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Refereeing the Referees: The Continuing Procedural Muddle in Cases of General Reference Pursuant to Ohio Rule of Civil Procedure 53

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REFEREEING THE REFEREES: THE CONTINUING PROCEDURAL MUDDLE IN CASES OF GENERAL REFERENCE PURSUANT TO OHIO RULE OF CIVIL PROCEDURE 53

by

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I. INTRODUCTION

The recent avalanche of civil litigation[1] has heightened the modern court's demand for a streamlined and more efficient method of administering the judicial process.[2] The advent of the so-called "ministerial" judge,[3] tight centralized calendar control,[4] and the use of mediators[5] and arbitrators[6] exemplify specific responses to the broad systemic problem. Judicial reference provides another "procedural"[7] device which sometimes is perceived as offering a solution to the problem of judicial delay.[8]

Judicial reference is generally defined as the substitution of "non-judicial" personnel in the place of judges to perform a designated and limited portion of

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[1]*See, e.g.*, Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982); Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Rosenberg, *Let's Everybody Litigate*, 50 TEX. L. REV. 1349 (1972); Fleming, *Court Survived in the Litigation Explosion*, 54 JUDICATURE 109 (1970); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Kline, *Law Reform and the Courts: More Power to the People or the Profession*, 53 CAL. ST. B.J. 14 (1978); Bok, *Dealing with Overload in Article III Courts*, 70 F.R.D. 231 (1976). As to the increase in the volume of civil litigation in Ohio, see generally the data published yearly by the Ohio Supreme Court in Ohio Courts Summary. It is notable, however, that the perception of a dramatic increase in civil litigation is not universally shared. *See, e.g.*, Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 5 (1983).

[2]*See, e.g.*, Burger, *supra* note 1, at 275; Burger, *Today's Challenge: Improving the Administration of Justice*, 55 N.Y. ST. B.J. 7 (1983).

[3]*See, e.g.*, Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

[4]*See, e.g.*, *Individual Calendar Works in D.C. Court*, 5 THIRD BRANCH 6, (May 1973); *Five Districts Using Individual Calendar*, 1 THIRD BRANCH 1, (Sept. 1969); Planet, Smith, Olson, & Connolly, *Screening and Tracking Civil Cases: A New Approach to Managing Cases in the District of Columbia*, 8 JUST. SYS. J. 338 (1983).

[5]*See, e.g.*, Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

[6]The reference device should be distinguished from arbitration as a method of dispute resolution. See generally 6 O. JUR. 3D *Arbitration* §§ 1 *et. seq.* (1978) for a discussion of arbitration as method of dispute resolution.

[7]Judicial reference is purely a procedural device and is not jurisdictional. Dillon v. Cleveland, 117 Ohio St. 258, 158 N.E. 606 (1927); Toulmin v. Becker, 94 Ohio App. 524, 115 N.E.2d 705 (1952). *See also* Hines v. Amole, 4 Ohio App. 3d 263, 448 N.E.2d 473 (1982); Lindsay v. Lindsay, 106 Ohio App. 146, 146 N.E.2d 151 (1957).

[8]Turner, *"Relief is Just a 'Civil Rule' Away,"* 47 OHIO ST. B. REP. 297 (1974).

a trial court's adjudicatory function[9] in a particular case or class of cases.[10] For example, instead of submitting contested issues of fact and/or law to a judge (or jury), cases go to a referee appointed to determine both and to report a proposed solution to the trial court.

The judicial reference device set out in Rule 53 of the Ohio Rules of Civil Procedure was touted in 1974 as a procedure capable of relieving the "problem of justice delayed" by "easing the increasing judicial burden" on a besieged judiciary.[11] While judicial reference is certainly no panacea for the problem (if numbers alone are a valid indicator), it is difficult to refute claims that the reference device contributes to a more efficient and speedy administration of justice.[12]

Although the regular and widespread use of referees is a relatively recent phenomenon,[13] judicial reference has enjoyed a long history in Ohio.[14] For well over a hundred years, Ohio trial judges have had specific statutory authority to refer certain cases to a appointed non-judicial "referees" for determination.[15] Historically, an Ohio judge could refer cases to a referee either upon the voluntary consent of the parties in the litigation or compulsorily in cases in which there was no right to a jury trial.[16] In either circumstance, a judge retained the

[9]The reference device is meant to function as an aid to the trial court in exercising its adjudicatory function. Thus, for example, the reference device does not contemplate the appointment of arbitrators. *See* Cuyahoga County v. Bd. of Mental Retardation, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975). However, the referee is a substitute for the trial judge in the exercise of certain judicial functions. Historically, a referee's hearing is usually conducted in lieu of and not in addition to a trial on the merits. St. Clair Savings v. Jansan, 40 Ohio App. 2d 211, 318 N.E.2d 538 (1974).

[10]For a general definition of "reference," *see* Lawson v. Bissel, 7 Ohio St. 129 (1857). The terminology can be confusing. Judicial reference is a broad generic term which can refer to the use of masters, special masters, referees and other non-judicial personnel for a variety of purposes. *See generally* 47 O. JUR. 2D *References* § 12 (1961). In this article, the term "judicial reference" refers to the Ohio practice of using referees to hear evidence on disputed issues of fact and law and report their findings and recommendations to the trial court. While a reference can be very limited in scope, this article deals primarily with the reference of an entire case to a referee for hearing and report on all disputed issues. The practice of referring an entire case to a referee will be called "general reference" as distinguished from a more restrictive "single-issue reference."

[11]Turner, *supra* note 8, at 297.

[12]For example, subsequent to the adoption of the Ohio Rules of Civil Procedure, Montgomery County hired its first full-time common pleas court referee in 1975. In 1985, there were eight full-time common pleas court referees. In addition, a substantial number of "part-time" referees are utilized. Without these referees, additional case pressures would fall on already overburdened judges. State-wide municipal court case statistics also reflect the contribution made by municipal court referees. Since 1975, there have been over 200,000 cases per year terminated by hearings held before referees. OHIO MUNICIPAL COURTS ADMINISTRATIVE JUDGE REPORT, COMPOSITE FOR THE ENTIRE STATE.

[13]*See supra* note 12.

[14]For a complete and more detailed history of judicial reference in Ohio *see* 47 O. JUR. 2D *References* § 81 (1961).

[15]Although reference was initially recognized in this country in early common law, *see, e.g.*, Heckers v. Fowler, 69 U.S. 123 (1865), reference in Ohio was originally legislatively created. The original statutory grant is found in 51 Ohio Laws 57, § 283 enacted in 1853. More recently, reference was governed by §§ 2315.26-2315.37 of the Ohio Revised Code, as amended effective December 1, 1967. In addition, reference was authorized in the probate court by § 2315.37 of the Ohio Revised Code, in municipal court by § 1901.13(A) of the Ohio Revised Code, and in juvenile court by § 2151.16 of the Ohio Revised Code.

[16]Consensual reference was governed by § 2315.26 of the Ohio Revised Code and was interpreted as being incident to the court's power of judicial administration. Dillon v. Cleveland, 117 Ohio St. 258, 158 N.E. 606

discretion to refer the case in its entirety ["general reference"] or merely to refer a portion of the case ["single issue reference"].[17]

With the adoption of Rule 53 of the Ohio Rules of Civil Procedure in 1971, judicial reference became a matter governed directly by the Ohio Rules of Civil Procedure and was no longer a matter of statutory authority.[18] Although the increased use of referees in Ohio seems to correspond to the adoption of Rule 53,[19] the authoritative change was essentially cosmetic. In scope, Rule 53 was intended to cover matters formerly governed by sections 2315.26 through 2315.43 inclusive of the Ohio Revised Code,[20] and Rule 53 of the Federal Rules of Civil Procedure.[21] For example, the rule retains the broad scope of reference which had existed under the prior statutory practice[22] by specifically preserving a trial judge's discretionary power to determine the scope of the reference, that is, whether the reference will be "general" or "single issue."[23] Similarly, Rule 53 authorizes reference only by consent of the parties except in those cases where neither party has a right to trial by jury.[24] Thus, Rule 53 preserves the prior limitation on the kinds of cases potentially subject to an order of reference,[25] a limitation consistent with the view that

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(1927); Rankin v. Hannan, 37 Ohio St. 113 (1881). Where consent was absent, compulsory reference was provided for in § 2315.27 of the Ohio Revised Code. *See generally*, 47 O. JUR. 2D *References* §§ 4-6 (1961).

[17] § 2315.26 of the Ohio Revised Code, which applied in cases of consensual reference, specifically allowed reference of "any of the issues" in the action. § 2315.27 of the Ohio Revised Code authorized compulsory reference in non-jury matters "in any case." In either situation, the referee could be appointed to hear the facts and/or the law in a case. *See* Lawson v. Bissell, 7 Ohio St. 129 (1857). This article distinguishes between cases in which all issues, i.e., the entire case, is referred, and those in which only a portion, i.e., less than the entire case, is sent to a referee. The former will be referred to as "general reference" and the latter "single-issue reference."

[18] The Ohio Civil Rules are accorded a position of superiority *vis-a-vis* state statutes that regulate procedure by voiding procedural statutes in conflict with those rules. *See* OHIO CONST. art. IV, § 5(B). Thus, with the adoption of the Ohio Rules of Civil Procedure in 1974, Rule 53 superseded §§ 2315.26-2315.43 of the Ohio Revised Code.

[19] *See supra* note 12.

[20] OHIO REV. CODE ANN. § 271 (Page 1982) (Staff note).

[21] The Ohio Civil Rule 53 is patterned after the Rule 53 of the Federal Rules of Civil Procedure. *Id.* The two are similar but not identical. One major difference is the applicable trial court scope of review of the referee's proposed factual findings. Ohio Civil Rule 53 authorizes a trial court to reject the referee's findings without any deference. OHIO R. CIV. P. 53. *See infra* text accompanying notes 57-60. In marked contrast, Rule 53(E)(2) of the Federal Rules of Civil Procedure requires that "in an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." FED. R. CIV. P. 53(E)(2). *See* Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

[22] *See supra* note 17.

[23] Rule 53(A) authorizes the appointment of a referee to "hear an issue or issues." OHIO R. CIV. P. 53(A). In addition, Subsection (A) of Rule 53 addresses the appointment of referees and the criteria that govern the selection process. The only limitation in Rule 53 concerning appointment is that the person selected be an "attorney at law admitted to practice in this state." *Id.* Historically, there was no limitation on the appointment of non-attorneys. § 2315.28 of the Ohio Revised Code authorized the selection of a referee by agreement of the parties or, in the absence of such an agreement, at the court's discretion.

[24] Rule 53(A) specifically limits the appointment of referees to cases in "which the parties are not entitled to a trial by jury" or to cases in "which the parties specifically consent in writing or in the record in open court." *Id.*

[25] *See supra* note 16.

reference is a procedural device originating in the court's equity jurisdiction.[26]

In theory, reference enhances judicial efficiency[27] by altering the normal adjudicatory process and substituting a designated non-judicial person to act in place of the trial judge for certain limited purposes. When a court refers a case to a referee to hear and report on all disputed issues of fact and law, the court saves the time otherwise normally required to accomplish these judicial tasks.[28] Ultimately, increased judicial efficiency directly relates to the nature of the reference, with "general reference" providing the greatest savings. The court undoubtedly saves substantial time when it refers entire cases to referees to hear and report on all disputed issues.[29]

Even in cases of general reference, however, the referee is not intended to be a complete substitute for the trial court.[30] Instead, the referee performs only the limited portion of the judicial function specifically authorized in the trial court's order of reference.[31] While the referee may be empowered to act as the

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[26]The early Ohio reference statutes date back to 1853. There is no legislative history existing with regard to those early statutes. However, there is some suggestion that the initial Ohio reference statutes were based on the inherent powers of courts of equity to refer cases. *See* Deville v. Deville 87 Ohio App. 220, 94 N.E.2d 474 (1949). This position is consistent with former § 2315.27 of the Ohio Revised Code which had authorized reference only in those cases where the parties were not permitted a jury trial as a matter of right (absent consent). *See* 47 O. JUR. 2D *References* §§ 6, 12 (1961). In the federal system, reference is based on provisions of the old equity rules. Federal Rule of Civil Procedure 53 joined in one category court officers whose functions had been divided before the merger of law and equity. *See* Cruz v. Havick, 515 F.2d 322 (5th Cir. 1976), *cert denied*, 424 U.S. 917 (1976); Universal Oil Products Co. v. Hall, 76 F.2d 258 (8th Cir. 1935), *cert denied*, 296 U.S. 621 (1935); Finance Committee v. Wassen, 82 F. 525 (7th Cir. 1897).

[27]*See infra* note 28. In contrast, historical experience with the reference device at the Federal level suggests otherwise. "It is a matter of common knowledge that reference greatly increases the cost of litigation and delays and postpones the end of litigation. The delay in some instances is unbelievably long. Likewise, the increase in cost is heavy." Adventures in Great Eating v. Best Place to Eat, 131 F.2d 809, 814-15 (7th Cir. 1942). However, there have since been dramatic changes in federal court opinion. *See* Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975); Gallagher, *Comment: An Expanding Role for United States Magistrates*, 26 AM. U.L. REV. 66 (1976).

[28]Historically, the reference device was viewed as a mechanism to relieve the court of its work. Burch v. Harte, 1 Ohio N.P. 447, 484, (1903). The device was also a way of facilitating the administration of justice particularly when cases could not be quickly adjudicated because of court delays. Strunk v. Moores, 12 Ohio Dec. 436 (1901). One of the prime reasons for creating the reference device was the limited nature of equity jurisdiction. Thus, the referee's inquiry may be broader and more effective than that of the equity court where, for example, the case before the court presents detailed questions of bookkeeping. Meyer v. Lipski, 7 Ohio N.P. 366, 367 (1900); Robison v. Cleveland City R.R. Co., 5 Ohio N.P. 293, 297-98 (1898). Interestingly, the increased current use of referees in Ohio seems inconsistent with the historical roots of the reference device.

[29]This conclusion is based on the realistic assumption that the trial court will take less time to "review" the report and recommendations of the referee than it would if it were to entirely hear the matter itself (there is no available empirical data relevant to this assumption). However, the amount of time saved by the trial court is directly related to the nature of the trial court "review" and the amount of deference given to the findings and recommendations of the referee. *See infra* text accompanying note 174. For example, if a *de novo* hearing is held after a judicial reference, there would be an overall loss of efficiency since the case would expend twice the number of "judicial" man-hours.

[30]For example, while Rule 53 grants to referees certain powers in common with a judge in the trial court, *see infra* note 47 and accompanying text, Rule 53 does not give a referee the power to enter a binding judgment. OHIO R. CIV. P. 53(E)(5). *See infra* text beginning at note 66.

[31]Rule 53 provides that the order of reference "may specify or limit" the powers of the referee and may direct him to "report only upon particular issues or to do or perform particular acts or to receive and report evidence only." OHIO R. CIV. P. 53. A court may also "fix the time and place" for hearings and for the filing

court's hearing officer in place of the trial judge[32], the jurisdictional power to actually effect the rights and obligations at issue between the parties remains in the court[33] and cannot be judicially delegated to a non-judicial third person.[34] Thus, referees can not actually decide cases in place of the judge — they may only aid the court to exercise its judicial powers more efficiently.[35]

The dichotomy existing between the requirements of judicial "decision-making" and judicial efficiency creates the tension that is the primary focus of this article. The trial court cannot delegate its judicial "decision-making" power to a referee and yet judicial "decision-making" after the reference is a time consuming process which limits the efficiency of the adjudicatory scheme.[36] The dilemma is at once both obvious and problematic.

Can a court really retain its actual "decision-making" function when it bases its decision on the written "report" of a third party? Can the referee system really promote judicial economy if the trial court must "review" the record made before the referee in order to make its own judicial determination? How many of the functional aspects of a "decision-making" can a judge delegate and still retain his or her "decision-making" power? To the outside observer, the functional relationship between the judge and referee seems uncertain at best.

On its face, Rule 53, as originally enacted, sets out a procedural mechanism which attempts to reconcile these seemingly conflicting goals of judicial reference. Subsection E of Rule 53 establishes a number of safeguards designed to ensure that the final decision in any case of reference is made by the judge and not the referee, while simultaneously enhancing overall judicial efficiency.[37] Despite the existence of these safeguards, problems developed shortly after the rule's enactment in 1971 which raised serious doubt concern-

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of the report. *Id.* The notion of "powers" contained in Rule 53 incorporates both the scope and function of the reference. Thus, a court may limit the scope of the reference to those issues specifically enumerated by the referring court. *Id.* Similarly, the function of the referee may be limited to "particular acts" enumerated by the court including a limitation that the referee is to "receive and report evidence only." *Id.*

[32] *Id.*

[33] The referee has no authority to enter binding judgments. *See* OHIO R. CIV. P. 53(E)(5). *See also infra* text beginning at note 66. In addition, the Ohio Constitution squarely places judicial power in the judiciary. Any attempt to delegate that power, therefore, would raise serious constitutional concerns. *See infra* text accompanying note 55. *See also supra* note 7.

[34] *See infra* note 49 and accompanying text.

[35] *See infra* note 51. *See also* Rule 1(B) which requires that the rules be construed and applied to "effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." OHIO R. CIV. P. 1(B).

[36] *See infra* text beginning at note 174. This conclusion concerning efficiency is based on an assumption concerning the total number of judicial man-hours expended in resolving the litigant's dispute. *See supra* note 29. However, if one were to look beyond the number of hours expended per case to the *economic* cost per hour of time, a different conclusion might well be reached. Because a referee's salary is much less than that of a judge, there could be an economic savings even when the use of the reference device results in an overall increase of judicial man-hours. Presently there exists no empirical study in Ohio which addresses these particular economic issues.

[37] *See infra* text beginning at note 55.

ing the extent to which the spirit and intent of the rule were actually followed in practice.[38] On December 24, 1984 and January 8, 1985, the Supreme Court of Ohio submitted proposed amendments to Rule 53 before the Ohio General Assembly.[39] These amendments were reviewed and, subsequently, were made effective on July 1, 1985 in an attempt to address and resolve many of the problems which developed under Rule 53 as it stood originally enacted.

This article examines the problems that existed under Rule 53, as originally enacted, as well as the proposed solutions embodied in the 1985 amendments to the rule. The article initially examines the allocation of judicial "decision-making" power between the trial judge and the referee in cases of general reference. It then analyzes the effectiveness of the various procedural safeguards contained in the rule and the amendments. Lastly, the article proposes additional procedural safeguards that would better balance the inherently conflicting goals of a successful reference system.

II. THE ALLOCATION OF JUDICIAL POWER AND DECISIONMAKING

A. *The Referee's Enumerated Powers — Ohio Civil Rule 53(C)*

Historically, there has been little controversy in Ohio concerning a Referee's authority in cases of reference. The "powers" of a referee have always been derivative[40] and the same is true in cases referred pursuant to Rule 53.[41] As set out in Subsection (C) of Rule 53, a referee can act only as specifically authorized by the referring trial court which retains the discretion to limit the reference as it deems necessary.[42] In this regard, the notion of a referee's "powers" contained in Rule 53 incorporates a judicially controlled limitation on *both* the scope of the reference and the function of the referee.[43]

While the referring trial court may specify or limit the scope of the refer-

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[38] *See infra* text beginning at note 70.

[39] 15 Ohio Op. 3d A-11 (1985).

[40] Mennel Milling Co. v. Slosser, 140 Ohio St. 445, 446-50, 45 N.E.2d 306, 307-08 (1942); Dillon v. Cleveland, 117 Ohio St. 258, 265-71, 158 N.E. 606, 609-10 (1927); Gault v. Gault, 20 Ohio App. 2d 57, 59-61, 251 N.E.2d 866, 868-69 (1969).

[41] OHIO R. CIV. P. 53(C). A referee derives his power to act directly from the trial court by virtue of its order of reference. A referee has no authority to act absent an order of reference. Eisenberg v. Peyton, 56 Ohio App. 2d 144, 144-46, 381 N.E.2d 1136, 1138 (1978); Berry v. Berry, 50 Ohio App. 2d 137, 139-41, 361 N.E.2d 1095, 1096-97 (1977); Wolff v. Kreiger, 48 Ohio App. 2d 153, 155-56, 356 N.E.2d 316, 318-19 (1976). However, a properly adopted local rule of court providing for an automatic reference in certain classes of cases satisfies the requirement of Rule 53 that there must be an order of reference to authorize any action on the part of a referee. White v White, 50 Ohio App. 2d 263, 266-68, 362 N.E.2d 1013, 1016-17 (1977).

[42] OHIO R. CIV. P. 53(C) Pursuant to this rule, the referring trial court in its order of reference "may specify or limit" the powers of the referee "to report only upon particular issues or to do or perform particular acts or to receive and report evidence only." *Id.* Further, the rule specifies that the referee has and shall exercise his power "subject to the specifications and limitations" in the reference order. *Id.*

[43] *Id.* The scope of the reference refers to the substantive issues to be addressed by the referee. The function of the referee can vary depending on the specific order of reference, i.e., to hear evidence only, to hear evidence and recommend resolution, etc. *See supra* note 42 and accompanying text.

ence by directing the referee to address only specified issues in the case, it need not. The trial court is equally empowered to refer *all* disputed issues to the referee for resolution.[44] Regardless of any limitation placed upon the scope of the reference, however, the trial court can limit the referee's function by restricting the reference to particular acts, for instance to receive and report evidence only.[45] It is important to note, however, that any court-imposed limitations are purely discretionary. Although the referring court retains the discretion to limit *both* the scope and function of the reference it need not always do so — it is free to restrict or not restrict the reference as it deems appropriate.[46]

Unless specifically limited by the trial court's order of reference, Rule 53(c) confers upon referees certain broad "powers" which are co-extensive with those normally attributable to a trial judge.[47] Pursuant to that specified "power," a referee may discharge duties normally performed by the court itself. Thus, for example, the referee can conduct "judicial-type" hearings in place of the judge and perform other acts which are generally judicial in nature such as compelling the attendance of witnesses, ruling on the admissibility of evidence, administering oaths, and interrogating witnesses.[48]

At first blush, the delegation of these "judicial powers" to non-judges appears somewhat problematic. The Ohio Constitution squarely places all judicial power in the judiciary, therefore, any attempt to delegate that power raises serious constitutional concerns.[49] The Ohio Rules of Civil Procedure cannot alter or diminish a court's judicial power since the Ohio Supreme Court's rule-making authority is limited, pursuant to Section 5(B) of Article IV of the Ohio Constitution, to prescribing rules of "practice and procedure."[50]

The staff notes to Rule 53 indicate that the rule contemplates that a referee will do no more than "aid" a trial court in expediting its business.[51] Despite an apparent grant of judicial "power" to the non-judicial referee, Rule 53 does not contemplate that reference will operate as a substitute for the trial

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[44]Rule 53(A) specifically authorizes the appointment of a referee "to hear an issue or issues" in any case in which there is no right to a jury trial. OHIO R. CIV. P. 53(A).

[45]*See supra* note 42.

[46]*See* OHIO R. CIV. P. 53(A).

[47]*See supra* note 42. Notably, while many of the referee's powers are coextensive with those of the trial court, there are limitations. Thus, while the adjudicatory functions of a referee and a court can be similar, the referee has no jurisdictional power to actually determine the rights and liabilities between the parties. *See* Wolff v. Kreiger, 48 Ohio App. 2d 153, 356 N.E.2d 316 (1976).

[48]OHIO R. CIV. P. 53(C).

[49]Judicial power is constitutionally vested in the "Supreme Court, Court of Appeals, Courts of Common Pleas and divisions thereof, and any such other courts inferior to Supreme Court as may from time to time be established by law." OHIO CONST. art. IV, § 1.

[50]OHIO CONST. art. IV, § 5; Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976); State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975); State v. Wailer, 48 Ohio App. 123, 356 N.E.2d 306 (1975), *aff'd*, 47 Ohio St. 2d 52, 351 N.E.2d 195 (1976).

[51]*See* Dillon v. Cleveland, 117 Ohio St. 258, 158 N.E. 606 (1927); Toulmin v. Becker, 94 Ohio App. 524, 115 N.E.2d 705 (1952).

court in the exercise of its judicial "decision-making" function.[52] To assume that a referee functions as judge merely because the enumerated "powers" of the referee as contained in Rule 53 appear "judicial" in nature[53] seriously mistakes the fundamental nature of the reference device.[54] To fully understand this functional distinction and its significance, one must first consider the manner in which a successful reference is meant to operate in practice.

B. *The Mechanics of Judicial Reference — Ohio Civil Rule 53(E)*

Subsection E of Rule 53 sets out a relatively simple mechanism through which a successful court ordered reference is accomplished. Regardless of the nature or scope of a reference, the referee, after hearing the matter referred, "shall" prepare and submit to the referring trial court a written "report upon the matters submitted to him by the order of reference."[55] Within fourteen days of the submission of this report, either party in the litigation may file with the court written objections to the content of the report.[56] The court is then ready to proceed with its disposition of the case. The court may "adopt, reject or modify the report; hear additional evidence; return the report to the referee with instructions; or hear the matter itself."[57]

On its face, the above-quoted portion of Rule 53(E) outlines the parameters of the judge-referee relationship. The referring trial court retains absolute discretion to act concerning the report as it deems appropriate.[58] A court could, for example, entirely reject the report and subsequently decide to hear the matter itself[59] with no deference to the findings or conclusions con-

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[52] A distinction must be made among various judicial functions. For example, a referee can conduct a judicial type hearing and rule on evidentiary questions (both "judicial functions"), but cannot actually affect any litigant's rights and liberties (also a "judicial function"). *See* Wolff v. Krieger, 48 Ohio App. 2d 153, 356 N.E.2d 316 (1977) (A referee's authority is limited to conducting a hearing, taking testimony and reporting the evidence and/or its recommendations to the trial court).

[53] *Id.*

[54] *Id. See also* Ivywood Apartments v. Bennett, 51 Ohio App. 2d 209, 367 N.E.2d 1205 (1976) (noting that a referee is not a judge and can not perform the duties of a judge). This is a significant change from the original statutory reference scheme in Ohio. Mennell Mining Co. v. Slosser, 140 Ohio St. 445, 45 N.E.2d 306 (1942). "[T]rial before referees is a substitute for a trial in court. The findings of the facts is, in effect, the special verdict of the jury. The conclusions of law of referee stand as the . . . decision of the court; and if not set aside, a judgment follows of course." *Id.* at 446, 45 N.E.2d at 307.

[55] OHIO R. CIV. P. 53(E)(1). The Ohio Supreme Court has interpreted this subsection to require referees to "perform certain mandatory duties." State *ex rel.* Lesher v. Kainrad, 65 Ohio St. 2d 68, 70, 417 N.E.2d 1382, 1384 (1981). For the text of this subsection *see infra* note 133.

[56] OHIO R. CIV. P. 53(E)(2). The relevant portion of the rule provides that "a party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report." *Id.* The 1985 amendment to Rule 53 provides that "[i]f objections are timely served and filed by any party, any other party may serve and file objections within ten (10) days from the date on which the first objections were filed, or within the time otherwise prescribed by this rule, whichever period last expires." *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id. See also* Mayle v. Mayle, No. 84-6268 (Ohio Ct. App. filed Feb. 13, 1984); Bakaitis v. Bakaitis, No. 83-7997 (Ohio Ct. App. Filed May 23, 1983); Jeewek v. Jeewek, No. 81-43018 (Ohio Ct. App. Filed May 21, 1981).

tained in the referee's report.[60] In this scenario, the reference is merely advisory at best since the court is not obliged to give any effect to the report of the referee.[61] It is important to note that despite a Rule 53 reference, final "decision-making" remains a "judicial," trial court function.[62]

This unique functional relationship between judge and referee defines the nature of reference and, simultaneously, protects the procedural scheme against any charge of unlawful delegation of judicial power.[63] Mandatory trial court acceptance of the referee's report and recommendation(s), on the other hand, would seemingly result in a total relinquishment of the court's judicial "decision-making" function to a non-judicial person.[64] The reference device is saved from this infirmity because the trial courts retain absolute and seemingly unfettered discretion to act as they wish subsequent to the reference.[65] Thus, ultimate judicial power and judicial "decision-making" remain intact despite the reference.

Although "decision-making" power remains in the trial court, realistically there is very little incentive for the trial court to completely disregard the report of the referee absent any special circumstances.[66] The "reviewing" court is also the "referring" court and is rarely inclined to reject the fruits of its own reference. To protect against this natural tendency toward a *de facto* delegation,[67] Rule 53 specifically provides that the referee's report has no independent significance absent affirmative adoption by the trial court and is effective and enforceable "only when approved and entered as a matter of record by the court."[68] This provision of the rule does not prohibit a court from adopting a

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[60] OHIO R. CIV. P. 53(E)(2).

[61] *Id. See also* Conn Construction Co. v. Department of Transportation, 14 Ohio App. 3d 90, 94, 470 N.E.2d 176, 180 (1983); Nolte v. Nolte, 60 Ohio App. 2d 227, 229-32, 396 N.E.2d 807, 810-11 (1978); Berry v. Berry, 50 Ohio App. 2d 137, 139-41, 361 N.E.2d 1095, 1097-98 (1977); Wolff v. Kreiger, 48 Ohio App. 2d 153, 155-56, 356 N.E.2d 316, 318-19 (1976).

[62] It is important to remember that a reference in no way alters a court's jurisdictional power to determine the rights and liabilities of litigants. *See supra* note 47. Judicial "decision-making" is the *court's* constitutionally granted power. It is clearly a judicial function to determine the facts in a controversy between adverse parties, to apply the law to the facts, and to render a final binding judgment. Incorporated Village of Fairview v. Giffee, 73 Ohio St. 183, 76 N.E. 865 (1905); Staples v. Sprogue, 31 Ohio L. Rep. 120 (1929), *aff'd*, 34 Ohio App. 354 (1930). *See generally* 16 O. JUR. 3D *Constitutional Law* §§ 332 *et seq.* (1979).

[63] Without question, a judge cannot delegate his judicial power to a non-judicial third person in the absence of specific authority. Demereaux v. State, 35 Ohio App. 418, 172 N.E. 551 (1930). *See generally* 16 O. JUR. 3D *Constitutional Law* § 370 (1979) *citing* 22 O. JUR. 3D *Courts and Judges* § 51 (1979).

[64] *See supra* note 63.

[65] *See supra* note 56 and accompanying text.

[66] Given the limited nature of the equity court's inquiry, there was special need for the referee in the adjudicatory process, *see supra* note 28, and courts seemed inclined to accept the work of the referee. In Ohio, however, reference now seems linked to the search for enhanced judicial efficiency. *See supra* notes 8, 28. Even now, though, there are built-in constraints which deter a court from rejecting the results of a reference. *See, e.g.*, Pinkerson v. Pinkerson, 7 Ohio App. 3d 319, 455 N.E.2d 693 (1982) (where the court recognized the docket pressures that bear on the state's trial courts).

[67] *Id.*

[68] OHIO R. CIV. P. 53(E)(5).

referee's report and recommendation(s).[69] A trial court is still free to rely upon the report and recommendation(s) in its entirety, but it must first affirmatively adopt the report as its own. Thus, the trial court (and not the referee) ultimately retains the exclusive power to decide upon the rights and liabilities of the litigants.

C. *The Developing Case Law*

Despite the careful theoretical allocation of judicial responsibilities between the trial court and its referee pronounced in Rule 53, problems developed in practice soon after the rule was promulgated in 1974. These problems required a clarification of the relationship between the referring court, the referee and the referee's report. Although Rule 53 expressly requires the trial court to "approve" a referee's report,[70] the rule is silent concerning how such approval is to be given. Additionally, the original rule establishes no guidelines concerning the appropriate form of the referee's report.[71] In light of these two deficiencies, some Ohio referees drafted their reports in the form of a final judgment without any accompanying explanation.[72] This problem was magnified when some trial courts did no more than sign the report, thereby "adopting" it as their own.[73] Critics promptly dubbed this practice "rubber-stamping" and questioned the propriety of allowing a trial court to "adopt" a referee's report by signature without any real independent review.[74] While this practice undoubtedly aids in clearing judicial calendars, it effectively removes the seat of judicial "decision-making" from the court to the referee and increases the potential for abuse of that judicial power.[75]

The Rule 53 reference device and the developing problem posed by "rubber-stamping" were first considered by the Franklin County Appeals Court in 1975 in the case of *Logue v. Wilson*.[76] Although the appeal was ultimately

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[69] *See supra* note 56. *See also* Eisenberg v. Peyton, 56 Ohio App. 2d 144, 381 N.E.2d 1136 (1978).

[70] *See supra* note 68.

[71] This has been partially remedied by the 1985 amendments to Rule 53. *See infra* note 157 and accompanying text.

[72] Thus, for example, in the seminal case of Logue v. Wilson, 45 Ohio App. 2d 132, 341 N.E.2d 641 (1975), discussed in the text accompanying *infra* notes 76-84, the referee's report consisted of the following: "Case called. Plaintiff and defendant in court. Show cause hearing held. Judgment is rendered for plaintiff for writ of replevin for property described." *Id.* at 132, 341 N.E.2d at 642.

[73] In *Logue*, the trial court adopted the referee's report on the same day it was filed by entering the following notation on the report: "[r]eferee's report approved. Jenkins" *Id.*

[74] *See infra* text beginning at note 83.

[75] A corollary problem focuses on the due process rights of the litigants. When a court abdicates its judicial function, the parties to the action are deprived of a trial before the court on the basic issues in the litigation. This concern was expressed most recently in the federal court system over the use of magistrates in certain contexts. *See, e.g.*, TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972), *quoting* La Buy v. Howes Leather Co., 352 U.S. 249 (1957). In 1980, the United States Supreme Court upheld the constitutionality of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1976), in United States v. Raddatz, 447 U.S. 667 (1980), *reh'g denied*, 448 U.S. 916 (1980). Much of the *Raddatz* opinion deals with the due process considerations.

[76] 45 Ohio App. 2d 132, 341 N.E.2d 641 (1975). The use of the term "rubber-stamping" first appears in *Logue*.

decided on other grounds,[77] the court took the opportunity to address the reference procedure used in the case and concluded that the reference was improper for several reasons.[78] First, the court found that the report itself was deficient because it was worded as a judgment and, further, contained no statement of the basis for the decision.[79] In addition, the trial court disregarded the fourteen day period during which the plaintiff could object to the report and entered judgment on the report the same day it was received.[80]

The *Logue* decision is significant for a number of reasons. First, the court affirmed the principal clearly articulated throughout Rule 53[81] that the final judgment in cases of reference must be that of the trial court and not that of the referee.[82] In affirming this principal, the court warned against construing Rule 53 to grant power to the referee to render a "judgment which has not received the independent analysis of the court."[83] The court specifically denounced "rubber-stamping," a practice which it said failed to comply with either the "requirements or spirit of Civil Rule 53."[84]

To assure "independent analysis," the *Logue* Court focused on both the form and content of the referee's report which, in the court's view, should not be worded as a judgment.[85] Rather, it should contain "sufficient information from which the [trial] judge may render his own decision," and at a minimum requires "a statement of the basis of his [referee's] findings and recommendation(s)."[86] While the court did not elaborate further concerning the amount of detail a referee's report must contain to enable a court to render its "own decision,"[87] the intent behind the *Logue* decision is clear. Even in cases of general reference, the trial court alone has the ultimate judicial power to actually decide the merits of the case. The referee's report merely provides the basis upon which the court should make its own independent evaluation. In this respect, the *Logue* opinion suggests a very mechanistic view of the referee's report — it is no more than the procedural tool through which the trial court can more efficiently accomplish its ultimate judicial function, that is, its

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[77]The appeal was dismissed for jurisdictional reasons. The appellate court found that it was without jurisdiction to hear the appeal because the trial court's entry of judgment disposed of less than all the pending claims and thus the trial court's judgment did not constitute a final appealable order. *Id.* at 136, 341 N.E.2d at 643.

[78]*Id.* at 136, 341 N.E.2d at 644. *See supra* note 72.

[79]*Id.*

[80]*Id.*

[81]*See supra* note 68.

[82]*Logue*, 45 Ohio App. 2d at 136, 341 N.E.2d at 644.

[83]*Id.*

[84]*Id.*

[85]The court characterized the report as an "important" part of the reference procedure. *Id.*

[86]*Id.*

[87]The court's failure to elaborate its general concern contributed to the need for more specific guidelines in the rule itself. *See infra* text beginning at note 157.

judicial "decision-making."[88]

Just two years later in the case of *Ivywood Apartments v. Bennett*,[89] the same Franklin County Court of Appeals expanded the views expressed in its *Logue* opinion. The court began in *Ivywood* by reiterating the concern it expressed but did not fully address in *Logue*, that lower courts must strictly adhere to the fourteen day period during which a party retains the right to object to the referee's report.[90] In the court's view, failure to strictly comply with the fourteen day objection period prevented the trial court from giving adequate "independent" consideration to the report,[91] and denied the appellant his right to file objections.[92]

While the court in *Ivywood* could have relied solely upon the rationale of *Logue*, it instead injected into the consideration the additional notion of fairness to the litigants declaring that "[t]he nub of the issue, . . . is that a hearing before a referee is not fair and complete until a judge, following independent and careful consideration, along with an opportunity to review objections, has acted upon the referee's report."[93] As was true with *Logue*, the analysis in the *Ivywood* devision leaves much to be desired. The opinion adds little to the requirement in *Logue* of "independent analysis." In addition, the *Ivywood* decision fails to fully articulate the basis of its fairness concern, which is seemingly grounded in some vague notion of due process.[94] Despite these weaknesses, the two cases highlight the importance of independent "decision-making" by the trial court, and establish the initial functional distinction between judge and referee in cases of general reference. Both cases were widely cited and followed by other Ohio appeals courts in the years immediately following the decision.[95]

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[88]The Franklin County Court's concern with the reference procedure was further illustrated in Wellborn v. K-Beck Furniture Mart, Inc., 54 Ohio App. 2d 65, 375 N.E.2d 61 (1977). It was noted that a court could follow a referee's recommended court of action but must "reduce that recommendation to a judgment by a proper judgment entry. Merely stating that the report is approved does not constitute a judgment." *Id.* at 66, 375 N.E.2d at 62.

[89]51 Ohio App. 2d 209, 367 N.E.2d 1205 (1976).

[90]*Id.* at 214, 367 N.E.2d at 1208.

[91]*Id.*

[92]*Id.* A litigant's right to file objections to a referee's report is an important and integral procedural safeguard which ensures judicial independence in cases of general reference. Rule 53 objections are not merely intended to preserve error made during the evidentiary hearing. *See infra* notes 110-12 and accompanying text.

[93]*Ivywood*, 51 Ohio App. 2d at 214, 367 N.E.2d at 1208. *See also* Pinkerson v. Pinkerson, 7 Ohio App. 3d 319, 320, 455 N.E.2d 693, 694 (1982) (where the court characterizes Rule 53(E) procedures as being "designed to protect the rights of all litigants").

[94]The *Ivywood* decision also contains veiled references to what might be construed as an equal protection issue. "[A]ppellant did not have adequate opportunity to file objections to the referee's report. The right to object, pursuant to Civil Rule 53, was improperly denied appellant, while granted other civil litigants." *Ivywood*, 51 Ohio App. at 212, 367 N.E.2d at 1208. Like the fairness question, however, the *Ivywood* opinion fails to adequately develop any basis for the court's thinking.

[95]*See, e.g.*, Eisenberg v. Peyton, 56 Ohio App. 2d 144, 381 N.E.2d 1136 (1978); Nolte v. Nolte, 60 Ohio App. 2d 227, 396 N.E.2d 807 (1978); Wellborn v. K-Beck Furniture Mart, Inc., 54 Ohio App. 2d 65, 375 N.E.2d 61 (1977); White v. White, 50 Ohio App. 2d 263, 362 N.E.2d 1013 (1977); Wolff v. Kreiger, 48 Ohio App. 2d 153, 356 N.E.2d 316 (1976).

By 1980, the developing case law seemed clear and consistent. The "rubber-stamping" abuse initially identified and addressed in the *Logue* and *Ivywood* cases was uniformly condemned.[96] Judicial attention continued to focus on the form of the referee's report[97] and on the timing of trial court action subsequent to the reference.[98] A referee could no longer enter a report in the form of a judgment to be approved by the trial court. The report had to contain a statement of the basis for the decision sufficient to enable the court to make its own independent determination.[99] Nor could any trial court action on the report be taken prior to the expiration of the fourteen day objection period.[100]

It is important to note again that, during this time period, judicial concern with the reference device stemmed primarily from the dual concerns articulated in *Logue* and *Ivywood* — judicial integrity and procedural fairness. Despite wide acceptance and support of these principles, courts soon faced other interpretation problems in the Rule 53 context.

In *Keatley v. United National Bank and Trust Co.*[101], the Stark County Court of Appeals considered the relationship between the filing of Rule 53(E)(2) objections and subsequent appellate review of the merits of the action. In that case, the trial court entered a judgment adopting the referee's report and recommendations. Neither party filed objections to the report and recommendations prior to the court's adoption of the report. Despite the failure to file objections to the referee's report, the plaintiff filed a timely appeal from the court's entry of final judgment. The issue presented on appeal was whether the plaintiff's failure to file Rule 53 objections to the report of the referee precluded subsequent appeal of issues that could have been raised before the trial court but were not.

In answering the question, the court held that the filing of Rule 53 objections was a mandatory prerequisite to any appellate review of issues which could have been raised by objection to the trial court.[102] In so holding, the court found that the objection requirement in Rule 53 embodies the general evidentiary requirement that error must be preserved by objection in the trial court.[103] The court opined that the purpose of Rule 53 objections is to relieve the trial court of the responsibility to review *sua sponte* the referee's report and recom-

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[96] *See supra* note 95.

[97] *See, e.g.*, Nolte v. Nolte, 60 Ohio App. 2d 227, 396 N.E.2d 807 (1978); Wellborn v. K-Beck Furniture, Inc., 54 Ohio App. 2d 65, 375 N.E.2d 61 (1977).

[98] *See supra* rate 95. *See also* Berry v. Berry, 50 Ohio App. 2d 137, 139-41, 361 N.E.2d 1095, 1097-98 (1977).

[99] *See supra* note 97.

[100] *See supra* note 98.

[101] 68 Ohio App. 2d 198, 428 N.E.2d 158 (1980).

[102] *Id.* at 198-99, 428 N.E.2d at 158-59.

[103] *Id.* "In our view, the requirement of preserving a claim of error by making an appropriate objection in the trial court is the concept captured by the objection requirement in Civil Rule 53(E)." *Id.*

mendations prior to its adoption:

> We have carefully considered the alternate view of this appeal which is that the trial judge had the sua sponte responsibility to review the referee's four-paged Findings of Fact and Conclusions of Law and to verify, to his own satisfaction, the correctness thereof. We reject this view. It is our opinion that the function of Civil Rule 53(E)(2), which requires objection to the referee's report, is to relieve the trial court of that responsibility.[104]

In holding that the trial court had no independent responsibility to review the referee's report, the court in *Keatley* implicitly expressed a view of the referee-judge relationship out of step with that of its sister courts. The clear teaching of *Logue* and its progeny was that final "decision-making" authority resides only in the trial court and not in the referee.[105] The procedures set out in Rule 53 itself were designed to protect against usurpations of trial court "decision-making" authority and to ensure the procedural fairness of the adjudicatory process.[106] In contrast, the *Keatley* majority determined that trial court review of the referee's report was triggered only when one of the litigants filed objections. Absent such objection, the trial court was free to simply adopt the referee's report and recommendations and enter judgment without independent consideration.[107] Thus, a party's failure to object to the referee's report completely relieves the trial court of any responsibility to verify the accuracy of its own judicial decision. It is difficult to accept this result without a corresponding willingness to also accept a functional realignment of the trial judge-referee relationship. Absent any real review, the final decision is that of the referee and not that of the trial court. This view of the reference process is clearly at odds with the overwhelming weight of the then existing authority.[108]

In the 1982 case of *Normandy Place Associates v. Beyer*,[109] the Ohio Supreme Court erased any existing ambiguity surrounding the proper interpretation of the judge-referee relationship as embodied in Rule 53. In that case,

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[104] *Id.*

[105] *See supra* text accompanying notes 76-95.

[106] *See supra* text accompanying notes 82-93.

[107] It is interesting to note that Judge Rutherford's strong dissent in *Keatley* fails to specifically address the question of a trial court's responsibility to independently review the referee's report and recommendation(s). Instead, he focused on the reviewability of the judgment at the appellate level and concluded that an appellate court was free to review the lower court decision and judgment for any plain error apparent on its face despite any failure to object below. *Keatley*, 68 Ohio App. 2d at 208, 428 N.E.2d at 164 (Rutherford, J., dissenting).

> I am aware of the fact that a Court of Appeals in the exercise of its discretionary power ought not, generally, to consider matters not called to the attention of the trial court; but, I do not read Civil Rule 53(E) to preclude exercise of discretionary power in the instant case because no objection was made to errors, which, in my opinion . . . appear on the face of the report, and to errors of commission, I feel, to be of such magnitude that justice requires they be given consideration.

Id.

[108] *See supra* text accompanying notes 76-100.

[109] 2 Ohio St. 3d 102, 443 N.E.2d 161 (1982).

the Ohio Supreme Court addressed the same issue originally tackled by the appellate court in the *Keatley*[110] case, that is, whether the filing of Rule 53(E) objections to a referee's report is a prerequisite to subsequent appellate review of the findings and/or recommendations subsequently adopted by the trial court.[111] The Ohio Supreme Court held that the failure to file objections to a referee's report does not operate as a waiver of the issue on appeal.[112] In so holding, the Court expressly disapproved of the holding in *Keatley.*[113]

In reaching this result, the majority stressed that the rule regarding the preservation of error by objection[114] must be read in conjunction with Rule 53(E)(2).[115] They relied upon the permissive construction normally afforded the word "may" contained in the rule[116] to conclude that the rule "does not mandate the filing of objections to a referee's report."[117] Despite the court's technically narrow holding in *Beyer,* the dual concerns underlying *Logue* and its progeny are at the heart of the *Beyer* decision as well. The first concern deals with the nature of the reference device and its resulting impact on the overall fairness of the adjudicatory process. In the view of the court in *Beyer,* the right at stake in the case, meaningful appellate review, was a significant right.[118] Under *Keatley,* if a party failed to file Rule 53 objections his appeal was barred. However, because of the absence of a clear legislative warning to litigants specifically outlining the consequences of their failure to file Rule 53 objections, the court in *Beyer* was reluctant to deprive litigants of "such a substantial right as the right of appeal."[119]

In addition, the *Beyer* opinion suggests an underlying concern with "rubber-stamping" — the *de facto* delegation problem previously discussed.[120] Couched as concern for the "high regard [for] . . . the function of the judiciary," the Supreme Court noted that it is "the primary duty of the [trial]

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[110]The record of the *Beyer* decision was certified for review and final determination to the Ohio Supreme Court by the Montgomery County Court of Appeals which concluded that its decision in *Beyer* conflicted with the judgment of the Stark County Court of Appeals in Keatley v. United National Bank and Trust, 68 Ohio App. 2d 198, 428 N.E.2d 158 (1980).

[111]The appellants in *Beyer* argued that the failure to specifically object to certain language contained in the referee's report precluded appellate review of that same question. *Beyer,* 2 Ohio St. 3d at 103, 443 N.E.2d at 163. Their argument was obviously premised on the well established rule that only errors which are brought to the attention of the trial court are reviewable on appeal. *See, e.g.,* Stores Realty Co. v. Cleveland, 41 Ohio St. 2d 41, 322 N.E.2d 629 (1975).

[112]*Beyer,* 2 Ohio St. 3d at 103, 443 N.E.2d at 163.

[113]*See supra* text accompanying note 104 for the court's holding in *Keatley.*

[114]*See, e.g., Stores Realty Co.,* 41 Ohio St. 2d 41, 322 N.E.2d 629.

[115]*Beyer,* 2 Ohio St. 3d at 104, 443 N.E.2d at 163.

[116]"A party *may,* within fourteen days of the filing of the report, serve and file written objections to the referee's report." OHIO R. CIV. P. 53(E)(2) (emphasis added).

[117]*Beyer,* 2 Ohio St. 3d at 105, 443 N.E.2d at 163.

[118]*Id.*

[119]*Id.*

[120]*See supra* text accompanying notes 76-100.

court, and not the referee, to act as judicial officer."[121] Like the *Logue* court,[122] the Supreme Court emphasized the necessity for independent review of the referee's report.[123] This review is the procedural mechanism to ensure against usurpation of the trial court's judicial "decision-making" function:

> In order for the trial court to maintain its independence, it is of utmost importance that it carefully examine any report before it for errors. Accordingly, we reject any concept which would suggest that a trial court may in any way abdicate its function as judge over its own acts. We therefore hold that, even in the absence of an objection to a referee's report, the trial court has the responsibility to critically review and verify to its own satisfaction the correctness of the result.[124]

The Supreme Court's concern for the "independence" of the trial court, and its strong language refusing to sanction any abdication of the trial court's judicial function, suggests a higher regard for the continued integrity of the judicial process than for judicial economy.[125] When coupled with the Supreme Court's concern over the procedural fairness of the process, the case presents a clearly drawn functional line between the judge and referee.

Actual judicial "decision-making" authority rests solely in the court and is not to be diminished in any way by the reference. Every judicial decision must be that of the trial court and not that of the referee, and these decisions must result from the exercise of "independent trial court judgment" even when a litigant fails to object to the report.[126] Significantly, the litigants' action (in objecting) or inaction (in failing to object) does not affect the allocation of ultimate judicial "decision-making" authority which remains in the trial court.[127] In this respect, the exercise of independent "decision-making" by the trial court is both absolute and mandatory.

The functional distinction between judge and referee articulated in the case law preserves the reference device from a charge of unlawful delegation of judicial power. However, in practice it is not easy to achieve the delicate procedural balance created to preserve the rule. Although the *Beyer* decision mandates judicial independence, it fails to articulate practical standards preserving such independence and leaves a number of other related questions unanswered.

Can the trial court accomplish the independent critical review mandated

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[121] *Beyer*, 2 Ohio St. 3d at 105, 443 N.E.2d at 164.

[122] *See Logue*, 45 Ohio App. 2d at 136, 341 N.E.2d at 644.

[123] *Beyer*, 2 Ohio St. 3d at 105, 443 N.E.2d at 164.

[124] *Id.*

[125] This is especially so given the *Beyer* dissent's concern with the loss of judicial efficiency which they feel will stem from the majority holding. *See id.* at 107, 443 N.E. 2d at 165 (Krupansky, J., dissenting).

[126] *See id.* at 105, 443 N.E.2d at 164.

[127] *Id.*

by the decision without rehearing (or at least reviewing) the evidence initially heard by the referee? Can a reviewing trial court give deference to any aspect of the referee's report and maintain its function as an independent decision-maker? Can the requirement of independent "decision-making" be reconciled with the underlying purpose of a reference of increasing judicial efficiency? The language of the original version of Rule 53 offers no help in resolving the dilemma. However, the recent amendments to Rule 53 attempt to address and answer these concerns by adding detailed requirements for the content of a report and by articulating standards for the reviewing trial court.[128]

This article continues its analysis by examining the recent amendments to Rule 53 and their relationship to the existing standards set out in the case law in the context of three important and related questions. First, when is the report itself sufficient to enable the reviewing trial court to satisfy the independent review requirement? Second, what standard is a reviewing trial court to apply when reviewing a referee's report. Is the court free to defer to any portion of the report? Finally, what relation, if any, does the use and availability of the transcript of the evidence presented by the parties at the hearing before the referee have in safeguarding the independence of the trial court? The first two questions are closely related and will be addressed initially. The importance and function of the transcript in the trial court review process will then be assessed.

III. THE SUFFICIENCY OF THE REFEREE'S REPORT AND RECOMMENDATION

A. *The Case Law*

Beginning with the decision in *Logue v Wilson,*[129] Ohio courts have consistently viewed the referee's report as the medium through which a successful reference is accomplished.[130] If a trial court hopes to follow the principles established in the previously discussed case law[131] and exercise truly independent "decision-making" in cases of reference, then the referee's report must play the primary role in ensuring the independence of the court's "decision-making" process. Absent any objections,[132] the court's independent analysis and decision will normally be based on the referee's report.[133]

As originally enacted and as amended, Rule 53 (E)(1) mandates that the

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[128] *See infra* text beginning at note 157.

[129] 45 Ohio App. 2d 123, 341 N.E.2d 641 (1975).

[130] *See supra* text beginning at note 76.

[131] *Id.*

[132] Pursuant to Ohio Civil Rule 53(E)(2), the trial court retains the discretion to rehear all or part of the evidence originally heard by the referee. *See supra* note 56. Additionally, the trial court may have a transcript of the referee's hearing available for review before ruling on any objections. OHIO R. CIV. P. 53(E)(1). *See infra* note 134 for the text of that subsection of the rule.

[133] *See infra* text beginning at note 174.

referee prepare and file with the trial court a report upon the matters submitted by the order of reference.[134] However, the original version of the rule neither required nor suggested any particular form or content of the referee's report. To some extent this omission contributed to the "rubber-stamping" problems previously addressed.[135] In part, this shortcoming in the rule was remedied by subsequent judicially created requirements for an "adequate" referee's report.

The initial statement concerning the requisite content of a referee's report was first articulated in 1975 in the *Logue* decision discussed previously.[136] Emphasizing its general concern for the "independence" of the judicial "decision-making" function,[137] the *Logue* Court suggested that the report of the referee must contain sufficient "information" to allow the trial court to render its own independent decision[138] — a standard that a report prepared in the form of a judgment did not meet.[139] While it made clear that a referee's report couched in the form of a final judgment was deficient,[140] the *Logue* Court offered little guidance concerning just how much "information" a report must contain to enable the trial court to independently decide the disputed issues in the case.

In 1978, the Cuyahoga County Court of Appeals addressed this elusive issue in *Nolte v. Nolte.*[141] In *Nolte,* the appellate court considered a challenge to a lower court's decision which had been based on deficiencies in a referee's report upon which the trial court relied in rendering its final judgment.[142] The *Nolte* decision refines the general standard articulated in *Logue*[143] by focusing on the sufficiency (or insufficiency) of the factual predicate for the recommended conclusions contained in the referee's report. Concerned with the trial court's ability to independently review the referee's report, the appellate court

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[134]OHIO R. CIV. P. 53(E)(1). This subsection provides that:

> [t]he referee shall prepare a report upon the matters submitted to him by the order of reference. He shall file the report with the clerk of the court and shall mail a copy to the parties. In an action on the merits of an issue to be tried without a jury, he shall file with his report a transcript of the proceedings and of the evidence only if the court so directs.

Id.

[135]*See supra* text beginning at note 76.

[136]*See supra* text accompanying notes 85-88.

[137]*Logue,* 45 Ohio App. 2d at 136, 341 N.E.2d at 644.

[138]*Id.* "While it is not inconsistent with Rule 53 that the referee recommend a proposed judgment to the referring court, it should not be worded as a judgment and *it should contain sufficient information from which the judge may render his own decision." Id.* (emphasis added). "The report of the referee at a minimum requires a statement of the basis of his findings and recommendations in order that the judge may make an independent analysis of its validity . . . ." *Id.*

[139]*Id.*

[140]*Id.*

[141]60 Ohio App. 2d 227, 396 N.E.2d 807 (1978).

[142]The appellant in *Nolte* asserted that it was an error of law for the trial judge "to accept, adopt, and journalize a report of a referee . . . when that report makes no finding of fact to support the conclusions and recommended entry, and where the trial judge makes no independent findings of fact to support the journal entry." *Id.* at 229, 396 N.E.2d at 809.

[143]*See supra* note 138.

determined that "when a referee's report contains a conclusion regarding an issue in the case, the facts that lead to that conclusion must also be contained in the report.[144]

Although the *Nolte* case was decided prior to the Supreme Court's decision in *Beyer,*[145] its requirement that referees articulate underlying facts as part of their reports is consistent with the notion of independent trial court analysis contained in the *Beyer* line of cases.[146] Since the trial court's decision, absent objection, is based entirely on the referee's report,[147] the trial court can independently assess the validity of any recommended conclusion *only* when the factual basis for that conclusion is also incorporated as part of the report. Otherwise, the trial court is, in essence, abdicating its judicial "decision-making" function to the referee.[148]

The requirement that referees articulate the underlying facts as part of their reports is now well established in the case law[149] and, in most instances, presents little difficulty in application. A referee's report recommending the adoption of certain legal conclusions must contain the necessary factual predicate for such legal conclusions. Without the necessary supporting facts, the report would supplant rather than aid the trial court in accomplishing its "decision-making" function. For example, in a proceeding for divorce, Rule 75(L) of the Ohio Civil Rules requires that no judgment be entered upon testimony that is not corroborated by additional credible evidence.[150] If the referee's report recommends that the trial court enter a judgment of divorce for the moving party, the report must contain sufficient factual findings to allow the trial judge to "independently" determine that the entry of that judgment is appropriate. Essentially, the trial judge must be able to "independently" determine from the referee's report that the moving party has established the legal elements of the cause of action. Thus, at a minimum, the report must contain the finding that there is other credible corroborative evidence to support the petitioner's allegations. Only then can the trial court conclude that the judgment for divorce is appropriate. Where the referee's report fails to state the necessary factual predicate, the trial court is incapable of "independently" determining whether the recommended judgment for

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[144] *Nolte,* 60 Ohio App. 2d at 230, 396 N.E.2d at 808-09.

[145] *Nolte* was decided in 1978 while *Beyer* was decided four years later in 1982.

[146] *See supra* text beginning at note 109.

[147] *See infra* text beginning at note 174.

[148] While the Court must review the report for legal errors which appear on its face, *see infra* text accompanying notes 192-96, it is not judicial "decision-making" in the first instance. At the trial court level, fact-finding is an integral part of the judicial "decision-making" function. Trials are necessary because a court can apply substantive law to determine the rights of the parties only after "it finds the facts . . . ." J. FRANK, COURTS ON TRIAL, at 3 (1970). *See also supra* note 62.

[149] *See, e.g.,* Ferrie v. Ferrie, 2 Ohio App. 3d 122, 440 N.E.2d 1229 (1981).

[150] OHIO R. CIV. P. 75(L).

divorce is proper.[151]

The "factual predicate" requirement set out in *Nolte* is not limited to legal conclusions. The *Nolte* case itself suggests that the requirement applies equally to legal *and* factual conclusions contained in the referee's report. That case began at the trial level when the father-appellee filed a post-divorce decree motion to modify child custody alleging that the mother's home environment was "detrimental to the child's physical, mental and emotional health."[152] After hearing the evidence and testimony presented, the referee concluded that the home environment of the mother-appellant was dangerous to the child's physical and emotional development and recommended a change in custody.[153] However, neither the report nor the recommended journal entry contained any basis for this crucial factual conclusion.[154] The appellate court criticized the trial court for adopting the recommendation of the referee in the absence of any articulated factual predicate to support the referee's conclusion that the mother's home environment endangered the child.[155] In effect, the referee and not the trial court made the decision changing custody. Since it made no clear statement of the facts, the appellate court found that the referee's report was insufficient and that the trial judge could not properly adopt its recommended disposition.[156]

B. *The Rule 53(E) Amendments*

The recent amendments to Rule 53 (E)(5) which specifically mandate that the factual findings of the referee be sufficient to allow independent analysis by the trial court partially remedy the shortcomings of Rule 53, as originally enacted, which failed to specifically address the required content of the

[151]The facts of the example parallel those of Ferrie v. Ferrie, 2 Ohio App. 3d 122, 440 N.E2d 1229 (1981). In that case, appellant argued that the referee's report did not contain sufficient information to allow the trial court to independently determine whether the plaintiff should be granted a divorce. The referee's report in the case simply stated conclusions and did not mention whether there was any corroboration as required by Rule 75(L). In reversing the trial court's award of divorce, the court of appeals held that the "report must contain a brief summary of the underlying facts and corroborative testimony supporting the legal conclusion that the plaintiff is entitled to a divorce." *Id.* at 123, 440 N.E.2d at 1231. A number of other cases reach the same conclusion. *See, e.g.*, Eisenberg, v. Peyton, 56 Ohio App. 2d 144, 381 N.E.2d 1136 (1978) (whenever a referee's report contains a legal conclusion, but omits the facts necessary to reach that conclusion, the judgment is voidable). *See also Nolte*, 60 Ohio App. 2d 227, 396 N.E.2d 807 (1978).

[152]*Nolte*, 60 Ohio App. 2d at 227, 396 N.E.2d at 808.

[153]*Id.*

[154]The referee's report, which was adopted without modification by the trial judge, contained the following statement: "[t]he [c]ourt further finds that based upon the evidence presented to this [c]ourt, the child's present environment with the defendant-mother endangers significantly his physical and his emotional development." *Id.* at 229, 396 N.E.2d at 809. However, nothing in the report specifically suggested exactly *what* in the environment constituted the danger.

[155]The *Nolte* opinion makes reference to prior decisions admonishing the Domestic Relations Division of the Cuyahoga County Court of Common Pleas for failing to comply with the mandates of Rule 53. *Id.* at 231, 396 N.E.2d at 810, *citing* Eisenberg v. Peyton, 56 Ohio App. 2d 144, 381 N.E.2d 1136 (1978); Berry v. Berry, 50 Ohio App. 2d 137, 361 N.E.2d 1095 (1977). However, the court in *Nolte* cautions against construing their "denunciation of the flagrant abuses of Civil Rule 53" as a disapproval of the proper uses of referees. *Nolte*, 60 Ohio App. 2d at 231-32, 396 N.E.2d at 810.

[156]*Id.*

referee's report. The rule as amended requires that "[t]he referee's findings of fact must be sufficient for the court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment order."[157] While this addition to Rule 53 seems consistent with the previously discussed judicial standard,[158] the amendment goes beyond the prior case law by clarifying the method of its application.

The amended rule requires that every referee's report contain findings of fact sufficient for the trial court to make an "independent analysis."[159] In this respect, the amended rule merely embraces as its own the general standard first articulated in *Logue*.[160] In addition, however, the amended rule amplifies both the *Logue* and *Nolte* decisions by suggesting the nature of the anticipated trial court analysis of the referee's report. Thus, while the previous case law focused on the facts necessary to support the "conclusions" contained in the report,[161] the amended rule specifically requires that the referee's report contain sufficient facts to allow the court to independently analyze "the issues and to apply appropriate rules of law in reaching a judgment order."[162]

This new language in the amended rule suggests a dual focus by the reviewing trial court. Consistent with the prior case law,[163] a referee's report must contain sufficient findings of fact to allow the trial court to apply the appropriate rules of law to reach its judgment.[164] In addition, however, the findings of fact must be sufficient to allow the court to make an independent analysis of the "issues."[165] Here the amendment seems cryptic at best since the term "issues" is not defined in the rule and it is unclear whether "issues" refers only to legal issues or whether it also includes disputed questions of fact.

The use of the conjunctive "and" in the text of the amended rule suggests an "independent analysis" of some additional disputed issue(s) beyond the court's mere application of law to fact.[166] It is probably safe to assume that "issues" does not refer solely to pure questions of law since their resolution does not necessarily depend upon a factual predicate.[167] The absence of any

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[157] OHIO R. CIV. P. 53(E)(5).

[158] *See supra* text beginning at note 136.

[159] OHIO R. CIV. P. 53(E)(1).

[160] *See supra* text accompanying notes 85-87.

[161] *See supra* text accompanying note 144.

[162] OHIO R. CIV. P. 53(B)(5).

[163] *See supra* text beginning at note 136.

[164] OHIO R. CIV.P. 53(E)(5).

[165] *Id.*

[166] *See supra* text accompanying note 157.

[167] However, in its deliberation concerning a potential change in substantive law, a court may rely on "legislative" facts. *See* MCCORMICK ON EVIDENCE 759, 766 (2d ed. 1972); Karst, *"Legislative facts in Constitutional Litigation,"* 1960 SUP. CT. REV. 75, 99-100, 109; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.3, at 353 (1958).

other explanation for including the word "issues" in the amended rule suggests that the anticipated "independent analysis" extends additionally to issues of disputed fact. However, this interpretation seems at odds with subsection (6) of amended Rule 53(E) which allows a court to adopt the referee's proposed findings of fact without any "independent analysis" when there has been no objection to those findings.[168] With no guidance inherent within the rule itself, the question of the meaning of the word "issues" in the amended rule will remain unanswered pending further judicial interpretation.

In so far as the amended rule requires factual findings sufficient to allow the court to apply the appropriate rules of law in reaching its decision, it is clearly consistent with the prior judicially created standard previously discussed.[169] However, Ohio courts have also required that the referee's report contain sufficient evidence to support factual conclusions contained in that report.[170] Unless the phrase "independent analysis of the issues" is interpreted to include disputed issues of conclusory fact, the amended rule alters the prior judicially created requirements for an adequate referee's report — a potentially disturbing result given the important role that the report plays in maintaining the functional balance between judge and referee in cases of general reference.[171]

Because of this ambiguity, the amended rule fails to remedy completely the omission in Rule 53 as it originally stood. While the original rule was silent, this deficiency was partially remedied by the judicially created standards previously discussed.[172] The case law requirement that a referee's report contain adequate facts to support both factual and legal conclusions was both understandable and consistent with the functional roles of judge and referee. The amended rule seems to abandon this established approach for one that is arguably less clear than and possibly inconsistent with the prior standard.

Ultimately, any discussion of the "proper" content of the referee's report leads to consideration of its function in the final adjudicatory process. As discussed previously, the referee's report was viewed historically as the mechanism through which the trial court effectuates *its* "decision-making" function.[173] However, the recent amendments to Rule 53 suggest a significant departure from the referee-judge relationship established in the prior case law. It is this departure which this article next considers.

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[168] *See infra* text accompanying note 196.

[169] *See supra* text accompanying note 149.

[170] *See supra* text accompanying note 152.

[171] *See supra* text beginning at note 57.

[172] *See supra* text beginning at note 136.

[173] *See supra* text beginning at note 40.

IV. REVIEW OF THE REFEREE'S REPORT AND RECOMMENDATION — "INDEPENDENT DECISIONMAKING"?

As traditionally understood, the relationship between a trial judge and referee is unlike that between an appellate and trial court. There is little functional similarity between an appellate court, which reviews the decision of a trial court, and a referring trial court, which "reviews" the report of a referee.[174] Historically, an Ohio trial court does not engage in an "appellate" type review of the referee's report, at least not as the term is commonly understood.[175]

Initially, it is important to note that a trial court need never actually "review" the referee's report.[176] Both the original and amended Rule 53 specifically authorize the trial court, after objection, to treat the report as it deems appropriate.[177] Interestingly, on its face the rule gives the trial court absolute and apparently unfettered discretion. Regardless of the sufficiency or wisdom of a referee's report, the trial court may entirely reject it.[178] Any such rejection is not reviewable on appeal.[179] Additionally, unlike an appellate court which must review the trial court's decision,[180] the trial court can completely reject the referee's report and instead elect to make its judicial decision after a *de novo* hearing.[181] Moreover, a trial court is not restricted historically by a limited scope of review requiring deference to the referee's proposed factual findings.[182]

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[174]In reviewing a trial court judgment in Ohio, the court of appeals does not substitute its judgment for that of the trial judge. Rather, the appellate court determines if the trial court judgment was erroneous. Yomnick v. Leece-Neville Co., 28 Ohio Op. 2d 344, 188 N.E.2d 610 (1963); Crellin v. Parish, 136 N.E.2d 454 (1955). Even in cases of general reference, the trial court *must* substitute its judgment for that of the referee since the referee is merely an aid to the trial court in the exercise of (the trial court's "decision-making" function. *See supra* text accompanying notes 86-88.

[175]Generally, an appellate court reviews the judgment of the trial court solely for legal errors. No new evidence may be introduced. *See, e.g.*, State *ex rel.* Squire v. Cleveland, 150 Ohio St. 303, 82 N.E.2d 709 (1948). The appellate court is limited to the record as it was developing at the trial court level. Cleveland v. Whipkey, 29 Ohio App. 2d 79, 278 N.E.2d 374 (1972). *See generally* 4 O. JUR. 2D *Appellate Review* §§ 248,499 (1961). In reviewing questions of fact, the appellate court is limited to determining whether the verdict or findings are supported by substantial evidence or are contrary to the manifest weight of the evidence. Yomnick v. Leece-Neville Co., 28 Ohio Op. 2d 344, 188 N.E.2d 610 (1963); Cleveland Ry. Co. v. O'Reilly, 16 Ohio App. 132 (1920). In contrast, the trial court in considering the report and recommendation(s) of the referee can hear new evidence, *see supra* text accompanying notes 57-62, and should weigh the evidence presented by the litigants. Despite the reference, however, the trial court retains its judicial "decision-making" power. *See supra* text accompanying notes 82-88. Interestingly, the trial court-referee relationship is similar to the long prevalent appeal *de novo* now abolished by Ohio Appellate Rule 2. *See generally* 4 O. JUR. 3D *Appellate Review* § 13 (1977).

[176]*See* OHIO R. CIV. P. 53(E)(2).

[177]*Id. See supra* text beginning at note 56 for a discussion of the applicability of Rule 53(E)(2).

[178]OHIO R. CIV. P. 53(E)(2).

[179]The trial court's rejection of a referee's report and recommendation(s) pursuant to Rule 53(E)(2) should not be overturned by the court of appeals given the broad discretion granted to the trial court within Rule 53 itself. Note, however, that the trial court's final judgment may be reviewed upon appeal by the appellate court pursuant to its normal scope of view.

[180]*See* Ohio R. Civ. P. 53(E)(2).

[181]*Id.*

[182]*See supra* note 175. Deference to the referee's proposed findings of fact is inconsistent with true, independent judicial "decision-making."

While a trial court's refusal to accept the referee's report and insistence upon a *de novo* hearing may decrease judicial efficiency,[183] such refusal poses no threat to independent judicial "decision-making."[184] However, when a trial court fails to properly "review" the referee's findings and/or conclusions in adopting the referee's recommendations (alluded to previously as "rubber-stamping"[185]) the principal of judicial independence is threatened. The developed case law clearly counters this practice and mandates independent "decision-making" by a reviewing trial court whenever the court adopts the referee's report as its own.[186] Unfortunately, as suggested previously, the "independent decision-making" standard is not easily implemented. While a reviewing trial court need not defer to the referee, may it do so if it pleases? When a reviewing trial court wishes to adopt the referee's report, can it defer to the referee's findings and/or conclusions or must it "independently" determine both the legal and factual issues to its own satisfaction?

The original version of Rule 53 does not address the propriety of trial court deference to the referee but the omission is partially remedied by the amended rule. While retaining the language of the original rule which confers discretion on the trial court to act as it deems appropriate subsequent to a reference,[187] the amended rule adds language which specifically allows a referring court to adopt a referee's recommendation(s) concerning appropriate legal conclusions and resolutions of the issues in the case.[188] However, the sanction of the amended rule contains certain restrictions. Though the trial court is free to adopt a referee's recommendation(s) regarding the ultimate outcome of the case, it can not adopt a referee's proposed judgment as its own since the amendment specifically requires a court to enter its own judgment.[189]

In addition, even when a court wishes to adopt portions of the report, it must do more than merely "defer" to the conclusions contained therein. The amended rule specifically requires that, prior to adopting the report, the reviewing trial court must determine whether there are any "error[s] of law or other defect[s]" on the face of the report.[190] This determination must take place "even if no party objects to [such] an error or defect."[191]

The quoted portion of the amended rule seems to require a mandatory

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[183] *See supra* note 29.

[184] Note however that the rejection of the proposed findings of fact on the basis of credibility without rehearing the evidence raises due process concerns. *See infra* note 257.

[185] *See supra* text beginning at note 76.

[186] *Id.*

[187] *See supra* text beginning at note 56.

[188] Rule 53(E)(5) specifically authorizes that the "[c]ourt may adopt the referee's recommendations about appropriate conclusions of law and the appropriate resolution of any issue." OHIO R. CIV. P. 53(E)(5).

[189] "The court shall enter its own judgment of the issues submitted for action and report by the Referee." *Id.*

[190] *Id.*

[191] *Id.*

form of a limited appellate-type review. While a court may adopt a referee's recommendation(s) concerning the outcome of the matter, it must nevertheless independently examine the *report* for any errors of law or other defects apparent *on the face of the report.*[192] Thus, while a court may adopt the referee's report, it cannot under any circumstances defer to the legal conclusions contained in the report. The trial court must review the report for any legal defects that may appear on its face even when no party objects to any portion of the report.[193]

In this regard, the amended rule seems consistent with and even codifies the view of the judge-referee relationship developed in the *Logue* line of cases.[194] The rule specifically prohibits "rubber-stamping" and requires that each court enter its own independent judgment on the issues submitted for reference. Like *Logue* and its progeny, the amended rule ensures that the exercise of judicial "decision-making" power remains squarely in the trial court.

The rule, as amended, also demands a measure of trial court "independence" by requiring the court to exercise its own judgment on questions of law even in the absence of an objection to the report.[195] The trial court can not merely defer to the referee in matters concerning questions of law.[196] In a limited sense, the amendment embraces the view of the judge-referee relationship which underlies the *Beyer* decision — the action or inaction of the litigants in no way effects the allocation of judicial power which remains in the trial court despite a litigant's failure to specifically object to the report.[197]

While a court may adopt legal conclusions, what about factual questions at issue in the reference? Can a court defer to the factual findings contained in the referee's report and, if so, what becomes of the "independent decision-making" requirement of *Beyer*? By implication, the amended rule allows a reviewing court to adopt the findings of fact of the referee "without further consideration" unless there is an objection filed by the party opposing the adoption of the report.[198] Absent objection, the trial court seems free, in essence, to defer to the referee in regard to matters of disputed fact.

The amended rule seems, then, to draw a distinction between the "reviewability" of legal and of factual issues. Even absent any objection, the reviewing trial court must still determine if there are errors of law or "other

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[192] *Id.* This language suggests a review similar to an appellate court's review for legal error in the trial court's final decision and judgment. *See supra* notes 174-75.

[193] OHIO R. CIV. P. 53(E)(5).

[194] *See supra* text beginning at note 129.

[195] OHIO R. CIV. P. 53(E)(5).

[196] *Id.*

[197] *See supra* text accompanying note 124.

[198] OHIO R. CIV. P. 53(E)(6).

defect[s] on the face of the report."[199] However, a court must go beyond the face of the report to review questions of fact *only* when a party files an objection to the action.[200]

At first blush, the amended rule appears to depart from the *Beyer* requirement of an independent trial court review notwithstanding the parties' failure to object to any portion of the referee's report.[201] However, closer scrutiny of the *Beyer* decision suggests that this conclusion is arguable. In discussing the independence of the trial court, the majority in *Beyer* speaks of an examination by the trial court for any possible errors within the "report."[202] If this language merely suggests a review for errors contained on the face of the report, the anticipated review need only be a somewhat limited form of appellate-type review with some corresponding deference to the referee — essentially the same standard expressed in the amended rule. This interpretation is inconsistent with truly independent trial court "decision-making."[203]

The trial court review of factual findings suggested in Rule 53(E)(6), as amended, seems to be a form of limited appellate review similar to the review implemented for administrative agency actions.[204] This type of limited appellate review contemplates a review of decisions as previously made by another court or adjudicatory body.[205] To the extent that the amended rule contemplates any trial court "review" of issues "decided" by a referee, the rule seems to depart from the requirement of independent "decision-making."[206] Any deference by the trial court to matters "decided" by the referee essentially removes the "decision-making" function from the trial court. The trial court becomes a court of review as opposed to being the "deciding" court.

While the notion of a limited appellate-type review seems inconsistent with "independent" trial court "decision-making," the majority in *Beyer* hints of a somewhat more limited view of trial court "independence." In discussing the proper role of the trial court, the *Beyer* majority speaks of a trial court examination of the "report" for any errors contained therein.[207] Within the same paragraph, however, the *Beyer* court expressed the additional requirement that

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[199] *See* OHIO R. CIV. P. 53(E)(5). *See also supra* text beginning at note 129. "Other defects" would include the failure to articulate sufficient facts to support legal conclusions.

[200] *See* OHIO R. CIV. P. 53(E)(6).

[201] *See supra* text accompanying note 124.

[202] *Beyer*, 2 Ohio St. 3d at 105, 443 N.E.2d at 164.

[203] *See supra* text beginning at note 70.

[204] Court review of administrative agency fact-finding is generally very limited in Ohio. *See, e.g.*, New York Central R.R. Co. v. Public Utilities Comm'n, 163 Ohio St. 250, 126 N.E.2d 320 (1950). *See generally* 2 O. JUR. 3D *Administrative Law* §§ 173-78 (1977).

[205] *See supra* text beginning at note 174.

[206] *See supra* note 62.

[207] *See Beyer*, 2 Ohio St. 3d at 105, 443 N.E.2d at 644.

the trial court verify to its satisfaction the correctness of the "result."[208] Substitution of the word "result" for "report" is an important distinction with apparent significance. If a trial court is to verify to its own satisfaction the correctness of the "result," the nature and scope of review necessarily requires less deference and thus differs markedly from that necessary to simply review the referee's "report" for errors contained on its face.[209]

The holding of *Beyer* coupled with the strong language of that decision suggests an interpretation requiring true independent judicial "decision-making" and little, if any, deference. This interpretation of the *Beyer* opinion is additionally suggested by the dissent in *Beyer* which criticizes the majority holding as being counter-productive to the purpose for the reference tool which is to increase judicial efficiency.[210] By requiring the level of independence suggested in the *Beyer* majority opinion, the dissent argues that the majority has actually increased rather than decreased the workload of an already overburdened judiciary.[211] The dissent seems to fear that increased judicial time will need to be spent in the "reviewing" process.[212] The dissenting justices in *Beyer* apparently interpreted the majority opinion as requiring a truly independent "decision-making" procedure which would naturally result in a more time-consuming judicial process. Unfortunately, the *Beyer* majority failed to address this criticism and this omission adds to the difficulty of determining the full intent of the opinion.

Apart from the theoretical requirements of the majority decision in *Beyer*, implementation, as suggested by the *Beyer* dissent, is problematic.[213] In contrast, the amended rule is anything but ambiguous setting out an understandable and easy standard for dealing with the trial court's adoption of recommended findings of fact.

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[208] *Id.*

[209] Review for errors that appear *on the face of the report* is a review limited to the legal sufficiency of the report itself. The reviewing trial court would determine if the referee correctly applied the relevant legal doctrine to the factual findings made in reaching a recommendation. This review essentially precludes any review of the referee's factual findings as long as these findings are legally sufficient to support the proposed result. On the contrary, to review to verify the *correctness of the result*, the trial court must address the correctness of the proposed findings of fact which form the predicate for the resolution of the case.

[210] [T]he majority's holding defeats the purpose of the use of referees . . . . The referee system was instituted to facilitate the prompt and efficient resolution of disputes and to alleviate some of the tremendous overload on trial courts. The majority accomplishes the opposite result by placing the responsibility upon the trial court to scrutinize the referee's report, search for errors and anticipate all possible grounds for objection.

Beyer, 2 Ohio St. 3d at 107, 443 N.E.2d at 165 (Krupansky, J., dissenting).

This heightened trial court responsibility was also mandated by subsequent appellate court decisions. *See, e.g.*, Garcia v. Tillack, 9 Ohio App. 3d 222, 459 N.E.2d 918 (1983) *citing* Normandy Place Assoc. v. Beyer, 2 Ohio St. 3d 103, 443 N.E.2d 161 (1984) "The trial judge is then required to review the report and make an independent analysis of the *underlying facts involved in the dispute.* It is the duty of the trial judge to *critically* review and verify the correctness of the referee's report prior to its adoption." *Id.* at 223, 459 N.E.2d at 919 (emphasis added).

[211] *Beyer*, 2 Ohio St. 3d at 107, 443 N.E.2d at 165 (Krupansky, J., dissenting).

[212] *Id.*

[213] *See id.* at 106-08, 443 N.E. at 164-66.

> As referenced above, the new rule specifically provides that a trial court:
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> [m]ay adopt any finding of fact in the referee's report without further consideration unless the party who objects to that finding supports that objection with a copy of all relevant portions of the transcript from the referee's hearing or an affidavit about evidence submitted to the referee if no transcript is available.[214]

The rule draws a clear distinction between legal and factual questions — the former must always be independently reviewed and decided by the trial court but not so the latter. The new language clearly places the initial burden to initiate review of factual questions upon the parties and not on the trial court. Without objection, a trial court is free to "adopt" any factual finding of the referee without considering its correctness. This result is certainly troublesome if the function of the trial court is to make an independent decision based upon the report of the referee. It is difficult to conclude that deference to a referee's proposed findings of fact is consistent with the idea of independent trial court "decision-making." Unless the *Beyer* decision is interpreted as requiring something less than true independent "decision-making," the amended rule significantly alters the previously well-established functional relationship between the trial court and the referee.

V. THE RECORD OF THE REFEREE'S HEARING

There is no requirement that a record be made of the proceedings which are heard before a referee.[215] Rule 53 sets forth three requirements which must be satisfied before a referee is obligated to make a record of the evidentiary hearing. First, a party must make an affirmative request for a record.[216] This provision of the rule has been consistently interpreted as being mandatory — neither the referee nor the referring trial court has the responsibility or obligation to order that a record of the proceedings be made.[217] The party's request alone, however, is insufficient to insure maintenance of a record of the hearing. A party must also "guarantee the costs" involved in preparing such a record.[218] Further, the referring court must "order" that the referee make a record of the proceeding.[219]

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[214] OHIO R. CIV. P. 53(E)(6).

[215] "When a party so requests and guarantees the cost, and the court so orders, the referee shall make a record of the evidence offered and excluded in the same manner as and subject to the same limitations upon a court sitting without a jury." OHIO R. CIV. P. 53(C).

[216] *Id.*

[217] *See, e.g.*, White v. White, 50 Ohio App. 2d 263, 362 N.E.2d 1013 (1977), "Rule 53(C) places a mandatory duty upon a party who wants a court reporter to record the evidence at a hearing before a referee, to file a written motion requesting a court reporter to make a record of the evidence." *Id.* at 269-70, 362 N.E.2d at 1018.

[218] OHIO R. CIV. P. 53(C).

[219] *Id.* The trial court's order requiring that a transcript be prepared can be made by individualized journal order in a particular case or class of cases, by a blanket journalized order of reference, or by any applicable local rule.

The transcript of the proceedings before the referee plays an important role in the fairness of the actual adjudicatory proceeding. Without a record of the evidence adduced at the referee's hearing, a party's right to an independent decision by the trial court[220] and to a meaningful review by an appellate court is all but eliminated.[221] A trial court is severely limited in its ability to "independently" decide a case absent a transcript of the proceedings before the referee. Without such a transcript, a trial court is practically limited to reviewing the record solely for any legal errors which may appear on the face of the referee's report since the trial court has no basis upon which to review questions of disputed fact.[222] If the court wishes to independently review the proposed findings, the case must be remanded to the referee or, alternatively, the trial court must hear the matter *de novo* to determine the disputed factual issues.

Rule 53, as originally enacted, did not specifically require the objecting party to provide the transcript of the proceedings before the referee to the trial court. Despite the rule's original silence, Ohio courts have consistently held that an objecting party must provide a transcript of the referee's hearing whenever the objections to the report raise factual issues which require a *de novo* review of the evidence.[223] For example, where the objections of a party go to the weight of the evidence presented at the referee's hearing, the objecting

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[220] *See infra* note 222.

[221] *See, e.g.*, Walker v. Walker, 40 Ohio App. 2d 6, 317 N.E.2d 415 (1974) "Without some record of the relevant testimony adduced at trial, appellant's right to appeal is, for all practical purposes, eliminated." *Id.* at 9, 317 N.E.2d at 417. An appellate court would still be able to review pure questions of law, but would be unable to review for any errors which required analysis of the testimony adduced at the original referee's hearing. *See* Staggs v. Staggs, 9 Ohio App. 3d 109, 458 N.E.2d 904 (1983).

[222] If the trial court is to make an independent analysis of the underlying facts involved in the dispute, a transcript of the testimony elicited before the referee is essential. *In re* Marriage of Sissinger, 5 Ohio App. 3d 28, 448 N.E.2d 842 (1982).

> The trial court, of course, may substitute its judgment as to the findings of fact for that of the referee either predicated upon the transcript of the proceedings or upon evidence received by the court itself. Thus it is important that the court be provided a transcript of the evidence where the objections to the referee's report go to factual issues requiring a *de novo* review of the evidence by the trial court.

Id. at 30, 448 N.E.2d at 844.

Note, however, that the Ohio case law is not consistent concerning what effect failure to provide a transcript of the referee's hearing to the trial court has on subsequent appellate review. The better approach, and one consistent with the *Beyer* opinion, *see supra* text accompanying note 124, is that "a judgment upon the referee's report is fully reviewable upon appeal regardless of whether or not objections were made or *supported* in the trial court to the referee's report." *Sissinger*, 5 Ohio App. 3d at 31, 448 N.E.2d at 842. *See also* Zacek v. Zacek, 11 Ohio App. 3d 91, 463 N.E.2d 391 (1983). Other Ohio appellate courts have declined to review the findings of the trial court below where the parties had presented the *appeals* court with a transcript of the proceedings before the referee, but had not provided the *trial* court with a copy of that transcript. *See, e.g.*, Airwyke v. Airwyke, No. 83-1857, slip op. at 6 (Ohio Ct. App. filed 1983). ("[I]t is well settled that a reviewing court can consider only that which was considered by the trial court and nothing more. Thus, we could not examine a transcript of proceedings which the trial court did not examine or have the opportunity to examine."); Mc Alister v. McAlister, No. 84-1919 (Ohio Ct. App. Filed 1984); Walker v. Walker, No. 83-1917 (Ohio Ct. App. Filed 1983).

[223] *See, e.g., In re* Marriage of Sissinger, 5 Ohio App. 3d 28, 448 N.E.2d 842 (1982). Local Rule 2.51 of the Rules of Practice and Procedure of the Court of Common Pleas, Montgomery County, requires that an objecting party file with the court a transcript of the referee's hearing within thirty days after the filing of objections.

party must furnish the trial court with a transcript to enable it to weigh the contradictory evidence.[224] In the absence of such a transcript, the trial court may accept the findings of the referee without additional consideration.[225] The amendments to Rule 53 specifically adopt this same practice by allowing the reviewing trial court to adopt the factual findings of the referee in the absence of the transcript.[226] The responsibility to furnish the transcript is placed squarely upon the objecting party and the failure to so provide it can result in the trial court's outright adoption of the referee's proposed findings of fact without any consideration.[227] This type of wholesale adoption of the referee's proposed findings results in the entry of judgment by the trial court without "independent" trial court "decision-making."

Despite its shortcomings, the amended rule provides an improved procedure which is sure to aid the unwary civil litigant. It specifically provides that the objecting party may support his or her objection with an "affidavit about the evidence submitted to the referee" in the absence of the prepared transcript of the testimony.[228] This addition to the rule is a marked improvement upon former practice because it recognizes the practical difficulties faced by unrepresented and/or indigent litigants whose cases are heard by a referee in the first instance.[229]

The unrepresented party who initially appears before the referee rarely knows to affirmatively request a record of the hearing. Moreover, even an informed party will be unable to understand and appreciate the significance of the decision to waive a record. The proposed amendment protects the unsophisticated party by allowing objections to the factual findings of the referee in instances where the party presents an affidavit regarding the testimony presented. A party's right to file objections and receive an "independent" review by the trial court is at least partly preserved, as is the right to any meaningful appellate review.

While the amended rule provides a needed remedy for the unrepresented or the impecunious, it is not a panacea. The rule enables a party to present an

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[224] *See In re* Marriage of Sissinger, 5 Ohio App. 3d 28, 448 N.E.2d 842 (1982).

[225] *Id.*

[226] The court may adopt any finding of fact in the referee's report without further consideration unless the party who objects to that finding supports that objection with a copy of all relevant portions of the transcript from the referee's hearing or the affidavit about evidence submitted to the referees if no transcript is available.
OHIO R. CIV. P. 53(E)(6).

[227] *Id.*

[228] *Id.*

[229] The new addition to Rule 53 makes trial court review of the referee's report similar to the appellate practice of review. However, typical appellate review is different from the trial court review process pursuant to Rule 53 in one significant manner. The appellate court never engages in initial factfinding — it merely determines if the findings made below are supported by the substantial weight of the evidence. *See supra* note 175. In marked contrast, the reviewing trial court analyzes and reviews the evidence adduced before the referee to make its own independent determination of the facts. *See supra* text accompanying notes 176-82.

affidavit "if no transcript is available."[230] However, the rule offers no definition of unavailability. Does unavailability refer to the situation where neither party requests a record of the referee's hearing and subsequently one party files objections to the report? In the absence of a request for a transcript by one of the parties, the transcript will certainly not be available to the trial court for its independent review. Is the transcript unavailable where there is a transcript but the objecting party is unable to pay for its reproduction? If the purpose of the addition to the rule is to protect unrepresented or indigent parties, then it would seem that lack of availability within the meaning of the rule should be interpreted to mean both literal and economic unavailability. Is the transcript unavailable when an unsophisticated party waives the right to a transcript by failing to request one? If so, what constitutes an informed waiver? Absent a knowing and informed waiver, an unrepresented or indigent party should benefit from the new procedure whenever that party is unable (economically or otherwise) to furnish the transcript to the trial court. This broad interpretation of unavailability would help to protect the litigants and simultaneously preserve the integrity of the judicial "decision-making" process.

Even should the Ohio courts adopt the approach discussed above, however, the issue of whether a trial court can adequately review a referee's proposed findings of fact on the basis of the parties' affidavits must be addressed. Normally, a trial court would review the findings of fact based on the transcript of the testimony elicited before the referee. How does a reviewing trial judge deal with an objection to the referee's proposed factual findings when a party's affidavit constitutes the entire "record" of the proceedings before the referee? Can the trial court independently determine the facts in a case by reviewing only the affidavit of a party, even if both parties submit affidavits?

To independently assess the validity of the referee's proposed findings, the court must proceed to weigh the evidence presented to the referee. In theory, when a counter affidavit is filed, the court can weigh the evidence based upon the affidavits of both parties. However, given the inherently limited nature of an affidavit,[231] this is a difficult if not impossible task. The dilemma is particularly acute where the disputed factual questions require findings regarding the credibility of the testimony given by multiple witnesses.[232] The problem is

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[230] *See* OHIO R. CIV. P. 53(E)(6).

[231] The transcript of the hearing before the referee provides a verbatim account of the actual testimony adduced including the verbatim account of any cross-examination. An affidavit of the testimony will not be a verbatim recitation nor will it necessarily provide an account of the cross-examination. In addition, the natural tendency in drafting an affidavit of this nature is to resort to characterization, thus depriving the court of a record of the specific testimony elicited through direct and cross-examination.

[232] Judicial factfinding on the basis of a written record is extremely problematic since findings of fact frequently rely on impressions of demeanor and other factors that often are not apparent on the face of a written record. *See, e.g.*, Holiday v. Johnston, 313 U.S. 342 (1941). Because an affidavit is not a verbatim record of the actual evidence adduced at the hearing, it is even less reliable as a basis for factfinding than the transcript of the hearing.

equally troublesome in cases where only one party files an affidavit in support of their objections. In the absence of a counter affidavit, must the trial court accept the version of the facts as articulated in the sole affidavit? This result might be acceptable except in those cases where the party failing to file the counter affidavit is not represented by counsel.

It is difficult if not impossible for a trial court (on the basis of affidavits) to exercise the independent review and "decision-making" previously discussed. In order to achieve the degree of independence required by the case law, a trial court should hear the evidence itself rather than rely on the parties' affidavits when the trial court is required to resolve questions of disputed fact and no record of the proceeding before the referee is available. However, to require a *de novo* hearing in this instance subverts the overall judicial efficiency of the reference device.[233]

VI. CONCLUSIONS AND PROPOSALS

Since the increased use of referees began in Ohio approximately ten years ago,[234] the courts have struggled to balance the competing and conflicting interests that underlie a successful system of reference. First, referee's must be effective in reducing delays and otherwise increasing the overall efficiency of the Ohio trial courts.[235] Secondly, actual judicial authority can only be exercised by the judiciary and cannot be completely delegated to non-judicial officers.[236] The referee-judge relationship as embodied in Rule 53 of the Ohio Rules of Civil Procedure, as originally enacted, attempted to balance these interests to preserve the constitutionality and overall effectiveness of the reference device. Unfortunately, the effort was not entirely successful.

The "rubber-stamping" problems which developed shortly after the adoption of the original Rule 53[237] reflected the need for increased efficiency by a number of Ohio trial courts. By merely adopting the work of the referee by signature without independent analysis, many judges relinquished their judicial "decision-making" authority to their referees.[238] In the absence of meaningful guidance in the original Rule 53, Ohio appellate courts intervened to readjust the delicate balance which underlies a successful reference system.[239]

The developed case law correctly reasserted the primacy of independent judicial "decision-making." Trial courts were cautioned to exercise their judicial "decision-making" power independently of their referees.[240] Despite the

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[233] *See supra* note 29.

[234] *See supra* note 12.

[235] *See supra* note 29.

[236] *See supra* note 33.

[237] *See supra* text beginning at note 70.

[238] *See supra* text beginning at note 70.

[239] *Id.*

[240] *Id.*

clear functional dichotomy between the referee and judge articulated in the case law, implementation remained problematic due to the lack of specificity concerning the proper standard for trial court review of the referee's report and recommendation(s).[241] Rule 53, as amended, attempts to resolve these problems by specifically addressing various aspects of the judge-referee relationship. While the amended rule is a clear improvement over its predecessor,[242] it is only partially successful in eliminating confusion and in balancing the competing interests which underlie the reference system. Two areas of concern and confusion remain — the proper use of the transcript of the referee's hearing and the trial court's "scope of review" of the referee's report and recommendation(s).

There is no doubt that the amended rule improves upon the serious deficiencies of the original rule with respect to the transcript of the referee's hearing. The amended rule recognizes the important role the transcript plays in maintaining the functional balance between judge and referee. It also recognizes the economic realities faced by the average litigant by authorizing the use of an affidavit in place of the actual transcript of testimony. While this procedure better protects the rights of individual litigants, a serious question remains concerning the efficacy of using affidavits in place of a transcript when the trial court is called upon to determine questions of disputed fact.[243] In this circumstance, the trial court has no choice except to rehear the disputed evidence itself. This is especially so when factfinding ultimately hinges on questions of witness credibility.[244]

In the review scheme created by Rule 53, as amended, the report of the referee continues to play a primary role. Thus, the amended rule mandates that the referee's report contain sufficient findings of fact to allow the trial court to independently determine the issues and to apply the appropriate rules of law. However, confusion remains because the phrase "independent analysis of the issues" contained in the amended Rule 53 is undefined and capable of more than one meaning in this context.[245] Regardless of whether the phrase includes "issues" of disputed fact, a referee's report should, at a minimum, articulate separate findings of fact and conclusions of law to facilitate a thorough yet efficient review by the trial court.[246] In addition, the report should contain a

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[241] *Id.*

[242] *See supra* text beginning at note 228.

[243] *See supra* note 231.

[244] *See supra* note 232.

[245] *See supra* text beginning at note 165.

[246] This recommendation essentially requires that the report of the referee comply with the requirements of Ohio Civil Rule 52. While findings of fact and conclusions of law are normally the responsibility of the trial court, "the order of reference to the referee may include instructions to provide the trial judge with recommended separate findings of fact and conclusions of law." Zacek v. Zacek, 11 Ohio App. 3d 391, 396, 463 N.E.2d 391, 393 (1983). Requiring separate findings of fact and conclusions of law increases the accuracy and efficiency of the review process and facilitates the trial court's mandatory review for errors that may appear on the face of the referee's report. *See supra* text accompanying note 192. Requiring compliance with Rule 52 is also consistent with the Ohio Supreme Court's test for determining the applicability of the rule

narrative report of the evidence elicited at the hearing which supports the individual findings of fact. Thus, the report would contain on its face not only individual findings of fact but a recitation of the evidence to support the findings.[247]

The amended rule correctly sets out a clear standard of trial court review of the legal questions that appear on the face of referee's report and recommendation(s). Prior to adopting the report and recommendation(s) of the referee, the trial court must review the referee's report for any legal errors that may appear on the face of the report.[248] This is a mandatory review that must take place even in the absence of objection by either of the litigants.[249]

In marked contrast, the trial court is free to adopt the referee's proposed findings of fact "without further consideration" unless a party objects to the referee's report and recommendation(s).[250] The amended rule seems to authorize complete deference to the referee in matters of disputed fact in the absence of objection, a result that seems to undercut the meaning of "independent" trial court "decision-making" in favor of judicial efficiency.[251]

Finally, Rule 53, as amended, completely fails to address one additional significant issue. How should the reviewing trial court deal with issues of disputed fact that rest on the determination of credibility? When faced with objections which challenge the referee's recommended findings of fact, can the trial court accept or reject the findings of the referee on the basis of credibility without rehearing the disputed testimony? An affirmative answer raises very serious due process concerns,[252] while a negative answer significantly under-

itself. The test is whether the proceeding "contemplates an order which is necessarily based upon the determination of factual issues," and the "questions of fact are tried by the court without intervention of a jury." Werden v. Crawford, 70 Ohio St. 2d 122, 124, 435 N.E.2d 424, 426 (1982).

[247] A trial court must review the referee's report for errors that appear on the face of the report. The confusion concerning the meaning of the phrase "independent analysis of the issues" contained in the amended rule, *see supra* text beginning at note 165, might be resolved by requiring the referee to make separate findings of fact and by requiring a recitation of evidence to support these findings. The trial court would then be better able to analyze and review both the legal and factual issues. With respect to the factual issues, the trial court would determine whether the factual findings are supported by the elicited evidence. While this is a very limited review of the factual issues (with a great deal of deference), it nevertheless requires trial court "analysis" of factual issues even in the absence of an objection and thus enhances actual trial court "decision-making." Nevertheless, it still will not fully comport with the notion of true independent judicial "decision-making."

[248] *See* OHIO R. CIV. P. 53(E)(5).

[249] *Id.*

[250] *Id.*

[251] *See supra* text beginning at note 200. This problem is would be partially alleviated if a referee were required to articulate evidence to support the proposed findings, and if the trial court were to at least apply a minimal form of review to determine the accuracy of the proposed findings, and if the trial court were to at least apply a minimal form of review to determine the accuracy of the proposed findings.

[252] This article has not addressed the due process issues inherent in the use of referees to determine all the issues in a case. However, the federal courts have grappled over the years with similar issues in regard to federal masters and magistrates. *See, e.g.*, United States v. Raddatz, 447 U.S. 667 (1980), *reh'g denied*, 448 U.S. 916 (1981). In *Raddatz*, the Supreme Court addressed the issue of whether a federal district court was obligated to conduct a *de novo* determination when *adopting* a magistrate's proposed findings of fact when

mines judicial efficiency.[253] Certainly, the trial court is ill-equipped to make findings of fact on the basis of affidavits when credibility is an issue.[254] Even when the transcript is available, there may be instances when the trial court should rehear the evidence to preserve the rights of the parties and the integrity of the judicial process.[255]

The clash between judicial efficiency and judicial "decision-making" continues despite the recent amendments to Rule 53. Though an improvement over the original Rule 53, the amended rule fails to remedy all the deficiencies of the referee system and creates additional unresolved problems. It may, however, be unrealistic to expect more given the conflicting goals of the reference system. The increased use of referees in the past ten years corresponds to a search for procedures to decrease the burden on a besieged judiciary and simultaneously increase judicial efficiency. The choice has been to increase the number of full-time referees and to refer to these referees entire cases for hearing and recommendation(s). In light of anticpated continuing procedural problems, it may be time to rethink the usefulness of the non-consensual referral of entire cases to referees for hearing and disposition. This article does not suggest the elimination of full-time referees. Rather, it recommends that further consideration and thought be given to the manner in which the referee is utilized.[256]

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credibility was the major determinant. Over a strong dissent, the *Raddatz* majority found sufficient procedural safeguards to minimize any due process problems. *Id.* at 695. Nonetheless, even the *Raddatz* majority seemed to concede that a *rejection* of a magistrate's proposed findings on the basis of credibility without rehearing the witnesses was problematic:

> The issue is not before us, but we assume it unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

Id. at 681. Only one Ohio court has addressed this due process issue. In Bakaitis v. Bakaitis, No. 83-7997 (Ohio Ct. App. Filed May 23, 1983), the court rejected the appellant's argument that his due process rights were violated because the trial court rejected the findings and recommendations of the referee and instead decided the case on the basis of the transcript of the referee's hearing.

[253]Requiring the trial court to rehear the witnesses results in an overall loss of judicial time. *See supra* note 28.

[254]*See supra* note 231.

[255]*See supra* note 252.

[256]Our current system of non-consensual reference relies on a fiction. If we remain committed to a system of non-consensual general reference as a mechanism to increase judicial efficiency, rather than perpetuate the fiction, we should embark on an effort to explore ways to give to referees the authority they currently exercise *de facto*. In the alternative, increased use of referees in the pre-trial stages of civil litigation could prove extremely effective while avoiding many of the problems discussed above. *See* Gallagher, *Comment: An Expanding Role for United States Magistrates*, 26 AM. U.L. REV. 66, 101 (1976). In 1958, Judge Irving Kaufman suggested that federal masters be given an expanded role in pre-trial proceedings. *See* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 463 (1958). The pre-trial functions which Judge Kaufman suggested for magistrates in 1958 are essentially those given to magistrates today. *See* Gallagher, *supra*, at 66.