

RULE 53. REFEREES

(a) Appointment and Compensation. The court in which an action is pending may appoint one or more referees therein, not exceeding three in number. As used in these rules “referee” includes a master and an auditor, and the singular includes the plural. The compensation to be allowed to a referee shall be fixed by the court, and such compensation and necessary expenses incurred by a referee as allowed by the court shall be paid by the state on presentation of the proper certificate of the clerk, or by such of the parties, or out of any fund or subject matter of the action, which is in the custody and control of the court, or by apportionment among such sources of payment, as the court shall direct. The referee shall not retain the report as security for 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 referee is entitled to a writ of execution against the delinquent party.

(b) Reference.

(1) *Reference by Agreement.* The court may appoint a referee in all cases where the parties agree that the case may be so tried.

(2) *Reference Without Agreement.* In absence of agreement of the parties, a reference shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when an investigation of accounts or an examination of vouchers is required; in an action to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the referee may specify or limit the referee’s powers and may direct the referee 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 referee’s report. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 103 of the Maine Rules of Evidence for a court sitting without a jury.

(d) Witnesses. The parties may procure the attendance of witnesses before the referee 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 by the court as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(e) Report.

(1) *Contents and Filing.* The referee shall prepare a report upon the matters submitted to the referee by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report. In cases where the reference is by agreement of the parties, the referee shall file with the clerk of the court the report, together with the original exhibits and together with any transcript which, at the election and expense of one or more of the parties, may be made of the proceedings and of the evidence before the referee. In cases where the reference is without agreement and where the action is to be tried without a jury, when the order of reference so provides, the referee shall file with the report and the original exhibits a transcript of the proceedings and of the evidence and the cost of such transcript shall be included in the necessary expenses incurred by the referee as provided in Rule 53(a). The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-jury Actions.* In an action where there has been a reference by agreement, the referee's conclusions of law and findings of fact shall be subject to the right of the parties to object to acceptance of the referee's report. On waiver by all parties of the right to object to acceptance of the referee's report, the court shall forthwith enter judgment on the referee's report. Except where such waiver occurs, any party may within 10 days after being served with notice of the filing of the report serve written objections upon the other parties. Application to the court for action upon the report and upon objections thereto, if any have been served, shall be by motion and upon notice as prescribed in Rule 7(b). The court shall adopt the referee's findings of fact unless clearly erroneous. Except as otherwise provided in this paragraph (2), 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. If no objections have been timely filed, the court shall forthwith enter judgment on the referee's report.

(3) *In Jury Actions.* In an action to be tried by a jury the referee shall not be directed to report the evidence. The referee's findings upon the issues submitted to the referee 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) *Draft Report.* Before filing a report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(5) *Amendment.* On motion of a party made not later than five days after notice of filing of the report, the referee may amend the findings or recommendations or make additional findings or recommendations. The referee shall file a supplemental report containing any amended or additional findings or recommendations or denying the motion, in the manner provided for filing the original report in paragraph (1) of this subdivision. Within ten days after being served with notice of the filing of a supplemental report, any party may serve written objections to the original or the supplemental report as provided in paragraph (2) of this subdivision.

**Advisory Committee's Notes
March 1, 1998**

Rule 53(e) is amended to correct a misreference that occurred when Rule 6(d) and Rule 7 were amended on July 1, 1990. The correct reference is now Rule 7(b).

**Advisory Committee's Notes
1991**

Rule 53(a) is amended to permit reference in the District Court. Given the broad range of jurisdiction now permitted to that court, there is good reason to make available a procedural device with the potential for saving time and expense for the parties and reducing burdens on the trial docket. Referees' reports will be subject to objection in the District Court. Appeal from any judgment entered will lie to the Superior Court and then to the Law Court as in other actions.

**Advisory Committee's Notes
1981**

Rule 53(e)(5) is added to cure a difficulty that has arisen in practice under the original rule: There is no provision for resubmission of a case to the referee for clarification or amendment of his report prior to its submission to the court. As originally drafted, the rule apparently envisioned that in such situations objections would be made under Rule 53(e)(2) and the objecting party would then seek remand by the court after review of the record. This is a very cumbersome

procedure, especially with a voluminous transcript wholly unfamiliar to the Superior Court justice.

The amended rule provides a procedure for such situations similar to that contained in Rule 52(b) for amendment of the court's findings in a case tried without a jury. Under the new provision, the referee may, on motion made within five days after notice of filing of the report, make amended or additional findings or recommendations. These new matters, or his denial of the motion, are to be contained in a supplemental report which is to be filed in the same manner as the original report. Objections to either the original or the supplemental report must be made within ten days, as provided in Rule 53(e)(2).

Advisory Committee's Note
September 1, 1980

Rule 53(a) is amended to reflect the fact that expenses of this variety are now paid by the state.

Rule 53(c) is amended to reflect the abrogation of Rule 43(c) and the incorporation of its substance in Maine Rule of Evidence 103.

Advisory Committee's Note
July 21, 1977

The purpose of the amendment is to change the previously existing requirements of the rule which required a party to reserve his right at the time of reference of a case to object to the referee's report. The amendment does this by making it unnecessary to preserve the right to object at the time the action is referred. The rule states that the referee's conclusions of law and findings of fact are subject to the right of the parties to object to acceptance to the referee's report. The rule provides that such objections must be asserted within ten (10) days after the party or its counsel is served with notice of the filing of the report. This is accomplished by the serving of written objections upon other parties and filing them with the Court. In the event that objections are not served within the ten-day (10) period, the Court is required to forthwith enter judgment on the basis of the referee's report.

Advisory Committee's Note
April 15, 1975

This amendment is designed to resolve doubts which have arisen about the responsibility of a party to file a motion for action upon the referee's report when no objections have been timely filed. In the past some judges have required motion and notice in such cases and others have accepted the referee's report on ex parte presentation. When the reference is by agreement without reservation of the right to object, the referee's conclusions of law and findings of fact are conclusive. In these circumstances no useful purpose is served by the motion procedure and the amendment provides that the court shall forthwith enter judgment on the report. Similarly, when no objections have been timely filed in situations where the reference is by agreement with the right to object reserved or where the reference is in the absence of agreement, the motion and notice procedure seems an equally needless burden. It is not unreasonable to impose upon the parties the obligation to file objections if they are dissatisfied with either the referee's conclusions of law or his findings of fact. When the rule provides for entry of judgment on the report forthwith, it is contemplated that the clerk will perform the ministerial function of presenting the report to the court for acceptance, but a party may do so if the clerk does not.

Explanation of Amendments February 1, 1960; September 18, 1961

The September, 1961, amendment added language to Rule 53(a) permitting the court in its discretion to order the parties, or any of them, to pay the compensation and expenses of the referee or to order such payment to be made out of any property which is the subject matter of the action and in the custody and control of the court. It is intended that this be used only in the exceptional situation and not in the usual reference case. In prior practice it has been for the most part limited to receivership actions and actions for partition. Simultaneously with the September, 1961, amendment of Rule 53(a), the applicable statute (now 4 M.R.S.A. § 501) was amended in the same fashion.

The amendment of Rule 53(a) also makes it clear that the referee may not delay filing his report until his compensation has been paid; but provides that his remedy is by execution against the party or parties ordered by the court to pay such compensation.

The February, 1960, amendment made Rule 53(e) more consistent with prior Maine practice in reference cases. It is not customary for a transcript of the testimony to be filed with the referee's report. The rule, as originally written, would require a transcript of the proceedings to be filed unless otherwise directed

by the order of reference in all actions to be tried without a jury. As amended, the rule requires a transcript only when requested by one or more of the parties and at the expense of the requesting party or parties, in cases referred by agreement; and only when the order of reference provides for a transcript, in cases referred by the court without agreement.

Reporter's Notes December 1, 1959

This rule differs in many significant respects from Federal Rule 53, although based in general upon it. The term "referee" is used to cover referees, masters, and auditors because referees are the most widely used in Maine and most of the cases arising under the rule will be referee cases.

Rule 53(b) (1) is designed to preserve the existing practice of references by agreement. R.S.1954, Chap. 113, Sec. 93 (amended in 1959) [now 4 M.R.S.A. § 501]. Such references have not hitherto been possible in equity cases, *Faxon v. Barney*, 132 Me. 42, 165 A. 165 (1933), and under a merger of law and equity it may be expected that the court would not normally grant a reference in a case when equitable relief is sought.

Rule 53(b) (2) reflects the prevailing attitude when it says that references without agreement shall be the exception rather than the rule. The second sentence covers the situation where the present statute provides for an auditor's hearing. R.S.1954, Chap. 113, Sec. 89 (repealed in 1959).

Rule 53(e) (2) provides that the referee's findings of fact in nonjury actions shall be accepted unless clearly erroneous. It is believed that this formulation is consistent with existing law and that the various statements of the standards are distinctions without a difference. *Staples v. Littlefield*, 132 Me. 91, 167 A. 171 (1933) (reference by agreement; findings upheld "if there is any evidence to support" them); *Stewart v. Grant*, 126 Me. 195, 137 A. 63 (1927) (master; report not to be set aside "unless the evidence shows it to be clearly wrong"). There is no intention to change the law with respect to either a referee's or a master's findings.

The rule goes into much less detail than Federal Rule 53 about procedural matters. The intention is that except as otherwise provided the existing Maine practice shall continue. Some of this practice is a matter of custom not spelled out by statute, and it appears to have worked satisfactorily.

R.S.1954, Chap. 113, Sec. 93, as amended in 1959 [now 4 M.R.S.A. § 501], provides the basic statutory authority for the appointment and compensation of referees, masters and auditors, and specifies certain of their powers which are not included in Rule 53.