



The role of Special Masters in resolving complex cases

Special Masters streamline the dispute resolution process, minimizing the costs, delays and risks of complex cases such as construction defects

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The fire started just above the first floor ceiling. Workers renovating the seven-story historic hotel fled the smoke-filled stairway, stumbling and falling on the way. Aerosol paint cans exploded from the heat, and the fire grew to three alarms. Firefighters blasted the 100-year-old building with water and successfully

extinguished the flames. Unfortunately, the hotel suffered extensive damage from the fire, smoke and suppression efforts. Rain later doused the interiors through the open roof and windows. Mold grew. Lead paint flaked and peeled off the walls.

The hotel owners performed millions in repairs. They resolved an insurance claim with their carrier and then sued the renovation contractor for remaining fire

and breach of contract damages. The general contractor in turn sued the subcontractors suspected of starting the fire and their insurance carriers. Liability was hotly contested. The general placed a lien against the building, served stop notices and sued the hotel group for unpaid contract balances; the subcontractors also sued for sums due. Five actions for personal injuries and subrogation followed. Two years after the initial



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filing, significant investigation and litigation costs had been incurred. Counsel disagreed on how to address “threshold” legal and factual issues. The parties anticipated taking roughly 70 percipient depositions and filing motions to bifurcate and/or motions for summary adjudication/judgment. The Superior Court consolidated the eight cases, set, and then vacated, a trial date.

The Superior Court subsequently appointed a Special Master. Shortly thereafter, the parties deposited more than 250,000 pages of documents, responded to initial insurance and scope of work interrogatories and deposed twelve key percipient witnesses. Within seven months, and before the trial-setting conference, the Special Master focused the parties on the key issues and successfully brokered a global settlement of the consolidated litigation and a related federal insurance coverage action.

Why a Special Master?

Complex cases involve multiple parties, difficult and time-consuming issues, large volumes of discovery, coordination with other pending actions or extensive post-judgment supervision. They require “exceptional judicial management to avoid placing unnecessary burdens on the court or litigants ...” (Cal. Rules of Court, rule 3.400(a)(b).) Special Masters support the court with the efficient and effective management and resolution of these cases. Special Masters streamline discovery and litigation, reduce delays often associated with complex cases, negotiate settlements and ultimately save the parties and court significant time and expense. The parties may stipulate to a Special Master or the court may appoint the Special Master on its own motion. (Code Civ. Proc., §§ 187, 638, 639.)

Multiparty construction defect cases and Judicial Council Coordination Proceedings provide additional examples of the effective use of Special Masters to successfully resolve complex cases.

Construction defect cases

Construction defect cases typically involve numerous parties, attorneys, insurance companies and experts. Each player has its own goals. The property owner wants maximum funds to repair defects and cover losses. The builder disputes plaintiff’s repair scope and cost estimates, and seeks to pass plaintiff’s claims, and often the builder’s legal fees, onto subcontractors. The subcontractors concentrate on minimizing damages and shifting responsibility. The design professionals distinguish between construction errors and design issues. Attorneys challenge pleadings, decipher contracts, pursue claims and assert defenses. Insurers highlight policy language to define covered losses and involve other carriers to share the risk. Experts bring technical insight to all aspects of the discussions. Discovery and litigation costs soar.

In the 1980s, California experienced a population growth that more than doubled the national rate. The resulting high demand for housing ignited the construction industry and eventually caused a dramatic increase in construction defect litigation. With heavy caseloads, the Superior Courts simply could not invest sufficient time to conduct settlement negotiations to resolve these multiparty complex cases. The courts became backlogged. After studying the federal courts’ successful use of Special Masters, the San Francisco and San Mateo Superior Courts worked with local lawyers to create Alternative Dispute Resolution programs to address complex construction defect cases. They drafted a pre-trial order that included the appointment of Special Master to manage discovery under the Court’s supervision. John Griffiths was the first Special Master in California to successfully implement the order. He pioneered a process that streamlined the production of necessary information, narrowed the issues and engaged the parties in meaningful

settlement discussions in multiparty construction cases. The process significantly shortened trial preparations at significant cost and time savings to the participants.

The legislature ultimately deemed constructive defect cases involving many parties or structures as provisionally complex. (Cal. Rules of Court, rule 3.400(c)(2).)

The process for resolving complex construction defect cases has evolved over the years. The use of Special Masters continues to be an effective and efficient means of organizing, managing and resolving complex construction defect cases.

As an example, in a recent case a large public university alleged more than \$50 million in construction and design defects and economic loss at seven apartment buildings on the university campus. Three dozen defense parties included the builder, subcontractors, sub-subcontractors, product manufacturers and design professionals. The case within the case involved battles between the primary carriers, the excess carriers and the additional insurers. The builder’s prime insurer filed a complaint in intervention and a federal coverage action.

With multiple attorneys and experts representing each party, joint and defense-only expert meetings involved well over a hundred participants. It was standing room only for Case Management Conferences. The judge cautioned that the courthouse was physically too small to host the trial. However, offsite trial locations raised security issues and complications for the judge who had other cases that had to be conducted at the court during any construction trial. In short, the case was a logistical nightmare.

The Special Master worked with the Superior Court and all parties to streamline case management, resolve discovery disputes and address disagreements that arose during ongoing dormitory repairs and student move-outs. All parties’ input was solicited for



pre-trial orders. Focused and structured communications provided real-time updates. Without service of formal individual discovery requests, the parties successfully produced voluminous project documents, shared document expenses, conducted site inspections and destructive testing, arranged biweekly site visits, exchanged confidential expert reports, generated a discoverable statement of claims, attended substantive expert meetings, disclosed and produced percipient and expert witnesses, and coordinated approximately 200 days of deposition testimony. The Special Master also partnered with the mediator to negotiate scores of settlements, winnowing the number of parties and issues until the case globally settled before trial.

Judicial council coordination proceedings and multi-district litigation

The California Judicial Council Coordination Proceeding (JCCP) Courts are recognized for their ability to manage national litigations in cooperation with other coordinated proceedings. Federal Multidistrict Litigations (MDLs), which are the federal equivalent to the JCCP, often overlap with coordinated proceedings in various state courts, including California. There are natural tensions between separate and independent jurisdictions, and Special Masters have successfully served to ease those tensions. More recent MDL/JCCP cases have served as cooperation models on issues that have been historically difficult to resolve, such as the conduct of liability discovery, document production, the sharing of work product, the use of a centralized case specific database, the coordination between counsel across many jurisdictions, trial setting, and consensual resolution.

In larger multi-venue complex cases, that perhaps include both state and federal jurisdictions outside of California, the use of Special Masters to foster

communication between the parties and the JCCP court is now generally accepted. The Special Master assignments vary across litigations but have included all of the issues identified above. Currently, the federal courts are using Special Masters to oversee issues such as discovery, coordination with state courts, the selection of bellwethers, global settlement negotiations, etc.

In the early 2000s, in California Special Masters were granted JCCP assignments for aggregate settlement allocations. (Code Civ. Proc., § 638.) Because of the growing recognition of the success of JCCPs to resolve national cases on the merits, and the need for Special Masters to assist in that resolution, the role of Special Masters has increased.

In one recent JCCP, plaintiffs sought compensation for personal injuries and damages stemming from a prescription drug that was associated with a serious medical condition. The proceedings involved well over 5,000 plaintiffs and 18 different manufacturing defendants, with cases located in 16 different state and federal venues across the country and three coordinating jurisdictions. The role of the court-appointed Special Masters, in cooperation with coordinating courts and the parties, led to the successful resolution of this complex case. The Special Master created protocols and set a compensatory structure, along with case-specific criteria that was consensually adopted by the parties and the coordinating courts. These efforts resulted in both closure for the manufacturing defendants and participation for over 99 percent of the plaintiffs.

Special Masters working with the JCCP court are an integral part in resolving complex MDLs. There are certain limitations on a JCCP court and its ability to assign specific cases to a specific private mediator. However, in coordination with the federal MDL, Special Masters have had an increased role in the California system because of the complex state federal issues that are addressed in MDLs.

A clear and purposeful approach

Successful case management of complex litigation by Special Masters requires a clear and purposeful approach to effectively and efficiently streamline the entire dispute resolution.

As a first step, the Special Master convenes all counsel and leverages their significant talent and experience to establish common objectives. The group uses straightforward case goals to generate a clear and cost-efficient resolution strategy. The parties participate in setting realistic deadlines to bring the case at issue, conduct discovery, explore potential motions and recommend a trial date. At the same time, the Special Master identifies opportunities for meaningful settlement discussions and calendars productive mediations and settlement conferences.

The Special Master streamlines data-gathering to allow analyses of necessary information without voluminous written discovery demands. Generally, a central depository or database is established where the parties deposit all relevant documents, insurance information and factual information regarding the parties' roles in the dispute. The parties may agree to prepare factual declarations or limited interrogatories regarding claims or defenses. This minimizes expense and delay and prioritizes information needed for meaningful negotiations.

The Special Master encourages expert dialogue to simplify complex and technical issues, clarify defenses and risks, explore creative solutions and expand settlement options. Fairly candid expert exchanges frequently occur under the mediation privilege and before any formal expert disclosures and depositions.

With the parties' consent, the Special Master enhances individual settlement strategies through one-on-one calls with decision makers to discuss goals, address obstacles and explore available resources in advance



of mediation. Will plaintiff only consider a global settlement? Will lead parties allow peripheral party settlements? Who will or must attend the settlement discussions? Are there insurance coverage issues or other obstacles that may impede the negotiations? The Special Master advances the framework for meaningful negotiations, with settlements ultimately brokered by the Special Master and/or a mediator.

Importantly, throughout the resolution process, the Special Master conducts focused, ongoing regular group teleconferences to continuously provide real time updates on outstanding issues and opportunities and promote effective communication and timely execution of action plans. Detailed summaries follow each conference. Counsel preview all status reports and proposed orders before their submission to the court.

In short, a Special Master supports the court's efficient and effective management and resolution of all types of complex cases. Through a clear and purposeful approach to the entire dispute resolution process, she

streamlines discovery and litigation, minimizes delays and creates meaningful opportunities for productive settlement negotiations. The use of Special Masters optimizes resolution outcomes, while minimizing the significant risks, delays and costs of complex litigation.



Skikos

Steven Skikos, a founding partner of Skikos, Crawford, Skikos & Joseph LLP, has been a trial attorney since 1990. Skikos has tried multiple pharmaceutical and medical device cases, tried numerous employment law cases in

state and federal court on behalf of plaintiffs and defendants, prosecuted and tried criminal cases. Since 1996, Skikos has focused on complex pharmaceutical drug and medical device litigation. He has been court-appointed lead and/or liaison counsel for California Judicial Counsel Coordinated Proceedings (JCCP) and/or for the federal Multi-district Litigation (MDL) in more than a dozen cases. Skikos has been a lead negotiator responsible for settling more than \$4 billion in cases for tens of thousands of plaintiffs and

has served as strategic leader in several more national litigations.



Goyette

Anne M. Lawlor Goyette, a principal of Griffiths•Goyette, has resolved hundreds of complex civil disputes as a full time Special Master and Mediator since 1998. Through prepared and productive negotiations, Ms. Goyette has facilitated \$300 million in settlements, from cost waivers to \$35 million, primarily in cases involving construction, real estate, insurance and related issues. Ms. Goyette is an ADR panelist for numerous appellate, state and federal courts, serves as Special Master and Referee for more than two dozen California Superior Courts and acts as Special Master in national and statewide class actions. She enjoys the highest Top Rated Lawyer-AV® Preeminent™ Martindale Hubbell rating, Super Lawyers® distinction in Alternative Dispute Resolution and membership in National Academy of Distinguished Neutrals.

