

1 John A. Furlong, Bar No. 018356
2 General Counsel
3 STATE BAR OF ARIZONA
4 4201 N. 24th Street, Suite 100
5 Phoenix, Arizona 85016-6266
6 Telephone: (602) 252-4804
7 John.Furlong@staff.azbar.org

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND RULES 53(a)
and 53(b), ARIZONA RULES OF
CIVIL PROCEDURE

Supreme Court No.

**Petition to Amend Rules 53(a) and
53(b) of the Arizona Rules of Civil
Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona hereby petitions the court to amend Rules 53(a) and 53(b) of the Arizona Rules of Civil Procedure. The proposed changes clarify the court's authority to appoint a special master, even if one party objects to appointment of the master, and provide guidance to the court and the parties regarding the circumstances under which appointment over the objection of one party is appropriate.

The complete text of the proposed amended rule is shown on Appendix A, and a redlined version of the proposed changes is shown on Appendix B.

I. Rationale Supporting Proposed Amendment.

In recent years, trial courts have increasingly relied upon special masters appointed under Rule 53, Ariz. R. Civ. P., to assist in civil litigation. *See Scottsdale Mem'l Health Sys., Inc. v. Maricopa County*, 224 Ariz. 125, 146, 228 P.3d 117, 138 (Ct. App. 2010) (Swann, J., concurring). Case law suggests that trial courts may

1 appoint special masters, even over the objection of a party, so long as the
2 requirements of the rule are otherwise met. *See id.*; *Tierra Ranchos Homeowners*
3 *Ass'n v. Kitchukov*, 216 Ariz. 195, 198, 165 P.3d 173, 176 (App. 2007). The current
4 rule, however, does not specify the circumstances under which appointment over the
5 objection of a party is warranted. As a result, there is a potential for abuse: some trial
6 courts may routinely appoint masters without any stated justification. At the same
7 time, there is a potential for underutilization of masters as well, because other courts
8 may be reluctant to appoint a master where appropriate, due to the lack of guidance
9 in the rule.

10 The current rule is also silent regarding whether a particular master may be
11 appointed over the objection of a party. Although prospective masters may not be
12 appointed unless they file an affidavit disclosing whether there may be grounds for
13 disqualification, there may be circumstances in which a party objects to the
14 appointment of a master absent disqualifying circumstances. The rule should provide
15 for a method which allows a party to object to the appointment of a master in civil
16 cases even if specific cause for disqualification is not present.

17 The proposed changes to Rule 53(a)(3) are intended to provide guidance to
18 parties and trial courts regarding the circumstances under which masters may be
19 appointed over the objection of a party. The rule also clarifies that notice and an
20 opportunity to be heard must be provided prior to appointing a specific master.

21 **II. Specific Changes to Rule 53(a).**

22 Rule 53(a)(3) currently requires only that the court consider “the fairness of
23 imposing the likely expenses on the parties and must protect against unreasonable
24 expense or delay” in appointing a master. It does not, however, address what actions
25 the court may take if a party objects to the appointment of a master. The proposed

1 changes to Rule 53(a)(3) expressly provide for the court to either decline to make the
2 appointment based upon the objection (proposed Rule 53(a)(3)(A)), or appoint the
3 master with express findings on the record that the appointment of the master is
4 warranted, that the benefit of the appointment outweighs the likely expense, and the
5 appointment is warranted after considering the parties' respective abilities to pay the
6 likely expense.

7 New Rule 53(a)(4) is partly a reorganization of current Rules 53(b), which is
8 entitled "Order appointing master." Current Rule 53(b)(1) is entitled "Notice," and
9 discusses the requirement that the court provide the parties with notice and an
10 opportunity to be heard prior to the appointment, and notes that "a party may suggest
11 candidates for appointment." This subsection should be included within Rule 53(a)
12 which discusses the process for appointment of masters and is entitled
13 "Appointment," rather than Rule 53(b), which focuses upon the process for issuing
14 orders relating to the master's appointment. Substantively, the provision clarifies that
15 the rule permits objection to the appointment of a specific master, and requires that
16 the court provide the parties with notice and an opportunity to be heard prior to
17 appointing a specific individual.

18 In addition to the above changes, an italicized title for each subpart of Rule
19 53(a) is proposed in order to make the format of the rule consistent with the
20 remainder of Rule 53(b). No substantive change to the rule is intended by inclusion
21 of these titles.

22 **III. Conclusion**

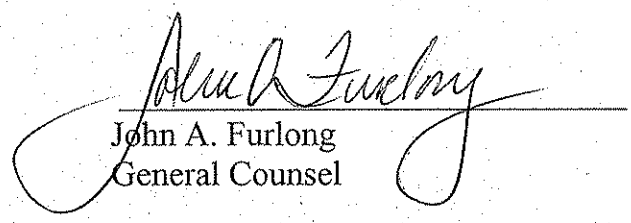
23 The State Bar of Arizona respectfully requests that the Court amend Rules
24 53(a) and 53(b) of the Arizona Rules of Civil Procedure as shown on Appendix A.

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

RESPECTFULLY SUBMITTED this 13th day of December,

2013.



John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
13th day of December, 2013.

By: Kathleen A. Lundgren

Appendix A

Rule 53. Masters

Rule 53(a). Appointment

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact and conclusions of law on issues to be decided by the court without a jury if appointment is warranted by
 - (i) some exceptional condition or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- (C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available superior court judge in the county in which the court sits.

(2) *Disqualification.* A master shall not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under Rule 81 of the Rules of the Supreme Court of Arizona unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) *Objection.* In appointing a master, the court shall consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. If one or more parties object to the appointment of a master, the court may, after providing a notice and opportunity to be heard:

- (A) decline to make the appointment; or
- (B) appoint a master based upon a finding on the record stating the reasons that:
 - (i) one or more of the circumstances for the appointment specified in Rule 53(a)(1) is present;
 - (ii) the benefit to the court and the parties outweighs the likely expense; and
 - (iii) the appointment is warranted after considering the parties' respective abilities to pay the likely expense.

(4) *Notice.* The court shall give the parties notice and an opportunity to be heard before appointing a specific master. A party may suggest candidates for appointment.

Rule 53(b). Order appointing master

(1) *Contents.* The order appointing a master shall direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(i).

(2) *Acceptance of Appointment.* Before accepting an appointment as a master, the prospective appointee shall file an affidavit or declaration disclosing whether there is any ground for disqualification under Rule 81 of the Rules of the Supreme Court of Arizona. If a potential ground for disqualification is disclosed, the prospective appointee shall not proceed with the appointment unless the parties have consented (with the court's approval) to waive the ground for disqualification.

(3) *Amendment.* The order appointing a master may be amended at any time after notice to the parties and an opportunity to be heard.

Rule 53(c). Master's authority

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may order impose upon a party any noncontempt sanction provided by Rules 37 or 45, and may recommend a contempt sanction against a party and sanctions (including contempt) against a nonparty.

Rule 53(d). Meetings and evidentiary hearings

(1) *Meetings.* When a master is appointed, the clerk shall forthwith furnish the master with a copy of the appointing order. Upon receipt thereof, unless the appointing order

otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys, to be held within twenty days after the date of the appointing order, and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and, if applicable, make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Evidentiary hearings.* Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

Rule 53(e). Master's orders

A master who makes an order shall file the order and promptly serve a copy on each party. The clerk shall enter the order on the docket.

Rule 53(f). Draft reports

Before filing a report, a master may submit a draft of the report to the parties for the purpose of receiving comments.

Rule 53(g). Master's reports

A master shall report to the court as required by the order of appointment. The master shall file the report and promptly serve a copy of the report on each party, unless the court directs otherwise.

Rule 53(h). Action on master's order, report, or recommendations

(1) *Time to object or move.* A party may file objections to--or a motion to adopt or modify--the master's final order, report, or recommendations no later than 10 days from the time the master's final order, report, or recommendations are served, unless the court sets a different time.

(2) *Fact findings.* The court shall decide all objections to findings of fact made or recommended by a master under the clearly erroneous standard, unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed de novo, or

(B) the findings of a master will be final.

(3) *Legal conclusions.* The court shall decide de novo all objections to conclusions of law made or recommended by a master.

(4) *Procedural matters*. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(5) *Action*. In acting on a master's final order, report, or recommendations, the court shall consider and rule upon any objections and motions filed by the parties, and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

Appendix B

Rule 53. Masters

Rule 53(a). Appointment

(1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact and conclusions of law on issues to be decided by the court without a jury if appointment is warranted by
 - (i) some exceptional condition or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- (C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available superior court judge in the county in which the court sits.

(2) Disqualification. A master shall not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under Rule 81 of the Rules of the Supreme Court of Arizona unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) Objection. In appointing a master, the court shall consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. If one or more parties object to the appointment of a master, the court may, after providing notice and an opportunity to be heard:

- (A) decline to make the appointment; or
- (B) appoint a master based upon a finding on the record stating the reasons that:
 - (i) one or more of the circumstances for the appointment specified in Rule 53(a)(1) is present;
 - (ii) the benefit to the court and the parties outweighs the likely expense; and
 - (iii) the appointment is warranted after considering the parties' respective abilities to pay the likely expense.

(4) Notice. The court shall give the parties notice and an opportunity to be heard before appointing a specific master. A party may suggest candidates for appointment.

Rule 53(b). Order appointing master

~~(1) Notice. The court shall give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.~~

(21) *Contents.* The order appointing a master shall direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(i).

(32) *Acceptance of Appointment.* Before accepting an appointment as a master, the prospective appointee shall file an affidavit or declaration disclosing whether there is any ground for disqualification under Rule 81 of the Rules of the Supreme Court of Arizona. If a potential ground for disqualification is disclosed, the prospective appointee shall not proceed with the appointment unless the parties have consented (with the court's approval) to waive the ground for disqualification.

(43) *Amendment.* The order appointing a master may be amended at any time after notice to the parties and an opportunity to be heard.

Rule 53(c). Master's authority

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may order impose upon a party any noncontempt sanction provided by Rules 37 or 45, and may recommend a contempt sanction against a party and sanctions (including contempt) against a nonparty.

Rule 53(d). Meetings and evidentiary hearings

(1) *Meetings*. When a master is appointed, the clerk shall forthwith furnish the master with a copy of the appointing order. Upon receipt thereof, unless the appointing order otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys, to be held within twenty days after the date of the appointing order, and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and, if applicable, make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Evidentiary hearings*. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

Rule 53(e). Master's orders

A master who makes an order shall file the order and promptly serve a copy on each party. The clerk shall enter the order on the docket.

Rule 53(f). Draft reports

Before filing a report, a master may submit a draft of the report to the parties for the purpose of receiving comments.

Rule 53(g). Master's reports

A master shall report to the court as required by the order of appointment. The master shall file the report and promptly serve a copy of the report on each party, unless the court directs otherwise.

Rule 53(h). Action on master's order, report, or recommendations

(1) *Time to object or move*. A party may file objections to--or a motion to adopt or modify--the master's final order, report, or recommendations no later than 10 days from the time the master's final order, report, or recommendations are served, unless the court sets a different time.

(2) *Fact findings*. The court shall decide all objections to findings of fact made or recommended by a master under the clearly erroneous standard, unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed de novo, or

(B) the findings of a master will be final.

(3) *Legal conclusions.* The court shall decide de novo all objections to conclusions of law made or recommended by a master.

(4) *Procedural matters.* Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(5) *Action.* In acting on a master's final order, report, or recommendations, the court shall consider and rule upon any objections and motions filed by the parties, and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.