

ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee

DRAFT MODEL STATE RULE

(a) Use of Court-Appointed Neutrals

- (1) Unless prohibited by state law, at the outset of complex litigation and in other cases that create particular needs that a neutral might satisfy, the court and parties should consider whether it is appropriate to appoint a neutral to assist with the just, speedy and inexpensive disposition of issues in the case.
- (2) In determining whether to appoint a neutral and the scope of the appointment, the court should consider:
 - (A) whether a neutral could address any matter within the scope of the appointment more expeditiously than would be practicable without the neutral, considering the court's case load and the neutral's particular expertise;
 - (B) whether a neutral's involvement may assist with preserving the integrity of the judicial process;
 - (C) whether the appointment is proportionate to the issues and needs of the case;
 - (D) whether the benefit of appointing a neutral outweighs the expense; and
 - (E) whether the appointment can be made without imposing an unreasonable financial burden on any party.

(b) Scope of Appointment

Unless state law or the court provides otherwise, and subject to any court rules or procedures applicable to the function being performed, in appropriate cases:

- (1) a neutral may perform the following without the parties' consent:
 - (A) conduct pre-trial case management;
 - (B) coordinate cases across multiple jurisdictions;
 - (C) provide advice or information to the court on complex or specialized subjects;
 - (D) oversee and manage discovery;
 - (E) conduct privilege reviews;
 - (F) investigate factual matters identified by the court;
 - (G) perform accountings, and calculate damages, attorneys' fees and costs;
 - (H) facilitate resolution of disputes between or among otherwise aligned parties and/or their counsel;
 - (I) monitor implementation of and compliance with court orders;
 - (J) conduct and/or oversee claims administration;
 - (K) oversee settlement administration;
 - (L) mediate or otherwise facilitate settlement; and
 - (M) allocate responsibility for payment of the neutral's compensation.
- (2) subject to the provisions of subpart (f) below, a neutral may exercise the following powers without the parties' consent:
 - (A) issue procedural orders;

- (B) make proposed findings of fact;
 - (C) make proposed conclusions of law;
 - (D) make evidentiary rulings;
 - (E) compel, take and record evidence;
 - (F) conduct hearings on particular issues; and
 - (G) sanction parties (other than for contempt);
- (3) a neutral may exercise the following powers only with the parties' consent:
- (A) conduct non-jury trials of entire actions; and
 - (B) make findings of fact and conclusions of law; and
- (4) a neutral may exercise other powers as to which the parties consent and the court approves.

(c) Appointment of Neutral

(1) Selection

- (A) Before appointing a neutral, a court must provide notice to the parties and invite them to suggest candidates for appointment.
- (B) The court may consider suggested candidates and other candidates on any rosters or other listings of pre-screened individuals from a diverse pool of potential candidates, but the court is not required to select from among such candidates.
- (C) The court should select a neutral with due regard for the court's needs, the parties' preferences, and any requirements relating to a roster in a manner that ensures qualified and appropriately skilled and experienced candidates are identified and chosen.

(2) Qualification Procedure

- (A) Upon receiving notice of a prospective appointment, and before accepting the appointment, a prospective appointee shall file an affidavit disclosing whether he or she (and, if applicable, the individual's firm) has any information, including but not limited to information regarding any relationship to the parties, their attorneys or the action, that might be viewed as implicating the impartial and fair administration of justice; this disclosure shall be updated after appointment if the neutral becomes aware of any such facts requiring disclosure.
- (B) The affidavit shall also include an oath that if appointed, the neutral will administer justice without favor to or prejudice against any party and will faithfully and impartially discharge and perform all duties in accordance with the law and the court's instructions.
- (C) Within five days, or such other period as the court may order, any party who objects to the prospective appointment may file an objection stating the grounds therefor.
- (D) If no objection is filed on or before the deadline for making one, or if the parties consent to the appointment notwithstanding the disclosure, the court may proceed with the appointment.
- (E) The court should not select a proposed candidate if a party files a timely objection and the court sustains the objection, or the court decides on its own that the proposed candidate is not suitable for the particular matter.

(F) Upon motion by a party or on the court's own motion, the court in its discretion may terminate a neutral appointment.

(d) Appointing Order

- (1) The appointing order should:
 - (A) identify the particular role the neutral is expected to fill;
 - (B) describe in writing and with reasonable specificity the scope of the neutral's appointment, including, if appropriate, the duration and/or tasks to be completed;
 - (C) state the circumstances, if any, in which the neutral may communicate ex parte with the court or a party;
 - (D) state the circumstances, if any, in which the standards of review will differ from those set forth in subsection (f)(3);
 - (E) state whether the parties have stipulated to waive review by the trial court as set forth in subsection (f)(4); and
 - (F) set forth the basis and terms of the neutral's compensation, with the court:
 - (i) at the outset of the appointment, setting the rate of compensation, addressing reimbursement for expenses, identifying the source of funds, stating whether and how the parties will share responsibility for the neutral's compensation, and directing how and to whom invoices are to be submitted for payment.
 - (ii) The neutral's compensation may be modified through an amendment of the appointing order at any time subsequent to the appointment, by the court's adjusting the rate of compensation, the source of funds, and the allocation of responsibility for payment, as the circumstances warrant, such as when a party's conduct has been a significant reason for the appointment of the neutral.
- (2) The appointing order may state:
 - (A) whether the neutral is prohibited from performing any of the functions described in subpart (b)(1);
 - (B) whether the neutral is prohibited from exercising any of the powers described in subsection (b)(2);
 - (C) whether the neutral is permitted to exercise any of the powers described in subsection (b)(3);
 - (D) whether and the extent to which the neutral is required to inform the court as to the status of the matters within the scope of the appointment; and
 - (E) the nature of the materials to be preserved and filed as the record of the neutral's activities; provided, however, that unless otherwise stipulated, where a neutral is appointed to conduct a non-jury trial of an entire matter or to make findings of fact or conclusions of law, a transcript of any testimony taken and copies of any exhibits shall accompany the neutral's report.
- (3) Before issuing an order of appointment, the court should ensure that the expense associated with the appointment of a neutral does not deprive any party of access to the court.
- (4) The appointing order may be amended by the court on its own or upon motion of the parties.

(e) Neutral's Responsibilities

- (1) After appointment, the neutral should proceed with diligence to ensure the just, speedy and inexpensive determination of the matters before him or her.
- (2) Neutral's Orders, Reports and Recommendations
 - (A) A neutral who issues a written order shall file it with the court and ensure prompt service of a copy on each party.
 - (B) A neutral who prepares a written report or recommendation shall file it with the court and ensure prompt service of a copy on each party, along with any testimony or exhibits required pursuant to subsection (d)(2)(E).
 - (C) A neutral appointed to conduct a non-jury trial of an entire matter or to make findings of fact or conclusions of law shall comply with the requirements applicable to a trial court rendering an appealable decision.
 - (D) A neutral may share drafts, designated as such, of an order, report or recommendation with all parties prior to filing the final version.
 - (E) Unless an order, report or recommendation is marked as a draft, the time for the parties to respond or file objections shall run from the later of the filing or service of the order, report or recommendation.
 - (F) A neutral shall provide such additional reports to the court as the appointing order may require.

(f) Action on Neutral's Order, Report or Recommendations

- (1) Action by the Parties
 - (A) A party may file with the court and simultaneously must serve on all other parties written objections to – or a motion to adopt or modify – the neutral's order, report or recommendations no later than 14 days after a copy of the order, report or recommendations is served, unless the court sets a different time. Any objection to or motion seeking to challenge a proposed finding of fact must specifically identify the finding to which the party objects and identify the evidence of record that contradicts that finding.
 - (B) Another party may file a written response to those objections or that motion, and a written reply may be filed in response thereto, in accordance with the applicable rules governing motion practice, unless the court orders otherwise.
- (2) Action by the Court
 - (A) In acting on a neutral's order, report or recommendations, the court may adopt or affirm, modify, wholly or partly, reject or reverse, or resubmit to the neutral with instructions.
 - (B) The court, on its own or by motion of a party, may conduct a hearing (i) if a party has filed an objection or a motion to modify, (ii) if the court intends to receive evidence before acting upon the neutral's order, report or recommendations, or (iii) if the court intends to modify, wholly or partly, reject or reverse the neutral's order, report or recommendations.
- (3) Standards for Review by the Court in the Absence of a Stipulation to Waive Review
 - (A) The standards of review set forth in this section apply in the absence of applicable state rules.

- (B) The court may vary the standards of review in the appointing order of any objections to, or issues raised by a motion to amend or modify, an order, report or recommendations of a neutral, as permitted by section (d)(1)(D) above.
 - (C) Subject to the court's approval, the parties may stipulate to applicable standards of review of any objections to, or issues raised by motion to amend or modify, an order, report or recommendations of a neutral;
 - (D) Absent applicable state law, order of the court, or stipulation by the parties, the following standards of review shall apply to an order, report or recommendation by a neutral if a party objects or files a motion to amend or modify such order, report or recommendation in accordance with subsection (f)(1)(A):
 - (i) the court shall review conclusions of law de novo;
 - (ii) with regard to findings of fact, the court shall review the objection or motion first to determine whether the objecting or moving party has raised sufficient contradicting evidence under section (f)(1)(A) to warrant review and review only those findings to which this evidence has been adduced. When reviewing findings of fact, the court does not owe deference to the neutral's findings. However, absent order of the court, the court will conduct its review based on the record adduced before the neutral; and
 - (iii) procedural rulings shall be reviewed for abuse of discretion.
- (4) Stipulations that Waive Review by the Court
- (A) If the parties stipulate to the neutral's conducting trials of entire non-jury actions;
or
 - (B) if the parties stipulate to the neutral's making findings of fact and conclusions of law; then
 - (C) the parties waive review by the trial court and an appeal from the neutral's determination may be taken to a higher court as would any other appeal from a trial court's determination.