

Special Masters Can Ease COVID-19 Criminal Case Backlog

By **The Honorable Thomas I. Vanaskie (Ret.)** and **Geoffrey R. Johnson**

(August 6, 2020, 5:26 PM EDT)

A tsunami of criminal trials will soon be released from COVID-19 quarantine. Already backlogged and overburdened court systems will strain to move trials forward under social distancing guidance in order to protect the speedy trial rights of criminal defendants.

These developments are happening in real time, with courts implementing a range of protocols for the resumption of jury trials that endeavor to balance the rights of the accused with the need to safeguard the health and safety of judges, jurors, parties and witnesses alike.

By way of example, the U.S. District Court for the Middle District of Pennsylvania has announced a comprehensive plan to reinstitute criminal trials during the ongoing pandemic.[1]

Briefly summarized, in addition to juror health screening questionnaires and on-site personal protective equipment, the court's plan outlines a number of innovative procedures for the safe resumption of jury trials, including having witnesses testify from the jury box, seating jurors at least 6 feet apart in the gallery, and realigning counsel tables to both accommodate social distancing rules and this new courtroom layout.

Moreover, to limit the number of jurors in a courthouse and ensure there is sufficient space available for appropriate distancing, the court's plan will limit jury trials to one trial per courthouse at a time.

The Middle District of Pennsylvania's plan, created through meaningful collaboration between federal prosecutors and public defenders, represents an innovative and thoughtful approach for processing criminal matters during this horrid pandemic. It also underscores the tireless commitment of judges, prosecutors and the defense bar to the administration of justice during these unprecedented times.

It seems clear, however, that these necessary precautions for the safe resumption of jury trials will cause the pace at which the court's criminal docket is typically processed to slow significantly, thereby increasing its backlog of criminal matters.



The Honorable
Thomas I. Vanaskie (Ret.)



Geoffrey R. Johnson

What can the Middle District of Pennsylvania — and other courts that adopt similar procedures in order to conduct criminal jury trials — do about this exacerbating problem? One approach that has not received much attention, but has significant promise, is to enlist the services of private judicial adjuncts, otherwise known in the federal court system as special masters, to assist the judicial administration of criminal matters in the ongoing COVID-19 landscape.

This article explains the legal bases for the appointment of special masters in federal criminal cases, and outlines some possible roles of special masters in such cases.

When compared to civil litigation, in which special masters are routinely appointed to oversee a variety of case functions, there is a relative dearth of criminal cases involving special masters. This could be for a number of reasons.

On a basic level, in contrast to civil matters, which — while consequential — generally involve money or property disputes, criminal cases implicate the most significant interests at stake in our justice system: an individual's life and liberty. Thus, to the extent courts are sensitive to the general criticism that the use of judicial adjuncts signals an unwelcome abdication of judicial authority, such concerns might forestall a court from seriously considering the use of a special master in a criminal case.

Moreover, while courts most often appoint special masters to manage and streamline discovery in document-heavy commercial cases, criminal matters historically involved significantly less documents and other discovery-related issues, thereby obviating perhaps the most common function of special masters in our courts.

The digital era has changed all that, with criminal prosecutions now routinely involving massive amounts of digital evidence, from aural and video recordings, to text messaging and social media evidence, as well as complex financial data. Thus, many criminal cases now involve intense and time-consuming battles over complex electronically stored information.

Special masters are routinely employed to tackle such onerous motion practice in civil cases, saving the courts and litigants considerable expense while minimizing delay. The fact remains, however, that district courts have the authority to appoint special masters in criminal matters for exactly the same purpose. This power is derived from two distinct sources: (1) a court's inherent authority, and (2) Federal Rule of Civil Procedure 53, which governs the appointment of special masters in civil litigation.

By way of example, a few years ago in *United States v. Black*, Chief U.S. District Judge Julie A. Robinson of the U.S. District Court for the District of Kansas appointed a special master to review hundreds of hours of video recordings collected at a correctional institution in connection with a prosecution for conspiring to bring in contraband to the prison. The recordings implicated the attorney-client privilege, warranting time-consuming review of the recordings.^[2] In so doing, Judge Robinson explained that it is well-settled that courts have inherent authority to appoint special masters in managing litigation.^[3]

Judge Robinson further reasoned that, while the Federal Rules of Criminal Procedure do not address special master appointments, courts are nevertheless permitted to draw on Federal Rule of Civil Procedure 53's provisions on special masters in making such appointments in criminal cases.^[4] What's more, because Federal Rule of Civil Procedure 53 permits a court to assign a special master's review costs to the government, Judge Robinson assigned such costs to the government as part of the special master's appointment under Rule 53.^[5]

Appointment of a special master to assist in reviewing recorded communications for privilege issues is but one example of the support role that special masters can serve in criminal cases. The Justice Manual, issued by the U.S. Department of Justice, suggests enlisting the service of a special master as one possible method for reviewing documents seized from a law office pursuant to a search warrant in a criminal matter.[6]

As an example of this, in a recent high-profile criminal case involving President Donald Trump's former attorney Michael Cohen, U.S. District Judge Kimba M. Wood of the U.S. District Court for the Southern District of New York appointed former U.S. District Judge Barbara S. Jones to analyze whether physical and electronic files that federal investigators seized from Cohen's office during a raid were shielded by the attorney-client privilege.[7] Over a five-month period, the special master reviewed a trove of documents as part of the privilege review process and issued six reports regarding her findings.[8]

While the special master's appointment in the Cohen case represented an added expense, one that was split between the government and the defendant, the special master's work undoubtedly streamlined a review process that the district court, which has a robust docket in one of the busiest courts in the country and myriad other demands on its time, would likely not have had the bandwidth to handle expeditiously.

By way of further example, in 2001, U.S. District Judge Paul L. Friedman of the U.S. District Court for the District of Columbia in *U.S. v. McDonnell Douglas Corp.* appointed a special master to aid and expedite the resolution of numerous complex discovery disputes between the parties, including disputes that involved the disclosure of classified documents.[9]

The special master's broad-sweeping authority in that case encompassed, among other things, the ability to resolve all discovery motions, as well as assessing whether certain documents were discoverable by the defendant under Federal Rule of Criminal Procedure 16 or the U.S. Supreme Court's decision in *U.S. v. Brady*.[10]

Again, as above, the comprehensive special master appointment in *McDonnell Douglas* demonstrates the manner in which judicial adjuncts can help courts to effectively manage complex and time-consuming discovery issues in criminal cases, thus permitting the court to focus its attention on other pending matters, while at the same time protecting the speedy trial rights of criminal defendants.

This is not intended to be an exhaustive list of the functions that special masters can perform in assisting judicial administration in federal criminal cases. To be sure, as complex federal criminal prosecutions increasingly involve expansive subpoenas of electronic data and hundreds of thousands (if not millions) of potentially discoverable documents, it is not hard to imagine a scenario in which special masters play a markedly increased role in helping district courts to resolve pretrial issues in criminal matters.

What is important to keep in mind going forward, however, is that special masters can provide a useful tool through which courts can promptly resolve numerous pretrial disputes in criminal cases. Indeed, as Judge Friedman's appointment order in *McDonnell Douglas* observed, the use of special masters in criminal cases can assist defendants in preparing a full and adequate defense, as well as aid the court and the parties to proceed toward a prompt resolution of a criminal case.[11]

Altogether, as a result of implementing time-consuming — but needed — safety protocols for conducting criminal jury trials in a COVID-19 world, our already overtaxed federal trial courts face an

extensive and growing backlog of work. This includes, but is not limited to, pretrial criminal matters that judges and their staffs will likely not have the bandwidth to address in the near future.

Special masters, however, can assist federal trial judges in efficiently and expeditiously navigating these pretrial issues in criminal matters, thereby alleviating this impending logjam, guiding such matters to trial when necessary, and safeguarding the constitutional right of criminal defendants to a speedy trial. Further, as criminal cases become increasingly complex, the successful reliance on special masters in such cases during this pandemic may provide a template for their continued use in a post-COVID-19 landscape.

Thomas I. Vanaskie is of counsel at Stevens & Lee PC. He is a former judge for the U.S. Court of Appeals for the Third Circuit and the Middle District of Pennsylvania.

Geoffrey R. Johnson is an associate at Stevens & Lee.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See The Middle District's Plan for the Reinstitution of Jury Trials, available at <https://www.pamd.uscourts.gov/news/middle-districts-plan-reinstitution-jury-trials>.

[2] United States v. Black, No. 16-20032-JAR, 2016 WL 6967120, at *1 (D. Kan. Nov. 29, 2016).

[3] Id. at *3.

[4] Id. at *4.

[5] Id.

[6] See Justice Manual, § 9-13.420(F).

[7] See Alan Feuer, Special Master Finishes Review of Files in Cohen Case, N.Y. Times (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/cohen-trump-files-review.html>.

[8] Id.

[9] See Order of Reference to Special Master, No. 1:99-cr-00353-PLF (D.D.C. Jul. 2, 2001).

[10] Id.

[11] Id.