

Alabama Rules of Civil Procedure

VI. TRIALS

Rule 53.

Masters.

(a) *Appointment and compensation.* Each court to which these rules are applicable or the presiding judge in those courts having more than one judge, may appoint one or more standing masters for the court, and the court in which any action is pending may appoint a special master therein. No master except by express or implied waiver of the parties or the attorneys shall serve in any case wherein the master is interested or related to any of the parties, a stockholder of a party or an attorney of a party within the fourth degree of affinity or consanguinity. As used in these rules the word "master" includes a referee, an auditor, and an examiner. 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 the master's report as security for the master's 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 of 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 the master's powers and may direct the master 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 the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master 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 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 the Alabama Rules of Evidence for a court sitting without a jury.

(d) *Proceedings.*

(1) MEETINGS. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) WITNESSES. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) STATEMENT OF ACCOUNTS. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) *Report.*

(1) CONTENTS AND FILING. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless

otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by order of reference, the master shall serve a copy of the report on each party.

(2) IN NONJURY ACTIONS. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report any party shall serve any written objections thereto upon the other parties. Applications to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) IN JURY ACTIONS. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) STIPULATION AS TO FINDINGS. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) DRAFT REPORT. Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(dc) *District court rule.* Rule 53 does not apply in the district courts.

[Amended eff. 10-1-95; Amended eff. 1-1-96.]

Committee Comments on 1973 Adoption

The first sentence of Rule 53(a) differs from Rule 53, F.R.C.P., in its reference to courts to which this rule is applicable. The second sentence prohibits appointment of masters having an interest or a relative in the controversy. See Eq. Rule 92, *DeMoville v. Merchants & Farmers Bank*, 237 Ala. 347, 186 So. 704 (1937). Matters relevant to federal maritime practice have been excluded. With these exceptions, the rule is identical to Federal Rule 53.

Under prior Alabama practice reference to a master was limited to suits in equity. A statutory procedure permitted appointment of a referee in common-law causes, Tit. 7, §§ 266-269, Code of Ala., but the statutes were ambiguous, their application in jury cases was uncertain, and they were little used. Thus, they are superseded by this rule, which sets out a uniform procedure applicable to all actions, whether hitherto legal or equitable. The rule similarly supersedes the rules regulating masters in equity. Equity Rules 79-88.

No reported case has been found dealing with law side statutory procedure for masters. As to masters in equity, prior law designated the register as standing master unless otherwise ordered by the court.

Rule 53 leaves the position of standing master within the flexible control of the court. Designation of the register as standing master under Rule 53(a) would be entirely appropriate.

Rule 53(a) also treats the compensation of the master, a matter not expressly covered under the old Equity Rules 79-88. See Tit. 7, § 269 for former law side provision for fees of the master.

Rule 53(b) details the occasions upon which the appointment of a master will be appropriate. The appointment is discretionary and can come on the court's own motion or on motion of a party. The Rule clearly categorizes the appointment as an exceptional situation. Because of the increased costs, likelihood of delay, and possible lack of confidence in the outcome, the power to order a reference is to be sparingly exercised. See *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir.1942) for arguments against appointment of a master. See also the limiting decision in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), reh. denied 352 U.S. 1019, 77 S.Ct. 553, 1 L.Ed.2d 560 wherein the Court found no exceptional conditions based upon calendar congestion, complexity of issues and prospect of an unduly long trial. See 9 Wright & Miller, *Federal Practice and Procedure, Civil* § 2205 (1971).

Rule 53(c) regulates the powers of the master. The court may specify or limit the powers or invite findings on particular issues, or to report evidence only. Thus, armed with his instructions from the court, the master is then empowered to conduct his duties with authority similar to that available to the court. For example, he may require production of records, rule upon evidence, put witnesses on oath, conduct examination and, when requested, make a record of the evidence.

Rule 53(d) further details the mechanics of the performance of the master's duties, Subpoena and sanction power is available under Rule 53(d)(2).

Rule 53(e) covers the report of the master. Reference to a master, even with the affirmative consent of the parties is not a waiver of jury trial. Rule 53(e)(3), (4). In a jury case the findings of the master are read to the jury, subject to any objections on points of law, and are sufficient to make out a prima facie case for the party favored by them. However, the parties may present to the jury any other evidence they desire and are free to call witnesses who were heard by the referee. Rule 53(e)(3).

In a non-jury case the parties may object to the findings of the master, and the court, after hearing, may accept or reject the findings of the master, in whole or in part. The court is to accept the findings unless they are "clearly erroneous." Rule 53(e)(2). This is the same standard which appellate courts are to follow in passing on the findings of a trial court in a non-jury case, Rule 52(a). And it is the standard already employed in Alabama with regard to the report of a master. See Reporter's Comment to Rule 52.

This rule permits the court to direct that the master make both findings of fact and conclusions of law. Rule 53(e)(1). Conclusions of law, if made, are not binding upon the court. 5A Moore's *Federal Practice*, ¶ 53.12(5) (2d ed. 1971). Prior Alabama practice did not permit the master to make conclusions of law.

In *Jones v. Moore*, 215 Ala. 579, 112 So. 207 (1927), the failure to except to the master's report was considered an admission of its correctness. Federal construction of Rule 53 in conjunction with Rule 52(b) has reached a different result. Under Federal Rule 52(b), a party is permitted to raise for the first time, on appeal, a question of the sufficiency of evidence to support the findings of the trial court in a non-jury proceeding. In *Bingham Pump Co. v. Edwards*, 118 F.2d 338 (9th Cir.1941), cert. denied 314 U.S. 656, 62 S.Ct. 107, 86 L.Ed. 525, the appellant failed to except to the master's report and the trial court thereupon approved the master's report. Applying Rule 52(b) the Ninth Circuit permitted the objection to the findings of the master to be raised for the first time on appeal. See 5A Moore's *Federal Practice*, ¶ 53.11 (2d ed. 1971). The application of Rule 52(b) to non-jury proceedings wherein the trial court has adopted the findings of a master puts too great a burden on the trial court. Consequently, Rule 53(e)(2) is phrased differently from Federal Rule 53(e)(2) in that the Alabama Rule requires that parties "shall" serve any written objections, rather than "may" serve as used in Federal Rule. Consequently, the failure to except to the master's report at the time it is submitted to the trial court would preclude an objection to the report being made for the first time on appeal, the provisions of Rule 52(b) as to non-jury proceedings wherein no masters report is involved notwithstanding.

Nothing in this Rule is to be taken in derogation of Rule 52(b) within the context of a non-jury proceeding wherein no master's report is involved.

**Committee Comments to October 1, 1995,
Amendment to Rule 53**

Subdivision (e). The amendment is drawn from the present version of F.R.Civ.P. 53(e). It requires the master to serve copies of the report on the parties, thereby removing the responsibility from the clerk, who was required to serve those copies under the former rule.

**Committee Comments to January 1, 1996
Amendment to Rule 53**

The reference to "Rule 43(c)" in the last sentence of subparagraph (c) was changed to "the Alabama Rules of Evidence" because of the abrogation of Rule 43(c).