

In Chambers

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Inside this Issue:

- New Judiciary Leaders Elected
- State Bar of Texas Adopts New Paralegal Definition & Standards

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Special thanks to Mr. Alvin Hale, retired Texas Department of Public Safety Trooper and Bailiff for the 51st District Court, for this issue's cover art. Mr. Hale's art has been featured in a number of DPS awards and in various publications throughout Texas. After the September 11th terrorist attacks, Mr. Hale designed and sold a special piece that raised \$2,000 for the 9-11 Fireman's fund.

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The staff of *In Chambers* strives to provide current information about national and local judicial educational issues and course opportunities for Texas judges.

Readers are encouraged to write letters to the editor and submit questions, comments, or story ideas for *In Chambers*. Contact Staci Priest, Publications Coordinator, by calling 800-252-9232, faxing 512-469-7664, or e-mailing stacip@yourhonor.com.

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THE USE AND APPOINTMENT OF SPECIAL MASTERS

By Professor Roger Haydock, FORUM Director of Education, and Ms. Sherry Wetsh, Attorney

Masters are used to provide services to courts, parties and lawyers. Masters can act as mediators or conference judges; they can manage discovery; they can be assigned to pre-trial and post-trial matters; they can testify as expert witnesses; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; they can perform accounting or computation of damages; they can serve as technology masters; and they can monitor compliance with a court order or settlement agreement. A benefit of the use of a special master is that it allows the parties and the court the ability to rely on the expertise of a particular neutral professional.

All courts have the power to appoint a special master or other type of judicial adjunct to assist with civil and criminal cases. Fed. R. Civ. P. 53 governs the appointment of masters in Federal Court. Rule 171 of the Texas Rules of Civil Procedure (TRCP) provides Texas State courts authority to appoint a master. In addition to TRCP 171, Chapter 154 of the Texas Civil Practice and Remedies Code provides the court with authority to refer a case to an impartial third party. Other statutory authority to consider are Chapter 151 of the Texas Civil Practice and Remedies Code which governs trials by special judges, and Chapter 171 of the Texas Civil Practice and Remedies Code, which applies to cases that are referred to arbitration.

TRCP 171 allows for the appointment of a master in exceptional cases and for good

cause.

Fed. R. Civ. P. 53 (a)(1)(A) states that the court may appoint a master to perform duties consented to by the parties. The appointment order establishes the master's powers, limits and responsibilities. This order is often referred to as an "order of reference". TRCP 171 does not specifically detail what language the court should include in the order of reference. However, Fed. R. Civ. P. 53 prescribes a number of items an appointment order must include and suggests others that should be included. Therefore, this article will discuss the requirements detailed in Fed. R. Civ. P. 53.

Prior to appointing a master under Fed. R. Civ. P. Rule 53, the Court must give the parties notice and an opportunity to be heard. Parties may suggest candidates for appointment. Rule 53 gives the court authority to appoint a master to perform duties consented to by the parties. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard. The following is a check list of items pursuant to Rule 53, to include in the appointment order.

1. An appointment order must specifically direct the master to proceed with all reasonable diligence.

2. An appointment order must state the master's duties, including any investigation or enforcement duties, and any limits on the master's authority.

3. An appointment order must identify when ex parte communications may occur.

4. An appointment order must identify what records the master must maintain.

5. An appointment must describe how the master's rulings will be received and reviewed.

6. An appointment must describe clearly how the master will be compensated.

Although not required by Fed. R. Civ. P. 53, it would be considered good practice to include a statement in the appointment order that the appointment of the master is appropriate. It is also good practice to identify the source of authority for appointment.

Fed. R. Civ. P. 53 (b) states that the court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. section 455, and if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification. Attaching the affidavit to the appointment order or referencing its filing in the order is appropriate.

An appointment order should include a provision restating or modifying the master's authority to impose sanctions for failure to cooperate. Fed. R. Civ. P. 53 (c) gives the master authority to impose upon a party any noncontempt sanction provided by Fed. R. Civ. P. 37 or 45, and may recommend a contempt sanction against a party and sanctions against a non party.

When considering whether to appoint a master, one key issue of consideration is absent the parties consent, whether the judge can require the parties to pay the master's fees. Rule 53 is silent regarding this issue. TRCP 171 states that the court shall award

See "Special Masters" continued on page 20


development of the paralegal profession for the past 25-30 years, some paralegals have become qualified through their training and work experience under the supervision of a licensed lawyer. Nevertheless, the Standards recommend that persons who fail to meet the educational criteria, possess a minimum of four (4) years previous work experience in performing substantive legal work, before being considered a paralegal.

Significantly, for both educational and recoverable-work requirements, substantive legal work does not include clerical or administrative work. Instead, the Standards define "substantive legal work" as including, but not being limited to: conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting

investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate closings, depositions, court or administrative hearings, and trials with an attorney.

The Standards also give consideration to the ethical obligations of the attorney to ensure that the conduct of the paralegal performing the services is compatible with the professional obligations of the attorney. It remains the obligation of the employing or supervising attorney to fully inform a client as to whether a paralegal will work on the legal matter, what the paralegal's fee will be, and whether the client will be billed for any non-substantive work performed by the paralegal. Further, a paralegal is prohibited from engaging in the practice of law, providing legal advice, signing

pleadings, negotiating settlement agreements, soliciting legal business on behalf of an attorney, setting a legal fee, accepting a case, or advertising or contracting with members of the general public for the performance of legal functions.

The articulation of these Standards will provide clarification of "education, training or work experience" as delineated in the Gill Savings case and its progeny, and hopefully render less complex the courts' decision whether to fee or not to fee. 

FOOTNOTES

- † With the assistance of Delaine J. Foss, Staff Attorney, 261st District Court, Travis County.
- * Board Certified Paralegal – Civil Trial Law, Texas Board of Legal Specialization
- 1. Now termed "Paralegal."
- 2. Gill Sav. Ass'n v. Int'l Supply Co., Inc., 759 S.W.2d 697, 705 (Tex.—App. Dallas 1988, writ denied).
- 3. Id.
- 4. See All Seasons Window & Door Mfg. v. Red Dot Corp., 181 S.W.3d 490, 504 (Tex. App.—Texarkana 2005, no pet.); Moody v. EMC Services, Inc., 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied).


reasonable compensation to be taxed as costs of court.

Several different rules and codes of professional responsibility apply or can be construed to apply to a judicial adjunct's conduct. If the judicial adjunct is a lawyer, he or she is governed by the applicable state rules of professional responsibility. Certain provisions of the Code of Conduct for United States Judges (CCUSJ), apply to special masters and commissioners. Although judicial adjuncts are not considered judicial employees, a judge may choose to impose portions of the Code of Conduct for Judicial Employees (CCJE), on a master or other judicial adjunct. 28 U.S.C. section 455 governs the disqualification of federal judges. And of course, Fed. R. Civ. P. 53 and TRCP 171 directly govern masters.

Numerous alternative dispute resolution (ADR) organizations have their own set of ethical guidelines for their neutrals. The National Arbitration Forum's Code of Conduct for Arbitrators is located at www.arb-forum.com.

The ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes can be found at www.abanet.org/dispute. JAMS Arbitrator Ethics Guidelines and JAMS Comprehensive Arbitration Rules and Procedures are available at www.jamsadr.com.

The Academy of Court Appointed Masters (ACAM), created in 2004 at a conference sponsored by the National Arbitration Forum, has completed a handbook which contains sample appointment orders, as well as numerous useful references. The handbook may be downloaded from the ACAM website which is www.courtappointedmasters.org.

As ADR continues to grow, the use of special masters is likely to increase. For example, as discussed in the Spring 2006 edition of IN CHAMBERS, there are State Judicial District Courts that have appointed a conference judge to conduct settlement conferences/mediations for felony cases. The creative uses of a judicial adjunct are only limited by the parties and the court. 



**ETHICS
OPINIONS**

Question & Answer

No new ethics opinions have been issued since July 2006. To ask an ethics question, contact Judge Stephen B. Ables (830.792.2290) or the State Commission on Judicial Conduct (877.228.5750).

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