excessive delegation of judicial power . . . and to the precise language of Rule 53(b)’”) (internal citation omitted).

51. Fed. R. Civ. P. 53.

52. FED. R. CIV. P. 53 advisory committee’s note (2003).

Advisory Committee's belief that, except in cases requiring the technical expertise of special master or when a magistrate judge is unavailable, "the existence of magistrates may indeed make the appointment of outside masters unnecessary in many instances."<sup>53</sup>

Finally, before appointing a special master for any purpose, district courts are directed to pay "particular attention . . . to the prospect that a magistrate judge may be available for special assignments."<sup>54</sup> Rule 53 states that district judges must also specifically consider "the fairness of imposing the likely expenses on the parties" and must avoid "unreasonable expense or delay" when deciding to appoint a special master.<sup>55</sup>

Pursuant to Rule 53, a magistrate judge may perform any duty that may be performed by a special master.<sup>56</sup> The Comments provide also that, if a district judge wishes to assign a magistrate judge a task that could not be performed under the Act, but could instead be performed under Rule 53, the district court may formally designate the magistrate judge as a "special master."<sup>57</sup> In contrast, the district courts do not have the same flexibility in appointing special masters to tasks that are normally performed by magistrate or district judges, the most important of which is sitting as a trier of fact.<sup>58</sup>

### *Benefits of Magistrate Judges*

Rule 53 and its Comments state a plain preference for the use of magistrate judges over special masters. The Rule thus acknowledges the many benefits of magistrate judge assignments in complex civil cases.

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53. *Id.*

54. *Id.*

55. FED. R. CIV. P. 53 (a)(3). Although the Rule requires district judges to "consider" these factors before appointing a special master, it does not require them to explain their reasons for the appointment. Instead, the Rule mandates that district judges carefully delineate the scope of the authority granted to the special master.

56. FED. R. CIV. P. 53 advisory committee's notes (2003) ("[t]here is statutory authority to appoint a magistrate judge as special master . . . [but] . . . no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge.").

57. *Id.* ("[I]t may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1)."); see also James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 801 n.8 (Magistrate judges are preferable as special masters for a number of reasons, including comparatively fewer time constraints, much-reduced expenses to litigants, and familiarity with judicial work.) (internal citations omitted).

58. FED. R. CIV. P. 53 advisory committee's note (2003) (precluding special masters from performing certain core judicial functions except upon on one of two findings by the court, noting "[a]t the extreme, a broad delegation of pre-trial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.>").

There are number of reasons why magistrate judges, as federal judicial officers, are preferable to outside special masters for managing complex litigation.

#### Cost

The most apparent advantage of magistrate judge assignments is the financial savings to the litigants. Magistrate judges are public servants who are paid out of public funds. Accordingly, the use of a magistrate judge does not pose any additional financial cost for parties who are already in federal court.<sup>59</sup> Further, magistrate judges have a trained legal staff of law clerks and research librarians, as well as the ability to call upon the resources of the district's clerk. The district clerk may provide administrative assistance, translation services, conference rooms and courtrooms for proceedings and depositions, and electronic recording of conferences and hearings. Additionally, the district clerk can provide immediate access to court records and transcripts of other proceedings before the district judge. Finally, appointing magistrate judges to manage MDL cases avoids the potential for expensive special master fee disputes, which can add more contention to the end of a long and difficult litigation process.<sup>60</sup>

In contrast, using an outside special master to manage complex litigation can be extremely expensive—"[t]he need to pay compensation is a substantial reason for care in appointing private persons as masters."<sup>61</sup> Federal MDL cases, by their very nature, are lengthy and complex and they can require many years of a special master's attention. In addition to the cost of the special master's hourly rate—a rate reflecting the experience and expertise that led to the appointment—the litigants incur the cost of the special master's support staff, as well as transcriptions and other fees for each proceeding. As a result, special master fees in the largest MDL cases

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59. Farrell, *supra* note 3, at 273.

60. See, e.g., *United States v. Krizek*, 111 F.3d 934, 943 (D.C. Cir. 1997) (affirming award of fees to special master notwithstanding challenge to provision in order of reference that delegated master's functions to legal assistants where efficient and economical); see also David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141, 179 (1985) (discussing litigants' difficulty in challenging special master fee awards on appeal); Margaret G. Farrell, *Special Masters*, FEDERAL JUDICIAL CENTER - REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 614 (1st ed. 1994) (noting that while some attorneys privately object to the fees and expenses charged by masters, they are reluctant to voice their objections "for fear of alienating an important decision maker in their case and possibly the judge who appointed him or her.").

61. See, e.g., *Silberman*, *supra* note 5, at 2150 (discussing the "staggering" costs of some of the largest MDL cases); see also FED R. CIV. P. 53 (2003 amendments to subdivision (h)).

have reached into the hundreds of thousands of dollars.<sup>62</sup>

#### Potential for Unnecessary Delay

Using special masters in place of magistrate judges to manage MDL cases can also lead to delay and case stagnation. The plain language of Rule 53 acknowledges the very real danger of “unreasonable expense and delay.”<sup>63</sup> “Increased financial costs” and delay are reported by commentators as the “most-cited” justification for the requirement that district courts use magistrate judges rather than special masters except in extraordinary circumstances.<sup>64</sup> In some cases involving particularly numerous issues or litigants, the special masters appointed have served for many years—in essence, that single appointment becomes a significant portion of their entire career.<sup>65</sup> This raises the danger that special masters may become invested in prolonging the litigation, consciously or unconsciously, to perpetuate their own employment.<sup>66</sup>

#### Neutrality

Using a magistrate judge to manage a federal MDL case also avoids potential problems regarding the neutrality of a special master and the unconscious perception bias a special master may form against one party or the other.<sup>67</sup> As judicial officers, magistrate judges are officers of the district court and their neutrality is assured by merit selection, extended professional training, eight-year tenures and fixed salaries that are not dependent on the litigation. Finally, perhaps most importantly, magistrate judges are bound by all of the judicial canons of ethics at all times.<sup>68</sup>

By contrast, the neutrality of special masters is not assured by their

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62. For example, in the Agent Orange Product Liability Litigation the total fees for the three masters was reported to “total hundreds of thousands of dollars.” Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 359 (1986). Another estimate deduced the fees plus expenses, paid to one firm alone, as totaling more than \$3 million. Stephen Labaton, *Five Years After Settlement, Agent Orange War Lives On*, N.Y. TIMES, May 8, 1989, at D1. See also Levine, *supra* note 57, at 142 (noting that the issue of special masters fees has largely been overlooked in academic literature).

63. FED. R. CIV. P. 53(a)(3).

64. Farrell, *supra* note 61, at 614.

65. *Id.* See also Silberman, *supra* note 5, at 2174 (use of special masters is expensive and may impact focusing on a case’s merits).

66. Farrell, *supra* note 61, at 614.

67. Farrell, *supra* note 3, at 276.

68. Farrell, *supra* note 13, at 1033 (noting that, because of the activist nature of their methods, “it may not be appropriate to apply all judicial canons to the ethics of special masters.”).

tenure or fixed salaries.<sup>69</sup> Additionally, especially in cases where special masters are appointed as a result of their expertise and specialized knowledge in a particular field, litigants may worry that the masters are not truly neutral.<sup>70</sup> Special masters who are practicing attorneys tend to have substantial experience with similar disputes. Accordingly, in smaller legal markets or highly specialized fields, it may be very difficult to find a completely disinterested special master with no prior relationship to any of the parties.<sup>71</sup> For example, as practicing lawyers, some special masters may have spent their entire careers either as litigators or experts on one side of the docket or the other in similar disputes. Further, special masters are not guaranteed to have received training as neutral parties or to have prior experience serving in that capacity. Finally, there is the lingering specter of how the special master's plans after the litigation has ended might affect his or her neutrality in their case.<sup>72</sup> Special masters may be fully employed by the case, and thus dependent on it for employment.<sup>73</sup> Alternatively, they may work "part-time" and thus be faced with concerns about their own reputations and future employment prospects in light of their rulings as special masters.<sup>74</sup> The Comments to Rule 53 acknowledge a particular issue, "peculiar to the master's role"—the master or his firm may even be appearing before the district judge in other litigation.<sup>75</sup> This situation might improperly influence the master, the judge, or the other parties in either case.<sup>76</sup>

The question of neutrality is extremely important because special masters can be actively involved in the development of the litigation, including defining the rights of the parties.<sup>77</sup> As commentators have noted, Rule 53 does not require that the special master act as a "passive generalist judge" but rather instead allows masters to be "active specialists" who may be given quasi-judicial authority "to take all appropriate measures to perform the assigned duties efficiently and fairly."<sup>78</sup>

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69. Farrell, *supra* note 3 at 275.

70. Farrell, *supra* note 13 at 1034.

71. Farrell, *supra* note 61 at 604.

72. *Id.* (noting that a cadre of "repeat players" with experience in numerous cases have a vested interest in maintaining their reputations as successful settlement masters).

73. *Id.*

74. *Id.*

75. FED. R. CIV. P. 53 (a)(2)-(3) advisory committee's note.

76. *Id.*

77. Farrell, *supra* note 3, at 256, 280-81.

78. *Id.* In a separate article, Farrell further noted:

More fundamentally, the appointment may represent a deviation from the traditional adversary model of justice by interjecting a neutral, but not passive, specialized decision maker into the judicial system, which otherwise depends on more passive, generalist judges. Unlike court-

### Proxies for District Judges

In many cases, magistrate judges may be better proxies for the district judges they assist than special masters. This is especially true where the special masters have no previous judicial experience or did not serve as a law clerk for that district judge. As noted above, magistrate judges receive extensive training in handling federal cases—essentially the same training received by district judges. Further, due to the nature of their office and the federal docket, magistrate judges work closely with district judges on a variety of matters and cases. Due to this unique “front-row seat” to the district judge’s historical handling of cases, magistrate judges may be more likely to make rulings that will be affirmed by the district judge, leading to fewer challenges to the magistrate judge’s decisions by the litigants and a faster, more efficient litigation process. Accordingly, the assignment of magistrate judges may enhance the efficiency of the litigation by reducing the costs of appeals to the district court and modification of the magistrate judge’s or special master’s orders.

### Due Process and Fairness

Using magistrate judges, rather than special masters, may also be necessary for litigants to feel that they have received full due process. As the Comments to Rule 53 note, the performance of judicial functions by judicial officers rather than outside special masters “may be particularly important in cases that involve important public issues or many parties.”<sup>79</sup>

Although the effect is difficult to quantify, using magistrate judge injects humanity into an inherently dehumanizing process and enhances the parties’ perception of due process and justice.<sup>80</sup> This is particularly true in many of the types of cases encompassed in MDL: mass torts, products liability and financial fraud cases. In these types of cases, large numbers of plaintiffs have suffered or potentially will suffer life-threatening injuries, financial devastation or other catastrophic events. Plaintiffs may lose their sense of individual identity as they are lumped into “classes” and the sum total of their lives is reduced to a bundle of statistics—in effect, they become one among thousands. Such litigants’ value to their lawyers may

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appointed experts, masters are not witnesses to be examined and cross-examined by the parties, nor are they full-time, government-paid jurists, like magistrate judges.

Farrell, *supra* note 61, at 621. *See also* Silberman, *supra* note 5, at 2142 (expressing concerns that special masters might use judicial authority to coerce settlements).

79. FED R. CIV. P. 53 (a)(1) advisory committee’s note.

80. Farrell, *supra* note 3, at 286 (discussing the impact that special masters have on the humanity and on due process in mass tort cases).

seem to be measured by the scope of their illness or financial loss. Simply put, these litigants deserve the right to have their day in court before a federal judge. Through its presumption in favor of magistrate judges, Rule 53 acknowledges as much.

In contrast, when private special masters are appointed, parties may be left with the impression that their cases are not important enough for the court to resolve itself. By appointing a magistrate judge, the district judge sends a clear message that the case and the litigants are important and worthy of judicial consideration and resources. Providing a judicial officer who will talk to litigants, listen to their concerns, commiserate where appropriate, and rule with compassionate understanding may lead to the litigants being more amenable to compromise on disputed issues and resolving their cases prior to trial.<sup>81</sup> Alternatively, using special masters can foster a perception of a two-tier justice system in which parties who are able to pay the most receive faster, potentially more favorable outcomes through the use of a special master chosen by the district judge.<sup>82</sup>

#### Precedent

Finally, a unique advantage of magistrate judge assignments is the creation of legal precedent. Decisions of magistrate judges are typically clearly articulated and published on an “accessible record.”<sup>83</sup> Accordingly, their decisions may be found and followed by other magistrate and district judges.<sup>84</sup> On the other hand, special master decisions, “particularly those based on informal proceedings and arguments by the parties,” have no precedential value.<sup>85</sup> Such decisions are rarely consulted or cited by district or magistrate judges, or even other masters.<sup>86</sup> Typically, only the district

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81. *Id.* (discussing these issues from the perspective of using special masters in mass tort litigation).

82. *See* Farrell, *supra* note 13, at 1041 (noting that the use of special masters could foster the perception of “justice for a price”).

83. *See* Farrell, *supra* note 3, at 283-84.

84. *Id.* at 284.

85. Farrell also highlights this concern with respect to the standard of review for special master reports, which are “accepted because they are not demonstrated to be clearly erroneous.” *Id.*

[T]hey are developed only to handle the cases before them and are not rules of general application. As idiosyncratic rules specifically designed for the particular situation, they do not provide universal principles. Thus, critics of current special master practice argue that the unique procedures developed by masters . . . run counter to the foundational, “trans-substantive” premise of the Federal Rules of Civil Procedure – the establishment of a single set of procedural rules to be applied in all types of civil litigation, without regard to their subject matters.

Farrell, *supra* note 3, at 282.

86. The lack of formality and a record may give rise to other concerns about special

court's decision accepting a special master's report is available as an element of public law.<sup>87</sup> "Thus, having issues resolved by private special masters may deprive the public of the benefit of understanding which considerations were significant to the Court's decision and using that understanding to predict a result in similar cases."

#### Consequences of Choice

The failure to apply Rule 53's mandates regarding the presumption in favor of the use of magistrate judges can result in the loss of the above advantages and waste judicial resources. Thus, this thesis sets out to determine the frequency of magistrate judge and special master appointments, as well as the manner of and justifications for those appointments. Section III presents the methodology used to conduct this research.

#### IV. METHODOLOGY USED

The overall questions posed by this thesis relate to the frequency of magistrate judge and special master appointments and the effect of special master appointments upon federal MDL cases. Addressing these two questions required a two-phase research design. Phase One of the design consisted of an empirical analysis to examine magistrate judge and special master usage by district courts. Phase Two consisted of judicial interviews to gain insight into the judicial decision-making process regarding special master appointments and magistrate judge use in MDL cases.

##### *Phase One: Empirical Data*

The sample pool for the first phase of the study began with a list of all federal MDL cases closed in calendar years of 2011 and 2012. Of these 112 total cases, intellectual property cases<sup>88</sup> and any cases whose docket

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masters. See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 421–22 (1986) (noting that "the absence of a record can create . . . perverse incentives" for the special master; "off the record" the master might feel "freer to cajole or pressure counsel" or "less constrained in arriving at and articulating his decisions"; "the absence of a record can both exaggerate a master's sense of power (by removing the constraint of appellate review) and increase the temptation to abuse it").

87. See Farrell, *supra* note 3, at 284.

88. The rationale for excluding intellectual property cases was two-fold. First, because of their very nature, intellectual property disputes are the most likely cases to need the input from technically skilled third parties. When this characteristic combines with the complexities of multi-district litigation, the likelihood of a special master appointment increases even further. Accordingly, these cases were considered less helpful for an inquiry into special master

entries were not available for download were excluded. The resulting pool was 101 MDL cases. To ensure consistency, the following data was compiled by a single researcher.

#### Basic Data Tables

For all cases in the sample pool, whether or not a magistrate or special master was used, basic data was collected. The data categories were as follows:

Date opened and date closed;

Type of MDL (Air Disaster, Antitrust, Common Disaster, Contract, Employment Practices, Miscellaneous, Products Liability, Sales Practices, or Securities);

Transferee district for the MDL;

Number of cases originally consolidated at the creation of the MDL;

How the case closed (*i.e.* settlement, remand, dismissal, etc.);

Whether the disposition that closed the MDL was appealed; and

If appealed, whether the case was remanded.

Data for the first three categories was available online at the website maintained by the Judicial Panel on Multi-district Litigation (the “MDL Panel”).<sup>89</sup> The fourth category—the number of cases consolidated into an MDL action at opening—was obtained from the Statistical Analyst at the Judicial Panel on Multidistrict Litigation.<sup>90</sup> The fifth, sixth, and seventh categories required research into the 101 individual district docket reports. The docket reports for each MDL case were accessed via the Case Management/Electronic Case Files (“CM-EFC”) system.<sup>91</sup> To determine how the case was closed, the following search terms were manually entered: “Final Order,” “Judgment,” “Settlement,” “Summary Judgment,” “Dismiss,” and “Order.” A single term or combination of terms identified

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appointments in the majority of MDL cases. Second, the Federal Judicial Center has already analyzed the frequency and role of special masters in patent cases generally. *See, e.g.*, JAY P. KESAN & GWENDOLYN G. BALL, FED. JUDICIAL CTR., A STUDY OF THE ROLE AND IMPACT OF SPECIAL MASTERS IN PATENT CASES (2009).

89. The MDL Panel provides data from 1995 to present day on its website. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL INFORMATION, <http://www.jpml.uscourts.gov/statistics-info>.

90. For purposes of this study, the statistician accessed the transfer orders and identified the number of individual cases sent to the transferor court at the time of initial consolidation. That number of cases was added to that number of individual cases originally filed in the transferee district. This process determined the total number of individual cases consolidated at the opening of 101 MDL cases.

91. Cases were searched by their transferee district case number in their specific district’s CM-EFC, not their MDL Number through the MDL database (*i.e.* 2:03-md-1532 instead of MDL No. 1532).

the order that closed the MDL case, which was then downloaded and read to confirm the mode of disposition.

After determining the mode of disposition for each MDL case, the terms “Notice of Appeal,” “USCA” (United States Court of Appeals), and “remand” were searched to determine whether the disposition had been appealed. The intent was to identify appeals of the disposition rather than, for example, interlocutory appeals of a class certification order. If the disposition had been appealed, the orders from the circuit court were downloaded and read. Because many of the appeals were dismissed or still pending, data collection for this category consisted of a binary: remanded or not remanded. Dismissed and pending cases were counted as not remanded.

#### Identifying Magistrate Judge and Special Master Activity

Within each docket report, manual term searches were run to identify whether a magistrate judge or special master had been used in the case. For magistrate judges, “magistrate,” “judge,”<sup>92</sup> and “appointing” were searched to identify the MDLs that used at least one magistrate judge before closing. Magistrate judge involvement was only counted if the docket entries indicated activity beyond being automatically assigned the case—*e.g.*, issuing pre-trial orders or conducting scheduling conferences. The count after this process showed that magistrate judges were involved in 54 of the 101 MDL cases in the pool.

The process of searching individual districts’ CM-EFC was identical for special masters. Each MDL’s district docket report was accessed and manually searched for the terms “special master,” “appointing,” and “Rule 53.” A total of 20 MDLs in the pool were identified as having at least one special master appointed.<sup>93</sup>

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92. This generic term was run in order to compare the names of the assigned district-level judges and catch orders that were issued by a magistrate judge, but which were not entered into the docket entry system with the judge’s full title. For example, “ORDER signed by Judge Hanks” would have otherwise gone uncounted because it was not docketed as, “ORDER signed by Magistrate Judge Hanks.”

93. To ensure that no Rule 53 appointees had been overlooked, at the end of the research, the dockets of all 36 MDL cases that had neither a special master nor a magistrate involved were revisited. The goal was to detect any special masters or magistrate judges who were missed simply due to courts’ varying terminology. Accordingly, the following terms were searched: “court-appointed expert,” “referee,” “auditor,” “examiner,” “assessor,” “appraiser,” and “trustee.” Of the 36 docket reports revisited, only two contained any of these terms. The legal authority cited in the orders appointing these third parties was bankruptcy law and Federal Rule of Evidence 706, respectively, and the appointments involved were a trustee and an expert witness. Because Rule 53 was not the enabling authority, these were not considered special master appointments. The overall count of MDLs that used special masters remained at 20.

## Identifying the Legal Authority for Assignment

### Magistrate Judges

Once the 54 MDL cases that used magistrate judges were identified in the pool, individual docket reports were accessed again to discern the legal authority used to assign the magistrate judge—*i.e.* Rule 53 or 28 U.S.C. §636.

To ensure that the magistrate judges were not serving in the capacity of a special master under Rule 53, any referral orders available were downloaded and read for references to Rule 53 or special masters. Some docket reports did not contain entries that explicitly assigned a case to a magistrate judge. In those cases, orders issued by the magistrate judge were downloaded and read for references to Section 636, Rule 73, or 14 days to appeal.

Ultimately, when the docket was silent as to the legal authority under which the magistrate judge was acting, the magistrate involvement was considered to be under Section 636, not Rule 53, by default.<sup>94</sup> Of the 54 cases from the pool handled by magistrate judges, only 1 case showed a magistrate judge serving as a special master under Rule 53. This case had already been identified in the search for special master activity.<sup>95</sup>

### Special Masters

Orders appointing the special master were available only for 14 of the 20 MDLS that used special masters. These orders were downloaded and read to identify the district court's legal authority and rationale for appointing a special master. The orders were searched for references to the

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94. Further research revealed that, in districts where there is some type of procedure in place to automatically refer pre-trial motions to magistrate judges, the enabling legal authority is not commonly reiterated in any orders issued by the magistrate judges. Examples of districts with this practice are the Northern District of California and the Eastern District of New York. In such docket sheets, magistrate judges often issued orders and held scheduling conferences without a prior docket entry in that case referring the suit to them.

95. Although there is a perception that sitting magistrate judges are often appointed as special masters under Rule 53, the research revealed that this was not true in the MDL cases analyzed. This is perhaps because almost all of the tasks a magistrate judge might need to perform in managing MDL cases are already encompassed within the scope of duties that can be assigned to them under §636(b)(1). Thus, magistrate judges would rarely need to be designated as special masters to assist in the management of MDL cases. *See e.g.*, FED R. CIV. P. 53(a)(1) advisory committee's note (commenting on the 2003 amendment, ("[I]t may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1)."); *See, e.g.*, David Ferleger, *Special Masters Under Rule 53: A Welcome Evolution*, SN040 ALI-ABA COURSE OF STUDY 1, 6 (2007) ("[a]ttorneys, law professors, and retired judges are often appointed [as special masters]").

following:

- Any direct citation to Rule 53;
- Party consent to the appointment;
- Exceptional circumstances present;
- Limitations on judicial resources;
- Inherent powers of the district court; and
- Consultation with magistrate judge(s).

In many of the orders, more than one rationale for appointing a special master was cited in the district judge's order of appointment. The rationales were compiled and catalogued, and the names of the special masters were collected so that further research on their professional qualifications could be conducted.

#### Identifying Duties

The duties performed by the magistrate judge were generally available either on the docket report itself or in the order referring the case to a magistrate judge. These orders were downloaded, read, and catalogued accordingly. If neither a docket entry nor an order indicated a specific function for a magistrate judge, then the magistrate judge was categorized as performing only "Pre-Trial" duties on the case.

The duties of special masters were discernable in 18 of 20 of the MDL cases. Unlike the parallel inquiry with magistrate judges, the special master's duties were left undefined for the 2 MDL cases where neither a docket entry nor an order was available.<sup>96</sup> Again, this information was available either on the docket report itself or in the order appointing the special master, which was downloaded, read, and catalogued.

#### Identifying Rate of Remand Upon Appeal

The earlier process of collecting basic data identified which of the 101 MDLs in the pool had been appealed and remanded. This data was cross-referenced with the lists of magistrate judge and special master MDL cases to identify which cases had been appealed and remanded. For MDL cases using magistrate judges, 18 of 54 dispositions were appealed, and 3 of those 18 were remanded. For MDL cases using special masters, 6 of 20

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96. The decision to categorize general magistrate judge duties as "Pre-Trial" was due to noticeable activity on the docket sheet. For example, even if magistrate judges were not explicitly referred all pre-trial motions, their role became clear when they issued scheduling orders and granted motions to appear *pro hac vice*. In contrast, special master activity did not track on docket sheets in the same manner, and the decision to deem that data unavailable was made to avoid inaccuracy.

dispositions were appealed, and 2 of those 6 were remanded.

Returning to the individual docket reports, the remand orders issued by the circuit courts of appeal were downloaded and read. From these opinions, the grounds for remand were analyzed to determine whether the appellate court's reasoning centered on the magistrate judge's or special master's recommendations or decisions. For example, if a special master served as a mediator and the district judge's decision to approve the settlement was overturned, that MDL case was counted as a remand involving magistrate judge or special master activity. In the sample pool, none of the 3 remands from MDL cases with magistrate judges were overturned based on the magistrate judge's decisions. However, 1 of the 2 remands in MDL cases with special masters was overturned due to a decision made by the special master.

#### Data Compilation

Finally, the data collection process above allowed for the creation of four over-arching categories of MDLs: (1) MDLs Using Only a Magistrate Judge; (2) MDLs Using Only a Special Master; (3) MDLs Using Both; and (4) MDLs Using Neither.

Because the investigative process identified cases using magistrate judges or special masters, the results were cross-referenced to identify and compile information for MDL cases using both. That total number was 9. On the other hand, for the 36 MDL cases that used neither a special master nor a magistrate judge, only basic data was collected.

A variety of statistical comparisons were run using the cumulative data and these four categories of MDL cases. The results of these comparisons will be presented and discussed in the next section.

#### *Phase Two: Interviews*

In Phase Two, the goal was to gain a general understanding of the motivations and considerations underlying a district judge's decision to appoint a magistrate judge or a special master. To gain this insight, and cast a wider net with respect to sources, a different list of recent MDL cases was compiled. This list was unrelated to the list of cases used in Phase One. This Phase Two list consisted of cases in which special masters and/or magistrate judges were appointed, and included currently pending cases as well as closed cases. The cases were also selected to reflect geographic diversity—the list represented Districts from the East Coast, West Coast, Midwest, and Gulf Coast. In all, nine district judges and three magistrate judges were interviewed. These interviews were conducted by a

single researcher to ensure consistency and followed the protocols attached as Appendix B-1 and B-2. The breakdown of the interview participants was as follows:

- 4 district judges who appointed outside special masters—3 in MDL cases and 1 in a complex class action;
- 4 district judges who used magistrate judges in MDL cases;
- 1 district judge who appointed a magistrate judge as a special master in an MDL case; and
- 3 magistrate judges who had assisted in MDL cases.<sup>97</sup>

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

The following findings are based upon the numerical data and analysis gleaned from Phase One and the interview responses in Phase Two.

##### *Qualifications*

The data from Phase One showed that the magistrate judges and the special masters shared similar backgrounds. For the magistrate judges, the average length of judicial service was 12 years. Similarly, 71% of the special masters were former state or federal judges and/or former law clerks. All of the magistrate judges were licensed attorneys and virtually all (99%) of the special masters were attorneys. Except for one special master who was licensed as a certified public accountant, none of the special masters had any advanced technical training or expertise in a scientific field. This was also true for the magistrate judges. Instead of technical training or scientific expertise, the special masters were “legal specialists” who either had previous experience handling particular types of cases or issues, such as pre-trial matters, or had focused upon that area in their legal studies. Similarly, 47% of the special masters were current or former law school professors. This stands in stark contrast to special masters in patent MDL cases, who tend to have specialized technical education or backgrounds.<sup>98</sup>

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

98. Kesan & Ball, *supra* note 90, at 4-5.

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*Searching From Within*

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*Reliability*

The data from Phase One did not establish that the work of one group was clearly any more reliable or likely to be affirmed than the work of the other. The docket sheets did not reflect any modifications or rejections to the recommendations of magistrate judges and special masters.<sup>99</sup> Similarly, appeals arising from cases using either magistrate judges or special masters rarely resulted in reversal and remand. Of the 20 MDL cases using a special master, six cases were appealed.<sup>100</sup> Only two of those cases were remanded back to the district court, and the district judge's acceptance of the special master's recommendation was the basis for the remand in only one of those two remanded cases. Of the 54 cases using magistrate judges, 18 cases were appealed. Only three of these 18 cases were reversed and remanded, and none of them were reversed because of the district judge's adoption of decisions or recommendations made by the magistrate judges.<sup>101</sup>

*Incidence Of Special Master And Magistrate Use*

## Overall Utilization

District judges do not appear to be systematically using special masters in place of magistrate judges for the management of MDL cases. To the contrary, magistrate judges were used to manage the sample MDL cases far more often than were special masters. As seen in Appendix A-1, although special masters were used in 20% of the cases surveyed, magistrate judges were used in 54% of the cases surveyed. Furthermore, magistrate judges were used alone over four times (45% of the cases) as often as outside special masters were used alone (11% of the cases). In 9% of the cases in the sample pool, district judges used both special masters and magistrate judges. On the other hand, 36% of MDL cases used neither a special master nor a magistrate judge.

The largest MDLs tended to use magistrate judges, not special masters. As seen in Appendix A-3, the average size of the MDL case where magistrate judges were used alone was larger than the average size of the MDL case in which a special master was used alone.

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99. Such modifications or rejections, however, may have taken place informally, off the record, and would not be reflected in the docket sheet.

100. See App. A-5.

101. *Id.*

### Subject Matter of the MDL

Clear patterns in the data emerged regarding the use of magistrate judges and special masters, depending upon the type of MDL.<sup>102</sup> Special master appointments were most common in products-liability MDL cases (32%)<sup>103</sup> and were not used at all in commercial MDL cases involving securities and sales practices (0%). In contrast, magistrate judges were assigned in 21% of products-liability MDL cases, 62% of antitrust MDL cases, and 48% of sales practice MDL cases.<sup>104</sup> In a significant number of products-liability cases (26%), the district court appointed both a magistrate judge and a special master.

One obvious difference between products-liability and commercial cases is that products-liability cases involve scientific rather than commercial or business knowledge. However, it is not clear that this was the deciding factor for the higher incidence of appointing special masters in these cases. The special masters appointed in products-liability cases were “legal specialists” rather than technical specialists, and they were largely involved with discovery management. Perhaps the products-liability MDL cases surveyed, which included toxic tort actions, were more suited to special master appointments because these types of cases often involve complex legal issues such as damage claims and causation, along with large numbers of geographically diverse plaintiffs with greatly varying degrees of injury.<sup>105</sup>

The finding that special masters were not used in any of the securities MDL cases contradicts the assumptions of one commentator, who argues that special masters are particularly suited to such work because magistrate judges are “generalist jurists” who “usually do not have the special legal [expertise] often needed in toxic tort and other specialized

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102. Interestingly, the data in Appendix A-9 reflects that use of a magistrate judge or a special master did not correlate to the number of magistrate judges in the district or the overall workload of the district. The data in Appendix A-8 reflects that the size of the MDL case does not appear to correlate to the duration of the litigation.

103. Almost all special master use was in either products liability cases (6 of 11 or 54.5%) or in miscellaneous cases (4 of 11 or 36.3%). The last special master was appointed in an antitrust case (1 of 11 or 9.1%). See Appendix A-4.

104. Magistrate judge utilization was more widely distributed, with a magistrate judge assisting in every type of MDL. See Appendix A-9.

105. See Farrell, *supra* note 3, at 239-245 (noting that the unique characteristics of toxic tort litigation make these types of cases difficult for district courts to manage). “Toxic torts” are personal injury cases where plaintiffs allege that exposure to certain types of agents—usually pharmaceuticals or chemicals with harmful health effects—has resulted in illness, injury, or death. Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343 at n.159 (2011). See also Carey E. Jordan, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 HOU. L. REV. 473 at n.9 (1996).

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[proceedings].<sup>106</sup>*Functions Assigned*

While some have criticized special masters as becoming “surrogate judges” and expanding beyond the scope historically contemplated for them,<sup>107</sup> the MDL cases analyzed did not reveal any unnecessarily broad delegations of judicial authority<sup>108</sup> to their appointed special masters.<sup>109</sup> Instead, special masters were most often appointed to perform narrow specialized tasks. Such tasks included managing complex discovery and any disputes that may arise (in 50% of the cases using a special master alone) or conducting settlement proceedings and claims evaluation and administration.<sup>110</sup> Most of these appointment orders tracked the requirements of Rule 53 and were very specific in setting out the scope and details of the special masters’ duties.<sup>111</sup> Special masters were not assigned fact-finding authority in any of the cases reviewed.<sup>112</sup>

Further, even though some of the cases (9%) used both a special master and a magistrate judge, the district judges were mindful not to make these assignments in a manner that duplicated or wasted efforts.<sup>113</sup> When special masters and magistrate judges were used together, they usually performed distinctly different roles in the litigation. If they performed similar roles, the tasks of the special masters and magistrate judges did not overlap.

Information gained in Phase Two’s judicial interviews was consistent with these observations. In Phase Two, district judges reported tailoring the authority they assigned to special masters to fit the specific needs of each case. One judge reported being particularly aware of the risk that a special master might take on the mantle of the courts’ authority and act as a “de facto” federal judge. Judges also reported being conscious of the time constraints and additional cost of special masters, and they stated that they

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106. Farrell, *supra* note 3 at 255.

107. *Id.* at 256; Silberman, *supra* note 5, at 2134.

108. See Farrell, *supra* note 3, at 256-57. For examples of this type of broad authority, see Silberman, *supra* note 5, at 2145-2150 (discussing the AT&T Anti-Trust Litigation, the Ohio Asbestos Litigation, and the Agent Orange Litigation).

109. See App. A-5. The data did not reveal any evidence of exceptional delegations of authority in the orders reviewed. Note also that one special master was assigned to preside over a summary jury trial.

110. See App. A-5.

111. *Id.*

112. *Id.* None of the cases reported “exceptional” conditions as a basis for the appointment of a special master. Compare FED. R. CIV. P. 53(a)(1)(B).

113. See Appendix A-6.

specifically divided up assigned tasks between judges and special masters to avoid unnecessarily burdening any individual magistrate judge or special master.

### *Case Duration*

The sample cases that used only a special master took longer to resolve than cases using only a magistrate judge. The average MDL case in the sample pool remained open for approximately 1,877 days.<sup>114</sup> When both a magistrate judge and special master were used, the MDLs lasted an average of 2,918 days.<sup>115</sup> Cases assigned to special masters consumed an average of 2,643 days; in contrast, MDL cases assigned to magistrate judges remained open for an average of 1,541 days.<sup>116</sup> On its face, this data might suggest that magistrate judges resolve their assigned cases faster than special masters.

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

### *Efficient Use of Resources*

It is impossible to draw any empirical conclusions from the information derived from docket sheets and judicial interviews regarding a cost-benefit analysis of the overall cost savings from using special masters or magistrate judges. In large part, this is due to a dearth of information about the plaintiffs' attorneys' fees, the special masters' fees, or the settlement amounts. Assuming all of this information was present, a meaningful analysis of the overall costs to the parties—and to the justice system as a whole—resulting from the use magistrate judges versus special masters would still prove extremely difficult.

As commentators have noted, even in instances where the actual amount of the special master's fee is large, the parties and courts somewhat paradoxically still see them as the most cost-effective and inexpensive means of achieving the particular goal of MDL litigation: resolution of a dispute regarding overall responsibility for any harm deemed to be a result

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114. See Appendix A-2.

115. *Id.*

116. *Id.*

of a defendant's actions.<sup>117</sup> “Thus the cost of a special master may be more than offset by the efficiency and lower costs of the informal processes the master use[s]” to keep disputes outside of any formal court setting.<sup>118</sup> Likewise, while there are no direct immediate financial costs to the parties when discovery matters are not assigned to a special master, “much higher costs may be incurred by taxpayers” when judges perform such functions.<sup>119</sup> Further, even “greater costs may be imposed through protracted litigation and unrealized settlements that masters might have brought about.”<sup>120</sup>

Historical evidence reflects that, in certain cases, the immediate, additional litigation expense to the parties as a result of special master appointments can be quite large.<sup>121</sup> However, such cases often involve very unique issues and are comparatively uncommon, and an overall costs and benefits to the parties—as well as the administration of justice from the use of special masters in such cases—are not easily quantifiable.<sup>122</sup> Pursuant to Rule 53, the assessment and balancing of the benefits and costs of special master appointments is placed in the discretion of the district courts.<sup>123</sup> The data collected and interviews of the judges reflected the reality that there are rarely formal objections by the parties in an MDL case to the payment of special master fees, as reflected in the high incidence of consent to special master appointments.<sup>124</sup> The district judges interviewed also reported universal confidence and pleasure with the assistance provided by the masters.<sup>125</sup> The magistrate judges interviewed reported that they were able to manage their regular caseloads effectively while assigned to MDL cases. This data and the interview comments, coupled with the lack of any empirical evidence of the systematic abuse of the special master appointments, supports the conclusion that district courts are using special masters and magistrate judges as envisioned by Rule 53 to maximize the

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117. Farrell, *supra* note 3, at 274-75.

118. *Id.* at 275.

119. *Id.*

120. *Id.*

121. Silberman, *supra* note 5, at 2150.

122. *Id.* at 2145-50.

123. FED. R. CIV. P. 53.

124. Interviews were conducted between Feb. 6-Feb. 15, 2014 by the Hon. George C. Hanks, Jr. Interviewees are federal district and magistrate judges in closed and currently pending multi-district litigation cases. According to ethical principles outlined in the Belmont Report, a U.S. government-commissioned report adopted by Duke University for all research involving human subjects, individual responses to the interview protocol questions are anonymous and will not be attributed to individual participants. No effort has been made to ascribe a particular response to any one participant. The following paragraphs and information contained therein are as a result of these interviews therefore no additional citation can be provided.

125. *Supra* note 124.

use of judicial and litigation resources.<sup>126</sup>

#### VI. BEHIND THE CURTAIN: OTHER FACTORS IMPACTING DISTRICT JUDGE'S DECISION TO APPOINT A MAGISTRATE OR SPECIAL MASTER

As contemplated by Rule 53, all of the district judges interviewed in Phase Two reported that their decision to use a magistrate judge or special master was a matter of judicial discretion, and that the parties had little input into this decision.<sup>127</sup> Further, their overall decision-making process tracked the concerns set out in the Comments to Rule 53—in making their decisions, the judges reported being conscious of the need to balance the competing interests of the parties: the cost-free oversight of a sitting federal magistrate judge against the perceived expertise and efficiency of an outside special master. These district judges were careful to adhere to the mandates of Rule 53 when appointing a special master, “consider[ing] the fairness of imposing the likely expenses [of imposing a special master] on the parties and [protecting] against unreasonable expense or delay.” Further, the appointment orders surveyed in Phase One demonstrated a high incidence of district judges carefully observing mandates of Rule 53 and citing the legal authority under which they were making their appointments.<sup>128</sup>

But what other factors might be at play? The interviews in Phase Two, coupled with the comments of those advocating for either the increased or decreased use of special masters, revealed a number of intangible considerations district judges evaluate when appointing a magistrate judge, special master, both or neither to assist with the management of complex litigation. Among these are the district judge's own estimate of the amount of time needed for particular tasks and the district judge's willingness to assign particularly time-consuming tasks to a judicial colleague; the perceived degree of specialized training or experience needed to perform a particular task; whether the task was suitable for a judicial officer, including whether *ex parte* communications might be required or desirable; local customs and culture; and the availability of particular individuals to serve as special masters.<sup>129</sup> Interestingly, even though many commentators claim the number of MDL filings has increased in recent years, the judges interviewed reported that this alleged increase did not figure in their decisions when deciding whether

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126. FED. R. CIV. P. 53.

127. *Id.*

128. *See* App. A-5.

129. *Supra* note 124.

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to use a magistrate judge or special master.<sup>130</sup>

*Perceived Expertise and Time Burden*

Overall, judges reported that the most important factors when considering whether to appoint a special master were whether the contemplated tasks required particular expertise, and the amount of time the district judge estimated the tasks would consume.<sup>131</sup> All of the interviewed judges reported that the magistrate judges in their districts were outstanding jurists and could, in theory, handle any duty assigned to them, given enough time and resources.<sup>132</sup>

However, there appeared to be a direct correlation between the level of expertise required to accomplish a task and the time needed to complete it: tasks requiring higher expertise levels demanded proportionally greater amount of times for completion.<sup>133</sup> Accordingly, more often than not, tasks that district judges believed were likely to consume the vast majority of a magistrate judge's time were instead assigned to special master.<sup>134</sup>

The consideration of these two factors often resulted in appointments of multiple special masters in a single case, as well as appointments using both special masters and magistrate judges in the same case.<sup>135</sup> The judges who used both special masters and magistrate judges stated that they structured the assignments so as to assign tasks that were more adjudicatory in nature, and required less time investment—such as evaluating expert qualifications and handling routine discovery disputes—to magistrate judges.<sup>136</sup> On the other hand, tasks that the district judge estimated would require a hefty investment of time, such as investigating and resolving large-scale e-discovery disputes, were typically assigned to special masters.<sup>137</sup>

*Nature of Task as Appropriate for a Judicial Officer*

Many of the special masters appointed performed particularly specialized tasks not typically performed by judges. One such function is

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. As the data demonstrates, there were almost as many cases using both special masters and magistrate judges, working in conjunction, as there were cases using special masters alone. *See* App. A-1.

136. *Supra* note 124.

137. *Id.*

the process of administering settlement claims and monitoring potentially fraudulent claims.<sup>138</sup> Oversight of billing records for common-benefit work by plaintiffs' counsel is another such function.<sup>139</sup> A fraudulent claims investigation and prosecution special master appointment was also reported.<sup>140</sup> While magistrate judges could, in theory, perform these tasks, these are investigatory, quasi-prosecutorial tasks in which judges do not usually participate.<sup>141</sup> Further, the district judges interviewed noted that a number of available special masters had already developed the necessary procedures and recruited the specific staff necessary, and these masters had previously successfully completed these tasks in earlier cases.<sup>142</sup> Accordingly, the judges stated that they appointed special masters because they wanted to avoid "reinvent[ing] the wheel" for such difficult tasks.<sup>143</sup>

The judges also differed in their views about the importance of *ex parte* communications and informal procedures of special masters in making the decision.<sup>144</sup> One judge stated that a key reason special masters worked so well was because they could engage in informal *ex parte* communications with the parties to freely discuss and work out problems well before rising to the level of requiring judicial attention.<sup>145</sup> *Ex parte* communications are traditionally eschewed by judges, including magistrate judges.<sup>146</sup> However, another judge stated that possible *ex parte* communications did not pose a problem because the district's magistrate judges were highly trained and skilled in mediation and ADR techniques and they routinely engaged in such communications as part of those mediations.<sup>147</sup> The judge further noted that the matter could also be addressed by an agreement between the parties regarding the magistrate judge's *ex parte* communications.<sup>148</sup>

Finally, the judges offered interesting insight into how attorney personalities could play a role in their decision whether to appoint a special master or a magistrate judge. The judges agreed that there was a generally

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138. *Id.*

139. *Id.*

140. *Id.*

141. One judge also reported using a special master as what commentators refer to as an "academic proceduralist"—a special master who contributes to "not only processing the individual case but also to conceptual thinking about pre-trial management and innovative practices for complex litigation." Silberman, *supra* note 5, at 2153.

142. *Supra* note 124.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

a high caliber of attorneys in the federal MDL bar.<sup>149</sup> However, some judges noted regional and case-specific differences in attorney litigation tactics and the bar's perception of the role of magistrate judges.<sup>150</sup> Further, where there are likely to be numerous appeals of magistrate judge decisions, some district judges believed it was more efficient to have the district judge make adjudicatory decisions and to appoint special masters to ease administrative burdens in everyday management decisions.<sup>151</sup> Other judges thought that the issues of attorney contentiousness and frequent appeals were largely in the hands of the district judge and should not preclude use of a magistrate judge.<sup>152</sup> These judges expressed the belief that such issues could be resolved through the district judge retaining a firm control over the attorneys and requiring attorneys to demonstrate professionalism and respect towards the magistrate judge as judicial officers.<sup>153</sup>

The judges differed in their views on the need for special masters to address large scale discovery issues. As noted above, some appointed special masters to avoid placing an undue time burden upon magistrate judges and reserving magistrate judge assistance for unforeseen future cases.<sup>154</sup> Others felt large-scale e-discovery required the use of special masters with specialized expertise and training in the field, mainly for the purposes of creating innovative processes such as predictive coding to review documents and manage the discovery.<sup>155</sup> There was also a belief in some cases that evolving appellate standards might require the use of special masters in e-discovery.<sup>156</sup> Other judges, however, opined that the specter of complex e-discovery should not necessarily lead to a special master appointment.<sup>157</sup> These judges cited previous experience reflecting the reality that most complex e-discovery disputes were resolved by mutual agreement among the parties pursuant to Federal Rule 26 and the doctrine of mutually assured destruction.<sup>158</sup> In some districts, magistrate judges were trained as both discovery specialists (because of the volume of discovery issues handled) and as neutral adjudicators, and district judges felt the benefits of this combined experience outweighed the benefits of

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149. *Supra* note 124.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

special master involvement in e-discovery.<sup>159</sup>

The latter observations, in light of the data regarding special master qualifications, are very important to analyzing the future roles of magistrate judges if regular case dockets continue to increase. While large-scale e-discovery might have increased the courts' need for technical or scientific assistance, such discovery does not mandate the increased use of the non-technical management assistance of paid special masters.<sup>160</sup> As noted by some districts, magistrate judges possessing similar legal backgrounds to special masters are more than capable of developing the expertise in specialized legal areas such as e-discovery.<sup>161</sup> As seen in other functions such as ADR, the more training they receive and the longer they perform the function, the more efficient magistrate judges become in performing the tasks.<sup>162</sup> Thus, the tasks will take less time to complete and allow magistrate judges to take on other duties in the management of the court's regular dockets.

#### *District Culture*

The interviews revealed another important factor affecting the decision: the specific culture of a given district court regarding magistrate judges.<sup>163</sup> Districts with standing orders referring all pretrial matters to magistrate judges had a larger propensity to use such judges in MDL cases than districts lacking such orders.<sup>164</sup> Districts using a team approach to case management—where magistrate judges typically worked closely with district judges throughout multiple stages of a case—also had a stronger likelihood of using magistrate judges rather than a special master.<sup>165</sup> Districts that used magistrate judges as specialists for certain aspects of pretrial case management (such as discovery disputes in complex cases or settlement conferences) also used magistrate judges more than special masters to assist in the management of MDL cases.<sup>166</sup>

Based on these types of cultural differences, some unusually

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159. *Supra* note 124.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Dessem, *supra* note 29, at 799 n.39 (discussing various models of magistrate judge utilization nationwide). This result is reflected in the data collected. Districts such as the Northern District of California and the Eastern District of New York, in which standing orders automatically referred pre-trial motions to magistrate judges, used such judges alone far more often than districts without such orders. *See* Appendix A-9.

innovative approaches were reported. One judge, for instance, described using a three-tiered special master approach, combining the efforts of the judge overseeing the case: a special master responsible for ongoing settlement discussions; a special master with previous law clerk experience to deal with *ex parte* communications between the parties to resolve issues before they reached a point of critical mass; and, finally, a tertiary special master to deal with attorney class-benefit issues.<sup>167</sup> The magistrate judge was assigned the essential function of preparing the infrastructure for the case through rulings on administrative motions, such as *pro hac vice* motions, and acting as a liaison with clerk's office to set up the files and systems needed to administer the cases—duties that the magistrate had considerable experience performing in other cases.<sup>168</sup> In another case the court appointed an “on call” special master who was available as needed should the parties wish to informally address settlement issues without court involvement.<sup>169</sup> Finally, in one case discussed in greater detail below, the court managed an exceptionally large MDL by utilizing a comprehensive team of magistrate judges.<sup>170</sup> This approach included the judge sitting on the bench alongside the magistrate judge for some matters, and also using a panel of magistrate judges to resolve certain issues.<sup>171</sup>

Another aspect of the culture within a particular district was the level of communication and collegiality between magistrate judges and district judges. Magistrate judges interviewed in Phase Two reported that, although the cases they were assigned did consume a large amount of time, their dockets did not become unmanageable.<sup>172</sup> In fact, despite the increased demands on their dockets and staff, the magistrate judges reported they enjoyed the challenges of the cases, and appreciated their role as part of the district court team.<sup>173</sup> All of the magistrate judges interviewed reported that, prior to their assignment to the litigation, the assigning district judge consulted them about the workload and time commitments each case would require.<sup>174</sup> The magistrate judges also reported that their fellow magistrate judges often stepped in to assist with their regular docket or that their workloads were managed through an internal reassignment of cases.<sup>175</sup> Two of the judges reported that the district judges expressly gave them the

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167. *Supra* note 124.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

option of discontinuing their work on the MDL if the matter became too burdensome.<sup>176</sup> Neither of the judges surveyed stated that this had ever happened.

#### *Particular Individuals Appointed as Special Master*

Once the decision to use a special master is made, the interviewed judges agreed that reputation, trust, confidence in their abilities, and personal integrity are the key factors they considered in making individual appointments. These factors are important given the amount of judicial authority that a special master can wield, not to mention the potential for a special master's actions to exceed her authority. The parties in the cases analyzed were often directly involved in making suggestions for potential masters.<sup>177</sup> The judges reported that maintaining transparency and avoiding any appearance of impropriety was extremely important throughout the special-master appointment process.<sup>178</sup> Several judges reported that they never appointed any former private-practice coworker for this very reason.<sup>179</sup> The judges interviewed did not know any of their selected special masters in a social context, either (excepting previous courthouse staff and magistrate judges) prior to an appointment except by reputation.<sup>180</sup> In each case, all of the judges obtained the express consent of the litigant parties regarding the individual ultimately appointed as special master.<sup>181</sup>

#### *Alleged Increase in MDL Filings*

Some commentators have recently argued that the courts should increase their use of special masters to respond to a “longer-term upward trend in MDL activity.”<sup>182</sup> These commentators argue that, even in the face of Rule 53's clear preference for magistrate judges, federal magistrate judges cannot assist with the increasing MDL docket load because they are not trained as mediators or in ADR techniques (which is clearly not the case).<sup>183</sup> Other commentators assume that the increased filings will simply overwhelm the court system, magistrate judges included, and outside help

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176. *Supra* note 124.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1294 (2005).

183. *See generally* Lantka, *supra* note 33.

must therefore be sought.<sup>184</sup> However, these commentators do not fully consider the flexibility of the role of the federal magistrate judge, and they do not take the qualifications and abilities of the magistrate judge corps into account.<sup>185</sup> The arguments instead make little more than a passing reference to the availability of magistrate judges to assist in the management of these cases. Further, the actual rate at which MDLs are being resolved or closed in recent years, compared against the number of new cases being filed or consolidated, is difficult to determine—in short, it is not at all clear that the MDL dockets are actually “increasing” at a rate that requires additional appointments.<sup>186</sup>

Another argument made in support of increasing the number of special master appointments pertains to rapidly expanding criminal dockets. Magistrate judges are the only judicial corps that can assist the district courts in managing these dockets. Thus, it has been argued that assigning magistrate judges to time-consuming MDL cases would negatively impact timeliness and due process in the criminal justice system.<sup>187</sup> However, this argument is also unwarranted. As seen in the cases surveyed, the MDL panel has not assigned MDL cases to the border districts—which have been facing drastically increasing criminal caseloads—or to districts that have a large number of judicial vacancies.<sup>188</sup>

#### *Judicial Perceptions of MDL Cases*

The interviews conducted with district judges revealed four observations in particular to MDL cases that they considered being extremely important in regards to future decisions to use magistrate judges and special masters in MDL cases. First, nearly every MDL case is unique,

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184. Fellows, *supra* note 182, at 1296-97 (“[d]espite magistrate contributions to the civil case workload, the court crisis continues”); see also Margaret G. Farrell, Special Masters In The Federal Courts Under Revised Rule 53, SM051 ALI-ABA COURSE OF STUDY 1, 13 n.43 (2006) (arguing that special masters are needed because “federal magistrate judges . . . have heavy caseloads, are generalists and are not skilled in mediation, have little experience in the use of informal procedures and lack substantive expertise”).

185. Fellows, *supra* note 182, at 1296-1297.

186. See App. A-7, indicating the number of pending cases from 1999 to the present. This chart reflects that in recent years the number of MDL cases has been decreasing.

187. See Fellows, *supra* note 182, at 12-70.

188. See App. A-9. For information regarding the caseloads by district and the number of judicial vacancies for fiscal years 2011 and 2012, see THE STATISTIC DIV. OF OFFICE OF JUDGES PROGRAMS, JUDICIAL BUSINESS OF THE U.S. COURTS 2011 ANNUAL REPORT OF THE DIR. HONORABLE THOMAS F. HOGAN, DIR., <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx>.

and some are unique to the point of lacking any preexisting analogue in American case law. Each case has different litigants, different counsel, and differing dynamics between two, plus, they involve claims from all parts of the country—and, in some cases, outside of it, including ones with litigants who reside in American territories beyond the mainland U.S., and sometimes in foreign countries not bound by American law.<sup>189</sup> Each case furthermore involves different, and sometimes largely novel, legal issues, including ones in states outside of a magistrate judge’s usual jurisdiction, which can necessitate a learning curve on the judge’s part. As a result, decisions regarding magistrate judge and special master appointments that work perfectly well in one MDL case may prove to be entirely inappropriate under the circumstances of a different case.

Second, MDL cases cannot be treated simply as larger versions of the types of complex litigation most judges are already accustomed to handling. Doing so creates the very real risk that a case will become a judicial “black hole,” lasting for many years and depriving its litigants of their substantive due process rights to be heard in a timely fashion.<sup>190</sup> One judge noted that because of this issue, the court in the district specifically sought to appoint special masters with no previous MDL-case experience, ones without any preconceptions as to how the case should be managed.

Third, special master appointments have become a lucrative “cottage industry” for the bar<sup>191</sup> and, in the interests of equity for all involved parties, courts should carefully consider whether there is a bona fide need to appoint a special master before electing to do so. One judge interviewed was particularly surprised by the several phone calls received from special masters “offering their services” once an MDL case had been announced.<sup>192</sup> On whole, judges are keenly aware of the problems inherent with special master appointments, and they suggest that courts remain vigilant in overseeing special master activities.<sup>193</sup> Whenever the court appoints an unelected individual—one whose final adjudications may end up beyond the purview of traditional judicial review—to serve as a buffer between the court and litigating parties, there is the ever-present risk that this individual will simply assume the mantle of federal judicial authority with respect to

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189. See, e.g., *Lindsey v. Dow Corning Corp.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994).

190. See Heyburn & McGovern, *supra* note 8, at 31 (so-called “black hole cases” comprise the single most prominent MDL-related complaint).

191. Silber, *supra* note 5, at 2137.

192. *Supra* note 127.

193. *Id.*

the parties.<sup>194</sup>

Finally, as a result of what was described by one judge as “judicial inertia,” there does not appear to be much cross-pollination with respect to management styles and conceptual ideas regarding MDL litigation among courts.<sup>195</sup> Judges tend to use the same management techniques in successive MDL cases, or they simply adopt the management techniques of a respected colleague. In most instances, however, this choice works well, and this approach can be a highly economical use of judicial resources.<sup>196</sup> However, as seen in the next section, the lack of innovation regarding magistrate judge versus special master utilization can result in the deprivation of the litigants’ due-process rights through unmitigated case stagnation.

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

#### VII. UNIVERSE WITHIN A UNIVERSE: THE CONQUEST OF THE ASBESTOS MDL

The information collected from the research revealed several overarching principles relevant to the role of magistrate judges. One was that no two cases are alike and therefore should be managed with an individualized approach.<sup>197</sup> Further, special masters may be helpful in carrying out niche or long-term duties. But magistrate judges are the best choice to take on broader duties. In fact, if used wisely, their experience and relationship with the district court could manage litigation even more efficiently than a special master could.<sup>198</sup>

To illustrate these conclusions, a real-life scenario may be informative. One need look no further than one of the longest-running tort cases in legal history: asbestos litigation. Not only is it socially significant as the earliest and largest mass tort to resonate on a national level, but it is also legally relevant as a teaching tool for future case management. Further, it has been the subject of a well-written and thoughtful analysis by Judge Eduardo Robreno, the primary district judge involved in the

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194. *Supra* note 127.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

solution.<sup>199</sup> The discussion below is drawn from his personal account of the litigation.

### *Era of Consolidation and Aggregation*

Throughout the 1970s and 1980s, a mass of asbestos personal injury claims became backlogged in state and federal courts. In 1991, when asbestos cases were finally consolidated into MDL-875, an estimated 715,000 claims were pending.<sup>200</sup> However, as most were state court claims, only 26,000 cases were initially transferred to the Eastern District of Pennsylvania.<sup>201</sup> The number of cases and claims continued to rise and eventually swelled to over 180,000 cases and more than 10 million claims.<sup>202</sup>

The first silver bullet fired at the newly consolidated cases was a near miss. Judge Weiner, the Eastern District of Pennsylvania judge presiding over the MDL, appointed a steering committee of leading plaintiffs.<sup>203</sup> Plaintiff counsel negotiated a settlement that would extinguish the claims of an estimated 250,000 to 2,000,000 individuals who had suffered from asbestos exposure.<sup>204</sup> An opt-out class was conditionally certified, and another district judge in the Eastern District of Pennsylvania found the settlement terms fair and reasonable.<sup>205</sup> However, the settlement was reversed on appeal to the Third Circuit.<sup>206</sup> The United States Supreme Court affirmed the ruling by reasoning that the sprawling, heterogeneous class that had been certified did not to satisfy the requirements of Rule 23.<sup>207</sup> Thus, regardless of how fair or reasonable the settlement terms were, it could not go forward.<sup>208</sup>

After the dissolution of the settlement arrangement, the search for a uniform solution to the asbestos docket continued. A series of proposed legislative bills aimed to expedite the embattled resolution process, but

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199. Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 106 (2013).

200. *Id.*

201. *Id.* at 112.

202. Robreno, *supra* note 199 at 100.

203. *Id.* at 112.

204. *Id.* at 112-13.

205. *Id.* at 113.

206. *Id.*

207. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (“The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. But uncommon questions abounded.”) (internal citations omitted).

208. *Id.* at 622 (“Federal courts, in any case, lack authority to substitute for Rule 23’s certification criteria a standard never adopted—that if a settlement is ‘fair,’ then certification is proper.”).

none survived past the floors of Congress.<sup>209</sup> At the behest of Senator Arlen Specter, then Chief Judge Edward Becker of the Third Circuit attempted to mediate the case once more.<sup>210</sup> This time, however, no settlement could be reached.<sup>211</sup>

*New Sheriff in Town: One Size Does Not Fit All*

After seventeen years of attempted aggregation and consolidation, Judge Eduardo Robreno decided to overhaul the management strategy.<sup>212</sup> A district judge with sixteen years on the bench, Judge Robreno took over MDL-875 on October 1, 2008.<sup>213</sup> By 2008, MDL-875 had been dubbed a “black hole” and “the third level of Dante’s inferno.”<sup>214</sup> Cognizant of the fact that a global method to the largest and longest-active MDL case had been previously unsuccessful—and, apparently, widely criticized—Judge Robreno inverted the wisdoms of old. Aggregation and consolidation transformed to “one size would not fit all.”<sup>215</sup>

Judge Robreno maintained his role as the primary administrator and the adjudicator of substantive legal issues.<sup>216</sup> But his revolution came with respect to his use and choice of magistrate judges and special masters. Judge Weiner had never involved a magistrate judge in the MDL’s management, but that was quick to change. Judge Robreno called for volunteer assistance from the magistrate judges in his district who might be interested in helping him resolve the case.<sup>217</sup> Four responded and formed his judicial team.<sup>218</sup> Each of the magistrate judges was assigned their own subset of asbestos cases over which they had “Pre-Trial”<sup>219</sup> authority.<sup>220</sup> They were also to facilitate settlement discussions between the parties.<sup>221</sup>

There were two specialized dockets of cases in which Judge Robreno took “the most intensive” case management approach: the maritime docket

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209. *Id.* at 114–16.

210. *Id.* at 116-17.

211. *Id.*

212. *Id.* at 126.

213. *Amchem Products*, *supra* note 207.

214. *Id.*, n.167 (citing *In re United States Lines, Inc.*, No. 97 CIV. 6727(MBM), 1998 WL 382023, at \*7 (S.D.N.Y. July 9, 1998)).

215. *Id.* at 127.

216. *Id.* at 128.

217. *Id.*

218. *Id.*, n.172

219. “Pre-Trial” is used here as it was in our statistical research and analysis, and includes general day-to-day duties such as holding scheduling hearings and managing discovery.

220. *Id.* at 128.

221. *Id.*

(“MARDOC”) and the Virginia railroad brake docket.<sup>222</sup> These dockets, although still comprised of asbestos personal injury claims, were unique in that a single law firm represented all the plaintiffs in each docket. One firm represented all the plaintiffs in MARDOC and another represented all the plaintiffs in the Virginia railroad brake docket.<sup>223</sup> Therefore, there were no complications of communicating with and accommodating thousands of co-counsel.

To assist the magistrate judges he had already assigned these dockets, Judge Robreno appointed a special master as a “case administrator” to each docket.<sup>224</sup> To benefit from hard-earned institutional knowledge, Judge Robreno chose two special masters who had developed an understanding of the MDL from their service as law clerks to Judge Weiner.<sup>225</sup> The case administrators were to assist the magistrate judges in their day-to-day supervision of the cases by counseling the parties in pre-trial disputes.<sup>226</sup> However, unlike the magistrate judges, case administrators did not have authority to rule on such disputes.<sup>227</sup>

### *The Takeaway*

That was the general overview of Judge Robreno’s strategy: the four magistrate judges were delegated their universe of cases within the broader pool of consolidated asbestos cases. Despite the delegation, communication and standardization remained key. Judge Robreno held monthly meetings with the team to discuss progress,<sup>228</sup> and an MDL-875-only website was developed to make all important updates, orders, memoranda, etc. accessible to the parties and public.<sup>229</sup> Emphasis was placed on “one plaintiff-one claim” disaggregation and, relatedly, on the pursuit of individualized paths to resolution.<sup>230</sup> Further, strict, uniform procedural protocols were set in place for all cases within the MDL.<sup>231</sup> Finally, if they oversaw one of the specialized dockets, they were assisted by former law clerks in the form of a Rule 53 special master.<sup>232</sup>

Of course, over the course of several decades and between hundreds

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222. *Id.*

223. *Id.* at 128–29.

224. *Id.*

225. *Id.* at 128.

226. *Id.* at 129.

227. *Id.* at 128–29.

228. *Id.* at 130.

229. *Id.* at 131; *see also* MDL 875 HOME, <http://www.paed.uscourts.gov/mdl875.asp>.

230. Robreno, *supra* note 199, at 187.

231. *Id.* at 133–47.

232. *Id.* at 128–29.

of thousands of cases, not every case within the MDL survived to Judge Robreno's tenure in 2008. Likewise, not every case reached a disposition through this triumvirate approach of Judge Robreno flanked by magistrate judges and special masters.<sup>233</sup> However, the numbers speak for themselves and reflect a systematic leap towards resolution.

As of October 31, 2008, the month during which Judge Robreno inherited MDL-875, there were 51,818 cases pending.<sup>234</sup> Five years later, as of September 30, 2013, that number plummeted to 2,979 cases remaining on the docket.<sup>235</sup> Including cases that had been transferred and disposed within that time frame, a total of 181,560 cases had been terminated.<sup>236</sup> On January 1, 2012, the MDL Panel ceased transfer of new cases to MDL-875.<sup>237</sup> What was once seen as a "black hole" was transformed within five years, and the focus then turned to the relatively meager number of still-pending cases.

Though Judge Robreno's article recounts his experience with this single MDL, his insight and lessons learned are well-taken and corroborate conclusions drawn in the analysis above. First, each MDL is unique. A myriad of factors contributed to the size and duration of the MDL, particularly the prevalence of asbestos use in everyday life, the time it took for medical issues to manifest, and the variety of medical issues that could manifest.<sup>238</sup>

Second, as a result of each MDL's uniqueness, it is inevitable that certain case management techniques that worked on previous MDLs will not work for others. Aggregating cases into an MDL, certifying a class, and pushing a settlement through may be the perfect solution for cases originating out of a single disaster, such as an airplane crash. But when victims suffered from asbestos exposure both on the high seas in 1973 and in an uptown office building in 1984, the settlement class struggles to find an identity—or, in this case, pass Rule 23 muster.

Third, flexibility and innovation in the use of magistrate judges is necessary to tailor an individualized solution to each MDL's challenges. Whereas no magistrate judges were involved before Judge Robreno's oversight, the volunteer magistrate judges were pivotal in the whittling down of the asbestos giant. Not only did they direct traffic at the pre-trial

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233. Other contributing factors, such as changes in law, also led to the disposal of a significant number of cases. *See generally* Robreno, *supra* note 199.

234. *Id.* at 180.

235. Robreno, *supra* note 199 at 180-81.

236. *Id.*

237. *Id.* at 185.

238. *Id.* at 102-05.

stages, but they facilitated settlement talks or even pulled “double-duty” by overseeing a special master in one of the single-firm dockets. Their roles were broad and varied, depending on what the docket demanded.

Finally, of the various approaches to MDL management, the team-oriented approach appears to be superior. The sheer size and scope of MDL-875 made it an obvious target for a team of judges and special masters. Although it was theoretically possible for it to have been resolved by a single presiding judge working alone, it quite simply was not—and not for lack of time.

To quote the architect himself, “Trial judges in general, and federal district judges in particular, are by their nature and culture lone wolves who act alone in the execution of their duties . . . This general philosophy is not congruent with the administrative responsibilities of a large MDL.”<sup>239</sup> Judge Robreno recognized the complexity and volume of his assignment, rallied his fellow Eastern District of Pennsylvania federal judges, and delegated a substantial amount of authority. This delegation was made successful through routine meetings, standardized procedures, and by Judge Robreno retaining authority over substantive legal issues. The result was 181,560 cases terminated.

#### VIII. CONCLUSION: END OF THE STORY?

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

Arguments for increased special master appointments and the expansion of the judicial authority delegated to them as a result of a perceived “judicial crisis” are unwarranted. District courts have applied Rule 53 to achieve an efficient balance between competing interests of the parties in MDL cases: the cost-free oversight of a sitting magistrate judge against the expertise and perceived efficiency brought to an action by an outside special master. From the statistical evidence it is less than clear that

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239. Robreno, *supra* note 199 at 187–88.

MDL dockets have been increasing at a rate that would require increased special master appointments.

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

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

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

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