

Using Court-Appointed Neutrals

Section 1

Roles of Neutrals

Court-appointed neutrals serve many types of vital and productive roles. These services performed by neutrals provide courts, parties, and lawyers with essential and invaluable services in all kinds of cases, including common cases, complex and multi-party lawsuits, class actions, and multi-district litigation (MDLs). Rule 53 of the Federal Rules of Civil Procedure currently refers to court-appointed neutrals as “masters.” The various states refer to these neutrals with a variety of titles, including adjunct, commissioner, referee, monitor, facilitator, or neutral. A court-appointed neutral may play multiple roles throughout the lifetime of a case, including facilitative, adjudicative, informative, advisory, and as a liaison. Experienced neutrals may also be appointed to assist with non-litigation cases, involving community, social, or governmental disputes. Most commonly, court-appointed neutrals serve in one or more of the following roles.

1.1 Settlement Neutral

The use of settlement neutrals to reach global resolutions in large-scale tort litigation dates back at least to the Dalkon Shield cases and Agent Orange litigation beginning in the late 1980s. Courts have come to realize that the appointment of a neutral third-party who is granted quasi-judicial authority to act as a facilitator between the court and the parties can provide a useful approach to reaching a settlement. This is especially true in complex litigation involving numerous parties, or when the dispute has matured and individual settlements become recurring and time-consuming.

1.2 Discovery Neutral

The use of discovery neutrals to manage and supervise ordinary and complex cases is relatively commonplace. The neutral can manage a discovery plan, issue orders resolving discovery disputes, make recommendations to the judge, and monitor ongoing discovery. Sometimes a discovery neutral will sit in on depositions that are contentious. Because the authority of the neutral focuses on managing discovery, the role is viewed as less judicial and more managerial in nature.

1.3 Privilege Review Neutral

A related type of discovery neutral specializes in reviewing documents and data that contain or likely contain privileged information. These neutrals review the potentially relevant discovery in camera and provide the court with findings or recommendations regarding the legal status and factual nature of the information.

1.4 Electronic Discovery Neutral

Modern cases typically deal with electronically stored information (ESI) issues. Recent amendments to the discovery rules contain provisions regarding how best judges and lawyers can resolve problems that arise from accessible or recoverable information, native formats, and meta

data disclosures. A neutral experienced in both discovery procedures and computer systems and software can be an invaluable help to a court, the parties, and the lawyers. Substantial time and money can be saved by the use of a neutral to help resolve ESI disputes.

1.5 Coordinating Neutral

The term ‘coordinating neutral’ includes those whose work requires the coordination of activities in a variety of ways. For example, they may meet and confer with lawyers to develop proposed orders to submit to the judge; they may chair a liaison committee of lawyers; or they may work on associated aspects of complex cases and class actions. They may also coordinate events in related cases that are filed in different jurisdictions in state and federal courts to provide uniform and efficient procedures.

1.6 Trial Neutral

Neutrals may be assigned trial and hearing duties. Parties may agree to have their dispute heard by a neutral, either for final decision or for findings and recommendations subject to review by the court. Trial neutrals may also compile and interpret technical or complex evidence or voluminous data. In trade secret litigation, the need for a trial neutral may arise to deal with confidentiality matters. In patent suits, an experienced patent expert may assist with or conduct a *Markman* hearing, and prepare findings and recommendations on disputed claim terms.

1.7 Expert Advisor

It has long been considered within a court’s inherent authority to engage the help of an expert advisor. An expert consultant can act as a judicial tutor, providing guidance on complex or specialized subjects. Foreign law cases often create a need for such an expert. When an advisor is utilized, the judge conducts the trial with appropriate assistance from the advisor.

1.8 Technology Neutral

In cases intertwined with technological, scientific, or complex issues, neutrals with technical expertise can be very helpful. Neutrals who are experts in civil procedure as well as experts in a technical field can provide the courts and parties with the expertise necessary to understand and resolve problems. Parties who retain their own experts also benefit from the contributions made by these independent court-appointed professionals.

1.9 Monitor

Neutrals can be helpful after a case is resolved to ensure that a court’s order or settlement agreement is implemented properly and complied with over time. In civil cases, neutrals are often appointed to monitor compliance with structural injunctions, especially those involving employment or other organizational change, those involving accommodation facilities, or those requiring reform in government agencies. By surveying the defendant’s remedial efforts, the neutral can facilitate judicial evaluation of compliance with appropriate equitable relief.

1.10 Class Action Neutral

Neutrals assisting in a class action may perform a variety of tasks specific to this context, including identifying potential class members, drafting or implementing a notice to the class, managing procedural issues, and supervising settlement fairness hearings under Fed. R. Civ. P. 23 and state law equivalents.

1.11 Claims Evaluation and Oversight

Neutrals can be used to evaluate oversee administration of settlement of class action claims or to distribute money damages to a class of eligible recipients. These neutrals can help select, work with, and monitor the organization that administers and manages the details of the settlement. This function has become more commonplace as litigation comprises federal and state cases requiring this work.

1.12 Auditor/Accountant

A court-appointed neutral can assist the court by providing an accounting of complex financial information or the assessment and payment of recurring litigation expenses. For example, a court might ask a neutral to sort out a plaintiff's claim of damages or a defendant's ability to pay according to a settlement or judgment.

1.13 Receiver

A neutral can be asked by the court to function as a receiver. In this role, the adjunct would hold, manage, or preserve property until a dispute is resolved. Receivers can be given quite extensive responsibilities. In some cases, they have been appointed to run governmental or business entities.

1.14 Criminal Case Neutrals

In criminal cases, neutrals can assist the court in administering the resolution of cases. They can assist the prosecution and the defense in negotiating plea bargains while preserving and protecting the interest of the public and the constitutional rights of the defendant. Court-appointed neutrals may also help in administering or monitoring non-jail sentencing terms and conditions. A neutral may accompany a peace officer who is conducting a search for documents and, afterwards, review and secure the materials until a court determines if the items are discoverable or privileged.

1.15 Conference Neutral

A settlement neutral in a criminal case is sometimes referred to as a conference neutral. These neutrals help to settle disputes, often employing a community approach that involves the prosecutor, defendant, victim, and their families. Witnesses such as police officers sometimes participate. Conference neutrals are often able to obtain results that are more creative and more beneficial to the victims and their families than typical plea bargains.

1.16 Ethics Neutral

A state court may appoint a neutral to review evidence in connection with ethics complaints against attorneys. These neutrals can recommend whether disciplinary action against an attorney is appropriate, and if so, what sort. This process may supplement the work done by an ethics board.

1.17 Supreme Court Neutral

The United States Supreme Court and state Supreme Courts have original jurisdiction over certain types of cases—for example, boundary disputes between states or election controversies. Because these cases are typically beyond normal appellate functions, courts will often appoint a judicial neutral to develop and review an evidentiary record, manage discovery and motion practice, and recommend a final disposition.

1.18 Appellate Neutral

Neutrals may be appointed to assist appellate parties, lawyers, and courts regarding appropriate matters that need resolution, including motions, procedural issues, final settlement, and attorneys fees.

1.19 Specialized Neutrals

An expert neutral may also be appointed in situations other than litigation. The skills neutrals employ in judicial cases also apply to non-litigation matters. Neutrals have been appointed by governors, mayors, governmental officials, non-profit organizations, and private entities to solve problems. Congress and legislatures have also referred significant social problems to experienced neutrals. These experts can: work with groups and individuals to resolve disputes; distribute funds contributed in response to tragedies, and use neutral expertise in other types of controversies. Often, neutrals provide pro bono services in these situations.