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HANDBOOK FOR SPECIAL MASTERS

- Judicial Version -

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FOREWORD

This volume is an abridged version of a manual for masters appointed in prison and jail cases. It was originally prepared in 1980 and was subsequently revised and updated in 1982. The earlier manuals provided newly appointed masters with a basic introduction to both mastering and corrections. Development of the manuals reflected the fact that numerous masters -- often attorneys with limited experience in corrections or correctional administrators unfamiliar with functions of a judicial master -- were being appointed by courts to play an innovative and demanding role, about which little information was available in legal or other literature.

This abridgement responds to the many requests received by the National Institute of Corrections from a variety of courts for information on correctional masters. The purpose of this version is to provide judges with some insight into the practical workings of an institutional, correctional mastership. While much has been written about the theory behind the mastering concept, this work represents a first effort to translate the first half dozen years of actual mastering experience into guidelines for future appointees.

Like the earlier manuals, the focus of this abridgement is on the practical aspects of mastering. The exclusively correctional materials contained in the original, as well as chapters on the law of corrections and public administration included in the revised and updated handbook, have been deleted. This is not a legal treatise on mastering; rather, it is an effort on the part of experienced masters to provide newly appointed colleagues, and judges considering the appointment of a master, with a general overview of mastering in correctional institutions. The masters who collaborated in the development of these manuals found that role to be continually frustrating, challenging, rewarding, controversial, and exciting.

Also like the earlier manuals, this abridged version has its limitations. It represents the experiences of only a handful of masters, all involved in a small number of prison and jail cases. Those experiences, moreover, were so diverse that formulation of generalizations useful to future masters was difficult. The type of correctional institution or system involved, the degree of cooperation between parties, the relationship between master and judge, and the extent and nature of the order to be enforced all varied widely. Because each mastership represented a unique mixture of all of these elements, each one differed markedly. It is against this diverse background that the judgments contained in this handbook must be measured.

Although this volume focuses exclusively on mastering in prisons and jails, we are aware of the broader applications of the device in other settings and institutions. Over the past several years, we have reached out to exchange information with masters in other fields, most notably in mental health and education cases. Much of what is included in this manual applies equally well in other institutional contexts, and we hope that our work will be useful to a wider audience.

We wish to give special recognition to the original contributors to the special masters handbook: Walter W. Cohen, J. Michael Keating, Jr., Vincent Nathan, and Linda Singer. Their initial product was revised and edited in this current form by Michael Keating.

Allen F. Breed
Washington, D.C.

CHAPTER 1

NATURE OF A MASTER

The use of a master to oversee implementation of institutional judicial decrees is a new development in the law. Like most such innovations, it is undergoing continual evaluation and reshaping as it is applied in different contexts and exposed to new tests and problems. One need only look at the variety of labels applied to the concept to appreciate its as-yet whimsical legal character: "special master," "master," "monitor," "compliance coordinator," "receiver," "human rights committee," "factfinder."

The lineage of the concept is ancient and prestigious, linked as it is to the original English courts of chancery. These historical trappings, however, can be burdensome as well as picturesque, since they carry with them a vision of the office that is often inappropriate. To many observers, the title of "master," conjuring up the traditional role and structure embodied in Rule 53 of the Federal Rules of Civil Procedure,^{1/} is a misnomer, especially in view of the wide variety of tasks currently assigned to masters.

In some instances, a master in a correctional case is expected to perform exactly the tasks envisioned in Rule 53, i.e., those of a fact-finding agent in an exceptionally complex factual situation who is responsible for compiling a factual report to which the judge will apply the law in deciding the merits of the case. An example of this sort of master is the appointment by one federal court in Florida of a medical administrator and physician to survey the range of medical care provided in state prisons in order to help the court decide whether conditions passed constitutional muster. This is a classic use of the traditional master to gather data prior to the rendering of a judicial decision on the merits. In this type of case, both the title and the rule accurately describe the anticipated functions of the individual appointed as a master.

A master may also fulfill a second, less traditional role. Sometimes a court will appoint a master after ruling that constitutional violations have occurred, but before the court is ready to issue a remedial order. Here the role of the master is to help in the development of an acceptable and effective remedial order. The master's assistance may take the form of advising or consulting with the parties, providing expertise to the judge as he or she develops a remedy or acting as a mediator on behalf of a court in a multi-lateral negotiation of a remedial order. In one case in Tennessee, a state court judge appointed a master to act as a consultant to the court in developing an order responsive to the proven violations, while in Rhode Island a federal judge assigned an existing prison master to mediate between contending parties to a consent decree to produce a mutually acceptable amended decree for the state's juvenile correctional system.

This type of assignment carries the concept of the master beyond the expressed intent of Rule 53. It usually reflects the judgment of a court that it lacks adequate expertise to shape a meaningful remedy in a complex institutional case and simultaneously acknowledges the need for the active participation of parties, particularly the defendants, in formulating a prescription for the elimination of past institutional abuses. The role of mediator assigned

to the master usually requires separate, ex parte communication with parties and imposes on the master the task of persuading the parties to accept and commit themselves mutually to a specific agenda of relief. This assignment necessarily involves a substantial departure from the rigidly adjudicative posture of a Rule 53 master.

Still a third role assigned to a master, and the one that is the primary focus of this manual, is that of policing implementation of a remedial order to ensure that the relief granted by the court in the face of constitutional violations is actually carried out by the defendants. Such an assignment occurs only after a correctional institution or system has been found unconstitutional. It also occurs frequently after the defendants have either refused to carry out the relief granted or shown themselves incapable of carrying it out. It may involve the interpretation of a decree, fact-finding, negotiation, mediation, or assistance to the defendants in planning the relief called for by the remedial order. The task may be undertaken in the face of resentment and hostility on the part of the defendants and of intense public and media attention.

The subject matter of such assignments varies widely. In some instances, a specific policy, procedure, or condition within a specific institution -- such as discipline or medical care -- can be the subject of the remedial order. In other cases, violations may have been found in a broad range of conditions, policies, practices, and/or procedures in either a single institution or a whole system. Masters have served, or presently serve, to oversee the development of a disciplinary system in a state prison for women in New York and the provision of adequate medical care in a state facility in Illinois. They have or are overseeing compliance with orders in omnibus conditions cases in jails in Florida, Illinois, Maryland, New Jersey, Ohio, and Pennsylvania; in individual state prisons in Georgia, Illinois, New Mexico, Ohio, Tennessee and Washington; and in entire state correctional systems in Alabama, Oklahoma, Rhode Island, and Texas.

Masters are appointed for a wide variety of reasons. The reason cited most often by courts is post-decisional recalcitrance on the part of the defendants to implement the mandated reforms. But other factors are also involved, including, for example, the acknowledgment that the court lacks the resources and the expertise to judge whether the defendants have carried out remedies fully and fairly, and an understanding that the adversarial process, while indispensable in ferreting out the truth of alleged constitutional violations, is simply inadequate to police the application of policies and procedures on a continuing basis in institutions. This last point is critical; by the end of a prolonged trial on the merits, the spiritual and material resources of the plaintiffs may be exhausted and strong hostility may exist between plaintiffs' counsel and institutional administrators. In the aftermath of the trial ordeal, courts in complex institutional suits have often felt the need for a dispassionate, objective review of the compliance process, a need that is not met by the traditional adversarial process.

This third and most characteristic use of an "institutional master" also represents a departure from a straightforward reading of Rule 53. While the role includes the fact-finding functions described in the rule, it also involves a great deal more.

Some courts have demonstrated an understanding of the distinctions among the three roles just described by appointing different people to carry out the distinct tasks. In a case involving the Georgia State Prison at Reidsville, for example, a federal judge appointed a special master to hear the evidence in the case, the classic Rule 53 master. Later he appointed another individual, also designated a special master, to oversee compliance with the desegregation provisions of his order and, finally, after a number of remedial orders has been issued, he appointed still a third "special monitor" to review compliance with all of the provisions of all of the orders. Conversely, other courts have opted to assign two or more roles to the same individual, invoking as authority Rule 53.

This brief review makes clear that the institutional master, whose activities are the subject of this manual, is something more than, and different from, the traditional master. The pragmatic need of courts to deal with unwieldy and resistant institutions has resulted in the evolution of a distinctive legal device that probably has firmer theoretical roots in the power of an equity court to enforce its decrees than in Rule 53. In this development, the immediate needs of functioning courts have outstripped legal theory. This situation is not without its dangers, for courts -- especially appellate courts -- have set only a tentative stamp of approval on the device and have failed to defined its powers and limits.^{2/}

CHAPTER 1 FOOTNOTES

1/ The following are pertinent sections of Rule 53, Federal Rules of Civil Procedure:

Rule 53. Masters.

(a) **APPOINTMENT AND COMPENSATION.** Each district court with the concurrence of a majority of all judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) **REFERENCE.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation or damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) POWERS. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury.

- 2/ In its review of the case involving the Texas Department of Corrections, Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Texas 1980), the U. S. Court of Appeals for the Fifth Circuit recently provided an unambiguous endorsement of the use of an institutional master. See Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982).

CHAPTER 2

FUNCTIONS OF A MASTER

The preceding chapter merely hinted at the variety of tasks a master might be called on to undertake. What follows is a closer look at some of those functions, together with some practical guidance on how a master might be expected to cope with them.

The starting points for any consideration of the tasks to be performed by a master have to be the order of reference and the remedial order he or she is appointed to supervise. The overriding objective of the master is to secure compliance with a specific court order. The means adopted in a particular case will depend on the nature, complexity, and specificity of the ordered remedies; the relationship between the parties; the degree of hostility of the defendants toward the court and master; and, importantly, the judge's view of how the master ought to proceed. The means adopted in any particular case must be subordinated to the overall, dominant purpose of the mastership, which is implementation of mandated remedies.

It is possible to divide the functions of a master into two broad categories, the first related to the traditional, fact-finding role of a Rule 53 master, the second arising from the new post-remedial responsibilities of the master. The first category of functions includes such tasks as the collection of data, the holding of hearings, and the preparation and submission of reports to the court.

Collecting Data

There are three principal sources of data on compliance on which a practicing master must rely:

1. Documents. Any paper generated by the defendants is a potential source of information, whether it takes the form of reports, summaries, statistics, logs, checklists, or something else. A master should quickly become familiar with existing departmental or institutional documents pertinent to the remedial order. Such documents may be episodic, such as policy descriptions or incident reports, or continuing, such as disciplinary or post/position logs. But even before the master begins to review existing records, he or she should analyze exactly what information, documentary or otherwise, may be needed to determine whether the defendants are complying with the order. Because existing documentation frequently will not provide required data, the master may decide to develop his or her own reporting forms or requirements. It is important to carefully think through the purpose and effectiveness of any new requirements for documentation that may be imposed on the defendants. Useless demands for paperwork will serve little purpose except to increase the probable level of resentment of the defendants.

For a period after his or her appointment, a master may want to require the defendants to routinely submit copies of all basic weekly or monthly summaries, statistical analyses, or other reports relevant to issues in

the remedial order that are generated in the normal course of operations. After reviewing these submissions for a period, the master may elect to end or modify his or her requests, as the master can easily become buried in paperwork that distracts from the main endeavor. Whether the documentary burden rests more heavily on the master or the defendants, the key element in determining its usefulness is the contribution it makes to increasing the master's knowledge about the defendants' compliance.

Some practicing masters have suggested that there is a healthy prophylactic effect in requiring copies of routine reports, especially in areas such as discipline, administrative segregation, incident reports, and inmate counts. Knowledge that the master is, or may be, reviewing such reports may possibly make people more careful in their behavior; it is just as likely to simply make them more careful in their reporting. Thus, the master should always view with some skepticism the contents of written documents.

2. Observations. Prisons are not pleasant places, and the rationalization will recur often in the career of a master that he or she need not spend much time -- or more time -- in an institution to know what is actually happening there. It would be wise, particularly in the early days of a mastership, to reject that illusion. A master needs to know the structure, the rhythm, the feel, the people, the pace, the programs, the life of the institution or system within which he or she operates, especially if the case involves a variety of conditions. One can obtain this understanding only by spending time in the institution, observing meetings, sitting in on hearings, looking at programs, and visiting cellblocks and dormitories. Excursions to an institution should not be random or unplanned. There ought to be a purpose for each visit, and the master should plan to be present in the institution on a regular basis. At first, it may be a good idea to notify the institution in advance of pending visits, unless there is specific reason not to. If the master visits often and regularly enough, eventually there will be no need for advance notice, since his or her presence will be accepted as part of the regular institutional routine.

At the beginning of a mastership in an omnibus conditions suit, it makes sense to hold introductory meetings with every interested constituency both within and outside the institutions, including inmates, correctional officers (and their union, if one exists), non-custodial staff, administrators, legislators and political executives, and appropriate special interest groups. These meetings should feature both a personal introduction and an attempt to educate the participants in the nature, purpose, and limits of the master's role. Done effectively, these initial efforts can provide the fledgling master with considerable general information on the potential for, and obstacles to, implementation of the court order in the system within which he or she must work.

More specifically, the newly appointed master will want to attend any meetings and hearings that are pertinent to the remedial order, such as classification and disciplinary hearings. There is no better way to understand quickly how routine administrative decisions are reached. Such attendance will also help to accustom the defendants to the master's presence and will provide valuable raw material for evaluation of administrative procedures.

Finally, the best way to get an accurate feel for prison life is to spend time in the living and program areas of the institution. All kinds of people, both inmates and staff, will approach the roving master with complaints, requests, information, harassment, flattery, and lies. A healthy dose of skepticism and a dollop of experience will quickly teach a master to place such contacts in their proper perspective, and the sensitive ear can learn much about institutional procedures and problems from these apparently random tours of a correctional facility.

There are obvious limits to the value of a master's direct observations. Defendants and their agents are unlikely to repeat the abuses that led to court intervention in the presence of the data-gathering master. Procedures and practices encountered by the master tend to be model examples of reasonableness and fairness, and the master may never know whether observed performances accurately reflect regular operations or are a formal charade acted out for the prying master. The difficulties hedging the usefulness of direct observations compel a reliance on hearsay in effectively monitoring a court order. Knowing that he or she cannot hope, except in the rarest of instances, to personally confirm compliance or non-compliance with many of the specific aspects of a broad remedial decree, the master must develop access to reliable second-hand sources of information.

3. Interviews. Interviewing is one of a master's central skills. The master must be able to elicit information, weigh the credibility of its source, check it for accuracy, and understand and filter out the bias and animus that infect it. Chapter 7 will consider in greater depth some interviewing techniques; here it is important to consider the various constituencies that a master will interview.

At the beginning of a mastership, which often follows a sometimes bitter trial on the merits, the level of hostility of administrators toward the court and the court's representative can be extreme. Even in cases where parties have agreed to a consent decree or outwardly welcomed court intervention, there may be latent antipathy that is pervasive, though never articulated. No master should be surprised by such a reaction, because his or her presence is an unmistakable indictment of current institutional or departmental management. As the paladin of a court order requiring extensive reform of existing unconstitutional conditions, procedures, or practices, the master almost always is viewed as a threatening agent of unwanted change. Thus, virtually every active master can recite informal -- and sometimes formal -- administrative efforts to thwart and limit his or her contact with staff and inmates. If the hostility of the defendant administrators is open and intense, the master can expect that his or her every contact may be reported; that people interviewed often will be debriefed; that some of his or her interviewees may be plants or provocateurs. This suggests that administrators, as a group, may be expected to yield little useful information in the early stages of a mastership. However, there may be individual exceptions who are friendly and open with the master, and these can be valuable sources of information and leads. Moreover, after the passage of time has reduced tensions and allowed a better understanding of the role and limits of a mastership to spread, administrators are likely to become a more approachable and fruitful source of information for the master.

Most staff members of a correctional facility or system will follow the lead of their administrators in shaping their own relations with the master. They too are likely to feel threatened by the mandate for change seemingly personified by the master and fear for a loss of control over their immediate environment. Watchful waiting most often seems to characterize their initial response. Another complication in dealing with staff is that any fraternization on the part of the master is likely to taint his or her credibility with inmates, whose distrust of correctional officers in particular sometimes seems to verge on paranoia. With some exceptions, the master's development of reliable information sources among staff will take time. Unfailing politeness and pleasantness; normal curiosity about their functions and responsibilities; a willingness to corroborate or check the accurateness of inmate complaints and accusations, particularly wild ones; and an understanding of the basic decency of most correctional officers coupled with an appreciation of the difficulties of their job should eventually wear down the preconceived notions of most staff, who may become a rich store of compliance information.

The last major source of institutional information for the master is the inmate population. Because of the likely initial hostility of the defendant system or institution and its employees, the master often must rely heavily, even exclusively, on the testimony of inmates to gauge the extent of defendants' compliance with court orders. Many inmates are deeply biased, and their input must be probed and checked constantly. Much will be said later in Chapter 6 about some of the potential pitfalls in the relationship of a master with inmates (as well as with the other possible constituencies in a typical mastership), so here it is necessary only to warn the neophyte master against adopting an uncritical attitude regarding the information on compliance offered by inmates. While many prisoners tell the truth, some lie; all are captives to a large extent of animosity, frustration, and deep-seated hostility, which often combine to cloud their observations and impair their judgments.

Inmates can provide the master with information in a variety of ways. Some masters have relied principally on written correspondence; others have interviewed individuals on a more or less random basis; still others have formed formal committees of inmates with which the master meets regularly. Inmate correspondence can be helpful in deciding whom to interview by pinpointing individuals with particular problems related to compliance issues. Whatever the form of contacts, inmate input is essential to the master.

Holding Hearings

Rule 53 confers upon the master the authority to hold evidentiary hearings, and orders of reference in institutional cases characteristically empower masters to hold formal hearings. In practice, however, masters have held such hearings only reluctantly. The reasons for the reluctance are obscure; one explanation may be the fact that the parties, after disagreeing vehemently with the written tentative findings and recommendations of a master, tend to view a subsequent hearing before that same master as redundant and useless. They much prefer a hearing before the court.

A procedural rhythm has slowly emerged from the experience of masters. Within it, an individual master submits to the parties a written report on compliance, together with recommendations for the court's approval or further action. Parties may object to the master's report within a specified number of

days or request a hearing before the master, an independent hearing officer, or the judge to prove and argue their objections. The order of reference typically will specify who will serve as the hearing officer, if one is required. If the parties fail to object, the report of the master normally is considered final; if written objections are filed, they will be evaluated by the court in responding to the master's recommendations; if a hearing is requested by either party, the master accordingly will schedule a formal proceeding. Appendix A contains a local rule of court developed during the Rhode Island mastership to establish a normal course of review of the master's findings.

A master's hearing is a formal judicial exercise in which all of the rules of evidence and civil procedure apply. To the master who is a lawyer, the exercise may not be baffling; to the non-lawyer, it may be. The master without legal training or hearing experience should obtain assistance, formally or informally, from a friendly attorney on questions of procedure, admissibility of evidence, and other legal matters.

Some simple guidelines for a master confronted with a hearing may be helpful.¹⁷ It is essential that the issue or issues to be heard before the master be clearly and narrowly defined. A hearing on objections to a master's report is exactly that, a hearing on the objections only. There is no need for the parties to prove or disprove the whole report, only those portions of the report they dispute. The test of relevance throughout the hearing will be the bearing of the proffered evidence on the specific issue of the report in dispute. The master must hold parties and their counsel strictly to this rule and help them identify precisely the issue(s) to be resolved prior to the hearing. Often enough, a pre-hearing effort to narrow the issues will eliminate the need for a hearing altogether, especially if it turns out that there is no dispute over facts but only over the master's interpretation of those facts or his or her recommendations. The purpose of a hearing before the master, again, is simply to resolve disputes over the factual findings of the master. Arguments over a master's interpretations and recommendations can be made in writing first to the master and then, if the master rejects them, to the court.

In some situations, however, counsel, and sometimes even the master, tend to forget the formal nature of such hearings and treat them as informal proceedings. This can lead to the introduction of hearsay and other tainted evidence that eventually may fatally flaw the hearing results and embarrass the master. Because masters generally are not trial lawyers, have limited judicial or quasi-judicial experience, and may not even be attorneys, their command of applicable rules of evidence may be shaky. It is important, therefore, that they secure competent help or educate themselves carefully to carry out their hearing duties.

Writing Reports

A critical task of the master is the reporting of his or her findings and recommendations to the court. Most orders of reference contain detailed provisions requiring the master to file written reports on the status of the defendants' compliance on a regular basis. Not infrequently these reporting requirements are burdensome and distracting. One early master, obliged to submit a monthly report to the court in an omnibus suit, found himself doing little else but churning out voluminous, time-consuming monthly chronicles.

Only by getting the reporting requirement in the order of reference reduced substantially was the master able to resume a measure of control over his time and efforts.

The broader the range of the remedial decree, the more difficult the problem the master faces in organizing his or her reports. It is not easy to put together a coherent, comprehensive, and clear report on a dozen different subject areas in a number of institutions and settings. The success of the effort will depend to a large extent on the master's prior development of an overall strategy for the conduct of his or her office. Without such a strategy to focus fact-gathering efforts, the master may flounder from issue to issue in both monitoring and reporting. Early planning and organization will dictate methods and priorities and should result in record-keeping systems and files that provide an automatic structure for subsequent reports. In any event, the clear and logical organization of reports is a key element in their effectiveness. Appendix B provides a copy of the coded filing system adopted by the master in Ruiz prior to the assumption of his duties.^{2/} It clearly demonstrates the usefulness of prior planning in organizing a complex mastership.

Because the master's reports are simultaneously legal documents, public reports, and professional evaluations, their composition can be a formidable challenge. As legal documents, they are part of a procedural flow that must be acknowledged. Thus, each discrete report should recite its own procedural ancestry. There must be a careful delineation among findings of fact, conclusions, and recommendations, with the latter two being concrete, specific, and separate from the general text. Because they involve judgments about professional correctional conduct and practices, masters' reports must reflect an understanding of applicable professional terms and norms. Adequate response to these legal and professional needs, however, can turn such reports into an indecipherable stew for the general public, which is entitled to know whether the defendants are in compliance. Threading a path of clarity and readability through such a thicket of obstacles requires thoughtful preparation and considerable writing skill.

One important note: It is virtually inevitable that at some point in the course of a mastership a word, phrase, a characterization intended by the master to be critical but objective will be construed by one of the parties as libelous. Each word in a master's report, especially critical ones, must be carefully weighed to ensure that it is justified and appropriate. Adjectives and adverbs particularly should be scrutinized carefully because of the extraordinary sensitivity of parties in these suits. Almost every master can repeat tales of tremendous offense and stern exception being taken to words or phrases that seemed neutral and benign in the drafting. The objectivity of the master is too vital and fragile a commodity to be put at risk through the use of ill-considered, sarcastic, or acerbic language.

It is not just the substance and language of a master's report that can cause problems; the very method of its filing with the court and release to the public can raise a furor, as several masters have learned. In some courts, a reporter reviews filings daily; in certain highly visible cases, reporters monitor filing dates closely. The result occasionally has been the media's public release of a master's findings even before the parties have seen the report. The ensuing outcries caused by such occurrences could have been

prevented by only a modicum of forethought, but the possibility of premature public release simply was not anticipated.

These, then, are the traditional duties of a master: collecting data, holding hearings, preparing reports. These activities will occupy a majority of the time of masters in correctional cases, but they do not complete the list of functions masters are called on to perform. These other, extraordinary duties, described in the following paragraphs, flow from the master's involvement in the implementation of a complex remedial order in an equally complex institutional and organizational context and represent significant accretions to the evolving concept of the institutional master.

Interpretation of the Decree

The remedy in a prison or jail case is couched in general terms citing various standards, codes, or prior judicial rulings which defendants are directed to incorporate into conditions, practices, and procedures of the particular institution or system the court has found wanting. Findings on the merits that either precede or accompany the remedial order may add an element of specificity by listing the items the court has found to be unconstitutional. This still leaves a large gap. For example, if a court condemns in detail the inadequate physical conditions of an institution and requires the defendants to meet "applicable American Public Health Association (APHA) standards" to rectify those conditions, the defendants do not yet know specifically what they must do to comply with the order. Like most standards, those developed for public institutions by the APHA are designed to serve a multitude of different facilities and are themselves broadly stated. Applying them to prisons -- and to a particular prison -- may be extremely difficult. Standards, moreover, change over time. New groups develop more narrow and appropriate guidelines; the earlier wisdom of standard setters yields to further research and experimentation. Standards, finally, are replete with general terms such as "reasonable" and "feasible," and often distinguish mandatory from discretionary guidelines.

All of this means that the typical remedial order in a correctional case is rife with ambiguity. It is a principal early preoccupation of the master to work out these ambiguities with the parties and their counsel.

Vagueness is not the only infirmity a newly appointed master is likely to find in his or her remedial order. Such orders characteristically are written by judges and their clerks with little administrative experience, and the result not infrequently is unfamiliarity with or indifference to reasonable constraints of time and resources that inhibit and sometimes prevent effective administrative action. A court order may decree the construction of a new prison within a year, but it usually takes planners, legislators, architects, and contractors much longer to actually erect one. Only rarely will the first spade-full of dirt be turned for a new prison or jail within a year of the order to build.

Thus, in a frequently long and laborious process, the master, acting on behalf of the court and its mandate, must negotiate with the parties and sometimes mediate between them as they struggle to determine the exact meaning for them of the remedial decree. These negotiating and mediating tasks of the master represent possibly the most significant contribution of

this developing judicial device, for the master's presence allows the remedial decree to be a dynamic, flexible response to complex institutional problems. By providing a means for transferring initial interpretation and implementation of the remedy out of the strictures of the adversarial process and into a process of negotiation with the assistance of an objective intervening third party pledged to the integrity of the overall remedy, the mastership can limit hostility and confrontation and promote flexibility and reasonableness among the parties in the difficult process of introducing mandated change.

We shall consider in Chapter 7 some negotiating and mediating techniques a master can apply; here it is enough to note that the essence of mastering, to a large degree, lies in the process of persuading parties, most often the defendants, to accept, ascribe to, and fully implement the decree. After the meaning of a decree has been definitively established, the master will continue to negotiate with the parties and mediate between them as individual issues of compliance are documented and argued over time. Next to traditional fact-finding and reporting tasks, masters will find themselves devoting most of their time to continuing negotiations and mediation.

Planning Compliance

The newly appointed master may be surprised to find himself or herself involved in the defendants' planning for compliance with the remedial decree, but such a development is not unusual in this kind of case. The planning function of the master may be minor, involving nothing more than establishing a list of priorities among the required remedies that the defendants must follow. On the other hand, several masters have found themselves intimately involved in helping defendants develop specific plans to meet the court's requirements. Most often such participation comes after a defendant administration has shown itself to be incapable of aggressively assuming basic planning functions.

The result of a master's planning efforts is often a schedule for gradual compliance carefully worked out with the defendants that is acceptable to the plaintiffs and the court. The assumption of planning functions by the master, at least to date, has occurred only in cases where there is a large degree of cooperation between the master and the defendants. Thus, administrative planning may be another skill useful to masters.

Resource Development

In a number of prison and jail cases, masters have directly helped defendants develop the resources needed to comply with the remedial order. Such help can take the form of suggesting an outside correctional or administrative consultant who may show the defendants a cheaper, more feasible way of accomplishing required changes. The National Institute of Corrections and the Federal Bureau of Prisons have been invaluable sources of such technical assistance to masters and the defendants in correctional cases.

Until the Law Enforcement Assistance Administration (LEAA) was dismantled in 1981, some masters were able to help local correctional jurisdictions obtain federal funds to improve physical conditions, introduce new programs, and train staff. The current lack of funds reduces the capacity of

masters to help very much in this regard, but local correctional administrators frequently are unfamiliar with outside sources of funds -- whether federal, state or private -- and the master can still provide some useful information on funding to struggling defendants. Frequently, moreover, even if local jurisdictions are aware of available funds, they do not know how to pursue them effectively. Again, a master acquainted with the skills of grantsmanship can help the defendants mount an effective effort to tap dollars needed to comply with the decree.

More directly, the appointment of a master, whose very presence creates personal and inexorable pressure for compliance, has an impact on local governmental units responsible for funding the improvements ordered by the court. Some defendant directors of corrections or institutional superintendents will confess candidly that a court order, with its implicit threat of sanctions for non-compliance, is a powerful incentive for local budget-makers to free funds for long-neglected correctional needs. While it often seems to be customary for budget-makers to grumble about the court ordering such expenditures, as well as its costly, unproductive master, the funds almost always are forthcoming. There may not be much a master can do to help this process except to be ready to provide information relative to the court order and its potential costs.

Institutionalization of Results

Masterships terminate in a variety of ways. Some have ended with a formal decree spelling out in detail what the defendants must do in the future to maintain compliance. Others have simply faded away with no final comprehensive report or order. Whatever the eventual denouement, a master should consider from the beginning ways of institutionalizing any changes brought about by the remedial order. Some correctional institutions and staffs may be deeply opposed to change, and first impressions of the defendants' cooperative malleability may yield to a growing understanding that the defendants are only pretending to cooperate while waiting for the judicial storm to run its course. The development of mechanisms to help ensure that ordered remedies become permanent policies and practices will be a major challenge for the master. A number of masters have found both inmate grievance procedures and inmate councils useful devices in meeting this challenge.

An effective administrative grievance procedure incorporated in a termination order provides prompt hearing of complaints alleging violations of the court's order and subsequent backsliding on the part of the prison or jail administration. The Center for Community Justice in Washington, D.C., has spent more than a decade in the research and development of administrative correctional grievance procedures, and its various publications and studies should be consulted by any master interested in grievance mechanisms.^{3/} Much of the Center's work has been incorporated in the American Bar Association's standards on the rights of prisoners and in the Civil Rights of Institutionalized Persons Act (P.L. 96-247), passed by Congress in 1980.

An effective inmate council is another tool adopted by some masters to ensure that institutional administrators -- who sometimes may be the last to know what actually transpires in the cellblocks and dormitories of their own facilities -- are aware of serious problems related to the court's remedial

order. Correctional administrators often earnestly formulate and promulgate new policies and procedures in response to courts, only to find them largely ignored in practice by the lower echelons of correctional staff. Inmate councils can be extremely useful in documenting line staff departures from reform policies.

While terminating the services of the master in Taylor v. Perini, ^{4/} a case involving the Marion (Ohio) State Correctional Institution, the court rescinded its original order and entered a new one incorporating all of the various compliance plans developed during the course of the mastership. This final order required maintenance of the facility's inmate council and establishment of an institutional and departmental grievance procedure. The order also provided substantial incentive for defendants' use of the grievance procedure by requiring inmates with complaints related to the court's order to exhaust the procedure before seeking a contempt citation from the court.

Informal Advisor to the Judge

One last function needs to be addressed, although its importance will vary widely in different masterships. A popular version of the master's overall job describes the master as the "judge's eyes and ears" in all matters related to the remedial order. It is true that a judge most often appoints a master to find out on a continuing basis whether the defendants are obeying the remedial order, and it becomes, therefore, a prime function of the master to keep the judge informed about the defendants' progress. On the other hand, the master must remember that the judge may be required from time to time to hold formal evidentiary hearings and, possibly, contempt proceedings in the case. Thus, there is great need for the master to be sensitive to the implications of these contradictory demands. Fortunately, the task of remaining aloof from informal fact-finding is fundamentally that of the judge, and one judge's attitude on this matter may differ greatly from that of another. Judges usually have shared with masters their preferences in this regard, with some encouraging the informal consultation shunned by others.

Occasionally, the reliance of a judge on the master for information and advice on prison matters extends far beyond the remedial decree, and some masters have found themselves appointed to investigate and report on complaints unrelated to the issues in the original suit. If the master is a full-time employee of the court, it is hard to refuse such assignments, but they can become burdensome. A related common practice of judges in these correctional cases is the referral to the master of all prisoner petitions submitted to the court, whether or not they raise issues covered by the remedial decree. Masters, thus, often find themselves reviewing pro se prisoner petitions only tenuously related to the suit in which they serve as master.

This list of functions indicates how far the tasks of an institutional master have strayed from the parameters of Rule 53 of the Federal Rules of Civil Procedure. The rule's implicit ban against ex parte communications is meaningless for a master obligated to negotiate with the parties and mediate their differences, to help plan the defendant's compliance, to seek out and procure technical and financial resources for the defendants to institutionalize practices and policies, and, finally, to advise the judge on prison matters unrelated to the remedial order. Judges and masters must be continuously

aware of and responsive to the manifest departures from traditional notions of mastering involved in such activities.

CHAPTER 2 FOOTNOTES

- 1/ An excellent article with general information on the proper conduct of a master's hearing is John M. Greaney's "Trials before Masters: A Procedural and Substantive Primer for the Practicing Lawyer," 63 Massachusetts Law Review 195 (1978). While geared to Massachusetts procedure, its lessons are applicable more broadly.
- 2/ Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), involving the Texas Department of Corrections.
- 3/ The Center for Community Justice is located at 918 16th Street, N.W. Washington, D.C. 20006 (Tel: (202) 296-2565), and its Executive Director, Linda Singer, served as the master in a case involving Bedford Hills, New York State's major institution for female offenders.
- 4/ The master's final report in Taylor v. Perini was published in 477 F. Supp. 1289 (n.D. Ohio 1978); other reports of the master in this case may be found at 431 F. Supp. 570 (1977); 446 F. Supp. 1186 (1977); and 455 F. Supp. 1255 (1978).

CHAPTER 3

POWERS OF A MASTER

The three basic sources of power for a master are Rule 53 of the Federal Rules of Civil Procedure, the order of reference appointing him or her, and the inherent power of a court to enforce its equitable decisions. The best available analysis of these sources and the nature of a master's power is a 1979 article in the University of Toledo Law Review by Vincent M. Nathan, the dean of institutional and correctional masters.^{1/} Nathan's commentary provides a thoughtful study of an evolving judicial device and is widely recognized as a significant contribution to an understanding of the conceptual underpinnings of the institutional master.

We have already encountered the limitations of Rule 53 in our description of the diverse and complex tasks of a master. For all of these limitations, however, the rule remains central to an analysis of the legal powers conferred on a master by an appointing court. As indicated earlier, Rule 53 authorizes a master to gather evidence, hold hearings, and file reports with the court. It also empowers a master to subpoena documents, to admit and exclude evidence, to examine witnesses under oath, and to order transcripts of hearings.

Rule 53(c) also seems to suggest that the powers of a master may be expanded or contracted in the order of reference, that is, in the court order appointing the master in a specific case and delineating his or her powers and responsibilities: "The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts...." When appointing masters in institutional reform cases, judges almost uniformly have issued an order of reference spelling out the powers of the master just appointed. These orders often reflect some of the same ambiguity about the proper role of the master within a Rule 53 appointment cited in the previous chapter and assign to appointees both traditional and non-traditional powers and duties.

Because the power to accomplish much of what a master does will most often be traced back to the order of reference, and, through it, to Rule 53, it behooves a master to make sure early that the order appointing him or her is adequate. Unfortunately, by the time a master is appointed in most cases, the order of reference already may have been drawn up and issued, and the new master is faced with an already fixed charter. Before accepting such service or as soon as possible after appointment, the prospective or fledgling master should carefully review the order of reference and be satisfied that it provides sufficient power to operate effectively. Chief among the general powers the master should demand are unrestricted access and adequate support. Specifically, an order of reference should include all of the following provisions:

- Unlimited access to all physical facilities involved in the litigation;
- Confidential interviews with staff and inmates;

- Access to all relevant records and documentation in the possession of the defendants;
- Access to and the right to participate in institutional hearings;
- Power to hold hearings, call witnesses, and take testimony under oath; and
- Power to hire adequate support staff.

In some cases, the order of reference will have conferred additional powers on a master, including the authority to seek show-cause orders for contempt when parties fail to comply with the decree; to recommend the transfer, hiring, or termination of institutional staff; or to mediate or arbitrate disputes and grievances arising under the remedial order. Appendix C contains three typical orders of reference appointing masters in cases involving, respectively, a Toledo, Ohio jail (Jones v. Wittenberg), the Rhode Island state-wide prison system (Palmigiano v. Garrahy), and the Texas Department of Corrections (Ruiz v. Estelle). These orders provide useful examples against which to measure the adequacy of orders of reference in other cases.

The customary use of judges of an order of reference and the ritual citation of Rule 53 does not mean that courts are insensitive to the infirmities of the rule in defining the powers and tasks of an institutional master. More than 20 years ago, U. S. Circuit Court Judge Irving R. Kaufman pointed out that Rule 53 was not the only source of a master's power:

Over and above the authority contained in Rule 53 to direct a reference, there has always existed in the federal courts an inherent authority to appoint masters as a natural concomitant of their judicial power.^{2/}

More recently, Texas federal Judge William Wayne Justice invoked this "inherent authority" in appointing a master armed with special powers. Judge Justice reasoned that a court is obligated to see that its remedial orders are implemented; it, therefore, may take necessary steps to ensure their enforcement. The appointment of a master in Ruiz, wrote the judge, was necessary to ensure full implementation of the prescribed remedy.^{3/}

Ex parte Peterson is the leading case on masters and it provides a framework based on principles of equity for the appointment of masters in federal courts. In that 1920 case, the U.S. Supreme Court stated with clarity its view of the source of a master's powers:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.... This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal

courts, when sitting in equity by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.^{4/}

While most courts appointing masters in institutional reform cases have relied exclusively on Rule 53, others have followed the lead of Ex parte Peterson and sought justification for the appointment elsewhere. When federal Judge Frank M. Johnson created a "human rights committee" to oversee implementation of his remedial decree in the Alabama state prison system, he did not mention Rule 53. ^{5/} Others have pondered the applicability of Rule 53 and specifically rejected it:

Federal Rule of Civil Procedure 53 does not delineate the parameters of a court's authority. By reciting some of the functions of a Special Master, Rule 53 does not preclude others so long as the Court does not abdicate its decision-making responsibilities.^{6/}

The results of both these approaches were reversed on review, however, so their value in inducing the legal profession to apply measures other than Rule 53 to define the powers of institutional masters is limited. They reflect, nonetheless, a growing restiveness among judges at the trial level with the constraints and apparent inapplicability of Rule 53 to the remedial and enforcement structure they are seeking to create in individual institutional cases.

In its search for additional support for the appointment of a master, the court in Ruiz suggested that another potential source for some of the extraordinary powers of a master might be found in Rule 706 of the Federal Rules of Evidence. This rule authorizes a court to select and appoint expert witnesses to make and report findings of fact. Such an expert witness may be deposed by the parties, called on to testify by the court or any party, and subjected to cross-examination by parties, including the party calling him or her as a witness. Other than providing a structure for the orderly introduction of a master's testimony in a court proceeding, it is unclear what the rule adds in the way of legal underpinning for the post-remedial, expanded activities of a master.

To date, there has been little evaluation of the nature and extent of a master's powers and even less reflection on the sources of those powers by federal appellate courts. While rejecting Judge Johnson's creation of a 39-member committee to monitor implementation of his order in Alabama's prisons, the U. S. Court of Appeals for the Fifth Circuit seemed to approve the alternative appointment of a master or monitor, suggesting that the committee's functions "could more properly have been assigned to the magistrate or to a master, qualified to hold hearings, make findings of fact, and report to the Court for its approval or disapproval."^{7/}

This hardly amounts to an unqualified endorsement of the institutional master; it also provides few clues to the future appellate posture on the use of masters in institutional reform litigation. The appointment of masters has been a peripheral issue in several appellate decisions to date, but little has been said about the concept in these rulings, which have mentioned the device only to condemn specific appointments as premature or inappropriate.^{8/}

In early 1982, it appeared as though the Ruiz case involving the Texas Department of Corrections would provide definitive answers about the extent and limits of a master's powers. The defendants filed a motion seeking the dismissal of the master and his monitors for abuse of their powers, citing a series of alleged errors and misjudgments justifying termination. Hiring the law firm of Fulbright & Jaworski to handle their position on the mastership, the defendants condemned the master/monitor's first substantive report on the highly charged issue of the department's alleged continued use of inmates as building tenders or trustees, a practice supposedly ended by the remedial order. As the result of a wide-ranging settlement of several issues in March 1982, the defendants' motion for dismissal of the master was dropped, thereby avoiding a decision on the appropriateness of the master's allegedly improper actions.

The defendants, however, had earlier appealed the original remedial order in Ruiz, including the order of reference. In its review of the defendants' challenge, the U.S. Court of Appeals for the Fifth Circuit provided the fullest consideration to date by an appellate court of the use of an institutional master. The Fifth Circuit approved the lower court's appointment of a special master and monitors to oversee implementation of the prescribed remedy and rejected the appellants' attacks on the necessity for and validity of the use of the device. The Fifth Circuit also endorsed specifically the district court's invocation of the authority of both Rule 53 and its inherent equitable authority as the dual bases for its appointment.^{9/}

In at least two cases, neither of which ended happily or successfully, the parties themselves determined the powers that would be conferred on the master or "compliance coordinator." In both instances, the defendants, the state-wide departments of corrections in Arkansas and New Mexico, agreed to hire and support the coordinator, only later to become disgruntled with their agents' negative reports and what was perceived as an unwillingness to share critical information. The result in each case was the departure of the coordinator and the generation of considerable ill will. These experiences argue persuasively for the necessity of the master's independence, ensured by protected status within the judicial fold.

Not surprisingly, as more masters have been appointed and gone to work in institutional cases, there has been mounting criticism of the concept. Much of the criticism has focused on the role of masters in mental health cases, which tend to include all of the complex elements found in correctional cases and an additional controversial ideological issue. Most often in mental health cases, a court appoints a master to specifically supervise the de-institutionalization of a facility or system that has been found to be constitutionally offensive. In some cases, the master may be a strong advocate of de-institutionalization who acts aggressively to move people out of the condemned facility and into the community. The mental health master's prime task, therefore, is elimination or sharp reduction in the size and number of institutions operated by the defendants. Given this background, it is hard for masters in such cases to maintain an appearance of objectivity; in fact, these masters often are open advocates of de-institutionalization. This has led to increasing unhappiness with such masters, particularly as a professional and public backlash against the concept of de-institutionalization has developed.

Defendants' struggles against masters in mental health cases have assumed an indirect and subtle form. In New York State, after a series of unsuccessfully disputes with the findings and recommendations of a committee of monitors appointed to oversee improvements in conditions at the Willowbrook Developmental Center on Staten Island, the state legislature simply rejected Governor Hugh Carey's annual budgetary request for an appropriation to support the unpopular committee. The federal district court that appointed the review committee in the first place promptly found the governor, a named defendant in the suit, in contempt. On the appeal of the governor, however, the U. S. Court of Appeals for the Second Circuit reversed and ruled that the governor could not be held in contempt because he had done all he could do legally to obtain funding for the committee. "...(T)he court cannot compel the Governor to act unlawfully."10/

The State of Pennsylvania, inspired by the New York example, similarly took aim at the funding of the mastership in what is probably the leading case in mental health de-institutionalization. The legislature reduced the requested budget of the master by half in 1981. A further, and perhaps fatal, blow to this Pennsylvania mastership occurred when the Supreme Court decided almost simultaneously that the federal statute, violations of which the mastership was created to cure, merely exhorted states to de-institutionalize, rather than requiring them to do so, in order to participate in federal funding.11/

But it is not just mental health masters who have stirred up controversy. Within the broader context of growing discontent with so-called judicial activism, pressure increasingly has been brought to bear on "intrusive" courts and their reforming staffs. The gamut of dissent runs from the raucous and querulous 12/ to thoughtful expressions of concern about the impact on the judiciary of expansive use of masters in institutional litigation.13/ In one of the latter, the authors conclude:

The issues that these cases present are essentially managerial in nature and lend themselves neither to presentation nor to methods of solution familiar to the courts. The traditional process of judicial decision - presentation by personally affected parties of concrete controversies to a disinterested outsider who is bound by the rule of law - is supposed to produce decisions characterized by a rationality of a special and limited sort. This process cannot conveniently confront the inner dynamics of an organization that has attitudes and ways of doing business that must be altered, yet it is the usual process that underlies the familiar concept of judicial legitimacy. If one contrasts that model with the behavior of courts in institutional reform litigation generally and with the behavior of institutional reform masters, the paradox becomes clear: a court that wishes to shape an efficacious remedy has to deviate from the traditional adjudicative mode to do so, and that deviation puts at risk the institutional legitimacy of the court. 14/ (Emphasis in the original)

This tension between the constitutional doctrine of the separation of powers and meaningful enforcement of the Eighth Amendment's ban against the

imposition of cruel and unusual punishment is not new, but its focus on masters, their powers and prerogatives, is. A growing number of legal commentators hold that the separation of powers is as deeply rooted in the Constitution as individual rights, which cannot be vindicated by violating the former.^{15/}

What this means for the practicing master is that he or she is operating in an increasingly hostile environment and accordingly must exercise caution. It may mean that masters should carefully eschew non-traditional functions unless absolutely necessary. It may mean, finally, that masters should cling more closely and deliberately to the shelter of Rule 53 and consider the implications of some of the careful distinctions urged by academicians; for example:

If a monitor is a court officer designated a "master," the court may treat its reports with the deference due master's reports, accepting the findings of fact "unless clearly erroneous." But a monitor's activities are so unlike those of a Rule 53 master that the court should not do so. Monitoring rarely, if ever, proceeds by the quasi-judicial hearings envisaged by Rule 53. Lacking procedural safeguards, the results of monitoring should not enjoy presumption of legal validity.^{16/}

More than anything else, this chapter indicates that the powers of a master as yet are poorly defined. This lack of definition requires practicing masters to conduct their offices with exceptional care and sensitivity. Most often, they can follow safely the lead of the judge in their case and shape their mastering activities to accord with the judge's views and desires. But sometimes the individual master must be even more aware of and sensitive to subtle threats to his or her integrity, if the concept of the institutional master is to endure and evolve further.

CHAPTER 3 FOOTNOTES

^{1/} "The Use of Masters in Institutional Reform Litigation," 10 University of Toledo Law Review 419 (1979).

^{2/} "Masters in the Federal Courts: Rule 53," 58 Columbia Law Review 452, 462 (1958).

^{3/} Ruiz v. Estelle, 503 F. Supp. 1265, 1389-90 (S.D. Texas 1980). The Fifth Circuit explicitly affirmed Judge Justice's reasoning: "...[R]ule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established..." 679 F.2d 1115, 1161 (5th Cir. 1982).

^{4/} Ex parte Peterson, 253 U.S. 300, 312 (1920).

- 5/ Pugh v. Locke, 406 F.Supp. 318, 331-2 (M.D. Ala. 1976). Judge Johnson's appointment of the oversight committee was reversed subsequently, as indicated below.
- 6/ U.S. v. City of Parma, 504 F.Supp. 913, 924 (N.D. Ohio 1980), aff'd in part, 661 F.2d 562, 578-9 (6th Cir. 1981).
- 7/ Newman v. State of Alabama, 559 F.2d 283, 289 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978).
- 8/ See, for example, Justice Blackmun's concurrence in Pennhurst State School v. Halderman, 451 U.S. 1, 32-33 (1981).
- 9/ Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982). See the specific language of endorsement in footnote 3, above.
- 10/ New York State Association for Retarded Children v. Carey, 631 F.2d 162, 166 (2nd Cir. 1980). In mid-1982, the federal district judge handling the Willowbrook case expressed his intention of appointing a master to help resolve the lingering unfinished elements of the remedial order.
- 11/ Pennhurst State School v. Halderman, 451 U.S. 1 (1981).
- 12/ See, for example, the student note condemning federal court intervention in Rhode Island prisons in 14 Suffolk University Law Review 515 (1980).
- 13/ David L. Kirp and Gary Babcock, "Judge and Company: Court-appointed Masters, School Desegregation, and Institutional Reform," 32 Alabama Law Review 313 (1981).
- 14/ Id., at 395.
- 15/ See, for example, Robert F. Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies," 30 Stanford Law Review 661 (1978).
- 16/ "Special Project: The Remedial Process in Institutional Reform Litigation," 78 Columbia Law Review 784, 829 (1978). Nathan makes this same point in 10 Toledo Law Review, at 461. In Ruiz, the Fifth Circuit amended the order of reference to read as follows: "(2) unless based on hearings conducted on the record after proper notice, the reports, findings, and conclusions of the special master are not to be accorded any presumption of correctness and the 'clearly erroneous' rule will not apply to them..." 679 F.2d at 1163.

CHAPTER 4

ETHICAL ISSUES

In addition to difficulties of legal definition and justification, the use of masters in institutional litigation has created some ethical dilemmas. The maintenance of judicial impartiality and integrity while performing the post-remedial functions described above constitutes the central ethical challenge to the employment by a court of an institutional master.

As we have seen, the master is supposed to serve as the objective "eyes and ears" of the court. That description surely implies that the master reports to the court what he or she has seen and heard. Must such reports occur only in formal written submissions to the court or in testimony as an expert witness in hearings before the court? Can a master sit down with a judge and discuss the status of defendants' compliance, problems relating to the defendants' efforts to comply, and likely timetables for future compliance without treading impermissibly on the strict need for judicial aloofness from the merits of a pending case?

Responding to such questions can be complicated further by a pre-existing personal relationship between judge and master. In many desegregation cases, judges deliberately select local attorneys whom they know well to serve as masters for the negotiation and formulation of desegregation plans and remedies.^{1/} In one mental health case, after the defendants complained bitterly about the original master's de-institutionalization biases, the judge replaced the master with a friend.

Correctional masterships to date have avoided some of these pitfalls. Correctional masters most often are unknown to the judge prior to their appointment, so there is rarely a pre-existing personal relationship between judge and master. Because correctional masters frequently are brought in from elsewhere, they seldom have local political or legal connections and generally they have been relatively free of identifiable ideological coloring. Yet, if a judge debriefs his or her "eyes and ears" regularly over a period of time, it is impossible to avoid creating a special relationship that inevitably undermines the judge's isolation from the facts of the case. Part of the answer to the dilemma simply may be that the merits in such cases have already been decided, and any information on the post-remedial compliance of defendants provided to the judge by the master has nothing to do with "the merits of the case." The weakness of the response is that the judge subsequently may be required to rule on contempt motions involving precisely the kinds of issues on compliance already discussed and analyzed with the master.

There may be no satisfactory solution to this difficulty. Judge and master alike must be constantly sensitive to the problem. Ultimately, as indicated earlier, the responsibility for setting limits to the relationship between judge and master is the judge's alone. And judges have not hesitated to define such limits, with one prohibiting absolutely any informal discussion of the case with the master while another welcomes almost daily informal conferences on the status of compliance.

Linked to the difficulty of ex parte, informal discussion of the case with the judge is the problem of a master's ex parte communication with the parties. The code of judicial conduct prohibits judicial and quasi-judicial officials from engaging in ex parte communications "except as authorized by law."^{2/} But, as we have seen, confidential interviews with administrators, staff, and inmates are the principal sources of an institutional master's information on compliance. In addition, interpreting the remedial decree and helping the defendants plan and obtain resources for the implementation of mandated remedies, identified earlier as being among the most useful contributions of the correctional master, necessarily require ex parte communication with the parties. Everyone who has served to date as an institutional master agrees that such communication with staff members, named defendants, plaintiffs, and counsel is essential. Courts have acknowledged the difficulty by specifically authorizing masters in orders of reference to conduct ex parte, confidential interviews. This, in turn, arguably may satisfy the exception cited in the judicial canon, which suggests that ex parte communications may be permitted when "authorized by law."^{3/}

Another area of ethical difficulty for the master is posed by the media in spectacular omnibus correctional suits. Because masters are "temporary judges," they, too, are prohibited by the judicial code of ethics from making public comment on pending cases.^{4/} Characteristically, however, the media and the general public often are ignorant of the role and functions of a post-remedial master in a correctional suit. Practicing masters thus have tended to be initially cooperative in dealing with the media, seeking thereby to communicate to the public through the media some understanding of the powers and role of the master operating in their correctional institution(s) or system. The difficulty with this is that once the master has established a pattern of openness with the media, it is difficult to alter or end the relationship later. The master can quickly become used to, and perhaps seduced by, easy access to the media, and the media, for its own purposes, want the openness to continue. More will be said in Chapter 6 about the media relations of a master, but from an ethical point of view, excessive media exposure well may lead to allegations of abuse of a master's judicial role. While it is true that the judicial code permits public comments explaining a court's procedure, a master would be wise to construe that exception narrowly and to use it sparingly.

Few other provisions of the judicial code of ethics are likely to trouble most correctional masters. The code's restrictions on a master's political activities and donations and limits on a master's practice of the law in cases involving potential conflicts of interest are applicable primarily to local appointees, while most correctional masters are outsiders. Only those masters who reside in or relocate to the site of the case need to be concerned about these canons, although all ought to be familiar with them.

For the foreseeable future, institutional masters will be required at times to function effectively in areas where ethical principles are, at best, ambiguous. There is not likely to be a quick resolution of such problems as a master's discussion of compliance with the judge and ex parte interviews with parties. Masters will have to operate on their own, keeping in mind applicable ethical canons and their limits.

CHAPTER 4 FOOTNOTES

- 1/ See, for example, David L. Kirp and Gary Babcock, op. cit., at 390 ff, where the authors argue that the close relationship between masters and judges in desegregation cases, where much of the masters' work is political in nature, constitutes a serious breakdown in the meaningful separation of powers.
- 2/ Canon 3A(4) of the American Bar Association's Code of Judicial Conduct.
- 3/ Virtually the only discussion in the legal literature of this and other ethical issues generated by the use of institutional masters is to be found in Vincent M. Nathan's University of Toledo Law Review article, cited earlier. The Texas Department of Corrections in its motion for dismissal of the Ruiz master, relied almost exclusively on the discussion of ethical issues articulated for the first time in this seminal article. The irony of this is that the master in Ruiz is Vincent M. Nathan.
- 4/ Canon 3A(6) of the ABA Code of Judicial Conduct. The Code defines as a "Judge Pro Tempore" anyone who is an officer of a judicial system performing judicial functions, including specifically a special master.

CHAPTER 5

ADMINISTRATION OF THE MASTER'S OFFICE

To date, no two masters' offices have been set up in precisely the same manner. There have been significant variations in the status of the master, the master's staff, the location of the office, and the method of paying the master, other staff, and expenses.

Correctional masters have served both on a full-time and a part-time basis. Some have come from the local area; most have been from out of town. Where a master is not local, he or she may move to the area for the duration of the case, or continue to live elsewhere, visiting the site on a periodic basis.

There is no consensus among practicing masters about which of these arrangements is best. There are persuasive arguments both for and against appointing local masters, just as there are good reasons for and against requiring the master to relocate in the jurisdiction where monitored institutions are situated. If the suit involves an array of conditions in a state-wide system, the master (or subordinate monitors) will probably have to establish a permanent presence within the jurisdiction. The decisive factor in determining the location of the master generally will be the complexity of the case in terms of the number of facilities involved and issues covered by the remedial order.

Masters employ different types of staff depending on their own needs and expertise, the existing support systems available to them, and the extent of their monitoring responsibilities. One master hired only part-time law students and a part-time secretary; another used a full-time secretary and a full-time law clerk. The modest size of the staffs of masters reflects the fact that most masterships to date have involved only single institutions or a small state system.

The exception to this pattern is the Ruiz mastership established to monitor the compliance of the Texas Department of Corrections, the largest correctional system in the country, with a broad remedial decree applicable to all of its facilities. Organization of the Ruiz mastership involved the creation of what amounts to a small law firm including the master, a staff of four full- and part-time attorneys/monitors, several investigators, and an administrative staff. The sheer size of the undertaking has transformed the master in Ruiz from a monitor of compliance into an organizational manager, responsible for the recruitment, hiring, and training of staff; budgetary and administrative planning activities; and the supervision, coordination, and evaluation of personnel.

While Ruiz dwarfs the scale of its correctional predecessors, it is not typical. Masters generally serve on a part-time basis, while retaining their principal occupations as attorneys, professors, administrators, etc. Most are able to some extent to tap their existing research and secretarial staff and thus avoid the necessity of hiring additional personnel and assembling support systems.

Virtually every mastership has supplemented its limited personnel from time to time with consultants, although the areas of expertise of the consultants has differed widely. For example, one master who was a correctional administrator employed an attorney on a regular basis,^{1/} while another master who was an attorney employed a former correctional administrator. In addition, most masters have employed consultants on an ad hoc basis to advise them on subjects ranging from classification to sanitation.

Arrangements for a master's work-space also are subject to considerable variation. Many masters, again, have simply operated out of their existing offices, making use of their own filing, recordkeeping, and accounting systems. If a master's present office is inadequate, inconvenient, or located elsewhere, probably the best place to locate his or her office is in the courthouse, as long as sufficient space is available. This arrangement offers the attraction of proximity to the judge. Another alternative is for masters to rent space in a neutral territory. The new master should be cautioned against setting up an office in space controlled by the department of corrections, although that might be the least expensive and most convenient possibility. Housing the master in the defendants' office space affects the appearance of neutrality and may limit the master's ability to hold confidential interviews.

The need for staff office space and a logistical support system, even when these are modest, requires a master to assume planning and budgeting responsibilities. Occasionally, a court may direct the master to submit a budget before appointment. In one of the cases mentioned earlier involving the appointment of a compliance coordinator who was to be supervised and paid by the Arkansas Department of Correction, a budget was included in the order appointing the coordinator. A copy of this budget, which gives a useful example of the various categories of expenditures a master must anticipate, is provided in Appendix D.

Judges and defendants both may want a prospective or newly appointed master to submit a tentative budget, the former to obtain an approximate figure for the cost of utilizing a master and the latter perhaps to help decide whether to appeal the master's appointment. Because the eventual shape of a newly established mastership frequently is difficult to discern, it is preferable for the master, when faced in advance with a demand for a budget, to estimate expenses generously and by category rather than to become locked into a rigid and limiting financial charter.

In drawing up a budget, the master should consider the following categories of expenses:

- Compensation for the master (full-time or part-time salary or hourly rate);
- Compensation for the master's professional and clerical staff;
- Consulting fees;
- Rental of office space;

- Office equipment (including desks, chairs, conference table, bookcase, typewriter, file cabinet, in-out box, dictating equipment and transcriber, and general office equipment such as scissors, staplers, etc.);
- Office supplies (including stationery, carbon paper, copying paper, pens, pencils, paper clips, rubber bands, file folders, tape, index cards, etc.);
- Postage;
- Travel expenses (long distance and local);
- Per diem for the master if he or she does not live on-site;
- Per diem for staff and consultants;
- Duplication of reports; and
- Publications.

The major expense item in any calculation of the cost of the mastership is the master's own remuneration. This leads to the central question of how much may -- or should -- a master charge for his or her services. As with every other aspect of existing masterships, there has been considerable variety in the scale of compensation among masters. Most often, correctional masters have been paid an hourly fee, which has ranged from \$40.00 to \$95.00 an hour. Some masters (or coordinators) have received an annual salary, ranging from \$25,000 to \$40,000. Judicial guidance on the matter is scarce. In 1979, the U.S. Court of Appeals for the Sixth Circuit reviewed in some detail the compensation awarded by a federal district court to a Cleveland master in a school desegregation case. After a somewhat arbitrary discovery of an equitable principle applicable to the issue of a master's fee -- "[T]he highest range of fees in private litigation is not a proper basis for compensation of [the] master" -- the Court employed the following legal reasoning:

Though the compensation of the master in Hart ^{2/} was not set in advance, the district court noted that counsel in the case had suggested that "a reasonable fee would be based upon about half that obtainable by private attorneys in commercial matters."^{3/}

The Sixth Circuit then adopted and applied this "standard" of half of prevailing private fees as the appropriate measure of a master's remuneration and accordingly reduced the Reed master's hourly compensation from \$110.00 to \$65.00. Thus, the suggestion of counsel in Hart was transformed into legal doctrine. In all likelihood, future courts will regularly cite this "standard" articulated in Reed when they are called on to review questions of the appropriate compensation of masters.

Whatever the amount of a master's recompense, experience has shown that a regular method for payment of a master's expenditures must be established in advance. There have been significant problems when the defendants undertake to pay the master directly. In the first place, the processing of

vouchers through a state bureaucracy can cause substantial delays. In one case, the master waited several months for his first check, paying his staff and consultants out of his own pocket in the interim. Furthermore, the submission of expense vouchers directly to the defendants places them in a position to pass judgment on the appropriateness and size of various expenses, a practice that tends to erode the master's independence.

The most practical way of arranging for payment of the master is to have the court order the defendants to make deposits into the court. The master then submits periodic affidavits to the court in order to draw against the funds. The court approves the master's statement of expenses and directs the clerk to pay the master. Not only is this method faster than direct payment by the defendant, it also makes clear that the master is an employee of the court, not of the defendant, and that only the court has the authority to approve or disapprove a master's expenditures. Appellate courts have specifically approved this method of payment,^{4/} and several district courts have adopted it in their orders of reference appointing correctional masters.

In Ruiz v. Estelle, the court taxed the fees and expenses of the master as costs to the defendants, who were ordered to deposit \$150,000 with the clerk against which the master could draw after submitting periodic vouchers. Appendix E contains a copy of an itemized expense voucher submitted by the master in Ruiz, a case in which the master received an hourly fee.

Whatever the size and scope of the mastership, the master is hired and paid to organize the monitoring effort in an orderly and effective manner. To this extent, every master is an administrator whose fundamental responsibilities include planning, budgeting, supervision, and evaluation. It would be a sad irony indeed, if a mastership, created to monitor the reform of institutions characterized by bad management, succumbed itself to self-inflicted maladministration. Careful organization and initial planning are central to the eventual success of an institutional master.

CHAPTER 5 FOOTNOTES

- 1/ But see Reed v. Cleveland Bd. of Ed., 607 F.2d 737, 747 (6th Cir. 1979), in which the court stated that it did "not approve the practice of appointing legal advisors to a master or the court."
- 2/ The Hart case referred to here is Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975), which involved the development of a school desegregation plan in Coney Island, New York. The master in the case was Professor Curtis J. Berger of Columbia Law School, author of "Away from the Court House and Into the Field: The Odyssey of a Special Master," 78 Columbia Law Review 707 (1978).
- 3/ Reed v. Cleveland Bd. of Ed., at 745.
- 4/ See, for example Gary W. v. State of Louisiana, 601 F.2d 240, 245-6 (5th Cir. 1979).

CHAPTER 6

RELATIONSHIPS OF A MASTER

Probably the most delicate and demanding task of a master is to forge and maintain positive, productive relationships with key figures in the process of implementing a court's order. Some vital relationships are immediately self-evident; others will emerge as the case progresses or may be pertinent only in special cases. An example of the former is the judge in the case, while a governor or key legislator may fall into the second category. The neophyte master would do well to think about and prepare for as many of these potential relationships as possible.

The Judge

The master's most important relationship is that with his or her judge. It is critical that there be mutual respect and understanding between them; otherwise, the master can hope to achieve little. The nature of this key relationship will depend on a variety of factors, including the master's professional background, the judge's conception of the purpose and scope of a master, and the personal chemistry between the two individuals.

While generalizations about judges are of limited value, it may be worthwhile to note one or two of the basic conditions of the judicial calling. Judges, especially federal judges, are powerful people in their communities. They are used to deference from the local bar, politicians, and society at large. The impact of this power on individual judges varies considerably.

At the same time, many judges rely heavily on their own small staffs. It is therefore in the best interests of a master to become part of that small and loyal support team. This may be difficult because the master is involved in only one of the many cases pending before the judge. Even in a jurisdiction with a rich history of prison-related suits, the master will be dealing with only a minor proportion of the judge's overall workload and, consequently, must limit and consider carefully the demands he or she makes on the judge's time.

An important element in establishing a relationship with the judge will be the master's professional background and experience. If, for example, the master is an attorney, there will immediately be a shared professional understanding of terminology and procedure, and the lawyer will have a clear understanding of the ways and personnel of a court. However, what the judge expects of the master is correctional, not legal, expertise. This means that the attorney/master must either bring to the case or quickly acquire an understanding of the correctional elements of the local problem and a clear idea of how to resolve it. Former correctional administrators who are named masters most probably already have this knowledge.

Whatever the background of the master, it is vital that the judge and the master share a similar understanding of the purpose and scope of the master's functions. If this has not been clearly established prior to appointment, it is the first item of business the new master should address. The scope of the office will depend largely on the judge's expectations, which

should contain both a substantive and procedural framework for a working relationship. This does not mean that the master should passively accept whatever role definition the judge initially thinks is appropriate. On the contrary, the master should have a major share in defining the substantive elements of the role and should insist on regular access to the judge.

Once a basic relationship is established, the master can best ensure its maintenance by becoming a central figure in the judge's conduct of the case. While the judge may be distracted daily by the details of other cases and problems, the master has the time and opportunity to immerse himself or herself in the particulars of the one case. Because most judges are sensitive to procedural niceties of timing and form, the master may inherit a surprising measure of control over a case by reliably helping the judge to meet every deadline and by continually keeping the judge apprised of the evolving schedule for compliance.

Not all masters serve federal judges. As use of the concept widens, more local judges presumably will be appointing special masters in correctional cases. The few instances to date involving the appointment of a master by state courts indicate some of the complications that can arise, including in one case the supervision of a master by a panel of judges, among whom there was little agreement and considerable suspicion. Clearly, establishing successful relationships with three different judges with contrasting views of what the court and its master ought to be doing requires an extraordinary flair for diplomacy. There is not much point in trying to provide operating guidance for such a situation; masters finding themselves in such a predicament are on their own.

One lesson from the experience of masters appointed by local courts, however, is worth noting. The actors in a state proceeding are much more directly affected by the political implications of what they do. Federal judges are relatively immune politically from local outrage over their intervention in corrections; local judges may not be, and the result is that the master must keep current on the political aspects of the case and help the judge deal with them.

A judge's staff is another important relationship for the master. There may be law clerks, secretaries, a clerk of the court, and/or a magistrate with whom a master must compete for the judge's time. With the exception of the law clerks, all of these people probably have been around the judge far longer than the master and may continue to serve the judge long after the master is gone. They tend to be intensely loyal to and protective of the judge and sometimes may be suspicious of the master's role and influence with the judge. The relationship between judges and their law clerks often is an unusual and an especially close one. Law clerks, who traditionally are recent law school graduates, may sometimes be impatient with and intolerant of a master whose legal competence they may view as limited.

A short list of observations is an appropriate conclusion to this brief consideration of a master's relationship with the judge:

1. Do not be surprised if the judge, despite political theory and judicial doctrines on the separation of powers, turns out to be highly political.

2. Do not be surprised if the judge turns out to be extremely sensitive to the media. Life tenure does not prevent a judge from protecting any less zealously his or her public reputation.

3. Do not be surprised if some judges seem naive about institutions and organizations. Few judges have had administrative experience or more than minor exposure to organizational life. Consequently, they may not appreciate or understand the dynamics of organizations.

4. Do not be surprised at the snail-like pace of the judicial process. Your case is one of dozens competing for the judge's attention and delay is endemic to the court system. Patience is a prerequisite for a master.

Counsel

The key element in establishing a relationship with counsel in the case is defining an appropriate division of labor. Once appointed the master is viewed as the principal instrument for execution of the decree, and the adversarial system yields, to a large extent, to a ministerial or civil law process in which the master acts as investigator, prosecutor, and arbiter of compliance. Counsel may tend to withdraw from the situation.

Part of the explanation for the withdrawal is economic; after a protracted trial, the law practice of plaintiffs' counsel usually needs attention. Attorneys generally have other cases to defend, characteristically are undermanned, and may intervene again only when required to answer by a specific motion or formal inquiry. Moreover, application of the plaintiffs' attorneys for fees, which normally follows shortly after trial on the merits, often may make everyone aware of the costliness of the judicial process. Since the master is also costly, an effort is made to avoid duplication, which can mean deferral to the more permanent structure of the mastership.

What such a development overlooks, however, is the fact that the judicial process is fundamentally reactive. The court may not, on its own, find the defendants in contempt, even if there is clear noncompliance. Moreover, absent a specific provision in the order of reference creating the office, the master probably may not initiate a move to hold the defendants in contempt. The plaintiffs must formally pursue a ruling of contempt and present evidence to support such a ruling in a judicial hearing. The master's findings will be an important element in the hearing, but it is up to the parties to make the case in court. This means that interaction between the master and the counsel for the parties is a continuing necessity.

The ideal relationship is one in which the master can discuss accurately and candidly with counsel the posture of the compliance effort at any particular moment, even to the point of commenting on the need for, or appropriateness of, a formal submission to the court by one or another of the parties. That kind of relationship can evolve only when counsel for both the parties have complete faith in the integrity, objectivity, and fairness of the master.

A potential pitfall for the master in dealings with counsel (and with the parties) is the "forked tongue" syndrome. One cannot tell different people different things in the hope they will never communicate directly with each

other. The moment counsel for the parties discovers duplicity in the master, the mastership will lose its effectiveness. That does not mean that a master has to tell everybody everything, or everybody everything in exactly the same way. The underlying assumption is that direct, honest, open, and objective behavior on the part of the master is a central element in inducing the parties to understand and comply with the decree. The long-range advantages of integrity should not be jeopardized for the apparent short-range advantages of expediency.

While integrity is vital, the role of a master involves skills that are fundamentally manipulative. The goal is implementation of a decree; the actors are all dependent largely on the master for communication. Through the use of emphasis, suggestion, implication, nuances, etc., a sensitive and aware master can accomplish a great deal without recourse to duplicity. This is especially true since, in some cases, the principal curiosity of individuals involved in the compliance effort focuses on anticipated responses to their own actions or omissions.

One means of bolstering the basic honesty of the master's effort is to ensure that counsel for the parties communicate directly with each other. For example, defendants' counsel should automatically send copies of required reports, plans, and compliance schedules to plaintiffs' counsel. There is a tendency on the part of some defendants to consider their reporting obligation complete with they file a specific report with the master. If they do not also send a copy to plaintiffs' counsel, the master can end up absorbing the cost of duplication and/or risking the ignorance of one or more parties about items that are essential for compliance.

This same duty requires that the master keep everybody aware of his or her actions and reports. It frequently can be useful to provide counsel and the parties with advance copies of reports, particularly if a report is critical. Defendants who are asked by a news reporter to comment on a highly critical report they have never seen may feel betrayed and exposed. Moreover, there may be little or no communication between the defendants' counsel and the defendants. This means that certifying the service of copies of critical documents to the defendants' counsel does not ensure that the defendants will receive the documents, especially on a timely basis.

Occasionally masters have gone beyond simple notification and provided counsel and/or the parties (typically the defendants) with a draft of particularly critical reports for review. This has sometimes helped to improve the quality and accuracy of reports and to ensure a somewhat less hostile reception for the final product.

Even this brief discussion of relations with counsel should make it apparent to the fledgling master that he or she must exercise great circumspection and care in establishing relations with key figures in the case. The following are some additional observations that may influence a master's relations with counsel:

- o In procedural or strategic matters relative to the compliance effort, the master must deal directly and often with counsel for plaintiffs, who represent the only unified, informed, and detached negotiating agency for the inmate population as a whole. This is not intended to denigrate inmates,

whom that master will see and relate to daily, and whose contributions to compliance fact-finding are indispensable. But for the purposes of formulating procedural approaches to compliance difficulties, the master's chief contact point for the plaintiffs will be plaintiffs' counsel.

- Conversely, the master's dealings with counsel for the defendants are likely to be sporadic and unimportant. Principal contact point for the master with the defendants will be the defendants themselves, i.e., the administrators who run the system or institution, rather than their attorneys.

- To some extent, the master can control the amount of effort put into the case by parties' counsel. If the master discourages participation, counsel may willingly reduce their level of effort; if the master makes demands, the attorneys may have little recourse but to meet them.

- Non-lawyers serving as masters may assume that the sometimes harsh, unrelentingly adversarial courtroom behavior of counsel precludes their useful participation in negotiations. Courtroom posture usually represents a party's most extreme position, and normally there is ample opportunity for an effective mediator/master to promote negotiation successfully.

Parties

1. Defendants. The master will be required to interact regularly with administrators of the correctional institution or system involved in the suit. There may be hostility, uncertainty, and/or anxiety on the part of these administrators initially. As long as the master is viewed as the opposition, progress may be severely limited. On the other hand, efforts to ingratiate oneself with the defendants may undermine independence and objectivity and diminish potential effectiveness. The master must trace a difficult course that marks him or her as fair, understanding, firm, independent, and knowledgeable.

The master's professional background, whether it is legal or administrative, is unlikely to greatly affect his or her reception. In some cases, defendants may dismiss an attorney as ignorant of the intricacies of administration and correctional management. The attorney/master will do well to listen, absorb, question, and work unremittingly at conquering the budgetary, personnel, programmatic, and security elements of the correctional environment. In any event, however, even a novice master possesses a strong weapon with which to approach defendant administrators. The simple question "Why?" forces administrators to think about certain procedures and practices that have endured unchanged without regard for practicality or effectiveness. An attorney may be more apt to question entrenched yet illogical procedures than a former administrator who may have become somewhat inured to the status quo.

For the former administrator serving as a master, relating successfully to the defendants involves some different problems. Initial credibility may result in a more cordial beginning, but once the defendants realize that the master intends to fully support the judicial decree, they may experience a growing sense of the master's betrayal of profession. Thus, cordiality might give way to resentment. The chief administrator of the defendants may feel particularly threatened by a former administrator/master who criticizes the

chief administrator's performance. Possible resentment may be exacerbated by the fact that the functions and powers of a master sometimes are misunderstood, with far greater clout ascribed to the position than it actually possesses, thereby suggesting that the bona fide administrator has been supplanted or superseded. For all of these reasons, forging a positive relationship with the chief administrator of a defendant agency is a tricky task for a former administrator/master.

The relationship between the master and an administrator may be one marked by strained politeness, infinite wariness, vague mistrust, and perpetual defensiveness. Not surprisingly, some defendants wish fervently for the master's immediate departure, an attitude that could lead them to agree to changes they have no intention of instituting or to misrepresent present policies and conditions. In some cases, then, a master cannot accept the statements of the defendants at face value, but must carefully investigate their validity.

Moreover, some administrators in corrections, like some judges, can be naive about how organizations operate. These administrators tend to assume that a policy statement issued in a central office is enough to ensure that a reform will be evenly and correctly applied in every cellblock and tier in a far-flung correctional system. Thus, the misrepresentations a master encounters in dealing with administrators may proceed less from an effort to deceive than a basic failure to understand the dynamics of a correctional bureaucracy. Once again, the result is that a master must maintain a healthy level of skepticism, even when the good will of an administrator is apparent.

This last factor, a failure to understand the dynamics of organizational and bureaucratic life, may also explain why some administrators can be so optimistic and unrealistic in estimating the time necessary to implement reforms, whether they are procedural or physical in nature. One of the principal frustrations of implementing an omnibus judicial decree is the general lack of understanding of the snail-like pace of institutional reform. Almost every substantial expenditure of funds requires a double cycle of budgeting and legislative approval (assuming initial passage); appropriation of required funds, in turn, often is followed by a six-month period of processing the funding paperwork and meeting state or local bidding requirements; finally, major construction projects may be held temporary hostage to weather, labor disputes, or some other delaying factor. Procedural reform, moreover, which requires careful, coordinated development of new policy, training of involved personnel, orientation of staff and inmates, and evaluation, can be almost equally time-consuming. For these reasons, some administrators frequently fail to realistically calculate the time required to implement reform. The resulting miscalculations often lead to charges of deceit and incompetence and serve to escalate the level of mistrust.

The best way for a master to create a proper foundation for a continuing, fruitful relationship with administrators is to learn more about the system or institution involved in the suit than the administrators know. That is a less difficult task than it might at first appear, because the master has access to a far more balanced flow of information. A master, for example, characteristically will listen to both inmates and union leaders without

rejecting their representations out of hand. Special interest groups both within and without the system will tend to carry their observations and grievances to the master, who can check the accuracy of received information with every constituency. Out of the welter of sometimes conflicting information, the master will have to construct the true picture, but, in some cases, he or she may be the only person who is privy to all of the pertinent and necessary facts. Thus a patient, listening master can relatively quickly develop a special understanding of a complex institution or system.

The master should strive to immediately learn the relative power and effectiveness of the various administrators involved in the suit. While ready access to the chief administrator is vital, the master should probably resist bringing every difficulty to the top. Thus, thorough knowledge of the skills and power of subordinate officials can enable the master to select the individual through whom various kinds of problems can be resolved most effectively. From time to time, it also may be useful to plant ideas at lower levels of the organization hierarchy so that by the time they surface at the top of the structure, they are viewed as indigenous.

One possible obstacle to establishing effective relationships with the defendants is the presence of "phantom" defendants, that is, powerful key administrators who are not named as parties to the suit. Examples might include a governor in a state-wide suit or a sheriff or board of commissioners in a local case. The master should approach such phantom defendants immediately and directly and seek to involve them regularly in compliance activities. If the phantoms are permitted to roam unchecked around the periphery of the compliance effort, they may feel free to undermine the master's and their own subordinates' work.

Once a working relationship with the defendants is established, the master must be continually wary of co-optation. This is especially true when defendants are genuinely and actively attempting to comply with the court's mandate. There is a certain hypnotic effect in watching the flailing efforts of a sincere administrator to subdue and control a correctional bureaucracy: Small steps suddenly seem like giant strides and there is a tendency to lower standards lest the defendants become completely frustrated. When the master suspects a strengthening grip of co-optation, it is time to call in plaintiffs' counsel for a review of the situation. That will usually restore equilibrium.

2. Inmates. In securing compliance with the decree, the quality of the relationship of the master with the inmates is important, though not nearly so important as that with administrators. This fact simply reflects prison reality. Inmates have little control over physical environment other than sanitation; they have no control over staffing, programming, or other services.

The principal contribution of inmates to compliance is in the area of information. They know when policies and procedures have broken down because they are the daily victims of the breakdown. One of the best ways to test the validity of claimed reform is to spend time on the tiers and cellblocks talking to inmates.

There is an art in communicating with inmates, who constitute a master's special and most fascinating constituency. Absolute honesty, especially about

the limitations of a master's powers, is a prerequisite. Empathy and a willingness to listen and believe are likewise essential. Even if one is unable to do much very quickly about conditions, if the master listens to them in a spirit of sympathy and understanding, inmates will talk with reasonable candor and honesty. There is an element in most inmate conversations of perpetual grouching that may be an inevitable part of institutional life. That element necessitates a healthy degree of skepticism; nevertheless, the informational input of inmates is invaluable to a master.

Inmates, moreover, often may demonstrate a surprising sense of reality, and in some respects, may have expectations far below those of a newly appointed master. One master tells of his confident assurance to inmates that the pay telephones they sought on cellblocks would be installed before Christmas. Five Christmases later, he was still struggling to deliver the promised phones, but inmates were chuckling at his naivete rather than cursing his ineffectuality. They knew immediately, far better than he, the true measure of his difficulties and the likely pace of his progress.

A more difficult issue centers around whether the master should assume the functions of an institutional or systemwide ombudsman, particularly in areas unrelated to the judicial decree that the master was appointed to monitor. There is no easy answer to this dilemma. At the beginning of the suit when conditions are most likely to be chaotic, it may be almost impossible to resist providing some help to individual inmates. As (and if) things improve, a continued pattern of intervention may reduce the defendants' incentive to create acceptable, permanent, administrative means for handling individual complaints. Inmates may tend to see the master (at least initially) as a powerful intervening force who can require the system to respond. As time goes by, this view may deteriorate as the population begins to perceive the serious limitations to the master's powers. Nevertheless, there is a risk of widespread discontent and dissatisfaction if the ombudsman's role is rejected entirely. On the other hand, a practicing ombudsman in a collapsing system has little time left over to devote to substantial issues of reform. The difficulty is in responding to individual complaints often and effectively enough not to undermine the master's primary functions. Some masters have eschewed any ombudsman-like functions; others have accepted the role and tried to respond to every inmate complaint; others, finally, have sought to steer a middle course by responding selectively to individual complaints.^{1/}

A myth prevalent in corrections contends that no inmate will ever accept denial of a grievance. The falseness of the myth is indicative of the amount and kind of communication that presently occurs between some staff and inmates. The latter may have as firm an understanding of the reality of their conditions as most administrators and staff, but some may have learned through frequently bitter experience that exaggeration and tumult sometimes compel response, while reasoned dialogue is ignored. Hence they may be viewed as uncooperative and irresponsible when, in fact, their chief complaint is that they are never given the opportunity to act responsibly. The master can become the temporary conduit for reopening or initiating responsible communication between staff and inmates. Again, the difficulty is to avoid becoming a substitute for construction of a permanent conduit.

To manipulative inmates, the master simply represents another personage to be wooed and won. In the prison population, no less than in the

community, there are some slick operators. Empathy and sympathy are not incompatible with a healthy level of skepticism, and a master should be on guard against being used. It is, for example, a sure path to disaster to become a courier for inmates.

One of the most difficult situations in which to sort out truth in a prison environment involves physical confrontations between staff and inmates. Such confrontations often revolve around the issue of whether the use of force exceeded the need for it in a particular situation. Some inmates and staff, consciously or unconsciously, may exaggerate the actions of the other party and diminish their own contributions, often making it impossible to assign blame. The important element for the master is to listen carefully and objectively to both sides and to reserve judgment until after a thorough investigation. There may often be intense pressure on a master to intervene in such cases. If a master decides to become involved in such cases, he or she ought to be aware that findings of fact can be especially difficult.

One final note: Curiosity about an inmate's offence(s) is sometimes counterproductive. While there are exceptions, most inmates do not care to be pigeon-holed by category of offense and would rather not talk about how they arrived in prison. Knowledge of an inmate's offense, moreover, can get in the way of an objective, neutral hearing of his or her complaint, and is of little use to the master.

Miscellaneous Groups and Individuals

1. Politicians. Despite the judicial nature of the master's role and functions, implementation of many aspects of institutional reform is fundamentally a political task. Sometimes, then, executive and legislative office-holders will become involved in an omnibus suit. The executive must either defend past practices or push for reform; sometimes they may try to do both. Legislators, on the other hand, may be required to appropriate the funds necessary for many of the elements of reform. The master is liable to be an advisor to some of the politicians and a scapegoat to others. In one case, a master began as a direct advisor to the governor on correctional matters; in other cases, masters have had only limited direct contact with politicians.

In view of this varied history, it is nearly impossible to advise a new master on how to structure relationships with local politicians. Probably the safest posture is to avoid direct contact unless the case clearly demands otherwise; in the latter case, make sure that any political moves are carefully and clearly coordinated with the judge. The master, after all, is a judicial figure and a servant of the court. Excursions into the political arena involve risks, and a master should be sure that his or her judge supports such excursions. Such excursions, moreover, may intensify charges of judicial intrusion among critics of the use of the institutional master.

2. The Media. Much of the preceding advice also applies to the media. The interest of the media in a master can vary widely, depending largely on the level of public attention focused on the institution or system involved. In some cases, it may be impossible and counterproductive to avoid the media completely; in others, it may be more useful to refuse to discuss the case with the media.

It is difficult to formulate general guidelines for a master's dealings with the media. Much will depend on an individual's past experience, but most masters probably will not have had much prior media exposure. In that first rush of attention, there may be a tendency to believe that the interest of the media is in the master, when, in fact, the enduring interest of the media is in the "story." A master must learn not to say to reporters things he or she does not want repeated publicly. It is also well to remember that many defendants are themselves skilled in public relations and may be capable of besting a rookie master in a media confrontation.

The basic point to remember in determining appropriate media relations is the traditional judicial antipathy to the public discussion of pending cases. Probably that prejudice should not be set aside unless there is a real possibility that media inaccessibility will prevent implementation of the decree. In any event, a master's posture with the media should be discussed at length with the judge and both must agree on and understand the nature and impact of that posture.

If you decide not to talk to the media, do not ignore their calls; tell them you will not comment and why you will not.

If the media show great interest in an issue related to the suit, be sure to alert the judge and provide him or her with answers to anticipated questions. Some judges may have closer relations with the media than is realized and want to be prepared to respond to them.

One of the principal dangers of excessive media coverage for a master can be the temptation to reveal pieces of a settlement before all parties have agreed to it. For many of the same reasons a labor relations mediator avoids commenting on negotiations to the media, a master, many of whose functions involve mediation, has to be careful not to disclose elements of, or positions in, continuing negotiations.

3. Staff Unions. In some areas of the country, the determining factor in staff attitude toward the master and the court decree may be the leadership of the correctional officers' union. While such leaders are not direct parties to the suit, a master should attempt to meet with them early and diffuse some of the opposition they might generate.

If a strong union operates in an institution or system, the master may discover almost as much antagonism between staff and administration as may exist between staff and inmates. Faced with unionization, some administrators have adopted a stance of adamant hostility, encouraging thereby a level of confrontation that often precludes useful communication. Unions may return the hostility in kind and the state of relations between staff and administration can dissolve in chaos. In some cases, such chaotic relations have contributed substantially to creation of the unconstitutional conditions underlying the omnibus suit.

In such a situation, a sensitive master might help restore the lines of communication between staff and administrators. It is not an easy task and the master may meet strong resistance. Nevertheless, by being accessible and neutral to all, the master could become a positive conduit for communication between the union and the administration, if he or she makes

the effort to tap into the organizational structure of the union. It is not enough just to talk to line officers; the master must communicate directly and often with the union leadership.

In some situations, it may turn out that the union is simply too hostile to the court to work with the master, but the master should make that determination independently. The judgments of some administrators on the attitude and ability of union leaders should be accepted with skepticism. Only after sitting down with the union leadership both formally and informally will the master be able to gauge the value of the union's potential contribution to implementation of the court decree.

4. Special Interest Groups. The mater may have relatively frequent dealings with special interest groups, many of which have ultimate roots in the inmate population. Especially during the early stages of a mastership, these groups may seek out the master to promote their constituency. For the master who is unfamiliar with the locale and/or corrections, early contacts with such groups can be extremely helpful as sources of basic historical data and background information. Some examples of these special interest groups include organizations for relatives and friends of prisoners and various religious and ethnic support groups that provide an assortment of volunteer services to prisoners. These groups can sometimes be the best available source for a balanced account of prison conditions, although the master routinely should check out the accuracy of their descriptions. As in dealing with inmates, a measure of objectivity and empathy will provide a solid basis for an enduring and positive relationship with such groups.

Establishing working relations that are positive and successful with all of these diverse constituencies is the central and perhaps most difficult task of the master. His or her success in the case will be measured in direct proportion to success in handling these complex inter-personal relationships with key figures in a typical mastership.

CHAPTER 6 FOOTNOTES

- 1/ The Court of Appeals for the Fifth Circuit expressly forbade the master in Ruiz to undertake an ombudsman's role:

The order of reference does not make clear that, in conducting investigations and hearings, the special master and the monitors are not to consider matters that go beyond superintending compliance with the district court's decree. Such an express constraint is appropriate because of the danger that the special master or the monitors may entertain inmate complaints that convert the remedial process into a surrogate forum for new §1983 actions. In the interest both of prison administration and sound judicial procedure, it should be made clear to the plaintiffs, the special master, the monitors, and the TDC staff that the special master is not an inmate advocate or a roving federal district court....

Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir. 1982).

CHAPTER 7

SKILLS OF A MASTER

The variety of roles the institutional master must play requires different kinds of knowledge and skill. The investigator and fact-finder must know how to obtain and analyze data; the negotiator and mediator must be able to persuade effectively; the legal advisor must understand the judicial process and be familiar with the applicable law of corrections; the agent of organizational change must be sensitive to the institutional environment and difficulties of correctional administration; the court's "eyes and ears" must know how to report findings and recommendations accurately, clearly, and ethically. The preceding chapters have sought to provide some basic guidance for meeting the many challenges posed by these roles, but two skill areas, interviewing and mediation, have not yet been addressed and are discussed below.

Interviewing

The prime fact-finding tool of a master is the personal interview, which may be conducted with prisoners, staff, administrators, or representatives of other interested groups. The number of best-selling books on techniques for communicating and understanding communication, ranging from translations of body language to the elaborate codes of transactional analysis, suggests that asking questions and listening to responses may be more complicated than we have assumed. Masters, moreover, must conduct interviews in which they probe delicately for facts while somehow simultaneously promoting a positive commitment to the implementation of what are often viewed as threatening changes. Attorneys who are appointed masters often will be skillful at eliciting facts, but the traditional ploys of adversarial interrogation are unlikely to contribute substantially to increased trust and commitment. Former administrators, on the other hand, may promote a mutuality of understanding and commitment but leave essential data undeveloped. There is a need for balance, and what follows is designed to provide guidance in striking that balance.

1. Planning interviews. There is a place for serendipity in any mastership, but most of the usable information acquired by masters is the result of carefully planned interviewing. In assessing compliance with the particular provisions of the remedial decree, a master ought to pose similarly worded questions about the same facts or situation to everyone interviewed; otherwise, he or she will collect a mass of disparate, incomparable responses that defy analysis. Thus, there is often a need to fashion a structured format for interviews. The structure may vary according to the interviewed constituency, and the original structure almost always will change as questions are revealed in practice to be awkward, obscure, irrelevant, or unanswerable. By using a structured interview, the master will be reasonably sure that people are hearing and responding to the same questions and providing comparable data for subsequent analysis.

To expedite the collection of information, a master sometimes may want to consider the use of a questionnaire, especially in cases involving several

facilities. Usable questionnaires, however, may not be easy to prepare, and a master wishing to administer one probably should seek professional or academic help in designing both the questionnaire and the sampling techniques governing its use.

2. Framing questions. Because the educational level of people in jails and prisons may not be very high, the first guideline on language for masters is to keep it simple and clear. Also, staff and inmates alike tend to use legal jargon extensively, although their understanding of specific legal terms often may be confused and inaccurate. This means that masters may encounter a steady stream of legal malapropisms; it also means that the master probably should avoid legal vocabulary in interviews as much as possible. This will not always be easy because the terms of a remedial order sometimes are expressed in legal terminology, as, for example, in cases involving due process elements of an administrative procedure such as a disciplinary system.

The form of questions, as well as their language, can create problems. Leading questions often produce predictable answers when the people interviewed are eager to respond in ways they think the interviewer wants to hear. Accusatory or judgmental questions, on the other hand, are likely to arouse resentment and can impede the effective collection of data. The prosecutorial approach to interviewing will undermine a master's credibility and may close off his or her major source of information.

There is a subtle art to asking questions that elicit informative responses and project real empathy. Dr. Thomas Gordon has written a number of books designed to help people do just that, and these books provide a useful introduction to the delicate craft of careful questioning. However, it takes practice, not merely reading, to acquire such skills as "active listening," which requires the listener to decode and understand responses quickly and share that understanding as a means for the further development of meaningful communication.^{1/} This skill, moreover, is no substitute for inherent sensitivity, without which personal interviews can be largely barren.

3. Listening. Skillfully phrased questions are not much help to an interviewer who does not listen carefully to the responses. The strength of Dr. Gordon's approach to communication is that it blends listening and questioning inseparably; you cannot be a successful communicator, says Dr. Gordon, if you do not listen to what people are saying to you and use what they are saying to fashion further understanding and rapport.

Effective listening requires a certain amount of empathy with the speaker, but it can be difficult at times for a master to empathize with any of three basic correctional constituencies. The master must work to overcome latent antipathy to any individuals or groups he or she may encounter in jails and prisons. It is sometimes equally difficult for a master to avoid a measure of defensiveness in responding to recurring and persistent criticism of the court and the master either for their intrusiveness or for their failure to quickly deliver promised remedies. Heated defense of the court's record serves no useful purpose and postpones the collection of data.

One last paradoxical note on listening: It is sometimes impossible to get prisoners, whose access to sympathetic outsiders with potential clout is limited, to stop talking. Each master has to develop a means that is polite but firm for terminating, or at least truncating, interviews that turn out to be recitals of life histories. One or two such unchecked digressions can ruin an entire interview schedule; repeated digressions can render a master ineffective.

4. Notes and memoranda. The practice among masters in keeping records of interviews differs widely. Some record each interview on tape; others tape only some; and still others never use a tape recorder at all. Obviously, there is a need to document the data acquired from interviews that will be analyzed and eventually included in compliance reports. Those masters who avoid the use of a tape recorder usually take extensive notes during the interview or write up the results of their interviews in memoranda or amplified notes as soon as possible after each interview.

Whenever an interview with people involved either directly or indirectly in the case even hints at a potential difficulty, the master ought to record the particulars of the exchange in a memorandum for the record. Masters must frequently work along with numbers of hostile people who often can rely on each other to corroborate promises, statements, or accusations that may or may not have been made. A memorandum for the record filed immediately after a troublesome meeting may be the master's sole defense against future charges or claims.

Most of these same interviewing skills are no less applicable to mediation where careful language and effective listening and questioning are essential elements of success.

Mediation

Defined simply, negotiation is a process for resolving disputes in which two or more parties identify and discuss issues and attempt to resolve their dispute in a mutually acceptable way. Mediation simply adds to this process a neutral third party, whose function is to help the parties articulate their dispute and work out a mutually satisfactory solution. The mediator cannot impose a decision on the parties, who themselves remain primarily responsible for the resolution. Bereft of authority to solve the dispute, the mediator's sole power rests in his or her ability to persuade the parties to adopt a mutually acceptable resolution of their common problem.

Some observers argue that because the master need not rely solely on persuasion but may invoke the power of the court to impose settlement, he or she is not truly a mediator. The distinction is more theoretical than practical; judges, not masters, have the power to impose decisions, and practicing masters have worked assiduously (and, in many instances, with extraordinary success) to get the parties themselves to develop and agree to plans and schedules for compliance. Thus, individual masters rely regularly on mediating skills to bring about ultimate compliance with court orders.

Little practical material has been written on the skills and techniques of mediation, although some recent works on negotiation are applicable and useful. These emphasize what the parties themselves can and must do to

make the process of negotiation succeed.^{2/} The following material focuses briefly on two central aspects of mediation: structuring the dispute or problem, and persuading parties to agree to a solution. For the newcomer to mediation, much of this may appear to belabor the obvious, but, alas, there are no secret formulas for successful mediation. Mediation is an art form that requires sensitivity, imagination, flexibility, humor, and practice.

1. Structuring the dispute. The key to successful mediation is getting the parties to view their dispute as a mutual problem rather than a duel. When parties have been locked in combat over a long period of time, however, as they have been in a typical prison suit, that perception is not easy to bring about. It may take a matter of months or years to get the parties to a point where they see implementation of the court order primarily as a shared logistical problem rather than a form of punishment imposed, deservedly or otherwise, on the defendants.

The first step in structuring a dispute is identification of all of the involved issues. For various reasons, parties consciously or unconsciously may sublimate or seek to exclude from consideration important issues. The mediator's task is to get all of the relevant issues out in the open so that parties and mediator alike have an opportunity to help in their resolution. To identify issues is to characterize or label them, and a mediator can contribute greatly to a reasoned discussion of issues simply by helping the parties to define issues in positive and non-inflammatory terms. For example, one issue might be identified as "changes in the defendants' administrative procedures," rather than "defendants' arbitrary and capricious administrative decisions;" another might be "effective supervision of correctional officers," rather than "guard brutality." This is not just semantic legerdemain. The preferred language is free of accusation and judgment; it is problem-oriented in that it defines issues as solvable problems; and it is prospective in that it describes the issues in terms of future, rather than past, actions.

Once issues are identified, the mediator must determine the parties' actual, as opposed to their expressed, priorities among issues. The parties themselves may not identify what matters most to them, and it is up to the mediator to determine what weight the parties actually give to various issues so that subsequent bargaining occurs in a framework of reality.

All of these initial tasks are especially important in the early mediating efforts of a master. The parties emerge from the ordeal of trial with distorted images of each other. The adversarial process, particularly in an extended and heated case, can generate a great deal of hostility and may encourage parties to adopt the worst possible view of an opponent's actions and motives. The parties may be so blinded by the passions of trial they need a neutral outsider simply to be able to talk coherently with representatives of the other side. The master must work patiently and persistently in this environment to bring the parties to an understanding that the remedial process is a cooperative, not an adversarial, one and to build anew a sense of shared responsibility for the outcome of the implementation effort.

Once the dimensions of a specific problem are fully explored and defined, the mediator must provide an overall framework for handling

discussion and eventual resolution of issues. That framework may begin with the most important issue or the least important; it may start with general principles and move on to specific issues; it may identify categories of issues and deal with individual issues by group or category; or it may address itself first to those issues with time constraints. There is no best possible framework; any of these approaches can be used. The important point is that a structure subjects a spontaneous and amorphous dispute to order and a strong measure of control. This structure is one of the principal contributions of a mediator.

While parties work to identify, characterize, and place a priority on issues, the mediator must undertake a variety of peripheral functions, including those of:

- Educator. Parties to a correctional suit, particularly the defendants, operate under sometimes harsh constraints. Counsel for plaintiffs cannot appear to "betray" their clients' interests in a remedial process, and prisoners may watch their attorneys with a jealous and suspicious eye; defendant administrators work in a political and financial environment over which they may have little control. The mediator must make sure that the parties understand the constraints with which their counterparts live.

- Translator. Parties frequently do not hear or understand each other's positions, postures, or proposals because of the history of their relationship, prejudices, etc. The mediator must help the parties to find neutral language that will penetrate barriers against understanding and express positions and proposals in terms that promote mutual understanding and increase the likelihood of developing acceptable solutions.

- Reality tester. The mediator must puncture the inflated and unrealistic demands and proposals of parties and seek to defuse underlying passion and distrust.

- Catalyst. Most important of all, the mediator's presence subjects the parties' consideration of a specific dispute to a new and dynamic process. The effective mediator strives to capitalize on this dynamic by working persistently to get the parties to view their conflict from a fresh perspective and to approach solutions with open and innovative minds.

Applying structure to a dispute is the first vital phase of mediation, but mere organization is no guarantor of successful resolution. A mediator frequently needs to apply every available persuasive tool to get the parties to define and accept a solution to their problem.

2. Persuading parties to agree to a solution. Contrary to appearances, mediation is not the art of compromise. The most successful mediations are those in which the parties get everything they seek through the development of an imaginative, creative solution. The classic illustration is Mary Parker Follett's example of the library room with one widow: Disputants want the window either open for ventilation or closed to prevent drafts. While compromise suggests leaving it opened half-way, creative dispute resolution suggests the opening of a window in an adjoining room, thereby providing circulation of air without a draft. This means that intelligence,

resourcefulness, imagination, creativity, and flexibility are all highly desirable characteristics in a mediator.

The introduction of new and different potential solutions will almost inevitably provide movement in a stalled mediation. But where even that fails, the mediator may employ other simple devices.

3. Exposing the vulnerabilities of the parties. Virtually every disputant has some area of vulnerability, which may arise either from past actions or present positions. In institutional suits, a common example is one or another party's strained interpretation of some provision of the remedial decree that is clearly at variance with the express terms of the order or any reasonable reading of its meaning. It is useful to focus on such vulnerabilities when discussions stall, but like all negative approaches this may involve costs in terms of future cooperation.

4. Pointing out the inconsistencies of a party's position. When parties advance illogical positions, the mediator may legitimately call attention to lapses in logic, but the purpose of doing so is to get the chastened party to consider alternative, logical positions suggested by the mediator or other party.

5. Making clear the costs of non-settlement. In this kind of case, the mediating master has some powerful levers. By referring an unresolved dispute to the judge, the master can impose burdens of time and cost, publicity and media coverage, delay and frustration on the parties that will vary depending on the specific issue and the party. Masters have made excellent use of the threat of court referral to force parties to continue work on unresolved issues.

None of these simple approaches is nearly so effective as a good mediator's ability to generate additional ideas and resources for dealing with the common problem. The master has a unique opportunity to immerse himself or herself totally in the problems shared by parties and to develop a wide range of alternative and innovative means for resolving particular disputes as they arise. Immersion, however, also has its costs; the parties may tend less and less to view the master as a benign, uninterested outsider as he or she takes positions on the various commissions and/or omissions of the parties. Thus, no matter how often a master may be called on to find against one or another party, he or she should cling stubbornly to the standard of neutrality.

The timing of mediation in a mastership is also unique. For months the master may conduct what appear to be extended negotiations solely with the defendants without once meeting with plaintiffs or the counsel. Nonetheless, whatever emerges from these apparently unilateral negotiations must be acceptable to the plaintiffs or the issue will end up back in court; so the master truly is mediating between the parties rather than negotiating with them in sequence.

There are a growing number of agencies, companies, and individuals around the country that provide training in mediation.^{3/} A master new to the

art might consider undergoing such training. It could be a wise investment with potentially rich dividends for the master, the parties, and the court.

CHAPTER 7 FOOTNOTES

1/ Dr. Thomas Gordon's latest work is Leader Effectiveness Training (Bantam Books, Toronto: 1980). This book, like his earlier ones, Parent Effectiveness Training and Teacher Effectiveness Training, is available in paperback.

2/ See, for example, Roger Fisher and William Ury, Getting to Yes (Houghton Mifflin, Boston: 1981); and Herb Cohen, You Can Negotiate Anything (Bantam Books, Toronto: 1980), available in paperback.

3/ Some of these groups are:

Center for Community Justice
918-16th Street, N.W.
Washington, D.C. 20006
(202) 296-2565
Linda R. Singer

Conflict Management Resources, Inc.
61 West 62nd Street
Suite 20C
New York, New York 10023
(212) 246-7447
Joseph B. Stulberg

National Institute for Conflict Resolution
295 Madison Avenue
New York, New York 10017
(212) 685-3323
Herbert T. Jefferson

Appendix A

LOCAL RULE OF COURT GOVERNING MASTER'S
HEARINGS IN PALMIGIANO V. GARRAHY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LOCAL RULE OF COURT RESTRICTED TO
PROCEDURES TO BE FOLLOWED IN ALL FUTURE
HEARINGS IN THE CASES OF

PALMIGIANO v. CARRAHY, et al.
C.A. No. 74-172

ROSS v. CARRAHY, et. al.
C.A. No. 75-032

{a) Master's Review of Compliance.

As deadlines for compliance with portions of the Court's Order of August 10, 1977, as subsequently modified, are reached, the Master may make tentative findings concerning the defendants' compliance with each paragraph or sub-paragraph of the Order. These tentative findings will be based on reports submitted to the Master by the defendants or by independent experts appointed by the Master or by either party and on his own assessment of the defendants' progress towards compliance.

(1) The Master will provide written notification to both parties of his tentative findings and intended recommendations to the Court.

(A) Either party may file written objections to the tentative findings or recommendations of the Master within ten days of receipt. The party objecting may request a hearing before the Master. A copy of the objections and request for a hearing shall be served on the opposing party.

(B) If neither party files written objections within the requisite time period, the Master will proceed to file his findings and recommendations with the Court.

(C) Both parties, having waived their right to a hearing before the Master, are precluded from requesting a hearing before the Court without a showing of exceptional circumstances, except as the Court may otherwise order upon application of either party in the interests of justice.

(2) The Master at any time may schedule a hearing on his own motion in order to hear evidence concerning compliance. He will provide both parties with written notice of the date and time of such hearings, together with the issues to be considered. Master's reports that are based on such hearings may be challenged only pursuant to the provisions of paragraph (c) below.

(b) Hearings Before the Master.

Hearings before the Master will be informal but in conformance with Rule 53 of the Federal Rules of Civil Procedure. Strict rules of evidence will not be imposed. However, either party may object to the admissibility or relevance of any evidence sought to be introduced, and all objections will be noted for the record. All witnesses will be sworn. A court reporter will make a record of the proceedings. The record will be transcribed at the request of either party, the Master or the Court. The costs of a record transcribed at the request of either party will be borne by the party requesting it, the costs of a record transcribed at the request of the Master or the Court will be taxed as part of the Master's costs.

(c) Master's Reports to the Court.

Where the Master has held a hearing, either upon his own motion or upon the request of either party, the Master will file a formal compliance report with the Court. The report will contain numbered findings of fact and recommendations to the Court. Copies of the report will be served on both parties.

(1) If either party objects to any or all of the findings contained in the Master's report, that party shall file written objections within ten days of receipt of the report. The objecting party shall note each particular finding to which objection is raised, shall provide proposed findings of fact as alternatives to the challenged findings, and may request a hearing before the Court.

(2) Any request for a hearing before the Court must include a list of witnesses and documents to be presented to the Court. A copy of the objections, proposed findings, and any request for a hearing shall be served on the opposing party.

(d) Hearings before the Court.

The purpose of a hearing before the Court on a Master's report is to determine whether any of the findings of fact in the report to which a party objects are "clearly erroneous," as provided by Rule 53(e)(2) of the Federal Rules of Civil Procedure. Except as the Court might otherwise order to prevent manifest injustice, any evidence not previously presented to the Master will be admitted at such a hearing only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the Master.

Enter:

[Raymond J. Pettine]

Chief Judge

April 16, 1978

Appendix B

INITIAL FILING CODE FOR RECORDS
DEVELOPED IN RUIZ V. ESTELLE

RUIZ V. ESTELLE

<u>TAB</u>	<u>CASE ADMINISTRATION</u>
1.0	General Case Administration
<u>TAB</u>	<u>ORDERS</u>
1.1.0	Ruiz Docket
1.1.1	Court of Appeals Opinions
1.1.2	General Orders
1.1.3	Memorandum Opinion of December 10, 1980
1.1.4	Decree Granting Equitable Relief and Declaratory Judgment (April 20, 1981)
1.1.5	Supplemental Memorandum Opinion (April 20, 1981)
1.1.6	Order Denying Stay (April 20, 1981)
1.1.7	Consent Decree (April 20, 1981)
1.1.8	Order of Reference (April 20, 1981)
1.1.9	Amended Decree Granting Equitable Relief and Declaratory Judgment (May 1, 1981)
1.1.10	Order Requiring Deposit by June 1, 1981 (May 18, 1981)
<u>TAB</u>	<u>PLEADINGS/MOTIONS</u>
1.2.0	Prior Pleadings and Motions
1.2.1	Plaintiff's Recommendations for Special Master
1.2.2	Plaintiff-Intervenor's Nominations for Special Master
1.2.3	Defendants' Nomination for Special Master
1.2.4	Plaintiff's Proposed Remedial Order
1.2.5	Plaintiff-Intervenor's Proposed Remedial Order
1.2.6	Defendants' Proposed Remedial Order
1.2.7	Motion for Protective Order (Eroy Brown)
1.2.8	Defendants' Objections and Motion to Vacate Appointment and Reference of Special Master
1.2.9	Plaintiffs' Response to Defendants' Objections and Motion to Vacate Appointment and Reference of Special Master
1.2.10	Plaintiff-Intervenor's Response to Defendants' Objections and Motion to Vacate Appointment and Reference of Special Master
1.2.11	Plaintiff's Objections to Defendants' Proposed Standards Governing the Use of Chemical Agents
1.2.12	Special Master's Nominations of Persons to Serve as Monitors
1.2.13	Application by the Special Master for Permission to Employ Support Staff

<u>TAB</u>	<u>FISCAL MATTERS</u>
1.3.0	General Fiscal Matters
1.3.1	Budget
1.3.2	Center for the Study of Law in Institutional Litigation
1.3.3	Contracts
1.3.4	Time and Expense Records (General)
1.3.4.1	Time and Expense Records (VMN)
1.3.4.2	Time and Expense Records (JMB)
1.3.4.3	Time and Expense Records (WDA)
1.3.4.4	Time and Expense Records (JDL)
1.3.4.5	Time and Expense Records (WGB)
1.3.4.6	Time and Expense Records (JPT)
1.3.4.7	Time and Expense Statements
1.3.4.8	Payment Orders
1.3.5	Correspondence

<u>TAB</u>	<u>STAFF</u>
1.4.0	General Staff Matters
1.4.1	Vincent M. Nathan
1.4.2	Jacqueline M. Boney
1.4.3	William G. Babcock
1.4.4	W. David Arnold
1.4.5	Jon D. Levy
1.4.6	J. Patrick Trujillo
1.4.7	Prospective Monitors and Staff

<u>TAB</u>	<u>READING FILES</u>
1.5.0	Vincent M. Nathan
1.5.1	Jacqueline M. Boney
1.5.2	William G. Babcock
1.5.3	W. David Arnold
1.5.4	Jon D. Levy
1.5.5	J. Patrick Trujillo

<u>TAB</u>	<u>GENERAL</u>
1.6.0	Reporting Requirements
1.7.0	Ruiz Deadlines
1.7.1	Required Task Guideline (Defendants)
1.8.0	TDC Annual Reports
1.9.0	TDC Statistical Reports
1.10.0	TDC Rules & Regulations and Grievance
1.11.0	Publicity/Media

<u>TAB</u>	<u>CORRESPONDENCE</u>
2.0	General Correspondence
2.1	Judge Justice Correspondence
2.2	Plaintiff Counsel Correspondence
2.3	Plaintiff-Intervenor Correspondence

2.4	Defendants Counsel Correspondence
2.5	Hilliard's Counsel Correspondence
2.6	Director Estelle Correspondence
2.7	TDC Staff Correspondence
2.8	Institutional Staff Correspondence
2.9	General Inmate Correspondence
2.10	Judge Singleton Correspondence
2.11	Judge Bue Correspondence

TAB

3.0 - 20.0 RESERVED

TAB OVERCROWDING

21.0	Reduction of Population
21.1	Inmate Correspondence
21.2	Institutional Correspondence
21.3	TDC Correspondence
21.4	Counsel Correspondence
21.5	Judge Justice Correspondence
21.6	Expert Reports/Correspondence
21.7	Intra-Office Memos and Notes
21.8	General Correspondence
21.9	Compliance Plans/Reports
21.9.1	Report on Population and Housing (May 1, 1981)
21.10	Pleadings
21.11 - .15	RESERVED
23.0	Maximum Population (General)
23.1	Inmate Correspondence
23.2	Institutional Correspondence
23.3	TDC Correspondence
23.4	Counsel Correspondence
23.5	Judge Justice Correspondence
23.6	Expert Reports/Correspondence
23.7	Intra-Office Memos and Notes
23.8	General Correspondence
23.9	Compliance Plans/Reports
23.10	Pleadings
23.11 - .15	RESERVED
25.0	Multiple Celling/Dormitory Space (General)
25.1	Inmate Correspondence
25.2	Institutional Correspondence
25.3	TDC Correspondence
25.4	Counsel Correspondence
25.5	Judge Justice Correspondence
25.6	Expert Reports/Correspondence
25.7	Intra-Office Memos and Notes
25.8	General Correspondence
25.9	Compliance Plans/Reports
25.10	Pleadings
25.11 - .15	RESERVED

TABSECURITY & SAFETY

27.0	Security Staff (General)
27.1	Inmate Correspondence
27.2	Institutional Correspondence
27.3	TDC Correspondence
27.4	Counsel Correspondence
27.5	Judge Justice Correspondence
27.6	Expert Reports/Correspondence
27.7	Intra-Office Memos and Notes
27.8	General Correspondence
27.9	Compliance Plans/Reports
27.10	Pleadings
27.11 - .15	RESERVED
29.0	Staff Training (General)
29.1	Inmate Correspondence
29.2	Institutional Correspondence
29.3	TDC Correspondence
29.4	Counsel Correspondence
29.5	Judge Justice Correspondence
29.6	Expert Reports/Correspondence
29.7	Intra-Office Memos and Notes
29.8	General Correspondence
29.9	Compliance Plans/Reports
29.10	Pleadings
29.11 - .15	RESERVED
31.0	Use of Physical Force (General)
31.1	Inmate Correspondence
31.2	Institutional Correspondence
31.3	TDC Correspondence
31.4	Counsel Correspondence
31.5	Judge Justice Correspondence
31.6	Expert Reports/Correspondence
31.7	Intra-Office Memos and Notes
31.8	General Correspondence
31.9	Compliance Plans/Reports
31.10	Pleadings
31.11 - .15	RESERVED
33.0	Elimination of Building Tenders (General)
33.1	Inmate Correspondence
33.2	Institutional Correspondence
33.3	TDC Correspondence
33.4	Counsel Correspondence
33.5	Judge Justice Correspondence
33.6	Expert Reports/Correspondence
33.7	Intra-Office Memos and Notes
33.8	General Correspondence
33.9	Compliance Plans/Reports
33.10	Pleadings
33.11 - .15	RESERVED

35.0	Classification (General)
35.1	Inmate Correspondence
35.2	Institutional Correspondence
35.3	TDC Correspondence
35.4	Counsel Correspondence
35.5	Judge Justice Correspondence
35.6	Expert Reports/Correspondence
35.7	Intra-Office Memos and Notes
35.8	General Correspondence
35.9	Compliance Plans/Reports
35.10	Pleadings
35.11 - .15	RESERVED

TAB HEALTH CARE

37.0	Medical Care (General)
37.1	Inmate Correspondence
37.2	Institutional Correspondence
37.3	TDC Correspondence
37.4	Counsel Correspondence
37.5	Judge Justice Correspondence
37.6	Expert Reports/Correspondence
37.7	Intra-Office Memos and Notes
37.8	General Correspondence
37.9	Compliance Plans/Reports
37.10	Pleadings
37.11 - .15	RESERVED

39.0	Dental Care (General)
39.1	Inmate Correspondence
39.2	Institutional Correspondence
39.3	TDC Correspondence
39.4	Counsel Correspondence
39.5	Judge Justice Correspondence
39.6	Expert Reports/Correspondence
39.7	Intra-Office Memos and Notes
39.8	General Correspondence
39.9	Compliance Plans/Reports
39.10	Pleadings
39.11 - .15	RESERVED

TAB PSYCHIATRIC

41.0	Psychiatric Care (General)
41.1	Inmate Correspondence
41.2	Institutional Correspondence
41.3	TDC Correspondence
41.4	Counsel Correspondence
41.5	Judge Justice Correspondence
41.6	Expert Reports/Correspondence
41.7	Intra-Office Memos and Notes
41.8	General Correspondence
41.9	Compliance Plans/Reports
41.10	Pleadings
41.11 - .15	RESERVED

<u>TAB</u>	<u>SPECIAL NEEDS PRISONERS</u>
43.0	Special Needs Prisoners (General)
43.1	Inmate Correspondence
43.2	Institutional Correspondence
43.3	TDC Correspondence
43.4	Counsel Correspondence
43.5	Judge Justice Correspondence
43.6	Expert Reports/Correspondence
43.7	Intra-Office Memos and Notes
43.8	General Correspondence
43.9	Compliance Plans/Reports
43.10	Pleadings
43.11 - .15	RESERVED

<u>TAB</u>	<u>DISCIPLINE</u>
45.0	Disciplinary Practices and Procedures
45.1	Inmate Correspondence
45.2	Institutional Correspondence
45.3	TDC Correspondence
45.4	Counsel Correspondence
45.5	Judge Justice Correspondence
45.6	Expert Reports/Correspondence
45.7	Intra-Office Memos and Notes
45.8	General Correspondence
45.9	Compliance Plans/Reports
45.10	Pleadings
45.11 - .15	RESERVED

<u>TAB</u>	<u>RECORDING OF DISCIPLINARY HEARINGS</u>
47.0	Recording of Disciplinary Hearings (General)
47.1	Inmate Correspondence
47.2	Institutional Correspondence
47.3	TDC Correspondence
47.4	Counsel Correspondence
47.5	Judge Justice Correspondence
47.6	Expert Reports/Correspondence
47.7	Intra-Office Memos and Notes
47.8	General Correspondence
47.9	Compliance Plans/Reports
47.10	Pleadings
47.11 - .15	RESERVED

<u>TAB</u>	<u>SOLITARY CONFINEMENT</u>
49.0	Solitary Confinement (General)
49.1	Inmate Correspondence
49.2	Institutional Correspondence
49.3	TDC Correspondence
49.4	Counsel Correspondence
49.5	Judge Justice Correspondence
49.6	Expert Reports/Correspondence

49.7 Intra-Office Memos and Notes
49.8 General Correspondence
49.9 Compliance Plans/Reports
49.10 Pleadings
49.11 - .15 RESERVED

TAB ADMINISTRATIVE SEGREGATION

51.0 Administrative Segregation (General)
51.1 Inmate Correspondence
51.2 Institutional Correspondence
51.3 TDC Correspondence
51.4 Counsel Correspondence
51.5 Judge Justice Correspondence
51.6 Expert Reports/Correspondence
51.7 Intra-Office Memos and Notes
51.8 General Correspondence
51.9 Compliance Plans/Reports
51.10 Pleadings
51.11 - .15 RESERVED

53.0 Vague Rules (General)
53.1 Inmate Correspondence
53.2 Institutional Correspondence
53.3 TDC Correspondence
53.4 Counsel Correspondence
53.5 Judge Justice Correspondence
53.6 Expert Reports/Correspondence
53.7 Intra-Office Memos and Notes
53.8 General Correspondence
53.9 Compliance Plans/Reports
53.10 Pleadings
53.11 - .15 RESERVED

TAB ACCESS TO COURTS, COUNSEL AND PUBLIC OFFICIALS

55.0 Access to Courts, Counsel and Public Officials
(General)
55.1 Inmate Correspondence
55.2 Institutional Correspondence
55.3 TDC Correspondence
55.4 Counsel Correspondence
55.5 Judge Justice Correspondence
55.6 Expert Reports/Correspondence
55.7 Intra-Office Memos and Notes
55.8 General Correspondence
55.9 Compliance Plans/Reports
55.10 Pleadings
55.11 - .15 RESERVED

TAB OTHER CONDITIONS OF CONFINEMENT

57.0 Fire Safety
57.1 Inmate Correspondence
57.2 Institutional Correspondence
57.3 TDC Correspondence
57.4 Counsel Correspondence
57.5 Judge Justice Correspondence
57.6 Expert Reports/Correspondence
57.7 Intra-Office Memos and Notes
57.8 General Correspondence
57.9 Compliance Plans/Reports
57.10 Pleadings
57.11 - .15 RESERVED

59.0 Health, Safety & Hygiene (General)
59.1 Inmate Correspondence
59.2 Institutional Correspondence
59.3 TDC Correspondence
59.4 Counsel Correspondence
59.5 Judge Justice Correspondence
59.6 Expert Reports/Correspondence
59.7 Intra-Office Memos and Notes
59.8 General Correspondence
59.9 Compliance Plans/Reports
59.10 Pleadings
59.11 - .15 RESERVED

TAB NEW FACILITIES

61.0 New Facilities (General)
61.1 Inmate Correspondence
61.2 Institutional Correspondence
61.3 TDC Correspondence
61.4 Counsel Correspondence
61.5 Judge Justice Correspondence
61.6 Expert Reports/Correspondence
61.7 Intra-Office Memos and Notes
61.8 General Correspondence
61.9 Compliance Plans/Reports
61.10 Pleadings
61.11 - .15 RESERVED

63.0 Beto 2 & Grimes Unit (General)
63.1 Inmate Correspondence
63.2 Institutional Correspondence
63.3 TDC Correspondence
63.4 Counsel Correspondence
63.5 Judge Justice Correspondence
63.6 Expert Reports/Correspondence
63.7 Intra-Office Memos and Notes
63.8 General Correspondence
63.9 Compliance Plans/Reports
63.10 Pleadings
63.11 - .15 RESERVED

65.0	Existing Units (General)
65.1	Inmate Correspondence
65.2	Institutional Correspondence
65.3	TDC Correspondence
65.4	Counsel Correspondence
65.5	Judge Justice Correspondence
65.6	Expert Reports/Correspondence
65.7	Intra-Office Memos and Notes
65.8	General Correspondence
65.9	Compliance Plans/Reports
65.10	Pleadings
65.11 - .15	RESERVED

TAB

MANAGERIAL REORGANIZATION

67.0	Managerial Reorganization of TDC Facilities
67.1	Inmate Correspondence
67.2	Institutional Correspondence
67.3	TDC Correspondence
67.4	Counsel Correspondence
67.5	Judge Justice Correspondence
67.6	Expert Reports/Correspondence
67.7	Intra-Office Memos and Notes
67.8	General Correspondence
67.9	Compliance Plans/Reports
67.10	Pleadings
67.11 - .15	RESERVED

Appendix C

ORDERS OF REFERENCE IN THREE PRISON CASES

1. Jones v. Wittenberg
2. Palmigiano v. Garrahy
3. Ruiz v. Estelle (excerpts from order and amended orders)

ORDER OF REFERENCE IN
JONES V. WITTENBERG

THEREFORE, FOR THE REASONS STATED, GOOD CAUSE THEREFORE APPEARING, it is ORDERED that the motion filed by plaintiffs for appointment of a Special Master to supervise compliance with the order of July 30, 1971, be, and it hereby is, granted and the parties are granted ten days from the date of filing of this order in which to make recommendations as to a proper person to be named as Special Master, and it is

FURTHER ORDERED that the function of the Special Master will be to study and evaluate all of the various reports that have been filed in this matter to date and to determine what further reports and evidence are necessary to show whether and to what extent the present administrative regulations and practices at the Lucas County Jail are in compliance with the order of July 30, 1971, and it is

FURTHER ORDERED that the Special Master shall have the authority to seek orders from the Court to show cause why the defendants, or any of their agents, employees, or persons acting in concert with them, should not be punished as for contempt for failure to comply with his instructions or orders, or the order of this Court, and it is

FURTHER ORDERED that the Special Master shall have the full power to hold hearings and to call witnesses, including both inmates and members of the staff of the Lucas County Jail as he shall deem necessary, expedient, or desirable in carrying out his duties, and it is

FURTHER ORDERED that the Special Master is authorized to have unlimited access to all files of the Lucas County Jail, unlimited access to the premises of said Jail, and all and every part thereof, at any time or times of his choosing, and without the necessity of giving advance notice to the institutional officials or personnel of his intention to visit said premises, and it is

FURTHER ORDERED that the Special Master shall be authorized to conduct confidential interviews at any time with any staff member or inmate, and shall be [sic] unlimited access to and the unlimited right to attend institutional meetings and proceedings of every kind and nature whatsoever, and it is

FURTHER ORDERED that the defendants shall post notices throughout the said jail stating that the Court has appointed a Special Master, who may from time to time visit the said jail, and talk to the staff members or inmates, as he shall desire to do so. The notice shall emphasize that the Special Master's only function is to determine the state of compliance with the orders of the Court; that his appointment is not to be considered as providing any substitute for, or addition to, the regular grievance and disciplinary procedures of the Lucas County Jail; that he is not to investigate, to arbitrate, or to interfere with the disposition of the grievances or complaints of individual inmates or staff members; that if the Special Master desires any information from either inmates or staff with respect to such matters, he will

initiate the matter; and that if any person, inmate or staff member desires to bring any matter to the attention of the Special Master, he or she may do so only by making the desire known to counsel for the parties, who will then decide whether or not to bring the matter to the attention of the Special Master. The notices to be posted throughout the Lucas County Jail shall state the name and address of counsel for plaintiff and counsel for defendants. The notices shall remain posted until the Special Master has been discharged. The form of the notices shall be drafted by counsel and fixed by the Special Master, and it is

FURTHER ORDERED that not later than ninety days after his appointment, the Special Master shall file his first report, evaluating the compliance of the defendants with this Court's order of July 30, 1971. The report should, with respect to each particular findings therein, state the evidentiary basis for the finding, whether observation, interview, statistics, hearing, or any combination thereof. As to each item of said order, the report should show:

- (1) the state of compliance;
- (2) any applicable departmental or institutional regulations, and present actual practices thereunder in the Lucas County Jail;
- (3) the degree of cooperation given the Special Master by the defendants and members of the staff of said jail, specifically naming any staff members who have been uncooperative and the details of their lack of cooperation; and
- (4) a time-table for establishing full compliance with any portion of said order which the Special Master finds is not being complied with.

and it is

FURTHER ORDERED that after the filing of the initial report, the Special Master shall file reports not less often than every ninety days, until he finds that the Court's order of July 30, 1971, is being fully complied with in every respect, and that such compliance has been continuing for a sufficient length of time to make a lapse into noncompliance improbable. At that time the report of the Special Master may recommend his discharge and the termination of the Court's jurisdiction herein, and it is

FURTHER ORDERED that the Special Master shall be allowed his necessary expenses and reasonable fees for his services in carrying out his duties, which shall be taxed as part of the costs of this matter and assessed against the defendants in their official capacities as sheriff and county commissioners, to be paid out of funds budgeted by the Board of County Commissioners of Lucas County, Ohio for the operations of the Lucas County Sheriff's Department and Board of County Commissioners. IT IS SO ORDERED.

ORDER OF REFERENCE IN
PALMIGIANO V. GARRAHY

[24] 11. A Master shall be appointed by the Court within thirty days and shall be empowered to monitor compliance with and implementation of the relief ordered in this case, in keeping with its purposes as recited in the Opinion. The Master shall also advise and assist the Department to the fullest extent possible. The Master will report on a monthly basis to the Court on the progress of such compliance and implementation.

(a) In order to carry out his duties, the Master or his delegates shall have unlimited access to any facilities, buildings or premises under the control of the Department of Corrections, or any records, files or papers maintained by said Department. Access shall be granted at any time and no advance notice shall be necessary.

(b) The Master is authorized to conduct confidential interviews at any time, without advance notice, with any staff member or employee of the Department or any prisoner. The Master or his delegate may attend any institutional meetings or proceedings.

(c) The Master may require written reports from any staff members or employees of the Department of Corrections with respect to compliance with and implementation of this Court's orders.

(d) The Master shall be empowered to recommend to the Court that any staff member or employee of such Department be moved or transferred within the Department as he deems necessary to obtain compliance with and implementation of this Court's order. In the event that hiring of additional personnel or the termination of any current personnel is necessary to carry out or to prevent interference with the Court's order, the Master shall file a written report with the Court explaining why such action is necessary. Defendants may file a written response to the report and the Court shall approve or reject the recommendation of the Master.

(e) The Master may act as a whole or through subcommittees appointed by him.

(f) The Master is authorized to select and hire with the prior approval of the Court, a full time staff consultant if such person is needed to assist him in carrying out his duties and one full time clerk-stenographer if needed. Adequate offices, equipment and supplies shall be made available by the defendants. The Master may also consult appropriate, independent specialists.

(g) Necessary expenses for carrying out the Master's duties shall be paid pursuant to Rule 53, Federal Rules of Civil Procedure, and shall be taxed as part of the costs of this case against the defendants in their official capacities.

12. The defendants shall, within six months from the date of this order, submit to the Master and to the Court a comprehensive report setting forth their progress in the implementation of each and every subparagraph of this order. The report shall also include a timetable for full compliance.

ORDER OF REFERENCE IN
RUIZ V. ESTELLE

Pursuant to these bases of authority, the Special Master shall assist the Court by monitoring compliance with the Court's orders in this cause. All actions of the Special Master and any monitors or members of the Special Master's staff will be under the direct control and supervision of the Court. In particular, the Special Master and other persons operating on the Court's behalf shall not intervene in the administrative management of the Texas Department of Corrections or any of its institutions. In addition, the Special Master, his staff and any monitors who are appointed shall not be empowered to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance. The sole power to direct compliance and to punish noncompliance remains with this Court. The duties of the Special Master, then, will be to observe, monitor, find facts, report or testify as to his findings, and make recommendations to the Court concerning steps which should be taken to achieve compliance. The Special Master may and should assist the defendants in every possible way, and to this end he may and should confer informally with the defendants and their subordinates on matters affecting compliance. In order to accomplish these objectives, the Special Master shall have the following powers:

1. The Special Master shall have unlimited access to any facilities, buildings, or premises under the jurisdiction or control of the Texas Department of Corrections, and no advance notice of any visit or inspection shall be required.
2. The Special Master shall have unlimited access to the records, files and papers maintained by the Texas Department of Corrections to the extent that such access is related to the performance of the Special Master's duties of monitoring compliance. Such access shall include all Departmental, institutional, and inmate records, including but not limited to medical records. The Special Master may obtain copies of all such relevant records, files and papers.
3. The Special Master may conduct confidential interviews with all staff members and employees of the Texas Department of Corrections. In addition, he may engage in informal conferences with such staff members and employees, and such persons shall cooperate with the Special Master and respond to all inquiries and requests related to compliance with the Court's orders in this case. The Special Master may require compilation and communication of oral or written information relevant to such compliance.
4. The Special Master may conduct confidential interviews and meetings at the institution to which they are confined with any prisoner or group of prisoners under the jurisdiction of the Texas Department of Corrections.
5. The Special Master may attend any formal institutional meetings or proceedings at any institution under the jurisdiction of the Texas Department of Corrections.

6. The Special Master may require written reports from any staff member or employee of the Texas Department of Corrections with respect to compliance with this court's orders.
7. The Special Master shall have the full power to order and conduct hearings with respect to the defendants' compliance with this Court's orders. To this end he shall have the power to require the attendance of witnesses, including both prisoners and employees of the Texas Department of Corrections, and he shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.
8. The Special Master may select and employ necessary administrative, clerical, and support staff. All such persons as well as the nature of their compensation shall be approved by the Court in advance of their employment. In addition, with advance permission of the Court, the Special Master may hire independent specialists and experts to assist him in fulfilling the responsibilities assigned to him by this Court.
9. In exercising the powers enumerated in paragraphs 1 through 6 above, the Special Master may act by himself, or through monitors appointed by the Court. All actions of such monitors, however, shall be supervised and coordinated by the Special Master in order to accomplish the objectives of this Reference.

The Special Master shall, as he deems necessary or as required by the Court, file reports with the Court in which he shall make findings concerning the defendants' compliance with the provisions of the Court's Orders and the need, if any, for supplemental remedial action. In general, the Special Master's reports to the Court will be based upon reports prepared by individual monitors appointed by the Court as follows:

1. Reports of their factual observations shall be prepared by the monitors appointed by the Court and shall be submitted to the parties and to the Special Master. Any objections to such a report shall be the subject of a hearing before the Special Master upon request of any party. After the parties have had an opportunity to respond or object to a monitor's report, with or without a hearing, the Special Master shall file his report with the Court, including his findings of fact based upon the monitor's report, the record of any hearing, or both.
2. No objection may be filed to the Special Master's report which could have been filed to the monitor's report preceding it. Otherwise, any party may file written objections to the Special Master's report within fifteen days of the filing thereof with the Court. The objecting party shall note each particular finding or recommendation to which objection is made, shall provide proposed alternative findings, and may request a hearing or oral argument before the Court.

3. Any request for a hearing before the Court must include a list of witnesses and documents to be presented to the Court. A copy of the objections, proposed findings, and any request for a rehearing shall be served on all parties.
4. The Special Master's findings of fact shall be accepted by the Court unless shown to be clearly erroneous. Any evidence not previously presented to the Special Master in the course of the formal hearing preceding his report will be admitted at a hearing before the Court only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the Special Master.

In addition, the Special Master may submit reports based upon hearings held by him in the absence of preliminary reports by monitors, and in such instances the Special Master's reports and findings shall be treated in accordance with the provisions of Rule 53 of the Federal Rules of Civil Procedure. The Special Master may also submit reports based upon his own observations and investigations in the absence of a formal hearing before him, and such reports and findings shall be treated as those of an expert appointed under Rule 706 of the Federal Rules of Evidence. In any event, however, the Special Master's findings must be based upon evidence which is made part of the record before the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,)	
Plaintiffs)	
UNITED STATES OF AMERICA)	
Plaintiff-Intervenor)	
vs.)	Civil Action No. H-78-987
W. J. ESTELLE, JR., et al.,)	
Defendants)	

AMENDED ORDER OF REFERENCE

The Court, having discovered an error in the text of the Order entered on June 18, 1981, modifying its earlier Order of April 20, 1981, appointing a Special Master in this cause, hereby issues this Amended Order of Reference which shall supersede the aforementioned previous Orders.

In a Memorandum Opinion filed on December 10, 1980, the Court announced its intention to appoint one or more Special Masters in this cause. Subsequently, the Court received nominations from all parties and reviewed at length the qualifications of those persons whose names were submitted for consideration. For the reasons set forth in its earlier opinion, the Court hereby appoints Vincent M. Nathan to serve as Special Master for the Court in this cause.

Mr. Nathan was nominated both by the plaintiffs and by the United States of America. A native Texan, he graduated from the University of Oklahoma College of Law in 1959. He was a member of the faculty of the College of Law of the University of Toledo for 16 years, during the last 10 of which he served as a Professor of Law. He is now engaged in the practice of law in Toledo, Ohio.

Mr. Nathan was appointed in December of 1975 by the United States District Court for the Northern District of Ohio to serve as Special Master in Taylor v. Perini, litigation involving the Marion Correctional Institution in Marion, Ohio. In January of 1977, Mr. Nathan was appointed by the same court to serve as Special Master in Jones v. Wittenburg, litigation involving the Lucas County Jail in Toledo, Ohio. ^{1/} In June of 1979 Mr. Nathan was

^{1/} Mr. Nathan's reports in Taylor were confirmed by the district court and published at 413 F.Supp. 198 (1976), 421 F. Supp. 742 (1976), 431 F.Supp. 570 (1977), 446 F.Supp. 1186 (1977), 455 F. Supp. 1255 (1978), and 477 F.Supp. 1289 (1978). His report in Jones, which was also confirmed by the district court, was published at 440 F.Supp. 60 (1977). Taylor is a rare example of prison conditions litigation which has come to an end, a fact which commends Mr. Nathan's appointment by this Court.

appointed by the United States District Court for the Southern District of Georgia to serve as Special Monitor in Guthrie v. Evans, litigation involving the Georgia State Prison in Reidsville, Georgia. He continues to serve that court as special monitor at this time.

Mr. Nathan is the author of The Use of Masters in Institutional Reform Litigation, 10 Tol. L. Rev. 419 (1979), which was republished and distributed by the Federal Judicial Center. He has served and continues to serve as a consultant for the National Institute of Corrections and is an acknowledged expert in the field of implementation of judicial decrees in a correctional setting. In view of his extensive experience and impressive credentials, Mr. Nathan is fully qualified to assume the enormous responsibilities of monitoring compliance with the Court's order in this cause. Because the scope of application of the Court's remedial orders in this case will be infinitely broader than that encountered in any other example of correctional litigation, it is essential that the Special Master be a person with extensive experience and an established record of success.

In addition, the Court will appoint several monitors to assist the Special Master. These monitors will be persons of high professional qualification who are nominated by the Special Master. The Special Master shall supervise the activities of such monitors in accordance with the guidelines announced in Newman v. Alabama, 559 F.2d 283, 290 (5th Cir. 1977), cert. denied, 98 S. Ct. 3144 (1978). 2/

The Court grounds its appointment of a Special Master in this case upon two independent sources of authority. First, it relies upon its inherent power to make such an appointment:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.

Ex parte Peterson, 253 U.S. 300 (1920). The enforcement of its remedial order is a judicial duty which rests with this Court, and it has the inherent power to appoint a Special Master to provide assistance toward this end.

2/ The Court does not contemplate the appointment of a separate monitor for each prison in Texas as the Court in Newman suggested would be appropriate. The appointment of a separate and qualified monitor for each of Texas' 16 prisons would result in an enormous expenditure of public funds. Rather, the Court contemplates that the Special Master will be able to utilize a staff of perhaps 6 full-time monitors to monitor compliance throughout the Texas system. Such a model will achieve the minimal level of intrusiveness sought by the Court in Newman.

Second, the Court relies upon Rule 53 of the Federal Rules of Civil Procedure in making this reference. In its Memorandum Opinion of December 10, 1980, referred to above, the Court has demonstrated that the appointment of a Master is both necessary and appropriate in accordance with the provisions of Rule 53. The formal fact finding role contemplated by the Rule will be particularly relevant to the Special Master in this case to the extent that he may hold hearings and make factual findings as a result of those hearings for review by the Court.

Pursuant to these bases of authority, the Special Master shall assist the Court by monitoring compliance with the Court's orders in this cause. All actions of the Special Master and any monitors or members of the Special Master's staff will be under the direct control and supervision of the Court. In particular, the Special Master and other persons operating on the Court's behalf shall not intervene in the administrative management of the Texas Department of Corrections or any of its institutions. In addition, the Special Master, his staff and any monitors who are appointed shall not be empowered to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance. The sole power to direct compliance and to punish noncompliance remains with this Court. The duties of the Special Master, then, will be to observe, monitor, find facts, report or testify as to his findings, and make recommendations to the Court concerning steps which should be taken to achieve compliance. The Special Master may and should assist the defendants in every possible way, and to this end he may and should confer informally with the defendants and their subordinates on matters affecting compliance. In order to accomplish these objectives, the Special Master shall have the following powers:

1. The Special Master shall have unlimited access to any facilities, buildings, or premises under the jurisdiction or control of the Texas Department of Corrections, and no advance notice of any visit or inspection shall be required.
2. The Special Master shall have unlimited access to the records, files and papers maintained by the Texas Department of Corrections to the extent that such access is related to the performance of the Special Master's duties of monitoring compliance. Such access shall include all Departmental, institutional, and inmate records, including but not limited to medical records. The Special Master may obtain copies of all such relevant records, files and papers.
3. The Special Master may conduct confidential interviews with all staff members and employees of the Texas Department of Corrections. In addition, he may engage in informal conferences with such staff members and employees, and such persons shall cooperate with the Special Master and respond to all inquiries and requests related to compliance with the Court's orders in this case. The Special Master may require compilation and communication of oral or written information relevant to such compliance.

4. The Special Master may conduct confidential interviews and meetings at the institution to which they are confined with any prisoner or group of prisoners under the jurisdiction of the Texas Department of Corrections.
5. The Special Master may attend any formal institutional meetings or proceedings at any institution under the jurisdiction of the Texas Department of Corrections.
6. The Special Master may require written reports from any staff member or employee of the Texas Department of Corrections with respect to compliance with this Court's orders.
7. The Special Master shall have the full power to order and conduct hearings with respect to the defendants' compliance with this Court's orders. To this end he shall have the power to require the attendance of witnesses, including both prisoners and employees of the Texas Department of Corrections, and he shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.
8. The Special Master may select and employ necessary administrative, clerical, and support staff. All such persons as well as the nature of their compensation shall be approved by the Court in advance of their employment. In addition, with advance permission of the Court, the Special Master may hire independent specialists and experts to assist him in fulfilling the responsibilities assigned to him by this Order.
9. In exercising the powers enumerated in paragraphs 1 through 6 above, the Special Master may act by himself, or through monitors appointed by the Court. All actions of such monitors, however, shall be supervised and coordinated by the Special Master in order to accomplish the objectives of this Reference.

The Special Master shall, as he deems necessary or as required by the Court, file reports with the Court in which he shall make findings concerning the defendants' compliance with the provisions of the Court's Orders and the need, if any, for supplemental remedial action. In general, the Special Master's reports to the Court will be based upon reports prepared by individual monitors appointed by the Court as follows:

1. Reports on their factual observations shall be prepared by the monitors appointed by the Court and shall be submitted to the parties and to the Special Master. Any objections to such a report shall be the subject of a hearing before the Special Master upon request of any party. After the parties have had an opportunity to respond or object to a monitor's report, with or without a hearing, the Special Master shall file his report with the Court, including his findings of fact based upon the monitor's report, the record of any hearing, or both.

2. No objection may be filed to the Special Master's report which could have been filed to the monitor's report preceding it. Otherwise, any party may file written objections to the Special Master's report within fifteen days of the filing thereof with the Court. The objecting party shall note each particular finding or recommendation to which objection is made, shall provide proposed alternative findings, and may request a hearing or oral argument before the Court.
3. Any request for a hearing before the Court must include a list of witnesses and documents to be presented to the Court. A copy of the objections, proposed findings, and any request for a rehearing shall be served on all parties.
4. The Special Master's findings of fact shall be accepted by the Court unless shown to be clearly erroneous. Any evidence not previously presented to the Special Master in the course of the formal hearing preceding his report will be admitted at a hearing before the Court only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the Special Master.

In addition, the Special Master may submit reports based upon hearings held by him in the absence of preliminary reports by monitors, and in such instances the Special Master's reports and findings shall be treated in accordance with the provisions of Rule 53 of the Federal Rules of Civil Procedure. The Special Master may also submit reports based upon his own observations and investigations in the absence of a formal hearing before him. In any event, however, the Special Master's findings must be based upon evidence which is made part of the record before the Court.

The Special Master shall be compensated at the rate of Ninety-Five Dollars (\$95.00) per hour for services performed in accordance with this Order. Appropriate compensation for members of the Special Master's staff as well as that of monitors shall be established by the Court upon the recommendation of the Special Master and after notice to all parties. All reasonable expenses incurred by the Special Master in the course of the performance of his duties, including but not limited to the rental of office space and equipment in Texas, salaries of staff, long distance telephone, photocopying, printing, travel, data processing, and postage, shall be reimbursed.

The cost of the mastership shall be borne by the defendants as costs in this action. The Special Master shall submit to the Court periodic statements of his time and expenses for review and approval by the Court.

THE DEFENDANTS ARE HEREBY ORDERED to deposit the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) with the Clerk of this Court as interim payment of costs, and payments to the Special Master and to monitors shall be made by order of the Court out of such funds. As payments are made by the Clerk, the defendants shall deposit additional sums with the Clerk as the Court may order and direct.

The Special Master may cause copies of this Order of Reference or portions thereof to be posted in any facility under the jurisdiction of the Texas Department of Corrections and may cause such copies to be distributed to inmates within such facilities and to employees of the Texas Department of Corrections.

SO ORDERED this 24th day of July, 1981.

William Wayne Justice
Chief Judge
United States District Court
Eastern District of Texas
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,)	
Plaintiffs)	
UNITED STATES OF AMERICA)	
Plaintiff-Intervenor)	
vs.)	Civil Action No. H-78-987
W. J. ESTELLE, JR., et al.,)	
Defendants)	

AMENDED ORDER OF REFERENCE

In a Memorandum Opinion filed on December 10, 1980, the Court announced its intention to appoint one or more Special Masters in this cause. Subsequently, the Court received nominations from all parties and reviewed at length the qualifications of those persons whose names were submitted for consideration. For the reasons set forth in its earlier opinion, the Court hereby appoints Vincent M. Nathan to serve as Special Master for the Court in this cause.

Mr. Nathan was nominated both by the plaintiffs and by the United States of America. A native Texan, he graduated from the University of Oklahoma College of Law in 1959. He was a member of the faculty of the College of Law of the University of Toledo for 16 years, during the last 10 of which he served as a Professor of Law. He is now engaged in the practice of law in Toledo, Ohio.

Mr. Nathan was appointed in December of 1975 by the United States District Court for the Northern District of Ohio to serve as Special Master in Taylor v. Perini, litigation involving the Marion Correctional Institution in Marion, Ohio. In January of 1977, Mr. Nathan was appointed by the same court to serve as Special Master in Jones v. Wittenberg, litigation involving the Lucas County Jail in Toledo, Ohio. 1/ In June of 1979 Mr. Nathan was appointed by the United States District Court for the Southern District of Georgia to serve as Special Monitor in Cuthrie v. Evans, litigation involving the Georgia State Prison in Reidsville, Georgia. He continues to serve that court as special monitor at this time.

1/ Mr. Nathan's reports in Taylor were confirmed by the district court and published at 413 F. Supp. 198 (1976), 421 F. Supp. 742 (1976), 431 F. Supp. 570 (1977), 446 F. Supp. 1186 (1977), 455 F. Supp. 1255 (1978), and 477 F. Supp. 1289 (1978). His report in Jones, which was also confirmed by the district court, was published at 440 F. Supp. 60 (1977). Taylor is a rare example of prison conditions litigation which has come to an end, a fact which commends Mr. Nathan's appointment by this Court.

Mr. Nathan is the author of The Use of Masters in Institutional Reform Litigation, 10 Tol. L. Rev. 419 (1979), which was republished and distributed by the Federal Judicial Center. He has served and continues to serve as a consultant for the National Institute of Corrections and is an acknowledged expert in the field of implementation of judicial decrees in a correctional setting. In view of his extensive experience and impressive credentials, Mr. Nathan is fully qualified to assume the enormous responsibilities of monitoring compliance with the Court's order in this cause. Because the scope of application of the Court's remedial orders in this case will be infinitely broader than that encountered in any other example of correctional litigation, it is essential that the Special Master be a person with extensive experience and an established record of success.

In addition, the Court will appoint several monitors to assist the Special Master. These monitors will be persons of high professional qualification who are nominated by the Special Master. The Special Master shall supervise the activities of such monitors in accordance with the guidelines announced in Newman v. Alabama, 559 F.2d 283, 290 (5th Cir. 1977), cert. denied, 98 S. Ct. 3144 (1978). 27

The Court grounds its appointment of a Special Master in this case upon two independent sources of authority. First, it relies upon its inherent power to make such an appointment:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.

Ex parte Peterson, 253 U.S. 300 (1920). The enforcement of its remedial order is a judicial duty which rests with this Court, and it has the inherent power to appoint a Special Master to provide assistance toward this end.

Second, the Court relies upon Rule 53 of the Federal Rules of Civil Procedure in making this reference. In its Memorandum Opinion of December 10, 1980, referred to above, the Court has demonstrated that the appointment of a Master is both necessary and appropriate in accordance with

2/ The Court does not contemplate the appointment of a separate monitor for each prison in Texas as the Court in Newman suggested would be appropriate. The appointment of a separate and qualified monitor for each of Texas' 16 prisons would result in an enormous expenditure of public funds. Rather, the Court contemplates that the Special Master will be able to utilize a staff of perhaps 6 full-time monitors to monitor compliance throughout the Texas system. Such a model will achieve the minimal level of intrusiveness sought by the Court in Newman.

the provisions of Rule 53. The formal fact finding role contemplated by the Rule will be particularly relevant to the Special Master in this case to the extent that he may hold hearings and make factual findings as a result of those hearings for review by the Court.

Pursuant to these bases of authority, the Special Master shall assist the Court by monitoring compliance with the Court's orders in this cause. All actions of the Special Master and any monitors or members of the Special Master's staff will be under the direct control and supervision of the Court. In particular, the Special Master and other persons operating on the Court's behalf shall not intervene in the administrative management of the Texas Department of Corrections or any of its institutions. In addition, the Special Master, his staff and any monitors who are appointed shall not be empowered to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance. The sole power to direct compliance and to punish noncompliance remains with this Court. The duties of the Special Master, then, will be to observe, monitor, find facts, report or testify as to his findings, and make recommendations to the Court concerning steps which should be taken to achieve compliance. The Special Master may and should assist the defendants in every possible way, and to this end he may and should confer informally with the defendants and their subordinates on matters affecting compliance. In order to accomplish these objectives, the Special Master shall have the following powers:

1. The Special Master shall have unlimited access to any facilities, buildings, or premises under the jurisdiction or control of the Texas Department of Corrections, and no advance notice of any visit or inspection shall be required.
2. The Special Master shall have unlimited access to the records, files and papers maintained by the Texas Department of Corrections to the extent that such access is related to the performance of the Special Master's duties of monitoring compliance. Such access shall include all Departmental, institutional, and inmate records, including but not limited to medical records. The Special Master may obtain copies of all such relevant records, files and papers.
3. The Special Master may conduct confidential interviews with all staff members and employees of the Texas Department of Corrections. In addition, he may engage in informal conferences with such staff members and employees, and such persons shall cooperate with the Special Master and respond to all inquiries and requests related to compliance with the Court's orders in this case. The Special Master may require compilation and communication of oral or written information relevant to such compliance.
4. The Special Master may conduct confidential interviews and meetings at the institution to which they are confined with any prisoner or group of prisoners under the jurisdiction of the Texas Department of Corrections.

5. The Special Master may attend any formal institutional meetings or proceedings at any institution under the jurisdiction of the Texas Department of Corrections.
6. The Special Master may require written reports from any staff member or employee of the Texas Department of Corrections with respect to compliance with this Court's orders.
7. The Special Master shall have the full power to order and conduct hearings with respect to the defendants' compliance with this Court's orders. To this end he shall have the power to require the attendance of witnesses, including both prisoners and employees of the Texas Department of Corrections, and he shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.
8. The Special Master may select and employ necessary administrative, clerical, and support staff. All such persons as well as the nature of their compensation shall be approved by the Court in advance of their employment. In addition, with advance permission of the court, the Special Master may hire independent specialists and experts to assist him in fulfilling the responsibilities assigned to him by this Order.
9. In exercising the powers enumerated in paragraphs 1 through 6 above, the Special Master may act by himself, or through monitors appointed by the Court. All actions of such monitors, however, shall be supervised and coordinated by the Special Master in order to accomplish the objectives of this Reference.

The Special Master shall, as he deems necessary or as required by the Court, file reports with the Court in which he shall make findings concerning the defendants' compliance with the provisions of the Court's Orders and the need, if any, for supplemental remedial action. In general, the Special Master's reports to the Court will be based upon reports prepared by individual monitors appointed by the Court as follows:

1. Reports of their factual observations shall be prepared by the monitors appointed by the Court and shall be submitted to the parties and to the Special Master. Any objections to such a report shall be the subject of a hearing before the Special Master upon request of any party. After the parties have had any opportunity to respond or object to the monitor's report, with or without a hearing, the Special Master shall file his report with the Court, including his findings of fact based upon the monitor's report, the record of any hearing, or both.
2. No objection may be filed to the Special Master's report which could have been filed to the monitor's report preceding it. Otherwise, any party may file written objections to the Special Master's report within fifteen days of the filing thereof with the Court. The objecting party shall note each particular finding or recommendation to which objection is made, shall provide proposed alternative findings, and may request a hearing or oral argument before the Court.

3. Any request for a hearing before the Court must include a list of witnesses and documents to be presented to the Court. A copy of the objections, proposed findings, and any request for a rehearing shall be served on all parties.
4. The Special Master's findings of fact shall be accepted by the Court unless shown to be clearly erroneous. Any evidence not previously presented to the Special Master in the course of the formal hearing preceding his report will be admitted at a hearing before the Court only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the Special Master.

In addition, the Special Master may submit reports based upon hearings held by him in the absence of preliminary reports by monitors, and in such instances the Special Master's reports and findings shall be treated in accordance with the provisions of Rule 53 of the Federal Rules of Civil Procedure. The Special Master may also submit reports based upon his own observations and investigations in the absence of a formal hearing before him. In any event, however, the Special Master's findings must be based upon evidence which is made part of the record before the Court. Unless based on hearings conducted on the record after proper notice, the reports, findings and conclusions of the Special Master shall not be accorded any presumption of correctness and the "clearly erroneous" rule will not apply to them. Furthermore, neither the Special Master nor any monitor shall have the authority to hear matters that should appropriately be the subject of separate judicial proceedings, such as actions under 42 U.S.C.A. §1983, and their duties shall be restricted to those set forth above in this Order.

The Special Master shall be compensated at the rate of Ninety-Five Dollars (\$95.00) per hour for services performed in accordance with this Order. Appropriate compensation for members of the Special Master's staff as well as that of monitors shall be established by the Court upon the recommendation of the Special Master and after notice to all parties. All reasonable expenses incurred by the Special Master in the course of the performance of his duties, including but not limited to the rental of office space and equipment in Texas, salaries of staff, long distance telephone, photocopying, printing, travel, data processing, and postage, shall be reimbursed.

The cost of the mastership shall be borne by the defendants as costs in this action. The Special Master shall submit to the Court periodic statements of his time and expenses for review and approval by the Court.

THE DEFENDANTS ARE HEREBY ORDERED to deposit the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) with the Clerk of this Court as interim payment of costs, and payments to the Special Master and to monitors shall be made by order of the Court out of such funds. As payments are made by the Clerk, the defendants shall deposit additional sums with the Clerk as the Court may order and direct.

The Special Master may cause copies of this Order of Reference or portions thereof to be posted in any facility under the jurisdiction of the Texas Department of Corrections and may cause such copies to be distributed to inmates within such facilities and to employees of the Texas Department of Corrections.

SO ORDERED this ____ day of _____, 1982.

William Wayne Justice
Chief Judge
United States District Court
Eastern District of Texas
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,)	
Plaintiffs)	
UNITED STATES OF AMERICA)	
Plaintiff-Intervenor)	
vs.)	Civil Action No. H-78-987
W. J. ESTELLE, JR., et al.,)	
Defendants)	

ORDER AMENDING THE AMENDED ORDER
OF REFERENCE OF JULY 24, 1981

On July 24, 1981, an Amended Order of Reference was entered in the above-entitled and numbered civil action. The Court of Appeals for the Fifth Circuit, in its opinion of June 23, 1982, affirmed this Order, subject to two modifications. First, the reports, findings, and conclusions of the Special Master are not to be accorded the presumption of correctness under the "clearly erroneous" rule, unless based on hearings conducted on the record after proper notice. Secondly, the staff of the Special Master's office is not to hear any matters that should properly be the subject of separate judicial proceedings, such as actions brought pursuant to 42 U.S.C. §1983.

In response to these directions it is hereby ordered that the Amended Order of Reference of July 24, 1981, shall be further amended, by adding the following language at the end of the penultimate paragraph of page 6 of the aforementioned order: "Unless based on hearings conducted on the record after proper notice, the reports, findings and conclusions of the Special Master shall not be accorded any presumption of correctness and the 'clearly erroneous' rule will not apply to them. Furthermore, neither the Special Master nor any monitor shall have the authority to hear matters that should appropriately be the subject of separate judicial proceedings, such as actions under 42 U.S.C. §1983, and their duties shall be restricted to those set forth above in this order."

For the convenience of the parties the Amended Order of Reference, as modified by today's order, is republished in full herein and shall constitute the Amended Order of Reference in this cause.

The Court of Appeals also ordered this court to "reconsider whether or not there is a continuing need for a staff of six monitors to assist the special master." Slip op. at 105.

Turning to this issue, it is noted that in the Amended Order of Reference of July 24, 1981, the court announced its intention to "appoint several monitors to assist the Special Master," and stated that it contemplated "that the Special Master will be able to utilize a staff of perhaps six full-time monitors to monitor compliance throughout the Texas system." To date, the Special Master has sought and the court has approved only three full-time monitors and one part-time monitor. In addition, the Special Master's staff consists of two administrative assistants and two clerical personnel.

The initial Order of Reference in this case referred to the existence of 16 prisons within the Texas Department of Corrections. In fact, TDC is now operating 22 institutions, ^{1/} and additional units are about to come on-line. The total population of the system exceeds 33,000 prisoners.

One full-time monitor has been assigned to security and safety issues. These include the elimination of building tenders and the provision of adequate security staffing, matters that are dealt with in great detail by the parties' Stipulated Modification of Parts II(A) and II(D) of this Court's Amended Decree Granting Equitable Relief and Declaratory Judgment. In addition, this monitor is responsible for monitoring compliance with the provisions of the Consent Decree of April 20, 1981, relating to use of force and use of chemical agents. Finally, he is primarily responsible for overseeing implementation of the provision of the remedial decree relating to classification of prisoners.

A second of the full-time monitors employed in the Special Master's office is responsible for monitoring the lengthy and complex provisions of the remedial decree concerning access to courts, counsel and public officials. These provisions were modified in only one minor respect by the Court of Appeals. This monitor is also responsible for overseeing implementation of Section V (Work Safety and Hygiene) of the Consent Order of April 20, 1981.

The third full-time monitor appointed by the court is responsible for monitoring all issues relating to the discipline of prisoners. He is also charged with responsibility concerning implementation of the administrative segregation and death row provisions that were affirmed by the Court of Appeals, as well as Section VI of the Consent Decree of April 20, 1981, relating to the assignment and review of prisoners confined to administrative segregation.

The part-time monitor has been assigned to the health care area, and she monitors compliance with the extensive provisions of the Consent Order of April 20, 1981, on this subject. She is also responsible for monitoring the provisions of that Consent Order, as they relate to special needs prisoners and for overseeing the terms of the parties' stipulation concerning conditions in the Huntsville Unit Hospital.

^{1/} Beto I, Beto II, Central, Clemens, Coffield, Darrington, Diagnostic, Eastham, Ellis, Ferguson, Gatesville, Coree, Grimes County, Hilltop, Huntsville, Jester I, Jester II, Mountainview, Ramsey I, Ramsey II, Retrieven and Wynne.

Those provisions of the Court's Amended Decree Granting Equitable Relief and Declaratory Judgment affirmed by the Court of Appeals (e.g., the provision of at least 40 square feet per prisoner in all dormitories) are the shared responsibility of several monitors. The Special Master himself coordinates the activities of all the monitors, reviewing their work both formally and informally, and providing what has been acknowledged by all parties to be invaluable assistance in mediation and negotiation efforts on virtually every facet of the case.

Charged with responsibility for monitoring compliance with the pervasive and complex provisions of the mandates that were undisturbed by the Court of Appeals at 22 institutions, the Special Master and the monitors appointed by the court are required to read and respond to the voluminous correspondence from TDC's more than 33,000 prisoners. In addition, numerous disciplinary reports, tapes of disciplinary proceedings, incident reports, grievances, and other documentation must be reviewed on a daily basis. Allegations and other indications of noncompliance reflected in correspondence and written documentation must be investigated, often requiring review of additional records, interviews with staff and prisoners, and a visit to one or more of the widely scattered institutions that comprise the Texas Department of Corrections. The Special Master's office has produced formal reports in the areas of overcrowding, use of building tenders, discipline and administrative segregation, staff ratios, and access to courts, counsel and public officials. In addition, the efforts of the Special Master and the monitors have produced an important stipulation relating to conditions at the Huntsville Unit Hospital, as well as the comprehensive stipulation relating to the elimination of building tenders and the provision of adequate security staffing at TDC units. The implementation of these two stipulations alone has consumed substantial resources of time and energy in the Special Master's office.

In summary, it is evident that the employment of three full-time monitors and one part-time monitor reflects no more than the minimum level of professional staffing needed at this time in the Special Master's office. Indeed, employment of one or more additional full-time monitors may well become necessary. The Special Master is to be commended for his effort to conserve costs in every way in the conduct of his office.

The court has carefully reviewed all statements of time and expenses submitted by the Special Master and is aware that the operation of the mastership entails substantial expense. That level of expense, however, simply reflects the enormous scope of this case and the sheer size of the Texas Department of Corrections. While the court will review with the utmost care any request that the Special Master may make for the appointment of additional monitors or the employment of other personnel, it is incumbent upon the Special Master to inform the court if such additional resources are necessary for the efficient and effective operation of the mastership in this important litigation.

SIGNED and ENTERED this 4th day of August, 1982.

[Wm. Wayne Justice]

Chief Judge
United States District Court
Eastern District of Texas
Judge Presiding

Appendix D

COMPLIANCE COORDINATOR'S BUDGET IN FINNEY V. MABRY

1. Compliance Coordinator Salary:		
at least \$25,000 per year; total for 18 months		\$37,500.00
2. Secretary/Clerk Salary:		
at \$7,600 (Grade 11) per year; total for 18 months		11,400.00
3. Office Rental:		
at \$400 per month; total for 18 months		7,200.00
4. Initial office supplies to establish an office:		
a) 2 trash cans		
b) 2 staplers and staples		
c) 2 scotch tape dispensers		
d) 2 desk calendars		
e) 2 rulers		
f) 2 pairs of scissors		
g) wooden in-out boxes, legal size		
h) 2 telephone indexes		
	Total	125.00
5. Paper supplies:		
a) letterhead stationery and envelopes		
b) plain white bond		
c) carbon paper		
d) green rough draft paper		
e) yellow second sheets for carbons		
f) paper clips		
g) rubber bands		
h) pens		
i) pencils		
j) felt tip pens		
k) scotch tape		
l) masking tape		
m) index card files and cards		
at \$150 per month; total for 18 months		2,700.00

6. Postage:		
	at \$200 per month; total for 18 months	3,600.00
7. Office equipment:		
a) small calculator at	\$15.00 per month	
b) IBM correcting selectric	34.50 per month	
c) IBM dictating equipment	32.80 per month	
d) IBM transcriber	32.80 per month	
	at \$100.10 per month; total for 18 months	1,801.00
8. Office equipment:		
a) Executive wood desk	\$26.60 per month	
b) Swivel chairs	14.70 per month	
c) 2 side arm chairs	7.25 per month	
d) Secretarial desk w/return	33.65 per month	
e) Chair	10.20 per month	
f) 1-4 drawer legal file cabinet	9.65 per month	
g) Book case w/four shelves	12.75 per month	
	at \$122.05 per month; total for 18 months	2,196.00
9. Transportation:		
	car rental, \$250 per month; total for 18 months	4,500.00
10. Total cost of office operation including salaries		\$71,022.00

Appendix E

ITEMIZED EXPENSE VOUCHER OF THE MASTER
IN RUIZ V. ESTELLE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,)	
Plaintiffs,)	
UNITED STATES OF AMERICA,)	
Plaintiff-Intervenor,)	Civil Action No. H-78-987-CA
v.)	
W. J. ESTELLE, JR., et al.,)	
Defendants.)	

ORDER

The Court having approved an itemized statement of time and expenses submitted by the Special Master in the amount of Fifty Five Thousand Ninety One Dollars and Eighty Four Cents (\$55,091.84), a copy of which statement is attached hereto, and in order to avoid depletion of the fund which has been established for the payment of the fees and expenses of the Special Master in this cause, the defendants are hereby

ORDERED to deposit within thirty (30) days of the issuance of this order the sum of Fifty Five Thousand Ninety One Dollars and Eighty Four Cents (\$55,091.84) with the Clerk of this Court as interim payment of costs.

SIGNED and ENTERED this 7th day of January, 1983.

{Wm. Wayne Justice}

Chief Judge
United States District Court
Eastern District of Texas
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,)	
Plaintiffs,)	
UNITED STATES OF AMERICA,)	
Plaintiff-Intervenor,)	Civil Action No. H-78-987-CA
v.)	
W. J. ESTELLE, JR., et al.,)	
Defendants.)	

ITEMIZED STATEMENT OF SPECIAL MASTER'S TIME AND EXPENSES

Vincent M. Nathan hereby represents to the Court that the following expenditures of time and money were made by him in fulfilling his duties as Special Master from December 1, 1982 through December 31, 1982.

<u>DATE</u>	<u>ITEM</u>	<u>HOURS</u>	<u>EXPENSES</u>
12/2/82	Telephone conference Bill Turner, Shultz, Winter; conference Paul O'Reilly; conference JMB	1.0	
12/6/82	Telephone conferences Arnold (3), Gray, Kyle, Turner, Brorby, Winter; conference JMB	2.0	
12/7/82	Telephone conferences Gillespie, Winter; prepare application for employment of monitor and increase in salary of administrative assistants	2.0	
12/9/82	Review monitor's report on Huntsville Unit hospital; conference JMB	3.5	
12/9/82	Telephone conferences Belazis (3), Scott Atlas, Harbury (3), Gray; conference JMB	2.0	
12/10/82	Telephone conferences Mattox's office, Peck, Berger, Cray, Gillespie	2.0	

<u>DATE</u>	<u>ITEM</u>	<u>HOURS</u>	<u>EXPENSES</u>
12/14/82	Travel to Washington; conference with Gray and Mattox; travel to Houston	8.0	
12/15/82	Office work in Houston; travel to Sherman; conference with Judge Justice; travel to Houston	9.0	
12/16/82	Conference JMB, Dr. Gray, et al. in Huntsville	8.0	
12/17/82	Preparation of memorandum for Judge Justice; conference with Carl Clemens; office work; telephone conferences; staff conferences, etc.	8.5	
12/18/82	Case administration; conference JMB	1.5	
12/19/82	Review medical plan and special needs plan	2.5	
12/20/82	Attend hearing in Houston; conference with counsel	9.5	
12/21/82	Conference with counsel re medical care plan	8.0	
12/22/82	Correspondence; memorandum re classification/overcrowding negotiations	2.0	
	<u>General Expenses:</u>		
	Office supplies		\$ 609.44
	Postage and delivery charges		678.36
	Telephone expenses		133.28
	Computer line charges		1,172.64
	<u>Professional Services and Consultants:</u>		
	SIH, Inc. (computer consultant)		1,814.75
	Miller, Gardner (certified public accountants)		645.00
	Eugene V. Boisaubin, M.D. (medical expert)		2,380.00

<u>DATE</u>	<u>ITEM</u>	<u>HOURS</u>	<u>EXPENSES</u>
	Office lease		9,372.00
	Pro rata share of security expenses for Scanlan Building		1,517.16
	Workmen's compensation		172.00
	Subscriptions		35.97
	Dictation equipment rental		588.30
	Typing equipment rental		546.26
	Reproduction equipment rental		288.89
	Office furniture rental		214.93
	<u>Payroll Expenses:</u>		
	Sharry Harrison		1,630.91
	Faye West		2,209.72
	Daniel Manheim		1,461.27
	Michael Gillespie		1,461.27
	W. David Arnold		3,208.32
	William G. Babcock		2,979.18
	Paul Belazis		2,416.68
	Bookkeeping expenses		1,008.00
	Temporary office help		120.00
	Employee parking expense		178.95
	Jacqueline Boney (117.9 hours at \$65)		7,663.50
	<u>Travel Expenses for Vincent M. Nathan:</u>		
12/13-17	Toledo/Washington/Houston/Sherman/ Houston/Detroit		
	Air fare		871.00
	Meals		105.00
	Lodging		77.37
	Ground transportation		43.50
	Automobile rental		63.43

<u>DATE</u>	<u>ITEM</u>	<u>HOURS</u>	<u>EXPENSES</u>
12/19-21	Toledo/Detroit/Houston/Detroit/Toledo		
	Air fare		492.00
	Meals		122.25
	Ground transportation		51.20
	Parking		5.00
	Lodging for Special Master		347.34
	<u>Travel Expenses of Jacqueline Boney:</u>		
12/14-16	Toledo/Detroit/Houston/Detroit		
	Air fare		428.00
	Meals		23.01
	Ground transportation		6.00
12/19-22	Toledo/Detroit/Houston/Detroit		
	Air fare		532.00
	Meals		34.71
	<u>Travel Expenses for William Babcock:</u>		
	Travel to Units		
	Meals		17.81
	<u>Travel Expenses for W. David Arnold:</u>		
	Travel to Units		
	Meals		42.07
	Lodging		40.39
	Parking		8.50
	<u>Travel Expenses for Michael Gillespie:</u>		
	Travel to Units		
	Meals		63.08
	Lodging*		84.90
	Miscellaneous		23.00
	<u>Travel Expenses for Paul Belazis:</u>		
	Houston/Sherman/Houston		
	Air fare		80.00

* Includes lodging expenses for Dr. Carl Clements (classification expert).

<u>DATE</u>	<u>ITEM</u>	<u>HOURS</u>	<u>EXPENSES</u>
<u>Travel Expenses for Dr. Carl Clements:</u>			
	Tuscaloosa/Houston/Tuscaloosa Air fare		\$ 421.00
		69.5	\$48,489.34
	<u>Total Time of Special Master</u> 69.5 hours at \$95.00		\$ 6,602.50
		TOTAL	\$55,091.84

Vincent M. Nathan

Sworn to before me and subscribed in my presence this 4th day of
January, 1983.

Notary, Public

Appendix F

LIST OF PRISON AND JAIL MASTERS

Masters have been appointed in a number of prison and jail cases. The following non-exhaustive list provides, whenever possible, the case name, original case cite, and name, address, and telephone number of the last known master:

Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977)
(Oklahoma Department of Corrections)

H. John Albach IV, Esq.
3627 Howell Street
Suite 217
Dallas, TX 75204
(214) 528-9670

Carruthers v. Stark, C.A. No. 76-6086 (S.D.Fla. 1976)
(Broward County Jail, Fort Lauderdale, FL)

Howard Messing, Esq.
Nova University Law School
3100 Southwest 9th Avenue
Fort Lauderdale, FL 33315
(305) 527-7290

Department of Corrections v. Commissioner of Penal Institutions, City of Boston, C.A. No. 47463 (E.D.Mass. April 30, 1981)
(Suffolk County House of Correction at Deer Island, Boston, MA)

Neil Houston and John Larivee
Crime & Justice Foundation
19 Temple Place, 5th Floor
Boston, MA 02111
(617) 426-9800

Duran v. Apodaca, C.A. No. 77-721-C (D.N.M. 1980)
(New Mexico Penitentiary, Santa Fe, NM)

Daniel Cron, Esq.
(505) 471-1992

Duran v. Elrod, C.A. No. 74C-2949 (N.D. Ill. April 9, 1982)
(Cook County Jail, Chicago, IL)

Mr. Michael Mahoney, Executive Director
John Howard Association
67 East Madison Street
Suite 1216
Chicago, IL 60603
(312) 263-1901

Finney v. Mabry, 458 F.Supp. 720 (E.D.Ark. 1978)
(Arkansas prison system)

Stephen LaPlante
P. O. Box 6158
San Francisco, CA 94101

Guthrie v. Evans
(Georgia State Prison, Reidsville, GA)

Vincent M. Nathan, Esq.
644 Spitzer Building
520 Madison Avenue
Toledo, OH 43604
(419) 255-3036

Hamilton v. Schiro, 338 F.Supp. 1016 (E.D.La. 1970)
(Orleans Parish Jail, LA)

Robert Force, Esq.
Tulane University School of Law
New Orleans, LA 70118
(504) 865-5939

Hoptowit v. Ray
(Walla Walla State Penitentiary, WA)

Michael K. Lewis, Esq.
National Institute for Dispute Resolution
1901 L Street, N.W.
Suite 600
Washington, DC 20036
(202) 466-4764

Ippolito v. Howell
(Atlantic County Jail, Atlantic City, NJ)

John P. Richert, Ph.D.
Stockton State College
Pamona, NJ 08240
(609) 652-1776, ext. 616 or 512

Jackson v. Hendrick, 457 Pa. 405 (1974)
(Philadelphia jail system)

Walter W. Cohen, Esq.
Office of Consumer Advocate
14th Floor - Strawberry Square
Harrisburg, PA 17127
(717) 783-5048

Jones v. Wittenberg, 440 F.Supp. 60 (N.D.Ohio 1977)
(Lucas County Jail, Toledo, OH)

Timothy Doyle, Esq.
32055 Grand River Avenue
Farmington, MI 48024
(313) 478-5606

Vincent M. Nathan, Esq.
644 Spitzer Building
520 Madison Avenue
Toledo, OH 43604
(419) 255-3036

Lightfoot v. Walker, 486 F.Supp. 504 (S.D.Del, 1980)
(Medical care in Menard Correctional Center, a state
institution in Chester, IL)

Lambert King, M.D.
Montefiore - Rikers Island Health Service
15-15 Hazen Street
East Elmhurst, NY 11370
(212) 626-3420

Meeks v. Lane, C.A. No. 75-C96 (N.D.Ill. July 10, 1981)
(Protective custody rules, facilities, entitlements in four
Illinois maximum security prisons, Stateville, Joliet,
Menard, and Pontiac)

Michael Mahoney, Executive Director
John Howard Association
67 East Madison Street
Suite 1216
Chicago, IL 60603
(312) 263-1901

Palmigiano v. Garrahy, 443 F.Supp. 956 (D.R.I. 1977)
(Rhode Island prison system)

Allen F. Breed, Director
National Institute of
Corrections
320 First Street, N.W.
Washington, DC 20534
(202) 724-3106

J. Michael Keating, Esq.
McKinnon & Fortunato
1168 Newport Avenue
Pawtucket, RI 02861
(401) 723-9655

Powell v. Ward, 487 F.Supp. 917 (S.D.N.Y. 1980)
(Bedford Hills Correctional Facility, NY)

Linda R. Singer, Esq.
918 16th Street, N.W.
Washington, DC 20006
(202) 296-2565

Ruiz v. Estelle, 503 F.Supp. 1265 (S.D.Tex. 1980)
(Texas Department of Corrections)

Vincent M. Nathan, Esq.
P.O. Drawer 61070
Houston, TX 77208
(713) 221-9677

Stansbury v. Pinkney, C.A. Nos. 78-1051 through 1072
(C.D.Ill. September 1978)
(Pontiac Correctional Center, a state institution in Pontiac, IL)

Michael Mahoney, Executive Director
John Howard Association
67 East Madison Street
Suite 1216
Chicago, IL 60603
(312) 263-1901

Steward v. Rhodes, 473 F.Supp. 1185 (E.D.Ohio 1979)
(Columbus Correctional Facility, Columbus, OH)

Suzanne Richards, Esq.
and Bernard LaCour, Esq.
52 East Cay Street
Columbus, OH 94215
(614) 464-6458

Taylor v. Perini, 413 F.Supp. 189 (N.D.Ohio 1976)
(Marion Correctional Institution, Marion, OH)

Vincent M. Nathan, Esq.
644 Spitzer Building
520 Madison Avenue
Toledo, OH 43604
(419) 255-3036

Valentine v. Englehardt, 474 F.Supp. 294 (D.N.J. 1979)
(Passaic County Jail, NJ)

Edward J. Dauber, Esq.
Suite 815
Gateway 1
Newark, NJ 07102
(201) 643-3700

Other persons who have had direct or research experience in cases involving masters include:

M. Kay Harris, Visting Associate Professor
Temple University
Department of Criminal Justice
1926 Park Mall
Philadelphia, PA 19122
(215) 787-5167

Alan Chasset, Esq.
The Federal Judicial Center
Dolley Madison House
1520 H Street, N.W.
Washington, DC 20005
(202) 633-6356

Frank Merritt, Esq.
University of Toledo College of Law
2801 West Bancroft Street
Toledo, OH 43606
(419) 537-2949

Samuel Jan Brakel, Esq.
Research Attorney
American Bar Foundation
1155 East Sixteenth Street
Chicago, IL 60637
(312) 667-4700

Judith H. Friedman, Esq.
Special Counsel
Executive Office for
United States Attorneys
United States Department of Justice
Washington, DC 20530
(202) 633-3276

Appendix G

PUBLICATIONS ON THE SUBJECT OF MASTERS

With few exceptions, scholarship on the subject of the use of masters has been of recent origin. A person selected to serve as master may find the following helpful:

Berger, Curtis J., *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707 (1978)

Brakel, Samuel J., *Special Masters in Institutional Litigation*, 1979 Am. Bar Found. Res. Journal 543

Breed, Allen F., "Special Masters Ease Prison Reform," 41 Corrections Today, 41, No. 3, p. 16 (May/June 1979).

Kirp, David L. and Babcock, Gary, *Judge and Company: Court-appointed Masters, School Desegregation, and Institutional Reform*, 32 Ala. L. R. 313 (1981)

Levinson, Marc. R., "Special Masters: Engineers of Court-ordered Reform," *Corrections Magazine*, August 1982.

Nathan, Vincent M., *The Use of Masters in Institutional Reform Litigation*, 10 Tol. L. Rev. 419 (1979)

Note, *Force & Will: An Exploration of the Use of Special Masters to Implement Judicial Duress*, 52 Univ. of Colo. L. R. 105 (1980)

Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977)

Note, *Judicial Intervention in Rhode Island Prisons* 14 Suffolk U.L.R. 545 (1980)

Note, "Mastering" Intervention in Prisons, 88 Yale L.J. 1062 (1979)

Note, *Monitors: A New Equitable Remedy*, 70 Yale L.J. 103 (1960)

Prison Reform: *The Judicial Process*, Criminal Law Reporter (Supplement to Vol. 23, no. 17)

Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784 (1978)

In addition, M. Kay Harris and Dudley P. Spiller, Jr., published a study of implementation of judicial decrees in four cases involving correctional institutions. Two of these cases, Holland v. Donelon and Hamilton v. Schiro, involved the use of a master, and the Harris/Spiller study comments, inter alia, upon the use and effectiveness of the masters in these cases. See Harris & Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings, (1977). Copies of the Harris/Spiller study may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (Stock No. 027-000-00585-3).

The articles cited above should be available in any law school law library.