

Academy of Court-Appointed Neutrals

Section 3

Ethical Issues and Practical Concerns

This Section specifies the sources of ethical rules for court-appointed neutrals, posits a set of basic ethics rules that apply to neutrals, and provides a checklist of difficult situations the neutral may face in the course of the appointment.

What are the rules that should govern the neutral's behavior? The first rule, of course, is that the neutral should follow the mandate of the order appointing the neutral and, if necessary, seek appropriate guidance to understand how the judge would like particular situations handled. Beyond that, what codes govern a neutral's conduct? What impact do ethical rules and norms have a neutral's work?

Regardless of restrictions on *ex parte* conversations between the judge and the neutral, the parties may believe that the neutral is informed by the judge's thinking. Parties read volumes into what the neutral says, does, and even hints at. In high-profile litigation, even the neutral's political, social, and religious activity might come under scrutiny. The press, legislative entities, and regulatory entities that cannot contact the judge about the case may try to contact the neutral to ask questions about the case.

3.1 Sources of Ethical Rules for Court-Appointed Neutrals

Several different types of rules and codes of professional responsibility apply or can be construed to apply to a court-appointed neutral's conduct, including:

- a. **Applicable State Rules of Professional Conduct.** If the court-appointed neutral is a lawyer, the neutral is governed directly by these rules. The state equivalent of Rule 1.12 of the Model Rules of Professional Conduct may be particularly relevant to a lawyer serving as a court-appointed neutral. (Rule 1.12 of the Model Rules of Professional Conduct can be found at Appendix 6 or at: http://www.abanet.org/cpr/mrpc/mrpc_toc.html.)
- b. **Code of Conduct for United States Judges ("CCUSJ"), 28 U.S.C.S. app. (2005).** The Compliance section of this Code makes it binding on federal masters, except for the limitations on: certain financial dealings; certain fiduciary activities; the practice of law; participation in political, civic, charitable, and legal organizations; and limitations on the receipt of gifts. (CCUSJ can be found at Appendix 7 or at: <http://www.uscourts.gov/library/conduct.html>.)

- c. **Code of Conduct for Judicial Employees (“CCJE”).** Court-appointed neutrals ordinarily are not judicial “employees.” However, the CCJE states that:

Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

A judge may choose to impose portions of this code on a court-appointed neutral. *See* CCJE, Introduction If 2. (CCJE can be found at Appendix 8 or at:

<https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>)

- d. **28 U.S.C. § 455.** This statute governs the disqualification of federal judges. In addition, Federal Rule of Civil Procedure 53(b)(3) states that a court may appoint a neutral “only after the neutral has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455.” (Section 455 can be found at Appendix 5 or at: <http://codes.lp.findlaw.com/uscode/28/I/21/455>.)

- e. **Federal Rules of Civil Procedure.** Rule 53 directly governs neutrals. (Rule 53, along with the Advisory Committee Notes, can be found at Appendix 4 and at: <http://www.uscourts.gov/rules/>.)

- f. **Codes of Conduct for ADR organizations such as FORUM, JAMS, and AAA.** Several alternative dispute resolution (ADR) organizations have their own ethical guidelines for their neutrals. *See, e.g.:*

ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, particularly Canons I-VII, available at Appendix 9 and at:

https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/code_annotated_updated_feb_2013.authcheckdam.pdf

Forum’s Code of Conduct for Arbitrators, available at Appendix 10 and at:

<https://www.adrforum.com>

Forum’s Code of Procedure, particularly Part IV “Arbitrators,” Rules 20-24, available at: <https://www.adrforum.com/assets/resources>

JAMS Arbitrators Ethics Guidelines, particularly Guidelines I-IX, available at Appendix 11 and at: <http://www.jamsadr.com/arbitrators-ethics/>

JAMS Comprehensive Arbitration Rules and Procedures, particularly Rule 30, available at: <http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2030>

- g. **Applicable state court statutes and regulations.** There may be additional statutes or regulations in a given state that could serve as a source for ethical guidelines.

Which ethical code(s) govern a court-appointed neutral's conduct depends on the nature of the appointment and on the rules that the judge has chosen to impose. To some extent, this is uncharted territory, and overlapping rules from several different codes may apply to some situations. For example, Rule 53 of the Federal Rules of Civil Procedure governs certain special masters, but may not govern monitors or other adjuncts not appointed explicitly under Rule 53. Moreover, depending on the situation, a judge may choose to impose certain provisions of the Federal Code of Conduct for Judicial Employees on a neutral in one case but not in another case.

Table 2 summarizes the potentially applicable codes.

Table 2: Codes that Govern the Conduct of Court-Appointed Neutrals

| Code | Acronym | Applicability | Notes |
|--|--------------------------|--|--|
| State Rules of Professional Conduct | | All attorneys | Generally, an attorney is subject to the rules of all bars in which the attorney is admitted and a court can reasonably expect its own rules to apply to a neutral it appoints |
| Code of Conduct for United States Judges | CCUSJ | See Compliance Section—except for a few specified exceptions, this code applies to neutrals appointed in federal court | |
| Code of Conduct for Judicial Employees | CCJE | Federal judges may impose these or similar standards on non-employee neutrals | |
| 28 U.S.C. § 455 | Disqualification Statute | Fed. R. Civ. P. 53(b)(3) makes this binding on neutrals appointed in federal court | |

| Code | Acronym | Applicability | Notes |
|--|-----------------------|---|---|
| Rule 53 of the Federal Rules of Civil Procedure | Rule 53 | Binding on neutrals appointed in federal court | |
| Rules of specific organizations like the American Bar Association, American Arbitration Association, JAMS, and Forum | ABA, AAA, JAMS, FORUM | Applies to neutrals governed by the particular organization's rules or who work under those organizations | |
| State rules | | | There may be specific state rules that govern the conduct of court-appointed neutrals in that state |

3.2 Ethical Rules for Court-Appointed Neutrals

The basic ethical rules listed below draw on all of the sources of authority explained above. This list is intended to serve as a common-sense guide for the appointing judge and the court-appointed neutral to review together when the adjunct's appointment begins and refer to later as necessary.

The basic rules for court-appointed neutrals are summarized in the following table.

Table 3: Basic Rules for Court-Appointed Neutrals

| | Rule | Sources of Authority |
|--------|---|---|
| Rule 1 | Preserve Dignity and Integrity of the Court | CCUSJ, Canon 1; CCJE, Canon 1 |
| Rule 2 | Competence and Diligence | Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A (1)-(5); CCJE, Canons 3.B and C; JAMS Guidelines, II; ABA/AAA Code, Canons I.B and IV. |

| | | |
|--------|--|--|
| Rule 3 | Propriety | CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon I.A. |
| Rule 4 | Neutrality/Absence of Conflict or Appearance of Conflict | Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon 3.F; ABA/AAA Code, Canons I and II; JAMS Guidelines, V. |
| Rule 5 | Disqualification | 28 U.S.C. § 455; CCUSJ, Canon 3.C; ABA/AAA Code, Canons I.H and I; JAMS Guidelines, VII. |

Rule 1: Dignity and Integrity of the Court

Court-appointed neutrals should observe high standards of conduct to preserve the integrity, dignity, and independence of the appointing court and judicial system.

Sources: CCUSJ, Canon 1; CCJE, Canon 1.

Rule 2: Competence and Diligence

- 2A. A court-appointed neutral should accept only assignments: (1) for which the adjunct is suited by education, training, and experience; (2) that the adjunct is able to undertake and complete in a competent, professional, and timely fashion; and (3) as to which the adjunct is physically and mentally able to meet the reasonable expectations of the parties and the appointing court.
- 2B. A court-appointed neutral must maintain professional competence and diligently discharge assigned responsibilities in a prompt, fair, nondiscriminatory, and professional manner.
- 2C. A court-appointed neutral must be patient, dignified, respectful, and courteous; apply an even-handed and unbiased process; and treat all parties with respect.
- 2D. A court-appointed neutral must maintain order and decorum in conducting proceedings.

Sources: Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A(1)-(5); CCJE, Canons 3.B and C; ABA/AAA Code, Canons I.B and IV.

Rule 3: Propriety

- 3A. A court-appointed neutral should respect and comply with the law and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the adjunct and the judiciary.
- 3B. A court-appointed neutral should not engage in any activities that would call into question the propriety of the neutral's conduct in carrying out the responsibilities assigned by the appointing court.
- 3C. A court-appointed neutral should not allow family, social, or other relationships to influence official conduct or judgment. Nor should a neutral use the prestige of the office for private gain or to advance or appear to advance the private interests of others.

- 3D. A court-appointed neutral should not hold membership in any organization that practices discrimination on the basis of race, religion, sex, sexual orientation, or national origin.

Comment: Whether an organization practices discrimination is often a complex question to which court-appointed neutrals should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on factors such as how the organization selects members; whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members; and whether it is in fact an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. [CCUSJ, comment to Canon 2C]

Sources: CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon 1A.

Rule 4: Neutrality/Absence of Conflict or Appearance of Conflict

- 4A. A court-appointed neutral should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a neutral knows that the neutral or a member of the neutral's family or a relative of the neutral might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the neutral's ability to properly perform the assigned responsibilities.
- 4A. Before an appointment, a court-appointed neutral should disclose to the appointing court and the parties all matters required by applicable law, any actual or potential conflict of interest or relationship, or other information of which the neutral is aware that reasonably could lead a person to question the neutral's impartiality. This duty of disclosure continues throughout the assignment and must be supplemented when warranted.

Sources: Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon IF; ABA/AAA Code, Canons I and II

Rule 5: Disqualification

- 5A. Federal: A neutral may not have a relationship with the parties, counsel, action, or appointing court that would require disqualification of a judge under 28 U.S.C. § 455, unless waived by the parties and with the court's approval after full disclosure of any potential grounds for disqualification.
- 5B. State: A court-appointed neutral shall comply with the applicable state statutes and court rules governing disclosures, conflicts of interest, and disqualification.
- 5C. Financial interest: A court-appointed neutral may not own a legal or equitable interest, however small, in a party, nor have a relationship with a party such as serving as its director or advisor.

Note: Some exceptions to this rule include: *de minimis* ownership of mutual funds that hold a party's securities, unless the court-appointed neutral participates in management; holding office in an educational, religious, or similar organization that owns securities; and similar exceptions for government securities, mutual insurance companies, depositors in mutual savings associations, or similar associations, unless the outcome of a proceeding could substantially affect the value of the securities.

Sources: 28 U.S.C. Section 455; CCUSJ, Canon 3.C; ABAIAAA Code, Canons I.H and I

Rule 6: Confidentiality

- 6A. A court-appointed neutral should avoid making public comment on the merits of a pending action, except as appropriate in the course of official duties.
- 6B. A court-appointed neutral should never disclose confidential information received in the course of official duties, except as required in the performance of those duties.
- 6C. These restrictions on disclosure continue to apply after the conclusion of the court-appointed neutral's service, unless modified by the appointing judge.

Sources: CCUSJ, Canon 3.A(6); CCJE, Canon 3.D; ABAIAAA Code, Canon VI.B

Rule 7: Compensation/Time-keeping/Gifts and Favors

- 7A. A court-appointed neutral's compensation for official duties shall be determined by the appointing court.
- 7B. Reimbursement for expenses incurred in the course of service as a court-appointed neutral or for outside activities shall be clearly disclosed and shall be limited to the actual costs and overhead the judicial neutral reasonably incurs.
- 7C. A court-appointed neutral should not solicit or accept anything of greater than *de minimis* value from anyone doing business with the neutral or with the appointing court, or from anyone whose interest may be substantially affected by the performance of the neutral's official duties. Upon completion of an assignment, a court-appointed neutral may not accept gifts of any kind from a party encountered during the assignment until a period of time has elapsed sufficient to negate any appearance of a conflict of interest. The passage of one-year is presumptively sufficient to negate any appearance of a conflict of interest.

Note: A federal neutral is explicitly exempt from the limitations on receipt of gifts that apply to judges. The Compliance section of the CCUSJ makes Canon 5.C.4 relating to gifts inapplicable to neutrals. Nonetheless, good practice in dealing with proffered gifts, meals, trips, and favors is to decline them.

Sources: Rule 53(h); CCUSJ, Compliance Section (B); CCJE, 4.E; ABAIAAA Code, Canon VII

3.3 Checklist: Ethical Rules to Consider for Specific Neutral Roles

The general ethics rules discussed above have very different practical applications in different types of neutral appointments. In some cases, a judge may have strong concerns about the neutral's outside political activity or interactions with the press, while in other cases these concerns may be minimal or non-existent.

The judge and court-appointed neutral should meet at the beginning of the appointment to consider the items on the following checklist. Each item on this list may require a particularized interpretation of the general ethical rules, depending on the circumstances of the case. This list is based on practical problems that have arisen in actual neutrals' work.

Table 4. Checklist of Ethical Considerations and Practical Concerns

| ✓ | Step | Issue |
|--------------------------|------|--|
| <input type="checkbox"/> | 1 | Conflicts of Interest |
| <input type="checkbox"/> | 2 | Relationship With the Judge |
| <input type="checkbox"/> | 3 | Relationship With the Parties |
| <input type="checkbox"/> | 4 | Relationships Among Neutrals |
| <input type="checkbox"/> | 5 | Gifts and Favors |
| <input type="checkbox"/> | 6 | Interactions With Media |
| <input type="checkbox"/> | 7 | Interactions With Legislative and Investigative Bodies |
| <input type="checkbox"/> | 8 | Political Activity |
| <input type="checkbox"/> | 9 | Timekeeping and Compensation |
| <input type="checkbox"/> | 10 | Outside Work |

The following section lists questions that the judge and the neutral should discuss about each of the items listed above. The judge and neutral should consider these issues as they apply not only to the neutral, but also the neutral's staff.

☐ 1. Conflicts of Interest

Are there any potential conflict issues that the neutral should disclose?

- Has the neutral ever been involved in litigation with either party, or with any subsidiary of either party?
- Does the neutral have any ownership interest in either party?
- Does the neutral sit on any boards or advisory committees that might have any jurisdiction over or connection to either party or the matter at issue?
- Is there any reason that the neutral could not be fair and impartial to all parties?

❑ 2. Relationship With the Judge

- What are the circumstances under which the judge and the neutral should or should not be allowed to communicate *ex parte*?
 - Regarding scheduling?
 - Regarding the overall progress of any negotiations?
 - Regarding the progress of the neutral's work?
 - Regarding the parties' positions in any disputes?
 - Regarding legal matters pending before the judge?
 - Regarding other matters?
- What rules will govern the neutral's relationship with the judge's law clerk? In a complex case that lasts many years, will the neutral help orient each successive law clerk to the history and posture of the case?
- How will these rules about the neutral's *ex parte* communication with the judge be conveyed to the parties?
- Are there any concerns about social relationships between the neutral and the judge?

❑ 3. Relationship With the Parties

- What are the circumstances under which the parties and the neutral should or should not be allowed to communicate *ex parte*?
 - Are there negotiating roles in which *ex parte* communications are appropriate?
 - Are there adjudicative roles in which *ex parte* communications should be prohibited?
 - Given the neutral's multiple roles, how can the neutral properly isolate confidential information received through *ex parte* communications? For example, can the neutral have *ex parte* conversations while wearing one hat, and then effectively function as a neutral fact-finder while wearing a different hat?

- b. Are there any concerns about social relationships between the neutral and a party?

❑ 4. Relationships Among Neutrals

- a. To what extent may multiple neutrals assigned to the same case discuss confidential aspects of the case with each other?
- b. Do additional ethical considerations arise where one neutral serves as an “appellate” entity reviewing the work of another neutral?

❑ 5. Gifts and Favors

- a. What rule will the judge impose about gifts and favors?
 - Are *de minimis* gifts allowed from the parties to the neutral?
 - If yes, what is the definition of “*de minimis*?”
 - Should the rule be stricter if the government is a party?
- b. Are *de minimis* gifts allowed between neutrals?
- c. Are there any types of potential “favors” that the neutral would need to discuss with the judge before accepting?
- d. If the neutral’s fees are used to pay vendors (such as a class action administration firm), are there restrictions on gifts and favors that the neutral may accept from the vendors?

❑ 6. Interactions With the Media

- a. Reactive Media
 - How should the neutral respond to calls from the media about the case?
 - May the neutral comment about the case to the extent that information is in the public domain, or solely to explain procedural issues?
 - Are there any differences between a neutral’s ability and a judge’s ability to speak with the media about a case?
- b. Proactive Media
 - If media reports about the case are inaccurate, may the neutral, for example, write an op-ed piece to try to correct the reporting?
 - May the neutral work through the media to create a better public perception of the case?
 - Would the answer be different if the parties agree to the neutral taking on this work?

❑ 7. Interactions With Legislative and Investigative Bodies

- a. May the neutral respond to inquiries about the case from legislators?
 - May the neutral say more to legislators than the appointing judge would say?
- b. May the neutral appear and testify before a legislative committee if asked to do so?
 - If so, are there questions that the neutral may refuse to answer?
 - For each category of refusal, what privilege or other reason will be applicable?
- c. If the Government Accountability Office (GAO), for example, investigates the case, should the neutral cooperate in the investigation?
 - What types of materials should the neutral provide?
 - What materials, if any, are privileged or confidential? And what is the source of the privilege or claim of confidentiality?

❑ 8. Restrictions on Political Activity and Other Outside Activities

Unlike a federal judge or judicial employee, a federal court-appointed neutral is not automatically required to refrain from partisan or non-partisan political activity. CCUSJ, Compliance section, B (1). But when a neutral's role will be highly public, the neutral and appointing judge should consider whether it is necessary to limit the neutral's group memberships, political activity, and fiscal relationships to ensure actual and apparent neutrality. As mentioned above, a federal judge may choose to impose such restrictions.

- a. Should the neutral's partisan or non-partisan political activity be restricted?
- b. If yes, should the activity of the neutral's staff be similarly restricted?

❑ 9. Timekeeping and Compensation

- a. How should the neutral record his or her time?
 - Should the descriptions include confidential information?
 - Should itemized bills be submitted only to the court and under seal?
 - What time block should be used? (1/10 hour segments?)
- b. To what extent may the neutral charge for staff salaries and expenses? How and when should disclosure be made of such charges?
- c. May the neutral charge an "overhead" rate in addition to actual expenses? How and when should disclosure be made of such charges?

- d. What will the process be for constructing and obtaining court approval of budgets and invoices?

❑ 10. Other Work

- a. May the neutral accept other work, or is this appointment considered to be “full-time” work?
- b. May the neutral work on another case with or against an overlapping party? After disclosure and consent?