

PROPOSED MICHIGAN COURT RULE 2.519 GOVERNING APPOINTMENT OF MASTERS (NEW)

Issue

Should the Michigan Court Rules be amended to add new MCR 2.519, which would parallel Federal Rule of Civil Procedure 53, providing procedures for the appointment of masters by Michigan trial courts?

Synopsis

Currently, the Michigan Court Rules do not provide for procedures governing the appointment of masters by trial courts. While some Michigan courts appoint masters on an *ad hoc* basis, there is no uniformity due to the lack of a court rule specifying how the activities of masters are to proceed. Michigan is one of very few states without a specific rule on the appointment of masters. In 2000, Federal Rule 53 was extensively revised to update the practice regarding masters. The Civil Procedure and Courts Committee proposes that a similar rule be adopted in Michigan, on a pilot program basis. The proposed new rule differs significantly from the federal rule in that masters may be appointed only with the consent of the parties.

Background

MCR 2.519 is a new rule, derived from Fed. R. Civ. P. 53, proposed for adoption on a pilot program basis by the Civil Procedure and Courts Committee of the State Bar of Michigan.

The federal rule was extensively revised by amendment in 2003. That amendment was taken up by the federal advisory committee after it had received empirical research on the use of masters in federal court. See Thomas E. Willging et al., *Special Masters' Incidence and Activity*, Fed. Jud. Ctr. (2000). The federal rule provides significantly more detailed guidance to courts and litigants on the proper use of masters than its predecessor.

The Committee believes that a modified version of the federal rule, as revised, is valuable to litigants, and therefore appropriate for adoption on a pilot program basis in Michigan. Most significant among the modifications to the federal rule is the requirement that a master may be appointed only with the consent of the parties. In addition, the Committee has modified the language of the federal rule to conform to the Proposed Style Revision of the Federal Rules of Civil Procedure of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, dated February 2005.

MCR 2.519(A) includes specific guidance on the circumstances permitting the appointment of a master. There are many roles that masters may play in civil cases, particularly in complex cases. See generally Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 Wm. Mitchell L. Rev. 1299 (2005).

MCR 2.519(B) establishes specific requirements for the order appointing a master. These subjects reflect a form of “best practices” for the use of masters, and they define procedures to be followed upon referral to a master. The rule intentionally makes these

provisions mandatory because they are matters prone to dispute if not resolved at the time of appointment.

MCR 2.519(C) clarifies the extent of a master's authority and defines those powers expansively within the confines of the duties assigned to the master. The rule explicitly authorizes the imposition of discovery sanctions other than contempt by a master, and allows a master to recommend imposition of contempt sanctions. The procedures established under MCR 2.519(F) are intended to clarify the role of master and ensure that all parties, including the appointing judge and appointed master, understand the master's role. The standards of review of a master's decisions are particularly important to the parties and the court, and are set forth with special detail.

Compensation of masters under this rule should be established in the order of appointment. See MCR 2.519(B)(1)(e). In the majority of cases, compensation will be ordered to be paid by the parties pursuant to MCR 2.519(G)(2)(a). The provision of MCR 2.519(G)(2)(b) provides for payment from a fund created by the litigation, as where fees are awarded under the "common fund" doctrine, or by a fund that is the subject matter of the litigation.

MCR 2.519 MASTERS [Pilot Program]

(A) Appointment

(1) **Scope.** A court may enter an order appointing a master only with the consent of the parties, and then only to:

- (a) perform duties consented to by the parties;
- (b) hold trial proceedings and make findings of fact on issues to be decided by the court without a jury; or
- (c) address pretrial and posttrial matters.

(2) **Disqualification.** A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under MCR 2.003, unless the parties consent with the court's approval to the appointment after the master discloses any potential grounds for disqualification.

(B) Order Appointing a Master.

(1) **Contents.** The appointing order must 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 subrule (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 Subrule (G).

- (2) **Issuing.** The court may enter the order appointing a master only after:
- (a) the master files an affidavit disclosing whether there is any ground for disqualification under MCR 2.003; and
 - (b) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(3) **Amending.** The order appointing a master may be amended only with the consent of the parties, and vacated only by the court on motion for good cause shown.

(C) Master's Authority.

- (1) **In General.** Unless the appointing order directs otherwise, a master may:
- (a) regulate all proceedings;
 - (b) take all appropriate measures to perform the assigned duties fairly and efficiently; and
 - (c) if conducting an evidentiary hearing, compel, take, and record evidence in the same manner as the appointing court under these rules.
- (2) **Sanctions.** The master may by order impose on a party any noncontempt sanction provided by MCR 2.313 or 2.506, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(D) Master's Orders.

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

(E) Master's Reports.

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

(F) Action on Master's Order, Report, or Recommendations.

- (1) **Opportunity for a Hearing; Action in General.** In acting on a master's order, report, or recommendations, 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.
- (2) **Time to Object or Move to Adopt or Modify.** A party may file objections to-- or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) **Reviewing Factual Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

- (a) the findings will be reviewed for clear error; or
- (b) the findings of a master appointed under subrule (A)(1)(a) or (c) will be final.

(4) **Reviewing Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) **Reviewing 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.

(G) Compensation.

(1) **Fixing Compensation.** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms with the consent of the parties.

(2) **Payment.** The compensation fixed under subrule (G)(1) must be paid either:

- (a) by a party or parties; or
- (b) from a fund or subject matter of the action within the court's control.

(3) **Allocating Payment.** The court must allocate payment of the master's compensation among the parties as agreed by the parties.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 21, 2007**

The above new MCR 2.519 MASTERS should be adopted.

(a) Yes

or

(b) No

