SPECIAL MASTERS NEED TO BE REIGNED IN: WHY RULE FIFTY-THREE OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE AMENDED SO THAT SPECIAL MASTERS ARE HELD TO A FIDUCIARY STANDARD TYPE OF RELATIONSHP AND RECOMMENDATIONS ON HOW TO DO SO.

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Abstract:

Special masters can play vital roles in the litigation process, whether it be in assisting with aspects of discovery, the awarding of damages, or any other area of litigation where it might be difficult for a court to case-manage a complex issue on its own. However, a problem arises when special masters go beyond their limited scope of power, and in determining how courts and litigants can and should sanction that behavior. This paper dives into this history of special masters, this exact concern, and proposes using federal rulemaking to add a fiduciary relationship—a standard that exists in other areas of law— to Rule 53's issue when it comes to discipling special masters and holding them accountable.

Introduction:

Why do courts use special masters? Their origin, like most of this country's legal foundation, dates back to old-England. King Edward I was overwhelmed with petitions, and asked his lord chancellors to help sort through them. In turn, those same lord chancellors used clerks, called 'masters,' to assist them in dividing petitions.[1] Quite simply, King Edward couldn't manage the insurmountable task and his chancellors used what we would call 'special masters' as a form of delegating responsibilities. Today, the United States carries on the idea of special masters under Federal Rule of Civil Procedure. Rule 53 allows the court to appoint special masters to (a) perform duties that the parties to litigation consent to, (b) make findings of facts under certain conditions, and (c) address pretrial and posttrial matters that would be difficult for the judge to do.[2] Essentially, the special master is someone who serves a limited purpose for the court to do things the parties want it to do, to make some difficult findings of facts, or do things that would be impractical for a judge to do or administer. In this function, like the clerks that King Edward's chancellors were, special masters are necessary as a matter of efficiency and delegation.

There are many famous examples of special masters serving this exact purpose. Following the tragedy of the September 11th, 2001 terrorist attacks, Congress created the 9/11 Victim's Compensation Fund (originally) as a method to pay the victims' families in lieu of filing lawsuits against the airlines and other potentially liable entities.[3] Given the nature of potential

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[1] Timothy Noah, The Special Master Problem Didn't Start With Judge Cannon, The Soapbox, Sept. 8th, 2022, https://newrepublic.com/article/167682/special-master-cannon-kenneth-feinberg
[2] Fed. R. Civ. P. 53
[3] Susanna Kim, *9/11 Families, Except One, Receive Over $7 Billion*, August 23, 2011, ABC News, https://abcnews.go.com/Business/september-11-victims-family-seeks-justice/story?id=14364251

number of claimants (thousands), and the sheer amount of money involved, it is easy to see why the judiciary itself might struggle with administering funds and determining how much money each family could get. Thus, Attorney General John Ashcroft appointed mediation attorney Kenneth Feinberg to be the special master tasked with doing exactly this. Feinberg, who also administered funds for victims of the BP oil disaster and the Boston Marathon bombing, spent 33 months administering over $7 billion to victims' families.[4]

Another famous example is the appointment of John Cooper as special master in the *Waymo v. Uber* suit to determine if Uber had purposely withheld a letter in discovery.[5] Or even more recently, former President Trump filed a lawsuit over classified documents that were seized from his Mar-a-Lago resort and District Judge Cannon appointed retired judge Raymond Dearie to review if any of the documents were privileged (the lawsuit was subsequently dismissed, holding the special master appointment to be an improper exercise of jurisdiction since it blocked a government investigation after execution of a warrant).[6] Thus, whether it be distributing damages, investigating a potential discovery violation, reviewing a series of documents for

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[4] Elaine McArdle, *Kenneth R. Feinberg: 'I'm very proud of what we did'*, September 9th, 2021, Harvard Law Today, https://hls.harvard.edu/today/kenneth-r-feinberg-im-very-proud-of-what-we-did/

[5] Carolyn Said, *Uber erred by not sharing 'inflammatory' letter with Waymo, court says*, December 15th, 2017, Stamford Advocate, https://www.stamfordadvocate.com/business/article/Uber-erred-by-not-sharing-inflammatory-12434602.php

[6] Alan Feuer, *Judge Raymond Dearie Takes On Fraught Role in Trump Documents Case*, September 16th, 2022, New York Times, https://www.nytimes.com/2022/09/16/us/politics/judge-raymond-dearie-special-master.html; Kevin Breuninger, *Judge dismisses Trump's case challenging Mar-a-Lago document seizure after appeals court ends special master review*, December 12th, 2022, CNBC, https://www.cnbc.com/2022/12/12/trumps-mar-a-lago-case-dismissed-after-special-master-review-ended.html

potential privileges, or any of the other functions that a special master could serve, they play an integral role in our court systems.

The problem this paper outlines then, is how to address what happens when a special master abuses their limited (but potentially great) power, and what remedies could be available for any such violations. Part 1 of this paper will address the problems with special masters, including instances where they have or could violate their duties. Part 2 will explain the history of the fiduciary relationship, how it works in other contexts, and what it means for people held to such a standard. Part 3 finally, will explain why federal rulemaking is the best avenue for this potential change and what a potential amendment to Rule 53 could look like and the reasons as to why.

Part 1: The Problem with Special Masters

It is very clear that special masters can and have been quite useful in many high-profile cases and legal situations. But they also have plenty of concerns and issues in their use. Generally speaking, one concern is that special masters could end up doing the opposite of what we think they do; rather than make trials cheaper and more efficient, they could actually make them more costly and delay them.[7] In the context of fact finding investigations, if a special master's fact finding is extensive and lengthy, it could prove costly to the parties whom not only have to wait for the special master's report to the judge, but then reargue the report in front of the judge who reviews the master's report *de novo*.[8] It is also important to note that special masters

[7] *See* Josh Hartman & Rachel Krevans, *Counsel Courts Keep: Judicial Reliance on Special Masters, Court-Appointed Experts, and Technical Advisors in Patent Cases*, 14 Sedona Conference Journal, 61, (2013).
[8] *Id*. at 71

also have virtually no procedural safeguards attached to their roles, a concern especially apparent when they conduct out-of-court investigations or similar work. Unlike a court appointed expert, they are not deposed, don't often testify at trial, and aren't subject to cross examination.[9] These concerns all raise questions as to how parties to litigation can hold special masters accountable, especially when one or both parties are usually responsible for paying for the special master.[10]

Those same concerns speak to a different issue: how much discretion a special master should have in the context of what they do. Two approaches exist to this. The first, says that master should have lots of discretion since they'll know the parties more intimately that the judge could, and their needs will likely evolve as their task goes on, meaning informality is the most efficient way to proceed.[11] The other theory says judge's should reign tight control over special masters and force them to file reports frequently or else the judge may learn too little about the case and be unable to verify the master's work effectively or control the parties (and thus, likely to give extreme deference).[12] Without a standard of liability on a special master, both approaches could have dangerous consequences.

A relaxed approach means that special masters have complete control. They essentially become the judge or arbitrator for certain aspects of litigation—taking the parties farther away from judicial review and from the judge themselves. A party could have great concerns with this approach given the fact that the judge is ultimately the one who decides the important legal questions, yet is left out of what could be particularly important or complex parts of the

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[9] Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication, 53 U. Chi. L. Rev. 394 (1986).
[10] Andrew C. McCarthy, *Latest Mar-a-Lago Farce: Who Pays For the Special Master,* National Review, September 10th, 2022, https://www.nationalreview.com/corner/latest-mar-a-lago-farce-who-pays-for-the-special-master/
[11] Brazil *Supra* Note 11 at 417.
[12] *Id* at 417-18.

litigation. Parties would want to do everything in their power to ensure that a special master's recommendations, reports, etc. are favorable to them then, and thus will focus their attention on the special master's work. This will add time, cost (especially to the client), and energy that may ultimately take away from the litigation. And with no real way to hold these special master's accountable after the judge makes a *de novo* ruling of a special master's reports, or check the special master's work themselves, a party who loses at the special master stage (that is to say whatever the special master finds, reports, etc. is unfavorable to them) under this broad theory of power could face an insurmountable hurdle to overcome throughout the remainder of the litigation.

On the other hand, a stricter theory could be seen as unfavorable to the parties too. If a judge manages every aspect of the special master's work, the judge could be seen as stepping in-between the parties more so than they normally do. For example, most judges strongly dislike discovery disputes and would rather see the parties themselves deal with things civilly (especially since its usually the costliest part of trial).[13] If a judge hires a special master to oversee a discovery issue and micromanages that special master's work, the judge could be getting a glimpse into an area of the litigation that departs from the judicial norm in which they normally stay away from. And while it may be true that this way of managing special master's might subdue the accountability issues of the other extreme, this theory itself has its own flaws. An example such as this would force attorneys themselves to depart from the informal, casual nature of an area of litigation like discovery—potentially impacting their litigation strategy, the cost of trial for their clients (if they must adhere to proper formalities and spend more time

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[13] Carol E. Heckman, *Streamlining Discovery Motions: What Judges Want to See*, NY Law Journal, July 23rd, 2012, https://www.hselaw.com/files/070071229_Harter_Secrest.pdf

formulating more official discovery requests or production), any potential amicable relationships they had previously with opposing counsel, and other traditional litigation norms that they must now depart from. Plainly then, both extremes cause problems in their own respect, and both exist because parties don't have access rigid rules that can hold special masters accountable.

Another related issue with special masters that arises is their neutrality. As a matter of common sense, it would seem obvious that special masters should remain neutral in whatever aspect of the litigation they are tasked with working on since they essentially are filling the roles of a judge, the ultimate symbol of neutrality in litigation, in complicated parts of a case. That however, may not always be the case which presents another problem for parties. David Cohen, an attorney who has been a special master for many federal cases, described that remaining neutral "isn't easy."[14] And there is a serious question as to why this glorified judge's assistant, as Cohen described special masters to be, couldn't be neutral.[15] One potential reason is that a special master might not always be a lawyer, and thus is not aware of, or bound to, the same ethical considerations of neutrality that judges and lawyers might be. This happens more often in patent cases when a judge might need someone with the technological expertise related to the patent.[16] Lawyers in these situations might become particularly weary of a special master's ability to remain neutral or ability to understand what neutrality means—thus potentially prejudicing their client.

More apparent though when thinking about the issue of neutrality amongst special masters might come into play when discussing their compensation on matters, especially if it is

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[14] Rachel Treisman, *What a special master does, as told by a special master*, NPR, September 5th, 2022, https://www.gpb.org/news/2022/09/05/what-special-master-does-told-by-special-master
[15] *Id*.
[16] *Id*.

tied to the litigation itself. This was exactly the issue in *Cordoza v. Pacific States Steel Corporation*. Here, the defendant had left the medical plan for their retired steelworkers bankrupt, prompting an Employee Retirement Income Security Act (hereafter "ERISA") claim against them.[17] After finding an ERISA violation, the judge in the matter ordered the defendant to keep paying the medical benefits. The problem was that the defendant didn't have enough money to do so. Thus, the court hired Bruce Train and his associates to develop a contaminated plant site owned by the defendants as the means of paying the medical benefits.[18] One of the unique issues here though is that part of Bruce Train's compensation was tied to an interest in the land. While Train had begun to do what he was tasked with, negotiations to develop part of the plant site stalled because Train had sought more compensation.[19] A final investigation proved that Train: "had (1) rejected valid offers from the RDA in order to hold out for more compensation for himself, (2) misappropriated creditors' funds by forming a $1 million litigation war chest, (3) paid for personal tax advice with PSSC funds, and (4) overbilled for a legal assistant."[20]

Train was eventually forced to disgorge some of his wages, sanctioned, and had his earnings capped—all of which was upheld by the 9th Circuit.[21] While there was an amicable solution to the special master's clear abuse of neutrality here, it only happened after years and extensive judicial investigation—all of which cost the court time, money, and effort, and likely caused unease amongst the plaintiffs who wanted to secure their medical benefits. This more broadly speaks to the issue of potential earnings eroding a special master's ability to remain

[17] Cordoza v. Pacific States Steel Corp. 320 F.3d 989 (2003).
[18] *Id*.
[19] *Id*.
[20] *Id* at 994.
[21] *Id*.

neutral. Psychology backs this up. One study found a link between money and corruption, seeing that a controlled group exposed to money-related activities were more likely to be unethical as compared to a controlled group that was not exposed to money.[22] Other studies also linked dishonesty and deception with an ability to earn money.[23] Special masters, like Train, would be no different. Even if a black-and-white rule were to exist that no special master fees can have any tie to the litigation, special masters could still do things that contribute to this unethical behavior (such as bill more hours than what is required and prolong their work to make more money if paid on an hourly rate). And while a court itself may sanction special masters for doing such acts, the litigants themselves are without a standard to base any appeal themselves on.

Thus, whether it be the length of a special master's work, the amount of intervention a judge exercises in a special master's work, or a special master's ability to remain neutral, being without a standard exposes the use of special master's to several potential problems. The parties themselves have no way to hold special master's accountable, potentially putting them in a detrimental position in the litigation. Special masters are designed to make the court's life easier in complex cases and situations, but in turn, it might be doing the opposite. *Cordoza* was an example of why, and there is likely plenty more that we do (and perhaps do not) know about. The only way to fix that issue, is to develop a fiduciary standard to Rule 53 and give parties a basis to appeal special master's decisions through the Federal Rules of Civil Procedure.

Part 2: The Fiduciary Standard:

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[22] University of Utah, *Study shows money cues can trigger unethical behavior*, PhysOrg, June 21st, 2013, https://phys.org/news/2013-06-money-cues-trigger-unethical-behavior.html
[23] *Id*.

A fiduciary duty is a legal concept that reaches multiple areas of law: businesses, lawyer-client, other confidential types of relationships, etc. and requires that a person acting within this relationship to only act in ways that will benefit the other person—in other words, act in the other person's best interest.[24] The fiduciary is the person who owes the duty to act towards the benefit of the other person, and the beneficiary (sometimes called principal) is the person who benefits in this relationship.[25] Generally speaking this idea exists as a tool to protect interests of a beneficiary when someone represents them in some kind of capacity.[26] This duty even dates back as early as 1790 B.C. under the Code of Hammurabi, creating rules surrounding persons entrusted with the property of others for business.[27]

There are many famous examples of which this duty has been spelled out in litigation. In the business context, *Meinhard v. Salmon* is the most prominent case. In *Meinhard*, the court found the duty of loyalty breached by one co-adventurer (partner named Salmon) of a leasing business to another. Salmon created a new leasing deal for the property that would take place following the close of his current leasing deal with his co-adventurer, and did not disclose this business opportunity to his co-adventurer (essentially going behind his partner's back). Justice

[24] Cornell Law School, Legal Information Institute: Fiduciary Duty, https://www.law.cornell.edu/wex/fiduciary_duty
[25] Cornell Law School, Legal Information Institute: Principal, https://www.law.cornell.edu/wex/principal; Cornell Law School, Legal Information Institute: fiduciary, https://www.law.cornell.edu/wex/fiduciary; Cornell Law School, Legal Information Institute: beneficiary, https://www.law.cornell.edu/wex/beneficiary
[26] Adam Barone, *What Is a Fiduciary Duty? Examples and Types Explained, Investopedia,* August 19th, 2022, https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp
[27] Atherton, Susan C.; Blodgett, Mark S.; and Atherton, Charles A. (2011) "Fiduciary Principles: Corporate Responsibilities to Stakeholders," Journal of Religion and Business Ethics: Vol. 2, Article 5.

Cardozo, writing the opinion for the New York Court of Appeals just a few years before he would enter the Supreme Court, said:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[28]

Justice Cardozo is essentially spelling out the difference here. That even if in a normal context (here a business undertaking), the conduct undertaken by the fiduciary was permissible, the mere existence of the fiduciary relationship transcends normal conduct and forces one to act with the "finest loyalty." Likewise, in *Graphic Directions, Inc. v. Bush*, the Colorado Court of Appeals said that an employee-agent (fiduciary) who solicits their employers cliental as they prepare to depart the business to start their own also violates that duty of loyalty, the same transcending type of commitment that Justice Cardozo discussed in the *Meinhard* case.[29]

Aside from this duty, the duty of care was illustrated most prominently in *Smith v. Van Gorkum*. Here, the CEO of a company negotiated a merger (to which senior management disapproved) and the board of directors voted to approve after a two-hour meeting, based on an oral presentation with no merger document review. The Delaware Supreme Court found this to violate the duty of care. Justice Horsey explained that being a fiduciary is more than just abstaining from bad faith and fraud, but rather forces a director to have an affirmative duty to protect the beneficiary's interest—meaning they must examine information with a "critical eye," (care).[30] Again, this is another instance in which a court is recognizing that a fiduciary duty

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[28] Meinhard v. Salmon, 249 N.Y. 458, 463-464 (1928).
[29] Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (1993).
[30] Smith v. Van Gorkom, 488 A.2d 858, 872 (1985).

transcends normal activities. It wasn't enough that the board of directors weren't approving the merger with malice or bad intent (against the shareholders), but rather they had to take care and exercise reasoned decision in the choices they made because of the special relationship they hold with the shareholders of a company.

As these examples illustrate, in modern application, fiduciary duties require more from the fiduciary than what is asked of a normal layperson because of the special nature of the relationship itself and the overarching goal of protecting the beneficiary's interest. There are many different kinds of duties that could be placed on a fiduciary including the duties of: loyalty, care, good faith, prudence, etc., all of which could be relevant to special masters.[31] What they mean generally, are values that should be undertaken in any adaptation of a fiduciary relationship for special masters.

At its core, the duty of loyalty is the duty that speaks to preventing a fiduciary from violating conflicts of interest. This includes both personal interests of the fiduciary that are conflicting with the beneficiary's interests and duties the fiduciary owes to someone else conflicting with the beneficiary's.[32] Some also say that the duty of loyalty encompasses a duty to not profit off of the beneficiary's interest when completing their fiduciary duties.[33] Plainly this duty is exactly what a layman would think it means, being loyal to whomever is owed the loyalty—the beneficiary. In the special master context, the duty of loyalty could prove to be very important. The idea of not profiting off of the work would have been a principle that special master Train would have directly violated in *Cordoza* and subject him to discipline. Further, it gives a blanket standard for lawyers to examine special masters within litigation. If their primary

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[31] *See* Barone, *Supra* Note 26.
[32] Paul Miller (2013). *Justifying Fiduciary Duties*. McGill Law Journal 58(4), 969.
[33] *Id.*

duty of loyalty is to the court (as explained in Part 3), then any concerns about neutrality, the influence of money, and potential biases becomes moot.

The duty of care encapsulates the duty of good faith and the duty of prudence inside of it. Generally, exercising a duty of care means to purse the beneficiary's interests with reasonable diligence and prudence.[34] Further, some standards require a standard of good faith (i.e., acting in reasonable manner towards the beneficiary's interest, similar to negligence).[35] Essentially, if the duty of loyalty speaks to who's interest should be kept in mind when completing work, the duty of care speaks to the how that work must be accomplished. The main goals are essentially competence and diligence. This standard subdues many of the potential problems a standardless use of special masters endures. If a special master is forced to exercise this kind of care, a judge will not need to worry about micromanaging a special master's work since it will be done diligently and with good faith. The parties themselves will not need to worry about overdue costs or delays of trial since the special master must be zealous and do their work in good faith.

As such, the fiduciary duties of care and loyalty, which encapsulate many other important principles and duties in a fiduciary relationship, could protect against all the earlier raised concerns. The Federal Rule of Civil Procedure on special masters, Rule 53, might already itself subtly endorse this idea with its language. For example, the subsection on the authority of a special master says they may "take all appropriate measures to perform the assigned duties fairly and efficiently."[36] The specific diction here of "appropriate," or "fairly and efficiently," sound eerily similar what a duty of care statute might say about diligence and reasonableness. Further,

[34] Cornell Law School, Legal Information Institute: Duty of Care, https://www.law.cornell.edu/wex/duty_of_care
[35] *Id.*
[36] Fed. R. Civ. P. 53 (C)(1)(B)

another area of the rule states that the master can't have relationships with the parties or the parties' attorneys (unless consented to with court approval.[37] This vaguely mirrors the concept of the duty of loyalty and its overarching goal of preventing potential conflicts from existing. Thus, a fiduciary rule change is the best way to proceed.

Part 3: Why a Fiduciary Standard Should be Proposed and What it Might Look Like:

Before deciphering what potential fiduciary standards could look like, or should consider, it is important to determine why federal rulemaking is the appropriate method for change. Federal Rulemaking begins with the Advisory Committee, who scrutinizes proposals and eventually proposes some as amendments to the Standing Committee. The Standing Committee reviews the changes themselves and sends them to the Judicial Conference if they choose to do so. The Judicial Conference does the same and sends them to the final stop, the Supreme Court. If the Supreme Court is satisfied with the change, they'll officially promulgate the rule before May 1st, with effect taking place usually around December 1st (but not before) of that same year. Congress may themselves step in and enact legislation if they aren't satisfied with the Supreme Court's decision, but this rarely happens.[38]

This elongated measure of rulemaking is the best method to create a special master fiduciary standard. Firstly, the composition of the decision makers in this process proves why. The Advisory Committee consists of a diverse group of legal professionals: judges, lawyers, state chief justices, government lawyers, etc., meaning most of these members either litigate or have exposure to the concept of fiduciary duties (unlike members of Congress) and do so in different

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[37] Fed. R. Civ. P. 53 (A)(2)

[38] United States Courts, *How the rulemaking Process Works*, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works; 28 U.S.C. § 2071-2077.

ways.[39] Generally it also seems wise to let the people who will engage with these concepts the most be the ones who adopt the rules around them. While Congress could itself step in as warranted by the rulemaking process, it would be unwise since the judiciary itself is best equipped to "alter rules more deftly and with greater precision than could Congress."[40] Thus, the decision makers have the greatest ability to develop these rules in a meaningful way.

When thinking about what the amendment to Rule 53 itself should look like, the rule itself should consist of two core elements: (1) the fiduciary relationship defined, and the duties therein and (2) the review process and remedies for a breach of fiduciary duties by a special master. It is critical not only to define who is the beneficiary and who is the fiduciary and why, but explain how to sanction any violations of this rule. Otherwise, the standard itself would be deficient and useless. It would also be wise to look upon fiduciary restatements in other contexts as a guide for how to formulate or draft these fiduciary standards.

The fiduciary duty itself should consist of a duty of care and loyalty by special masters to the courts (the judge in the litigation) themselves. The special master is an extension of the judge, and is doing tasks difficult for the judge themselves to oversee. Thus, the duties belong to the judge as the beneficiary. What might need to be unique about this defined duty however, is that it should also explicitly give standing to the litigants as third parties as well (i.e., for the parties to be able to appeal to the court that the special master is not conforming to its fiduciary duty). This is because ultimately whatever the special master is tasked with doing will affect the

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[39] United States Courts, *Committee Membership Selection*, https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection

[40] Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 Wm. & Mary L. Rev. 2239, 2265, (2019), https://scholarship.law.wm.edu/wmlr/vol60/iss6/5

litigation to some degree, and the parties should have rights then in the same way they'd have rights against the judge to a trial.

Specifically, when thinking of the duty of care within this standard, business law provides the best guidance. The Restatement 3rd of Agency Law describes that agents need to act with care, competence, and diligence that is normally exercised by other agents in a similar circumstance.[41] Further, other provisions require the agent to act within the scope of their actual (directly stated) authority and refrain from conduct that is likely to damage the principle's enterprise (good faith).[42] Similarly, a special master should be diligent, competent, and careful in their handling of matters within a case, they should only act within the scope of what a judge hired them to do, and they should refrain from undertaking acts that damage the court's reputation or ability administer justice fairly. What this Restatement doesn't include that a duty of care element might want to would be to explicitly say that diligence or prudence should include not prolonging their duties if not necessary (to protect the parties from paying more than necessary). All of this will alleviate parties' concerns about the time and effort expended by the use of special masters and allow judges to trust the discretion of a special master.

When discussing the duty of loyalty, the Revised Uniform Partnership Act (hereafter "RUPA") and Restatement 3rd of Agency provide guidance. RUPA outlines that a partner can't compete with the partnership, deal with someone who has an adverse interest to the partnership, and must hold all profit for the partnership itself.[43] Meanwhile, The Restatement 3rd, which has a much more expansive duty of loyalty, outlines that an agent can't acquire a material benefit from the fiduciary relationship, act on behalf of an adverse party, compete with the principal, or use

[41] Re(3) of Agency §8.08
[42] Re(3) of Agency §8.09-8.10
[43] RUPA § 409.

the principal's information for their own benefit.[44] Likewise any loyalty provision for special masters should encompass many of these values: they should not profit in any way from the duties encompassed to them as special master (i.e. elongate their duties for more money, or hold out on transactions for more contingent payment like in *Cardozo*). Further, special masters should only act on behalf of the court and not advocate for, or give special treatment to, one of the parties since the special master is an extension of the judge themselves. It might be wise however to also include a provision under this duty defining neutrality. Black's Law dictionary defines a neutral party as a party who is impartial, and has no financial or personal interest in a controversy or dispute.[45] Something like this would be an adequate definition, put special masters on notice of the fact they must be neutral against the parties, and further reinforce the idea that they cannot seek financial personal gain from their employment as special master. Thus, the duty of loyalty here would be sufficient.

Lastly, it is important to think about remedies when a special master breaks their fiduciary relationship. The duty itself creates personal liability upon the fiduciary, thus giving them a reason to want to adhere to these standards.[46] The potential rule should state that the parties themselves could bring a claim of breach of fiduciary duty at any time before a jury verdict under Rule 53, or the judge themselves if they find the special master's conduct to be improper. This will allow everyone who plays a role in the litigation, that is to say everyone who could be impacted by the special master's decisions, to have a say if the special master does something wrong. A policy like that only seems fair. Further, if the parties bring a violation under

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[44] Re(3) of Agency §8.02-8.05

[45] *Neutral Party*, Black's Law Dictionary, https://thelawdictionary.org/neutral-party/

[46] Law Offices of Stimmel, Stimmel, and Roeser, *The Fiduciary Duty*, https://www.stimmel-law.com/en/articles/fiduciary-duty

Rule 53, there should be a hearing where the party must prove the breach by a preponderance of the evidence (to keep it consistent with the trial standard). If the judge finds a violation themselves, they should just have to state the reasons why in writing, and dictate why it meets the preponderance of the evidence. Lastly, the provision itself should give the special master or the other party to the case, the right to appeal a decision on the breach of fiduciary duty simply as a matter of due process.

When thinking about the penalties themselves, outside of the expected penalties: fines, suspension or firing from the role, recommendation of discipline to the Bar, etc., it is important to consider remedial solutions to the work the special master did on the trial itself. One idea might be to give the judge broad discretion, take any measure as necessary to return the trial to a position it was before the special master breached their fiduciary duty, or to return the trial to a position where it is if the special master never breached their fiduciary duty. This, as one could imagine, could give the judge the power to do a lot of creative things to return the trial to normal. This should be seen as desirable since the goal is to remediate the failures of someone who was meant to be loyal to the court, be an extension of the judge themselves, and help solve a complicated part of litigation. Along with this broad standard though, some specific penalties, as guidance, might be wise to include such as: holding the special master responsible for one or both parties' attorney fees from trial, order a new trial (if necessary), delay trial, give the parties an extended number of discovery requests (such as interrogatories), etc. These solutions all remediate this problem effectively. While this recommendation is not perfect, it shows that a fiduciary standard can solve all the problems a special master presents and create a way to return trial to a normal position as if the violation never occurred.

Conclusion:

Special masters are an important piece of civil litigation. They do however, present many problems that could hamper the fairness of trial for the parties and make special masters themselves self-interested parties. A fiduciary relationship, an area of law famous for keeping representatives of one party in line with the interests of that beneficiary, could be the solution. Forcing the special master to adhered to duties of loyalty and care, and creating sensible remedies to violations of those duties, can help special masters continue to be the useful tool they are in assisting with complicated areas of litigation.