



The New and Improved CRCP 53

Special Master Appointments

BY CHRISTOPHER ZENISEK

*Master of puppets I'm pulling your strings;
Twisting your mind and smashing your dreams;
Blinded by me, you can't see a thing; Just call my
name, 'cause I'll hear you scream.*

—Metallica, “Master of Puppets”¹

Little did fans know that Metallica’s 1986 hit was written about the intricate legal processes described in the Colorado Rules of Civil Procedure. Okay, not really. But it is true that, effective January 1,

2018, the Colorado Supreme Court adopted amended CRCP 53 regarding appointment of special masters. A “special master” is an individual, paid by one or more parties, whom the court appoints to undertake certain court responsibilities in a particular case.

This article explores the reasons behind the changes, outlines the process by which the Civil Rules Committee recommended the rule to the Supreme Court, and provides an overview of the amended CRCP 53.

Reasons for the Changes

In early 2015, an attorney suggested to the Colorado Supreme Court’s Civil Rules Committee that CRCP 53 needed amendment, as it contained some arcane language that seemed no longer to apply to current-day cases.

Among other concerns, the attorney noted that different standards applied to special master proceedings in jury versus non-jury cases. For instance, in a non-jury case the parties had 14 days to object to a special master’s order, while in a jury case there was no deadline for objection.² Likewise, in a non-jury case, findings of fact were to be accepted unless clearly erroneous.³ In a jury case, however, findings could be reviewed de novo, but the master’s ruling was admissible as evidence and could be read to the jury.⁴ Finally, the rule permitted a court to appoint a master in jury actions “only when the issues are complicated”; but for non-jury matters, “save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.”⁵

In practice, of course, it's virtually (maybe entirely) unheard of that a special master would *convene* a jury trial. Why, then, have a distinction between "jury" and "non-jury" cases if a master will not interact with a jury anyway?

The Civil Rules Committee, chaired by Court of Appeals Judge Michael Berger, appointed a subcommittee to study the issue.

Committee and Subcommittee Discussions

The subcommittee discovered that FRCP 53 had been revised in 2003 and had been in place since without significant criticism. After consideration, the subcommittee recommended that Colorado pattern an amended CRCP 53 on its federal counterpart, with some changes. Over the course of several meetings, the Civil Rules Committee discussed several concerns and revised the proposed amendments to CRCP 53 before ultimately recommending it to the Colorado Supreme Court.

The following is a synopsis of the concerns addressed.

Standards of Review

If a court receives a master's decision, by what standard shall it review the decision? If too lenient, the court risks losing the benefit of the master's help because it might have to spend as much time in review as if it had decided the issue initially. If the standard is too strident, however, the court's authority could be delegated unwisely into private hands.

After several discussions, the Civil Rules Committee accepted the approach set forth in FRCP 53—that is, a reviewing court must decide all legal conclusions *de novo*, and it must resolve all "objections to findings of fact made or recommended" *de novo* unless the parties have stipulated to a "clear error" standard or stipulated that the master's findings will be final.⁶ Finally, procedural matters may be set aside only for abuse of discretion.⁷

The amended standard of review provides that the trial court still may receive evidence and has wide discretion to "adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions."⁸

TIPS FOR ATTORNEYS (FROM THE BENCH)

1. Be realistic. Is your case truly an unwieldy mess demanding more attention than the court can provide? Or might a little patience and a few rulings help shape and resolve the matter? A special master is most useful in the former case.

2. Raise the issue early. By the time the court realizes the need for a special master, the trial might be approaching and it might be too late to bring in a special master. If you believe a master is necessary, raise the issue at a case management conference or earlier.

3. Don't be the "Unforgiven."*

Always confer. Rare is the case a court will wish to appoint a special master—after all, masters are "the exception and not the rule." Rarer is a special master appointment requested by one party and opposed by the other. Both by rule and by fairness, expect the court to be mindful of proportionality and financial impact on all parties. If there is good reason for opposing, you may face some resistance.

* Metallica's power ballad "The Unforgiven," released in 1991, was the second single from the band's fifth album, *Metallica*. [https://en.wikipedia.org/wiki/The_Unforgiven_\(song\)](https://en.wikipedia.org/wiki/The_Unforgiven_(song)).

4. Be open to it. This is an unusual procedure, and it might create some discomfort with the court. But special masters can be a useful tool. For instance, a case may involve multiple, complex rounds of motions that appear more intent on disrupting opponents than on resolving the merits of the case. Even if suggested by your opponent in a "holy war," having a master resolve a multitude of motions more quickly than the court can in between trials could be useful to resolving the case. And masters go a long way toward ensuring your case will get to trial without the need for a continuance.

5. Consider a status conference.

To prevent potential issues, ensure up front that the court, master, and parties are on the same page. For instance, consider any potential conflict with the proposed master, the time the master will need to be available for the parties, whether there are unusual procedures the master should follow, and what kinds of communication might be permitted between the court and the master.

Authority to Appoint

Concerns were also raised about the standard for special master appointment encouraging overuse of special masters—namely, removing the "exceptional condition" language. As noted above, before amendment, CRCP 53 permitted appointment for jury cases where "the issues are complicated"; and it permitted appointment for non-jury cases "save in matters of account

. . . upon a showing that some exceptional condition requires it."⁹

Ultimately, the Civil Rules Committee recommended the federal appointment standards, but it expressly kept the portion of CRCP 53 mandating that "reference to a master shall be the exception and not the rule."¹⁰

Amended CRCP 53 provides three avenues for the appointment of a master: (1) by the

parties' consent; (2) for trial proceedings with an exceptional condition, or where a court must perform an accounting or resolve a "difficult computation of damages"; and (3) where a court lacks sufficient time to "effectively and timely" address pre- and post-trial matters.¹¹

Access to Justice

The Civil Rules Committee also considered and addressed two specific concerns regarding access to justice (i.e., "And Justice for All"¹²):

1. If this form of justice is available to parties with resources, is it appropriate that parties with fewer resources cannot participate?
2. Does the assignment of a special master risk providing an unfair advantage where one party's resources are greater than the other's?

First, as with its federal counterpart, amended CRCP 53 requires that the court "must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits."¹³

Second, the amended rule requires that "the court must consider the *proportionality of the appointment to the issues and needs of the case, consider the fairness of imposing the likely expenses on the parties and protect against unreasonable expense or delay.*"¹⁴ (Italics reflect additions to FRCP 53.)

Senior Judge Service

Finally, the Civil Rules Committee addressed how to ensure that the amended rule does not displace CRCP 122, which allows appointment of retired judges. After much debate, revision to the comments, and public input, the final comment to amended Rule 53 simply states: "See also C.R.C.P. 122 Case Specific Appointment of Appointed Judges pursuant to C.R.S. § 13-3-111."¹⁵

The Amended Rule's Provisions

As noted above, the amended rule eliminates distinctions between "jury" and "non-jury"

cases, clarifies what reports must be due and when, and articulates specific standards of review for courts. Here is a general outline of how the amended rule works.

Appointment

First, a reminder: the Supreme Court adopted the amended rule, and the amended rule opens by advising that "[a] reference to a master shall be the exception and not the rule."¹⁶

As discussed, special masters may be appointed by three manners under Rule 53: (1) by consent, (2) to hold trial proceedings in some circumstances, or (3) to address pre- or post-trial matters.¹⁷ If by consent, CRCP 53 does not restrict the scope of appointment.¹⁸ If for trial, a court only may appoint to "make or recommend findings of fact on issues to be decided without a jury," and only if there is an "exceptional condition" or "the need to perform an accounting or resolve a difficult computation of damages."¹⁹ And if to address pre-trial and post-trial matters, a court may appoint for any "matters that cannot be effectively and timely addressed by the appointed district judge."²⁰ Once appointed, a special master must "forthwith" set a time and place for an initial meeting within 14 days.²¹

Disqualification

The amended rule requires a master to disqualify if the master has a relationship that would require disqualification under Colorado Code of Judicial Conduct, Rule 2.11.²² Further, a prospective master must disclose any potential grounds for disqualification.²³ The parties may waive a master conflict, but only with the court's approval.²⁴

Authority

Unless a court directs otherwise in its order, the master may regulate all proceedings and take all appropriate measures to perform the assigned duties fairly and efficiently.²⁵ If conducting an evidentiary hearing, the master may exercise the appointing court's power to compel and to take and record evidence.²⁶ This includes the power to issue sanctions under CRCP 37 and 45, and to recommend a contempt sanction.²⁷

TIPS FOR JUDGES (FROM THE BAR*)

- 1 If you have a form Order of Appointment based on the old CRCP 53, throw it out and use a new checklist and form based on the amended rule.
- 2 Clearly articulate the scope of the special master's duties in the Order of Appointment.
- 3 Unless the parties are consenting up front, make sure they have notice and an opportunity to be heard, which is recited in the Order of Appointment.
- 4 Make sure you and the special master understand the new disclosure standard (Colorado Code of Judicial Conduct, Rule 2.11).
- 5 Talk to the special master about when you want to talk and what you want to talk about.
- 6 If you don't want to be reviewing findings of fact de novo, propose that the Order of Appointment provide the parties stipulate that findings are final or reviewed for clear error if they don't object within a certain number of days.
- 7 Make sure your staff adds the special master to the Colorado Courts E-Filing system as an "Other Interested Party."

* Submitted by David Tenner, Esq.

Master's Orders and Reports

A "master who issues a written order must file it and promptly serve a copy on each party."²⁸ The master now need not report on anything and everything that occurs, but instead must report "as required by the appointing order."²⁹

Finality of, and Challenges to, a Master's Decision


A master's written order or report "shall be effective upon issuance," but subject to a more limited timeframe for review than the federal counterpart.³⁰ Challenges in Colorado must be made within seven days after service.³¹ If the master "took sworn evidence," the challenge must be made within 14 days.³²

In acting on the order, the court "must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions."³³ Factual findings and conclusions of law are

reviewed de novo.³⁴ However, the parties may stipulate to have facts reviewed for clear error or, in non-trial matters, to have the master's findings be final.³⁵ Finally, procedural decisions stand unless there is an abuse of discretion.³⁶

Conclusion

CRCP 53 was amended to clarify the standards by which special masters may be appointed, what the appointing court must consider, and the standards a court must use to review special master decisions. Hopefully, by tracking its federal counterpart, amended CRCP 53 will provide clarity and assist in providing equal access to justice with fair, efficient, and law-based

rulings from masters and the courts. And, as Metallica teaches, "Nothing Else Matters."³⁷ 



Christopher Zenisek is a district court judge in the First Judicial District. He presides over a docket of civil, criminal, and family law matters. Judge Zenisek serves on the Colorado Supreme Court Civil Rules Committee, and he chaired the subcommittee assigned with proposed revisions to CRCP 53.

Coordinating Editor: Hon. Stephanie E. Dunn, stephanie.dunn@judicial.state.co.us

NOTES

1. "Master of Puppets" is from Metallica's 1986 album of the same name; it was the band's third studio album. [https://en.wikipedia.org/wiki/Master_of_Puppets_\(song\)](https://en.wikipedia.org/wiki/Master_of_Puppets_(song)).
2. CRCP 53(e)(2) and (e)(3) (2017).
3. CRCP 53(e)(2).
4. CRCP 53(e)(3) (2017).
5. CRCP 53(b) (2017).
6. CRCP 53(f) (2018).
7. CRCP 53(f)(5) (2018).
8. CRCP 53(f)(1) (2018).
9. CRCP 53(b) (2017).
10. CRCP 53(a)(1) (2018).
11. *Id.*
12. *And Justice for All*, released in 1988, was Metallica's fourth studio album. [https://en.wikipedia.org/wiki/...And_Justice_for_All_\(album\)](https://en.wikipedia.org/wiki/...And_Justice_for_All_(album)).

13. CRCP 53(g)(3) (2018).
14. CRCP 53(a)(3) (2018).
15. CRCP 53 2018 cmt.
16. CRCP 53(a)(1) (2018).
17. *Id.*
18. CRCP 53(a)(1)(A) (2018).
19. CRCP 53(a)(1)(B) (2018).
20. CRCP 53(a)(1)(C) (2018).
21. CRCP 53(b)(5) (2018).
22. CRCP 53(a)(2) (2018).
23. CRCP 53(b)(3)(A) (2018).
24. CRCP 53(a)(2) (2018).
25. CRCP 53(c)(1) (2018).

26. CRCP 53(c)(1)(C) (2018).
27. CRCP 53(c)(2).
28. CRCP 53(d) (2018).
29. CRCP 53(e) (2018).
30. CRCP 53(d) and (e) (2018).
31. CRCP 53(f)(2) (2018).
32. *Id.*
33. CRCP 53(f)(1) (2018).
34. CRCP 53(f)(3) and (f)(4) (2018).
35. CRCP 53(f)(3) (2018).
36. CRCP 53(f)(5) (2018).
37. "Nothing Else Matters" was released in 1992 as the third single from the band's fifth studio album, *Metallica*. https://en.wikipedia.org/wiki/Nothing_Else_Matters.



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