"Isn't that Special": The Limited Powers of Special Masters

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The Church Lady's words may be particularly apt when it comes to the appointment of special masters in California's trial courts. Used appropriately, special masters can be extremely useful to the parties and the court. They can bring expertise to a complex case or issue, parse a large or technical record for the benefit of the trial court, and make recommendations to the court on matters presented by the parties. But the expertise and resources special masters bring to that job — in conjunction with their typically broad investigatory mandates under a trial court's order of appointment — may lead some to inadvertently overstep the bounds of their appropriate authority as judicial agents.

Given the extraordinary powers conferred on special masters — and the accompanying risk that those great powers will be taken too far — it may be surprising to learn that there is little appellate law on the appropriate use (or misuse) of a special master's delegated judicial authority. This dearth of appellate guidance is likely a function of aggrieved parties' prudent fear that an unsuccessful attempt to seek discretionary writ review from the appellate court will make matters far worse. As Ralph Waldo Emerson famously responded to a young Oliver Wendell Holmes' criticism of Plato, "When you strike at the king, you must kill him." Given the low probability of appellate intervention, the risk of challenging a special master often weighs decisively against even seeking appellate relief in this fraught context.

Despite the lack of appellate guidance, there is at least one rule that should be uncontroversial. Special masters, who function as an arm of the court, cannot exceed the appointing court's own judicial authority. From that Archimedean point, we argue that special masters must operate as judicial officers within the adversarial system of justice — and not as judicial inquisitors operating on an *ex parte* basis. We are forced to "argue" this point because (surprisingly) it is not clearly established by judicial opinion.

Special Masters Perform a Judicial Function

Section 639 of the Code of Civil Procedure empowers trial courts to appoint special masters without the parties' consent to perform a variety of functions when (among

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other things) (1) "a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action," (2) "it is necessary for the information of the court in a special proceeding," or (3) "the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."

Special masters perform a subordinate but nevertheless "judicial" function when appointed by a trial court to assist in the fact-finding process or make recommendations. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 721.) In recognition of that judicial role, Canon 6(A) of the California Code of Judicial Ethics provides that "[a]nyone who is an officer of the state judicial system and who performs judicial functions including ... a special master, is a judge within the meaning of this code."

Courts and Special Masters Are Passive Arbiters of Justice

The judicial role is defined by the adversary system of justice: "What makes a system adversarial rather than inquisitorial is ... the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 357, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 181, fn. 2.)

The "philosophy" underlying the adversary system "insists on keeping the function of the advocate, on the one hand, from that of the judge on the other hand." (Fuller, *The Adversary System,* Talks on American Law (Harold Berman ed. 1961) pp. 34-35.) Judges must therefore follow a fact-finding and decisional process within the parameters of an open, adversarial system, with the judge assuming the judicial function of a "neutral" and "passive" arbiter of justice. (*United States v. Sineneng-Smith* (2020) 140 S.Ct. 1575, 1579.) This system is "premised on the well-tested principle that truth — as well as fairness — is best discovered by powerful statements on both sides of the question." (*Penson v. Ohio* (1988) 488 U.S. 75, 84.)

Special masters, who function as judges and are subject to the same ethical canons as judges, must be held to the same constraints as their appointing judges. The premise that truth is best discovered and fairness is best protected by an open, adversary system in which the judge acts as a passive arbiter of justice is no less applicable when a special master performs the judicial function. The same principles require that the systemic constraints on *judicial* fact-finding and decision-making must apply to special masters performing such judicial functions.

Ex-Prosecutors as Special Masters

Trial courts often appoint former prosecutors as special masters, particularly those who have developed a specialized expertise that may be helpful in a given case. The problem is that former prosecutors may assume that they have been appointed to do what prosecutors do — i.e., conduct *ex parte* investigations. In determining whether to bring criminal charges, prosecutors have vast investigatory powers, allowing them to do things like privately interview witnesses and communicate with those having interests that conflict with their targets' interests. The targets of investigations have no due process right to participate in such investigations.

But special masters are not prosecutors investigating potential crimes or other forms of misconduct by the parties or counsel. They are agents of an appointing court who exercise

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delegated *judicial* powers, subject to the same canons of judicial ethics and constitutional norms as judges.

Judicial Canon 3B(7) Bars Ex Parte Investigations

Although orders appointing special masters rarely address the issue, it is clear that special masters, like courts, cannot pursue prosecutor-like *ex parte* investigations. Judicial Ethics Canon 3B(7) provides that "[u]nless otherwise authorized by law [or agreed to by the parties], a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed." The Advisory Committee's Commentary makes clear that Canon 3B(7) includes the corollary that "[a] judge shall not initiate, permit, or consider ex parte communications" on any matter of substance "concerning a pending or impending proceeding," absent the parties' express consent.

This rule against *ex parte* proceedings and communications is necessary to protect the integrity of the judicial truth-finding and decisional process because *ex parte* proceedings lead to "a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this

point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision...." (*United Farm Workers of Am. v. Superior Court* (1975) 14 Cal.3d 902, 908.) *Ex parte* proceedings provide "no opportunity" for an absent party "to know precisely what was said, when it was said, by whom, and what effect could be drawn from their offerings." (*In re Kensington* (3d Cir. 2004) 368 F.3d 289, 309-311.) Simply put, "[i]f judges engage in *ex parte* conversations with the parties or outside experts, the adversary process is not allowed to function properly and there is an increased risk of an incorrect result." (*Id.* at p. 310.)

Thus, "[t]he value of a judicial proceeding ... is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." (*Carroll v. Pres. & Comrs. of Princess Anne* (1968) 393 U.S. 175, 183.) That is why courts are "restricted from conducting independent investigations, since such a practice amount[s] to a denial of due process, and certainly would deny to a litigant the fair and impartial trial to which he is entitled." (*Conservatorship of Shaeffer* (2002) 98 Cal.App.4th 159, 164, quotations omitted.)

A Special Master's Ex Parte-Tainted Report Cannot Be Cleansed

Special masters, of course, are subject to all the Canons of Judicial Ethics, including 3B(7). But despite that bar on *ex parte* proceedings, some have dismissed concerns about *ex parte* investigations because a special master's findings and recommendations are merely advisory. Aggrieved parties will have an opportunity to rebut the special master's findings before the trial court makes any final decisions. In sum, "no harm, no foul."

That is an argument that only an appointing court (and the aggrieved party's adversary) could love.

The first problem with a special master's report that is tainted with *ex parte* information is obvious. The report itself exposes the judge to second-hand *ex parte* communications. A judge's willful exposure to substantive *ex parte* communications violates Canon 3B(7) and is a long-recognized basis for disqualification,

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as a matter of both statute and constitutional due process. (See, e.g., *In re Hancock* (1977) 67 Cal.App.3d 943, 949 [holding that due process requires resentencing due to judge's *ex parte* communications with prosecutor].) The fact that the *ex parte* information is provided to the court by an agent — i.e., a court-appointed special master — makes no difference. As the Seventh Circuit recognized in *Edgar v. K.L.* (7th Cir. 1996) 93 F.3d 256, information given to a judge about the treatment of patients in off-the-record briefings is no less disqualifiable "than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated." (*Id.* at p. 259.)

Even more insidious is the problem of the special master's "selection bias." A special master who conducts an *ex parte* investigation — interviewing witnesses, meeting separately with select parties or interested persons — will be exposed to information relevant to his or her assigned task. "Inevitably, he would have formed impressions about the character of some, perhaps many, of the individuals" involved in the matter being investigated. (*In re Brooks* (D.C. Cir. 2004) 383 F.3d 1036, 1045.) As a result, selection bias infects a special master's report through the choice of what to include and exclude from the report, the manner in which the information is conveyed, and the scope and direction of the underlying investigation.

While an aggrieved party may be able to rebut information included in a special master's report, when the special master is exposed to off-the-record, *ex parte* information, there is no way to know what is not in the report. Rebuttal is not a viable cure because there is no verbatim

transcript revealing precisely what was discussed and therefore no way to access the "silent facts" that have not been preserved. (*Kensington, supra,* 368 F.3d at p. 309.) As the D.C. Circuit explained in the context of a special master's investigation prior to formal contempt proceedings: "Our concern is not with information that enters the record and may be controverted or tested by the tools of the adversary process, our concern is with the information that leaves no trace in the record — such as [the special master's] contacts with 'moles' and unnamed DOI employees — that may reasonably be expected to color the way in which [the special master] approaches his task, and ultimately his report and recommendations to the district court, and thus to taint the [district court's] contempt proceedings despite the steps taken to insulate those proceedings from the information to which [the special master] was exposed *ex parte*." (*Brooks, supra,* at p. 1046, citations and internal quotations omitted.)

Because the report of a special master exposed to *ex parte* communications is subject to this incurable selection bias, the tainted report cannot properly be reviewed by the appointing court. (See *In re Kempthorne* (D.C. Cir. 2006) 449 F.3d 1265, 1272 [holding that "only suppression" of special master's reports tainted by *ex parte* communications "can ensure neither the plaintiffs nor the district court will rely upon the reports in the future, to the detriment of the 'public's confidence' in the judicial process"].)

It's Not Easy to Stop a Special Master from Violating Due Process

The cold truth is that it is not easy to stop a special master from overstepping the bounds of his or her authority. Appointed by the court, they have the court's confidence and benefit from a certain presumption that their conduct is appropriate. Moreover, any lawyer challenging a special master must do a cost-benefit analysis as to whether it is wise to run the risk of antagonizing someone with the power to

dramatically influence the outcome of the case. And the reality is that appellate remedies are quite limited.

The first step in attempting to control the conduct of a special master is to object early and often when appropriate. Perhaps the most important objection should be aimed at what does *not* appear in the appointment order. The order should (but rarely if ever does) specify that the special master must conduct an open, on-the-record judicial investigation, with no substantive *ex parte* communications and where counsel for the interested parties have a right not only to be present but also to question witnesses and review any documents available to the special master. Your best (and realistically, perhaps only viable) opportunity to protect your client's right to due process is to have that right enshrined in the appointment order.

Next, the appointment order should be carefully reviewed to determine whether any expressly-provided powers are not appropriate for a special master. If the order fails to assure an open process in which counsel has the right to participate, an order that expressly confers on the special master the authority to issue subpoenas, for instance, may be wielded to facilitate an *ex parte* process. Where that occurs, it is important to object.

During the course of the investigation, the special master may engage in conduct that goes beyond the bounds of the appointment order. One would hope that a well-founded objection would cause a special master to reconsider his or her course of conduct. If the objection is overruled or ignored, it may be wise to bring the objection to the court's attention. Where a special master files interim reports, they may present an opportunity to raise an objection to a continuing course of conduct. If those reports are filed in *camera,* an objection is warranted.

In view of the special relationship between a court and the special master whom the court has appointed, it is particularly important to avoid any conduct that may be deemed a waiver of the

right to object. An objection to a special master's report may be lodged after substantial resources have been devoted to its preparation; nobody wants to waste those resources due to a defect in the process — especially not the appointing judge, who is likely to give the special master the benefit of any doubt.

Nevertheless, when the special master's conduct implicates due process and the integrity of the fact-finding process, a prior failure to object to merely potential (or less substantial) abuse should not be deemed a waiver. The Supreme Court has made clear that the right to adversary process exists to protect the justice system's truth-finding function. (*Sineneng-Smith, supra,* 140 S.Ct. at p. 1579.) Accordingly, for almost 50 years, California courts have "applied the voluntary, knowing and intelligent [waiver] standard" in the context of due process and other constitutional rights in civil cases. Under that stringent standard, consent to a violation of due process rights is never presumed by mere inaction. (*Rockefeller Tech. Invests. (Asia) VII v. Changzhou Sinotype Tech. Co., Ltd.* (2020) 9 Cal.5th 125, 140-141.)

Indeed, federal courts have held that the mere failure to object to a violation of the federal equivalent to Canon 3B(7) cannot be treated as consent: "While we have no record of any objections being registered at that time, we cannot regard the silence that accompanied the [district court's] preemptive statement that 'any objection to such *ex parte* communications is deemed waived' as manifesting consent. To fulfill the principles and objectives of Canon 3 of the Code of Conduct, which proscribes *ex parte* communications except with consent, *affirmative consent* is dictated." (*Kensington,*

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supra, 368 F.3d at p. 311 [simplified].) Accordingly, where a party objects to a special master's report on constitutional grounds, having failed to previously object to the order of appointment, waiver standards such as the "doctrine of tantamount stipulation" ought not apply. As the California Supreme Court has explained, the doctrine of tantamount stipulation applies only to "tactical rights," not to rights that "exist solely to protect fair and impartial factfinding." (*In re Horton* (1991) 54 Cal.3d 82, 93, 95-96.) Where counsel's objections have been overruled, an appellate remedy exists, but is limited to a discretionary petition for writ of mandate. As evident from the dearth of published opinions, the probability of success by petition for writ of mandate is low.

Finally, if a writ petition fails and the trial judge is exposed to a special master's *ex parte*-tainted report, counsel should consider filing a motion to disqualify the trial judge. As indicated above, federal courts have held that suppression of a report from an *ex parte*-tainted special master is necessary to shield the trial court from bias-creating *ex parte* information as well as the presentation of information that was influenced by *ex parte* communications (selection bias). By the same rationale, a trial court actually exposed to such a bias-creating report must be disqualified in the interests of justice. Unless the trial judge strikes such a motion as untimely or frivolous on its face, such a motion should be ruled upon by a different trial judge. Once again, however, appellate relief is limited to writ review.

The Cliff Notes Version

The due process risks combined with the probable futility of after-the-fact efforts to cure any violations point to one simple lesson. At the earliest opportunity, submit a proposed paragraph for inclusion in the appointment order specifying that the special master's investigation must be conducted through an open process in which the parties have the same right to participate as they have in any fact-finding proceeding before the trial judge. The paragraph should include an express statement that Canon 3(B)7 applies to the special master to the same extent that it applies to any judicial officer. The paragraph should also contain language specifying that the special master shall not engage in any *ex parte* communications with the parties,

witnesses, interested persons, experts, or even the trial judge (except for scheduling or similarly non-substantive matters). If you wait until *after* the special master has commenced an *ex parte* process, irrespective of the controlling legal precedents and the requirements of due process, it may well be too late.

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