

I. Role of the Special Master

The Special Master is a quasi-judicial role where an expert is given legal authority to make prompt recommendations in high conflict, crisis situations to the court and to parents. The Special Master may also monitor compliance with court orders, as well as make recommendations regarding new issues that arise. This role differs from that of therapist, custody evaluator, mediator, or attorney, although there is some overlap. Although the Special Master may initially attempt to reduce conflict by mediating the issues by clarifying communication between parties, or by providing educational, legal, or therapeutic input, the Special Master will make a formal recommendation when these techniques do not bring closure in a timely manner. It is a recommending role, not negotiation, mediation, therapy, or education. The goal is conflict resolution instead of litigation. The process is based on more flexible, informal data collection, without strict adherence to the rules of evidence. The Special Master's role can be considered that of a "traffic cop" who has the authority to quickly intervene when the situation warrants action. Although the Special Master has an ongoing relationship with the parties, no therapist-patient, attorney-client privilege exists in this role.

II. Qualifications of the Special Master

Therapist Qualifications:

1. Current professional license in good standing.
2. Five years post-graduate degree experience with child custody issues that may include evaluations, therapy, and mediation.
3. Continuing Education required by statute.
4. Mediation Training.

And sufficient knowledge and expertise in any of the following:

- A percentage of practice in divorce, child custody evaluations, mediation, and/or treatment.
- Knowledge/training in child development, post-divorce adjustment, substance abuse, parent alienation, child abuse, and domestic violence as required by law.
- Experience with complicated psychological/psychiatric issues.
- Specific training in being a Special Master which might include consultation or mentoring with an experienced Special Master.
- Family Systems

- Mediation training.
- Knowledge of ethical guidelines and the standards of practice in the community where one is practicing
- Expertise in a specific area as needed for a particular family.

Attorney Qualifications:

- Five years licensed to practice law or Certified Family Law Specialist, California State Board of Legal Specialization.
- Member in good standing with Bar.
- If Special Master assignment involves child custody and, visitation:
 - I. Training in child development
 - II. Ten custody cases carried to resolution by stipulation or judgment.
 - III. Domestic violence training.
- Training and/or experience as Special Master.
- Forty hours mediation training, twenty hours minimum in family law.

III. Appointment of Special Master

- A. By Stipulation:** Section 638 of the Code of Civil Procedure allows the parties to stipulate to the appointment of a referee (Special Master) to hear and determine any or all of the issues in the proceeding, and to report a statement of decision to the court. This is the legal authority for appointment of Custody Special Masters.
- The Special Master should ensure that the appointment from the Court under Code of Civil Procedure §638 and Evidence Code §730 is signed by the judge, both parties, and their lawyers before beginning the case. The order should have all areas under the Special Master's jurisdiction indicated by a check mark.
- B. By the Court without Stipulation:** Section 639 of the Code of Civil Procedure authorizes the court to appoint a referee for limited purposes and with limited authority, generally limited to financial matters and discovery disputes.

IV Special Master objectives:

- Reduce reliance on court system

- Provide timely, cost effective conflict resolution
- Reduce conflict between parents
- Improve communication and problem-solving skills between parents
- Refocus parents on children's needs
- Educate role regarding the developmental and psychological needs of children
- Provide a stabilizing presence for families and children
- Provide channel of communication for children
- Provide protection and voice for child's therapy
- Monitor of compliance with existing court order

All objectives may not apply or be utilized in every case.

V. Initial Process:

- Be clear about issue authority; what the Special Master can and cannot do, what issues are within the scope of the appointment.
- Determine if process instructions for the parties need to be in writing.

VI. Client Communications

- **Meetings**
 - Joint
 - Separate
- **Phone Calls**
 - Joint
 - Separate
- **E-mail**
- **Keeping Order**

VII. Contact with Third Parties

- **Court**
- **Experts**
- **Teachers**
- **Collaterals**

VIII. Making Special Master Recommendations:

- All recommendations of the Special Masters are to be in writing.
- The Special Master shall use the format for Recommendations as set forth in Appendix B.
- The Special Master shall state the basis/reason for recommendations (for major issues)
 - There must be Family Code Section 3190 findings to support a recommendation for psychological exams or treatment
 - For alcohol/drug testing
 - For “best interests” of child(ren)
- The Special Masters Recommendations become orders, they must be stated clearly and in language that will result in an enforceable order.
- If the Special Master chooses to issue letters, memoranda, or other forms of informal decisions, the Special Master (and the parties) need to know that these will not become enforceable court orders.
- The Special Master's recommendation shall be provided to parties and counsel at least 24 hours prior to presentation to the court.

IX. Submitting Recommendations to the Court

- Prepare a transmittal letter indicating what is enclosed, what the court is asked to do, and outlining when and how the parties were provided with copies of the Special Master Recommendations prior to submission to the court.
- **Enclosures Include:**
 - Original and one copy of the Recommendations of the Special Master
 - Original and one copy of the proposed Order Adopting the Recommendations of the Special Master. The order shall be as set forth in Appendix C.
 - Notice/Proof/Declaration of Service of the Recommendations on the parties. (See

Appendix D)

- A copy of the Stipulation and Order Appointing the Special Master, with a request that it be returned. Special Master Recommendations must be in writing and provided to parties and their lawyers at least 24 hours before they are sent to the Court (see Section I). Highlight that portion of the Appointment Order which states whether the Special Master's recommendations become a permanent order upon presentation and approval by the court or after 15 days if no objection is raised.
- A self-addressed stamped envelope (adequate postage is required).
- **When the file-endorsed Order Adopting the Recommendations of the Special Master are returned:**
 - The Special Master shall provide to parties and counsel a copy of the file-endorsed order.
 - The Special Master shall prepare a Proof of Service and file it with the court. (See Appendix D.)
 - The original Proof of Services and one copy (for the Special Master's records) shall be mailed to the court along with a self-addressed stamped envelope.

X. Objections to Recommendations/Temporary Orders

- All motions objecting to the Special Master Recommendations shall be served on the Special Master as well as the other party and counsel.
- The Special Master may, but is not required, to appear at any hearing on objections to his/her Recommendations.

XI. Special Master Ex Parte Application for Emergency Orders Pursuant to Local Rule of Court 12.2

- Applications: Applications for Temporary Restraining Orders or other Ex Parte Orders are presented to the Family Law Assistance Center (FLAC) Legal Technician, Room 108 of the Court House. There is an attorney 'drop-box' available for attorneys and Special Master. Said applications are reviewed by a Legal Technician who presents the application to the appropriate judicial officer for a ruling. Except in extraordinary cases, judicial officers grant, grant in part, or deny said applications based only on written declarations which are signed under penalty of perjury. To the extent that such a declaration contains matter that is not admissible in evidence, the inadmissible matter will not be considered by the court. After having been acted upon by the court, Temporary Restraining Orders and Ex Parte orders may be picked up from the Legal Technician's Office.
- Notice. Unless notice of the application for Temporary Restraining Orders would frustrate the purpose of the order or would place the applicant or others in danger or cause irreparable harm, the parties must be given notice of the application twenty-four hours before the

court acts in order to give the parties an opportunity to present opposing declarations.

- The twenty-four hour period commences to run when the parties or counsel receive in his/her possession, during normal business hours, a copy of the application together with all supporting declarations and exhibits.

- The application for Temporary Restraining Orders or Ex Parte Orders is not complete unless accompanied by a declaration signed by the party setting forth the particulars of the notice or the reasons why notice has not been given. (See Appendix E)

- Temporary Restraining Orders or Ex Parte Orders must be personally served on the party/parties who are ordered to comply.

- A Proof of Service of the Temporary Restraining Orders or Ex Parte Orders must be filed (Send Original and one copy to court with self-addressed stamped envelope to the Court).

XII. Grievances

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XIII. Fees

- The Special Master should collect an advance retainer prior to the initiation of services as provided in the order. The court order will indicate financial responsibility for Special Master services. It is recommended that the Special Master require replenishment of the retainer before it is exhausted.

- Thereafter, bill regularly.
- Designate fees as “child support obligation”
- Collection
- Non-payment resignation. A Special Master may resign if fees are not paid.

XIV. Ethical Issues

- **Legal Mandates**

- The Special Master is bound by CANON 6D of the Code of Judicial Ethics (Appendix **)
- The Special Master must comply with California Rule of Court 244.1 (Appendix **)

- **Seven ethical problems often encountered in Special Master work:**

- **Informed Consent:** Informed consent implies providing our clients with information regarding a broad range of Special Master issues. These might include but may not be limited to the limits of confidentiality, fees, theoretical orientation, and typical protocols for resolving custody sharing impasses. Our clients should also have an opportunity to ask questions or clarify complicated procedures. Much of this information can be summarized in a handout. Some Special Masters may refer to this material as a "Parent Information Sheet" or "Special Master Agreement or Contract". Examples of these types of information handouts are contained in the Appendix F.

The court order appointing a Special Master often includes a data collection provision suggesting that the Special Master has access to information from a wide range of professionals who may be involved with the family. The order itself, however does not authorize the release of privileged or confidential information. A signed release of information remains necessary.

- **Multiple Roles:** There is general agreement among the mental health professionals in our community that the prohibition against dual roles or simultaneous roles as defined by our professional associations also applies to our work as Special Masters. We have identified two situations which would be unethical. The first encompasses any attempt to function simultaneously (or sequentially), as a psychotherapist and an Evaluator or Special Master. The second example is one in which there is an attempt to move from the role of Confidential Mediator to Evaluator or Special Master without informed consent. In each of these examples, problems with confidentiality would compromise any role assumed by the professional.

There is also general agreement that sequential roles can at times be appropriate. For example, a Non-confidential Mediator can at times shift to an evaluator role if the mediation was very brief, the mediator feels he or she has maintained neutrality, and all parties stipulate to the change in roles. Another situation where a sequential role might work is with a shift from Evaluator to Special Master. This again would require informed consent and a stipulation by all parties. A potential problem with this role change involves expert testimony: Evaluators routinely testify whereas a Special Master can choose to testify or not regarding his or her experience after being appointed Special Master. Separating these 2 roles in time might prove challenging. Collegial consultation during any of these role changing deliberations is advised as a prudent step in the process. A sample "Waiver of Conflict of Interest" form which might be helpful in these situations is included in the Appendix E.

- **Record Keeping:** According to the Stipulation and Order Appointing Special Master presently approved for use in Contra Costa County, "No formal record need be made. The Special Master's notes and records are not subject to subpoena by the parties or counsel." Documentation of the Special Master's work, both for clinical and billing purposes, however, is essential. It is generally agreed that the legal or mental health professional appointed as the Special Master would follow the standards of practice

for documentation defined by his or her professional association.

- **Ex Parte Communication** According to the Stipulation and Order Appointing Special Master (Appendix A) presently approved for use in Contra Costa County, "The parties and their attorneys shall have the right to initiate or receive ex parte communications with the Special Master." As an officer of the Court, however, the Special Master has the discretion to prohibit or allow ex parte communication on a case by case basis.
- **Bias:** Two types of bias are identified in relation to the Special Master's duty to avoid both actual bias and any appearance of bias: theoretical bias and perceived bias. Theoretical bias regards a professional's orientation based on his or her education, training and experience. For example, a mental health professional might have extensive training in attachment theory and therefore have a theoretical bias regarding mothers and infants. Prospective clients could interview their potential Special Masters regarding this type of bias. Perceived bias refers to a client's perception that the Special Master has favored the other party. With perceived bias, the grievance procedures outlined in the Stipulation and Order would provide an avenue to address those concerns.

Generally, a Special Master needs to be aware of his or her own biases (eg. gender, race, cultural), and refuse to accept cases which would compromise his or her ability to render an unbiased opinion.

Finally, any recommendations made by the Special Master should be supported by objective data collection.

- **Confidentiality:** According to the Stipulation and Order Appointing Special Master presently approved for use in Contra Costa County, "There shall be no waiver of the patient-therapist privilege as a result of any therapist communications with the Special Master." Therefore, although the Special Master process is inherently not confidential, it is possible and often necessary to insulate the confidential nature of a family member's therapeutic relationship with his or psychotherapist.
- **Consultation:** Special Masters are encouraged to seek consultation as needed particularly if this is a new area of practice or when confronted with a complexity beyond their expertise.